

The Debate on Whether or Not the SEC's ALJs Are Constitutional

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The 2007-08 financial crisis and the SEC's renewed focus on individual accountability led to the SEC bringing more of its claims before the SEC's in-house administrative law judges ("ALJs"), rather than the U.S. District Courts. Questions have arisen regarding due process and the fairness of the ALJs' rulings without being subject to the U.S. Constitution Appointments Clause. If ALJs are officers, not employees, then they must be appointed pursuant to the Appointments Clause. However, ALJs are currently hired through the government's civil service process.

In August 2016, the D.C. Circuit Court of Appeals held that ALJs were employees and, therefore, not subject to the Appointments Clause. *Raymond J. Lucia Cos. Inc. v. SEC*, No. 15-1345 (D.C. Cir. Aug. 9, 2016). Specifically, the D.C. Circuit stated that although ALJs' rulings are rarely overturned by the SEC, their decisions were not final and, therefore, their appointments were not controlled by the Appointments Clause. On June 26, 2017, sitting en banc, the D.C. Circuit denied the petition for review by an equally divided court (5-5), leaving the panel decision intact.

Conversely, in December 2016, the 10th Circuit of Appeals reached the opposite opinion and held that SEC ALJs were unconstitutionally appointed. *Bandimere v. SEC*, No. 15-9586 (10th Cir. Dec. 27, 2016). The 10th Circuit majority relied on the Supreme Court's decision in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), where the Court had held that the Tax Court's special trial judges were inferior officers and not employees.

Given the current split of authority on the issue, Supreme Court review is likely.