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# Agency Independence From Presidential Supervision: Changes Ahead

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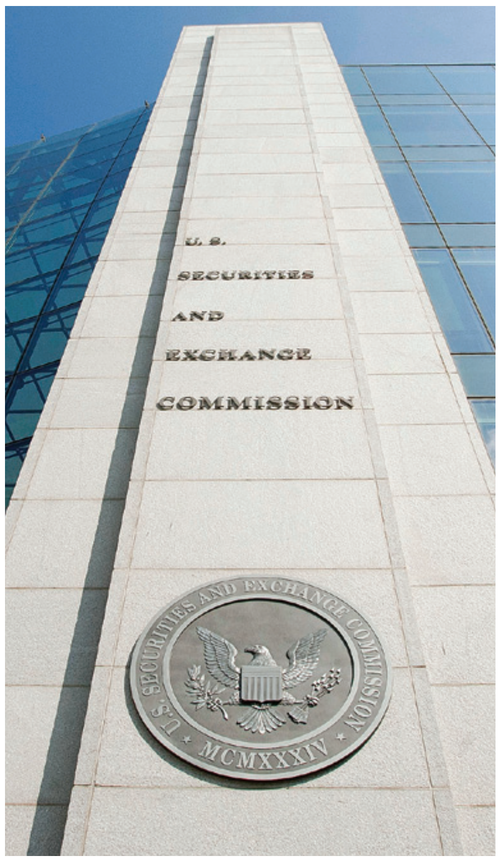
While art might imitate life, the same has scarcely been said of administrative law. Rarely does that discipline—typically preoccupied with arcane procedure—reflect contemporary political debates. This year is different, however. Even as the media regales us with minutia of the Administration's dealings with federal agencies (who must follow White House orders? who fired this official and why?), similar concerns reverberate through appellate courts. But the public and the courts appear to approach the issue from opposite perspectives: Even as the public focuses on protecting agency independence from political intrusion, the trend in the courts has favored Presidential control.

Indeed, two of the year's most significant unfolding appellate developments could limit the ability of Congress to insulate administrative agencies from the President's influence. After several years spent in jurisdictional tangles, challengers to the independence of the Securities and Exchange Commission's administrative law judges (ALJs) have begun to score victories in the federal courts of appeals. Meanwhile, a panel of the District of Columbia Circuit has overturned the provisions of the Dodd-Frank Act protecting the director of the Consumer Financial Products Bureau from removal by the President. Both issues are heading for en banc consideration by the full D. C. Circuit—and could shortly become ripe for U.S. Supreme Court review.



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SEC building, Washington, D.C.

The results could emerge as significant victories for the Executive Branch in an ongoing struggle for influence over the administrative state.

### SEC's ALJ Structure

The enactment of the Dodd-Frank Act has prompted a wave of litigation challenging the way the federal government—and, in particular, the SEC—appoints and utilizes ALJs. The statute gave the SEC greater flexibility to pursue enforcement proceedings before these in-house tribunals, rather than in federal district courts. In response, enforcement targets—many of them chafing at the perceived unfairness of forums where both their adversaries and the judges are SEC personnel—have sought to

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identify and litigate potential constitutional frailties in ALJ proceedings.

For several years, this search bore little fruit. Lawsuits against the SEC based on due process and equal protection principles received chilly receptions in the federal courts. Moreover, challenges to ALJ tribunals by plaintiffs who have not yet completed adjudications before those tribunals were deemed premature—and therefore jurisdictionally deficient.

But two arguments rooted in the separation of powers have begun to gain traction with some federal judges. One focuses on the fact that SEC ALJs have not been appointed by the President or by the head of the agency (in case of the SEC, the Commission itself). The other argument focuses on the structural difficulties a President would encounter in removing an ALJ. In effect, ALJs enjoy at least two layers of tenure protection: removing them for cause requires action by the SEC, but SEC Commissioners can themselves only be removed by the President for cause. (Full disclosure: Some of the first cases developing these arguments were brought by parties represented by Skadden Arps.)

Both the appointment and removal arguments assume that ALJs are not mere federal employees, but "officers" of the executive branch with substantial authority. The Constitution requires such officers to be appointed by the President or the agency head, and Supreme Court decisions prevent them from enjoying multiple levels of tenure protection from Presidential removal. But the precise personnel status of ALJs is highly disputed, and the only pre-Dodd-Frank decision on the subject—a decision by a split D.C. Circuit panel in *Landry v. Federal Deposit Insurance*, 204 F.3d 1125 (D.C. Cir. 2000)—held that they were merely employees, not officers. Because of the *Landry* precedent, the D.C. Circuit was the least propitious judicial forum for post-Dodd-Frank challenges to SEC's ALJ system—but that is exactly where the first decision unencumbered by jurisdictional quagmires emerged. Predictably enough, in August 2016, a D.C. Circuit panel in *Lucia v. SEC* relied heavily on *Landry* in holding that ALJs are not constitutional officers—and thus turned away a challenge to the ALJs' appointment.

But only a few months later, in December 2016, another set of challengers had better luck in the Tenth Circuit. In *Bandimere v. SEC*, a split panel of that court—unpersuaded by *Landry* or *Lucia*—held that the ALJs were indeed constitutional officers and therefore were not properly appointed by the SEC. The resulting split among the Circuits seemed destined for Supreme Court review. Then, in February 2017, the SEC suffered another setback when the D.C. Circuit vacated the panel decision in *Lucia* and agreed to rehear the case en banc. The SEC's heretofore successful defense of its ALJ system now faces real peril.

And a nationwide loss for the SEC could have broader effects across the administrative state. The SEC's five ALJs are only a microcosm of thousands of such adjudicators across the Executive Branch, whose decisions could arguably be called into question by constitutional litigation.

## CFPB Independence

In the meantime, the D.C. Circuit became a setting for another—and more politically salient—battle involving the Dodd-Frank Act and agency independence. The director of the CFPB, a controversial new regulatory and enforcement agency established by that statute, can only be removed by the President for cause. In that sense, the director is no different from commissioners of the SEC or of numerous other so-called independent regulatory agencies, including the Federal Communications Commission, Federal Trade Commission, or Commodity Futures Trading Commission. In the context of those multi-member commissions, the Supreme Court had upheld for-cause removal provisions as far back as the New Deal, in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

But should the courts adhere to the rule of *Humphrey's Executor*—and thus permit an agency official to be insulated from Presidential control—in the context of an agency headed by a single individual? In October 2016, a split panel of the D.C. Circuit in *PHH Corporation v. CFPB* answered this question in the negative, excising from the Dodd-Frank Act the for-cause protections accorded to the CFPB's director. The majority opinion by Judge Brett Kavanaugh portrayed the dispute as a clash of fundamental principles rather than bureaucratic minutia: Without supervision by an electorally accountable president, he reasoned, the "headless fourth branch of the U.S. Government"—namely, the independent agencies that "exercise enormous power over the economic and social life of the United States"— threatened "individual liberty." Indeed, the phrase "individual liberty" conspicuously materialized no less than 10 times in the introductory pages of Judge Kavanaugh's opinion. (This is hardly surprising: Judge Kavanaugh is one of the judiciary's leading skeptics of independent agencies and he offered a thought-provoking critique of Humphrey's Executor years ago in his concurring opinion in *In re Aiken County*, 645 F.3d 428 (D.C. Cir. 2011)—a dispute involving the Nuclear Energy Regulatory Commission.) The second vote on the panel's majority came from Judge Raymond A. Randolph—the dissenter in *Landry* who continues to adhere to his views in that case.

CFPB sought en banc review (supported by the Obama Administration's Justice Department as amicus curiae) and the D.C. Circuit obliged—on the same day that it ordered en banc review in *Lucia*. Indeed, the two cases could be intertwined: The resolution of the ALJ issues in *Lucia* may prove dispositive in *PHH Corporation*, which involved an ALJ adjudication.

Then, on March 17, 2017, the Justice Department—now in the Trump Administration—changed its position and submitted an amicus brief opposing CFPB. The *PHH Corporation* panel's decision striking down the CFPB director's for-cause removal protections articulated "the better view" of the law, reasoned the brief. It is, perhaps, fitting that a litigation about agency independence would eventually pit an agency's lawyers against the President's.

But would excising the CFPB director's for-cause removal protections have material, broad effects? Perhaps not. Purportedly independent agencies headed by a single official are exceedingly unusual. And removal protections might make no difference to the workings of the CFPB after an appointee of President Trump assumes leadership.

On the other hand, if the CFPB were to lose its structural independence, it could become subject to additional government-wide procedures, including centralized regulatory review by the Office of Information and Regulatory Affairs. Moreover, if the *PHH Corporation* decision were endorsed by the en banc D.C. Circuit or the Supreme Court, it would surely call into question the continuing vitality of *Humphrey's Executor* and of other indicia of agency independence.

Finally, the Trump Administration's about-face in *PHH Corporation* could be a herald of its bolder assertion of control over independent regulatory agencies. This from an Administration that has been uncharacteristically circumspect in exempting independent agencies from its regulatory reform directives. See Office of Management and Budget, *Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs,"* (stating that the executive order's requirements do not "apply to significant regulatory actions of independent agencies").

## Conclusion

In short, the separation-of-powers doctrine on agency independence from Presidential supervision could be on the brink of major changes. Two important decisions pending review by the en banc D.C. Circuit are likely to chart the doctrine's direction.