Appointments Clause

Burgess v. FDIC, the Appointments Clause, and the Separation of Powers

By

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Last week, the Fifth Circuit became the third circuit court to consider whether administrative law judges (ALJs) are "inferior Officers" subject to the Appointments Clause of the Constitution. In *Burgess v. FDIC*, the court stayed an FDIC order that assessed a civil penalty against Cornelius Burgess and required his withdrawal from the banking industry. Mr. Burgess is asking the Fifth Circuit to review the FDIC's order, which he argues is invalid because the ALJ who issued the agency's initial decision was not appointed under the Appointments Clause. The court held that Burgess established a likelihood of success on his Appointments Clause challenge.

This ruling echoes the Tenth Circuit's opinion in *Bandimere v. SEC*, in which the court held that ALJs in the Securities and Exchange Commission are "inferior Officers." But the D.C. Circuit, in *Lucia v. SEC*, reached the opposite conclusion.

What's really at stake? According to the U.S. Supreme Court, the "declared purpose of separating and dividing the powers of government . . . was to diffuse power the better to secure liberty." Further, "by limiting the appointment power" itself, the Framers "could ensure that those who wielded it were accountable to political force and the will of the people." As now-Justice Kagan explained, the "lines of responsibility should be stark and clear, so that the exercise of power can be comprehensible, transparent to the gaze of the citizen subject to it."

Finally, as Justice Scalia emphasized, the appointment of "Officers" under the Appointments Clause was one means of holding the President accountable for the conduct of his appointees: the President is "directly dependent on the people, and since there is only *one* President, *he* is responsible. The people know whom to blame."

For better or worse, however, the Constitution does not define "inferior Officers," and the Supreme Court has admitted that its "cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers." What it has said, in its 1991 decision in *Freytag v. IRS*, is that an "Officer of the United States" is "any appointee exercising significant authority pursuant to the laws of the United States," who "must, therefore, be appointed in the manner prescribed by" the Appointments Clause. In *Freytag*, the Court concluded that the office of "special trial judge" within the U.S. Tax Court had been "established by Law" (the "duties, salary, and means of appointment for that office are specified by statute"); and that these special trial judges exercise significant discretion in carrying out their "important functions" (taking testimony, conducting trials, ruling on admissibility of evidence, and having power to enforce compliance with discovery orders). Because of these "significant authorities," the judges' inability to enter final decisions was not, contrary to the government's arguments, dispositive. Therefore, special trial judges are "inferior Officers" within the meaning of the Appointments Clause.

But this "significant authority" prong has led lower courts to different analyses and conclusions—as the circuit split shows. The Tenth Circuit in *Bandimere* concluded that an SEC administrative law judge was an "Officer" because, as in *Freytag*, (1) the position was "established by law,"; (2) the duties, salary, and means of appointment were specified by statute; and (3) the ALJ "exercised significant discretion in carrying out . . . important functions." The Fifth Circuit's recent opinion in *Burgess* agrees with *Bandimere* here. In *Lucia*, however, the D.C. Circuit concluded—contrary, it appears, to the Supreme Court's *Freytag* decision—that because an SEC administrative law judge cannot enter a final decision, the ALJ is not an inferior officer.

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Mr. Lucia has filed a cert petition with the U.S. Supreme Court, and the SEC has until September 29 to decide whether to seek review of the *Bandimere* decision. The circuit split, together with yet another opinion on the issue, suggests that the Supreme Court will have to resolve the matter.

In light of the important separation of powers issues raised in these cases, and because, as Justice Alito notes, "liberty requires accountability," here's hoping the Supreme Court grants cert and concludes that administrative law judges are "inferior Officers" within the meaning of the Appointments Clause.