

Administrative Law Judge Hiring and Constitutional Challenges

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2018 Advanced Texas Administrative Law Seminar

Appointments Clause

- The *President* “by and with the advice and *consent of the Senate*, shall appoint . . . judges of the Supreme Court, and 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*.”

Background

- “Buckets-of-Money” investment strategy.
- Enforcement penalty challenge based on ALJs being unconstitutional: “US officer” vs. “inferior officer.” Also claims of ALJ “bias.”
- D.C. Circuit disagrees (10th Circuit had earlier agreed); Supreme Court takes the case.
- U.S. Solicitor General defends SEC at D.C. Circuit; does a 180° change at Supreme Court and attacks the SEC’s decision.

Supreme Court Consideration

- Supreme Court appoints an amicus curiae to defend the SEC decision.
- Other amici file briefs, such as law professors, ALJ organizations, wealthy investors.
- Lively oral argument, active questioning: independent, merit-based, civil-service system vs. political accountability? new “US officer” definition based on who makes final decision?

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