

Supreme Court Set to Rule on Constitutionality of SEC's ALJs

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In April, the U.S. Supreme Court heard oral argument in *Lucia v. SEC* to resolve the federal circuit court split on whether the SEC's administrative law judges (ALJs) are "inferior officers" of the United States who must be appointed in accordance with the Appointments Clause of the U.S. Constitution, and not mere employees whose hiring is not required to meet constitutional standards.

The Appointments Clause requires that inferior officers be appointed by the President, the courts, or the heads of departments. Because ALJs have historically been hired by an HR division of the Commission and not the Commission itself, a finding that they are "inferior officers" could render their decisions unconstitutional, undermining the legitimacy of the SEC's in-house courts and potentially giving the myriad respondents found liable in SEC administrative proceedings a basis to challenge judgments entered against them.

In an interesting turn of events likely spurred by the new executive administration, the Solicitor General notified the Supreme Court early this year that the government would no longer defend the constitutionality of the SEC's ALJ hiring process. As a result, the Supreme Court appointed an amicus curiae, New York appellate attorney Anton Melitsky, to defend the SEC's prior position.

Last November, the Commission attempted to resolve the issue by ratifying the hiring of its current ALJs. This maneuver arguably protects the constitutionality of current ALJs as appointed by a "head of department" pursuant to the requirements of the Appointments Clause. However, if the Supreme Court agrees that SEC ALJs were unconstitutionally appointed, the consequences of such a ruling, if any, on the viability of the decisions by previous ALJs remains unclear. We may soon learn the answer if the Supreme Court addresses this issue, along with the constitutionality question, in *Lucia v. SEC*.