

## Client Alert

### 5th Circuit Joins the 10th Circuit in Questioning the Constitutionality of the Hiring Process for Federal Administrative Law Judges

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In its September 7 decision in *Burgess v. Federal Deposit Insurance Corporation*, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit strongly suggested that the hiring process for most federal administrative law judges, or ALJs, is unconstitutional, adding to a growing debate that has already created a split between the D.C. Circuit (which has decided the question differently) and the Tenth Circuit (with which the Fifth Circuit has now aligned). The cases from the D.C. and Tenth Circuits, discussed in an [earlier alert](#), concerned ALJs assigned to the Securities and Exchange Commission (SEC), while the more recently decided Fifth Circuit case concerns ALJs assigned to the Federal Deposit Insurance Corporation (FDIC). The underlying question in both sets of cases, however, is the same: are ALJs — who are hired through the Office of Personnel Management (OPM) and then assigned to particular agencies based on various factors — in fact "inferior Officers" of the United States who must be appointed in a manner consistent with the Appointments Clause of the U.S. Constitution?

Relying on the U.S. Supreme Court's decision in *Freytag v. Commissioner of Internal Revenue*, the Fifth Circuit — ruling preliminarily on a motion for stay pending full merits review — explained that a government worker is an "inferior Officer" if his or her office "entails 'significant[t] . . . duties and discretion.'" Whether an office entails significant duties and discretion, the Fifth Circuit continued, depends on: (1) "whether the office is 'established by law;' (2) whether the 'duties, salary, and means of appointment for that office are specified by statute;' and (3) whether the officeholder may 'exercise significant discretion' in 'carrying out . . . important functions.'" Because the Administrative Procedure Act creates the ALJ position and describes ALJ functions, pay scale, and applicable hiring practices, the Fifth Circuit found that the first two criteria were likely satisfied with respect to FDIC ALJs. It found that the third criterion was likely satisfied because FDIC ALJs exercise substantial discretion in taking testimony, conducting trials, ruling on the admissibility of evidence, and enforcing compliance with discovery orders. All three criteria appearing to be satisfied, the Fifth Circuit deemed it likely that FDIC ALJs are inferior officers under *Freytag*, and therefore may only be appointed by the President, the courts, or the heads of departments — which is not how they are appointed under existing practice.

In a [2000 decision](#), and then again in a [2016 decision](#), the D.C. Circuit rejected the argument that ALJs are inferior officers. The D.C. Circuit reasoned that government workers are only inferior officers if they possess final decision-making authority, which ALJs do not because their decisions are usually reviewable by higher agency authority. In *Burgess*, the Fifth Circuit joined [the Tenth Circuit](#) in disagreeing with the D.C. Circuit. According to the Fifth Circuit, whether ALJs possess final decision-making authority is not outcome-determinative under *Freytag*; it is enough that ALJs exercise significant discretion over important functions, regardless of whether their discretion is "final."

Because of the split of authority among the circuits and the potential ramifications for the many federal agencies which rely extensively on ALJs, many believe the question of the constitutionality of the OPM hiring process for federal ALJs will need to be decided by the Supreme Court. To that end, a [petition for certiorari has been filed](#) in the case arising out of the D.C. Circuit, and the Supreme Court is expected to decide whether to accept that case in the next term (which begins this coming October).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

**Daniel W. Wolff**

Partner – Washington, D.C.

Phone: +1.202.624.2621

Email: [dwolff@crowell.com](mailto:dwolff@crowell.com)