



Securities Litigation ADVISORY ■

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U.S. Supreme Court Rules That SEC ALJs Were Not Properly Appointed Under the U.S. Constitution

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On June 21, 2018, the U.S. Supreme Court issued its decision in [Lucia v. Securities & Exchange Commission](#), holding that the U.S. Securities and Exchange Commission's (SEC) administrative law judges (ALJs) were *not* properly appointed under the U.S. Constitution. The Court's decision brings much needed finality to an issue that had split the federal courts, but important questions remain about the opinion.

Each of the SEC's five ALJs were appointed by SEC staff members, not the commission itself, and the issue in *Lucia* was whether that appointment procedure complied with the Constitution's Appointments Clause. If the ALJs are mere employees of the SEC, the ALJs' appointments were constitutional. If, however, the ALJs are "Officers of the United States" under the Appointments Clause, their appointments were constitutionally deficient because only the President, courts of law, or department heads can appoint constitutional officers.¹

In a 7–2 decision, with Justice Kagan writing for the majority, the Supreme Court held that the ALJs are constitutional officers. Relying principally on its decision in *Freytag v. Commissioner*, 501 U.S. 868 (1991), in which the Court held that special trial judges of the U.S. Tax Court were constitutional officers, the court reasoned that the appointments of SEC ALJs were subject to the Appointments Clause because SEC ALJs: (1) occupy a continuing position established by law; and (2) have significant authority and responsibilities (e.g., presiding over adversarial hearings, taking testimony, ruling on evidence, etc.). As a result, the Supreme Court held that all five of the SEC's ALJs were *not* properly appointed under the Constitution.

¹ Although the government maintained in the lower court that the SEC ALJs were not constitutional officers, at the Supreme Court the government reversed its position, pursuant to a Trump Administration directive, and did not dispute Lucia's contention that the SEC ALJs were improperly appointed under the U.S. Constitution. The government's change in position prompted the Court to appoint an amicus curiae to defend the lower court's decision holding that the SEC ALJs are mere employees of the SEC, rather than constitutional officers. The Trump Administration's action raises additional questions about the impact of this decision and the scope and direction of future regulatory enforcement.

Turning to the appropriate remedy for Lucia, the Court held that he must be provided with a new hearing before an SEC ALJ that was properly appointed under the Constitution. In addition, the Court held that SEC ALJ Cameron Elliot (who decided the case) could *not* be the SEC ALJ assigned to Lucia's case on remand.

Although the Court's decision in *Lucia* resolves an important issue regarding whether SEC ALJs were properly appointed, important questions remain. Among other things, there will undoubtedly be litigation regarding the enforceability of past ALJ decisions in light of the fact that they were not properly appointed. Likewise, consistent with the Court's decision that Lucia is entitled to a new hearing in front of a new ALJ, respondents in pending SEC administrative proceedings may argue that their cases should similarly be "restarted" with a new ALJ that was properly appointed. Suffice it to say, the lower federal courts and the SEC's ALJs themselves will have important roles fleshing out the full impact of *Lucia*.

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