

# Administrative Law Judge Hiring and Constitutional Challenges

Thomas K. Anson  
CLARK HILL | Strasburger

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 (10<sup>th</sup> 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?

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

## Title search: Administrative Law Judge Hiring and Constitutional Challenges

Also available as part of the eCourse

[2018 Advanced Texas Administrative Law eConference](#)

First appeared as part of the conference materials for the  
13<sup>th</sup> Annual Advanced Texas Administrative Law Seminar session  
"Administrative Law Judge Hiring and Constitutional Challenges"