



[As observed in this blog](#) and elsewhere, the U.S. Securities and Exchange Commission has aggressively pursued enforcement actions in administrative proceedings before its own Administrative Law Judges (ALJs), rather than before federal judges in the U.S. District Courts.

In response, defendants have begun raising constitutional challenges to the SEC's administrative proceedings, claiming that the SEC's hiring and removal process for ALJs violates the [Appointments Clause in Article II](#), Section 2 of the Constitution. On June 8, 2015, for the first time, a federal district court [enjoined](#) SEC administrative proceedings against defendant Charles L. Hill, accepting the claim that the SEC's hiring process for ALJs violated the Appointments Clause. Some background on the SEC's hiring and firing policies for ALJs is necessary to evaluate the constitutional challenges to the administrative proceedings. The SEC's ALJs are

hired by the chief ALJ, who acts under the supervision of the SEC's human resources department. SEC ALJs are removable only for good cause by SEC Commissioners, who in turn cannot be removed by the President except for inefficiency, neglect of duty, or malfeasance in office. There have been two main attacks to the SEC's administrative process under the Appointments Clause. Under the first theory, challengers claim that the administrative proceedings unconstitutionally insulate the ALJs from removal by providing **two layers of tenure protection**. Under the second theory, challengers to the SEC's appointment of ALJs assert that the ALJs are **inferior officers** who must be appointed by an SEC Commissioner. In defense of its hiring practices, the SEC has argued that ALJs are not officers at all, but rather "**mere employees**" who are not subject to the Appointments Clause. To date, challengers of the SEC's administrative proceedings have primarily relied on the first argument, with no success. Even assuming that the SEC's ALJs were inferior officers, courts applied a functional test, distinguishing between roles that are executive in nature and functions that are quasi-judicial or adjudicatory. Reasoning that principles of judicial independence weighed against increased executive oversight of officials performing quasi-judicial functions, courts found that the double layers of tenure protection afforded to the SEC's ALJs presented no problems under the Appointments Clause. While challenges to the way ALJs can be fired have been unsuccessful, the recent *Hill* decision may signal that courts will be more receptive to challenges to the ways ALJs are hired. Rejecting the SEC's claim that its ALJs are "mere employees" whose decisions do not become final until the Commissioners sign off on them, the *Hill* Court ruled that ALJs exercise the type of "significant authority" over administrative proceedings indicative of their status as inferior officers. Because the ALJs were not appointed by the SEC's Commissioners, the *Hill* Court found the SEC's administrative proceeding to be in violation of Article II. While acknowledging that the ruling was based on a technicality that could easily be cured by changes to the SEC's hiring process for ALJs, the *Hill* Court observed that this technicality undercut the validity of the entire administrative proceeding against the defendant. In response to the *Hill* decision, several litigants with pending challenges to the two-layer tenure protection have sought leave to amend their pleadings to also challenge the hiring of the ALJ presiding over their cases under the Appointments Clause. Rather than adopting the easy fix the *Hill* Court suggested of having Commissioners appoint ALJs in accordance with the Appointments Clause, the SEC appears to have dug in its heels, having the DOJ submit a [letter](#) blasting the reasoning behind the *Hill* decision in a case pending in the U.S. District Court for the Southern District of New York. As the challenges mount to the constitutionality of the SEC's administrative proceedings, there are likely to be many more fights in district courts before the issue is settled.

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