



Supreme Court finds ALJs must be constitutionally appointed

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Key points:

- SEC ALJs are covered by Constitution's appointments clause
- New hearing by legally appointed official is required
- Same ALJ may not rehear case even if subsequently constitutionally appointed

HOTLAW: In a decision that could affect administrative judge decisions at the Merit Systems Protection Board and the Equal Employment Opportunity Commission, the Supreme Court found that Securities and Exchange Commission administrative law judges are "officers of the United States" and therefore subject to the Constitution's Appointments Clause.

The Court ordered the SEC to follow the proper appointment procedures and have a constitutionally appointed ALJ rehear and decide the case at issue.

"This is a huge and adverse development in federal administrative employment law," attorney John Mahoney told **cyberFEDS®**.

The case "would greatly impact EEOC/MSPB administrative judge decisions, as they will likely be viewed as 'Officers of the United States,' subject to the Appointments Clause of the U.S. Constitution," which provides that "only the President, 'Courts of Law,' or 'Heads of Departments' can appoint such 'Officers,'" he explained. "But none of those actors appointed EEOC or MSPB judges" and "therefore, their decisions are likely voidable," based on Mahoney's review.

The EEOC and the MSPB did not immediately respond to requests for comment on the impact of the decision.

Case name: *Lucia v. Securities and Exchange Commission*, [118 LRP 26727](#) (U.S. 06/21/18); reversing 832 F.3d 277 (D.C. Cir. 2016).

Ruling: In a 7-2 opinion, the Court found that Securities and Exchange Commission administrative law judges are officers of the United States within the meaning of the Constitution's Appointments Clause and that another properly appointed ALJ would have to hear the case to cure the constitutional violation. The Court reversed and remanded the lower court decision.

Background

The petitioner appealed an SEC ALJ decision that found he violated the law and imposed sanctions, arguing that the proceeding was invalid because the ALJ was not constitutionally appointed.

As "Officers of the United States" subject to the Appointment Clause, the petitioner argued that SEC ALJs must be appointed by the president, "Courts of Law," or heads of departments.

The SEC and the U.S. Court of Appeals, D.C. Circuit subsequently on appeal rejected the argument and found that SEC ALJs are employees with lesser responsibilities outside the purview of the Appointments Clause. The petitioner asked the Supreme Court to determine whether SEC ALJs were officers under the appointments clause and resolve a Circuit split, with the D.C. Circuit's decision conflicting with a 10th Circuit decision in *Bandimere v. Securities and Exchange Commission*, 844 F.3d 1168 (10th Cir. 2016).

Analysis

SEC staff members appointed the current SEC ALJs "rather than the [Securities and Exchange] Commission proper," which has the authority to enforce the nation's securities laws by instituting an administrative proceeding, which is typically delegated to the ALJ, the court explained.

To decide the case, the Supreme Court looked to the analysis in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), which held that United States Tax Court "special trial judges" were officers, decided the case because "point for point" SEC ALJs have "equivalent duties and powers as STJs in conducting adversarial inquiries."

Based on this test for distinguishing between officers and employees, an individual must occupy a "continuing" position established by law and must "exercise significant authority pursuant to the laws of the United States."

Like Tax Court STJs, SEC ALJs:

- Hold a continuing office established by law. The position is created by statute and they receive a career appointment. [5 USC 556](#) - [5 USC 557](#) , 5372, 3105; [5 CFR 930.204](#) (a).
- Exercise "significant discretion" when carrying out the "same 'important functions.'"
- Have "all the authority needed to ensure fair and orderly adversarial hearings -- indeed, nearly all the tools of federal trial judges" including the power to take testimony, conduct trials, rule on the admissibility of evidence, and enforce compliance with discovery orders.
- Issue decisions "containing factual findings, legal conclusions, and appropriate remedies."

The Court explained that the SEC ALJ had even more autonomy because unlike STJ decisions, which must be adopted by a Tax Court judge to become final, the SEC can decide against reviewing an ALJ initial decision, which then makes the ALJ's decision the final decision and "deemed the action of the [Securities and Exchange] Commission."

Curing the constitutional violation

To remedy an appointments violation, Justice Elena Kagan said a new "hearing before a properly appointed" official is necessary.

However, the official must be someone other than the original ALJ because even if the ALJ is constitutionally appointed, "he cannot be expected to consider the matter as though he had not adjudicated it before." Therefore, to cure the constitutional error, "another ALJ (or the [SEC] itself) must hold the new hearing."

In a concurring opinion, Justice Stephen Breyer disagreed with the majority's cure for the constitutional error contending that he saw "no reason" why the same ALJ could not rehear the case, as "typically the judge who rehears the case is the same judge who heard it the first time" when a judge is reversed on appeal and a new trial ordered.

Dissent

In a dissent joined by Justice Ruth Bader Ginsberg, Justice Sonya Sotomayor argued that

SEC "ALJs are not officers because they lack final decision-making authority" since the SEC retains "plenary authority" over administrative proceedings and rulings.

Even if the SEC does not review an ALJ's initial decision, "the initial decision still only becomes final when the [SEC] enters a finality order."

Therefore, SEC "ALJs do not exercise significant authority because they do not, and cannot, enter final, binding decisions against the Government or third parties."

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June 22, 2018