WINNING AND LOSING AGAINST THE SEC

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ABSTRACT

The Dodd-Frank Act significantly expanded the SEC’s enforcement flexibility by authorizing the agency to seek almost any remedy in administrative proceedings, but without removing its right to litigate in court. The SEC Enforcement Division has used the new power to bring more enforcement actions in administrative proceedings rather than in court.

The change has faced strong opposition. Defendants have brought constitutional challenges to proceedings before administrative law judges (“ALJs”), who decide contested actions filed in administrative proceedings. Judges, lawmakers, practitioners, and academics have raised doubts that litigation before ALJs is fair to the defendants. To remedy the perceived unfairness, two bills have been introduced in Congress and the SEC recently amended procedural rules governing litigation before ALJs.

The critics have relied heavily on a report published in the Wall Street Journal purporting to show that the SEC enjoys a home-court advantage in litigation before ALJs. As documented in this Article, the evidence and the conclusions offered by the Wall Street Journal are unfounded. This Article compiles and analyzes a large dataset of all enforcement actions filed in fiscal years 2007 to 2015 to test two empirical claims advanced by the Wall Street Journal and the critics of administrative adjudication, and finds very limited support for either. First, although the SEC’s use of the administrative forum in contested actions has increased significantly since Dodd-Frank, most of the increase is due an increase in filings against registered firms and individuals, who faced ALJs even before the Dodd-Frank amendment. Second, there is no robust evidence that the SEC is more likely to prevail in enforcement actions decided by ALJs than in similar actions adjudicated by federal judges. The reported disparity in outcomes is the result of the different characteristics of cases filed in each type of forum.

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INTRODUCTION

In August 2013, the Securities and Exchange Commission (“SEC”) celebrated a confidence-boosting victory after a jury trial of the "Fabulous Fab,” Goldman Sachs’ trader Fabrice Tourre, who was found liable of defrauding investors in mortgage securities.¹ A series of stinging trial defeats followed that victory. First, Mark Cuban prevailed after a much-publicized insider-trading jury trial.² Soon afterwards, over the course of four months, the SEC lost at trial again, and again.³ Around the same time,

¹ See Justin Baer, Chad Bray & Jean Eaglesham, “Fab” Trader Liable in Fraud, WALL ST. J., Aug. 2, 2013, http://www.wsj.com/articles/SB10001424127887323681904578641843284450004 (reporting that the victory produced “happiness around the halls” of the SEC).


³ Between December 2, 2013 and January 27, 2014, the SEC lost against eight defendants charged with insider trading and accounting fraud. See U.S. Sec. & Exch.
the SEC’s new Enforcement Director announced that the agency would file more enforcement actions in administrative proceedings instead of in federal district court. Coming on the heels of trial losses, the change in policy looked to many like an opportunistic search for a more favorable adjudicator. Contemporaneous news articles and commentary insinuated that the SEC was motivated by “home-court advantage:” administrative law judges (“ALJs”), who decide cases filed in administrative proceedings, are SEC employees, and as such would be reluctant to rule against the agency.

The change in enforcement policy was possible because of a provision included in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Section 929P(a) of the Dodd-Frank Act authorized the SEC to seek fines from any firm or individual in an administrative proceeding. Before the amendment, the SEC could impose fines in administrative proceedings only on registered firms and individuals, such as broker-dealers, investment advisers, and firms that registered securities with the agency. But the SEC had to sue in federal district court to secure fines against non-registered firms and individuals—public companies and executive officers charged with accounting fraud, traders charged with insider trading violations, and those charged with selling unregistered securities, including most Ponzi schemers.

Initially, expanding the jurisdiction of ALJs, who decide cases filed in administrative proceedings, did not raise eyebrows. Few recognized the amendment’s full potential and the SEC was reluctant to use it. As the SEC started filing more actions in administrative proceedings, defendants’
objections and public unease began to mount. This foment culminated in a front-page report in the Wall Street Journal on SEC litigation in front of ALJs. The news story, based on an analysis of outcomes in SEC enforcement actions over several years, reported that securities defendants were considerably more likely to lose when the SEC sued them in administrative proceedings than when it sued them in court. The story purported to offer empirical validation to the claims that ALJs were biased in favor of the SEC, and accused the SEC of steering weaker cases to the administrative forum.

The news story attracted almost immediate responses by federal judges, practitioners, advocates, academics, and the press. Defendants have cited the reported figures in lawsuits seeking to enjoin SEC enforcement actions filed in administrative proceedings, arguing that the administrative forum gave the Enforcement Division “an unfair advantage.” One federal judge has said that these arguments were “compelling and meritorious,” and another added, quoting the Wall Street Journal figures, that litigation before ALJs was “unfair to the litigants.”

The SEC’s inspector general has conducted an investigation into whether

12. See Morgenson, supra note 4 (quoting SEC enforcement director Andrew Ceresney as saying that the SEC “will be bringing more administrative proceedings given the recent statutory changes”). See also Urska Velikonja, Securities Settlements in the Shadows, 126 Yale L.J.F. (forthcoming 2016).


14. See id.


the ALJs are biased.\textsuperscript{22} Relying on the \textit{Wall Street Journal} reporting, two bills have been introduced in Congress to reduce the perceived procedural and substantive bias in administrative securities enforcement.\textsuperscript{23} The SEC, under significant and sustained pressure to change its enforcement practices, recently amended procedural rules that govern litigation before ALJs.\textsuperscript{24} Although the amendments to the SEC’s Rules of Practice substantially expand defendants’ procedural rights in administrative proceedings, the critics of its enforcement program demand more by continuing to invoke the purported disparity in outcomes.\textsuperscript{25}

That empirical support would influence the debate about a controversial statute is laudable—assuming that the data are representative and the analysis thorough and correct. Unfortunately, the evidence that most critics of ALJ adjudication cite is misleading in important respects. This Article is the first to collect and analyze all enforcement actions filed over a relatively long period of time: it reviews enforcement actions filed between fiscal years 2007 and 2015 against 10,967 defendants.\textsuperscript{26} Using the collected data, the Article tests two related claims that the \textit{Wall Street Journal} and the critics of administrative adjudication have made: first, that


\textsuperscript{26} See Joseph A. Grundfest, Fair of Foul? SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation, at 11-12 (Nov. 24, 2015), Rock Ctr. for Corp. Gov., Working Paper Series No. 212 (observing that the data necessary to analyze forum choices and outcomes “do not exist”).
the SEC is steering more contested cases to administrative proceedings, and second, that the SEC is more likely to prevail in cases decided by ALJs. As to the first claim, the Article reports evidence that the SEC’s use of the administrative forum in contested actions has increased significantly since the adoption the Dodd-Frank Act.\textsuperscript{27} Not all of the increase is attributable to expanded jurisdiction of ALJs; about half of the increase is due to the fact that the SEC has been bringing more actions that historically have been filed in administrative proceedings, that is, actions against regulated entities and individuals. As to the second claim, there is no evidence that the SEC is more likely to prevail in enforcement cases decided by ALJs than in those adjudicated by federal judges.\textsuperscript{28} The reported disparity in outcomes is the result of the different nature of cases filed in each type of forum. In short, the \textit{Wall Street Journal} compared apples to oranges.

The results reported in this Article are significant because of the substantial influence that \textit{Wall Street Journal’s} reporting has had on the law and practice of securities enforcement. At the same time, the results reported in this Article should not be understood to imply that the type of forum does not matter in securities enforcement. Rather, the information that is available on enforcement actions does not allow one to draw useful empirical conclusions regarding the relationship between forum choice and case outcome. The controversy surrounding administrative adjudication will no doubt continue after this Article. What one would hope is that the debate will continue on the merits of the constitutional and policy arguments, and not on the basis of a poorly constructed dataset and shoddy analysis.

The Article proceeds in three parts. Part I describes the legal background of the Dodd-Frank amendment, the difference in procedural rules in court and before ALJs, and the related constitutional and empirical challenges. Part II uses a complete dataset of enforcement actions filed between 2007 and 2015 to assess two claims. First, that the reported increase in the cases filed in administrative proceedings is due largely to contested litigation before ALJs. And second, that ALJs are more likely to rule for the SEC than federal judges. The Article finds only limited support for the first claim and none for the second. Part III discusses the implications of the results. Significantly, because of omitted and unobservable variables, as well as selection bias, the result should not be interpreted to suggest that the forum makes no difference. Rather, the data in this space is not useful to resolve what is at its core a public relations problem for the SEC. It is nevertheless important to correct the record because the \textit{Wall Street Journal’s} study has been so influential since its publication. The Article concludes with a caveat regarding the greater use of empirical scholarship in policy making. As the influence of big data

\textsuperscript{27} See discussion infra in Part II.B.
\textsuperscript{28} See discussion infra in Part II.C.
increases, so should our concern about the quality of both, the data and the analysis. The significant impact of the poorly-conducted study by the Wall Street Journal provides a cautionary tale.

I. LEGAL CHANGE AND THE RELATED CONTROVERSY

The controversy about the increase in the number of cases decided by ALJs developed in several steps. First, the Dodd-Frank Act expanded the SEC’s discretion, which it took time to exploit. Next, the SEC suffered several high-profile losses at trial. Then, the SEC chose this inopportune time to announce that it was going to bring more cases in administrative proceedings.

This Part sets the stage for the empirical analysis that follows in Part II. It explains the legal background and the significance of the Dodd-Frank amendment, outlines the procedural differences between the two different types of forums, and concludes with a discussion of the constitutional and empirical challenges raised against adjudication by ALJs.

A. The Legal Change

The Dodd-Frank Act included hundreds of new legal provisions. Some of them, like the Consumer Financial Protection Bureau and the Volcker Rule, attracted considerable political, media, and academic attention at the time they were adopted. Others did not.

Section 929P(a) was one of those sections that few outside of a small group of securities lawyers paid attention to at the time. The legislative history for the amendment is remarkably sparse. Robert Khuzami, the SEC’s then-Director of Enforcement submitted a ten-page statement to the Senate Judiciary Committee in support of Dodd-Frank, and he devoted a single sentence to what would become Section 929P(a): “Additional legislative proposals that would serve to enhance the Division’s effectiveness and efficiency include the ability to seek civil penalties in cease-and-desist proceedings.” The only legislative history of Section 929P(a) in the House Report on Dodd-Frank states that “This section streamlines the SEC’s existing enforcement authorities by permitting the


SEC to seek civil money penalties in cease-and-desist proceedings under Federal securities laws.\(^3\)

Historically, the SEC could not seek monetary sanctions at all. During the 1970s, the SEC began to seek disgorgement of ill-gotten gain as an ancillary equitable remedy\(^3\) but it did not have the right to seek fines until 1984.\(^3\) The Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (“Reform Act”) considerably expanded the SEC’s penalty authority. The Reform Act empowered the SEC to seek fines in administrative proceedings against entities and individuals registered with the SEC, including broker-dealers, investment advisers, and firms that registered securities with the agency.\(^3\) But the SEC had to sue in court non-registered firms and individuals to secure fines. Examples of the latter include the SEC’s enforcement actions against WorldCom for accounting fraud in which it obtained a $750-million fine\(^3\) or against Angelo Mozilo for securities fraud in which it secured the “largest ever financial penalty against a public company senior executive.”\(^3\)

Section 929P(a) authorizes the SEC to seek in administrative proceedings civil penalties against any person that is found to have violated federal securities laws.\(^3\) The new provision allows the SEC to resolve almost any enforcement action in administrative proceedings, but does not eliminate the SEC’s authority to litigate in court. As a result, the provision authorizes the SEC to choose where to file an enforcement action,\(^3\) except for actions in which the SEC seeks remedies that only courts or only ALJs

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B. Procedural Differences

The SEC has plenary enforcement authority over violations of federal securities laws. In court, the agency is authorized to seek monetary penalties, disgorgement, clawbacks, injunctions, officer and director bars and an assortment of equitable remedies. In administrative proceedings, the agency can seek monetary penalties and disgorgement, cease-and-desist orders (which are similar to injunctions), as well as officer and director bars, various bars from working in the securities industry, bars from appearing before the Commission as auditor or attorney, and various other remedies, including the imposition of an independent consultant or corporate monitor. The overlap in remedies is not perfect but in most enforcement actions, the Commission can “obtain many . . . of the same remedies in administrative proceedings as [it] could get in district court.”

Administrative proceedings differ from in-court litigation in several respects. In settled actions filed in administrative proceedings, ALJs are not involved at all: the Enforcement Division proposes a settlement and the Commission (i.e., the sitting Commissioners) approves the settlement by issuing the order instituting proceedings (“OIP”), making findings, and imposing sanctions.

39. For example, only a court can order a clawback under section 304 of the Sarbanes-Oxley Act, while an associational or professional bar can be ordered in administrative proceeding only.

40. See Andrew Ceresney, Keynote Speech and New York City Bar 4th Annual White Collar Institute (May 12, 2015), https://www.sec.gov/news/speech/ceresney-nyc-bar-4th-white-collar-key-note.html. The SEC is far from the only agency that can seek monetary penalties in an administrative proceeding. FTC, OSHA, banking regulators, etc.

41. 15 U.S. §77t(a), (b) (“Whenever it shall appear to the Commission [that] any rule or regulation . . . have been or are about to be violated, it . . . may investigate such facts.”) (emphasis added).

42. Ceresney, ABA Remarks, supra note 38.

court must be approved first by the Commission and then by a judge in order to become effective.

Procedural rules differ more significantly in contested actions as compared with settled actions, though the difference can easily be overstated.\textsuperscript{44} Formal administrative adjudication at the SEC is governed by the Administrative Procedure Act and the SEC’s Rules of Practice.\textsuperscript{45} Internal rules provide that ALJs conduct hearings “in a manner similar to non-jury trials in the federal district courts.”\textsuperscript{46} ALJs receive career appointments, not unlike federal judges.\textsuperscript{47} At a high level of generality, proceedings before ALJs are similar to judicial adjudication.\textsuperscript{48} The parties have the opportunity to submit briefs, to propose findings of fact and conclusions of law. After a hearing, the ALJ prepares a written decision that can be appealed to the Commission.

But the devil is in the details. A defendant in federal district court has the right to full civil discovery, adjudication by an independent Article III judge, and the procedure is governed by the Federal Rules of Evidence and the Federal Rules of Civil Procedure. A defendant sued in court is usually entitled to a jury trial, though more often than not, SEC’s civil actions are resolved by summary judgment, not by a jury.\textsuperscript{49} Judges who preside over cases heard in court are completely independent from the agency. Significantly, judges are also better positioned to dispatch “wholesale rebukes of agencies” and are less constrained by “bureaucratic regularity” than ALJs.\textsuperscript{50}

By contrast, ALJs are SEC employees. There is no jury. ALJs follow the rules of administrative procedure and have no equitable authority. ALJs can hear “[a]ny oral or documentary evidence”\textsuperscript{51} except for evidence that is “irrelevant, immaterial, unduly repetitious, or unreliable.”\textsuperscript{52} Unlike in

\textsuperscript{44} SEC ALJs enjoy many of the powers that trial judges have. 5 U.S.C. §§ 556–57. But see Sarah N. Lynch, \textit{SEC to File Some Insider-Trading Cases in Its In-House Court}, Reuters, June 11, 2014, http://www.reuters.com/article/us-sec-insidertrading-idUSKBN0EM2D120140611 (quoting one defendant’s charge that the administrative proceedings at the SEC are a “kangaroo court”).


\textsuperscript{47} 5 C.F.R. § 930.204(a).


\textsuperscript{49} See discussion infra in Part II.B.

\textsuperscript{50} Zaring, supra note 18, at 1217 (using \textit{US v. Newman} as an example for a broad equitable decision).

\textsuperscript{51} 5 U.S.C. § 556(d).

\textsuperscript{52} 17 C.F.R. § 201.320.
court, ALJs may hear hearsay evidence.\textsuperscript{53} Depositions are limited and rare, though that is no different from enforcement actions filed in court or in criminal prosecutions.\textsuperscript{54} Some motions, including motions to dismiss, either were unavailable until recently,\textsuperscript{55} or were used in more limited circumstances than they are in court.\textsuperscript{56}

Most significantly, the process before ALJs is much quicker than in court. Mandatory timelines imposed by the SEC’s Rules of Practice require that in many cases, the entire administrative proceeding be completed in less than one year. The July 2016 amendments extended the prehearing period from four to up to ten months, but the entire timeline before ALJs remains compressed when compared with court, where a contested enforcement action can linger for as long as a decade.\textsuperscript{57} The tight timeline in a proceeding before an ALJ can be both a bug and feature for the respondent. On the one hand, it may be difficult for a respondent to review the evidence and prepare a defense within the short timeline.\textsuperscript{58} On the other hand, once the enforcement action is filed in an administrative proceeding, the SEC Enforcement Division’s trial lawyers face the same tight deadlines.\textsuperscript{59} A longer timeline in court gives the defendant more time to prepare a defense, but also extends the period during which the defendant may not be able to work in the securities industry because of the ongoing proceedings.

Respondents in administrative proceedings enjoy a significant advantage over those sued in federal court. The SEC’s Rules of Practice impose a \textit{Brady}\textsuperscript{60} obligation on the Enforcement Division.\textsuperscript{61} The Division must turn over all exculpatory evidence to the respondent before any

\textsuperscript{53} Thomas C. Gonnella, Order on Motions in Limine, Administrative Proceedings Rulings Release No. 1579 (July 2, 2014) (providing that “when ‘in doubt,’” about the admissibility of evidence, “the evidence should be admitted”).

\textsuperscript{54} \textit{See} Zaring, \textit{supra} note 18, at 1167 n. 54 (quoting SEC Director of Enforcement Ceresney as saying that depositions in criminal proceedings are “exceptionally rare”).


\textsuperscript{58} \textit{See} Davison et al., \textit{supra} note 20, at 107, May 6, 2015.

\textsuperscript{59} \textit{See id.} at 108.

\textsuperscript{60} Brady v. Maryland, 373 U.S. 83 (1963).

\textsuperscript{61} \textit{See} 17 C.F.R. § 201.230(a)(1) (2015) ("[T]he Division of Enforcement shall make available for inspection and copying by any party documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division’s recommendation to institute proceedings.").
hearing in administrative proceeding, but there is no comparable obligation to defendants the SEC sues in court.\textsuperscript{62} There are considerable and important procedural differences between an SEC administrative proceeding and litigation in federal district court but as informed commentators have observed, “these differences do not always favor the Enforcement Division.”\textsuperscript{63} It is certainly not obvious that the two sets of procedural rules must or should be identical.\textsuperscript{64}

\section{C. Constitutional Challenges}

The SEC was initially reluctant to use Section 929P(a).\textsuperscript{65} One of the first contested enforcement actions filed under the new jurisdictional provision was against Rajat Gupta, a high-profile insider trading respondent.\textsuperscript{66} Gupta filed a lawsuit against the SEC in federal court seeking to enjoin the pending proceeding before the ALJ.\textsuperscript{67} Among other claims, he contended that the proceeding before the ALJ would deprive him of equal protection: like defendants were sued in court, not before an ALJ.\textsuperscript{68} After an exchange of briefs and a denial of the SEC’s motion to dismiss,\textsuperscript{69} the Enforcement Division moved to dismiss the administrative enforcement action and sued Gupta in court, like other defendants it prosecutes for insider trading.\textsuperscript{70} Gupta may have thought that his chances for an acquittal were better in court, so he rolled the dice and lost.\textsuperscript{71}

The SEC persisted and has faced an ever-longer list of constitutional challenges in lawsuits seeking to enjoin enforcement actions filed in the

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\item \textsuperscript{62} Under rules of civil discovery, the SEC may be compelled to hand over evidence to the defendant but only if the defendant requests specific evidence.
\item \textsuperscript{63} Davison et al., supra note 20, at 113.
\item \textsuperscript{64} See Grundfest, supra note 26, at 17. The U.S. Supreme Court noted in the past that the similarities between adjudication in court and before ALJs were “overwhelming.” Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 759 (2002).
\item \textsuperscript{65} See Morgenson, supra note 4.
\item \textsuperscript{67} Complaint, Rajat K. Gupta v. Sec. & Exch. Comm’n, 1:11-cv-1900 (S.D.N.Y. Mar. 18, 2011).
\item \textsuperscript{68} See id. at 6–8.
\item \textsuperscript{69} Opinion and Order, Rajat K. Gupta v. Sec. & Exch. Comm’n, 1:11-cv-1900 (S.D.N.Y. July 11, 2011).
\item \textsuperscript{72} Less than a year after the SEC dismissed the administrative proceeding and filed a lawsuit in court, a jury found Mr. Gupta guilty of insider trading in a parallel criminal action, and in mid-2013, the SEC, too, prevailed against Mr. Gupta in a sweeping summary judgment decision. Memorandum Order at 1-2, Sec. & Exch. Comm’n v. Rajat K. Gupta & Raj Rajaratnam, 1:11-cv-7566 (S.D.N.Y. July 17, 2013) (holding in favor of the SEC on all counts on liability and remedies).
\end{itemize}
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administrative proceeding. Several district courts have ruled that using ALJs to resolve contested actions was either unconstitutional or “likely unconstitutional.”

The most successful and most commonly advanced claims have been those based on the separation of powers as defined in Article II of the U.S. Constitution, specifically appointment and removal authority. ALJs are not appointed within the meaning of Article II by the Chair of the Commission as Article II requires for appointments of “inferior officers.” In addition, ALJs enjoy multiple layers of protection from removal by the President. If ALJs are indeed inferior officers, then a violation of Article II follows almost automatically, unless the U.S. Supreme Court were to craft an exception. Even if the Supreme Court were to find ALJ appointment unconstitutional, the fix—appointment by the Commission—would not change the process before ALJs or the perception of their (un)fairness.

Marginally less successful have been claims that administrative adjudication deprives respondents of a right to trial by jury guaranteed by the Seventh Amendment. The right to a jury only applies to “suits at common law.” The Supreme Court has held that “when Congress creates new statutory ‘public rights,’ it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment.” In addition, penalty regimes similar to the SEC’s are widely used across the administrative state, suggesting that challengers will either have to explain why SEC ALJ

73. For an analysis of the constitutional arguments advanced by defendants in SEC enforcement actions, see Alexander I. Platt, SEC Administrative Proceedings: Backlash and Reform, 71 Bus. Law. 1, 14 (2015) [hereinafter Platt, Backlash].
75. Jean Eaglesham, SEC Faces Block on In-House Judge, WALL ST. JR., June 9, 2015, at C1.
76. See Platt, Backlash, supra note 73, at 14 (listing eight defendants who raised removal claims).
78. Free Enterprise Fund v. PCAOB, 561 U.S. 477, 484 (2010) (holding that “multilevel protection from removal is contrary to Article II’s vesting of the executive power in the President”).
79. See Platt, Backlash, supra note 73, at 15 (observing that given the widespread use of ALJs across the federal bureaucracy a holding of their unconstitutionality would be “potentially transformative”); Zaring, supra note 18, at 1195 (explaining that given the importance of impartial administrative adjudication, the Supreme Court would likely find an exception).
80. “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” U.S. CONST. amend. VII.
81. Id.
adjudications are uniquely bad, or risk undermining much of administrative practice.\textsuperscript{83}

Finally, defendants have raised objections related to due process, and non-delegation, none of which have nor are likely to fare well.\textsuperscript{84} Although the process before ALJs is different than the process in the courts, both have passed constitutional muster in like situations.\textsuperscript{85}

Despite some early successes, virtually all of the lawsuits seeking to enjoin the SEC’s administrative proceedings for constitutional infirmities have been dismissed at the district court level or denied on appeal.\textsuperscript{86} By contrast, the empirical challenge to ALJs has persisted.

\textbf{D. Empirical Challenges}

In addition to arguing that ALJ adjudication is unconstitutional, defendants and their counsel have been very effective in arguing that administrative proceedings are unfair. They usually invoked the \textit{Wall Street Journal} report showing a disparity in success rates to buttress their claims.\textsuperscript{87}

Two strands of empirical critiques of the SEC’s administrative adjudication have been advanced. The first contends that procedural rules in administrative proceedings are so unfair to the respondents that they simply cannot win against the SEC.\textsuperscript{88} The second contends that ALJs are

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\bibitem{83} Platt, \textit{Backlash}, supra note 73, at 18.

\bibitem{84} See, \textit{e.g.}, Withrow v. Larkin, 421 U.S. 35, 55–56 (1975) (holding that it did not violate due process for the SEC to both investigate and adjudicate a case); Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 759 (2002) (holding that the similarities between adjudication before ALJs and before federal district court judges are “overwhelming”).\textsuperscript{Zaring, supra note 18, at 1197.}

\bibitem{85} See id.


\bibitem{88} See Eaglesham, \textit{SEC Trials}, supra note 13; U.S. CHAMBER OF COMMERCE, supra note 17, at 15; Joseph Q. Patterson, \textit{Many Key Issues Still Left Unaddressed in the Securities and
biased against respondents because ALJs are SEC employees. Both strands rely on the same empirical data.

Perceptions that administrative proceedings may be biased for either procedural or subjective reasons have been circulating for some time. In October 2013, the New York Times published an op-ed that suggested disparate success rates between actions decided by ALJs as compared with court. But the data was limited to one year of enforcement actions.

In October 2014, the Wall Street Journal published a front-page report on SEC enforcement. The story purported to show that the SEC was substantially more likely to prevail against respondents it sued in administrative proceedings than in federal district court. The Wall Street Journal reported that the SEC “won all six contested administrative hearings” in fiscal 2014, “but only 61%—11 out of 18—federal-court trials.”

In a subsequent story, the Wall Street Journal reported that over a five year period, the SEC prevailed in 90% of cases litigated before ALJs, compared with 69% of cases tried in federal court. Significantly, both stories


See e.g., McLucas & Martens, supra note 6, at A17 (opining that “there is no evidence that ALJs harbor bias”); Daniel R. Walfish, The Real Problem with SEC Administrative Proceedings, and How to Fix It, FORBES (July 20, 2015), http://www.forbes.com/sites/danielfisher/2015/07/20/the-real-problem-with-sec-administrative-proceedings-and-how-to-fix-it/ (“My own observations are that the ALJs strive to be fair to all parties. . . .”); Jean Eaglesham, SEC Ex-Enforcement Chief Calls for Reforms to In-House Judges, WALL ST. J. (May 12, 2015), http://www.wsj.com/articles/sec-ex-enforcement-chief-calls-for-reformsto-in-house-judges-1431471223 (“Robert Mahony, who retired as an SEC judge in 2012 after more than 14 years at the agency, told the New York conference the SEC judges were ‘absolutely 100% fair [and] straight.’” (alteration in original)).

A third strand, namely that the Commission hears appeals from ALJ initial decisions, has been advanced but is less commonly invoked. Significantly, the Commission rarely rejects ALJ’s decision wholesale.

Id. supra note 4 (reporting that the SEC prevailed in 88% of cases filed before ALJs and in 63% of cases filed in court during fiscal year 2011).

Eaglesham, SEC Trials, supra note 13.

Id.
suggested that the SEC was “sending more cases to in-house judges” opportunistically, because it was more likely to win.95

Unlike previous news stories that relied on limited data, the Wall Street Journal’s reporting purported to show a persistent disparity in outcomes over several years. The report has had an unusually widespread impact. It changed what previously were perceived as doomed attempts by fraudsters to avoid liability into a national story of agency malfeasance. Following the Wall Street Journal reporting, many respected commentators observed that the lack of procedural protections before ALJs “significantly disadvantages respondents who are charged in the SEC’s in-house courts.”96 One prominent judge concluded that SEC administrative proceedings were “arguably unfair[,]” and suggested that difficult securities cases be decided “by neutral federal courts.”97 Citing the same figures reported by the Wall Street Journal, the U.S. Chamber of Commerce released a report in July 2015 in which it suggested that defendants could not obtain a “full, fair, and impartial adjudication” before administrative law judges.98

These critiques culminated in two bills that were introduced in Congress. The Due Process Restoration Act, introduced in October 2015, would empower securities defendants to remove enforcement actions to federal court, and raise the standard of persuasion before administrative law judges to “clear and convincing,” from “preponderance of the evidence.”99 The second bill, the Financial CHOICE Act, introduced in June 2016, follows the approach of the first bill.100 In addition, the bill would prohibit the SEC from imposing an officer and director bar in an

95. Id. (reporting that in fiscal years 2012 and 2013 the SEC prevailed in 90% and 100% of trials before ALJs and in 75% and 63% of trials in court).


97. Rakoff Address, supra note 15, at 7 (relying on the WSJ figures in concluding that it is “hardly surprising in these circumstances that the S.E.C. won 100% of its internal administrative hearings in the fiscal year ending September 30, 2014, whereas it won only 61% of its trials in federal court during the same period”).

98. U.S. CHAMBER OF COMMERCE, supra note 17, at 3.


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administrative proceeding, presumably to make filing enforcement actions in the administrative forum less appealing, and would give potential defendants the right “to make an in-person presentation” before the commissioners in advance of filing an enforcement action.

Both bills have lingered in Congress, but the SEC, under significant and sustained pressure to change its enforcement practices, recently amended the Rules of Practice that govern litigation before ALJs. The amendments substantially expand respondents’ procedural rights in administrative proceedings. In what I have described elsewhere as primary enforcement actions, the new rules give respondents ten months instead of four to prepare a defense, and allow respondents can take a limited number of depositions, which previously they were not authorized to do. The Enforcement Division and the respondent have the right to file dispositive motions that are very similar to the motions available in civil litigation in federal district court. Hearsevay evidence continues to be permitted, so long as it is relevant, material, and reliable. Because the amendments “fall short of the procedural safeguards afforded defendants in federal district court,” securities defense attorneys remain concerned about the “statistical disparity” uncovered by the Wall Street Journal.

101. See id. at § 418.
102. See Henning, supra note 23.
108. See 17 C.F.R. §201.233(a).
109. See 17 C.F.R. §201.250.
110. See 17 C.F.R. §201.320(b).
111. See Bondi, Ortiz & Wheatley, supra note 25; Olson, supra note 96 (concluding that the amendments to the Rules of Practice “fail to provide adequate protections”); Brune, supra note 24, at 5 (arguing that more significant procedural changes were necessary
In addition to revising its Rules of Practice, the SEC explained in May 2015 under what conditions enforcement staff would bring actions before administrative law judges versus in court.\footnote{112. SEC \& EXCH. COMM’N, DIVISION OF ENFORCEMENT APPROACH TO FORUM SELECTION IN CONTESTED ACTIONS, https://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf.} Commentators derided the principles as incoherent,\footnote{113. See e.g., Peter J. Henning, Choosing the Battlefield in S.E.C. Cases, N.Y. TIMES (May 11, 2015), http://www.nytimes.com/2015/05/12/business/dealbook/choosing-the-battlefield-in-sec-cases.html (“The considerations provided by the enforcement division about when it will recommend proceeding before an administrative judge rather than in federal court shed little light on how the decision will be made.”); Patterson, supra note 88, at 1688.} and they had a point.\footnote{114. See Grundfest, supra note 26, at 8-9 (explaining that by litigating before ALJs, the SEC wanted to take control over the interpretation of federal securities laws); SEC \& EXCH. COMM’N, SEC DIVISION OF ENFORCEMENT APPROACH TO FORUM SELECTION IN CONTESTED ACTIONS (May, 8, 2015), https://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf (explaining that if a “contested matter is likely to raise unsettled and complex legal issues under the federal securities laws . . . obtaining a Commission decision on such issues, subject to appellate review in the federal courts, may facilitate development of the law).} The SEC has yet to offer more definitive sorting principles.

Finally, and perhaps most significantly, faced with incessant criticism over the perceived disparity in outcomes, the SEC has opted to file more actions in court, despite being authorized to litigate actions in the administrative forum.\footnote{115. Jean Eaglesham, SEC Cuts Use of Own Judges, WALL ST. J., Oct. 12, 2015, at A1 (reporting that the SEC filed only 11% of contested actions before ALJs in the fourth quarter of fiscal 2015, compared with almost 50% in the second quarter) [hereinafter Eaglesham, SEC Cuts].} The shift is significant because actions in court are generally more costly to litigate. For an agency that operates on a limited budget, every dollar spent litigating actions in court that could be litigated more cost-effectively in administrative proceedings is a dollar not spent prosecuting another securities violation. The trade-off may be worthwhile if an administrative proceeding is inappropriate for the case in question,\footnote{116. See e.g., Grundfest, supra note 26, at 21 (proposing a list of factors to decide when litigation before ALJs may be appropriate in securities enforcement actions).} but it is nevertheless a trade-off with associated costs and benefits.

II. CONTESTED ACTIONS IN SECURITIES ENFORCEMENT

The news stories have created a perception that ALJs who adjudicate securities enforcement actions filed in administrative proceedings are biased against securities defendants,\footnote{117. See Grundfest, supra note 26, at 21; Morgenson, supra note 4; See Fuchs, supra note 89. This is contrary to what experiences securities practitioners believe. See e.g.,} or, in the alternate, that procedural
rules in administrative proceedings make it difficult for respondents to defend against charges of securities violations. Moreover, critics have alleged that the SEC’s enforcement staff have taken advantage of the built-in bias and has been steering cases to ALJs to increase the likelihood that it will win. As a result of the perception created by the news stories, the SEC amended its Rules of Practice and has filed fewer actions in administrative proceedings since the controversy emerged.

Given the real and significant impact of the Wall Street Journal’s reporting, its data and analysis are worth re-examining. This Part reports the results of an empirical investigation into SEC litigation. Contrary to the allegations advanced in the Wall Street Journal’s report, this Part concludes that available data cannot confirm or refute the charge that the SEC is more likely to prevail before ALJs because of their bias in favor of the SEC or because of the differences in procedural rules.

The analyzed data do, however, shed light on two related questions. First, the evidence reported in this Part suggests that the SEC has significantly increased the number of respondents sued in administrative proceedings, but only about half of the increase is attributable to the SEC’s exercise of its new power to seek fines against non-registered persons in administrative proceedings. Moreover, resolution of contested actions by ALJs remains the exception: a large majority of contested cases continue to be filed in federal district court.

Second, there is no robust support for the proposition that the SEC is more likely to prevail in like cases before ALJs than in court. The variation in outcomes by type of forum reported by the Wall Street Journal is largely explained by the different types of cases that are prosecuted in court, and by the fact that individuals, who are more often sued in court than firms, are both, more likely to contest the SEC’s charges and more likely to prevail when they do so.

The lack of a robust relationship between the type of forum and case outcome reported in this Part is significant because of the prevailing contrary evidence. As discussed in more detail in Part III, the conclusions offered here should not be interpreted to imply that the type of forum does not matter. There are significant omitted variable and selection bias effects that cannot be resolved with the information that is available. The evidence offered in Part II and the analysis discussed in Part III suggest that any questions of whether administrative adjudication is appropriate in

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McLucas & Martens, supra note 6, at A17 (opining that “there is no evidence that ALJs harbor bias”).

118. See sources cited in note 88.
119. Eaglesham, SEC Trials, supra note 13.
120. See discussion infra in Part II.B.
121. See Velikonja, Reporting Agency Performance, supra note 106, at 976 nn. 414-16.
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201x] securities cases ought to be resolved by lawyers advancing legal arguments, and not by empiricists.

A. Data and Methodology

The data reported and studied in this Article was drawn from Select SEC and Market Data Reports ("Reports") that the SEC prepares annually and publishes on its website.\(^{122}\) The Reports include a list of all enforcement actions filed during the fiscal year, organized by subject matter and date.\(^{123}\) According to the Reports, between fiscal years 2007 and 2015, the SEC filed about 650 to 800 enforcement actions against 1400 to 1900 defendants per year.

The Reports list SEC litigation by the legal proceedings filed and not by the defendant. In previous work, I reported that the SEC often targets multiple defendants in a single enforcement action, and that the same defendant can be targeted for the same securities violation in two or three enforcement actions.\(^{124}\) This practice renders the accounting of enforcement by the number of enforcement actions filed invalid and unreliable.\(^{125}\) To remedy the problem, I reviewed each enforcement action listed in the Reports for fiscal years 2007 to 2015 and pulled up the relevant documents in PACER or Bloomberg Law for civil actions and in Westlaw or the SEC’s website for administrative proceedings. The documents were reviewed, and the information coded and tabulated by defendants, not by enforcement actions.\(^{126}\) The initial coding excluded actions targeting delinquent filing and contempt proceedings.\(^{127}\) This yielded cases against 10,967 defendants.

The data analyzed in this Article also exclude certain groups of defendants and actions to ensure that the cases compared are, in fact, comparable. First, the data only include defendants charged with securities


\(^{123}\) See e.g., U.S. SEC & EXCH. COMM’N, SELECT SEC AND MARKET DATA FISCAL 2015, at 4–21 tbl.3.

\(^{124}\) See Velikonja, Reporting Agency Performance, supra note 106, at 933–37.

\(^{125}\) See id. at 932–57 (discussing the various reasons that reported SEC enforcement statistics are invalid and unreliable).

\(^{126}\) Searches for civil actions were done in Bloomberg Law database (which makes PACER available), and for administrative actions on the SEC’s website and in Westlaw.

\(^{127}\) Delinquent filing actions are filed in administrative proceedings and look very different from other primary actions. Defendants are usually defunct entities; the remedy is revocation of the common stock; and most actions are decided by default. See Velikonja, Reporting Agency Performance, supra note 106, at 940–45. Studies of SEC enforcement practices usually exclude delinquent filing actions. See SEC ENFORCEMENT ACTIVITY AGAINST PUBLIC COMPANY DEFENDANTS, FISCAL YEARS 2010–2015, at 11 (2016), available at http://www.law.nyu.edu/sites/default/files/SEC-Enforcement-Activity-FY2010-FY2015.pdf.
violations, and do not include relief (or nominal) defendants, who received ill-gotten gains without violating securities laws,128 Although relief defendants often contest charges that the SEC brings, they are, by definition, not securities violators that the SEC punishes. Moreover, the SEC sues virtually all relief defendants in court.129 Because their likelihood of success is different and driven by different factors than the success of securities defendants, including them in the analysis would not help to assess whether ALJs were more likely to rule for the SEC than judges. Removing relief defendants reduces the data set to 9,967 defendants.

Second, only defendants targeted in primary enforcement actions are included,130 not respondents in follow-on and secondary actions. A primary enforcement action is one in which the SEC targets a defendant for violating securities laws, and seeks an injunction or a cease-and-desist order, and perhaps a fine, disgorgement, and other remedies.131 Primary enforcement actions are filed in court and in administrative proceedings. By contrast, the SEC files follow-on and secondary actions in administrative proceedings only. Both types of actions are second (and sometimes third) proceedings against the same respondent for the same violation.132 Follow-on actions are based on injunctions or convictions issued in earlier proceedings, and so respondents are collaterally estopped from contesting the factual basis for the follow-on action. The SEC should win follow-on actions. 133 As a result, the SEC’s likelihood of success in follow-on actions is considerably higher than in primary enforcement actions. The SEC files few secondary actions and virtually all are either filed as settled actions or are settled during the proceeding.134

128. See Velikonja, Reporting Agency Performance, supra note 106, at 946–47.
129. See Grundfest, supra note 26, at 11 n.27.
130. The SEC divides enforcement actions into three categories: independent enforcement actions, follow-on actions, and delinquent filing actions. See SEC Announces Enforcement Results for FY 2015 (Oct. 22, 2015), http://www.sec.gov/news/pressrelease/2015-245.html. The category independent actions combines what I call primary actions and secondary actions. I have continued to use the different nomenclature to avoid double-counting respondents in secondary actions.
132. A follow-on action is a second enforcement action filed against the same defendants for the same violation. It is based on the first enforcement action in which the defendant was fined and enjoined, and seeks to impose a professional or associational bar. The collected data includes follow-on actions against 1,854 defendants and secondary actions against 89 defendants. A subset of follow-on actions is based on a criminal conviction alone, and so the follow-on action is the only proceeding before the SEC. These actions were also excluded. For a detailed methodology, see id. at 925–32.
133. See id. at 663 (reporting that only defendants whose underlying conviction or injunction was vacated prevailed against the SEC in a contested follow-on action).
134. Secondary actions, sometimes referred to as cease-and-desist actions, are best understood as a concession to the respondent. Instead of filing one action in court seeking a fine and an injunction, the Enforcement Division files two: a civil action seeking monetary penalties and an administrative action seeking a cease-and-desist order. This is a concession
Thus compiled data includes actions against 8,021 securities defendants in primary enforcement actions. Of those, 5,832 were prosecuted in federal district court and 2,189 in administrative proceedings. In addition to information on the forum in which the action was filed, I collected information on the identity of the defendant (individual or firm), the type of the violation, when the action was filed and when it was resolved or whether it is still ongoing, what was the method of resolution (i.e., filed as settled, settled, default, trial, summary judgment, dismissal, ongoing), whether the case was accompanied by and/or based on a criminal action, and information about the outcome. In terms of outcomes, I collected information on whether the SEC prevailed on at least one count on liability (decisions in court cases are often bifurcated), whether the finding of liability was based on collateral estoppel by a criminal conviction or plea, and on the sanction that was imposed. The coding of outcomes includes all actions filed in fiscal years 2007 to 2015 and concluded with a substantive disposition on liability by March 1, 2016.

Table 1 below reports summary statistics on primary enforcement actions filed in fiscal years 2007 to 2015. Both, firms and individuals are significantly more likely to be sued in court than before ALJs, but individuals are much more likely than firms to be sued in court.

<table>
<thead>
<tr>
<th>Filings</th>
<th>Court Frequency</th>
<th>AP Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individuals</td>
<td>3,876</td>
<td>77.5%</td>
</tr>
<tr>
<td>Firms</td>
<td>1,952</td>
<td>64.7%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Filed Settled Actions</th>
<th>Court Frequency</th>
<th>AP Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individuals</td>
<td>1,063</td>
<td>27.4%</td>
</tr>
<tr>
<td>Firms</td>
<td>429</td>
<td>21.9%</td>
</tr>
</tbody>
</table>

As shown in the summary statistics table, firms are generally more likely to settle during the investigation than are individuals, but less so when the action is filed in court. This is largely because most of the firms that the SEC sues in court are associated with securities offering and to the settling defendant because cease-and-desist orders that are imposed in administrative proceedings generally tend to have less significant consequences than obey-the-law injunctions imposed in court actions. See id. at 929–32. Of 89 actions, only 6 were not settled; of those six, three were decided by default, two were consolidated with actions filed in court, and one was voluntarily dismissed. Data on file with author.

135. For civil actions, I performed docket searches and reviewed relevant documents as available in PACER and Bloomberg Law. For administrative actions, the search was done in the SEC’s database of administrative proceedings and in Westlaw.

136. The difference is statistically significant at p<0.01.
market manipulation schemes, and are either wholly owned by or are controlled by the targeted individual defendant. Each defendant often controls multiple firms, and so when a single individual refuses to settle, so do multiple firms. Only a small minority of enforcement actions are contested to the end and ultimately decided by trial, summary judgment, or dismissal. Of the cases that are not filed as settled actions, more than half ultimately settle. Of the remainder, most are decided by default or voluntarily dismissed because the defendant died, ceased to exist, could not be served, or similar, and only a sliver are contested to the end and decided by a judge, a jury or an ALJ.137

B. Has the SEC Shifted Enforcement to Administrative Adjudication?

During fiscal years 2013, 2014 and 2015, the SEC reported filing many more enforcement actions in administrative proceedings than in previous years.138 According to the Reports, in fiscal 2012 the SEC filed 63% of enforcement actions against 52% defendants in administrative proceedings.139 By fiscal 2014, the SEC filed 81% of enforcement actions against 70% of defendants in administrative proceedings.140 A shift on that scale in merely two years is highly unusual, and it has attracted considerable critical attention.141

The increase in the reported number of enforcement actions filed in administrative proceedings is due to several confounding factors. Since 2010, the SEC has increased the number of delinquent filing actions and follow-on proceedings that it files.142 Both groups of cases are always filed in administrative proceedings.143 Second, a large portion of the change is due to the increased number of settled actions filed in administrative proceedings since fiscal year 2013. In fiscal year 2010, before Dodd-Frank’s adoption, the SEC filed 32% of settled enforcement actions in

137. See discussion infra in Part II.C.
140. See U.S. SEC. & EXCH. COMM’N, SELECT SEC AND MARKET DATA FISCAL 2014, at 3 tbl.2
141. See e.g., Zaring, supra note 18, at 1174; Platt, Backlash, supra note 73, at 9 (suggesting that court losses “caused the agency to shift” to administrative adjudication); Michael Dvorak, SEC Administrative Proceedings and Equal Protection “Class of One” Challenges: Evaluating Concerns about SEC Forum Choices, 2015 COLUM. BUS. L. REV. 1195 (2015); Eaglesham, SEC Wins, supra note 89 (quoting former SEC Commissioner Grundfest observing that this is “a fundamental change”).
142. See Velikonja, Reporting Agency Performance, supra note 106, at 978, 980.
143. In both the SEC succeeds at much higher rates than in primary enforcement actions, but its success is not generally considered as problematic. As noted above, these actions were not included in the statistical comparison of outcomes reported in Part II.C.3.
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administrative proceedings. By FY 2015, the SEC filed 83% of settled enforcement actions in administrative proceedings.\textsuperscript{144} For various reasons, when the matter is settled during the investigation, both the SEC and settling defendants usually prefer to file the settled action in administrative proceedings.\textsuperscript{145}

By contrast, the increase in the number and the share of contested actions\textsuperscript{146} filed in administrative proceedings has been relatively modest. In FY 2010, the year before the Dodd-Frank Act became effective, the SEC filed contested enforcement actions against 504 defendants overall. Of these, 40 defendants (8%) were sued in administrative proceedings and 464 (92%) in court. In fiscal year 2015, the SEC filed contested actions against 577 defendants. Of those, 105 defendants (18%) were sued in administrative proceedings and 472 (82%) in court. As shown in Figure 1 below, the change in the number and the share of defendants who are forced to litigate before ALJs is relatively small, but the difference is statistically significant.

\textsuperscript{144}See Velikonja, supra note 12.

\textsuperscript{145}See id.

\textsuperscript{146}The term “contested action” in this context is meant to include actions that were not filed as settled actions. Many of actions that were initially contested ultimately settled. In subsequent sections, the term “contested action” includes actions that were contested to the end.
The table reports the number of defendants targeted in contested actions.

The increase in the number of contested case filings in administrative proceedings is not due entirely to the SEC’s newly expanded jurisdiction. A review of all contested OIPs filed in administrative proceedings between 2011 and 2015 reveals that a significant majority, 294 of 403, could have been filed in administrative proceedings before the statutory change.147 These include actions against registered investment advisors, broker dealers, and transfer agents for violations of various regulatory and disclosure requirements, and stop orders targeting false registered offerings of securities. Thus, about half of the increase in the number of contested actions filed in administrative proceedings is attributable to the SEC’s exercise of prosecutorial discretion, and not to the Dodd-Frank amendment.148

147. Data was hand-coded, so the number is best understood as an approximation and not an exact figure.
148. Between 2007 and 2010, the SEC sued on average 38.75 respondents in administrative proceedings. Assuming similar trends were to continue, the SEC would sue 194 respondents in administrative proceedings between 2011 and 2015. Instead, it sued 403

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**Figure 1: Filings in Contested Cases by Year**

![Bar chart showing filings in annual administrative proceedings and court cases from 2007 to 2015.](chart.png)
However, the other half of contested actions filed in administrative proceedings since 2011, about 109,149 were filed pursuant to the SEC’s new power. That number certainly would have been higher absent the controversy about ALJ bias.150 As suggested by the figures reported in Table 2, the bulk of these cases targets securities offering and issuer disclosure and reporting, not insider trading, as some of the commentary suggested.151 Most of these cases are still ongoing, so—despite the effort in this Article—it is somewhat premature to examine the SEC’s track record in litigation before ALJs after Dodd-Frank.

As a general matter, the SEC has not used the expanded jurisdiction of ALJs to advance novel theories of securities violations in contested administrative proceedings, as has been suggested.152 Most first-of-its-kind actions were filed as settled actions, not as contested actions.153 Instead, as shown in Table 2, the most common charges are similar to the charges that the SEC bring in court: fraudulent disclosure, offering of unregistered securities, and violations related to pooled investment vehicles.

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149. The data was hand-coded, so the number is best understood as an approximation and not an exact figure.

150. See Eaglesham, SEC Cuts, supra note 115, at A1 (reporting that the SEC filed only 11% of contested actions before ALJs in the fourth quarter of fiscal 2015, compared with almost 50% in the second quarter).


152. To be fair, the critics do not contend that the SEC has often used ALJs to secure a favorable re-interpretation of the law. Rather, they contend that the SEC has done so and doing so in a single matter can have significant consequences for many subsequent enforcement actions. See Andrew N. Vollmer, SEC Revanchism and the Expansion of Primary Liability Under Section 17(a) and Rule 10b-5, 10 VA. L. & BUS. REV. 273 (2015) (discussing the SEC’s demand for Chevron deference to a novel interpretation of securities laws in the SEC’s administrative case against Flannery).

In sum, since 2011 the SEC has started litigating more aggressively in administrative proceedings in both, settled and contested actions. The increase is considerable and statistically significant. But the overall number of cases litigated before ALJs remains small compared with the number of cases litigated in court, as shown in Figure 1 above. Moreover, a significant portion of the increase is not attributable to the use of the SEC's new authority to sue non-registered firms and individuals in administrative proceedings but rather to the exercise of prosecutorial discretion. Since 2011, the SEC has been aggressive in targeting violations that are routinely litigated in administrative proceedings, such as the filing of fraudulent registration statements.\footnote{For example, between 2011 and 2015, the SEC prosecuted 31 defendants in stop order proceedings, compared with 9 between 2007 and 2010. Data on file with author.} In other words, since 2011, the SEC has changed the mix of the cases it prosecutes, and most of the contested cases it has litigated before ALJs have been those that can only be prosecuted in administrative proceedings. At the same time, the SEC has used its new authority to sue before ALJs more than one hundred defendants where before the Dodd-Frank Act it could have sued them only in court. The development is important and one that invites and deserves further study as more cases are decided over time.

C. Is there a Disparity in Outcomes Depending on Where the Enforcement Action is Filed?

The previous section analyzed changes in filing practices after the Dodd-Frank amendment; this one analyzes case outcomes using the same
data. The section begins with an overview of outcomes in SEC enforcement actions. It then defines important variables that are necessary to test the claim that the SEC is more likely to prevail when it litigates before ALJs than in court.

The Wall Street Journal report that compared the SEC’s success rates in court and before ALJs did not perform any statistical tests of significance.\textsuperscript{155} This section uses both, a chi-squared test and a logistic regression. The chi-squared test compares success rates without controlling for other potentially significant variables. By contrast, in logistic regression one is able to perform multivariate analysis by controlling for (i.e., holding constant) selected qualities.\textsuperscript{156} In other words, logistic regression allows one to test whether the higher likelihood of success before ALJs is due to the type of forum or some other case characteristic. This section uses both statistical methods for a very limited purpose, namely to test whether there is a robust association between the type of forum in which a case is litigated and the outcome.\textsuperscript{157}

1. Overview of Outcomes in Securities Enforcement

As is true for litigation generally,\textsuperscript{158} the vast majority of the SEC’s cases settle. Of cases filed between fiscal years 2007 and 2015, 3,124 of 8,021 defendants (39%) settled before the SEC filed a public enforcement action. More than half of defendants that initially contested the charges settled during the public proceeding, resulting in an overall settlement rate of around 75%.\textsuperscript{159} Only a small minority of defendants, 290 of 8,021 defendants (3.6%), litigated their cases to trial. For actions resolved by a

\textsuperscript{155} See Eaglesham, SEC Wins, supra note 89.
\textsuperscript{157} The article does not purport to draw any inferences about settled cases and so does not get into the Priest-Klein hypothesis or its critics. See George Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Analysis 1 (1984); Daniel Klerman & Yoon-Ho Alex Lee, Inferences from Litigated Cases, 43 J. Legal Analysis 209 (2014).
\textsuperscript{159} Of the cases filed in fiscal years 2007 to 2015 and resolved by September 15, 2016, defendants settled 78%. (The denominator to calculate the overall settlement rate does not include ongoing cases.)

third-party adjudicator, it is considerably more common that they are decided by default (718 defendants or 9.0%) or summary disposition (363 defendants or 4.5%) than by trial.\textsuperscript{160}

**Table 3: Case Disposition (2007–15)\textsuperscript{a}**

<table>
<thead>
<tr>
<th>Case Disposition</th>
<th>Court</th>
<th>Frequency</th>
<th>Administrative Proceeding</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Filed Settled</td>
<td>1,492</td>
<td>25.6%</td>
<td>1,632</td>
<td>74.6%</td>
</tr>
<tr>
<td>Settled</td>
<td>2,292</td>
<td>39.3%</td>
<td>271</td>
<td>12.3%</td>
</tr>
<tr>
<td>Default</td>
<td>636</td>
<td>10.9%</td>
<td>82</td>
<td>3.7%</td>
</tr>
<tr>
<td>Dismissal**</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Involuntary</td>
<td>29</td>
<td>0.5%</td>
<td>0</td>
<td>0.0%</td>
</tr>
<tr>
<td>Voluntary (Def. win)</td>
<td>47</td>
<td>0.8%</td>
<td>1</td>
<td>0.0%</td>
</tr>
<tr>
<td>Procedural (no win)</td>
<td>141</td>
<td>2.4%</td>
<td>14</td>
<td>0.6%</td>
</tr>
<tr>
<td>Summary Disposition</td>
<td>357</td>
<td>6.2%</td>
<td>4</td>
<td>0.2%</td>
</tr>
<tr>
<td>Trial/ALJ*</td>
<td>127</td>
<td>2.2%</td>
<td>163</td>
<td>7.4%</td>
</tr>
<tr>
<td>Ongoing (i.e., no decision)</td>
<td>711</td>
<td>12.2%</td>
<td>22</td>
<td>1.0%</td>
</tr>
<tr>
<td>Total</td>
<td>5,832</td>
<td></td>
<td>2,189</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{a} The table includes cases filed in fiscal years 2007 to 2015 and resolved by September 15, 2016.

\textsuperscript{*} The category “Trial/ALJ” includes dispositions in 51 cases that are still ongoing but where an ALJ had issued a decision and the defendant, the Enforcement Division, or both appealed the decision to the Commission. This was done to test the charge that ALJs, by virtue of being employees of the SEC, are biased in its favor.

\textsuperscript{**} “Involuntary dismissals” are those issued by a third-party adjudicator. “Voluntary dismissals” are those by SEC motion where the case was dismissed because the SEC could not prevail. “Procedural dismissals” are dismissals that were ordered by SEC motion because the case could not continue (e.g., defendant died or dissolved, voluntarily complied, settled another matter), and do not suggest that the defendant prevailed.

\textsuperscript{160} Dismissal is rare; cases against 73 defendants were dismissed. Of 73, 29 were dismissed by a third-party adjudicator and 44 were dismissed voluntarily. Data on file with author.
Table 4: Likelihood of Success by Type of Litigation Forum

<table>
<thead>
<tr>
<th>Type of Litigation Forum</th>
<th>Decided in Court</th>
<th>SEC win</th>
<th>SEC win rate</th>
<th>Decided in AP</th>
<th>SEC win</th>
<th>SEC win rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trial/ALJ*</td>
<td>127</td>
<td>105</td>
<td>82.7%</td>
<td>163</td>
<td>146</td>
<td>89.6%</td>
</tr>
<tr>
<td>Summary Disposition</td>
<td>357</td>
<td>344</td>
<td>96.4%</td>
<td>4</td>
<td>4</td>
<td>100.0%</td>
</tr>
<tr>
<td>Involuntary Dismissal</td>
<td>29</td>
<td>0</td>
<td>0.0%</td>
<td>0</td>
<td>0</td>
<td>0.0%</td>
</tr>
<tr>
<td>Total</td>
<td>513</td>
<td></td>
<td></td>
<td>167</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* The category “Trial/ALJ” includes dispositions in 51 cases that are still ongoing but where an ALJ had issued a decision and the defendant, the Enforcement Division, or both appealed the decision to the Commission. This was done for two reasons: first, to be consistent with the *Wall Street Journal*’s method, and second, to test the charge that ALJs, by virtue of being employees of the SEC, are biased in its favor.

All studies to date have involved straight comparisons of trial outcomes in court and before ALJs. The first news story, reported in October 2013, noted that the SEC prevailed in 88% of cases filed before ALJs and in 63% of cases filed in court during fiscal year 2011.161 The *Wall Street Journal* story, published a year later, reported that between October 2013 and September 2014, “the SEC won all six contested administrative hearings where verdicts were issued, but only 61%—11 out of 18—federal-court trials.”162 The same article noted that in the preceding two fiscal years, the SEC won 90% and 100% of administrative cases and 75% and 67% of trials in court.163 In a follow-up story, the *Wall Street Journal* reported that the SEC has been steering cases increasingly to administrative law judges and prevailed in 90% of cases litigated before ALJs, compared with 69% of cases tried in federal court.164

Table 4 shows a difference in success rates between cases decided by an ALJ and at trial that seemingly confirms the *Wall Street Journal*’s observation: the SEC prevails in fewer than 83% of jury and bench trials in court but in almost 90% of cases decided by ALJs. But the difference is not statistically significant.165 The publicized disparities in outcomes in litigated cases are mostly noise: they are based on very small samples and thus the disparities they report are not ones that suggest real differences.166

163. See *id*.
164. Eaglesham, *SEC Wins, supra* note 89.
165. The p-value in a chi-square test is 0.177.
166. Using the data I collected, I find that of defendants sued between 2007 and 2014 whose actions were resolved during fiscal year 2014, the SEC prevailed against 18 of 21 of defendants in contested administrative proceedings (86% success) and against 23 of 34 defendants at trial in court (68% success). Of defendants sued between 2007 and 2013...
Moreover, as shown in Table 4, the published comparisons of success rates omit a majority of the dispositions on the merits that are handed down by federal judge deciding securities cases, specifically summary judgments and dismissals.\textsuperscript{167} Both are obviously important in a study of outcomes and are also unevenly distributed between the two different types of fora. Contested actions filed in administrative proceedings are almost always decided by an ALJ and virtually never by summary disposition.\textsuperscript{168} By contrast, a majority of contested actions filed in court are decided by summary judgment.\textsuperscript{169} This omission biases the success-rate comparison because the SEC is more likely to win on motion for summary judgment than it is when the case goes to trial.\textsuperscript{170} Including summary dispositions in a comparison of outcomes would suggest that the SEC is more likely to prevail in court than before ALJs: 93\% versus 90\%.\textsuperscript{171}

But this comparison, too, is misleading. First, it does not include dismissals, which are discussed in more detail below in Part II.C.2. If involuntary dismissals (i.e., not by SEC motion) are included, the SEC prevails in 88\% of court cases and 90\% of cases decided by ALJs, which is

\footnotesize

whose actions were resolved during fiscal year 2013, the SEC prevailed against all defendants in contested administrative proceedings, but only against 13 of 21 defendants in court trials (62\% success). But in fiscal 2012, the SEC prevailed against 3 of 5 defendants sued in administrative proceedings (60\% success) compared with 10 of 14 that litigated trials in court (71\% success).

\textsuperscript{167} See Eaglesham, \textit{SEC Trials}, supra note 13 (comparing trial verdicts with initial decisions by ALJs).

\textsuperscript{168} See Olson, \textit{supra} note 96, at 14 (observing that ALJs have “only granted a handful” of motions for summary disposition).

\textsuperscript{169} Motions for summary disposition are little used before ALJs. 17 C.F.R. § 201.250(b). The closest analog to a motion for summary judgment in SEC administrative proceedings is a motion for summary disposition in SEC administrative proceedings which is de facto limited to follow-on actions and delinquent filing cases. \textit{See} Platt, \textit{Unstacking the Deck}, supra note 56 (reporting that 176 of 186 actions resolved by summary disposition were in follow-on and delinquent filing actions). \textit{See also} Jeffrey L. Gibson, Exchange Act Release No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2111-12 (collecting cases), petition for review denied, 561 F.3d 548 (6th Cir. 2009).

\textsuperscript{170} The reason that the SEC prevails at summary judgment at such high rates is not bias on the part of federal district judges, it is the fact that many of its enforcement actions are well founded. In addition to defendants who were convicted before the resolution of the summary judgment motion, 55 were later convicted or pleaded guilty to securities fraud related to the same set of facts as the summary judgment motion. While defendants usually can and do contest the allegations in the SEC’s complaint, the fact that they were later criminally sanctioned for the same misconduct goes a long way towards explaining why the SEC is so successful at summary judgment.

\textsuperscript{171} It does happen that a defendant prevails against the SEC by summary judgment by lying to the enforcement staff. One such defendant was later indicted for the same violation. \textit{See} U.S. Sec. & exch. Comm’n, Spanish Investor Indicted for Impeding SEC Investigation and Litigation Regarding $4.6 Million Insider Trading Scheme, Lit. Rel. No. 23,591 (July 5, 2016), https://www.sec.gov/litigation/litreleases/2016/lr23591.htm.

\textsuperscript{171} Using a chi-square test, the observed disparity in success rates is not statistically significant.
statistically indistinguishable. Second, sometimes the reason that the SEC prevails at summary judgment is that the defendant is fighting a losing battle. In enforcement actions that prosecute offering fraud schemes (e.g., Ponzi, pyramid, and like schemes), penny stock frauds and insider trading, in particular, the SEC often sues defendants who are facing criminal charges for the same misconduct. As defendants plead guilty or are convicted, the SEC moves for summary judgment on liability in the civil case. In 80 of 344 summary judgments at which the SEC prevailed, the order granting summary judgment for the SEC was based on the defendant’s earlier criminal conviction or guilty plea related to the same securities violation. Because defendants convicted of the same violation are collaterally estopped from denying the allegations related to the criminal charges in the SEC enforcement action, the court usually grants the SEC’s request for summary judgment.\textsuperscript{172} Excluding these summary judgments from the comparison of success rates lowers the SEC’s success rate in court to 369 of 433, or 85\%—only marginally more successful than in administrative proceedings where the SEC prevailed in 90\% of cases, and statistically indistinguishable.

2. Description of the Variables

Comparisons to this point do not control for anything other than where the case is litigated. But as commentators as well as SEC’s representatives have pointed out, cases vary significantly along other dimensions.\textsuperscript{173} For example, many of the SEC’s losses at trial have been in insider trading cases. To test the hypothesis that the type of forum matters, I used logistic regression, in which I controlled for case and defendant characteristics. This section provides more detail on how the response variable was constructed, and what predictors in addition to the type of forum were used in the regressions reported in Part II.C.3. Part III discusses the limitations of the model, in particular my inability to control for case quality, and discusses the implications of the results in light of the limitation.

a. The Response Variable: What Counts as “Success”?

The SEC itself measures success as the percentage of defendants in enforcement actions against which the SEC prevails on at least one of the

\textsuperscript{172} Courts grant the SEC’s summary judgment motion on liability, leaving the only remaining question, on appropriate remedies, for further proceedings. More often than not, the court imposes an injunction and associational bar, but waives or gives credit for fines, forfeiture, and restitution ordered in the criminal case.

\textsuperscript{173} See Grundfest, supra note 26, at 12-13.
counts. Alternately, success can be defined more narrowly, to record as successes only those cases where the SEC prevails on the most serious charges filed, such as violations of scienter-based provisions of securities laws, or even more narrowly, to record as success only those cases where the SEC receives all of the relief it seeks. This Article adopts the SEC's own definition of success. It does so because it is the definition adopted in the news stories that have reported on the SEC's success rates and the primary purpose of the study is to question the analysis using the same data.

A thornier matter than defining “success” is the treatment of dismissals. Enforcement actions are resolved by a contested motion to dismissed very rarely, usually because the statute of limitations had run, or because the court has no personal jurisdiction over the defendant. Vacatur, an order setting aside a judgment or vacating the legal proceeding is similarly rare; lower court dispositions or settlements are vacated either when a higher court reverses the district or appellate court’s judgment, as it occurred in the Supreme Court’s decision in Gabelli v. SEC, or when a higher court reverses a related decision, as it occurred after the Second Circuit decided the U.S. v. Newman insider trading case. After Newman, district courts vacated settlements and summary judgment decisions rendered against ten defendants in SEC enforcement actions, and may vacate more. These dismissals are included in Tables 3 and 4 as involuntary dismissals against the SEC (i.e., as defendant “wins” by involuntary dismissal).

Despite a handful of highly-publicized involuntary dismissals, a large majority of dismissals are voluntary. The SEC files a motion to dismiss the action without prejudice and without cost (i.e., each side bears its litigation expenses) for a variety of reasons. More often than not, a voluntary dismissal does not imply that the SEC lost. The SEC routinely moves to dismiss an action against a defendant who died during the

174. See, e.g., Sec. & Exch. Comm’n, FY 2010 PERFORMANCE AND ACCOUNTABILITY REPORT 27 (reporting that the SEC prevailed in 92% of enforcement actions resolved in FY 2010).

175. Under that definition of success, cases where the SEC prevails only on the subsidiary, negligence-based or strict-liability counts, would count as losses for the SEC.

176. See Zaring, supra note 18, at 1176.


179. 133 S.Ct. 1216 (2013).


182. Details on dismissals are shown in Table 3 above.
proceeding or ceased operations.\textsuperscript{183} These dismissals are neither wins nor losses for the SEC, and they are categorized as neither.\textsuperscript{184} Voluntary dismissals and postponements for failure to locate and/or serve the defendant because he fled to Tonga\textsuperscript{185} or Argentina,\textsuperscript{186} likewise, are neither wins nor losses for the SEC, even if the defendant ultimately escapes liability. Similarly, actions that the SEC drops because the defendant was convicted,\textsuperscript{187} settled a related enforcement action,\textsuperscript{188} or complied with the SEC’s demand voluntarily\textsuperscript{189} should not count as losses for the SEC. Finally, when the SEC closes a receivership in court, it often voluntarily dismisses enforcement actions against entities after prevailing against the individual who used the entity to perpetrate his scheme. These dismissals are essentially “wins” for the SEC, rather than a “losses,” but were nonetheless excluded from the analysis.\textsuperscript{190}

At the same time, at least some of the voluntary dismissals should be understood as acknowledgements by the Enforcement Division that the case is unwinnable. For example, the SEC sometimes amends the complaint and drops a defendant from the complaint without explanation. At other times, the SEC files a settled motion to dismiss the action without prejudice and without cost (i.e., each side bears its litigation expenses). While the motion usually does not explain the reason, news articles and press releases published contemporaneously often explain that the SEC dismissed the action because it could not advance a successful case.\textsuperscript{191}

\begin{footnotes}

\textsuperscript{184} That is, they are excluded from the analysis of contested actions.


\textsuperscript{190} If they were coded as “wins”, they would be included in the \textit{Expanded} model below. This would increase the SEC’s success rate in court and would render the Court no longer statistically significant. See \textit{infra} Part II.C.3.

\textsuperscript{191} Such voluntary dismissals are celebrated in the press as SEC losses. See e.g., James B. Stewart, \textit{Another Fumble by the S.E.C. on Fraud}, N.Y. Times, Nov. 17, 2012, at B1 (reporting that the SEC, “in a rare public about-face,” asked a judge to dismiss charges against a defendant).
\end{footnotes}
Voluntary dismissals that should properly be understood as SEC “losses” are most common in insider trading actions, and were included in some of the analyses of case outcomes reported below.

Overall, 232 cases against defendants sued between 2007 and 2015 were dismissed. All 232 cases were reviewed. In addition, I searched for accompanying news stories to find a reason for the dismissal. The actions were hand coded for whether the dismissal was by SEC motion or whether the SEC objected to the dismissal (i.e., voluntary or involuntary): 29 dismissals are involuntary and 203 voluntary. Voluntary dismissals were further coded for whether voluntary dismissal is best understood as a “win” by the defendant. In 155 of 203 voluntary dismissals, neither side prevailed and the case was dismissed due to death, voluntary compliance, etc., whereas 48 are coded as defendant wins. If the latter are included in the comparison, the SEC prevailed against 449 of 560 defendants in court (80% success rate) and against 150 of 168 defendants in administrative proceedings (89% success rate). Unlike all other reported differences in success rates, this difference is statistically significant.193

b. Predictors of Success194

The comparisons of success rates reported in Part II.C.1 compare outcomes by type of forum without controlling for any other aspects of case quality. But factors other than in what forum is the case filed likely affect the SEC’s likelihood of success. The logistic regression analysis reported in section III.C.3 includes four independent variables that were expected to be significant predictors of the likelihood of success: the type forum in which the action is filed, whether the defendant is a firm or an individual, whether the action is accompanied by and/or based on a criminal conviction or plea, and the subject matter category of the enforcement action. Although I also collected information on the year in which the actions were filed and resolved, and on who was SEC Chair at the time the action was filed, these were not significant predictors of success and so were not included in the regression analyses reported below.

This section provides additional detail on why I selected the predictors included in the regression, and how I collected the relevant information.

192. These include insider trading actions that were originally settled or decided by summary judgment but were vacated post-Newman.
193. The chi-square statistic is 5.6706; the p-value is .01725. This result is significant at p<.05. The result is the same if summary judgments based on criminal convictions are excluded.
194. In classical literature on statistics, the term independent variable is commonly used to refer to inputs that have some influence on the output or response variable. In the modern statistical literature, independent variables are called predictors, the term this paper adopts. See Trevor Hastie, Robert Tibshirani & Jerome Friedman, The Elements of Statistical Learning: Data Mining, Inference, and Prediction 9 (2 ed. 2009).
First, the Article tests the Wall Street Journal’s claim that the forum in which the case is filed is significantly correlated with the likelihood of success, and so the variable was included in all regressions.

Second, as suggested by information included in Table 1, individuals are significantly more likely than firms to contest the enforcement action. The reasons vary but one important reason is that individuals are much more likely than firms to face significant bars from working in the securities industry or before the Commission, and other collateral consequences that result from a finding of liability.¹⁹⁵ Because individuals are more likely to contest charges, one would expect that outcomes in cases against individuals are likely to be different than outcomes in cases against firms.

Third, where the SEC’s case accompanies a criminal action for the same violation, that violation is likely more serious and the SEC’s odds of winning higher than when the SEC prosecutes alone. For existence of parallel criminal proceedings, I searched in Bloomberg Law for criminal actions against the defendant, and reviewed indictments or criminal information documents for facts matching those in the SEC enforcement action. To code for whether the disposition in the SEC’s case was based on a parallel criminal case, I read the SEC’s dispositive motion (usually the motion for summary judgment) and the court opinion or memorandum explaining the decision granting the SEC’s motion. If the opinion or memorandum mentioned that the defendant is collaterally estopped from disputing the facts because of a criminal case, the cases was coded as “based on” a criminal action.

Finally, I included the subject matter categorization because the likelihood that the SEC will prevail varies significantly by the type of violation charged. Ceteris paribus, the SEC should be much more likely to prevail when the violation does not require a showing of mens rea (i.e., strict liability violations) than where the SEC must prove scienter. Many rules in the regulated securities industry are strict liability provisions, so one would expect the SEC’s success rate to be higher in actions against broker-dealers and investment advisers, for example, than in actions targeting insider trading. Case categorization is thus expected to be an important predictor of SEC success on the merits.

To code for subject matter category, I used the SEC’s Reports for initial coding of subject matter. I coded cases in one of the six categories: securities offering, market manipulation, broker dealer, investment adviser, issuer reporting, and insider trading. Eight cases were coded as missing because the SEC categorized them as other categories and there were not enough cases in each of the categories to yield meaningful

¹⁹⁵ See Urska Velikonja, Waiving Disqualification: When Do Securities Violators Receive a Reprieve?, 103 CALIF. L. REV. 1081 (2015). Whether the defendant is an individual was obvious from the complaint or the OIP.
results. The SEC categorizes inconsistently, I reviewed all enforcement actions and recoded a handful that were improperly categorized.

Table 5 below reports the SEC’s success by type of forum and subject matter category for the dataset labeled as Substantive Disposition in regressions reported in Part II.C.3. The data includes dispositions by trial, by defendant’s or the SEC’s motion for summary judgment or summary disposition, and after a defendant’s motion to dismiss filed over the SEC’s objection, but does not include voluntary dismissals. The Table suggests that the SEC’s overall success rate is marginally greater before ALJs than in court (the difference is not statistically significant). What really makes a difference in the likelihood of success is the subject matter of the charged violation. The SEC loses more than 40% of contested insider trading actions and almost 30% of contested accounting fraud actions, but fewer than 10% of other actions. Since insider trading and accounting fraud cases are overwhelmingly filed in court, the SEC’s track record in court looks worse than its record before ALJs.

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196. Three cases are against transfer agents, two miscellaneous, two municipal offering, one FCPA case. In a separate set of regressions, I coded these eight cases for the categories to which they were closest. For example, as the SEC used to do in the years past, I coded the FCPA case as an issuer disclosure case, and three transfer agent cases as investment adviser cases. I then re-ran all regressions and the results were essentially the same.


198. All stop orders were categorized as “Securities Offering.” All 12(j) actions were coded as “Delinquent Filing” and excluded from the analysis. Contempt proceedings were coded as such and excluded from the analysis. In all, 4 contested actions were recoded or removed from the sample.

199. A table of success rates by case category that includes voluntary dismissals by SEC motion is included in the Appendix.

200. As noted above in Part II.C.3.a, the difference is statistically significant.
### TABLE 5: SUMMARY OF SEC SUCCESS BY CASE CATEGORY

<table>
<thead>
<tr>
<th>Case Category</th>
<th>SEC win</th>
<th>Number and win rate by category</th>
<th>Total</th>
<th>Overall SEC win rate</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Court</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>SEC win %</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Overall*</td>
<td>Yes</td>
<td>452</td>
<td>150</td>
<td>602</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>63</td>
<td>17</td>
<td>80</td>
</tr>
<tr>
<td>Insider Trading</td>
<td>Yes</td>
<td>38</td>
<td>2</td>
<td>40</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>29</td>
<td>1</td>
<td>30</td>
</tr>
<tr>
<td>Issuer Reporting</td>
<td>Yes</td>
<td>35</td>
<td>14</td>
<td>49</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>16</td>
<td>4</td>
<td>20</td>
</tr>
<tr>
<td>Broker-Dealer</td>
<td>Yes</td>
<td>23</td>
<td>56</td>
<td>79</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>1</td>
<td>7</td>
<td>8</td>
</tr>
<tr>
<td>Investment Adviser</td>
<td>Yes</td>
<td>54</td>
<td>47</td>
<td>101</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>3</td>
<td>5</td>
<td>8</td>
</tr>
<tr>
<td>Market Manipulation</td>
<td>Yes</td>
<td>54</td>
<td>3</td>
<td>57</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>3</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Securities Offering</td>
<td>Yes</td>
<td>246</td>
<td>22</td>
<td>268</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>12</td>
<td>0</td>
<td>12</td>
</tr>
</tbody>
</table>

* The Table includes dispositions at the motion to dismiss (not by consent), summary judgment, and trial (i.e., the same as Substantive Disposition dataset in Part II.C.3). The table includes all actions filed in FY 2007-15 and resolved by September 15, 2016.

* The Overall numbers include three transfer agent actions filed in AP, two municipal securities actions filed in court, one miscellaneous action filed in court and one in AP, and one FCPA action filed in court.

### 3. Regression Results

Using the predictors described above, the analysis reported in this section tests whether the SEC’s likelihood of prevailing is significantly associated with where the action is litigated. The analysis includes controls for case category, the identity of the defendant (individual or firm), and whether the action was based on a criminal prosecution, or accompanied by a parallel criminal action.

Table 6 below reports regression coefficients and measures of significance for four different data sets: the first, Substantive Disposition, includes all actions decided by trial, by summary disposition, or by motion to dismiss issued over the SEC’s objection. These are best described as contested enforcement actions decided by a third-party adjudicator. The regression dubbed Trial includes only actions decided after a full trial, and

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201. In unreported regressions, I also controlled for the year in which the case was filed and the SEC Chair. Neither of the variables was statistically significant.
does not include dismissals or summary dispositions. The data analyzed in the *Trial* regression is the most similar to the data that the *Wall Street Journal* relied on to claim that there exists a disparity in outcomes. The difference is that the *Wall Street Journal* collected information on outcomes in all cases decided between 2010 and 2015, regardless of when the cases were initially filed, whereas the results below include only cases filed between 2007 and 2015 and decided by September 15, 2016.

The final regressions labeled *Expanded* include all actions included in the *Substantive Disposition* model, as well as voluntary dismissals where the SEC moved to dismiss its case against the defendant because its case was weak (based on contemporaneous statements or news stories). These regressions measure the SEC’s likelihood of prevailing depending on the forum in which the action is filed. Importantly, because they include voluntary dismissals by SEC motion the regression models labeled *Expanded* do not measure whether ALJs are more likely to rule for the SEC than courts. Significantly, all cases where the reason for the dismissal could not be ascertained were coded as defendant wins.

As already noted, all regressions include cases that were filed in fiscal years 2007 to 2015 and were decided by September 15, 2016. For actions filed in FY 2013 and later, more than 10% of the cases filed in court remain ongoing, which could bias the result.\footnote{To mitigate against the risk that defendants who litigate longer are more likely to prevail against the SEC, I also report regression coefficients based on the *Expanded* dataset including only cases filed in FY 2007 to 2012.\footnote{\footnotetext{Many of the cases that are ongoing are stayed pending the resolution of the parallel criminal case. As a result, I do not expect that the cases still pending are the ones the SEC is more likely to lose. If anything, the opposite is likely true.}}\footnote{I also ran regressions using only cases filed in FY 2007 to 2012 in the *Substantive Disposition* and *Trials* datasets and the results were similar to those reported for the full dataset; predictor Court was not significant in any model whereas other predictors were either significant or not, and with the same signal.}}

*Substantive Disposition* includes cases decided at trial, by summary disposition and by involuntary dismissal

*Expanded* includes cases decided at trial, by summary disposition or substantive dismissal (i.e., voluntary and involuntary)

*Trials* includes only cases decided after a trial (by ALJ, jury verdict or after bench trial)
Table 6: Logistic Regression Coefficients

<table>
<thead>
<tr>
<th></th>
<th>Substantive Disposition</th>
<th>Trials</th>
<th>Expanded (incl. voluntary dismissal)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>'07–'15</td>
<td>'07–'15</td>
<td>'07–'15</td>
</tr>
<tr>
<td>Court(^a)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Log odds</td>
<td>0.22</td>
<td>0.44</td>
<td>0.79*</td>
</tr>
<tr>
<td>Wald (df=1)</td>
<td>0.33</td>
<td>0.99</td>
<td>5.01</td>
</tr>
<tr>
<td>Odds ratio</td>
<td>1.25</td>
<td>1.55</td>
<td>2.20</td>
</tr>
<tr>
<td>Individual</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Log odds</td>
<td>1.70**</td>
<td>1.74**</td>
<td>1.50**</td>
</tr>
<tr>
<td>Wald (df=1)</td>
<td>13.89</td>
<td>7.67</td>
<td>17.51</td>
</tr>
<tr>
<td>Odds ratio</td>
<td>5.48</td>
<td>5.73</td>
<td>4.48</td>
</tr>
<tr>
<td>Based On Criminal (^a)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Log odds</td>
<td>1.87**</td>
<td></td>
<td>2.34**</td>
</tr>
<tr>
<td>Wald (df=1)</td>
<td>8.35</td>
<td></td>
<td>15.94</td>
</tr>
<tr>
<td>Odds ratio</td>
<td>6.48</td>
<td></td>
<td>10.43</td>
</tr>
<tr>
<td>Parallel Criminal (^a)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Log odds</td>
<td>-0.54</td>
<td>-0.62†</td>
<td>-0.71†</td>
</tr>
<tr>
<td>Wald (df=1)</td>
<td>1.57</td>
<td>2.81</td>
<td>2.71</td>
</tr>
<tr>
<td>Odds ratio</td>
<td>0.58</td>
<td>0.54</td>
<td>0.49</td>
</tr>
<tr>
<td>Category</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wald (df=6)</td>
<td>68.06**</td>
<td>4.26</td>
<td>112.70**</td>
</tr>
</tbody>
</table>

Pseudo R\(^2\) 0.297 0.150 0.403 0.461
N 682 290 728 571

\(^*\)p<0.01; \(\ast\)p<0.05; \(\dagger\)p<0.1

The dependent variable is whether SEC won on at least one of the counts (SEC win is coded as 1). The variable Court codes actions decided by ALJ as 1 and by court as 0. The variable Individual codes actions against firms as 1 and against individuals as 0; the variable Based on Criminal codes actions based on criminal convictions as 1. In variable Category, actions targeting securities offering violations are coded as the baseline.

\(^a\)None of the dispositions at trial were based on a criminal conviction or plea, so the predictor is not included in the regression analysis.

Table 6 reports for each predictor three statistics generated by the logistic regression model. The first is a log odds coefficient, the second the Wald statistic, and the third an odds ratio. The log odds coefficient is a logarithmic measure of association between the response variable (i.e., SEC success) and the predictor. The Wald statistic is a measure of statistical significance: it tells one whether the observed association is so large that it is unlikely to appear by chance. The higher the Wald statistic, the more likely that the observed association between the two variables is real.\(^204\) The

\(^204\) See Gareth James, Daniela Witten, Trevor Hastie & Robert Tibshirani, An Introduction to Statistical Learning 134 (2015).
odds ratio is a more useful measure than the log odds coefficient: it quantifies the association. An odds ratio of 5.48 for the predictor Individual in the Substantive Disposition model implies that the SEC is 5.48-times as likely to prevail against a firm than against an individual defendant, all else being equal.

A positive log odds coefficient implies that the predictor and the response variable are positively correlated; a negative number suggests a negative correlation. All predictors used in the regression models are categorical. Three—Court, Individual, and Based on Criminal—are binary, where the observation takes on one of two values (i.e., ALJ or court, individual or firm, convicted or not). For each of the predictors, one of the options was chosen as the baseline. A logistic regression reports log odds coefficients as compared with a baseline, so the choice of a baseline matters. In the models reported above, the baseline value for the predictor Individual was litigation against an individual. Thus, the reported log odds coefficients measure the relationship between an SEC win in a case against a firm as compared with litigation against an individual. A positive coefficient suggests that the SEC is more likely to win against a firm than against an individual defendant, all else being equal. Similarly, the log odds coefficients in the regression model Trial for predictors Court and Based on Criminal are positive: given the selected baselines (litigation in court and no conviction, respectively), the SEC is more likely to prevail in a case filed before an ALJ and in an action against a defendant convicted for the same violation. The SEC is less likely to prevail when the action is accompanied by a parallel criminal case: this is what one might call the Newman effect. Many insider trading cases are accompanied by criminal indictments that are later dismissed.

By contrast, the coefficients for Category are negative. Category is a qualitative predictor. The subject matters for enforcement actions are a finite set and there is no ordering between classes: an action for insider trading is not better or worse than an action for market manipulation. I chose cases that target securities offering violations as the baseline to compare against other types of cases. Because the SEC’s likelihood of winning in a securities offering case is the highest as compared with other categories (see Table 5), the log odds coefficients for all other subject matter categories are negative: the SEC is less likely to prevail in a broker-dealer or issuer reporting matter than it is in a securities offering matter, all else being equal.

205. It does not matter for the calculation which is chosen as the baseline; the baseline only matters in interpretation and only because it determines whether the log odds coefficient is positive or negative. See Hastie, Tibshirani & Friedman, supra note 194, at 119.
As is common in studies reporting the results of a statistical analysis, coefficients that are statistically significant are marked with stars.\textsuperscript{206} Notably, in the models most similar to the results reported in the \textit{Wall Street Journal}, labeled \textit{Trials} and \textit{Substantive Disposition}, the variable Court is not statistically significant. In other words, even though the log odds coefficient for the predictor Court is positive in both models, the result does not allow one to reject the null hypothesis that there is no association between the type of forum in which an action is filed and case outcome. Contrary to the claims advanced by the \textit{Wall Street Journal}, the data analyzed do not support the conclusion that the SEC is more likely to win at trial before an ALJ than it is in court once one controls for case category, the nature of the defendant, and the existence of parallel criminal proceedings. Any reported disparities in outcomes in individual years are noise.

What matters in adjudicated cases is not where the case is litigated but whether the targeted defendant is an individual and, to a lesser extent, what type of violation was charged.\textsuperscript{207} The SEC is significantly less likely to prevail against individual defendants and against defendants targeted for insider trading and issuer reporting.\textsuperscript{208}

The only model in which the type of forum is statistically significantly associated with case outcomes are the third models labeled \textit{Expanded}. The models include voluntary dismissals by the SEC. In the \textit{Expanded} model that includes all contested cases filed between 2007 and 2015, the variable Court is statistically significant at p<0.05.\textsuperscript{209} Holding other predictors constant, the SEC is statistically significantly more likely to win on at least one count when the case is filed in administrative proceedings.

Even this result should be taken with reservations. Venue does not matter for cases decided by trial, it is only significant when voluntary dismissals are included. This suggests two additional caveats. First, for many voluntary dismissals, conclusive contemporaneous evidence on why was the case dismissed is not available. When in doubt, the voluntary dismissal was coded as a defendant win.\textsuperscript{210} Second, the venue is not significant when cases filed after 2012 are excluded. A close review of the

\textsuperscript{206} One star signals that the result is significant at p<0.05, which means that there is less than a 5% chance that there is no relationship between the response (SEC win) and the predictor (e.g., litigation in court). Two stars signal that the result is significant at p<0.01, which implies that there is less than a 1% chance that there is no relationship between the response and the predictor.

\textsuperscript{207} Using odds ratios reported in Table 6, the SEC is more than 5-times more likely to win when the defendant is a firm than when the defendant is an individual.

\textsuperscript{208} Using odds ratios reported in Table 6, compared with securities offering cases, the SEC is 17-times less likely to prevail on a dispositive motion in insider trading cases and 8-times less likely to prevail in issuer reporting cases.

\textsuperscript{209} Note that if cases filed in fiscal 2012 are included as well, the variable Court is not statistically significant.

\textsuperscript{210} This includes about half of voluntary dismissals coded as defendant wins.
data suggests that there might be a “Newman effect” at play: the SEC moved to dismiss a number of insider trading cases post-Newman. This result remains unchanged regardless of whether individual predictors are removed from, and added back into the regression. In other words, individuals targeted in insider trading and issuer reporting actions are consistently more likely than other defendants to prevail against the SEC. Defendants convicted of crimes are significantly less likely to prevail against the SEC. Contrary to the oft-repeated claims of statistical disparity, these results do not support the conclusion that defendants are more likely to win at trial in court than before ALJs, nor do they suggest that judges are more likely to rule for defendants than are ALJs. The analysis does suggest that defendants might fare better when the SEC targets them in court than before ALJs, but only for defendants sued after 2012 and only if the SEC dismisses the case voluntarily.

III. INTERPRETING THE RESULTS

The statistical analysis reported in Part II suggests that the Wall Street Journal’s data on which many advocates of reform have relied cannot be used to support the claim that the SEC is more likely to prevail when it litigates before ALJs. At the same time, the findings reported in this Article do not suggest that the type of forum is irrelevant. The SEC’s expanded jurisdiction is new and many of the post-Dodd-Frank cases are still ongoing, so none of the regressions can validly test only post-Dodd-Frank data. Even if additional data were available, there are significant problems with using the reported statistics to inform policy-making.

The gold standard in empirical studies is a double-blind randomized controlled experiment: divide the sample into two groups that are similar along relevant dimensions, randomly assign one group to treatment (in this case, adjudication by ALJ), and observe whether treatment is correlated with different outcomes as compared with the control group. Unfortunately, a double-blind study of outcomes in securities enforcement actions based on the type of forum is impossible because the SEC, and the ALJ or the judge deciding the case know that the SEC chose to file the case in their forum.

And so, evidence of disparities must come from an observational study like the one printed in the Wall Street Journal and the one reported above. Carefully designed observational studies can be used to identify significant associations between variables of interest, but most trained statisticians caution users from drawing causal inferences based on observational studies.

211. The result is consistent in unreported regressions using only one, two or three covariates, as well as stepwise methods.
This Article has catalogued the many problems with the Wall Street Journal's report. But the empirical analysis in Part II, too, has significant limitations. This Part discusses two: omitted variable bias and selection bias. It concludes with recommendations for going forward.

A. The Missing Pieces: Omitted Variables and Selection Bias

The conclusion offered in Part II.C.3 that the type of forum does not matter assumes that the included predictors capture the relevant characteristics of cases filed in either forum. If so, there is no robust statistically significant association between the forum in which an SEC enforcement action is litigated and the defendant’s success against the SEC.

This assumption is certainly not satisfied. The regression models reported above omit important variables. Representation might matter: pro se defendants may be more likely to lose than those represented by counsel, and in particular if counsel is experienced.\(^{212}\) The ALJ or federal judge deciding the case might matter, or the SEC regional office that conducted the investigation. One could collect more data, but none of this is likely to be worthwhile because the two most important characteristics that are omitted, namely case quality and the SEC's perception of case quality, are either not easily measured or are not observable.

The type of forum where the case is litigated is not random. The SEC selects what cases to litigate in court and which ones to file in administrative proceedings, so selection bias is a significant concern. It is possible that the SEC files in administrative proceedings cases that it believes it could not win in court—the charge lobbed by the Wall Street Journal.\(^{213}\) If so, one would expect the SEC to win less often before ALJs than in court, assuming all else is equal.\(^{214}\) If the SEC filed more difficult cases before ALJs, the finding of no disparity in outcomes would be significant. It would suggest that the proverbial deck is stacked in favor of the SEC in administrative proceedings. It is also possible that the SEC files easier cases or cases that it is \textit{ex ante} more likely to win in administrative proceedings. In that case, the finding of no disparity would suggest that ALJs are biased against the SEC.

Unfortunately, the complaints and the OIPs do not supply enough information to code consistently for case quality. External proxies, such as stock price movement on announcement of detected violation,\(^{215}\) could be

\(^{212}\) \textit{See} Zaring, \textit{supra} note 18, at 1179 tbl.1.  
\(^{214}\) That is, assuming that success rates for like cases are the same in court and before ALJs.  
useful as a measure of the seriousness of the violation. But, stock-price data is limited to public firms, which represent only 4% of SEC enforcement actions and an even smaller slice of contested actions, so it is not useful as a general measure of case quality. Moreover, if the concern is the SEC’s opportunistic forum selection, then we would need a variable to measure the SEC’s perception of case quality. Unfortunately, that, too, is not observable at present.

There is a second selection bias effect that renders win ratios of limited value in assessing the fairness of SEC enforcement. Despite the interest in litigated cases, it is far more common for defendants to settle with the SEC. Over the period studied, about 40% of cases were filed as settled actions, and another 35% were settled during the proceedings. But settlement rates are not stable. During the study period, 38% of cases were filed as settled in fiscal 2009, while 52% of cases filed were filed as settled actions in fiscal 2014. In addition, the share of settled actions filed in court has declined, from 30% in fiscal 2007 to 15% in fiscal 2015, while the share of settled actions filed in administrative proceedings remained flat at 80%.

Defendants’ willingness to settle may be affected by their perception that ALJs are less fair. The SEC has reportedly threatened investigated parties with litigation before ALJs if they are unwilling to settle. As a result, more parties may be settling post-Dodd Frank than before and the case mix that is adjudicated may have changed. Alternately or in addition, defendants’ willingness to settle may have declined after the Wall Street Journal’s reporting. As some defendants have succeeded in lawsuits seeking to enjoin administrative proceedings, others may have been encouraged to contest charges instead of settling. And so, the mix of contested cases keeps changing, rendering any long-term analysis problematic.

The SEC’s enforcement practices, too, have changed over time. Between 2007 and 2015, the SEC lived through three Chairs with vastly different priorities, and underwent a serious restructuring of its Enforcement Division. The restructuring reportedly had an impact on the morale as


217. The ratio for settled cases is based on cases that have been resolved and does not include ongoing cases. See discussion supra in Part II.C.1.

218. There was a decline in 2012 and 2013 to 61 and 65%, respectively. Data on file with author.


220. See id. (quoting SEC Enforcement Director Ceresney as saying the SEC “threatened administrative proceedings” and the defendant settled).

221. See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-358, SECURITIES AND EXCHANGE COMMISSION: GREATER ATTENTION NEEDED TO ENHANCE COMMUNICATION AND
well as on the level of enforcement activity.\footnote{222} Finally, the SEC has changed where it files contested cases.\footnote{223} While absolute numbers are a single figure, success rate is a ratio comprised of two numbers: the numerator and the denominator. One can change the success rate by changing either, or both. As such, success rates are more vulnerable to small changes in inputs and biases discussed above.

All of these factors suggests that success rates are not a useful measure of fairness in SEC enforcement. It is unfortunate that they have become one, and even more unfortunate that the Wall Street Journal report that stirred the controversy was done as poorly and over-claimed as extensively.

\textbf{B. Beyond the Empirics}

The Wall Street Journal's report can serve as a useful cautionary tale. It combined bold claims and seemingly straightforward data analysis to make the case that the SEC was treating defendants unfairly. It confirmed the perceptions that the SEC was a sore loser and was changing the rules of the game to ensure it would win in the future.

After the analysis offered in this Article, one would hope that empirical claims of disparity would disappear from the ongoing debate about the fairness of the administrative forum. But the perception that ALJs supply a lesser form of fairness is likely to persist.\footnote{224} Since empirical evidence is lacking, the debate about the fairness of administrative adjudication and the appropriate remedies should be held on the policy merits and demerits. There are good and bad arguments advanced by both the SEC and its critics. What the battling sides hopefully will accept is that the data in this debate is no trump card. This is one of those controversies that will have to proceed with “messy” policy arguments.

The ultimate result might be that the SEC amends procedural rules before ALJs again to model them more closely on the Federal Rules of Civil Procedure, as some commentators have proposed.\footnote{225} But that is unlikely to satisfy everyone. Both bills proposed in Congress include removal

\begin{footnotesize}
\begin{enumerate}
\item \footnote{222}{See id.}
\item \footnote{223}{See Eaglesham, \textit{SEC Gives Ground}. supra note 96.}
\item \footnote{224}{See e.g., Eaglesham, supra note 96 (“Democratic self-governance requires that the governed be generally convinced of the system’s evenhandedness. We are concerned that the SEC is damaging the perceived legitimacy of how the agency uses its enforcement power.”); Michael S. Piwowar, Comm’r, U.S. Sec. & Exch. Comm’n, Remarks at the “SEC Speaks” Conference 2015: A Fair, Orderly and Efficient SEC (Feb. 20, 2015), http://www.sec.gov/news/speech/022015-spchcmsp.html (“To avoid the perception that the Commission is taking its tougher cases to its in-house judges, and to ensure that all are treated fairly and equally, the Commission should set out and implement guidelines for determining which cases are brought in administrative proceedings and which in federal courts.”).}
\item \footnote{225}{See e.g., Bondi, Ortiz & Wheatley, supra note 25; Zornow, supra note 104.}
\end{enumerate}
\end{footnotesize}
provisions that would entitle defendants to remove any action to federal
district court and raise the burden of persuasion if the case were to stay in
administrative proceedings.\textsuperscript{226} Practitioners have suggested that the
Commission “bring all but its most routine cases in federal court.”\textsuperscript{227}

These proposals are associated with significant costs and benefits.\textsuperscript{228}
Removing most cases to court would increase the workload and stress the
already overburdened federal judiciary.\textsuperscript{229} Complex regulatory matters
may be beyond the capacity of even the most dedicated layperson jurors.\textsuperscript{230}
By contrast, unsettled legal questions perhaps are better left to federal
judges. The choice of forum involves trade-offs and no single type of forum
is best for all types of disputes.

CONCLUSION

It is hardly news that a news story got an important fact wrong. The
\textit{Wall Street Journal}’s story is unusual in the significant influence that it has
had on the law and the practice of securities enforcement. Many of the
power players in securities regulation have referenced the disparity,
including judges deciding securities cases, a sitting SEC Commissioner,
and congressmen advancing statutory amendments. The reported disparity
led the SEC itself to amend its Rules of Practice and to face continuing
scrutiny. This is a remarkable feat for any empirical study, let alone a
seriously deficient one.

This Article surveys all enforcement actions filed in fiscal years 2007 to
2015 to test two claims about SEC enforcement in administrative
proceedings that its critics frequently advance. First, the Article finds that
the SEC has significantly increased the number of respondents it sues in
administrative proceedings. But only a small minority of the filings are
pursuant to the SEC’s new power to seek civil fines against non-registered
individuals and firms in administrative proceedings. Second, contrary to
the widely-circulated report in the \textit{Wall Street Journal}, the Article does not
find a robust correlation between the selected forum and case outcome.
This finding does not imply that the type of forum in which the SEC litigates
does not matter. Rather, there are significant empirical obstacles to finding
any useful results by comparing case outcomes.

The controversy about the fairness of SEC enforcement in
administrative proceedings will no doubt continue. By discrediting the data

\textsuperscript{226} See discussion \textit{supra} notes 99-103 and accompanying text.
\textsuperscript{227} Brune, \textit{supra} note 25, at 5.
\textsuperscript{228} See Grundfest, \textit{supra} note 26, at 21.
\textsuperscript{229} \textit{See} Peter J. Henning, \textit{Reformimg the SEC’s Administrative Process}, N.Y. TIMES
(speculating that more cases would be filed in court).
\textsuperscript{230} \textit{See generally} Davison et al., \textit{supra} note 20, at 104 (observing that complex issues
can be “outside the experience and understanding of a typical layperson jury”).
that many of the SEC’s critics have used to buttress their claims, this Article hopes that the debate can proceed at a lower volume, and offer more measured solutions than some of the proposals advanced thus far.
Winning and Losing Against the SEC

APPENDIX

FIGURE 2: SUCCESS BY CASE CATEGORY, INCL. VOLUNTARY DISMISSALS

<table>
<thead>
<tr>
<th>Case Category</th>
<th>SEC win</th>
<th>Number and win rate by category</th>
<th>Total</th>
<th>Overall SEC win rate</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Court SEC win %</td>
<td>AP SEC win %</td>
<td></td>
</tr>
<tr>
<td>Overall</td>
<td>Yes</td>
<td>451</td>
<td>80.5%</td>
<td>150</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>109</td>
<td>4.3%</td>
<td>18</td>
</tr>
<tr>
<td>Insider Trading</td>
<td>Yes</td>
<td>38</td>
<td>40.9%</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>55</td>
<td>4.3%</td>
<td>2</td>
</tr>
<tr>
<td>Issuer Reporting</td>
<td>Yes</td>
<td>35</td>
<td>56.5%</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>27</td>
<td>4.3%</td>
<td>4</td>
</tr>
<tr>
<td>Broker-Dealer</td>
<td>Yes</td>
<td>23</td>
<td>85.2%</td>
<td>56</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>4</td>
<td>4.3%</td>
<td>7</td>
</tr>
<tr>
<td>Investment Adviser</td>
<td>Yes</td>
<td>54</td>
<td>93.1%</td>
<td>47</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>4</td>
<td>4.3%</td>
<td>5</td>
</tr>
<tr>
<td>Market Manipulation</td>
<td>Yes</td>
<td>54</td>
<td>94.7%</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>3</td>
<td>4.3%</td>
<td>0</td>
</tr>
<tr>
<td>Securities Offering</td>
<td>Yes</td>
<td>246</td>
<td>94.3%</td>
<td>22</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>15</td>
<td>4.3%</td>
<td>0</td>
</tr>
</tbody>
</table>

a The Table includes dispositions at the motion to dismiss, summary judgment, trial, as well as voluntary dismissals where the SEC moved to dismiss because its case was weak (i.e., the same as Expanded dataset in Part II.C.3).