

Search

[Previous](#) [Next](#)



- [The Irrepressible Myth That SEC Overregulation Has Chilled IPOs](#)  
2 By [John C. Coffee, Jr.](#)



- [Insider Trading's Legality Problem](#) By [Miriam H. Baer](#)



- [Blue Sky Banter Podcast: SEC's Robert Jackson on Dual Class Shares and More](#) By [Reynolds Holding](#)



- [Securities Litigation in 2017: "It Was the Best of Times, It Was the Worst of Times"](#) 1 By [John C. Coffee, Jr.](#)



- [Fact and Fiction: The SEC's Oversight of Administrative Law Judges](#)  
1 By [Robert J. Jackson, Jr.](#)



- [A Rule-Based Method for Comparing Corporate Laws](#) By [Lynn M. LoPucki](#)



- [From Texas Gulf Sulphur to Chiarella: A Tale of Two Duties](#) By [Donald C. Langevoort](#)



- [Visionaries and Pragmatism in Financial Regulation](#) By [Kathryn Judge](#)

Editor-At-Large [Reynolds Holding](#)

## [The CLS Blue](#) [Sky Blog](#)



### **Columbia Law School's Blog on Corporations and the Capital Markets**

Editorial Board [John C. Coffee, Jr.](#) [Edward F. Greene](#) [Kathryn Judge](#)

## **Menu**

[Skip to content](#)

- [Our Contributors](#)
- [Corporate Governance](#)
- [Finance & Economics](#)

- [M & A](#)
- [Securities Regulation](#)
- [Dodd-Frank](#)
- [International Developments](#)
- [Library & Archives](#)

## Fact and Fiction: The SEC's Oversight of Administrative Law Judges



By [Robert J. Jackson, Jr.](#) [March 9, 2018](#) by [renholding](#)

### [1 Comment](#)

I've had the honor of serving as a commissioner of the SEC for just over a month now— and I've learned a lot in that time, mostly from the outstanding staff. I've been schooled about cryptocurrency, spent hours wading through enforcement recommendations, and have been left in awe of the breadth of knowledge and expertise across our agency.

One thing that I always tried to bring to my work as an academic, and that I now hope to bring to my work as a policy-maker, is a focus on data and facts. Numbers are powerful things. A well-placed statistic can turn an argument on its head and make us question our most basic assumptions.

Here's a figure about my new home that's been getting a lot of attention: 90 percent. Supposedly, “in about 90% of cases, an SEC Administrative Law Judge's ('ALJ') initial decision became final when the Commission [did not] engag[e] in plenary review” of the decision.<sup>[1]</sup> That statistic has become the basis for the argument that, since 90 percent of the cases become final without full commission review, the SEC doesn't exercise control over ALJs—in violation of the Constitution.<sup>[2]</sup>

Before I started this job, I thought that this 90 percent number seemed high—and troubling. The implication is that the commission is asleep at the wheel and allowing ALJs to exercise considerable federal power without real oversight. Now, I've only been a commissioner for two months. But it's already clear to me that this argument has little basis in reality.

Since I am a data guy, my team and I reviewed all of the SEC's ALJ decisions from 2014 to 2015 by hand to better understand that 90 percent number. Here's what's really going on:

- Fully 80 percent of the ALJ decisions during that period were *default* decisions: the respondent never showed up! That's not surprising: Many of these proceedings were brought against defunct companies, like the shell companies used in pump-and-dump schemes. If our real concern is about respondents getting the process they deserve, it makes no sense to use data that includes cases in which the respondents chose not to participate.
- In the rest of the cases, the respondent appeared, participated before the ALJ, and chose not to ask the commission to review the case. In fact, for as long as anyone at the SEC is aware, the commission has granted timely respondent requests to review ALJ decisions *100 percent of the time the respondent has asked*. If a respondent wants us at the commission to review an ALJ decision, the rule is simple: ask and ye shall receive.
- Finally, during the sample period we reviewed, the respondent requested that the commission review the case only 10 percent of the time, suggesting that respondents are rarely aggrieved enough by the ALJ proceedings to ask us to intervene. And, of course, given the rule noted above, the commission agreed to review all of those cases.

To sum up, of the 90 percent of ALJ cases that became final without full commission review, the overwhelming majority was default decisions—and the rest were cases where the respondent didn't even ask for review. In fact, the *only* proceeding of which I am aware during this time period where review of an ALJ's decision was timely sought and the commission refused review was one in which the *SEC's own enforcement division* made the request.

Finally, even if the parties to a proceeding before an ALJ don't request plenary review, every individual commissioner, including me, can require full commission review of an ALJ decision at any time.<sup>[3]</sup> Our exceptional staff reviews *every* initial ALJ decision to advise the commissioners of cases where full commission review is warranted. And the commission has granted review in such circumstances, which shows that the commission does not just look at decisions appealed to us by the parties but exercises considerable oversight over all ALJ decisions.

The review statistic isn't the only fictional 90 percent figure floating around in this area. The U.S. Chamber of Commerce, for example, has argued that the SEC wins “90% of the cases it brought before its ALJs, as compared with 69% of cases before district court judges.”<sup>[4]</sup> But as the true experts in this area have noted, “there is no statistically reliable evidence that the Commission has a ‘home court’ advantage before ALJs’.”<sup>[5]</sup>

Next month, the Supreme Court will hear arguments to determine whether the commission's use of ALJs is consistent with the Constitution. I hope that the court's consideration of that important

question will be driven by the actual practices we use at the SEC in our work with administrative law judges—rather than fiction masquerading as data.

## ENDNOTES

[1] Brief For Petitioners *in* Raymond J. Lucia and Raymond J. Lucia Companies, Inc. v. SEC, No 17-130, at 32 (Feb. 21, 2018) (citing *Bandimere v. SEC*, 844 F.3d 1168, 1180 n.25 (10th Cir. 2016) (citing 17 C.F.R. § 201.360(d)(2)).

[2] *Id.*; Brief for Respondent Supporting Petitioners, Raymond J. Lucia and Raymond J. Lucia Companies, Inc. v. SEC, No 17-130, at 22 (Feb. 21 2018).

[3] Rules of Practice and Rules on Fair Fund and Disgorgement Plans, 17 C.F.R. § 201.411 (Sept. 2016) (“The Commission may, on its own initiative, order review of any initial decision, or any portion of any initial decision, within 21 days after the end of the period established for filing a petition for review pursuant to Rule 410(b). . . . *The vote of one member of the Commission, conveyed to the Secretary, shall be sufficient to bring a matter before the Commission for review.*” (emphasis added).

[4] Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* Supporting Petitioners *in* Raymond J. Lucia and Raymond J. Lucia Companies, Inc. v. SEC, No 17-130 (filed Aug. 25, 2017). It should be remembered that this 90 percent includes all of default judgments discussed above.

[5] Brief for Urska Velikonja and Joseph A. Grundfest as *Amici Curiae* in Support of Neither Party, Raymond J. Lucia and Raymond J. Lucia Companies, Inc. v. SEC, No 17-130 (filed Feb. 28, 2018).

*This post comes to us from Robert J. Jackson, Jr., a commissioner of the U.S. Securities and Exchange Commission.*

## 1 Comment

1.  *David A. Zisser*

This is a rebuttal to an argument that has not been made. The issue of the frequency of Initial Decisions becoming final without Commission review relates to a technical legal argument made by the Commission that has now been abandoned and disclaimed by the government: that ALJ’s were not inferior officers for purposes of the Appointments Clause because they did not have the authority to issue “final” decisions. No one, to my knowledge, suggested that the Commission was not involved in its internal adjudicative process. But, as then Commissioner Fleischman noted in his concurring opinion in *In the Matter of Stuart James*, 50 SEC 468 (1991), the issue of bias in administrative

proceedings is a real one, regardless of statistical studies, and is worthy of serious evaluation by the Commission, assuming that it has a real interest in administering a fair system. In the interest of full disclosure, I am counsel in for Mr. Bandimere in SEC v. Bandimere, in which the 10th Circuit found that the Commission's ALJs were inferior officers for Appointments Clause purposes. I also was counsel to several respondents in the Stuart James proceeding.

[March 9, 2018 at 11:30 am](#)

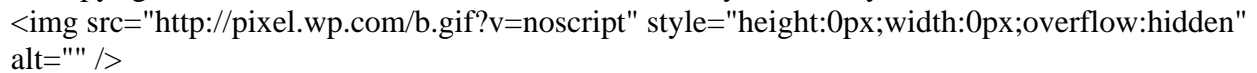
Comments are closed.

 [Columbia Law School](#)

[Home](#) [About](#) [Contact](#) [Subscribe](#) or [Manage Your Subscription](#) [RSS](#) [Email](#) [Twitter](#)

Powered by [WordPress.com](#) [VIP](#)

© Copyright 2018, The Trustees of Columbia University in the City of New York.

 ``