

Supreme Court: SEC Administrative Law Judges Must Be Appointed By Political Officials

By Jacob A. Burchfield

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Are Administrative Law Judges (“ALJs”) “Officers of the United States” or simply employees of the Federal Government? In *Lucia v. SEC*, decided last Thursday, the Supreme Court answered that question in favor of the former, and the potential ramifications—and follow-on litigation—are likely to ripple through administrative agencies and the entities they regulate for years to come.

The SEC is responsible for enforcing the securities laws of the United States. Among the remedies available to it, the SEC may institute an administrative proceeding against alleged violators. These proceedings are presided over by an ALJ, who has the “authority to do all things necessary and appropriate” to ensure a “fair and orderly” adversarial proceeding. Staff members of the SEC—rather than the Commissioners themselves—have appointed five ALJs to oversee these administrative proceedings. Upon completion of an administrative hearing, an ALJ typically issues an initial decision. The SEC may then choose to review the decision or issue an order finalizing it, at which time the initial decision becomes “the action of the Commission.”

In *Lucia*, an investment broker used misleading marketing practices to deceive prospective clients. The SEC assigned his case to an ALJ, who fined him \$300,000 and barred him for life from the investment industry. Lucia appealed, arguing that the entire proceeding was invalid because the Commission’s ALJs are “Officers of the United States,” and thus subject to the Appointments Clause of the Constitution. The Supreme Court agreed.

Guided by *Buckley v. Valeo*, the Court analyzed whether ALJs exercise “significant authority” pursuant to the laws of the United States. Justice Kagan, writing for the majority, left a closer examination of “significant authority” for another day and held that *Lucia* was directly controlled by *Freytag v. Commissioner*, a case in which the Supreme Court held that special trial judges of the U.S. Tax Court were “Officers” for purposes of the Appointments Clause.

Under the Supreme Court’s holding, ALJs exercise continuing office because they receive career appointments. Even more importantly, ALJs have significant discretion to “take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders.” Under *Freytag*, this means ALJs are Officers, even if their decisions are not final. Furthermore, the SEC has no obligation to review the ALJs’ opinions—giving their decisions a finality even greater than the special trial judges at issue in *Freytag*.

In the aftermath, it is clear that the SEC has the power to officially appoint ALJs in compliance with the Appointments Clause, and one would expect it will do just that. Justice Kagan’s opinion has, however, been seen as a triumph of the separation of powers doctrine. The *Lucia* ruling will give more executive oversight to ALJs and, in turn, increase their accountability as they oversee high-dollar monetary and regulatory cases.

The Justices also decided to sidestep a larger question. The Trump administration had asked the Justices to go further and strike down statutory restrictions on removing the ALJs from office—a result which opponents said would limit the independence of the adjudicatory bodies in question. The Court refused the request, noting that no lower court had addressed the question.

Going forward, litigants in a variety of administrative settings are likely to challenge the constitutionality of the appointments of the ALJs who preside over their cases. The Social Security Administration, for example, employs more than 1,400 ALJs who preside over more than 700,000 cases per year. Most federal agencies employ dozens of ALJs. Are their appointments invalid as well? Given the highly specific facts at issue in *Lucia*, it is hard to say. Nothing in the opinion itself suggests that it is limited to the SEC, and its logic would appear to apply across administrative bodies. Stay tuned.

If you would like more information, please contact:

[Jacob A. Burchfield](mailto:jburchfield@burr.com) in Birmingham at jburchfield@burr.com or (205) 458-5368 or the Burr & Forman attorney with whom you regularly work.

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