When Is a Judge Not Really a Judge?

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An “alphabet soup” of federal agencies established since the 1930s have gradually supplanted the rule of Congress and the courts with the rule of supposed expertise. This accumulation of power is what James Madison identified in Federalist No. 47 as “the very definition of tyranny.” An example of this trend is the Securities and Exchange Commission’s increased use of in-house administrative law judges under the Obama administration.

Following high-profile losses in federal court—remember the insider trading charges against Mark Cuban?—the SEC decided to file fewer enforcement cases in courts presided over by independent judges. Instead, the agency began to take advantage of its in-house administrative law judges. Conveniently, a change in the Dodd-Frank Act authorized the agency’s judges to hear more kinds of cases and dispense more penalties.

Administrative law judges are agency employees. The proceedings they oversee provide fewer protections than court cases. They also tend to set stern deadlines and limit the right to factual investigation, often leaving defendants to rely on the SEC’s evidence. According to a 2015 Wall Street Journal analysis, the agency’s shift paid off: Through the beginning of that year, it won 90% of cases in its in-house court, compared with 69% of regular court cases. Administrative decisions can be appealed to court but are rarely reversed. That’s because the judges apply a deferential “clear error” standard to the agency’s factual findings.

The due-process problems inherent in this arrangement are apparent. Less obvious, at least to the SEC, is that it also violates the Constitution’s Appointments Clause, which requires Senate hearings and confirmation votes for department heads and other senior officials. To promote political accountability, the Constitution also requires that “inferior officers” with significant responsibility be appointed by the president or senior officials who are confirmed by the Senate.

This month, the 10th U.S. Circuit Court of Appeals ruled that the SEC’s administrative law judges aren’t mere employees but inferior officers. They take testimony, rule on motions, issue subpoenas, preside over triallike hearings, make factual determinations and can even enter judgments and impose penalties in certain circumstances. The court’s analysis was guided by a 1991 Supreme Court decision holding the same about “special trial judges” who had similar powers under the U.S. Tax Court. The SEC will surely appeal, and there is a high likelihood that the Supreme Court will affirm the lower court’s ruling.

The immediate problem for the SEC is that Congress hasn’t authorized the appointment of administrative law judges through the constitutional process. So the agency faces the risk, in cases it tries in-house, that its decisions will be voided. The SEC and its allies will push for a legislative fix so that in-house judges can be properly appointed. Congressional Republicans should use the demand for legislation as a bargaining chip for other reforms, such as restricting cases that can be heard in administrative courts.

But a legislative fix only heightens the contradictions of trying these cases outside of real courts. Due process requires that judges be neutral. A fix would make them political appointees.

Moreover, in *Free Enterprise Fund v. Public Accounting Oversight Board* (2010), the Supreme Court struck down an arrangement whereby appointed officers were double-insulated from removal. They could lose their jobs only for good cause, and the agency head with the power to remove them could himself only be fired for good cause. That kind of double protection, the court explained, impermissibly "subverts the President's ability to ensure that the laws are faithfully executed" and "the public's ability to pass judgment on his efforts."

Administrative law judges are nearly identically insulated from political control. They can be dismissed only for good cause by their agencies, and even then only if the Merit Systems Protection Board agrees. If the 10th Circuit's decision is upheld, this will almost certainly be the next shoe to drop, and it will leave administrative law judges subject to political control.

That means the in-house judges will be political appointees subject to the supervision of other political appointees—and at risk of dismissal for failure to follow instructions. Will agencies be able to maintain the pretense that they are "judges" in any meaningful sense? It's difficult to see how.

The SEC's overreaching may spell the end of the administrative state's growth—marking the point when Congress and the courts started to regain lost ground. Thanks, Mr. Obama.

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