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Unappointed ‘Judges’ Shouldn’t Be Trying Cases

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President Trump promised to nominate judges in the mold of Antonin Scalia, and that thought was no doubt foremost in his mind when he chose Neil Gorsuch to fill Scalia’s vacant seat. On Monday Justice Gorsuch and his colleagues will consider whether the hiring of adjudicators deciding cases within federal agencies will also be subject to the kind of accountability that making an appointment entails.

So-called administrative law judges are not “principal officers,” so they are not subject to Senate confirmation under the Constitution’s Appointments Clause. The question in *Lucia v. Securities and Exchange Commission* is whether they are “inferior officers.” In that case, the clause requires them to be appointed by principal officers, such as commissioners acting collectively or a cabinet secretary, themselves appointed by the president. The alternative is that they are mere employees, who can be hired by lower-level managers with no presidential responsibility.

The dividing line, the Supreme Court has explained, is whether the position entails the exercise of “significant authority.” There shouldn’t be much doubt on which side of that line the SEC’s judges fall.

In this case, the commission’s Enforcement Division decided to bring fraud charges against investment adviser Raymond Lucia in its own administrative court instead of a judicial court. The SEC alleged that Mr. Lucia misled participants in his “Buckets of Money” seminars when he used slides showing hypothetical returns based in part, rather than in whole, on historical data (as the slides themselves disclosed). The SEC assigned the case to an administrative law judge, Cameron Elliot. According to the record, Mr. Elliot sided with the SEC’s Enforcement Division in every one of his first 50 cases.

Who hired Mr. Elliot? The SEC initially stated that he was selected by its chief administrative law judge from a list of qualified candidates provided by the Office of Personnel Management. But Mr. Elliot himself said he transferred from the Social Security Administration and that someone in the SEC’s human-resources department presumably “signed off” on his hiring. It is clear that he wasn’t appointed according to the Appointments Clause—that is, neither the president nor the commission appointed him.

Nonetheless, Mr. Elliot presided over a full-blown trial. The parties examined and cross-examined witnesses, introduced evidence, and made objections, upon which Mr. Elliot ruled. SEC judges oversee discovery, decide motions, impose sanctions for misconduct, decide what

evidence will be allowed in the official record, and make determinations of fact and law. They ultimately issue an "initial decision" that stands unless the commission intercedes. These decisions can carry serious penalties, ranging from fines to banishment from the securities industry.

Those were, in fact, among the penalties that Mr. Elliot—"Judge Elliot" to those who appear before him—imposed on Mr. Lucia. Relying on the factual record set by Mr. Elliot and his findings, the commission upheld his decision and the penalties.

In 1991, the Supreme Court held that "special trial judges" who proposed opinions for judges on the U.S. Tax Court were inferior officers—not mere employees—because they took testimony, conducted trials and ruled on evidence, exercising significant discretion in all those tasks. Under that logic, SEC judges assuredly qualify as officers. They do all those things and also issue decisions that take on legal force unless the commission takes action. Even the federal government agrees with that position, though it argued the opposite in the lower courts.

The only factor that may give the justices pause is that there are so many administrative law judges across the federal government. To pre-empt that concern, Mr. Lucia's lawyers have suggested the court could distinguish between the relatively few ALJs who conduct adversarial proceedings like the SEC's and the many more who consider appeals of benefit denials. But there is only one statute that creates the office of "administrative law judge" across all agencies, so there's no legal basis to declare some of them officers and others employees. Additionally, the law allows any ALJ to be detailed to any other agency, so that every ALJ may end up presiding over adversarial hearings.

There's no reason to fear disruption if the justices rule in Mr. Lucia's favor. Every agency employing ALJs already has the legal authority to leave their appointment to the top officer, as the Constitution requires. And in only a handful of pending cases has the appointments issue been raised. If necessary, the high court could clarify that its decision applies only prospectively—just as it did when it held that bankruptcy courts lacked authority to decide certain kinds of claims.

What it should not do is permit agencies to shirk what Justice James Wilson identified as the principle underlying the Appointments Clause: "The person who nominates or makes appointments to offices, should be known. His own office, his own character, his own fortune should be responsible."

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