

# A TRENDING USE OF INSULATION AND A TEMPORARY WAY OUT

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## I. Introduction

In 2010, Associate Justice Stephen Breyer warned the majority of the United States Supreme Court of the consequences facing their decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.<sup>1</sup> In this decision, the Court held that after losing in administrative court, defendants may challenge the constitutionality of the administrative process before a federal court. In other words, defendants may challenge the constitutionality of the hiring process of administrative law judges (“ALJs”), enabling defendants to undermine the administrative process by attacking the method of hiring the ALJs who rendered the unfavorable decisions against such defendants.<sup>2</sup> A recent trend of this type of litigation has proven Justice Breyer correct. Specifically, defendants who have been charged by the Securities and Exchange Commission (“SEC”) for violating rules and regulations have bought themselves extra time by filing pretextual federal-question claims in federal courts to directly challenge whether or not the hiring of SEC ALJs violates Article II of the Constitution.<sup>3</sup> This tactic, used by defense counsel to delay and derail their clients’ cases, has been relatively successful in a few jurisdictions thus far, even though the President has not invoked his Article II powers to challenge the ALJ hiring process.<sup>4</sup>

There is an overriding interest to abide by Congress’s decision that defendants go through the entire administrative review process prior to challenging such process. The Administrative Procedure Act (“APA”) was created in 1946<sup>5</sup> to “establish[] the fundamental relationship between regulatory agencies and those whom they regulate[,]” which essentially “permitted the growth of the

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1. 561 U.S. 477 (2010).

2. See *id.* at 543 (Breyer, J., dissenting) (“Does every losing party before an ALJ now have grounds to appeal on the basis that the decision entered against him is unconstitutional?”).

3. Article II of the United States Constitution confers powers to the executive branch. See U.S. CONST. art. II, § 1 (“The executive power shall be vested in a President of the United States of America.”); see, e.g., *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016); *Duka v. SEC*, No. 15 Civ. 357 (RMB) (SN), 2015 U.S. Dist. LEXIS 124444 (S.D.N.Y. Sept. 17, 2015); *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015); *Tilton v. SEC*, No. 15-CV-2472 (RA), 2015 U.S. Dist. LEXIS 85015 (S.D.N.Y. June 30, 2015); *Hill v. SEC*, 114 F. Supp. 3d 1297 (N.D. Ga. 2015).

4. See Jerome Nelson, *Administrative Law Judges’ Removal “Only For Cause”: Is That Administrative Procedure Act Protection Now Unconstitutional?*, 63 ADMIN. L. REV. 401, 409 (2011) (“[P]residents rarely test the removal provision.”).

5. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 551 (1994)).

modern regulatory state”<sup>6</sup> as it exists today. Tom Clark, the Attorney General appointed by President Harry Truman (and who later became an Associate Justice of the Supreme Court),<sup>7</sup> explained that one of the fundamental purposes of the APA is “[t]o prescribe uniform standards for the conduct of formal rule making” and “[t]o restate the law of judicial review.”<sup>8</sup> According to Clark’s Manual on the Administrative Procedure Act, claims may “be subject to judicial review” so long as the relevant statute permits review of agency action or so long as the agency action is considered “final.”<sup>9</sup> Since inception, the intent of the APA has been to allow Article III courts to review agency actions *after* the agency makes a final decision.<sup>10</sup> If courts continue to allow defendants to derail adverse administrative proceedings without exhausting administrative remedies first, others in similar predicaments will follow the trend, rendering the APA’s purpose futile.<sup>11</sup> Even if SEC defendants are entitled to judicial review of this constitutional question prior to final agency order, the argument that ALJs are improperly appointed is flawed and has no merit because SEC ALJs are not under the purview of Article II’s Appointment Clause.

Sufficient precedence holds that “when a statute is unclear, the resulting discretion belongs generally to the agency charged with its administration” because the agency has the “expertise and political sensitivity [which the] courts lack.”<sup>12</sup> The Supreme Court has previously stated “neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law . . . to be tried in an Article III court before a judge enjoying lifetime tenure and protection against salary reduction.”<sup>13</sup> Here, through the observation of the history and the language of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”)<sup>14</sup> and the Securities Exchange Act of 1934,<sup>15</sup> there is sufficient clarity to demonstrate that following two of the most major economic downfalls of our time, Congress intended to give the SEC broad powers to stringently regulate securities in order to prevent similar future catastrophes.<sup>16</sup> When Congress “explicitly [leaves] a gap for the agency to

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6. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1558–59 (1996).

7. Associate Justice Tom C. Clark served on the United States Supreme Court from 1949 to 1967. See Tom C. Clark, *Former Justice, Dies: On the Supreme Court for 18 Years*, N.Y. TIMES (June 14, 1977), <http://www.nytimes.com/1977/06/14/archives/tom-c-clark-former-justice-dies-on-the-supreme-court-for-18-years.html>.

8. TOM C. CLARK, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947), available at <http://archive.law.fsu.edu/library/admin/attorneygeneralsmanual.pdf>.

9. *Id.* at 120, § 10(c) (“Judicial Review”).

10. See Administrative Procedure Act, 5 U.S.C. § 704 (1966) (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”); see also *FTC v. Standard Oil Co.*, 449 U.S. 232, 244–47 (1980) (holding that defendant company was not entitled to judicial review before the conclusion of the FTC’s administrative adjudication against it).

11. See, e.g., *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 216 (1994) (holding that the language and structure of the Mine Act does not demonstrate “that Congress intended to allow mine operators to evade the statutory-review process”); *Bebo v. SEC*, 799 F.3d 765, 775 (7th Cir. 2015) (“Every person hoping to enjoin an ongoing administrative proceeding could make this argument, yet courts consistently require plaintiffs to use the administrative review schemes established by Congress.”); *Chau v. SEC*, 72 F. Supp. 3d 417, 425 (S.D.N.Y. 2014) (“This Court’s jurisdiction is not an escape hatch for litigants to delay or derail an administrative action when statutory channels of review are entirely adequate.”).

12. Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 66 (2009); see *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984) (holding that if a statute expresses a clear intent from Congress, then courts must defer to this intent when interpreting the statute, but if it is unclear, the court must construe the agency’s interpretation “based on a permissible construction of the statute”).

13. *Palmore v. United States*, 411 U.S. 389, 408 (1973).

14. Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301, et. seq. (2010).

15. Securities Exchange Act of 1934, 15 U.S.C. § 78a.

16. See 12 U.S.C. § 5301 (stating that the purpose of the Dodd-Frank Act is “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail’, to protect the

fill, there is an express delegation of authority to the agency to” fill that particular gap.<sup>17</sup> In the Dodd-Frank Act, Congress explicitly delegated its prosecutorial authority to the SEC because it purposely left a gap in the Act for the SEC to fill when determining the “*other purposes*” for which the Dodd-Frank Act could be used.<sup>18</sup> If more courts allow SEC defendants to derail their cases in this pretextual manner, the intent of Congress to effectively and efficiently prosecute securities-law violators will be moot. The administrative proceedings against such defendants will be further disrupted, delayed, and undermined while the defendants are able to circumvent liability for the fraudulent schemes in which they participated. This type of circumvention is precisely what Congress intended to prevent in its enactment of the Dodd-Frank Act. Moreover, it is ultimately up to the legislature, and not the courts, to change the administrative adjudicatory process.

In order to understand the constitutionality of the SEC’s administrative process, Part II of this Article begins with a history of Article II’s Appointments Clause. Part III describes the competing theories resulting from a circuit split, specifically *Hill v. Securities & Exchange Commission*<sup>19</sup> and *Bebo v. Securities Exchange Commission*.<sup>20</sup> Part IV of this Article then evaluates the impact of the Appointments Clause on the Dodd-Frank Act and discusses the consequences of raising meritless constitutional questions that jeopardize the intent of the Dodd-Frank Act. Subsection IV.A. explains the exhaustion doctrine and subsection IV.B. explores Congress’s intent of implementing the Dodd-Frank Act, as well as the SEC’s review. Subsection IV.C. analyzes why SEC ALJs are not considered “Inferior Officers” in the context of Article II. Subsection IV.D. examines subject matter jurisdiction of federal courts over these constitutional questions. Subsection IV.E. confirms that the SEC is an independent agency. Part V discusses the implications of SEC-based litigation in the future. Part VI concludes that the SEC’s administrative process is constitutional.

## II. History of the Appointments Clause

As we see in modern times, former President Barack Obama’s ability to appoint a Supreme Court Justice to fill the late Justice Antonin Scalia’s seat became a hotly contested issue by Republican Senators who adamantly opposed and doubted Obama’s constitutional power to appoint a Supreme Court Justice during his “lame-duck” session of Congress.<sup>21</sup> Article II, section 2 of the United States Constitution states the following powers of the President and Congress:

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American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and *for other purposes*) (emphasis added); see also 15 U.S.C. § 78b (stating one of the purposes of the Securities Exchange Act is “to impose requirements *necessary* to make such regulation and control reasonably complete and effective” since the securities markets affect “a national public interest”) (emphasis added); see *infra* note 107 and accompanying text for information about the Great Recession and the Great Depression.

17. *Chevron*, 467 U.S. at 843–44.

18. See 12 U.S.C. § 5301.

19. 114 F. Supp.3d 1297 (N.D. Ga. 2015).

20. 799 F.3d 765 (7th Cir. 2015).

21. See Jeff Mason & Richard Cowan, *Obama Weighs Republican for Supreme Court*, REUTERS (Feb. 25, 2016, 7:50 AM), <http://www.reuters.com/article/us-usa-court-idUSKCN0VX11LL>; Burgess Everett & Glenn Thrush, *McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama*, POLITICO (Feb. 13, 2016, 6:34 PM), <http://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248>; Brian Rosenwald, *It’s Not Too Late for Obama to Pick a New Justice*, CNN (Feb. 15, 2016, 6:18 PM), <http://www.cnn.com/2016/02/15/opinions/power-to-choose-new-justice-rosenwald/>.

[The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such Inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>22</sup>

In comparison to other constitutional provisions, Article II is hardly disputed. The President can appoint ambassadors, Supreme Court Justices and other United States “Principal Officers” with the advice and consent of the Senate.<sup>23</sup> On the other hand, Congress can vest its appointment powers in the President, Courts of Law, or Heads of Departments to appoint “Inferior Officers.”<sup>24</sup> In the rare cases that this provision is actually disputed, the issue usually revolves around the meaning of “Officer” and the President’s ability to appoint.

Since the Framers did not explicitly define “Inferior Officer”, courts have approached this issue by observing various factors of the chosen official’s position “on a case-by-case basis rather than through a definitive test.”<sup>25</sup> Generally, any appointee who is *not* labeled a Principal Officer is by default an Inferior Officer. Congress must then decide if the Appointment Power of such Inferior Officer should be vested in the executive branch or the judicial branch.<sup>26</sup> For the most part, a “President’s right . . . to appoint an officer hinges on whether the appointment is important enough to be considered a ‘[P]rincipal [O]fficer’ position.”<sup>27</sup> In essence, if the appointee is not a Principal Officer who has a sufficiently “important” position, Congress can vest the power to appoint such Inferior Officers in any of the President, Courts of Law, or Heads of Department.<sup>28</sup> However, a conclusory definition as to what an “Officer” is and what is considered an “important” duty is still ambiguous because there are few cases that articulate a principle.<sup>29</sup>

*Myers v. United States* is one of the earliest cases that analyzes the removal powers of the President.<sup>30</sup> Here, the Supreme Court recognizes Article II vests executive power in the President for the purpose of granting him “the power of appointment and removal of executive officers”<sup>31</sup> because “[t]he power of removal is incident to the power of appointment.”<sup>32</sup> Consequently, the Court holds that the unrestricted power of Congress to remove Officers is invalid because it takes away the exclusive power of the President to remove executive branch officials.<sup>33</sup>

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22. U.S. CONST. art. II, § 2, cl. 2.

23. *See id.*

24. *See id.*

25. Douglas Cox, *Inferior Officers*, THE HERITAGE FOUND., <http://www.heritage.org/constitution/#!/articles/2/essays/92/inferior-officers> (last visited Jan. 13, 2016, 11:47 A.M.); *see, e.g.*, Edward Susolik, *Separation of Powers and Liberty: The Appointments Clause, Morrison v. Olson, and Rule of Law*, 63 S. CAL. L. REV. 1515, 1545 (1990) (explaining that in *Morrison*, the Supreme Court considered “whether Morrison’s duties and functions were important enough to characterize her as a principal officer, or whether the temporary and narrow nature of her position made her an ‘Inferior Officer’ (or even an ‘employee’)”).

26. Susolik, *supra* note 25, at 1546.

27. *Id.* at 1539.

28. *See id.*

29. *See id.* at 1545.

30. 272 U.S. 52 (1926).

31. *Id.* at 115.

32. *Id.* at 122.

33. *See id.* at 176.

Ultimately, it is the president who has the power to appoint and remove Officers of the executive branch.

In *Humphrey's Executor v. United States*,<sup>34</sup> the Court adds another factor for removal. The President's power to remove an officer "will depend upon the character of the office."<sup>35</sup> This case dealt with the character and nature of the Federal Trade Commission ("FTC"). Because the FTC is considered a "quasi-judicial" and "quasi-legislative" agency, the Court determines it "must be free from executive control" as contemplated by the Federal Trade Commission Act.<sup>36</sup> In other words, when Congress uses its authority to create an independent "quasi-legislative" or "quasi-judicial" agency, executive power and control are meant to be kept sufficiently out of reach.<sup>37</sup> Therefore, the Act essentially limits the removal powers of the President in these types of quasi-agencies to situations where there is "just cause" for firing, such as for "inefficiency, neglect of duty, or malfeasance in office."<sup>38</sup> Thus, although the President has the power to appoint the FTC Commissioner,<sup>39</sup> Congress still limits the President's removal powers depending on the nature of the office.

Yet, in *Buckley v. Valeo*, the Supreme Court states that the Appointments Clause may "control[] the appointment of . . . typical administrative agency [members] even though its functions . . . may be 'predominantly quasi-judicial and quasi-legislative' rather than executive."<sup>40</sup> Further complicating the analysis, even if the agency is intended to be "independent of the Executive in [its] day-to-day operations, the Executive [is] not excluded from selecting [members],"<sup>41</sup> despite the "quasi-judicial" or "quasi-legislative" nature of the office.

*Buckley* also adds more factors to the President's removal authority while reaffirming the principle that only the President is allowed to select Principal Officers with the advice and consent of the Senate, while Congress may allow the President, Heads of Departments, or the Judiciary to appoint Inferior Officers.<sup>42</sup> Here, an Officer is one who may exercise "significant authority".<sup>43</sup> Because "Officers of the United States" were "defined to include 'all persons who can be said to hold an office under the government,'"<sup>44</sup> the members of the Federal Election Commission in this case were considered "at the very least . . . 'Inferior Officers' within the meaning of [the Appointments] Clause" and not employees of the United States.<sup>45</sup> "Employees [are believed to be] lesser functionaries subordinate to officers of the United States, whereas the Commissioners, appointed for a statutory term, are not subject to the control or direction of any other executive, judicial, or legislative authority."<sup>46</sup>

To determine whether the appointment of the Federal Election Commission members is valid, the Court focuses on the Commission's enforcement powers,

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34. 295 U.S. 602 (1935).

35. *See id.* at 631.

36. *Id.* at 628.

37. *Id.* at 629.

38. *Id.* at 623, 626.

39. *Id.* at 619–20.

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

41. *Id.*

42. *Id.* at 132.

43. *See id.* at 126.

44. *Id.*

45. *Id.*, 126 n.162.

46. *Id.* at 126, 126 n.162.

which generally include the Commission's task of developing the statute by way of "rulemaking and advisory opinions, [as well as] functions necessary to ensure compliance with the statute and rules—informal procedures, administrative determinations and hearings, and civil suits."<sup>47</sup> Because these functions "may be discharged only by persons who are 'Officers[,]'" the "provisions of the [Federal Election Campaign] Act, vesting in the Commission primary responsibility for conducting civil litigation, violate [Article II]."<sup>48</sup> Again, the Court sustained the principle "that an [O]fficer is 'any appointee exercising significant authority pursuant to the laws of the United States.'"<sup>49</sup> Three factors that appear to be considered here in the Court's determination of significance are the appointee's "level of responsibility or power", the appointee's tenure, and the impermanent "nature of the office."<sup>50</sup>

In *Freytag v. Commissioner*, the Tax Reform Act of 1986 allows the Chief Judge of the Tax Court to appoint special trial judges ("STJs") to hear certain proceedings designated by the Chief Judge.<sup>51</sup> It was determined that STJs were "Inferior Officers" because although they were not allowed to enter final case decisions,<sup>52</sup> they played a vital role beyond ministerial tasks in assisting the Chief Judge, including responsibilities such as the ability to "take testimony, conduct trials, rule on the admissibility of evidence, and . . . enforce compliance with discovery orders."<sup>53</sup> In sum, STJs were given significant discretion in aiding the Chief Judge's decision with respect to formulating outcomes of cases. However, since the Tax Court is determined to be a "Court of Law' within the meaning of the Appointments Clause," the Chief Judge was well within his authority to appoint STJs.<sup>54</sup> The Supreme Court concludes that the Tax Court was in fact an Article I court because the nature of the court is "judicial, rather than executive, legislative, or administrative."<sup>55</sup> The Tax Court also remains wholly independent of the other branches of government and it does not make rules or political decisions.<sup>56</sup>

Finally, in *Free Enterprise Fund*, the Supreme Court determines that the creation of the Public Company Oversight Board (the "Board") is unconstitutional because the Board members are considered "Inferior Officers" exercising significant authority.<sup>57</sup> Thus, a president cannot be insulated from removing them.<sup>58</sup> For example, the Board's significant authority includes the ability to:

promulgate[] auditing and ethics standards, perform[] routine inspections of all accounting firms, demand[] documents and testimony, and initiate[] formal investigations and disciplinary proceedings. The willful violation of any Board rule is treated as a wilful violation of the Securities Exchange Act of 1934 – a federal crime punishable by up to 20 years' imprisonment of \$25 million in fines . . . . And the Board itself can issue severe sanctions in its disciplinary proceedings, up to

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47. *Id.* at 137.

48. *Id.* at 140.

49. Susolik, *supra* note 25.

50. *Id.* at 1546 (explaining the last factor, "[t]he more temporary the nature of the office, the less likely that the appointee will be considered an officer").

51. *See* 501 U.S. 868, 870–71 (1991).

52. *Id.* at 874.

53. *Id.* at 881–82 (emphasis added).

54. *Id.* at 890–93.

55. *Id.* at 890–91.

56. *See id.*

57. *See* 561 U.S. 477, 485–86 (2010).

58. *See id.* at 492.

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and including the permanent revocation of a firm's registration, a permanent ban on a person's associating with any registered firm, and money penalties of \$15 million . . . . [T]he Board is "part of the Government" for constitutional purposes, and . . . its members are "Officers of the United States" who "exercis[e] significant authority pursuant to the laws of the United States."<sup>59</sup>

In total, Board members have significant authority because they can directly punish rule violators and order sanctions. Furthermore, provisions of the Sarbanes-Oxley Act prevents the President from appointing or removing Board members.<sup>60</sup> Even though properly appointed by the SEC Commissioner, who is the "Head of Department," individual Board members are "substantially insulated from the [SEC's] control" because the SEC is only allowed to remove the Board members for "good cause," which in effect, indirectly insulates the President's ability to remove these individual Board members, since the President appoints the SEC Commissioner.<sup>61</sup> Because an SEC Commissioner is appointed and could be removed by the President, this "multilevel protection from removal" is determined as "contrary to Article II's vesting of the executive power in the President"<sup>62</sup> since it does not allow the President to "ensure the faithful execution of the laws."<sup>63</sup> Nevertheless, the Supreme Court made a special note that this holding does not apply to ALJs.<sup>64</sup>

As a result of these removal cases, an "Officer" is still not clearly defined. Nonetheless, what is known so far is that a sitting President has the power to appoint and to remove Principal Officers, but this power may also depend on the "character of the office."<sup>65</sup> A Principal Officer typically has the ability to exercise significant authority. Factors determining what is "significant" include the level of responsibility and power an officer may have, the tenure of the officer's position, the impermanent nature of the position, the discretion an officer may exercise in making a decision,<sup>66</sup> the finality of an officer's decision,<sup>67</sup> and the independence of the agency. Inferior Officers may also be appointed by either the President, Heads of Department, or Courts of Law, subject to Congress's decision to vest such appointment authority.<sup>68</sup> Moreover, the President may not be blocked from removing Inferior Officers as long as restrictions on his removal power does not impede his ability to "take care that the laws be faithfully executed."<sup>69</sup>

For reasons further noted below, SEC ALJs are neither Principal Officers nor Inferior Officers because they do not have significant authority. Additionally, SEC ALJs do not have tenure like an Article III judge, and they do not have final discretion over their decisions. Furthermore, the SEC is considered an

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59. *Id.* at 485–86 (internal citations omitted).

60. *See id.* at 495–96 (noting the provision created a double layer of for-cause removal, which violated the separation of powers doctrine since it); *see generally* Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7211(e)(6) (providing that the SEC can only remove Board members "for good cause shown" and not at will).

61. 561 U.S. at 486, 510.

62. *Id.* at 484.

63. *Id.* (quoting *Morrison v. Olson*, 487 U.S. 654, 693 (1988)).

64. *See infra* note 162 and accompanying text.

65. *Humphrey's Executor v. United States*, 295 U.S. 602, 631 (1935).

66. *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 284 (D.C. Cir. 2016) (citation omitted).

67. *Id.*

68. *See* U.S. CONST. art. II, § 2, cl. 2.

69. *See Morrison v. Olson*, 487 U.S. 654, 689–693 (1988) (holding that as long as removal restrictions do not interfere with a president's ability to carry out his executive powers under Article II, the restrictions will be deemed constitutional).

independent agency because it performs “quasi-legislative” and quasi-judicial” functions.

### III. A Brief Introduction of the Competing Theories: *Hill* Versus *Bebo*

In an attempt to bypass certain stages of the proceeding, SEC defendants have been frequently raising federal question claims to challenge the constitutionality of the administrative proceedings against them.<sup>70</sup> Defense attorneys use this strategic trend because they speculate that federal forums, as opposed to administrative forums, will more likely rule in favor of the defendants. The primary cases, *Hill v. Securities & Exchange Commission*<sup>71</sup> and *Bebo v. Securities & Exchange Commission*,<sup>72</sup> present two different outcomes to the same constitutional argument raised by defense counsel in each case. *Hill* rules in favor of the defendant, holding that the hiring of the ALJs violates the Appointments Clause.<sup>73</sup> The court also holds that because the hiring violates the Constitution, the federal district court of Georgia has jurisdiction over the defendant’s constitutional claim, and therefore the defendant is allowed to bypass the requirement of exhausting all administrative remedies.<sup>74</sup> However, the *Bebo* court reached the opposite conclusion. Congress, in enacting section 78y of the Securities and Exchange Act of 1934 (“section 78y”),<sup>75</sup> did not intend for defendants undergoing administrative proceedings to halt the process by contesting the constitutionality of the process itself. Subsequently, by allowing defendants to derail their cases in this manner, it renders the fundamental point of administrative law futile since other defendants will follow the trend and attempt to delay their own cases.<sup>76</sup>

In *Hill*, defendant Charles Hill challenges the constitutionality of SEC administrative proceedings, as well as both the appointment and removal proceedings of SEC ALJs.<sup>77</sup> From his perspective, the Appointments Clause of Article II is violated because as an “Inferior Officer,” an ALJ should be appointed by the President, Courts of Law, or a Department Head as Article II requires.<sup>78</sup> The defendant’s removal argument is based on the fact that the very position of an ALJ violates the President’s removal powers because ALJs “are protected by two layers of tenure protection[,]” thereby insulating the President from being able to remove them for good cause.<sup>79</sup> In simpler terms, if ALJs are in fact considered “Inferior Officers,” then the SEC’s hiring process is unconstitutional because they are not properly appointed by the SEC Commissioner (“Head of Department”), Court of Law, or the President. If, however, ALJs are not considered “Inferior Officers,” then it is clear that the process of hiring ALJs is appropriate. Judge Leigh Martin May concluded that since “SEC ALJs are Inferior Officers, . . . their

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70. See *supra* note 3 and accompanying text.

71. 114 F. Supp. 3d 1297 (N.D. Ga. 2015).

72. 799 F.3d 765 (7th Cir. 2015).

73. See 114 F. Supp. 3d 1297, 1319 (N.D. Ga. 2015).

74. See *id.* at 1306 (“[T]he Supreme Court held that the text of § 78y . . . ‘does not expressly limit the jurisdiction that other statutes confer on district courts’ and that ‘there is no language indicating that the administrative proceeding was to be an exclusive forum.’”).

75. Securities Exchange Act of 1934, 15 U.S.C. § 78y.

76. See *Bebo v. SEC*, 799 F.3d 765, 775 (7th Cir. 2015).

77. See 114 F. Supp. 3d 1297, 1304–05, 1307 (N.D. Ga. 2015).

78. See *id.* at 1316.

79. *Id.*

appointment *violates* the Appointments Clause,”<sup>80</sup> and thus, under the authority of section 78y,<sup>81</sup> the administrative process “could foreclose all *meaningful* judicial review’ of [Hill’s] constitutional claims.”<sup>82</sup>

On the other hand, in *Bebo*, the Seventh Circuit Court of Appeals dismissed defendant Laurie Bebo’s “attempt to skip the administrative” process by challenging the SEC’s constitutional authority to conduct the proceeding against her.<sup>83</sup> The Seventh Circuit reasoned that it was Congress’s intent to provide this type of administrative review process pursuant to section 78y so that challengers would exhaust all administrative remedies first before taking their claims to federal court.<sup>84</sup> This process was considered to have provided meaningful review since Bebo can always raise her claims in federal court if she does not win “by the SEC’s final decision.”<sup>85</sup> Bebo’s argument that having to exhaust all administrative remedies costs a substantial amount also holds no weight because “the expense and disruption of defending oneself in an administrative proceeding does not automatically entitle a plaintiff to pursue judicial review in the district courts, even when those costs are ‘substantial.’”<sup>86</sup> Consequently, the Seventh Circuit Court disregarded Bebo’s contention that the SEC ALJs were improperly insulated from removal by the President<sup>87</sup> as the Court lacked the jurisdictional threshold to hear Bebo’s claim.

Essentially there are two main competing views. On the one hand, SEC administrative proceedings are unconstitutional because the accused is forced to go through an unlawful and one-sided process of review that does not provide meaningful review from improperly appointed ALJs. On the other hand, SEC administrative proceedings are constitutional because after all the administrative proceedings have been exhausted as provided for by section 78y, the accused is still allowed to have his or her claim reviewed by federal courts, thus providing for meaningful review. The former approach emphatically allows defendants to purposely delay or derail the SEC’s case against them, while the latter approach follows the APA’s guidelines as intended by Congress. An analysis of the exhaustion doctrine, the Dodd-Frank Act, the procedure of hiring ALJs, and the role ALJs play in the SEC administrative system is necessary to determine which theory is most likely to hold water.

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80. *Id.* at 1319.

81. 15 U.S.C. § 78y.

82. Hill v. SEC, 114 F. Supp. 3d 1297, 1307 (N.D. Ga. 2015) (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 489 (2010) (emphasis added)).

83. Bebo v. SEC, 799 F.3d 765, 767 (7th Cir. 2015); *see id.* at 775 (supporting her claim, Bebo also argued that “the administrative review scheme established by § 78y is inadequate because, by the time she is able to seek judicial review in a court of appeals, she will have already been subjected to an unconstitutional proceeding”).

84. *See id.* at 767; *see also* FTC v. Standard Oil Co., 449 U.S. 232, 245 (1980) (“[T]he [Administrative Procedure Act, 5 U.S.C. § 704,] specifically provides that a ‘preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.’”).

85. *Bebo*, 799 F.3d at 767.

86. *Id.* at 775 (citing *Standard Oil Co.*, 449 U.S. at 244); *see also Standard Oil Co.*, 449 U.S. at 244 (explaining that even though defendant has to bear substantial costs in defending itself, “[t]he expense and annoyance of litigation is ‘part of the social burden of living under government’”) (quoting *Petroleum Exploration, Inc. v. Public Serv. Comm’n*, 304 U.S. 209, 222 (1938))).

87. *See Bebo*, 799 F.3d at 768, 773.

## IV. Analysis

### A. The Exhaustion Doctrine

In general, a defendant must exhaust all available administrative remedies before seeking judicial review.<sup>88</sup> The exhaustion doctrine “is as old as federal administrative law”<sup>89</sup> and was initially created for the purpose of “orderly procedure” and to decrease the wasteful caseload in Article III courts.<sup>90</sup> The doctrine is recognized as “the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.”<sup>91</sup> Section 704 of the APA (“section 704”) explicitly states that “agency action or ruling not directly reviewable is subject to review on the review of the final agency action.”<sup>92</sup> In 1993, the Supreme Court affirmed that under this section, after “an aggrieved party has exhausted all administrative remedies expressly prescribed by statute of agency rule, the agency action is” considered final and subsequently may undergo judicial review by Article III courts.<sup>93</sup> The exhaustion doctrine was intended “to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies.”<sup>94</sup> For the most part, exhausting administrative remedies is, “required as matter of preventing premature interference with agency processes, so that agency may function efficiently and . . . to compile record which is adequate for judicial review.”<sup>95</sup>

However, the exhaustion doctrine is not dispositive in all cases. Instead, the decision to order the exhaustion of administrative remedies is “within [the] sound discretion of court.”<sup>96</sup> In other words, there are a few exceptions to exhausting administrative remedies, including without limitation: “when [an] agency has clearly violated constitutional rights of party seeking injunctive relief against administrative proceeding”;<sup>97</sup> “when administrative remedies are inadequate”;<sup>98</sup> when the “issue involved is strictly legal one not involving agency’s expertise or any factual determinations”;<sup>99</sup> when “exhaustion would . . . be futile or where

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88. See Raoul Berger, *Exhaustion of Administrative Remedies*, 48 YALE L.J. 981, 981 (1939).

89. *Id.*

90. See *id.* at 983, 984 (“Emphasis upon orderly procedure serves to preserve the advantages of a ‘preliminary sifting process’ by a tribunal specially equipped to deal with problems that are often of great technical complexity.”).

91. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938).

92. Administrative Procedure Act, 5 U.S.C. § 704 (1966).

93. *Darby v. Cisneros*, 509 U.S. 137, 146 (1993).

94. *Parisi v. Davidson*, 405 U.S. 34, 37 (1972) (citing *McKart v. U.S.*, 395 U.S. 185, 194–95 (1969)); see also *U.S. Postal Serv. v. Notestine*, 857 F.2d 989, 993 (5th Cir. 1988) (explaining that the APA “does not allow judicial usurpation of powers granted to an agency” but it does “permit[] judicial review only of final agency actions” because exhausting administrative remedies helps “(1) to avoid premature interruption of the administrative process; (2) to let the agency develop the necessary factual background upon which decisions should be based; (3) to permit the agency to exercise its discretion or apply its expertise; (4) to improve the efficiency of the administrative process; (5) to conserve scarce judicial resources . . . ; (6) to give the agency a chance to discover and correct its own errors; and (7) to avoid the . . . ‘weaken[ing] of the effectiveness of an agency . . .’”).

95. *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

96. *NLRB v. Indus. Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 429 n.8 (1968).

97. *Blue Ribbon Quality Meats, Inc. v. FTC*, 434 F. Supp. 159, 163 n.4 (W.D. Mo. 1976) (citing *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949)).

98. *Indus. Union*, 391 U.S. at 429 n.8 (citing *Greene v. U.S.*, 376 U.S. 149 (1964)).

99. *Borden, Inc. v. FTC*, 495 F.2d 785, 787 (7th Cir. 1974) (citing *Jewel Cos., Inc. v. FTC*, 432 F.2d 1155, 1159 (7th Cir. 1970)).

irreparable damage is likely to occur in [the] meantime”;<sup>100</sup> and when agency inaction or delay would cause prejudice to the claimant.<sup>101</sup>

Yet, there is another exception to this exception: “an allegation of unconstitutionality without more has been held insufficient to invoke . . . relief from the exhaustion requirement.”<sup>102</sup> It has even been observed that “[t]he requirements of orderly procedure . . . triumphed over the argument of *ultra vires* in cases which were alleged to lie outside the administrative jurisdiction of the subject matter.”<sup>103</sup> Thus, at times, following the orderly process of administrative review may preempt federal jurisdiction, even if the case involves a constitutional question.<sup>104</sup> Moreover, if Congress created a scheme in its statute that “all constitutional claims must be funneled through the direct-appeal process after a final agency action[,]” district courts cannot take it upon themselves to review the case despite the federal question raised.<sup>105</sup>

To determine whether Congress intended to provide a certain route of review, the statute’s “text, structure, and purpose” must be analyzed.<sup>106</sup> According to section 78y(a)(1) of the Securities Exchange Act of 1934, Congress gives a defendant the right to “obtain review of the [*final* order of the Commission] in the United States Court of Appeal for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing [a written petition] in such court, within sixty days after the entry of the order . . . .”<sup>107</sup> From the plain language alone, it is “fairly discernible” that Congress intended the SEC to implement a *final* decision *prior* to the defendant seeking judicial review in a federal forum, and that Congress also intended that the defendant “proceed exclusively through the statutory review scheme established by [section] 78y because that scheme provides for meaningful judicial review” in either the circuit court of appeals of the defendant’s jurisdiction, or the District of Columbia Circuit.<sup>108</sup> The purpose of the Dodd-Frank Act is to grant the SEC broad prosecutorial powers, and to establish a system of administrative exhaustion prior to reaching federal forum.<sup>109</sup> There is no evidence that can be found from the “text, structure, and purpose” of section 78y or the Dodd-Frank Act<sup>110</sup> that would suggest that a defendant is allowed to “challeng[e] the constitutionality of . . . the

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100. *Ogletree v. McNamara*, 449 F.2d 93, 99 (6th Cir. 1971) (citing *Pub. Utils. Comm’n v. U.S.*, 355 U.S. 534 (1958)); see *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992) (“[A]n administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it.”); see also *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677-78 (9th Cir. 1988) (holding that futility may occur when there is “undisputed bias which would render pursuit of an administrative remedy futile”).

101. *NLRB v. Long Island Coll. Hosp.*, 20 F.3d 76, 77 (2d Cir. 1994) (“The deference usually accorded to a governmental agency is inappropriate where . . . such inordinate delay has occurred.”).

102. *Berger*, *supra* note 88, at 996.

103. *Id.* at 999.

104. See *id.* (explaining that in *Lawrence v. St. Louis-San Francisco, Ry.*, 274 U.S. 588, 595 (1927), Justice Brandeis “insist[ed] on the exhaustion requirement although the constitutionality of a state act was in question”); see also *id.* n.94 (“Whether the Act is valid, is not for the moment so important as the fact that an adequate and orderly method is available for the determination of this question outside the equity powers of the court” (quoting *Clark v. Lindemann & Hoverson Co.*, 88 F.2d 59, 60 (C.C.A. 7th, 1937))).

105. *LabMD, Inc. v. FTC*, 776 F.3d 1275, 1279 (11th Cir. 2015) (citing *Doe v. FAA*, 432 F.3d 1259, 1262-63 (11th Cir. 2005)).

106. *Elgin v. Dep’t of Treasury*, 132 S. Ct. 2126, 2133 (2012).

107. Securities Exchange Act of 1934, 15 U.S.C. § 78y(a)(1) (emphasis added).

108. *Bebo v. SEC*, 799 F.3d 765, 774 (7th Cir. 2015).

109. See *Dodd-Frank Wall Street Reform and Consumer Protection Act*, 12 U.S.C. § 5323(h) (2010).

110. See *generally id.* (explaining that after a final decision is made, action can be brought to district court); see *generally id.* § 5563(b)(4) (explaining the appeal to the appellate court process).

structural authority of the SEC” in the midst of their ongoing administrative proceedings.<sup>111</sup>

Furthermore, it would be a mistake for courts to automatically assume that SEC defendants are free to raise a constitutional claim prior to final agency action based on *Free Enterprise Fund*'s holding. *Free Enterprise Fund* is distinguished from the situation at hand because the district court had jurisdiction over petitioners' constitutional claim challenging the “dual for-cause limitations on the removal of *Board* members” prior to final agency action.<sup>112</sup> This is crucial because “[s]ection 78y provides *only* for judicial review of [*SEC*] action” *after* final Commission action, but does not provide that every *Board* action “is encapsulated in a final Commission order or rule.”<sup>113</sup> Because this case involved *Board* action, and *not* Commission action, section 78y would not apply,<sup>114</sup> and thus, the petitioner here was free to bring a constitutional claim to an Article III court before exhausting administrative remedies. For specific claims regarding Board action, the exhaustion doctrine would not apply, unless the statute explicitly stated otherwise. This easily overlooked but important detail is the reason why the Supreme Court allowed judicial review at the stage *prior* to the administrative Board proceeding.<sup>115</sup> Thus, *Free Enterprise* has no bearing on section 78y proceedings.

Even if SEC defendants' analysis of the Appointments Clause has merit, they still have to follow the process of administrative review as prescribed by section 78y. It is ultimately up to the Legislature, and not the courts, to change the statute's process of administrative review. Until then, section 78y is intended to provide a route of agency review before claims reach federal jurisdiction. Otherwise, SEC defendants would consistently “jump the gun' by going directly to the district court to develop their case,” which “would create substantial uncertainty about what sort of claims could properly be adjudicated outside the administrative scheme.”<sup>116</sup> The District of Columbia Circuit Court of Appeals concluded that this was *not* Congress's intent.<sup>117</sup>

## B. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and the Administrative Process

The Securities Exchange Act of 1934 initially created the SEC “[t]o provide for the regulation of securities exchanges and . . . to prevent inequitable and unfair practices on such exchanges and markets”<sup>118</sup> in reaction to the Great Depression

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111. *Bebo*, 799 F.3d at 775; see 15 U.S.C. § 78y(a)(1) (stating that “[a] person aggrieved by a *final* order of the Commission . . . may obtain review of the order” in an Article III court) (emphasis added); see 12 U.S.C. § 5382 (2010) (“[T]he United States Court of Appeals for the District of Columbia Circuit shall have jurisdiction of an appeal of a *final* decision of the Court filed by the Secretary . . .”) (emphasis added).

112. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489, 490, 491–92 (2010).

113. *Id.* (emphasis added).

114. Congress intended that section 78y *only* covers final *Commission* orders. See 15 U.S.C. § 78y(a) (“Final Commission orders”).

115. See *Free Enter. Fund*, 561 U.S. 477 at 487, 490; see *infra* note 193 and accompanying text.

116. *Jarkesy v. SEC*, 803 F.3d 9, 30 (D.C. Cir. 2015).

117. See *id.*

118. Securities Exchange Act of 1934, Pub. L. No. 73-291, ch. 404, § 2, 48 Stat. 881; see *id.* § 4(a) (“There is hereby established a Securities and Exchange Commission . . . to be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate.”).

of 1929.<sup>119</sup> Since then, the Dodd-Frank Act further expanded the SEC's power to respond to the 2008 financial crisis.<sup>120</sup> The intent of the Dodd-Frank Act is “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail,’ to protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive financial services practices,”<sup>121</sup> among other purposes. In order to effectively enforce regulations, monitor businesses, and prevent yet another potential fiscal collapse, Congress established the SEC's broad powers, specifically granting rulemaking and prosecutorial authority to the SEC.<sup>122</sup>

The Dodd-Frank Act gives the SEC full discretionary authority to prosecute registered companies as well as unregistered individuals and companies through administrative proceedings.<sup>123</sup> Prior to the Dodd-Frank Act, the SEC was able to seek civil penalties against unregistered individuals only in federal court.<sup>124</sup> Now, the Dodd-Frank Act gives the SEC the discretion to choose either a federal court forum or an administrative forum to pursue its enforcement actions.<sup>125</sup> This type of policy with “special review procedure” was purposefully created in order to maintain consistency and to avoid duplication in securities regulation claims.<sup>126</sup>

The Chief Administrative Law Judge can either preside over the matter or may delegate an independent ALJ<sup>127</sup> to preside and issue an initial decision.<sup>128</sup> Respondents may appeal the initial decision to the SEC Commissioners, and if they lose again, they are free to petition their claims for review to the federal court of appeals.<sup>129</sup> Otherwise, if the issue is uncontested by either party, the SEC will

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119. SEC, THE INVESTOR'S ADVOCATE: HOW THE SEC PROTECTS INVESTORS, MAINTAINS MARKET INTEGRITY, AND FACILITATES CAPITAL FORMATION (June 10, 2013), <http://www.sec.gov/about/whatwedo.shtml> (explaining that “[w]hen the stock market crashed in October 1929,” the Securities Act of 1933 and the Securities Exchange Act of 1934, “which created the SEC, was designed to restore investor confidence in our capital markets by providing investors and the markets with more reliable information and clear rules of honest dealing”).

120. See Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (2010); see generally Marilyn Geewax, *Did The Great Recession Bring Back The 1930s?*, NPR (July 11, 2012, 11:52 AM), <http://www.npr.org/2012/07/11/155991507/did-the-great-recession-bring-back-the-1930s>; David M. Edwards, *How Does The Current Economic Recession Compare To The Great Depression?*, FORBES (Nov. 8, 2011, 10:54 AM), <http://www.forbes.com/sites/quora/2011/11/08/how-does-the-current-economic-recession-compare-to-the-great-depression/#600be3467597>.

121. 12 U.S.C. § 5301.

122. SEC, FAST ANSWERS (April 6, 2011), <http://www.sec.gov/answers/rulemaking.htm> (defining the SEC's rulemaking authority to include “updat[ing] rules under existing laws, or to create new rules within existing authority that the agency believes are needed”).

123. See *Hill v. SEC*, 114 F. Supp. 3d 1297, 1301–02 (N.D. Ga. 2015); see also Securities and Exchange Act of 1934, 15 U.S.C. §§ 78u(d), 78u-1, 78u-2, 78u-3.

124. See *Hill*, 114 F. Supp. 3d at 1301–02.

125. *Bebo v. SEC*, 799 F.3d 765, 768 (7th Cir. 2015) (“Section 929P(a) of Dodd-Frank . . . [gave] the SEC a choice of forums: . . . proceed in federal district court or conduct its own administrative enforcement proceeding.”); see generally Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, § 929P(a)-(b) (2010) (for the “Strengthening Enforcement by the Commission” section); see also Robert Anello, *Administrative “Home Court” Advantage in Enforcement Proceedings*, FORBES (Sept. 7, 2015, 4:40 PM), <http://www.forbes.com/sites/insider/2015/09/07/addressing-the-secs-administrative-home-court-advantage-in-enforcement-proceedings/#61fdc27154ea> (“In 2010, the Dodd-Frank Act provided the SEC with the option of pursuing internal administrative proceedings in lieu of filing an action in federal court.”).

126. *Jarkesy v. SEC*, 803 F.3d 9, 29 (D.C. Cir. 2015) (quoting *Rochester v. Bond*, 603 F.2d 927, 936 (D.C. Cir. 1979)).

127. See SEC, *How Investigations Work*, SEC.GOV, <http://www.sec.gov/News/Article/Detail/Article/1356125787012> (last visited Nov. 21, 2015, 3:27 PM); *Hill*, 114 F. Supp. 3d at 1302–03; see 17 C.F.R. § 201.110.

128. See *Hill*, 114 F. Supp. 3d at 1302–03.

129. See *id.* at 1303; *Bebo*, 799 F.3d at 767 (“If aggrieved by the SEC's final decision, [the accused] will be able to raise her constitutional claims in [a federal] circuit or in the D.C. Circuit.”); see 17 C.F.R. § 201.411(c); Securities and Exchange Act of 1934, 15 U.S.C. § 78y(a)(1).

accept and set in stone the ALJ's initial decision as a final decision.<sup>130</sup> Ultimately, "[a] decision is not final until the SEC issues it."<sup>131</sup>

Congress created the SEC in order to enforce its stringent laws in the securities market. Prior to the enactment of Dodd-Frank, the SEC did not have the authority to regulate unregistered individuals in administrative proceedings, but now, Congress specifically allows the SEC to do so. In allowing SEC defendants to derail their case and bypass the exhaustion doctrine ensures that the agency will not do its job of effective enforcement when it was originally created to do so, and will further frustrate congressional intent.

### C. SEC Administrative Law Judges Are Not "Inferior Officers": How Are They Appointed and What Are Their Responsibilities?

The APA created the position of the ALJ.<sup>132</sup> "SEC ALJs are 'not appointed by the President, the Courts, or the [SEC] Commissioners. Instead, they are hired by the SEC's Office of Administrative Law Judges, with input from the Chief Administrative Law Judge, human resource functions, and the Office of Personnel Management' ("OPM")."<sup>133</sup> Although "[f]ederal ALJs remain under the . . . control of their hiring agency,"<sup>134</sup> SEC ALJs are still "independent of the [SEC]."<sup>135</sup>

Under the authority prescribed by the APA<sup>136</sup> and federal securities law,<sup>137</sup> an ALJ has the authority to:

- (1) Administer oaths and affirmations;
- (2) Issue subpoenas;
- (3) Rule on offers of proof;
- (4) Examine witnesses;
- (5) Regulate the course of a hearing;
- (6) Hold pre-trial conferences;
- (7) Rule upon motions; and
- (8) Unless waived by the parties, prepare an initial decision containing the conclusions as to the factual and legal issues presented, and issue an appropriate order.<sup>138</sup>

The SEC has the discretion to decide whether or not to approve the ALJ's initial decision in order for it to become a final rendering,<sup>139</sup> since ALJs function as mere

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130. *Hill*, 114 F. Supp. 3d at 1303; *see also* SEC, *Office of Administrative Law Judges*, SEC.GOV, <http://www.sec.gov/alj> (last visited Nov. 21, 2015, 2:54 PM) (describing general procedures of an ALJ).

131. *Hill*, 114 F. Supp. 3d at 1303; *see also* *Bebo v. SEC*, 799 F.3d 765, 766–67 (7th Cir. 2015) (explaining that after an ALJ issues an initial decision, the SEC may either "adopt the ALJ's initial decision as the final decision of the agency or . . . grant [Bebo's] petition [for review with the SEC] and conduct *de novo* review. If the SEC's final decision is adverse, Bebo will then have the right under 15 U.S.C. § 78y(a)(1) to seek judicial review" in a federal forum).

132. *See* Administrative Procedure Act, Pub. L. No. 79-404 (1946), 60 Stat. 237.

133. *Hill*, 114 F. Supp. 3d 1297, 1303 (N.D. Ga. 2015); *see generally* *Classifications & Qualifications*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/> (last visited Nov. 21, 2015, 2:10 PM) (describing qualification standards for ALJs); *see also* Jay S. Bybee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act*, 59 LA. L. REV. 431, 443 (1999) ("Although agencies have the primary responsibility for their ALJs, the Office of Personnel Management has some role in the hiring and retention of ALJs."); *see* Administrative Procedure Act, 5 U.S.C. §§ 1305, 3344, 5372 (1994) (explaining the Office of Personnel Management's role in the process of appointing and compensating ALJs).

134. Bybee, *supra* note 133, at 444.

135. SEC, HOW INVESTIGATIONS WORK (May 24, 2013), <https://www.sec.gov/News/Article/Detail/Article/1356125787012>.

136. 5 U.S.C. §§ 551–59.

137. Securities and Exchange Act, 15 U.S.C. §§ 77u, 78d, 78d-1.

138. 17 C.F.R. §§ 200.14(a)(1)-(a)(8) (1995); *see also* SEC, *Office of Administrative Law Judges*, SEC, <http://www.sec.gov/alj> (last visited Nov. 21, 2015, 2:54 PM).

139. *See Office of Administrative Law Judges*, *supra* note 130 ("An initial decision becomes final when the Commission enters a finality order.").

advisory roles to the Commission.<sup>140</sup> Ultimately, SEC ALJs are employees and not Inferior Officers because they do not exercise significant discretion or authority.

At first glance, it appears that an ALJ has extensive responsibilities similar to that of an Inferior Officer. *Buckley* holds that Inferior Officers “exercis[e] significant authority pursuant to the laws of the United States[,]”<sup>141</sup> and thus, the issue to resolve is whether an ALJ exercises significant authority. As mentioned previously in *Freytag*, although the Chief Judge of the Tax Court had final decision-making powers,<sup>142</sup> an STJ was still considered an Inferior Officer because he or she was allowed to “take testimony, conduct trials, rule on the admissibility of evidence, and *have the power to enforce compliance* with discovery orders.”<sup>143</sup> Because an STJ is considered an Inferior Officer with respect to certain duties, his or her “appointment must conform to the Appointments Clause[,]”<sup>144</sup> but, the Court still recognizes that STJs are “mere employees with respect to other responsibilities.”<sup>145</sup> The distinguishing factor between an ALJ and an STJ is one of discretionary degree: an ALJ needs *permission* by way of order “from a federal district court to compel compliance,” whereas an STJ can actually “*enforce compliance with discovery orders*” and subpoenas without receiving an order from a federal district court.<sup>146</sup> This factor is critical because an ALJ cannot simply compel orders with unfettered discretion like an STJ can, but rather, an ALJ must get permission from an Article III court. An ALJ acts as a mere fact-finder and investigator, as opposed to an STJ who may “exercise significant discretion” by enforcing orders,<sup>147</sup> and who may have “power of final decision in certain classes of cases.”<sup>148</sup> Conclusively, ALJs cannot be “Inferior Officers” because under *Buckley* and *Freytag*, they must “exercise significant discretion” in order to attain that status.<sup>149</sup>

Another case that addresses a similar constitutional issue is *Landry v. Federal Deposit Insurance Corporation*.<sup>150</sup> In this case, after the Federal Deposit Insurance Corporation (“FDIC”) assigns a matter to an ALJ to preside over a formal hearing, the FDIC’s Board of Directors can choose whether or not to adopt the ALJ’s recommendation in order to issue a final order.<sup>151</sup> Landry argued against the constitutionality of the FDIC’s appointment process of ALJs, claiming that the process violates the Appointments Clause.<sup>152</sup> The District of Columbia Court of Appeals held that like the SEC, the FDIC Board of Directors are the only ones with authority to issue a final decision.<sup>153</sup> Therefore, since the FDIC ALJs cannot

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140. Clark, *supra* note 7, at 83 (“Where the hearing examiner (or other officer where permitted by the subsection) makes a recommended decision, the agency must always make an ‘initial’ or final decision. In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision – as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature.”).

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

142. *See Freytag v. Comm’r*, 501 U.S. 868, 874 (1991).

143. *Id.* at 881–82 (emphasis added).

144. *Id.* at 881.

145. *Id.* at 882.

146. Securities and Exchange Act, 15 U.S.C. § 78u(e) (“Upon application of the Commission the district courts . . . shall have jurisdiction to issue . . . injunctions[] and orders commanding (1) any person to comply with the provision of this title [15 U.S.C. §§ 78a et seq.], the rules, regulations, and orders thereunder . . .”). *Contra Freytag*, 501 U.S. at 882.

147. *Freytag*, 501 U.S. at 882.

148. *Landry v. FDIC*, 204 F.3d 1125, 1134 (D.C. Cir. 2000) (citing *Freytag*, 501 U.S. at 882).

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

150. 204 F.3d 1125 (D.C. Cir. 2000).

151. *See Landry*, 204 F.3d at 1128.

152. *See id.*

153. *See id.* at 1133.

render final decisions, they are not Inferior Officers, but rather mere employees.<sup>154</sup> The authority to issue final orders seemed to be the dispositive factor in the court's holding.

In *Ramspeck v. Federal Trial Examiners Conference*, the Supreme Court dealt with Federal Trial Examiners and individual trial examiners, who “had been appointed pursuant to [section] 11 of the Administrative Procedure Act.”<sup>155</sup> Due to the increasing “volume of business,” agency heads, United States Service Commission members, and National Labor Relations Board members often did not preside over evidentiary hearings.<sup>156</sup> To alleviate the heavy caseload of this “quasi-judicial” agency, the Commission “designated hearing or trial examiners to preside over [evidentiary] hearings[,]” who subsequently “made a report to the agency setting forth proposed findings of fact and recommended action.”<sup>157</sup> Authorized by section 11 of the APA, the Civil Service Commission, much like the SEC, was “authorized to make investigations, require reports by agencies, issue reports . . . , promulgate rules, appoint such advisory committees as may be deemed necessary, . . . subpoena witnesses or records . . . .”<sup>158</sup> Section 11 also established that examiners, like SEC ALJs, can only be removed by the agency for “good cause”.<sup>159</sup>

Yet, despite the hefty responsibilities these trial examiners may have had while presiding over evidentiary hearings, the Court still held that because “Congress intended to make hearing examiners ‘a special class of semi-independent subordinate hearing officers’ by vesting control of their compensation, promotion and tenure in the Civil Service Commission[,]” the examiners were found to serve more of an advisory and fact-finding role for the Commission, and not a role that had significant discretion.<sup>160</sup> Similar to an ALJ's lack of lifetime tenure, Congress also did not intend to include lifetime employment for hearing examiners.<sup>161</sup> The Supreme Court further held that a hearing examiner's position “is not a constitutionally protected position” because not only is it a congressionally-created position, but examiners also do not have a vested right in these positions since Congress may regulate them.<sup>162</sup>

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154. *See id.* at 1134.

155. *Ramspeck v. Fed. Trial Exam'rs Conference*, 345 U.S. 128, 129 (1953); *see generally* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237, § 11 (1946) (codified as amended at 5 U.S.C. § 7521 (2006)), <https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/01/act-pl79-404.pdf> (describing the Examiners position).

156. *Ramspeck*, 345 U.S. at 130.

157. *Id.* at 131.

158. *Id.* at 133 (quoting § 11 of the original Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237, 244 (1946) (codified as amended at 5 U.S.C. § 7521 (2006))).

159. *Id.* at 132; *see* 5 U.S.C. § 7521(a) (“An action may be taken against an administrative law judge appointed under section 3105 of this title [5 U.S.C. § 3105] by the agency in which the administrative law judge is employed *only for good cause* established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.”); *see also* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 542 (2010) (reaffirming 5 U.S.C. § 7521(a)-(b)'s principle of establishing removal for good cause); *see* Peter J. Henning, *S.E.C. Faces Challenges Over the Constitutionality of Some of Its Court Proceedings*, N.Y. TIMES (Jan. 27, 2015, 8:58 AM), <http://dealbook.nytimes.com/2015/01/27/s-e-c-faces-challenges-over-the-constitutionality-of-some-of-its-court-proceedings/>?\_r=0 (explaining that under the APA, an agency can remove its ALJs “only for good cause”).

160. *Ramspeck*, 345 U.S. at 143.

161. *See id.*; *see* *Freytag v. Comm'r*, 501 U.S. 868, 912 (1991) (Scalia, J., concurring) (explaining that judges in Article I courts, like the Tax Court, do not have life tenure); *see* Russell G. Ryan, *The SEC as Prosecutor and Judge*, WALL ST. J. (Aug. 4, 2014, 7:36 PM), <http://www.wsj.com/articles/russell-g-ryan-the-sec-as-prosecutor-and-judge-1407195362> (“[T]he [APA] established today's system of quasi-judicial tribunals overseen by [ALJs]. But these tribunals are not courts, and the administrative law judges are not life-tenured judicial officers appointed under Article III of the Constitution.”); *see* Judith Resnik, *Judicial Independent and Article III: Too Little and Too Much*, 75 S. CAL. L. REV. 657, 660 (1999) (“The congressional authorization over this century of these new federal . . . ALJs . . . has been challenged by litigants arguing their ‘right’ to an Article III judge who enjoys life tenure and a guaranteed salary.”).

162. *See Ramspeck*, 345 U.S. at 133.

There is evidence in the APA that Congress never intended ALJs to be considered more than simply “Civil Service employees” nor ever intended their statuses be elevated “above that of the investigative and prosecution personnel of the agency.”<sup>163</sup> In comparison, SEC ALJs’ roles are similar to that of the examiners because they both preside over evidentiary hearings and provide recommendations and reports of facts to the SEC to support the SEC’s final decision.<sup>164</sup> Additionally, like the Civil Service Commission, promulgated by statute, the Office of Personnel Management approves compensation for ALJs.<sup>165</sup>

The APA’s good-cause protection provision<sup>166</sup> was considered constitutional for sixty-four years until *Free Enterprise Fund’s* decision in 2010.<sup>167</sup> But, even the majority in that case recognized that its holding is *inapplicable* to ALJs because “unlike members of the Board, many administrative law judges . . . perform adjudicative rather than enforcement or policymaking functions.”<sup>168</sup> The President’s removal power only concerns executive officers, like Board members, and not ALJs because ALJs serve “purely recommendatory powers.”<sup>169</sup>

Moreover, the SEC is a “quasi-judicial” regulatory agency<sup>170</sup> and “the power of SEC ALJs is ‘quasi judicial.’”<sup>171</sup> Pursuant to *Humphrey’s Executor*, “quasi-judicial” agencies “must be free from executive control.”<sup>172</sup> Thus, taken together, ALJs’ adjudicatory function makes them “beyond the reach of presidential removal power” unlike Board members,<sup>173</sup> who perform purely executive functions. In conclusion, SEC ALJs are not “Inferior Officers” according to Article II of the Constitution, and thus, their “appointment” is constitutional.

To recap, SEC ALJs are neither Principal Officers nor Inferior Officers because they do not have significant authority. Additionally, they do not have tenure like an Article III judge, and they do not have final discretion over their decisions. Only the SEC Commissioner has the final say. Furthermore, the SEC

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163. Brief for the Appellant at 27-28, *Hill v. SEC*, 114 F. Supp. 3d 1297 (N.D. Ga. 2015) (No. 15-12831), <https://securitiesdiary.files.wordpress.com/2014/11/sec-11th-circuit-appeal-brief-in-hill-v-sec.pdf> (“[I]n enacting the APA, Congress envisioned that an ALJ’s ‘initial decision’ would be ‘advisory in nature’ and would merely ‘sharpen[] . . . the issues for subsequent proceedings.’” (quoting U.S. Dep’t of Justice, *Attorney General’s Manual on the Administrative Procedure Act* 83-84 (1947))).

164. Hearing Examiners are now ALJs. See Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237, § 11 (1946) (codified as amended at 5 U.S.C. § 7521 (2006)).

165. See *Pay & Leave*, OPM, <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/administrative-law-judge-pay-system/> (last visited Jan. 24, 2016) (describing ALJ pay system facts); see generally 5 U.S.C. § 5372 (1999) (describing basic pay levels for ALJs).

166. See Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237, § 11 (1946), <http://www.justice.gov/sites/default/files/jmd/legacy/2014/05/01/act-pl79-404.pdf> (“Examiners shall be removable by the agency in which they are employed only for good cause established.”). Now codified at 5 U.S.C. § 7521 (2006) (“An action may be taken against an administrative law judge appointed . . . in which the administrative law judge is employed only for good cause established.”).

167. See Nelson, *supra* note 4, at 402.

168. *Id.* at 412; see *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 592 n.10 (2010) (“[O]ur holding also does not address that subset of independent agency employees who serve as administrative law judges.”).

169. Nelson, *supra* note 4, at 413 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010)); see also *Free Enter. Fund*, 561 U.S. at 592 n.10.

170. *Securities and Exchange Commission (SEC)*, USLEGAL, <http://system.uslegal.com/administrative-agencies/securities-and-exchange-commission-sec/> (last visited Mar. 9, 2016, 2:41 PM).

171. Richard F. Albert, *Duka v. SEC Redux – SEC Holds Home Court Advantage for Another Round*, FORBES (April 23, 2015, 9:59 AM), <http://www.forbes.com/sites/insider/2015/04/23/duka-v-sec-redux-sec-holds-home-court-advantage-for-another-round/#646999ee237e>; see generally Noah Feldman, *SEC’s New Enforcement Powers Aren’t Going Away*, BLOOMBERG (Oct. 2, 2015, 11:20 PM), <http://www.forbes.com/sites/insider/2015/04/23/duka-v-sec-redux-sec-holds-home-court-advantage-for-another-round/#646999ee237e> (describing SEC ALJs as “quasi-independent” because “[t]hey work for an agency, but are supposed to exercise judgment independent of agency prosecutors”).

172. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 628 (1935).

173. Nelson, *supra* note 4, at 412.

is considered an independent agency because it performs “quasi-legislative” and “quasi-judicial” functions, which must be free from executive control.

#### D. Meaningful Review, Wholly Collateral, and Agency Expertise: Federal Courts Do Not Have Subject Matter Jurisdiction Over These Constitutional Claims At the First Instance

Opponents of the SEC administrative process argue that there is “strong policy reasons . . . for immediate federal court review” because after exhausting all the administrative remedies, “judicial review would no longer be meaningful” since “[a]ll the clients and [the] business will have already left, and the [defendant] will have nothing left to fight for.”<sup>174</sup> A possible remedy to the problem is to provide an “[i]mmediate federal review on a case-by-case basis . . . .”<sup>175</sup> However, that would hardly solve the problem, and would, in fact, be contrary to the exhaustion doctrine. As noted above, the purpose of the exhaustion doctrine is orderly procedure. By immediately referring every case to federal review after individuals raise an irrelevant constitutional question, the federal courts would be flooded with similar claims, which is the type of problem that the exhaustion doctrine tried to prevent in the first place.

For SEC defendants to obtain federal jurisdiction, three factors are considered: “if ‘a finding of preclusion could foreclose all meaningful judicial review’; if the suit is ‘wholly collateral to a statute’s review provisions’; and if the claims are ‘outside the agency’s expertise.’”<sup>176</sup> After taking these factors into consideration, it is possible for SEC defendants to still seek meaningful judicial review as prescribed by section 78y because section 78y does not explicitly restrict federal jurisdiction from hearing these types of securities claims.<sup>177</sup> “If the federal court can later hear the case and later undo the effects of an unconstitutional process, ‘meaningful judicial review’ will have occurred.”<sup>178</sup> The fact that defendants have to undergo an alleged unconstitutional proceeding in the first place is irrelevant so long as there is an offered route of judicial review.

##### *1. Meaningful Review*

There is no doubt that evaluating empirical data is important.<sup>179</sup> This recent trend of litigation fostered the growth of empirical studies examining the success rates of litigants who have their day in district court in comparison to the success rates of litigants who have their claims pursued in administrative court. According to recent studies, the SEC won ninety percent of cases against contesting defendants before its own judges from October 2010 to March 2015,

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174. Ryan Jones, *The Fight Over Home Court: An Analysis of the SEC’s Increased Use of Administrative Proceedings*, 68 S.M.U. L. REV. 507, 523 (2015).

175. *Id.*

176. *Free Enter. Fund*, 561 U.S. at 489 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212–13 (1994)); *see also Thunder Basin*, 510 U.S. at 212–13 (“This Court previously has upheld district court jurisdiction over claims considered ‘wholly “collateral” to a statute’s review provisions and outside the agency’s expertise, discussing particularly where a finding of preclusion could foreclose all meaningful judicial review.’” (citations omitted)).

177. *See Free Enter. Fund*, 561 U.S. at 489.

178. Jones, *supra* note 174.

179. *See generally* Peter H. Schuck, *Why Don’t Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 323 (1989) (“The neglect of empirical work is a bad, increasingly worrisome thing for our scholarship and teaching . . .”).

which is relatively higher than the SEC's sixty-nine percent success rate in federal court during the same period.<sup>180</sup> The studies also show that the SEC tends to bring a majority of its claims to administrative court.<sup>181</sup>

The data is irrelevant, however, to the question of meaningful review. Although defendants have to go through two steps of review by the SEC before they can take their claims to federal court, they still nonetheless have an avenue to pursue judicial review in a federal forum as prescribed by section 78y.<sup>182</sup> In *Elgin v. Department of Treasury*, the Supreme Court held that if a statute provides "review in the Federal Circuit, [in] an Article III court fully competent to adjudicate petitioners' [constitutional] claims,"<sup>183</sup> then "meaningful judicial review exist[s]."<sup>184</sup> The law appears to be that as long as Congress prescribes a route of federal judicial review, then presumably, meaningful review exists, and parties must adhere to the prescribed process. It is up to the legislature, and not the courts, to decide the process of administrative review and ensure a method of judicial review.

District courts that have not granted review for defendants on their federal question claims in the first instance have a good reason for doing so. Their reasoning is policy based, in fear of setting a precedent for other SEC defendants to attempt to derail administrative proceedings, and in fear of contradicting congressional intent. For example, in *Tilton v. Securities & Exchange Commission*, the New York district court dismissed Lynn Tilton's argument that forced litigation through unconstitutional administrative channels does not provide meaningful review.<sup>185</sup> Although Judge Ronnie Abrams acknowledged *Duka's* ruling (requiring plaintiffs to endure an unconstitutional proceeding may be harmful), absent a compelling reason, he refused to apply *Duka* in Tilton's situation.<sup>186</sup> Abrams recognized that "any arguably plausible claim in district court that an administrative proceeding should be enjoined as unconstitutional could confer jurisdiction and thus thwart Congress's intent to the contrary."<sup>187</sup> Ultimately, the fact that claimants must wait before seeking judicial review does not mean there is a lack of meaningful review. Moreover, there is a chance that defendants may prevail at the conclusion of the administrative proceeding against

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180. See Jean Eaglesham, *SEC Wins With In-House Judges*, WALL ST. J. (May 6, 2015, 10:30 PM), <http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803>; Gretchen Morgenson, *Crying Foul on Plans to Expand the S.E.C.'s In-House Court System*, N.Y. TIMES (June 26, 2015), [http://www.nytimes.com/2015/06/28/business/secs-in-house-justice-raises-questions.html?\\_r=0](http://www.nytimes.com/2015/06/28/business/secs-in-house-justice-raises-questions.html?_r=0).

181. See *id.* ("The SEC brought more than four out of five of its enforcement actions as administrative proceedings, rather than federal-court cases.")

182. See *Hill v. SEC*, 114 F. Supp. 3d 1297, 1305 (N.D. Ga. 2015) ("[J]udicial review can only come from the courts of appeal following the administrative proceeding and the SEC's issuance of a final order in Plaintiff's case.")

183. 132 S. Ct. 2126, 2137 (2012).

184. *Tilton v. SEC*, No. 15-CV-2472 (RA), 2015 U.S. Dist. LEXIS 85015, at \*9-10 (S.D.N.Y. June 30, 2015).

185. See *id.* at \*11-29; e.g., *id.* at \*15 (explaining that in *Freytag*, "the fact that the judicial review of the constitutionality of those proceedings occurred after the administrative proceedings concluded did not render such review meaningless" (citing *Freytag v. Comm'r*, 501 U.S. 868, 880-92 (1991))); *Chau v. SEC*, 72 F. Supp. 3d 417, 429-30 (S.D.N.Y. 2014) ("Criminal defendants . . . cannot interrupt their prosecutions and trials to appeal . . . [but] must await conviction and final judgment. Delaying judicial review does not violate [their] due process rights any more than requiring plaintiffs to await final adjudication before the SEC would violate theirs."); *Bebo v. SEC*, No. 15-C-3, 2015 U.S. Dist. LEXIS 25660, at \*10 (E.D. Wis. Mar. 3, 2015) ("If the process is constitutionally defective, Bebo can obtain relief before the Commission, if not the court of appeals . . . Until then, Bebo must 'patiently await the denouement of proceedings within the Article II branch.'")

186. See *Tilton*, 2015 U.S. Dist. LEXIS 85015, at \*12, \*15 ("This Court respectfully declines to adopt this reasoning."); see generally *Duka v. SEC*, No. 15 Civ. 357 (RMB) (SN), 2015 U.S. Dist. LEXIS 49474 (S.D.N.Y. April 15, 2015).

187. *Tilton*, 2015 U.S. Dist. LEXIS 85015, at \*12, \*15; see *Chau*, 72 F. Supp. 3d at 425 ("This Court's jurisdiction is not an escape hatch for litigants to delay or derail an administrative action when statutory channels of review are entirely adequate.")

them, so it would be an unnecessary burden on the court system to file a federal question claim in the midst of the administrative proceeding.<sup>188</sup>

The *Tilton* court also rejected the argument that requiring Tilton to go through the administrative review process “would subject [her] to ‘significant and irreparable injury’” such as financial harm and expenditure on such proceedings because “the expense and annoyance of litigation is part of the social burden of living under government.”<sup>189</sup> As stated in *Renegotiation Board v. Bannerkraft Clothing Company*, “[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.”<sup>190</sup> If held otherwise, every litigant would argue this claim, further burdening the court system with more frivolous cases, and would eventually render the exhaustion doctrine moot. Furthermore, the fact-finding capabilities of the ALJ and the SEC are considered adequate “for meaningful judicial review.”<sup>191</sup> As so, meaningful judicial review exists because section 78y grants appeals to address constitutional arguments and other issues that may arise, and ALJs have sufficient capacity to find facts.

## 2. Wholly Collateral

*Thunder Basin Coal Company v. Reich* explains that district courts have “jurisdiction over claims considered ‘wholly “collateral”’ to a statute’s review provisions . . . particularly where a finding of preclusion could foreclose all meaningful judicial review.”<sup>192</sup> Essentially, a determination as to whether these types of constitutional claims “are of the type Congress intended to be reviewed within”<sup>193</sup> section 78y is necessary. If this is so, “the claim may be channeled through the administrative process to guard against claim-splitting, which could involve redundant analysis of overlapping issues of law and fact.”<sup>194</sup> However, if this is not the case, and the claim “fall[s] outside the agency’s expertise” as well, the claim then becomes “‘wholly collateral’ to the type of dispute the agency is authorized to hear.”<sup>195</sup>

Here, the constitutional claims that particular SEC defendants are raising are not “wholly collateral” to section 78y’s review provisions because although these types of claims are unrelated to securities law, they are nonetheless raised during the administrative action, thereby making the claims “wholly collateral” to the administrative action. To continuously allow accused individuals to raise these “wholly collateral” claims in the midst of agency proceedings would defeat Congress’s purpose in attempting to enforce securities laws and regulations. From the language and legislative history of the Dodd-Frank Act, it is clear that the legislature intended that these claims be reviewed within section 78y to guard against claim splitting and redundancy. Otherwise, section 78y would not have a prescribed method of review.

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188. See *Jarkesy v. SEC*, 803 F.2d 9, 27 (D.C. Cir. 2015) (“[S]hould Jarkesy prevail in his administrative proceeding, his claims would never reach a court of appeals.”).

189. *Tilton*, 2015 U.S. Dist. LEXIS 85015, at \*18–19 (quoting *FTC v. Standard Oil Co. of Cal.*, 339 U.S. 232, 244 (1980)).

190. 415 U.S. 1, 24 (1974).

191. *Bebo*, 799 F.3d at 773.

192. 510 U.S. 200, 212–13 (1994).

193. *Id.* at 212.

194. *Elgin v. Dep’t of the Treasury*, 132 S. Ct. 2126, 2142 (2012).

195. *Id.*

In *Free Enterprise Fund*, the Supreme Court concluded that “[p]etitioners’ general challenge to the [Public Company Accounting Oversight] Board is ‘collateral’ to any Commission orders or rules from which review might be sought.”<sup>196</sup> Since the challenge was unrelated to Commission orders or rules, the challenge was “collateral to the administrative review scheme.”<sup>197</sup> The main focus is whether the Appointments Clause question that SEC defendants raise is related to the SEC’s orders or rules. If unrelated, then the question is collateral. On the other hand, *Elgin* held that if petitioners sought “the kinds of relief” consistently afforded by the types of claims “regularly adjudicated” by the particular agency within the statutory scheme, then these types of claims are not “wholly collateral.”<sup>198</sup>

At first glance, it appears that SEC defendants have a chance at satisfying this prong in obtaining federal jurisdiction. This particular claim challenging the constitutionality of the ALJ’s position is unrelated to the securities infringement, and hardly deals with SEC’s “orders or rules.”<sup>199</sup> Since these types of constitutional challenges are fairly recent, it is not really the types of claims “regularly adjudicated” by the SEC.<sup>200</sup>

Nevertheless, the timing of the question becomes a crucial factor to the District of Columbia Court of Appeal’s analysis as to whether or not these constitutional claims are indeed “wholly collateral” to the SEC’s administrative proceeding. If SEC defendants are raising these claims in the middle of the administrative proceeding against them, then these claims are not “wholly collateral” to the proceeding.<sup>201</sup> For example, in *Tilton*, Tilton “raised these issues as an affirmative defense [during] the administrative proceeding” so these issues were not “collateral” to the SEC’s “orders or rules from which review might be sought.” The ALJ and the SEC would eventually “rule on those claims and it will be the [SEC]’s order that [Tilton] will appeal, if in fact it finds against” Tilton.<sup>202</sup>

Moreover, the *Tilton* court explained that Tilton’s challenge was not “wholly collateral,” but was “rather intertwined” with the administrative proceeding.<sup>203</sup> Tilton was already being reviewed, so her “challenge therefore flow[ed] from the fact that [she was] the subject of the proceeding that [she sought] to enjoin.”<sup>204</sup> To hold otherwise would “defeat Congressional intent, as any litigant subject to an administrative proceeding would be invited to escape agency adjudication by fashioning an incidental constitutional challenge and claiming that it is wholly collateral to the pending proceedings.”<sup>205</sup> The fact that Tilton raised this constitutional issue *after* administrative proceedings started strongly indicates that this issue is merely an afterthought—a “Hail Mary” attempt to derail the proceeding—and is not actually “wholly collateral” to the proceeding. If it was

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196. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010).

197. *Tilton*, No. 15-CV-2472 (RA), 2015 U.S. Dist. LEXIS 85015, at \*30–31 (S.D.N.Y. June 30, 2015).

198. *Elgin*, 132 S. Ct. at 2139–40.

199. *Tilton*, 2015 U.S. Dist. LEXIS 85015, at \*31.

200. *Id.* at \*32.

201. *See id.* at \*32; *Cf. Free Enter. Fund*, 561 U.S. at 487, 490 (holding that petitioners’ constitutional question claims were collateral to the administrative review scheme because petitioners pre-emptively sued raising these claims only after the Public Company Accounting Oversight Board started a formal investigation, and petitioners did not raise these challenges during an administrative proceeding against them).

202. *Tilton*, 2015 U.S. Dist. LEXIS 85015, at \*32.

203. *Id.* at \*33.

204. *Id.* at \*32.

205. *Id.* at \*34.

truly collateral to the proceeding, Tilton, along with other defendants who raise the same claim, would have raised this claim prior to the start of the proceeding. It is worthy to note that even the Supreme Court has rejected Lynn Tilton's petition for certiorari to challenge the SEC's use of inhouse ALJs.<sup>206</sup>

Another example is *Jarkesy v. Securities & Exchange Commission*, a case in which the District of Columbia Circuit Court of Appeals agreed with *Bebo's* line of reasoning: SEC defendants must follow the statutory scheme provided before seeking judicial review in a federal forum.<sup>207</sup> Congress's decision to grant the SEC choice of forum powers does not enable these type of defendants "to collaterally attack [administrative] proceedings in court,"<sup>208</sup> especially in the midst of the proceeding. These constitutional claims at issue are "inextricably intertwined with the conduct of the very enforcement proceeding the statute grants the SEC the power to institute and resolve as an initial matter."<sup>209</sup> The *Jarkesy* court acknowledges the result might have been different had the claim been filed *before* the administrative proceeding began.<sup>210</sup> Again, the timing of the challenge is essential to the court's decision. Therefore, for defendants who file constitutional claims in the midst of their administrative proceeding, their claims cannot be considered "wholly collateral".

### 3. Agency Expertise

Every constitutional question need not be brought before an Article III court.<sup>211</sup> The Supreme Court recognizes that although "adjudication of the constitutionality of congressional enactments has generally been through beyond the jurisdiction of administrative agencies,"<sup>212</sup> pursuing a constitutional claim in federal jurisdiction is not necessarily mandatory, especially when a particular "[c]ommission has addressed constitutional questions in previous enforcement proceedings."<sup>213</sup> But, even though a commission has not previously reviewed constitutional questions, the Supreme Court indicates that claimants can have their claims meaningfully reviewed before a Court of Appeals.<sup>214</sup> It is possible that a commission may have no expertise in analyzing statutes other than the statutes that directly affect its agency. Nonetheless, the commission can still function as an appropriate body of government to review the claims at issue since "agency expertise [could] be brought to bear on" the statutory questions at issue.<sup>215</sup>

The *Hill* line of reasoning when it comes to agency expertise is that Article II claims do not "fall within the [SEC]'s expertise" because "the statutory questions

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206. See Kevin McCoy, *Turnaround Queen Lynn Tilton's Petition is Denied by Supreme Court*, USA TODAY (May 30, 2017, 12:35 PM), <https://www.usatoday.com/story/money/2017/05/30/supreme-court-denies-turnaround-queen-lynn-tiltons-petition-review/102308478/>; Greg Stohr, *Tilton Rejected by U.S. Supreme Court on SEC Fraud Complaint*, BLOOMBERG (May 30, 2017, 9:33 AM), <https://www.bloomberg.com/news/articles/2017-05-30/tilton-rejected-by-u-s-supreme-court-on-sec-fraud-complaint>; *infra* Part IV.D(2).

207. 803 F.3d 9, 12 (D.C. Cir. 2015)

208. James W. Kraus, *SEC Continues To Fight Off Collateral Challenges To Administrative Proceedings In The Wake Of Dodd-Frank*, WHITE-COLLARED BLOG (Oct. 6, 2015, 7:51 AM), <http://www.white-collared.com/blog/2015/10/6/sec-continues-to-fight-off-collateral-challenges-to-administ.html>.

209. *Jarkesy v. SEC*, 803 F.3d 9, 23 (D.C. Cir. 2015).

210. See *id.*; see, e.g., *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 at 487, 490; see *supra* note 193 and accompanying text.

211. See *supra* note 12 and accompanying text.

212. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (quoting *Johnson v. Robison*, 415 U.S. 361, 368 (1974)).

213. *Id.*

214. See *id.*

215. *Id.*

involved do not require technical considerations of agency policy” and are not the type of claims that “the SEC ‘routinely considers.’”<sup>216</sup> The *Bebo* court, on the other hand, presents a stronger argument based on precedent cases, such as *Elgin*. First, *Elgin* established that *Bebo* “cannot sue in district court under [section] 1331 [of title 28] merely because her claims are facial constitutional challenges.”<sup>217</sup> Second, *Elgin* also recognized that federal court “jurisdiction does not turn on whether the SEC has authority to hold [section] 929P(a) of Dodd-Frank unconstitutional, nor does it hinge on whether *Bebo*’s constitutional challenges fall outside the agency’s expertise.”<sup>218</sup>

The court in *Tilton* acknowledges that “even if the SEC lacked authority, competence, or expertise to adjudicate . . . constitutional claims, because meaningful review of those claims in an Article III court of appeals is available, district court jurisdiction would still be precluded.”<sup>219</sup> What is dispositive to the court’s opinion is the fact that meaningful review in federal court is ultimately available, and thus district courts lack jurisdiction, at least in the “first instance.”<sup>220</sup> Even so, adjudicating the constitutionality of statutes is generally not within the purview of administrative agencies, but, as explained by Supreme Court jurisprudence in *Thunder Basin Coal*, “[t]his rule is not mandatory.”<sup>221</sup> In *Chau v. United States*, the Southern District Court of New York recognizes that at least initially, the SEC is not completely incompetent to hear constitutional claims, such as equal protection claims, during agency hearings.<sup>222</sup> In sum, federal district courts do not have subject matter jurisdiction over SEC defendants’ constitutional claims in the first instance because (1) section 78y offers meaningful review; (2) the claims are not “wholly collateral” to their administrative proceedings; and (3) agency expertise in constitutional matters is not mandatory.

#### E. The SEC Is an Independent Agency

An “independent agency” is defined as “[a] federal agency, commission, or board that is not under the direction of the executive”<sup>223</sup> as delegated by Congress. As an exception to the President’s removal powers, the Supreme Court has acknowledged that Congress may create “independent agencies whose members may be removed only for cause and that may restrict the power of [P]rincipal [O]fficers, serving at the President’s pleasure, to remove certain inferiors.”<sup>224</sup> Although Congress created these independent regulatory agencies, they are still

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216. *Hill v. SEC*, 114 F. Supp. 3d 1297, 1309–10 (N.D. Ga. 2015).

217. *Bebo v. SEC*, 799 F.3d 765, 773 (7th Cir. 2015) (citing *Elgin v. Dep’t of Treasury*, 132 S. Ct. 2126 (2012)); see *Elgin*, 132 S. Ct. at 2141 (“As a general matter, federal district courts have ‘original jurisdiction of all civil actions arising under the Constitution, . . . [but,] Congress may remove certain claims from the general jurisdiction of the federal courts in order to channel these claims into a system of statutory review. For example, in *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000), we considered a clause providing that ‘no action . . . to recover on any claim’ arising under the Medicare laws ‘shall be brought under section 1331 . . . of title 28.’”); see generally 28 U.S.C. § 1331 (1980) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

218. *Bebo*, 799 F.3d at 773.

219. *Tilton v. SEC*, No. 15-CV-2472 (RA), 2015 U.S. Dist. LEXIS 85015, at \*36 (S.D.N.Y. June 30, 2015).

220. *Id.*

221. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994).

222. See 72 F. Supp. 3d 417, 435 (S.D.N.Y. 2014).

223. *Independent Agency*, BLACK’S LAW DICTIONARY (10th ed. 2014).

224. Nelson, *supra* note 4, at 405–06.

considered part of the executive branch.<sup>225</sup> However, these agencies, including the SEC, were created to “impose and enforce regulations free of political influence,”<sup>226</sup> namely from the President’s agenda. The difference between independent agencies and executive-branch agencies is that “[b]y design, independent agencies are insulated from the plenary control of the President.”<sup>227</sup> Justice Stephen Breyer, Congress, and other legal scholars identify the SEC as an independent agency,<sup>228</sup> meaning that the SEC is free from executive control.

Since independent agencies were created to be free from political influence, their structures are also created to weaken the political effect.<sup>229</sup> Independent agencies usually have an organizational structure that includes three basic parts to foster independence:

- (1) an odd number of members, with no more than a bare majority from the same political party . . .
- (2) serv[ing] fixed, staggered terms . . . that typically extend beyond the four-year presidential term . . . [and]
- (3) typically possess a combination of rulemaking, enforcement and adjudication powers and functions.<sup>230</sup>

One of the most “critical element[s] of independence is the protection—conferred explicitly by statute or reasonably implied—against removal except ‘for cause.’”<sup>231</sup> *Humphrey’s Executor* confirmed this “added . . . layer of constitutional protection to the agencies’ existing structural protections from presidential control.”<sup>232</sup> In fact, it has been suggested that “[i]ndependent agencies are almost always defined as agencies with a for-cause removal provision limiting the President’s power to remove the agencies’ heads to cases of ‘inefficiency, neglect of duty, or malfeasance in the office.’”<sup>233</sup> In other words, the most important factor that makes agencies independent is the lack of authority that the sitting president has in removing members of independent agencies for any reason but for the above-listed situations.<sup>234</sup>

As decided by *Humphrey’s Executor*, the purpose of the “for cause” removal protection is to prevent a president from removing an official for political

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225. *Branches of Government*, USA.GOV, <https://www.usa.gov/branches-of-government> (last visited Feb. 24, 2016) (explaining that the executive branch includes independent agencies).

226. *Independent Regulatory Agency*, CTR. FOR EFFECTIVE GOV’T, <http://www.foreffectivegov.org/node/2593> (last visited Feb. 24, 2016).

227. Lisa S. Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 600 (2010).

228. See Nelson, *supra* note 4 (noting that Justice Breyer in *Free Enterprise Fund* confirmed that the SEC is “an already independent agency”); see Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1137 (2000) (explaining that in 1980, Congress listed sixteen “independent agencies” in the Paperwork Reduction Act, including the Securities and Exchange Commission); see Breger & Edles, *supra* note 228, app. at 1285 (2000) (recording the SEC in the “Independent Federal Agencies” section of the appendix); see Paperwork Reduction Act of 1980, 44 U.S.C. § 3502(10) (listing the SEC as part of the definition of “independent regulatory agency”).

229. Breger & Edles, *supra* note 228.

230. *Id.* at 1137–38; see also Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 260 (1988) (describing characteristics of independent agencies based on “three statutory arrangements: the bipartisan appointment requirement; the fixed term requirement; and the requirement that removal be limited to express causes”).

231. Breger & Edles, *supra* note 228, at 1138.

232. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769, 771 (2013) (citing *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629–30 (1935)).

233. *Id.* at 772; see also Jennifer L. Selin, *What Makes an Agency Independent?* 4 (Ctr. for the Study of Democratic Inst.’s, Vanderbilt Law Sch., Working Paper No. 08-2013), [http://www.vanderbilt.edu/csdi/research/CSDI\\_WP\\_08-2013.pdf](http://www.vanderbilt.edu/csdi/research/CSDI_WP_08-2013.pdf) (“[T]he definition of independent agency most commonly cited by federal courts comes from the description in *Humphrey’s Executor v. United States*, which suggests that a truly independent agency is one that is headed by a multi-member body whose members serve fixed terms and are protected from removal except for cause.”).

234. See Bressman & Thompson, *supra* note 227, at 610 (distinguishing executive agencies from independent agencies: “independent agencies are different in structure because the President lacks authority to remove their heads from office except for cause. Thus, these agencies are independent in the sense that the President cannot fire their leaders for political reasons, and consequently, cannot use this ultimate sanction to back up particular policy recommendations”).

disagreements.<sup>235</sup> Initially, President Franklin D. Roosevelt attempted to replace a commissioner from the Federal Trade Commission with a member of his own selection, notwithstanding the restriction of removal under the Federal Trade Commission Act.<sup>236</sup> However, the Supreme Court still upheld the removal restriction by “relying on legislative history indicating that the agency was to be separate from an existing department and not subject to the orders of the President.”<sup>237</sup> The Court also found that the position of the FTC commissioner, having a “quasi-legislative and quasi-judicial” function, was an important and dispositive factor because since the function was not entirely an “executive” one, the FTC commissioner could be insulated from presidential removal.<sup>238</sup>

Another consideration is the distinction between independent agencies and executive agencies. Even though independent agencies are part of the executive branch, they are distinguished from executive agencies because executive agencies are subject to the president’s authority to a greater extent than are independent regulatory agencies.<sup>239</sup> Aligned with the principle of *Humphrey’s Executor*, “Presidents cannot (or at least do not) fully control independent agencies, and . . . an independent agency therefore can be sufficiently adverse to a traditional executive agency” to the point where the Supreme Court and the District of Columbia Circuit Court of Appeals have both “entertained suits between an independent agency and a traditional executive agency.”<sup>240</sup> Independent agencies not only seem to be “more insulated from the President” than traditional executive agencies are, but they are also “more responsive to Congress.”<sup>241</sup>

The SEC defendants’ argument that ALJs were improperly appointed since they are insulated from presidential control is further weakened by the fact that the SEC is, in fact, an independent agency. Congress intended the SEC to be independent, meaning that the President is essentially only dealing with appointing the Commissioner. Everything else, including hiring ALJs, is for the agency and the Office of Personnel Management to decide. Moreover, since the SEC performs “quasi-legislative” and “quasi-judicial” functions, limitation of the President’s power is permissible.<sup>242</sup> It would be different if the SEC had strict

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235. *Humphrey’s Ex’r*, 295 U.S. at 619, 625 (rejecting a removal based simply on the President’s disagreement with an independent agency and not based on “good cause”).

236. *See id.* at 628 (quoting President Roosevelt’s letter asking for FTC commissioner to resign because “the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection”); *see id.* at 623 (explaining that the language of the Federal Trade Commission Act is “definite and unambiguous” with respect to the president’s removal power only for inefficient, neglect of duty, or malfeasance in the office); *see* Federal Trade Commission Act, 15 U.S.C. § 41 (1914) (“Any commissioner may be removed by the President for inefficient, neglect of duty, or malfeasance in office.”).

237. Bressman & Thompson, *supra* note 227, at 617.

238. *Id.*; *Humphrey’s Ex’r*, 295 U.S. at 629 (“The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted.”). *But see* *Myers v. United States*, 272 U.S. 52, 163–76 (1925) (holding that presidents may not be restricted by Congress in removing positions which exercise purely “executive” functions).

239. *See* SEC v. FLRA, 569 F.3d 990, 997 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (“Independent agencies are those agencies whose heads cannot be removed by the President except for cause and that therefore typically operate with some (undefined) degree of substantive autonomy from the President . . . .”); *see also* Teresa Tritch, *Is the I.R.S. an Independent Agency?*, N.Y. TIMES BLOG (May 14, 2013, 6:28 PM) [http://takingnote.blogs.nytimes.com/2013/05/14/is-the-irs-an-independent-agency/?\\_r=0](http://takingnote.blogs.nytimes.com/2013/05/14/is-the-irs-an-independent-agency/?_r=0) (“One distinction between an executive agency and an independent agency is that the president, typically, cannot dismiss the head of the latter without serious cause. Independent agencies include the [SEC, NLRB, FCC, and the FTC].”).

240. *FLRA*, 569 F.3d at 997; *see, e.g.*, *Dep’t of Treasury v. FLRA*, 494 U.S. 922 (1990); *United States v. Nixon*, 418 U.S. 683 (1974); *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998).

241. Geoffrey P. Miller, *Symposium: The Independence of Independent Agencies*, 1988 DUKE L.J. 215, 218–19 (1988) (“Authors . . . with practical experience in independent agencies testify that Congress exercises substantial influence over the activities of these bodies.”).

242. Breger & Edles, *supra* note 228, at 1143.

executive duties because then the SEC would be completely under the President's control, and thus, the hiring process of the ALJ would be subsequently unconstitutional.<sup>243</sup> Conversely, if independent agencies were subject to the President's every whim and control, there would hardly be a distinction and a reason why two agencies, independent and traditional executive agencies, both exist at the same time. All in all, it is the legislature's duty to change the statute if Congress desires for the SEC to be a purely traditional executive agency as opposed to an independent agency.<sup>244</sup> As Justice Stephen Breyer mentioned, perhaps the president himself should be the one to raise this type of constitutional challenge if he believes he is being improperly insulated from the ALJs.

## V. Implications For the Future

If the final ruling of this issue were to follow *Hill's* line of reasoning, there would be consequences that would undercut the effective enforcement of securities laws and regulations. Following *Hill* will not only turn effective and efficient administrative proceedings into frivolous lawsuits that derail and delay administrative proceedings, but it will also frustrate the congressional intent of section 78y and the Dodd-Frank Act. If ALJs were to be removed at will, this "would substantially undermine adjudicatory independence, leaving agencies free to demand particular adjudicative results through the prospect of removing those who did not get the 'message,'" and consequently would have a "serious adverse impact on the fairness of the administrative adjudicatory system."<sup>245</sup> Contrary to *Humphrey's Executor*, the President would also have too much control and political influence over ALJs, who are supposedly independent from the SEC. Likewise, this trend would surely encourage the accused to participate in "both judge shopping and forum shopping."<sup>246</sup> Congress responded to the major problems of fraudulent securities activities by giving the SEC certain powers through section 78y, so courts should defer to legislative intent when deciding matters of administrative procedure.<sup>247</sup>

Even if the SEC defendants have merit in their constitutional argument, there is a simple fix to their problem. The SEC Commissioner can simply ratify the appointments of the ALJs.<sup>248</sup> Even the *Hill* court acknowledged this as a

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243. *Id.*

244. Congress can simply get rid of the "good cause" removal provision.

245. Nelson, *supra* note 4, at 417–18.

246. Ben Conarck, *SEC Wants Latest ALJ Case Taken Away From Georgia Judge*, LAW360 (June 16, 2015, 5:44 PM), <http://www.law360.com/articles/668717/sec-wants-latest-alj-case-taken-away-from-georgia-judge>; Jane Eaglesham, *SEC Fights Challenges to Its In-House Courts*, WALL ST. J. (June 21, 2015, 7:06 PM), <http://www.wsj.com/articles/sec-fights-challenges-to-its-in-house-courts-1434927977#livefyre-comment>.

247. See *supra* note 11 and accompanying text; see Stephanie Russell-Kraft, *Why Challenges to SEC Admin Court Will Likely Keep Failing*, LAW360 (Mar. 6, 2015, 8:04 PM), <http://www.law360.com/articles/628601/why-challenges-to-sec-admin-court-will-likely-keep-failing> ("Defendants may not like it, but Congress gave the SEC and other agencies the power to bring administrative claims knowing full well that the administrative court process differs from the federal court . . ."; "[T]he SEC is granted Chevron deference."); see generally *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 865 (1984) (granting deference to agency action).

248. See Order Denying Respondent LabMD, Inc.'s Motion to Dismiss at 2, In the Matter of LabMD, Inc., No. 9357 (Sept. 14, 2015), <https://www.ftc.gov/system/files/documents/cases/150914labmdmotion.pdf> ("Nonetheless, although we conclude that the Appointments Clause does not apply to the hiring of Commission administrative law judges, the Commission, purely as a matter of discretion, has ratified Judge Chappell's appointment as a Federal Trade Commission administrative law judge . . ."); see also Alison Frankel, *Unlike SEC, FTC Makes Quick Fix to Ward off ALJ Constitutional Challenge*, REUTERS BLOG (Sept. 16, 2015), <http://blogs.reuters.com/alison-frankel/2015/09/16/unlike-sec-ftc-makes-quick-fix-to-ward-off-alj-constitutional-challenges/> ("The [FTC] commissioners ratified the appointment of the LabMD in-house judge to ward off 'any possible claim that this administrative proceeding violates the Appointment Clause.'").

possible solution.<sup>249</sup> Alternatively, the SEC Commissioners could “preside over the matter themselves.”<sup>250</sup> With that being said, both solutions would not affect defendants’ substantive claims anyway. The SEC Commissioners could either easily “prospectively ratify the [ALJ] appointments,” or could perform a simple “*de novo* review of the determinations of the [ALJs to] correct[] any harmless error from their appointment,”<sup>251</sup> thus giving legitimacy to the result of the proceedings. It would not make a difference to the present defendants’ constitutional claims.

Another solution could be to allow these defendants the choice of forum. However, this solution is for Congress to decide. Moreover, defendants would likely choose federal forums over administrative forums each time since defendants are likelier to win in federal forums,<sup>252</sup> further frustrating congressional intent of effective enforcement. Thus, the best solution for now is to preserve the status quo. In the meantime, courts should collectively defer to congressional intent, follow precedent, and abide by the exhaustion doctrine when confronting these particular types of claims.

## VI. Conclusion

Defense attorneys have come up with a clever and creative way to attempt to get their clients out of the SEC’s administrative proceeding against them: they are utilizing Article II to reach federal jurisdiction where their clients will have a better change at success. However, Supreme Court jurisprudence on Article II indicates that ALJs are not likely to be considered “Inferior Officers” because they do not exercise significant discretion, nor do they have lifetime tenure. The APA stipulates that ALJs are “Civil Service employees,” and its legislative history suggests that there is no intent for ALJs to be considered more than that. Moreover, the SEC is an independent and “quasi-judicial” agency, and so, the “for-cause” protection SEC ALJs receive is not only the consistent standard that other agency ALJs typically receive,<sup>253</sup> but also the President is rightfully insulated from removing these “employees”.

But, even if defendants do raise a valid constitutional claim, district courts do not have subject matter jurisdiction over these types of claims because (1) SEC defendants can still obtain meaningful judicial review as prescribed by section 78y; (2) these constitutional claims are not “wholly collateral” to the administrative proceeding; and (3) SEC ALJs are not completely incompetent to hear constitutional questions, at least in the first instance, so therefore, agency expertise is not dispositive.

There is a strong public policy to abide by the exhaustion doctrine. If held otherwise, the effective enforcement of the Dodd-Frank Act would be aggravated, thus creating a serious adverse impact on the way the SEC can successfully execute its goals. All in all, the “bottom line is that . . . Congress passed the statute

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249. See *Hill v. SEC*, 114 F. Supp. 3d 1297, 1320 (N.D. Ga. 2015).

250. *Id.*

251. Frankel, *supra* note 248.

252. See Eaglesham, *supra* note 180 (explaining that defendants have a 31% success rate in federal court as opposed to 10% success rate in administrative court from October 2010 through March 2015).

253. See Russell-Kraft, *supra* note 247 (“If [defendants’ constitutional claims] worked, then a dozen agencies would be arranged unconstitutionally.”).

to give the SEC the authority to bring these cases administratively”<sup>254</sup> and all parties should abide by the law.

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254. *Id.*