Essay

The Constitutionality of SEC Administrative Law Judges: Exploring *Hill v. SEC*

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Abstract

There has recently been a series of challenges to the U.S. Securities and Exchange Commission's ("SEC") use of Administrative Law Judges ("ALJs") to preside over enforcement actions. In one of those challenges, Hill v. SEC*, Judge Leigh Martin May of the Northern District of Georgia ruled that SEC ALJs are inferior officers of the United States, and therefore their appointments must comply with the Appointments Clause of the U.S. Constitution, which they currently do not. The Eleventh Circuit reversed, ruling that the district court lacked subject matter jurisdiction to adjudicate the challenge. This Essay compares the district and appellate decisions, ultimately agreeing with Judge May's conclusions. The court of appeals failed to recognize that precluding collateral challenges to ALJ appointments renders most plaintiffs unable to ever challenge the appointments process, as their challenge will be moot by the time direct judicial review is available. However, some plaintiffs' cases may be saved by the "capable of repetition yet evading review" exception. If that occurs, and a plaintiff is heard on the merits of an Appointments Clause challenge, the entire administrative adjudicative system could come crashing down. Therefore, Congress should amend the ALJ appointments process to cure the constitutional defect.*

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Table of Contents

Introduction

On June 8, 2015, Judge Leigh Martin May of the U.S. District Court for the Northern District of Georgia granted Plaintiff Charles L. Hill, Jr.'s motion for a preliminary injunction against the U.S. Securities and Exchange Commission ("SEC").[1] The injunction halted the SEC's administrative proceeding against Mr. Hill.[2] Judge May's reasoning was straightforward: a SEC Administrative Law Judge ("ALJ") presided over Mr. Hill's enforcement action.[3] SEC ALJs are inferior officers of the United States.[4] Inferior officers may only be appointed by the President, the Courts of the United States, or the

1 Hill v. SEC, 114 F. Supp. 3d 1297, 1301 (N.D. Ga. 2015), *vacated*, No. 15-12831, No. 15-13738, 2016 U.S. App. LEXIS 10946 (11th Cir. June 17, 2016).

2 *Id.* at 1320–21.

3 *Id.* at 1302.

4 *Id.* at 1317.

heads of departments.[5] SEC ALJs are not appointed through one of these exclusive, appropriate methods.[6] Instead, the SEC's Office of Administrative Law Judges hires SEC ALJs through a statutorily prescribed process.[7] Therefore, Mr. Hill's pending administrative proceeding, presided over by a SEC ALJ, is likely unconstitutional.[8] The SEC appealed the order, and the Eleventh Circuit vacated for lack of subject matter jurisdiction over the collateral attack.[9] In doing so, the court of appeals failed to recognize that such a determination precludes meaningful judicial review of ALJ appointments at any point for most plaintiffs, even on direct review.

This Essay provides a deep analysis of the district and appellate courts' reasoning, eventually finding that SEC ALJs *are* inferior officers. However, as the Eleventh Circuit already found a lack of subject matter jurisdiction, an alternative means for obtaining judicial review in federal court (while the challenge remains justiciable) is suggested.

Part I outlines Judge May's decision in *Hill v. SEC*. Part II comments on the merits of the decision, ultimately agreeing with Judge May's district court opinion. Part III discusses the Eleventh Circuit's reversal, and outlines how, as a practical matter, preventing collateral attacks may preclude any meaningful judicial review of the SEC ALJ appointments process. Part IV suggests an alternative, applying the "capable of repetition yet evading review" exception to the mootness doctrine to allow a future litigant to challenge the appointments procedure of SEC ALJs in a federal appellate court. Part V addresses the somewhat disingenuous nature of the arguments set forth by Mr. Hill or those similarly situated, and suggests an alternative way out of this ALJ quandary.[10]

I. An Overview of the District Court Decision

Charles L. Hill, Jr. faced an uphill battle in seeking an order to enjoin the SEC from moving forward in its administrative proceeding against him. First, he had to convince Judge May that the federal district court had jurisdiction to hear his collateral challenge.[11] Second,

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5 *Id.* at 1316 (citing U.S. Const. art. II, § 2, cl. 2).

6 *Id.* at 1303.

7 *Id.*

8 *Id.* at 1320.

9 Hill v. SEC, No. 15-12831, No. 15-13738, 2016 U.S. App. LEXIS 10946, at *14–15 (11th Cir. June 17, 2016).

10 *See* Kent Barnett, *Resolving the ALJ Quandary*, 66 Vand. L. Rev. 797, 832 (2013).

11 *Hill*, 114 F. Supp. 3d at 1305–06. The appellate court vacated and remanded on this

he had to convince the court that the use of an administrative proceeding was likely unconstitutional.[12]

A. The Facts and Procedural History of Hill v. SEC

A basic understanding of the facts and history of *Hill* is necessary to understand the merits of the decision. Mr. Hill "is a self-employed real estate developer."[13] In June and July of 2011, he purchased, and then sold, stock in Radiant Systems, Inc. ("Radiant").[14] Mr. Hill made approximately $744,000 on the trades.[15] Suspecting impropriety, the SEC launched an investigation in 2013.[16] "On February 17, 2015, the SEC served [Mr. Hill] with an Order Instituting Cease–And–Desist Proceedings . . . alleging [Mr. Hill was] liable for insider trading."[17] The SEC also sought a civil penalty and disgorgement.[18]

The SEC claimed Mr. Hill made the trades in Radiant "because he received inside information about a future merger between Radiant and NCR Corporation" ("NCR").[19] NCR announced its tender offer in July 2011, and completed the merger in August.[20] Mr. Hill "contend[ed] he never received inside information."[21] Instead, he argued that he bought the stock on the basis of his personal knowledge of Radiant and sold on the advice of his stockbroker.[22]

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point. *Hill*, 2016 U.S. App. LEXIS 10946, at *12–15. This is consistent with other courts that have ruled on similar matters. *See* Tilton v. SEC, No. 15-2103, 2016 U.S. App. LEXIS 9970, at *9–11 (2d Cir. June 1, 2016); Jarkesy v. SEC, 803 F.3d 9, 30 (D.C. Cir. 2015) ("We hold that the securities laws provide an exclusive avenue for judicial review that Jarkesy may not bypass by filing suit in district court."); Bebo v. SEC, 799 F.3d 765, 767 (7th Cir. 2015). *But see* Duka v. SEC, 103 F. Supp. 3d 382, 389–90 (S.D.N.Y. 2015) (citing Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 489–90 (2010)) (finding three necessary criteria met for pre-enforcement challenges to agency action).

12 *See infra* note 79.

13 *Hill*, 114 F. Supp. 3d at 1301. Mr. Hill is not registered with the SEC. *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.* The SEC contended the trades violated section 14(e) of the Exchange Act and Rule 14e–3 promulgated thereunder. *Id.*

18 *Id.*

19 *Id.*

20 *NCR Commences Tender Offer for All Outstanding Shares of Radiant Systems*, NCR (July 24, 2011, 8:00 PM), http://www.ncr.com/news/news-releases/uncategorized/ncr-commences-tender-offer-for-all-outstanding-shares-of-radiant-systems.

21 *Hill*, 114 F. Supp. 3d at 1301.

22 *Id.*

Before the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"),[23] the SEC could not bring a suit against an unregistered individual, like Mr. Hill, in an administrative proceeding.[24] The SEC could only enforce its rules against unregistered individuals in federal district court.[25] However, in the current post-Dodd-Frank landscape, the SEC may initiate enforcement actions against *any person* in federal court *or* an administrative proceeding.[26] Dodd-Frank vested the SEC with full discretion to decide in which forum to bring an enforcement action.[27] The SEC exercised that discretion when it brought an administrative action against Mr. Hill.[28]

Mr. Hill brought suit in the U.S. District Court for the Northern District of Georgia, collaterally challenging the constitutionality of the SEC's use of an administrative proceeding against him, presided over by a SEC ALJ.[29]

B. District Court Jurisdiction

The first issue Judge May had to decide was whether the district court had subject matter jurisdiction to hear Mr. Hill's collateral challenge to the use of SEC ALJs.[30] Judge May rejected the SEC's argument that the exclusive means of judicial review for Mr. Hill was through the SEC's administrative review process, with eventual federal court review in the U.S. Courts of Appeals, under the Administrative Procedure Act ("APA").[31] Judge May found the SEC's

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23 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 15 U.S.C. (2012)).

24 The SEC could only bring administrative proceedings against regulated people or companies. *Hill*, 114 F. Supp. 3d at 1302 (citing Duka v. SEC, 103 F. Supp. 3d 382, 386 (S.D.N.Y. 2015)); Sam Wild, *SEC Enforcement Division Gets New Powers Under the Dodd-Frank Act*, MARCUM, http://www.marcumllp.com/publications-1/sec-enforcement-division-gets-new-powers-under-the-dodd-frank-act (last visited Aug. 10, 2016).

25 *Hill*, 114 F. Supp. 3d at 1302; Wild, *supra* note 24.

26 *See* 15 U.S.C. §§ 78u(d), 78u–1, 78u–2, 78u–3 (2012).

27 *See Hill*, 114 F. Supp. 3d at 1302; *see also Division of Enforcement Approach to Forum Selection in Contested Actions*, SEC.GOV, 1, http://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf (last visited Aug. 10, 2016) (discussing how the SEC chooses between administrative proceedings and federal court actions).

28 *See Hill*, 114 F. Supp. 3d at 1304.

29 *See id.* at 1305. Mr. Hill raised three constitutional challenges to the administrative proceeding before the ALJ. *Id.* at 1304–05. The ALJ rejected one of Mr. Hill's challenges, and found that he did not have the authority to address the other two challenges. *Id.* at 1305.

30 *Id.* at 1305–10.

31 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2012)); *Hill*, 114 F. Supp. 3d at 1305–06 (citing 15 U.S.C. § 78y (2012)).

arguments ran contrary to 28 U.S.C. § 1331[32] and 28 U.S.C. § 2201,[33] and the Supreme Court's interpretation thereof.[34] She reasoned that under *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[35] the court should presume that Congress did not intend to limit the jurisdiction of federal district courts, and therefore the court was free to hear Mr. Hill's challenge.[36]

In her first justification for finding Mr. Hill had standing, Judge May reasoned that "[t]o restrict the district court's statutory grant of jurisdiction under § 1331, there must be [c]ongressional intent to do so."[37] Under Supreme Court precedent, "[p]rovisions for agency review do not restrict judicial review unless the statutory scheme displays a fairly discernible intent to limit jurisdiction, and the claims at issue are of the type Congress intended to be reviewed within th[e] statutory structure."[38] Judge May found that because SEC enforcement actions can be brought in federal court *or* an administrative proceeding,

> Congress did not intend to limit § 1331 and prevent [Mr. Hill] from raising his collateral constitutional claims in district court. Congress could not have intended the statutory review process to be exclusive because it expressly provided for district courts to adjudicate not only constitutional issues but Exchange Act violations, at the SEC's option.[39]

Judge May never fully explained why the *SEC's option* of bringing an enforcement action in district court or in an ALJ proceeding meant Congress did not intend for the APA to be the exclusive means of federal court *review* of ALJ decisions.[40] In fact, other courts have already come to the opposite conclusion.[41]

Judge May's second justification for granting jurisdiction over Mr. Hill's challenge was more convincing. Under *Thunder Basin Coal Co.*

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32 *See* 28 U.S.C. § 1331 (2012) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

33 *See id.* § 2201 (authorizing declaratory judgments).

34 *Hill*, 114 F. Supp. 3d at 1305.

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

36 *Hill*, 114 F. Supp. 3d at 1306.

37 *Id.*

38 *Id.* (alterations in original) (quoting *Free Enter. Fund*, 561 U.S. at 489).

39 *Id.*

40 *See id.*

41 *See, e.g.*, Jarkesy v. SEC, 803 F.3d 9, 16, 30 (D.C. Cir. 2015) ("The securities laws contain an equally comprehensive structure for the adjudication of securities violations in administrative proceedings.").

v. Reich[42] and *Free Enterprise Fund*, courts "presume that Congress does not intend to limit jurisdiction if: (1) a finding of preclusion could foreclose all meaningful judicial review; (2) if the suit is wholly collateral to a statute's review provisions; and if (3) the claims are outside the agency's expertise."[43] Judge May found all three factors necessary to establish jurisdiction in Mr. Hill's case.[44]

First, Judge May found "that requiring [Mr. Hill] to pursue his constitutional claims following the SEC's administrative process 'could foreclose all meaningful judicial review' of his constitutional claims."[45] Mr. Hill challenged the constitutionality of the entire administrative process used against him (i.e., adjudication presided over by an unconstitutionally appointed officer).[46] The harm alleged, therefore, was the fact that Mr. Hill was "being forced to litigate in an unconstitutional forum."[47] If Mr. Hill had to wait for an ALJ decision and commission review, and appeal to a U.S. court of appeals to raise his constitutional challenge in federal court, his constitutional claim would be moot, as the court of appeals could not enjoin the allegedly unconstitutional proceeding which had already occurred.[48] In short, "[w]aiting until the harm [Mr. Hill] allege[d] [could not] be remedied [was] not meaningful judicial review."[49]

Second, the suit was "wholly collateral to the administrative proceeding."[50] In *Free Enterprise Fund*, the Supreme Court found that because the petitioners objected to the *existence* of the Public Company Accounting Oversight Board, not any of its substantive standards, the "[p]etitioners' general challenge to the Board [was] 'collateral' to any Commission orders or rules from which review might be sought."[51]

The same logic applied here. Mr. Hill was "not challenging an agency decision; [he was] challenging whether the SEC's ability to *make* that decision was constitutional. What occurs at the administrative proceeding and the SEC's conduct there is irrelevant to this pro-

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42 Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994).

43 *Hill*, 114 F. Supp. 3d at 1306 (quoting *Free Enter. Fund*, 561 U.S. at 489 (quoting *Thunder Basin*, 510 U.S. at 212–13)).

44 *Id.* at 1307–10.

45 *Id.* at 1307 (citing *Free Enter. Fund*, 561 U.S. at 489).

46 *See id.*

47 *Id.*

48 *Id.* Mr. Hill could not recover monetary damages, as the SEC has sovereign immunity. *Id.* at 1319.

49 *Id.* at 1308.

50 *Id.* at 1309.

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

ceeding which seeks to invalidate the entire statutory scheme."[52] Therefore, Mr. Hill's constitutional claim was wholly collateral.[53]

Third, Mr. Hill's constitutional claims were outside the SEC's expertise.[54] Mr. Hill's "constitutional claims [were] governed by Supreme Court jurisprudence, and 'the statutory questions involved [did] not require technical considerations of agency policy.'"[55] "These claims [were] not part and parcel of an ordinary securities fraud case, and there [was] no evidence that (1) [Mr. Hill's] constitutional claims [were] the type the SEC 'routinely consider[ed],' or (2) the agency's expertise [could] be 'brought to bear' on [Mr. Hill's] claims."[56] With that, Judge May concluded Mr. Hill's "constitutional claims are outside the SEC's expertise."[57]

As all three *Thunder Basin* factors were satisfied, the district court had subject matter jurisdiction.[58] The Eleventh Circuit's rejection of Judge May's reasoning is discussed below.[59]

C. The Merits of Hill v. SEC

Mr. Hill's complaint moved the district court to "(1) declare the administrative proceeding unconstitutional . . . and (2) enjoin the administrative proceeding from occurring until the Court [could] issue its ruling."[60] Mr. Hill argued the administrative proceeding against him was unconstitutional for three reasons: (1) it "violate[d] Article II of the Constitution[;]" (2) "Congress's delegation of authority to the SEC to pursue cases before ALJs violate[d] the delegation doctrine in Article I of the Constitution;" and (3) "Congress violated his Seventh Amendment right to jury trial by allowing the SEC to pursue charges in an administrative proceeding."[61] After rejecting Plaintiff's second and third theories,[62] Judge May found that "[b]ecause [the ALJ] was not appropriately appointed pursuant to Article II, his appointment is likely unconstitutional."[63]

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52 *Hill*, 114 F. Supp. 3d at 1309 (citing *Free Enter. Fund*, 561 U.S. at 490).

53 *Id.*

54 *Id.*

55 *Id.* at 1310 (quoting *Free Enter. Fund*, 561 U.S. at 491).

56 *Id.* (quoting Elgin v. Dep't of Treasury, 132 S. Ct. 2126, 2140 (2012)).

57 *Id.*

58 *Id.* at 1307–10.

59 *See infra* Section III.A.

60 *Id.* at 1305.

61 *Id.* at 1304–05.

62 *Id.* at 1313, 1316. This Essay will not address the merits of Mr. Hill's Article I and Seventh Amendment claims.

63 *Id.* at 1319.

> The Appointments Clause of the U.S. Constitution states:
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> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . 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.[64]

The Appointments Clause only applies, if the appointee is an "Officer[] of the United States."[65] If the appointee is a principal officer (i.e., a non-inferior officer), then the only permissible appointment procedure is a presidential nomination with the advice and consent of the Senate.[66] If the appointee is an inferior officer, then Congress can delegate the entire appointment procedure to the President, the courts of law, or the heads of departments.[67] If the appointee is not an officer at all (i.e., simply a government "employee"), then the Appointments Clause does not apply.[68]

Mr. Hill argued that SEC ALJs are inferior officers, and the court agreed.[69] Judge May reasoned that whether or not a SEC ALJ constituted an inferior officer turned on whether the ALJ exercised "significant authority" in conducting administrative proceedings.[70]

Relying heavily on the Supreme Court's decision of *Freytag v. Commissioner*,[71] Judge May agreed with Mr. Hill that SEC ALJs are inferior officers.[72] In *Freytag*, the Court found that Special Trial Judges ("STJs") of the Tax Court were inferior officers because they exercised "significant authority."[73] Factors cited by the Court in *Freytag* apply equally to SEC ALJs: the offices of STJs and ALJs—and the duties, salaries, and means of appointment of those offices—

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64 U.S. CONST. art. II, § 2, cl. 2.

65 *Id.*

66 *Id.*; *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 487 (2010).

67 U.S. CONST. art. II, § 2, cl. 2; Buckley v. Valeo, 424 U.S. 1, 132 (1976).

68 *See Buckley*, 424 U.S. at 126 n.162; *see also Hill*, 114 F. Supp. 3d at 1316.

69 *Hill*, 114 F. Supp. 3d at 1319.

70 *Id.* at 1316 ("Any appointee exercising significant authority pursuant to the laws of the United States is an Officer of the United States, and must, therefore, be appointed in the manner prescribed by [the Appointments Clause]." (alterations omitted) (quoting Freytag v. Comm'r, 501 U.S. 868, 881 (1991) (quoting *Buckley*, 424 U.S. at 126))).

71 Freytag v. Comm'r, 501 U.S. 868 (1991).

72 *Hill*, 114 F. Supp. 3d at 1317.

73 *Freytag*, 501 U.S. at 881.

are established by statute; both STJs and ALJs perform "more than ministerial tasks[;]" and "[t]hey take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders."[74] Therefore, Judge May found "that *Freytag* mandates a finding that the SEC ALJs exercise 'significant authority' and are thus inferior officers."[75]

Once Judge May found that SEC ALJs are inferior officers, the disposition of the case involved the mere application of a simple syllogism. The President, department heads, or courts of law must appoint all inferior officers.[76] SEC ALJs are inferior officers.[77] Therefore, they must be appointed by one of the prescribed methods. The SEC conceded that the Commissioners of the SEC ("Commissioners") did not appoint the ALJ presiding over Mr. Hill's administrative proceeding, nor did the President, nor the courts of law.[78] Thus the ALJ was not appropriately appointed pursuant to Article II. Because the ALJ presiding over Mr. Hill's administrative proceeding (and all SEC ALJs) was unconstitutionally appointed, Judge May issued a preliminary injunction, temporarily halting the administrative proceeding against Mr. Hill.[79]

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74 *Id.*; *Hill*, 114 F. Supp. 3d at 1317.

75 *Hill*, 114 F. Supp. 3d at 1319.

76 U.S. CONST. art. II, § 2, cl. 2.

77 *Hill*, 114 F. Supp. 3d at 1319.

78 *See id.* SEC ALJs "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." *Id.* at 1303 (citing 5 C.F.R. § 930.204 (2015)). If the SEC Commissioners themselves appointed SEC ALJs, "the head of a department" would have properly appointed the SEC ALJ pursuant to the Appointments Clause. *Cf.* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 511–13 (2010).

79 *Hill*, 114 F. Supp. 3d at 1320–21. The *Hill* decision was in the context of a motion for preliminary injunction.

> To obtain a preliminary injunction, the moving party must demonstrate: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) the threatened injury to the movant outweighs the damage to the opposing party; and (4) granting the injunction would not be adverse to the public interest.

Id. at 1310 (citing Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A., 320 F.3d 1205, 1210 (11th Cir. 2003)). Judge May technically only found that SEC ALJ appointments are "likely" unconstitutional, satisfying the first requirement for a preliminary injunction. *Id.* at 1319. The fact that without an injunction, Mr. Hill would be "subject to an unconstitutional administrative proceeding, and he would not be able to recover monetary damages for this harm because the SEC has sovereign immunity" satisfied the second requirement. *Id.* The court also found the "balance of equities" and the public interest was in Mr. Hill's favor, satisfying the third and fourth requirements. *Id.* at 1320. As to the third element, "there is no evidence the SEC would be prejudiced by a brief delay to allow this Court to fully address Plaintiff's claims." *Id.* And finally, "[t]he public has an interest in assuring that citizens are not subject to unconstitu-

The SEC appealed the order[80] and sought a stay of the preliminary injunction, which the Eleventh Circuit denied.[81] However, the Eleventh Circuit granted the SEC's request to expedite the appeal "for merits disposition purposes upon the conclusion of briefing."[82] In June 2016, the Eleventh Circuit vacated Judge May's ruling.[83]

II. An Analysis of the Appointments Clause Challenge

Judge May's opinion turns on whether one believes SEC ALJs are inferior officers of the United States. That characterization essentially depends on the applicability and persuasive power of two somewhat contradictory cases: *Freytag v. Commissioner* and *Landry v. FDIC*.[84]

A. Freytag v. Commissioner

In *Freytag*, the Supreme Court held that Special Trial Judges of the Tax Court were inferior officers.[85] The petitioners had challenged the constitutionality of an STJ presiding over their case in the U.S. Tax Court.[86] Like Mr. Hill, the *Freytag* petitioners argued that STJs are inferior officers of the United States, and thus must be appointed by the President, the courts of law, or the heads of departments.[87] The Commissioner argued that STJs only act as aides to the Tax Court judges, merely "assist[ing] the Tax Court judge in taking . . . evidence and preparing the proposed findings and opinion."[88] Further, STJs "lack[ed] authority to enter a final decision."[89] Therefore, the Com-

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tional treatment by the Government." *Id.* Despite the posture of the *Hill* decision as a preliminary injunction, the Eleventh Circuit heard the issue. Hill v. SEC, No. 15-12831-CC, 2015 BL 317748, at *1–2 (11th Cir. Aug. 10, 2015).

80 *Hill*, 2015 BL 317748, at *1–3.

81 *Id.* at *1 (SEC's "'Motion to Stay Preliminary Injunction Pending Appeal' is DENIED.").

82 *Id.*

83 Hill v. SEC, No. 15-12831, No. 15-13738, 2016 U.S. App. LEXIS 10946 (11th Cir. June 17, 2016).

84 Landry v. FDIC, 204 F.3d 1125 (D.C. Cir. 2000).

85 Freytag v. Comm'r, 501 U.S. 868, 882 (1991).

86 *Id.* at 877. "Petitioners [also] argue[d] that adjudication by the [STJ] in [their] litigation exceeded the bounds of the statutory authority that Congress conferred [on] the Tax Court." *Id.* at 873. It seems worth noting that petitioners had actually consented to the assignment of their case to an STJ. *Id.* at 878.

87 *Id.* at 880; *see also* U.S. Const. art. II, § 2, cl. 2; *supra* notes 64–68 and accompanying text.

88 *Freytag*, 501 U.S. at 880.

89 *Id.* at 881.

missioner argued, STJs are mere employees rather than inferior officers.[90]

The Supreme Court disagreed, applying the rule of *Buckley v. Valeo*[91] that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause]."[92] Citing the two courts that had ruled on the issue, the Court held that STJs are inferior officers.[93]

The Supreme Court agreed with the Second Circuit and the U.S. Tax Court in concluding that "the degree of authority exercised by the special trial judges [is] so 'significant' that it was inconsistent with the classifications of 'lesser functionaries' or employees."[94] The Court listed the attributes of STJs critical to its analysis:

> The office of special trial judge is 'established by Law,' . . . . [T]he duties, salary, and means of appointment for that office are specified by statute . . . . [STJs] perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders.[95]

"In the course of carrying out these important functions, the special trial judges exercise significant discretion."[96] Because STJs exercise "significant discretion," they are inferior officers.[97]

The Supreme Court then offered an alternative means of determining that STJs are inferior officers.[98] Under the relevant statute, "the Chief Judge may assign [STJs] to render the decisions of the Tax Court in declaratory judgment proceedings and limited-amount tax cases."[99] The Commissioner conceded that in cases in which an STJ acts pursuant to one of these Chief Judge assignments, STJs act as inferior officers.[100] The Supreme Court reasoned that STJs could not

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90 *Id.* at 880–81.

91 Buckley v. Valeo, 424 U.S. 1 (1976).

92 *Freytag*, 501 U.S. at 881 (alteration omitted) (quoting *Buckley*, 424 U.S. at 126).

93 *Id.* (citing Samuels, Kramer & Co. v. Comm'r, 930 F.2d 975, 985 (2d Cir. 1991); First W. Gov't Sec., Inc. v. Comm'r, 94 T.C. 549, 557–59 (1990)).

94 *Id.*

95 *Id.* at 881–82.

96 *Id.* at 882.

97 *Id.*

98 *Id.* ("Even if the duties of special trial judges . . . were not as significant as we and the two courts have found them to be, our conclusion would be unchanged.").

99 *Id.*

100 *Id.* *Freytag*'s case, however, did not involve an STJ acting pursuant to a Chief Judge assignment to render a final decision. *See id.*

be inferior officers for the purposes of some of their responsibilities (e.g., when acting pursuant to a Chief Judge assignment with the power to issue the decisions of the Tax Court), and mere employees for other purposes (e.g., when acting without the power to issue final decisions).[101] The Court found that because STJs act as inferior officers in some circumstances, they "[are] inferior officer[s] within the meaning of the Appointments Clause and [they] must be properly appointed."[102] "The fact that [an STJ] . . . performs duties that may be performed by an employee not subject to the Appointments Clause does not transform [her] status under the Constitution."[103]

Importantly, the Court offered this *alternative explanation* of why STJs are inferior officers *after* already stating that "[w]e agree with the Tax Court and the Second Circuit that a [STJ] is an 'inferior [o]ffice[r]' whose appointment must conform to the Appointments Clause."[104] The Court merely buttressed its conclusion with the alternative explanation, stating that "*[e]ven if* the *duties of special trial judges . . . were not as significant* as [the Supreme Court] and the [other] two courts have found them to be, [the Court's] conclusion would be unchanged."[105]

Although *Freytag* supports Judge May's decision in *Hill* that SEC ALJs are inferior officers,[106] *Landry v. FDIC* cuts directly against it.[107]

B. Landry v. FDIC

In *Landry*, the U.S. Court of Appeals for the District of Columbia concluded that ALJs of the Federal Deposit Insurance Corporation ("FDIC") were not inferior officers.[108] Judge Stephen F. Williams, writing for the court, acknowledged that *Freytag* was "the most analogous case."[109] Judge Williams did pay lip service to the

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101 *Id.*

102 *Id.*

103 *Id.* In making this conclusion, the Court rejected the Commissioner's argument that Freytag lacked standing to challenge the STJ's appointment because the STJ did not issue a final decision of the trial court in his case. *Id.* ("Special trial judges are not inferior officers for purposes of some of their duties under § 7443A, but mere employees with respect to other responsibilities.").

104 *Id.* at 881 (fourth alteration in original).

105 *Id.* at 882 (emphasis added).

106 Judge May relied on the primary, not the alternative, reasoning of *Freytag* to find that SEC ALJs, like STJs, are inferior officers. *See* Hill v. SEC, 114 F. Supp. 3d 1297, 1317–19 (N.D. Ga. 2015), *vacated*, No. 15-12831, No. 15-13738, 2016 U.S. App. LEXIS 10946 (11th Cir. June 17, 2016).

107 *Id.* at 1317–18; Landry v. FDIC, 204 F.3d 1125, 1133–34 (D.C. Cir. 2000).

108 *Landry*, 204 F.3d at 1134.

109 *Id.* at 1133.

"features of the STJ job" that the Supreme Court cited when determining that STJs were inferior officers in *Freytag*.[110] However, Judge Williams stressed the significance of the STJs' final decisionmaking power.[111] He differentiated FDIC ALJs from Tax Court STJs, noting:

> [T]he ALJs here can never render the decision of the FDIC. Final decisions are issued only by the FDIC Board of Directors. Moreover, even for the non-final decisions of the type made by the STJ in *Freytag*, the Tax Court was required to defer to the STJ's factual and credibility findings unless they were clearly erroneous, whereas *here the FDIC Board makes its own factual findings*.[112]

Relying on the Court's language explaining why the petitioner in *Freytag* "could raise the claim even though in his case the STJ had *not* been exercising [the final decisionmaking power]," (i.e., why the petitioner had standing), Judge Williams concluded, "we believe that the STJs' power of final decision in certain classes of cases was critical to the Court's decision."[113]

The *Landry* court relied on *Freytag*'s alternative reasoning for finding STJs inferior officers. Because the STJs' ability to make final decisions in *some* cases gave them "inferior officer status" in *all* cases, the plaintiffs had standing—even when the STJ was not exercising final decisionmaking power in the plaintiff's particular case.[114] Therefore, the D.C. Circuit found that the ability to make final decisions *at all* was the operative fact. Judge Williams reasoned, "[a]ll this expla-

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110 *Id.*; *see supra* text accompanying note 95. Judge Williams even lists the similarities between the FDIC ALJs and the STJs:

> The ALJ position here is also "established by Law," as are its specific duties, salary, and means of appointment. Similarly, both the ALJs here and the STJs in *Freytag* "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." And, the Court observed, "In the course of carrying out these important functions, the special trial judges exercise significant discretion," rather a magic phrase under the *Buckley* test.

Landry, 204 F.3d at 1133–34 (citations omitted).

111 *Id.* at 1133–34 ("[In *Freytag*,] the Court relied on authority of the STJs not matched by the ALJs here. *In particular, the Court noted that STJs have the authority to render the final decision* of the Tax Court in declaratory judgment proceedings and in certain small-amount tax cases." (emphasis added) (citing Freytag v. Comm'r, 501 U.S. 868, 882 (1991))).

112 *Id.* at 1133 (emphasis added) ("[FDIC] ALJs must file a '*recommended* decision, *recommended* findings of fact, *recommended* conclusions of law, and [a] *proposed* order.'" (citing 12 C.F.R. § 308.38 (2000))).

113 *Id.*

114 *Id.* (citing *Freytag*, 501 U.S. at 882).

nation would have been quite unnecessary if the purely recommendatory powers were fatal in themselves."[115]

C. Did Hill *Get It Right? Applying* Freytag *and* Landry

In *Hill v. SEC*, Judge May found Judge Williams's majority opinion in *Landry* unconvincing.[116] Instead, she agreed with the concurrence, in which Judge Arthur Randolph argued "that the majority's holding in *Landry* (which ultimately relied on the FDIC ALJ's lack of final order authority) was based on an *alternative* holding from *Freytag* as the Supreme Court had already determined the STJs were inferior officers before it analyzed the final order authority issue."[117]

Agreeing with Judge Randolph's concurrence, the court in *Hill* concluded "that the Supreme Court in *Freytag* found that the STJs[']powers—which are nearly identical to the SEC ALJ[']s here—were independently sufficient to find that STJs were inferior officers."[118] Primacy was key to the analysis; "[o]nly after it concluded STJs were inferior officers did *Freytag* address the STJ's ability to issue a final order; the STJ's limited authority to issue final orders was only an additional reason, not *the* reason."[119] Disregarding *Landry*'s persuasive power, Judge May found "that *Freytag* mandates a finding that the SEC ALJs exercise 'significant authority' and are thus inferior officers."[120]

Hill got it right. The Court in *Freytag* concluded STJs exercise "significant discretion" before mentioning—and without referencing—STJs' ability to enter final judgments in certain cases.[121] Further, the Court's alternative reasoning only responded to the Commissioner's argument that STJs were mere employees with respect to the plaintiff, because the STJ lacked final decisionmaking authority in the plaintiff's particular case.[122] If the Supreme Court truly found the ability to issue final decisions (in any case) determinative on the issue of whether STJs are inferior judges, it likely would have simply re-

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115 *Id.* Fatal meaning determinative of triggering the Appointments Clause.

116 *See* Hill v. SEC, 114 F. Supp. 3d 1297, 1318 (N.D. Ga. 2015), *vacated*, No. 15-12831, No. 15-13738, 2016 U.S. App. LEXIS 10946 (11th Cir. June 17, 2016).

117 *Id.* (citing *Landry*, 204 F.3d at 1142 (Randolph, J., concurring)).

118 *Id.*

119 *Id.* at 1319.

120 *Id.*

121 *See* Freytag v. Comm'r, 501 U.S. 868, 881 (1991); *see also supra* text accompanying note 96.

122 *See Freytag*, 501 U.S. at 881.

sponded to the Commissioner's argument first.[123] Instead, the Court laid out the factors it regarded as important to the analysis and found that STJs exercise the requisite "significant discretion," (and therefore are inferior officers) before ever mentioning STJs' power to issue final decisions in certain cases.[124]

Beyond ignoring the order and logic of the Supreme Court's opinion in *Freytag*, the *Landry* majority's argument does not hold water for an alternative[125] reason.[126] Judge Williams's majority relied on the Supreme Court's explanation that STJs' status under the Constitution is not transformed regardless of whether some of their duties "may [also] be performed by an employee not subject to the Appointments Clause."[127] Judge Williams reasoned that "[a]ll this explanation *would have been quite unnecessary* if the purely recommendatory powers were fatal in themselves."[128]

Contrary to Judge Williams's assertion, this explanation was necessary to address the Commissioner's standing argument. It answered the question of what class of plaintiffs could challenge the constitutionality of an officer's appointment. In other words, it explained that regardless of the actual power being exercised by the STJ in the specific proceeding, the fact that STJs were inferior officers in some instances dictated that they must be appointed pursuant to Article II.[129] Even if the STJ was not (1) taking testimony, (2) conducting trials,

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123 The Commissioner of Internal Revenue argued that STJs should not be deemed inferior officers "in subsection (b)(4) cases because they lack authority to enter a final decision." *Id.* The Supreme Court did not respond by skipping to its alternative reasoning (i.e., relying on the STJs' final decisionmaking power). Instead, the Court laid out the factors it regarded as important to the analysis, *see supra* text accompanying note 95, found that STJs exercise the requisite "significant discretion," and concluded that STJs were therefore inferior officers. *Freytag*, 501 U.S. at 881–82. Only after concluding that STJs exercised significant discretion (and were thus inferior officers) did the Court even mention their power to issue final decisions in certain types of cases. *Id.* at 882.

124 *Id.* at 881–82.

125 "Alternative" should not be confused with "determinative." *Cf.* Landry v. FDIC, 204 F.3d 1125, 1133–34 (D.C. Cir. 2000).

126 Judge Randolph's concurrence provides an additional reason the majority incorrectly interpreted *Freytag*. *See id.* at 1140–42 (Randolph, J., concurring) (explaining the Court's express approval of a Second Circuit opinion, which held that STJs are inferior officers without mentioning their ability to issue final decisions, and demonstrating the Court's intention not to rely on the "final decision" alternative argument in holding that STJs are inferior officers); *see also* Samuels, Kramer & Co. v. Comm'r, 930 F.2d 975, 986 (2d Cir. 1991) (finding that STJs are inferior officers without discussing the ability to make final decisions).

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

128 *Landry*, 204 F.3d at 1134 (emphasis added).

129 *See Freytag*, 501 U.S. at 882. In a sense, the Court simply applied the overbreadth doctrine to Appointments Clause challenges.

(3) ruling on the admissibility of evidence, and, yes, (4) issuing final decisions,[130] in the *petitioner's specific case*, the petitioner could still raise an Appointments Clause challenge.[131] Thus, the Court reasoned, "[t]his *standing* argument seems . . . beside the point," because the petitioner could challenge the STJs appointment regardless of the power exercised over him below.[132]

Only after addressing the standing argument did the Supreme Court note that STJs acted as inferior officers when they issued final decisions.[133] However, nothing indicates that this reference to the STJs' final decisionmaking powers rendered the entire prior analysis of STJs' other significant discretionary powers superfluous. Instead, the Court was merely clarifying that even if an STJ did not exercise one of the powers that made him an inferior officer in a specific case, the petitioner could still challenge the appointment. In short, the petitioner did not have a standing problem.[134]

Given the relatively clear precedent of *Freytag*, and the weaknesses of *Landry*'s majority opinion discussed above (and with the appropriate weight given to each decision),[135] *Hill* appears to have properly applied Supreme Court precedent in "find[ing] that SEC ALJs are inferior officers."[136]

III. The Eleventh Circuit's Decision

The Eleventh Circuit vacated Judge May's determination that the district court had subject matter jurisdiction to adjudicate a collateral attack on the SEC ALJ appointments process. In doing so, the court precluded Mr. Hill from any meaningful judicial review of his constitutional challenge, as the challenge will be moot by the time it may be heard by a federal court for the first time.

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130 *See id.* at 881–82.

131 *See id.* at 882 ("[STJs] are not inferior officers for purposes of some of their duties . . . but mere employees with respect to other responsibilities.").

132 *See id.* (emphasis added).

133 *See id.* ("If a special trial judge is an inferior officer for purposes of [final decisionmaking], he is an inferior officer within the meaning of the Appointments Clause and he must be properly appointed.").

134 *See id.* ("This standing argument seems to us to be beside the point.").

135 *See supra* notes 116–34 and accompanying text.

136 Hill v. SEC, 114 F. Supp. 3d 1297, 1319 (N.D. Ga. 2015), *vacated*, No. 15-12831, No. 15-13738, 2016 U.S. App. LEXIS 10946 (11th Cir. June 17, 2016).

A. The District Court Lacked Subject Matter Jurisdiction

The United States Court of Appeals for the Eleventh Circuit held that the district court lacked subject matter jurisdiction to hear a collateral attack on the constitutionality of SEC ALJ appointments. This ruling, while consistent with its sister circuits, misapplied the proper standard for determining when a statutory scheme provides exclusive jurisdiction to challenge agency decisions, and misunderstood the effect such a ruling would have on most litigants.

The Eleventh Circuit structured the jurisdictional analysis slightly differently than the district court. First, it asked whether there was a "fairly discernable" intent in the statutory scheme to allocate initial review to an administrative body.[137] Next, the court determined whether Mr. Hill's "claims [were] of the type Congress intended to be reviewed within the statutory structure."[138]

After reviewing the language of the relevant statute,[139] the court concluded that it was "fairly discernable" that Congress intended to preclude district court review of an administrative proceeding.[140]

To answer the second question, the Eleventh Circuit considered the factors from *Thunder Basin* in finding that the district court lacked subject matter jurisdiction. As noted above, the Supreme Court laid out a three-factor test in *Thunder Basin* to determine whether a district court has jurisdiction over a collateral challenge to agency action: (1) whether a finding of preclusion could foreclose all meaningful judicial review; (2) whether the suit is wholly collateral to a statute's review provisions; and (3) whether the claims are outside the agency's expertise."[141]

The Eleventh Circuit noted at the outset that the first factor, "meaningful judicial review" is the most critical.[142] The court rejected Mr. Hill's argument that there can be no meaningful judicial review on direct appeal because once the administrative adjudication has taken place (the very injury contended), the court cannot enjoin the adjudication, and thus there can be no remedy of the constitutional

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137 *Hill*, 2016 U.S. App. LEXIS 10946, at *12 (citing Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 (1994)).

138 *Id.* at *13 (citing *Thunder Basin Coal Co.*, 510 U.S. at 212). This division into a two-step analysis makes little practical difference, as step two appears to encapsulate the entire *Thunder Basin* three-factor test applied in the district court. *See* Section I.B.

139 *Hill*, 2016 U.S. App. LEXIS 10946, at *15–24.

140 *See id.* at *23–24.

141 *Thunder Basin Coal Co.*, 510 U.S. at 212–15.

142 *See Hill*, 2016 U.S. App. LEXIS 10946, at *24.

violation.[143] The court found that enduring an unwanted process, even at great cost, is not an irreparable injury on its own.[144]

In making this determination, the court found it significant that the Commissioners may not find against Mr. Hill at all, and if they do, that Mr. Hill will have two opportunities to stay the sanctions pending federal court review.[145] The court failed to explain how these facts make meaningful judicial review available. Instead, the Eleventh Circuit concluded that 15 U.S.C. § 78y—which grants the court of appeals the power to vacate an order—provides an adequate remedy. However, the court did not address how this remedy would be adequate for Mr. Hill and similarly situated plaintiffs, discussed in greater detail below.[146]

The court next found the "wholly collateral" and "agency expertise" factors to "not cut strongly either way."[147]

As to the "wholly collateral" factor, the court found that it does not "tip the scales in favor of [collateral] judicial review."[148] The Eleventh Circuit outlined two possible interpretations of the "wholly collateral" question. In the first, a court should "compare the merits of the respondents' constitutional claims to the substance of the charges against them."[149] The implication is that the more dissimilar the two claims are, the more "collateral" the district court action is. This interpretation supported Mr. Hill's claim: even if he was successful on the constitutional challenge, he could still face a civil enforcement action in federal court.[150] However, the Eleventh Circuit adopted a different approach. It "focus[ed] instead on whether [Mr. Hill's] claims [were] 'wholly collateral to the *statute's review provisions*.'"[151] If the collateral claim is a vehicle in which to obtain relief from the *original administrative process*, then the claim is not "wholly collateral," because the claim could be brought directly on appeal (i.e., it is within the statute's review provision).[152] In Mr. Hill's case, the result was unclear.

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143 *Id.* at *25.

144 *Id.* (citing FTC v. Standard Oil Co., 449 U.S. 232, 244 (1980)).

145 *Id.* at *28–29.

146 *See infra* Section III.B.

147 *Hill*, 2016 U.S. App. LEXIS 10946, at *38.

148 *Id.* at *41.

149 *Id.*

150 *Id.* at *41–42.

151 *Id.* at *42 (brackets omitted).

152 *See id.*

> [Mr. Hill] attack[s] the constitutionality of the ALJs and the administrative process as a vehicle to challenge the SEC's decision to bring the case before the Commission, suggesting that their constitutional challenges are not wholly collateral to the SEC's review provisions. But [Mr. Hill's] challenge is not a means to avoid liability altogether . . . even if [he] prevails on [his] constitutional claims, [he] could face a civil enforcement action in federal district court. Thus, [his] constitutional arguments are not a "vehicle by which they seek" to prevail on the merits.[153]

In the end, the court concluded that regardless of whether Mr. Hill's claim is considered "wholly collateral," the other factors dictate that the court lacked subject matter jurisdiction to hear the challenge.[154]

As to the "agency expertise" factor, the Eleventh Circuit found that agency expertise *could be brought to bear* on the question presented (despite the fact that the question has nothing to do with securities laws).[155] In doing so, the court relied heavily on *Elgin v. Department of Treasury*.[156] In the Eleventh Circuit's interpretation of *Elgin*, so long as the Commissioners might determine that the substantive claims (the alleged securities violations) are unsupported, and thus relieve Mr. Hill of liability, the agency's "expertise" can be brought to bear on the matter, "even if its expertise could offer no added benefit to the resolution of the constitutional claims themselves."[157] In other words, as long as Mr. Hill can win, the claim is within agency expertise. Even more vexing, the court noted "during oral argument . . . the SEC conceded that *Free Enterprise Fund* compels the conclusion that [Mr. Hill's] . . . challenge is outside the Commission's expertise," but still found this factor neutral at most.[158]

B. Substance-to-Procedural Switch

As pointed out by Judge Droney in his dissent in *Tilton v. SEC*,[159] the court's interpretation of the *Thunder Basin* factors seems to render the second and third factors essentially meaningless.[160] Under

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153 *Id.* at *43.

154 *Id.*

155 *See id.* at *38.

156 Elgin v. Dep't of Treasury, 132 S. Ct. 2126 (2012).

157 *See Hill*, 2016 U.S. App. LEXIS 10946, at *39 ("Thus, it is of no moment that respondents' Article II claims themselves are outside the agency's expertise.").

158 *Id.* at *40 n.8.

159 Tilton v. SEC, No. 15-2103, 2016 U.S. App. LEXIS 9970 (2d Cir. June 1, 2016).

160 *Id.* at *45–46 (Droney, J., dissenting).

the interpretation set forth by the Eleventh Circuit (and the majority in *Tilton*), the "wholly collateral" and "agency expertise" factors will be satisfied so long as an administrative proceeding can possibly dispose of the matter.[161] This is because the Eleventh Circuit wrongly interpreted *Elgin* to create a "substantive-to-procedural switch" in those two factors.[162] Judge Droney points out that the second and third factors actually weigh strongly in favor of a plaintiff similarly situated to Mr. Hill, and when measured with the first factor, demonstrate that the district court has subject matter jurisdiction to hear a collateral Appointments Clause challenge.[163]

The Eleventh Circuit's error stems from a misinterpretation of three Supreme Court cases: *Thunder Basin*, *Free Enterprise Fund*, and *Elgin*. In each of these cases, the Court compared the *substance* of the collateral challenge to the *substance* of the administrative action, not how they may relate *procedurally*.[164]

In *Thunder Basin*, the Court analyzed whether a mine owner must bring his claims in an administrative action before having his day in federal court.[165] In its analysis of the "wholly collateral" and "agency expertise" factors, the Court only considered the *substance* of the mine owner's claims as compared to the *substance* of claims normally brought in the agency.[166] The mine owner's claims required an interpretation of the parties' rights under the Mine Act and accompanying regulations, exactly the type of claims normally heard by the agency.[167] As such, the claims were squarely within the agency's expertise.

In *Free Enterprise Fund*, an accounting firm challenged a negative report published by the newly formed Public Company Accounting Oversight Board ("PCAOB").[168] The PCAOB had criticized the accounting firm's practices, but did not impose any sanctions, thus precluding the use of the statutory administrative review procedures.[169] The firm challenged the PCAOB's authority to issue the report, as its members' appointments violated the Appointments Clause of the U.S.

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161 *Id.* at *40 (Droney, J., dissenting).

162 *Id.*

163 *Id.* at *59–60.

164 *Id.* at *42–43.

165 *See* Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 213–14 (1994).

166 *See id.*

167 *See id.*

168 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 489–90 (2010).

169 *See id.* at 490.

Constitution.[170] The Court analyzed the second and third *Thunder Basin* factors by comparing the substance of the challenge (constitutional law) to the agency's expertise (securities laws and regulations).[171] The Court made no mention of any procedural relationship between the claims (i.e., a possible way to get the report reversed through an administrative procedure, such as violating a rule, then incurring significant sanctions, followed by raising a challenge in the administrative adjudication).[172]

In *Elgin*, the Court reviewed the plaintiffs' claims that their dismissal from federal employment for failure to comply with the Military Selective Service Act was unconstitutional.[173] The plaintiffs could have challenged their dismissals through administrative hearings, with subsequent judicial review in the federal courts of appeal.[174] Instead, they brought suit in federal district court.[175] The plaintiffs claimed that the Selective Service Act discriminates on the basis of sex by requiring only males to register for the draft, and therefore cannot be the reason for dismissal from employment.[176] They did not, however, challenge the availability or legitimacy of the administrative process.[177] Because the plaintiffs challenged the *substance* of the laws being imposed against them, rather than the *procedure* in which the law was enforced, the Court's analysis of the "wholly collateral" and "agency expertise" was necessarily different than in *Free Enterprise Fund*.[178] Unlike a claim that the agency lacks the authority to make a determination, the plaintiffs challenged their dismissal based on an allegedly unconstitutional federal statute.[179] Such a challenge is "precisely the type of personnel action regularly adjudicated by the [agency.]"[180] Importantly, it was not a challenge to the authority of the agency to take the challenged action.[181] "Whether or not that par-

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170 *See id.* at 478.

171 *See id.* at 491.

172 *See id.* at 490–91 ("[P]etitioners object to the Board's existence, not to any of its auditing standards.").

173 Elgin v. Dep't of Treasury, 132 S. Ct. 2126, 2140 (2012).

174 *See id.* at 2130.

175 *See id.* at 2131.

176 *See id.* The plaintiffs also argued it was a bill of attainder. *Id.*

177 Tilton v. SEC, No. 15-2103, 2016 U.S. App. LEXIS 9970, at *47 (2d Cir. June 1, 2016) (Droney, J., dissenting).

178 *See id.* at *46–47 (Droney, J., dissenting).

179 *Elgin*, 132 S. Ct. at 2131.

180 *Id.* at *47.

181 *Compare id.*, *with* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 513 (2010).

ticular challenge involved a constitutional question, it was—in the words of the Supreme Court—'a challenge to [agency]-covered employment action brought by [agency]-covered employees requesting relief that the [agency] routinely affords.'"[182]

Importantly, this holding does not mean that the substance of the plaintiffs' claims is immaterial so long as the administrative procedure can dispose of the suit (i.e., the substance-to-procedural switch).[183] The holding was instead consistent with precedent that the substance of the plaintiffs' collateral claims should be compared to the substance of the agency's expertise (and compared to the substance of any existing agency matter).[184] In *Elgin*, the substance of the collateral claim was within agency expertise, therefore there was no subject matter jurisdiction in the district court.[185] It just so happened that the challenge to employment discharge was based on a constitutional argument.[186]

In *Hill*, the Eleventh Circuit interpreted *Elgin* to hold that "if the agency can decide the merits of an underlying substantive claim and thus 'obviate the need to address the constitutional challenge,' its expertise sufficiently 'could be brought to bear' on the constitutional issues."[187] The court reasoned that because the Commissioners "might decide that the SEC's substantive claims are meritless[,] and thus would have no need to reach the constitutional claims," the claim is within the Commission's expertise.[188] The court failed to compare the substance of Mr. Hill's claims to the substance of the SEC's expertise, or to the substance of the underlying administrative proceeding. Thus the Eleventh Circuit incorrectly engaged in the substance-to-procedural switch.

Even though the Eleventh Circuit's interpretation of the *Thunder Basin* factors was likely flawed, other U.S. courts of appeals have adopted similar interpretations in finding that administrative respondents cannot collaterally attack the structure of an ALJ adjudica-

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182 *See Tilton*, 2016 U.S. App. LEXIS 9970, at *47 (Droney, J., dissenting) (quoting *Elgin*, 132 S. Ct. at 2140).

183 *Id.* at *47–48 (Droney, J., dissenting).

184 *See supra* notes 173–82 and accompanying text.

185 *See Elgin*, 132 S. Ct. at 2139–40.

186 *See Tilton*, 2016 U.S. App. LEXIS 9970, at *47–48 (Droney, J., dissenting).

187 Hill v. SEC, No. 15-12831, No. 15-13738, 2016 U.S. App. LEXIS 10946, at *38–39 (11th Cir. June 17, 2016) (citing *Elgin*, 132 S. Ct. at 2140).

188 *Id.* at *39.

tion.[189] As such, it is useful to determine the effect of such rulings on a respondent's ability to ever challenge the structure of agency adjudications.

C. *Without Collateral Review, Mr. Hill's Claims Will Become Moot Before Judicial Review Is Available, Thus Precluding Any Review*

As discussed above, the Eleventh Circuit held that the district court lacked subject matter jurisdiction to hear Mr. Hill's collateral challenge to the SEC ALJ appointments procedure. This ruling was predicated mostly on the proposition that Mr. Hill will be able to obtain substantive review of his claim after the Commissioners have issued a final decision, which can be appealed directly to one of the U.S. courts of appeals.[190] However, on direct review, a court would likely hold that Mr. Hill's challenge was moot, and thus presented a nonjusticiable question to the court. As such, the appeal would be denied without considering the merits of the challenge.

In order to understand why Mr. Hill's claim would be moot before he could raise it, imagine Mr. Hill's position after the Eleventh Circuit decision. The court ruled that he must wait until after the administrative adjudication and final SEC decision to appeal using the statutorily mandated process.[191] By that point, Mr. Hill will already be subjected to the complained of constitutional violation (i.e., an administrative adjudication being presided over by an unconstitutionally appointed ALJ).

The presiding ALJ only has authority to issue an initial decision, which may become final only by order of the Commissioners.[192] Assuming the initial decision is adverse to Mr. Hill, if he petitions for review, the ALJ decision will be reviewed de novo by the Commissioners.[193] Finally, judicial review in federal court will be available for Mr. Hill if he is "aggrieved by a *final order of the [c]ommission*."[194]

Assuming the Commissioners' decision is adverse to Mr. Hill, he will likely challenge the decision to an appropriate federal circuit court. Once there, he will once again challenge the nature of SEC

189 *See Tilton*, 2016 U.S. App. LEXIS 9970, at *36; Jarkesy v. SEC, 803 F.3d 9, 30 (D.C. Cir. 2015).

190 *See* 15 U.S.C. § 78y(a)(1) (2012).

191 *See Hill*, 2016 U.S. App. LEXIS 10946, at *44 (citing 15 U.S.C. § 78y).

192 17 C.F.R. § 201.360(b)(1) (2015).

193 *Id.* § 20.411.

194 *See* 15 U.S.C. § 78y(a)(1) (emphasis added).

ALJ appointments. However, the federal court will not have the power to grant Mr. Hill any relief because his claim will be moot.

Under the mootness doctrine, "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them."[195] Deciding the question of whether the SEC ALJ appointments process (at the time when review will be available) will not affect the rights of Mr. Hill, and thus the court of appeals will have no power to decide the question. As pointed out by Judge May:

> If Plaintiff is required to raise his constitutional law claims following the administrative proceeding, he will be forced to endure what he contends is an unconstitutional process. Plaintiff could raise his constitutional arguments only after going through the process he contends is unconstitutional—and thus being inflicted with the ultimate harm Plaintiff alleges . . . . By that time, Plaintiff's claims would be moot and his remedies foreclosed because the Court of Appeals cannot enjoin a proceeding which has already occurred.[196]

Mr. Hill could not even seek damages for the unconstitutional adjudication after the fact, as the SEC has sovereign immunity.[197]

As neither damages nor injunctive relief from the ALJ adjudication is available, a federal court decision could not "affect the rights" of Mr. Hill, and thus the appellate court would render the challenge moot, precluding all judicial review.

One could argue that the proper remedy would be for the appellate court to declare the ALJ adjudication unconstitutional, and vacate the Commissioners' order that is based on the unconstitutional adjudication. However, this remedy would exceed the scope of the circuit court's statutory review power, as determined to be the exclusive means of judicial review by the Eleventh Circuit.[198] Review is only available for those aggrieved by a "*final order* of the *Commission*," not an initial decision by an ALJ.[199]

In a normal case, a mistake by an ALJ in an initial order adopted by the Commissioners would give rise to a final order of the Commissioners, appealable to a circuit court. This is because the error will

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195 DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (quoting North Carolina v. Rice, 404 U.S. 244, 246 (1971)).

196 Hill v. SEC, 114 F. Supp. 3d 1297, 1307 (N.D. Ga. 2015), *vacated*, No. 15-12831, No. 15-13738, 2016 U.S. App. LEXIS 10946 (11th Cir. June 17, 2016).

197 *Id.* at 1319–20 (citing Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp., 715 F.3d 1268, 1289 (11th Cir. 2013)).

198 *See Hill*, 2016 U.S. App. LEXIS 10946 (citing 15 U.S.C. § 78y).

199 15 U.S.C. § 78y(a)(1) (emphasis added).

essentially become a part of the Commissioners' order. However, the improper appointment of an SEC ALJ—as contended by Mr. Hill—will likely be treated differently. The very existence and structure of the ALJ office will not be part of the SEC's final order, it is only the means in which the Commissioners will make their determination. In other words, the constitutional error will not be a part of the final, appealable order. This is reinforced by the fact that the Commissioners have the power to preside over SEC proceedings themselves.[200] Once the Commissioners make a final determination, they will remedy any appointments problem that may have existed in the initial determination, as that decision cannot become final without Commissioner approval.

Even if, on direct review, a court of appeals rejects this contention, the practical result will be the same. This is because to even reach the direct appeal stage, the initial decision by the ALJ must be adverse to Mr. Hill, and that decision must be confirmed, after de novo review, by the Commissioners.[201] Even if a court of appeals finds the issue of ALJ appointment not moot, the Commissioners will not (as a practical matter) reverse their prior, supposedly de novo decision. To do so would require them to concede that their prior decision was incorrect, even though no higher standard of review will apply.[202]

As Mr. Hill's claims (along with those similarly situated) will be moot by the time direct judicial review is available, and because collateral challenges to ALJ appointments fail for lack of subject matter jurisdiction, it seems likely that the federal circuit courts will never hear the merits of a challenge to the appointments procedure of SEC ALJs. However, certain plaintiffs may be able to preserve their ability to challenge ALJ appointments.

IV. The Possibility of a Future Challenger: Applying the "Capable of Repetition Yet Evading Review" Exception

Even though the Eleventh Circuit (and some of its sister circuits) has ruled that plaintiffs like Mr. Hill cannot collaterally attack the constitutionality of ALJ appointments, there may be an alternative

200 *See* 17 C.F.R. § 201.110 (2015).

201 *Id.* § 20.411.

202 In other words, if the Commissioners determine, without any deference to the ALJ, that Mr. Hill violated federal securities regulations, they will not later hold that Mr. Hill did not violate federal securities laws, given that their original determination was meant to be de novo in the first place.

means for Mr. Hill (and others) to challenge the appointments procedure of ALJs, even after the Commissioners issue a final judgment. This process would use the "capable of repetition, yet evading review" doctrine ("Doctrine"), an exception to the nonmootness requirement of justiciability.[203] The Doctrine has two requirements: "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again."[204]

As to the first element, assuming district courts do not have jurisdiction to adjudicate the constitutionality of ALJ appointments,[205] the challenged action is in a way, "too short [in duration] to be fully litigated prior to cessation or expiration."[206] Although "duration" is temporal, here, the challenged action will *never* be able to be reviewed because the claim will become moot once the SEC Commissioners review the ALJ decision.[207] Additionally, while it may be a stretch to say that this means the action is "too short in duration to be fully litigated," it is at least a conceivably valid argument.[208]

As to the second element of the Doctrine, "there is a reasonable expectation that the same complaining party will be subject to the same action again," in some cases.[209] Mr. Hill could certainly make another trade that triggers SEC enforcement action, and that enforcement, once again, could take place in an administrative setting, thus satisfying the second prong. More likely, the SEC could call professional traders or large investment banks before an ALJ multiple times. Although this is not certain, the second element has been satisfied on more tenuous grounds, including, in the context of abortion rights, the possibility that a litigant will become pregnant and desire an abortion (again) sometime in the future.[210] Therefore, while *Mr. Hill* may not satisfy the second element of the mootness exception, *other potential litigants* likely do.

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203 FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 462 (2007) (citing City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983); S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)).

204 *Id.* (quoting Spencer v. Kemna, 523 U.S. 1, 17 (1998)).

205 *See, e.g.*, Jarkesy v. SEC, 803 F.3d 9, 30 (D.C. Cir. 2015).

206 *Wis. Right to Life, Inc.*, 551 U.S. at 462 (quoting *Spencer*, 523 U.S. at 17).

207 *See* Hill v. SEC, 114 F. Supp. 3d 1297, 1319–20 (N.D. Ga. 2015), *vacated*, No. 15-12831, No. 15-13738, 2016 U.S. App. LEXIS 10946 (11th Cir. June 17, 2016); *supra* Section I.B.

208 The exact contours of this argument are left for further discussion.

209 *Wis. Right to Life, Inc.*, 551 U.S. at 462 (quoting *Spencer*, 523 U.S. at 17).

210 Roe v. Wade, 410 U.S. 113, 125 (1973).

If the Doctrine applies, a U.S. court of appeals could reach the merits of an administrative litigant's Appointments Clause challenge, even though it has technically become moot after an agency's final decision.[211] Therefore, even if a district court lacks original jurisdiction, a federal court may still hear the issue. In such a case, the courts of appeals should adopt Judge May's opinion on the merits.[212]

This alternative means of bringing the issue to federal court once again raises the problem of destroying seventy years of ALJ decisions. However, litigants who have already exhausted their appeal process through the APA cannot simply reopen their case for further review.[213] Moreover, courts will likely find that a holding that ALJs are unconstitutionally appointed only applies prospectively.[214] A court could also stay a judgment against the SEC (or another agency) until Congress can remedy Appointments Clause problems.[215]

V. The Disingenuous Argument and an Alternative Solution

While technically correct on the merits of the challenge (in the Author's opinion), the *Hill* decision accepts a somewhat disingenuous argument. Mr. Hill complained that he was "forced to take part in a proceeding where the prosecutor, judge, and initial appeals court are all instruments in an SEC machinery that operates largely outside the judiciary's purview."[216]

Judge May offered a technical solution: the Commissioners could simply issue an appointment themselves.[217] Because Commissioners, acting as a group, are the "Head of a Department,"[218] their involvement in ALJ appointments would remedy the Appointments Clause violation.[219] Adopting this procedure may not end the matter of the

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211 *See Wis. Right to Life, Inc.*, 551 U.S. at 462. In the SEC context, this occurs once the Commissioners make a final decision. 17 C.F.R. § 201.360(d)(2) (2015).

212 *See supra* Section II.C.

213 An attempted collateral challenge would be barred by both the statute of limitations and, if the capable of repetition exception applies, res judicata. *See, e.g.*, SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1463 (2d Cir. 1996).

214 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87–88 (1982); Chevron Oil Co. v. Huson, 404 U.S. 97, 107–09 (1971).

215 *See, e.g.*, *N. Pipeline Constr. Co.*, 458 U.S. at 88.

216 Plaintiff Charles L. Hill, Jr.'s Motion for a Temporary Restraining Order, or in the Alternative, a Preliminary Injunction at 2, Hill v. SEC, 114 F. Supp. 3d 1297 (N.D. Ga. 2015) (No. 1:15-cv-01801).

217 *Hill*, 114 F. Supp. 3d at 1320.

218 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 513 (2010).

219 *See* U.S. Const. art. II, § 2, cl. 2.

constitutionality of SEC ALJs altogether, but it would certainly solve the technical Appointments Clause problem.

This solution—which would have the Commissioners appoint SEC ALJs themselves—would only make SEC ALJs more beholden to the "SEC machinery." Instead of appointments through an evaluative process (with input from a somewhat independent Chief Administrative Law Judge),[220] SEC ALJ appointments would be completely dependent on the opinions of the leaders of the "SEC machinery." It stands to reason that the Commissioners would be more likely to appoint ALJs who generally agree with their policies than would result from the current appointments process. Therefore, in arguing for independent adjudicators, Mr. Hill may subject future litigants to administrative proceedings presided over by ALJs more beholden to the Commissioners than those who would be appointed under the current appointments procedure.

To reconfigure the remedy with the alleged harm, Professor Kent Barnett has proposed that ALJs be appointed by the United States Court of Appeals for the District of Columbia.[221] Although the political practicality of this solution is up for debate,[222] this solution would at least take the ALJ appointment process outside of the "SEC machinery."

Conclusion

Hill v. SEC was a watershed decision, holding that SEC ALJs are inferior officers of the United States, and thus must be appointed by the President, the heads of departments, or the courts of law. Given current precedent, Judge Leigh Martin May of the United States District Court for the Northern District of Georgia decided *Hill* correctly by rejecting *Landry* and properly applying *Freytag*. However, the Eleventh Circuit ruled that Mr. Hill lacked standing to collaterally challenge the appointment of SEC ALJs. This will preclude Mr. Hill from having the opportunity to challenge the ALJ appointments procedure even on direct review, as his challenge will become moot once the Commissioners render their own final decision. Using the "capable of repetition yet evading review" exception, however, certain

220 *Hill*, 114 F. Supp. 3d at 1303 (citing 5 C.F.R. § 930.204 (2015)).

221 Barnett, *supra* note 10, at 832.

222 Richard J. Pierce, Jr., Professor of Law, The George Washington University Law School, Remarks at the 2015 ABA Administrative Law Conference (Oct. 29, 2015) (explaining that the veterans' lobby would likely block attempts to amend the ALJ appointments process in Congress).

plaintiffs will be able to raise their Appointments Clause challenge in a federal court of appeals. Before this takes place, causing chaos in administrative adjudications across the country, the SEC and similarly situated agencies should remedy their Appointments Clause issues to ensure current and future administrative adjudications cannot be challenged on Appointments Clause grounds.