

Constitutionality of the SEC's Growing Administrative Forum

by Shea Bettwy, J.D. Candidate 2016 | September 4, 2014

The Securities and Exchange Commission (“SEC”) is [increasingly favoring the administrative process](#) over the court system for prosecuting securities cases, likely as a result of expanded powers included in the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act. For example, in the administrative forum, the SEC now has the [authority to prosecute all individuals](#) – even those not associated with regulated entities – and can impose more fines than it could before. Russell Ryan, a partner at King & Spalding in Washington, pointed out that the SEC obtained [a record \\$3.4 billion in monetary sanctions in 2013](#) and continues to bring multi-million dollar actions. Notably, the SEC recently added two administrative law judges to its staff, increasing the number of judges from three to five. Furthermore, in June, Enforcement Director Andrew Ceresney announced that the SEC will [bring more insider trading actions through administrative proceedings](#).

The gripe with the SEC's expanded administrative powers is that the SEC enjoys the comfort of major procedural advantages in the administrative forum over respondents who would prefer to settle matters in federal court. According to Ceresney, [insider trading cases are particularly difficult for the SEC to win in court](#), since evidence is “typically circumstantial,” “victim witnesses” are not available to influence juries, and juries tend to apply a higher standard than the preponderance of the evidence standard since they perceive the SEC as a criminal authority.

In the administrative forum, on the other hand, the [“SEC's rules favor the prosecution.”](#) [Lawyers have expressed concern](#) about the SEC's home-field advantage in administrative venues, and Ryan has gone so far as to characterize the SEC's administrative prosecutions as unconstitutional. A [complaint to a district court](#) regarding a recent SEC administrative action notes that respondents must “defend themselves in the truncated [administrative] proceeding with an extremely high volume of evidence, virtually no discovery, no protection of the Federal Rules of Civil Procedure, no counterclaims, no Federal Rules of Evidence ..., no jury, and no Article III judge ...” Ceresney insists, however, that the [SEC is “on pretty solid ground on the constitutionality”](#) of administrative proceedings, and will probably not consider proposals to include a removal process in the rules.

A hedge-fund manager [charged with securities fraud](#) in an SEC administrative action asked the [U.S. Court of Appeals for the District of Columbia to look into the constitutionality](#) of the SEC's administrative forum, arguing that the process lacks “minimum standards of fairness.” After Jarkesy filed an appeal (the District Court found that it lacked jurisdiction), the SEC [extended the deadline](#) for filing an initial decision to October 17.