UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2675/May 14, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16383

In the Matter of CHARLES L. HILL, JR.	ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION ON CONSTITUTIONAL ISSUES

The Securities and Exchange Commission initiated this proceeding under Section 21C of the Securities Exchange Act of 1934. The Division of Enforcement alleges that Respondent Charles L. Hill, Jr. "engaged in insider trading, in violation of Section 14(e) of the Exchange Act and Rule 14e-3 thereunder, in connection with" his purchase and sale of securities of Radiant Systems, Inc. Order Instituting Proceedings (OIP) at 1. A hearing is scheduled to begin on June 15, 2015, in Atlanta, Georgia.

Mr. Hill has moved for summary disposition, raising three constitutional issues.[1] First, he argues that this proceeding violates Article II of the Constitution because administrative law judges are protected by two layers of tenure protection. Mot. at 2-10. Second, Mr. Hill asserts that by giving the Commission the authority to pursue cases before administrative law judges, Congress violated the delegation doctrine in Article I of the Constitution. *Id.* at 11-15. Third, Mr. Hill argues that because he is an "unregulated individual[]," Congress violated his Seventh Amendment right to a jury trial by giving the Commission authority to bring this matter before an administrative law judge. *Id.* at 16-19. Although Mr. Hill styles his pleading as motion for summary disposition, the remedy he seeks is dismissal. *Id.* at 1, 10, 20.

For the reasons stated below, I DENY Mr. Hill's motion.

[1] This Order addresses only Mr. Hill's motion for summary disposition on constitutional issues. I previously ruled on Mr. Hill's motion for summary disposition on the merits. *See Charles L. Hill, Jr.*, Admin. Proc. Rulings Release No. 2649, 2015 SEC LEXIS 1789 (May 8, 2015).

1. Threshold issues

A. Authority to entertain Mr. Hill's arguments

Before considering Mr. Hill's arguments, I must determine whether I have the authority to address them. *See Plaquemines Port, Harbor and Terminal Dist. v. Fed. Mar. Comm'n*, 838 F.2d 536, 542 n.3 (D.C. Cir. 1988) ("Agency jurisdiction, like subject matter in the federal courts, cannot be achieved by consent of the parties."). After receiving Mr. Hill's motion, I directed the parties to address "whether I have the authority to rule on Mr. Hill's constitutional challenges" and directed their attention to *Elgin v. Dep't of the Treasury*, 132 S. Ct. 2126, 2136-37 & n.8 (2012), and *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994). *Charles L. Hill, Jr.*, Admin. Proc. Rulings Release No. 2564, 2015 SEC LEXIS 1473, at *1 (Apr. 21, 2015). The Division responded that I have authority to rule on Mr. Hill's challenges. Opp'n at 1-3. Mr. Hill disagrees.[2] Reply at 1-3.

Subsequent to instructing the parties to address my authority to rule on Mr. Hill's constitutional challenges, it came to my attention that the Commission has repeatedly held that it lacks the authority "to invalidate the very statutes that Congress has directed [it] to enforce." *Milton J. Wallace*, Exchange Act Release No. 11252, 1975 SEC LEXIS 2238, at *7 (Feb. 14, 1975); *see William J. Haberman*, Exchange Act Release No. 40673, 1998 SEC LEXIS 2466, at *10 n.14 (Nov. 12, 1998), *aff'd*, 205 F.3d 1345 (8th Cir. 2000); *Application of J. A. Sisto & Co.*, Exchange Act Release No. 2568, 1940 WL 36421, at *5 n.5 (July 1, 1940); *Walston & Co.*, Exchange Act Release No. 2150, 1939 SEC LEXIS 632, at *2 (June 14, 1939). It has recently reaffirmed this interpretation of its authority. *See* Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, Exchange Act Release No. 74244, 2015 SEC LEXIS 499, at *703 & n.1001 (Feb. 11, 2015). The Commission thus operates on the assumption that its "governing statutes are constitutional" "[u]nless and until the courts declare otherwise." *Milton J. Wallace*, 1975 SEC LEXIS 2238, at *7.

It follows from the foregoing that I lack the authority to rule on the constitutionality of particular provisions of the Exchange Act. I therefore summarize Mr. Hill's arguments below, together with the Division's responses, before addressing those issues that I retain authority to address. I have determined which arguments I may address by asking whether ruling in Mr. Hill's favor would necessarily require me to hold that a provision of the Exchange Act is unconstitutional. If so, I lack the authority to address the issue presented.

B. The administrative law judge position

Administrative law judges are creatures of statute, *see* 5 U.S.C. §§ 3105, 5372, who are insulated from agency influence by a number of statutes and regulations. At the outset, agencies are limited in their ability to choose new administrative law judges. An agency wishing to appoint a new administrative law judge must request a list of eligible candidates from the Office

[2] Mr. Hill is raising the issues now in the event he must do so in order to preserve them for further review.

of Personnel Management (OPM) and must choose from among the "highest three eligible[]" candidates certified by OPM.[3] 5 U.S.C. § 3318(a); 5 C.F.R. § 332.404. Once an individual is hired, he is not subject to evaluation by the agency and his rate of promotion is fixed by statute. 5 U.S.C. § 5372(b)(3)(A); 5 C.F.R. § 930.206(a). An agency may not monetarily reward an administrative law judge for issuing decisions favorable to the agency or for any other reason. 5 C.F.R. § 930.206(b). An agency is also barred from assigning administrative law judges to "perform duties inconsistent with their duties and responsibilities as administrative law judges." 5 U.S.C. § 3105. Once hired, an administrative law judge may not be removed or disciplined except for good cause shown before the Merit Systems Protection Board. 5 U.S.C. § 7521(a); 5 C.F.R. § 930.211. Congress further insulated administrative law judges from agency influence by giving agencies the power to review *de novo* an administrative law judge's decision, thereby removing an incentive to interfere with the administrative law judge's decisional process. *See* 5 U.S.C. § 557(b) (stating that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision").

2. Article II challenge

A. Mr. Hill's position

Principally relying on *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), Mr. Hill argues that because administrative law judges are protected by two layers of tenure protection, permitting an administrative judge to adjudicate this matter violates Article II of the Constitution. Mot. at 2-10. The argument proceeds in the following fashion.

Under the Constitution, there are two types of executive officers: principal officers and inferior officers. Mot. at 3; *see* U.S. Const., art. II, § 2, cl. 2; *Morrison v. Olson*, 487 U.S. 654, 670 (1988). A person is an executive officer if he or she is appointed and "exercis[es] significant authority pursuant to the laws of the United States." Mot. at 3 (quoting *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 881 (1991)) (modification in original). "'Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary.'" *Morrison*, 487 U.S. at 670 (quoting *Buckley v. Valeo*, 424 U.S. 1, 132 (1976)). In Mr. Hill's view, administrative law judges are inferior officers. Mot. at 4-9 (relying on *Freytag*). And, he implicitly says, *cf*. Mot. at 9-10, inferior officers cannot be doubly insulated from presidential removal, *see Free Enterprise*, 561 U.S. at 501-02.

Advancing from this premise, Mr. Hill notes that administrative law judges may only be removed from office if the Commission shows good cause for removal before the Merit Systems Protection Board. Mot. at 9. Additionally, both the Commission's members and members of the Merit Systems Protection Board are removable only for "inefficiency, neglect of duty, or

[3] Forcing agencies to choose from among the top three candidates is thought to prevent "agencies [from] hir[ing] ALJs with a more 'pro-enforcement attitude.'" Kent Barnett, *Resolving the ALJ Quandary*, 66 Vand. L. Rev. 797, 805 (2013) (citation omitted).

malfeasance in office." *Id.*; *see* 5 U.S.C. § 1202(d) (Merit Systems Protection Board).[4] According to Mr. Hill, under *Free Enterprise*, "this dual-layer removal scheme" is constitutionally infirm because it "precludes the President from exercising any oversight of executive officers." Mot. at 9-10 (relying on 561 U.S. at 484). As a result of this alleged infirmity, Mr. Hill argues that this proceeding must be dismissed. *Id.* at 10.

B. The Division's position

The Division responds that Commission administrative law judges are employees of the Commission and not executive officers, inferior or otherwise. Opp'n at 6-14. Even if administrative law judges are inferior officers, the Division says the use of administrative law judges does not violate Article II. *Id.* at 15. According to the Division, the Supreme Court stated that its decision in *Free Enterprise* did not apply to administrative law judges. *Id.*; *see* 561 U.S. at 507 n.10. In this respect, the Division points to the fact that an administrative law judge's authority is only adjudicatory; an administrative law judge has no enforcement or policymaking powers. Opp'n at 15-16. The Division believes this also serves to distinguish the Commission's use of administrative law judges from the circumstance presented in *Free Enterprise*. *Id.* at 16-19.

C. Dual-layer tenure protection does not violate the Constitution.

Free Enterprise concerned the Public Company Accounting Oversight Board. Congress "established the [Board], to oversee the audit of public companies that are subject to the securities laws." *See* Sarbanes-Oxley Act of 2002, Pub. L. 107-204, §101(a), 116 Stat. 745 (codified at 15 U.S.C. § 7211(a)). Congress gave the Board "expansive powers" to "regulate every detail of an accounting firm's practice." *Free Enterprise*, 561 U.S. at 485. The Board was thus empowered to "promulgate[] . . . standards, perform[] routine inspections of all accounting firms, demand[] documents and testimony, and initiate[] formal investigations and disciplinary proceedings." *Id.* It was also given authority to "issue severe sanctions in its disciplinary proceedings." *Id.* Although the Board was placed under the Commission's authority, its members could only be removed "'for good cause shown,' 'in accordance with' certain procedures." *Id.* at 486. And members of the Commission can only be removed for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 487.

The Supreme Court ultimately concluded that the double-layer of removal protection afforded members of the Board violated the Constitution's separation of powers. It noted that the Sarbanes-Oxley Act not only protected "Board members from removal except for good cause, but [it] withdr[ew] from the President any decision on whether that good cause exists" and instead gave that authority to Commissioners who are not "subject to the President's direct control." 561 U.S. at 495. Under this regime, the Board was "not accountable to the President,

[4] Section 4 of the Exchange Act does not say anything about the removal of members of the Commission. *See* 15 U.S.C. § 78d. The Supreme Court in *Free Enterprise* took it as a given that "the Commissioners cannot themselves be removed by the President except under the . . . standard of 'inefficiency, neglect of duty, or malfeasance in office,'" set forth in *Humphrey's Ex'r v. United States*, 295 U.S. 602, 620 (1935). 561 U.S. at 487.

and a President" was "not responsible for the Board." *Id.* And this situation presented a constitutional problem because it diminished the President's constitutional authority to execute the laws. *Id.* at 496. As the Supreme Court put it, the President "is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith." *Id.* at 496; *see id.* at 498 ("this Act subverts the President's ability to ensure that the laws are faithfully executed").

Having identified the constitutional violation, the Supreme Court concluded by clarifying that it was not the existence of the Board itself that violated the constitution. *Free Enterprise*, 561 U.S. at 508-09. Rather, it was the Board members' tenure protection in combination with the functions the Board performed that caused the violation. *Id.* Removal of the Board members' tenure protection thus served to remedy the separation of powers violation. *Id.*

Considering the foregoing and Mr. Hill's motion, it is apparent that his first argument is directed at the statute that grants administrative law judges certain protections from removal. Removal of administrative law judges is governed by 5 U.S.C. § 7521, which permits removal only on a showing of good cause before the Merits Systems Protection Board. A literal reading of Commission precedent suggests that because 5 U.S.C. § 7521 is not one of the "very statutes that Congress has directed [the Commission] to enforce," I have the authority to reach the merits of Mr. Hill's argument. *See Milton J. Wallace*, 1975 SEC LEXIS 2238, at *7. It would be incongruous, however, if I were unable to address the constitutionality of a provision of the Exchange Act, an Act I am regularly required to construe, but able to address the constitutionality of Section 7521, a provision I do not normally encounter. I therefore doubt that I have the authority to address this issue. Nonetheless, I resolve that doubt in favor of addressing this issue, operating under the assumption that I have authority to do so.

For purposes of this Order, I will assume that administrative law judges are inferior officers.[5] Even assuming administrative law judges are inferior officers, their tenure protections do not violate the Constitution's separation of powers.

As an initial matter, Congress can impose some "limited restrictions on the President's removal power." *Free Enterprise*, 561 U.S. at 495. Indeed, the question of whether limits on the President's power of removal are constitutional "will depend upon the character of the office" at issue. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631 (1935); *see id*. (contrasting the situation in *Myers v. United States*, 272 U.S. 52 (1926), involving an "officer . . . who was

[5] Both parties have presented strong arguments in support of their positions. As has been recognized, "[t]he line between 'mere' employees and inferior officers is anything but bright." *Landry v. FDIC*, 204 F.3d 1125, 1132 (D.C. Cir. 2000). Cutting against the Division is the fact that Congress (1) has for certain purposes exempted administrative law judges from the definition of the term "employee," 5 U.S.C. § 4301(2)(D); and (2) has permitted the Commission to assign administrative cases to be heard before "a division of the Commission, an individual Commissioner, *an administrative law judge, or an employee* or employee board," 15 U.S.C. § 78d-1(a) (emphasis added). Cutting against Mr. Hill is the fact that administrative law judges issue only initial decisions subject to *de novo* review by the Commission.

responsible to the President, and to him alone, in a very definite sense," with that of an officer whose "duties . . . were not purely of an executive nature but partook of the judiciary quality as well"). As the Supreme Court explained in *Morrison*, "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light." 487 U.S. at 691; *cf. Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985) ("The enduring lesson of [*Crowell v. Benson*, 285 U.S. 22 (1932)] is that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.").

In that light, one can see that an administrative law judge's tenure protections do not violate the Constitution. The problem with the tenure protections in *Free Enterprise* was that the Board exercised quintessentially executive functions; it performed investigative, enforcement, and policymaking functions. *See* 561 U.S. at 485. Yet, the Sarbanes-Oxley Act did not "give[] the Commission effective power to start, stop, or alter individual Board investigations," which are "executive activities typically carried out by officials within the Executive Branch." *Id.* at 504. By stripping the President of his executive power "'of appointing, overseeing, and controlling those who execute the laws,'" 561 U.S. at 492 (quoting 1 Annals of Cong. 463 (1789)), Congress violated the Constitution's separation of powers.

In contrast with members of the Board who exercise classically executive functions, the Commission's administrative law judges exercise only adjudicatory functions. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 n.8 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff'd in part and rev'd in part*, 561 U.S. 477 (2010); *see also Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 756-57 (2002) (discussing the similarities between trial judges and administrative law judges and between "administrative adjudications and judicial proceedings"). Indeed, they are barred from performing any other functions. 5 U.S.C. § 3105. The Commission's administrative law judges are therefore not among "those who execute the laws."[6] *Free Enterprise*, 561 U.S. at 492. Furthermore, their jurisdiction is limited to a specific subject matter and they "lack[] policymaking or significant administrative authority." *Morrison*, 487 U.S. at 691. As a result, the dual-tenure protection afforded administrative law judges does not unconstitutionally impair the President's ability to remove executive branch officials because those particular officials do not perform functions "central to the functioning of the Executive Branch." *Id.*

It is thus not surprising that the Supreme Court qualified its decision in *Free Enterprise*, saying that it did not apply to administrative law judges. 561 U.S. at 507 n.10. The Court explained that unlike Board members, "many administrative law judges . . . perform adjudicative rather than enforcement or policymaking functions, . . . or possess purely recommendatory powers." *Id.* (internal citation omitted). And this distinction matters because whereas enforcement or policymaking functions are "central to the functioning of the Executive Branch," *Morrison*, 487 U.S. at 691, adjudicating is not.

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[6] An administrative law judge is involved in an enforcement proceeding only to the same extent that a trial judge is involved in a prosecution. Like a trial judge, an administrative law judge does not investigate offenses, bring charges, or prosecute cases.

Indeed, although Congress gave the Commission no choice when it came to the Board, there is no requirement the Commission even use administrative law judges. *See* 5 U.S.C. § 556(b); 15 U.S.C. § 78d-1(a) (permitting the Commission to assign proceedings to "a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board"); *see also Free Enterprise*, 537 F.3d at 699 n.8 (Kavanaugh, J., dissenting). And when the Commission does use an administrative law judge, the administrative law judge does not issue a final agency decision but instead issues an initial decision that is subject to *de novo* review by the Commission.[7] *See* 5 U.S.C. § 557(b); 17 C.F.R. § 201.360(a). In this way, the Commission exercises complete control over the outcome and the administrative law judge in the way that matters most to a respondent.[8]

Furthermore, taken to its logical end, Mr. Hill's argument would mean that almost no independent agency could use administrative law judges. If "'a page of history is worth a volume of logic,'" however, it is unlikely this could be the case. *See Free Enterprise*, 537 F.3d at 699 (Kavanaugh, J., dissenting) (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)).[9]

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[7] The Attorney General's Manual on the Administrative Procedures Act, "a source . . . give[n] 'considerable weight,'" *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 (D.C. Cir. 1986), *see Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979), explains that an initial decision is "advisory in nature," Attorney General's Manual on the Administrative Procedures Act 83 (1947). An "agency is in no way bound by [an initial] decision." *Id*.; *see JCC, Inc. v. Commodity Futures Trading Com'n*, 63 F.3d 1557, 1566 (11th Cir. 1995); *Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986). Rather, except to the extent an agency defers to an administrative law judge's credibility determination, *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494-97 (1951), "the function of" the initial decision is to "sharpen[] . . . the issues for subsequent proceedings," Attorney General's Manual at 84.

[8] Mr. Hill says that an administrative law judge's initial decision can, in certain circumstances, be the Commission's final decision. Mot. at 8-9. While it is true that an administrative law judge's initial decision can become the Commission's final decision if a party fails to seek review by the Commission, *see* 17 C.F.R. § 201.360(d)(2), the initial decision will only become final if the Commission declines to *sua sponte* review the initial decision, *id.* And even in that instance, the initial decision only becomes final after the Commission issues an order to that effect. *Id.*; *cf. Stanley Jonathan Fortenberry*, Securities Act of 1933 Release No. 9742, 2015 SEC LEXIS 1271 (Apr. 7, 2015) (finality order). A Commission administrative law judge is powerless to cause his or her initial decision to become a final decision.

[9] The Social Security Administration appears to employ about 1,300 administrative law judges who annually issue over 700,000 decisions. *See* http://www.ssa.gov/appeals/about_odar.html (last visited May 12, 2015). Its commissioner is removable only for "neglect of duty or malfeasance in office." 42 U.S.C. § 902(a)(3). Many other independent agencies that use administrative law judges are also headed by officials who are removable only on similar grounds. *See* 15 U.S.C. § 41 (Federal Trade Commission); 29 U.S.C. § 661(b) (Occupational Safety and Health Review Commission); 30 U.S.C. § 823(b)(1) (Federal Mine Safety and Health Review Commission); 42 U.S.C. § 7171(b)(1) (Federal Energy

In the end, if 5 U.S.C. § 7521 were unconstitutional as applied to this situation, the solution would be for the Commission to assign this matter to "an employee or employee board," as authorized by 15 U.S.C. § 78d-1(a). *See Free Enterprise*, 561 U.S. at 509-10. This would, of course, represent a pyrrhic victory for Mr. Hill because his adjudicator would not be protected from Commission influence.[10] *See* 5 U.S.C. §§ 5372(b), 7521(a); 5 C.F.R. § 930.206; *see also* 5 C.F.R. §§ 930.201(f)(3), (4), .207(c), .211.

3. Delegation challenge

A. Mr. Hill's position

Mr. Hill argues that by giving the Commission the discretion to choose whether to seek civil penalties against unregulated individuals either administratively or in district court, Congress impermissibly delegated legislative power to the Commission. Mot. at 11-15. Mr. Hill supports his argument by pointing out that prior to the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010), the Commission had to bring an action in district court in order to seek civil penalties against an unregulated person. *Id.* at 12.

Relying on *INS v. Chadha*, 462 U.S. 919 (1983), Mr. Hill asserts that the delegation at issue is legislative. Mot. at 11-13; Reply at 5. Mr. Hill also relies on *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001). Mot. at 13. In *Whitman*, the Supreme said that because Congress may not delegate its legislative power, when it "confers decisionmaking authority upon agencies[,] [it] must 'lay down . . . an intelligible principle to which the person or body authorized to [act] is directed to conform.'" 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). According to Mr. Hill, in light of *Whitman*, "the need for substantial congressional direction is required" here because "Congress [has] confer[red] authority upon the Commission to institute enforcement actions for civil penalties against" unregulated individuals "in an administrative forum that lacks the procedural safeguards found in an Article III court."[11] Mot. at 13. Mr. Hill argues that because Congress has provided the Commission with no standard by which to judge whether to bring an action administratively or in district court, Congress violated Article I and contravened the Constitution's separation of powers. *Id.* at 15; Reply at 6-8.

Regulatory Commission); 46 U.S.C. § 301(b)(5) (Federal Maritime Commission); 49 U.S.C. § 1111(c) (National Transportation Safety Board).

[10] Mr. Hill's complaint about the tenure protections afforded administrative law judges is thus somewhat odd because those tenure protections are designed to protect him and every litigant appearing before an administrative law judge.

[11] The "lack[] [of] procedural safeguards" is presumably a reference to the fact that hearsay is not *per se* inadmissible in administrative proceedings, *see* 5 U.S.C. § 556(d), 17 C.F.R. § 201.320, and the fact that although Mr. Hill has access to nation-wide subpoena authority, 17 C.F.R. § 201.232, his ability to depose witnesses is much more limited than would be the case in a federal district court, *see* 17 C.F.R. § 201.233.

B. The Division's position

The Division responds that "prosecuti[ng] . . . violations of federal law is" an "executive function." Opp'n at 20. To the Division, the implication of this fact is not that Congress has impermissibly delegated legislative power; rather it is that Congress has given the Commission "broad prosecutorial discretion." *Id.* at 21.

Even if the decision where to bring an action is legislative, the Division asserts that no impermissible delegation occurred because Congress gave the Commission an "intelligible principle" to guide its decision. Opp'n at 22. The Division says that Mr. Hill ignores the statutory limits "on the Commission's ability to obtain civil penalties in administrative proceedings." *Id.* at 23 (citing 15 U.S.C. § 78u-2).

C. I lack the authority to address this issue

In order to Rule in Mr. Hill's favor, I would necessarily have to find unconstitutional a provision of the Exchange Act. Specifically, I would have to find that Section 21B of the Exchange Act, as amended by Section 929P(a)(2) of the Dodd-Frank Act, is unconstitutional. *See* 15 U.S.C. § 78u-2. Because Commission precedent bars me from taking this action, I lack the authority to rule on this issue. *See Milton J. Wallace*, 1975 SEC LEXIS 2238, at *7; *see also Whitman*, 531 U.S. at 473 ("Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.").

4. Seventh Amendment challenge

A. Mr. Hill's position

Mr. Hill argues that by giving the Commission authority to bring an administrative action against an unregulated individual, Congress infringed on his Seventh Amendment right to a jury trial. Mot. at 16-17. The Seventh Amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. Mr. Hill posits that the phrase "suits at common law" means "'suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." Mot. at 16 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989)). Relying on *Granfinanciera*, he says that one first compares the present action with those brought in eighteenth century England and second determines whether the action is legal or equitable in nature. *Id.* Mr. Hill argues that this proceeding is akin to an action in debt which would have been tried before a jury in a court of law. *Id.* at 17-18.

Granting that "Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment," Mot. at 18 (quoting *Granfinanciera*, 492 U.S. at 51), Mr. Hill argues that even if enforcement actions concern public rights created by Congress, until 2010 enforcement actions involving unregulated individuals had to be brought in district courts if the Commission sought civil penalties, *id.* He thus argues that in the Dodd-Frank Act,

Congress did not create a *new* public right.[12] *Id.* at 18-19; Reply at 10-12. Based on this premise, he asserts that Congress has impermissibly "altered" his Seventh Amendment rights. Mot. at 19.

B. Division's position

The Division responds by principally relying on *Atlas Roofing Co. Inc. v. OSHA*, 430 U.S. 442 (1977). Opp'n at 24-25. In *Atlas Roofing*, the Supreme Court said that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency." 430 U.S. at 455. The Supreme Court also said that the Seventh Amendment does not "prevent[]" Congress "from committing some new types of litigation to administrative agencies with special competence in the relevant field[,] . . . even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law instead of an administrative agency." *Id.*

Relying on the proposition that "'[p]ublic rights' cases are those that 'arise between the Government and persons subject to its authority,'" Opp'n at 24 (quoting *Atlas Roofing*, 430 U.S. at 457), the Division argues that Mr. Hill "has no right to a jury trial" because this matter "involv[es] statutorily created 'public rights,'" *id.* The Division concludes that Congress could "commit[] all securities law matters" to an administrative forum. *Id.* at 25. The Division thus says Mr. Hill's claim fails.[13] *Id.*

C. I lack the authority to address this issue

As with Mr. Hill's second issue, in order to rule in his favor, I would necessarily have to find unconstitutional Section 21B of the Exchange Act. I lack the authority to do that. *See Milton J. Wallace*, 1975 SEC LEXIS 2238 at *7.

5. Conclusion

In light of the foregoing, I DENY Mr. Hill's motion for summary disposition.

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James E. Grimes
Administrative Law Judge

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[12] Mr. Hill's reference to "public rights" refers the Supreme Court's recognition that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency." *Atlas Roofing Co. Inc. v. OSHA*, 430 U.S. 442 (1977); *see Crowell v. Benson*, 285 U.S. 22, 50-51 (1932).

[13] Mr. Hill argues that the relevance of *Atlas Roofing* is confined to instances in which Congress creates new public rights, which he asserts is not the case here. Reply at 10-12.