

INSIGHTS

Will Supreme Court Find Constitutional Problems With ALJs?

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Recent federal circuit court of appeals decisions have cast doubt on the constitutionality of the use of administrative law judges (ALJs) in adjudicative proceedings. ALJs are widely used to adjudicate disputes and enforcement actions in regulated industries, including in administrative proceedings overseen by the Federal Energy Regulatory Commission (FERC) and the Securities and Exchange Commission (SEC).^[1] At FERC, ALJs also preside over adversarial trial-type rate and technical proceedings. As of March 2017, the Office of Personnel Management (OPM) reported that nearly 2,000 ALJs were employed in the federal government.^[2] Unlike federal court judges, ALJs are not appointed by the President or subject to confirmation by the U.S. Senate. Rather, ALJs are selected and appointed by the federal agencies that employ them, in accordance with a selection process administered by OPM.

In recent years, litigants have raised challenges to the constitutionality of ALJs under Article II, section 2, clause 2 of the U.S. Constitution, which is known as the Appointments Clause. The Appointments Clause requires that “Officers of the United States” be appointed by the President, with the advice and consent of the Senate, and that Congress may, by law, “vest the Appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” “Inferior officers” are “appointee[s] exercising significant authority pursuant to the laws of the United States.”^[3]

The U.S. Court of Appeals for the Tenth Circuit ruled in December 2016 that the SEC’s ALJs are “inferior officers” for purposes of the Appointments Clause, because they “exercise significant discretion”: specifically, they have “authority to shape the administrative record by taking testimony, regulating document production and depositions, ruling on the admissibility of evidence, receiving evidence, ruling on dispositive and procedural motions, issuing subpoenas, and presiding over trial-like hearings,” to “make credibility findings,” and “issue initial decisions that declare respondents liable and impose sanctions.”^[4] SEC ALJs are hired by the SEC Chief ALJ following a selection process administered by the Office of Personnel Management, not appointed by the President, a court of law, or the head of a department. The court conclude that their appointments are therefore unconstitutional.^[5]

This ruling created a circuit split with the U.S. Court of Appeals for the District of Columbia Circuit, which ruled in August 2016 that the SEC’s use of ALJs did not violate the Appointments Clause.^[6] The D.C. Circuit decision turned on the fact that under SEC rules, ALJs do not have the ability to issue final decisions of the Commission; ALJ initial decisions are not final until the Commission takes action, either to review the decision *de novo* or to issue an order declining to

review the decision. Because SEC ALJs do not have the ability to issue final decisions, the court reasoned, they are employees, not officers, and are therefore beyond the reach of the Appointments Clause. (The Tenth Circuit expressly rejected this reasoning.) The D.C. Circuit denied *en banc* review of the decision on June 26, 2017.

On July 21, 2017, Raymond Lucia, the defendant in the D.C. Circuit case, filed a petition for certiorari with the U.S. Supreme Court. On September 29, 2017, the Solicitor General on behalf of the SEC filed a petition for certiorari of the Tenth Circuit case. The Court is widely expected to resolve the circuit split.^[7]

If the Supreme Court affirms the Tenth Circuit and finds that ALJs are “officers” under the Appointments Clause, it will likely be necessary for SEC ALJs to be appointed by the full Commission, as the Supreme Court previously held in *Free Enterprise Fund v. PCAOB* that the SEC is a “department,” and that the full Commission, not the SEC Chair, acts as its “head” for purposes of the Appointments Clause.^[8] It is unclear whether such a decision would have retroactive effect on cases that were previously adjudicated by SEC ALJs.

Such a decision would also have implications for FERC’s ALJs, whose powers are similar to those of SEC ALJs as described by the Tenth Circuit.

- First, it is not clear that FERC is a “department” whose head can appoint inferior officers. In *Free Enterprise Fund*, the Supreme Court held: “Because the [SEC] is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a ‘Department’ for purposes of the Appointments Clause.”^[9] This is not true of FERC, which is a component of the Department of Energy.^[10]
- Second, under *Free Enterprise Fund*, if FERC is a department, it may be necessary for the full FERC to appoint ALJs, rather than the Chairman alone, as is currently done.^[11]
- Third, FERC ALJs often preside over technical ratemaking proceedings rather than adversarial disputes or enforcement proceedings for which there is no federal court corollary.

None of these FERC-specific issues are likely to be resolved in a Supreme Court decision addressing the particulars of SEC’s use of ALJs; therefore, if the Supreme Court affirms the Tenth Circuit, future litigation appears likely.

^[1] The Commodity Futures Trading Commission (CFTC), by contrast, generally does not use ALJs, although it has the ability to do so under section 6(c) of the Commodity Exchange Act; its practice is to file its enforcement matters in federal district court.

^[2] See ALJs by Agency, available at <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency>. The vast majority of those are employed at the Social Security Administration, which has 1,655 ALJs. FERC has 13. The SEC has five.

^[3] *Bandimere v. SEC*, 844 F.3d 1168, 1173 (10th Cir. 2016) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

[4] *Id.* at 1179-80.

[5] *Id.*

[6] *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016).

[7] See, e.g., Peter J. Henning, *Why the Supreme Court May Review the SEC's In-House Judges*, N.Y. Times (Sept. 5, 2017), available at <https://www.nytimes.com/2017/09/05/business/dealbook/in-house-judges.html>.

[8] *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512 (2010) (“The Commission's powers...are generally vested in the Commissioners jointly, not the Chairman alone...The Commissioners do not report to the Chairman, who exercises administrative and executive functions subject to the full Commission's policies.”).

[9] *Id.*

[10] See 42 U.S.C. § 7171(a).

[11] See 42 U.S.C. § 7171(c).