

Hill v. SEC: Eleventh Circuit Buries District Court Challenges to the Constitutionality of SEC Enforcement Actions

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Last week, the United States Court of Appeals for the Eleventh Circuit held that a district court cannot hear constitutional challenges to an ongoing administration enforcement action of the U.S. Securities and Exchange Commission. *Hill v. SEC*, __ F.3d __, No. 15-12831, No. 15-13738 (June 17, 2016). Consistent with the exclusive review provisions of the Securities Exchange Act of 1934, constitutional

challenges to SEC enforcement actions may only be heard in federal court through direct appeal of a final agency order to a U.S. Court of Appeals. Earlier this month the Second Circuit, in *Tilton v. SEC*, __ F.3d __, No. 15-2103 (2d Cir. June 1, 2016), similarly held that a litigant cannot avoid the SEC's administrative process by filing a parallel federal lawsuit requesting an injunction against that process. The Seventh Circuit and D.C. Circuit have also reached this holding, and this outcome is starting to look inevitable. In *Hill*, the SEC appealed two orders from the U.S. District Court for the Northern District of Georgia enjoining its enforcement proceedings. In both orders, the District Court had found that at least one of the constitutional challenges was substantially likely to succeed on the merits. The respondents' constitutional challenges included that (i) the administrative proceeding

violated the removal protections of Article II because administrative law judges (ALJs) are protected by two layers of tenure; (ii) administrative enforcement actions before an ALJ violate the non-delegation doctrine of Article I; (iii) the grant of discretion to the SEC to bring an action in an administrative forum violated the Seventh Amendment right to a jury; and (iv) the presiding ALJ was not appointed according to Article II's Appointments Clause. The cases were consolidated on appeal. The appeals court explained that district courts generally have jurisdiction over claims raising constitutional challenges that seek declaratory and injunctive relief, but that Congress may allocate initial review of such claims to an administrative body. To decide whether Congress had done so here, the circuit relied on the two-part framework of *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). A court must first decide whether Congress's intent to preclude initial review in district courts is "fairly discernible in the statutory scheme." The court must next decide whether the claims "are of the type Congress intended to be reviewed within the statutory structure," analyzing whether the constitutional claims will receive "meaningful judicial review within the statutory structure," are outside the agency's expertise, and are wholly collateral to a statute's review provisions. The court found Congress's intent to preclude the district courts was discernible in the Exchange Act's review provisions, rejecting the argument that Congress should have used clearer language if it intended to bar district courts. The panel noted that the Mine Act provision at issue in *Thunder Basin* had a similar scope to the Exchange Act's review provision, and that both evidenced Congress's intent to preclude a challenge in a district court. The court then found Congress intended claims of the type respondents raised to be within this statutory structure. The court reasoned that the administrative process could provide meaningful judicial review even through the challenge was to the constitutionality of the process itself because on appeal of the final administrative order a U.S. Court of Appeals would remedy any deprivation. This is slim comfort to the respondents. Namely, for one of the respondents, the ALJ in the underlying case had "concluded that he lacked authority to rule on the constitutionality of a particular provision of the Exchange Act." That is, the constitutional arguments will first be ruled upon only after appellate briefing. When addressing the "agency expertise" and "wholly collateral" factors, the court noted they are "less conclusive" than the meaningful judicial review factor and "do not cut strongly either way." As to expertise, the panel reasoned that, using its expertise in securities matters "the Commission might decide that the SEC's substantive claims are meritless and thus would have no need to reach the constitutional claims." But it was the SEC's own expertise that led it to bring the enforcement action in the first place, so this gives little consolation to a defendant in an SEC administrative action who believes, not irrationally, that the proceeding is stacked against her. Moreover, this reasoning appears to reduce the "agency expertise" factor of *Thunder Basin* to irrelevance. That is, it will always be the case when challenging an agency enforcement action in district court that the agency could avoid constitutional questions with a substantive ruling in favor of respondents. Lastly, the panel noted that the "wholly collateral" question can be viewed in two ways, by comparing the constitutional challenge either to the law's review provision or to the administrative charges. The panel focused on the Exchange Act's review provision, finding that even if the respondents prevailed on their constitutional claims, they would just face a civil enforcement action in federal district court as opposed to the ALJ proceeding.

Consequently, their constitutional arguments were not a “vehicle by which they seek” to prevail on the merits. But this interpretation of the “wholly collateral” factor suggests a universal outcome; challenges to the constitutionality of an ongoing administrative proceeding will almost always go to process and not the merits. *Hill* sidelines challenges in district courts to the constitutionality of ongoing SEC enforcement actions, at least in the Eleventh Circuit. By deciding the matter on jurisdictional grounds, the Eleventh Circuit did not end the debate over the constitutionality of the SEC’s use of administrative proceedings for the enforcement of the securities laws. Rather, it postponed resolution of this debate to another day, while guaranteeing that the Circuit, and not a district court, will first decide the matter.

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