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Stop protecting unconstitutional judges

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Imagine your amateur softball league has a bylaw that all umpires must be hired by the league commissioner. Before a big game, some emergency umps-for-hire pile out of a van and start officiating without the commissioner's approval. You're skeptical, but it's pointless to object during the game — the league has a hard rule that umpires won't respond if you challenge their credentials. They make some terrible calls, and after a tough loss, you protest the game to the league — both because of the bad calls and because they shouldn't have been allowed to umpire in the first place. Then comes the surprise: The league answers that despite its policy that umps must ignore all arguments about their hiring, you should have objected during the game anyway. And because you didn't object during the game, you've lost your chance to object after the game.

Sound ridiculous? It may be, but it's basically what happened to Willie Carr in his ongoing saga with the Social Security Administration. The SSA denied Carr's application for social security disability payments. To challenge that denial, Carr first had to make his case to one of the SSA's own administrative law judges. But those judges all suffered from a serious constitutional defect: They weren't appointed by the social security commissioner, which is the bare minimum the Constitution requires for "officers of the United States."

The SSA knew the appointment of its judges might be a problem. It explicitly warned all of its judges that people making claims before them might bring up the judges' appointments. The SSA told those judges in no uncertain terms *not* to address any such arguments. That means even if Carr had stood up in his hearing and objected to the judge, "you're out of order!" it wouldn't have made a lick of difference.

Carr lost his administrative hearing, and sure enough, not long after that the Supreme Court held that administrative judges of the Securites and Exchange Commission are indeed "officers of the United States" who must be appointed by their department head (if not by the president). That decision removed all doubt that Social Security judges are also officers of the U.S. and that they were appointed improperly. The acting commissioner of Social Security acknowledged as much by attempting to "ratify" the appointments of every judge in her agency.

Carr's case, meanwhile, had shifted to federal court, where he reasonably asked for a new hearing before a social security judge whose appointment complied with the Constitution. That's when the SSA first argued that Carr had lost the right to make this request by not raising an earlier (futile) protest before the invalid SSA judge herself. The Court of Appeals for the 10th Circuit accepted the SSA's argument and barred Carr from challenging the judge's appointment.

The Supreme Court took Carr's case and will soon decide whether he and hundreds of others in his position will ever have the opportunity to get a constitutionally compliant hearing.

Carr's case is an opportunity for the Supreme Court to settle an important question of administrative law. People who are unhappy with an agency action are generally required to go through every stage of that agency's complaint procedure before suing in court. Surviving the slog through an agency's bureaucratic appeals process is known by the legal term "exhaustion" (probably because that's what happens to people who endure it). Beyond this general requirement that people must progress through each *stage*, some agencies also have laws explicitly requiring that every specific *issue* a person wants to raise in federal court must have first been raised in those agency proceedings.

It's this stricter form of exhaustion, known as "issue exhaustion," that the SSA wants to impose on Carr. But as explained in an amicus brief filed by the New Civil Liberties Alliance and the Cato Institute, imposing an "issue exhaustion" requirement in this context would be wrong for two key reasons. First, no statute or rule mandates any such requirement, meaning the SSA is asking the judiciary to *create* an exhaustion rule with no textual basis. And second, barring someone from raising an argument in federal court is justified *only* if that person avoided raising the issue before the agency to sidestep an agency decision on the question purposefully. We know from the SSA's own policy that it *wouldn't* have addressed or decided the appointment issue even if Carr had raised it, so that justification simply doesn't apply here.

The Supreme Court should hold that judicially imposed exhaustion rules make no sense when an agency refuses even to address an issue. The court should give Carr what he should have gotten a long time ago: a new hearing before a social security judge who was appointed as the Constitution requires.

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