

SEC Administrative Law Judge Appointments Held Likely Unconstitutional

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Defendants in SEC administrative enforcement proceedings have increasingly been going to federal court to challenge the SEC's stepped-up use of its "in-house" tribunal. While the early results were not promising, more recent challenges have gained some traction. In *Hill v. SEC* and *Gray Financial Group, Inc. v. SEC*, a judge from the U.S. District Court for the Northern District of Georgia has issued preliminary injunctions halting SEC administrative proceedings, and a Manhattan federal district court judge has issued a comparable ruling in *Duka v. SEC*. The Georgia court held in both actions that the "[enforcement defendants] have proved a substantial likelihood of success on the merits of their claim that the SEC has violated the Appointments Clause [under Article II of the U.S. Constitution]." In reaching this conclusion, the court accepted the enforcement defendants' position that SEC administrative law judges (ALJs) are "inferior officers" (rather than mere employees of the agency) and, as such, must be appointed by either the President alone, the SEC Commissioners, or the federal judiciary, which they are not. The New York court adopted the same rationale. The Georgia court noted that the constitutional defect "could easily be cured by having the SEC Commissioners issue an appointment or preside over the matter themselves." Instead, the SEC has appealed the Georgia and New York district court rulings to the Eleventh Circuit and Second Circuit, respectively. As long as the government continues to litigate the constitutional issue, it is unlikely that the SEC will seek to "cure" the defect through a revised ALJ appointment process. Doing so might be viewed as a government concession that calls into question ALJ appointment procedures in other agencies. Moreover, changes to the appointment process could require new legislation from Congress, could get mired in politics within the SEC, and would have to be reconciled with the already complex bureaucratic procedures associated with ALJ appointments.

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