

Securities Litigation Update: After Full D.C. Circuit Deadlocks, Circuit Court Split over the Constitutionality of SEC Administrative Law Judges Likely Bound for Supreme Court

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On June 26, 2017, the full D.C. Circuit Court of Appeals

[split down the middle](#)

over whether the Securities and Exchange Commission's (the "SEC's") appointment of Administrative Law Judges ("ALJs") is consistent with the Constitution. As detailed in a

[prior alert](#)

, panels of the Tenth and D.C. Circuit Courts of Appeals had previously come to opposite conclusions in response to constitutional challenges to the SEC's appointment of ALJs. These challenges, described in detail

[here](#)

, have contended that ALJs are inferior officers who were not appointed according to the Appointments Clause in Article II of the Constitution. The issue initially appeared settled when the D.C. Circuit held in *Lucia v. SEC* that ALJs were not officers subject to the requirements of the Appointments Clause. But, on December 27, 2016, the Tenth Circuit decided in *Bandimere v. SEC* that ALJs were indeed inferior officers and therefore were in violation of the Appointments Clause. On May 3, 2017, the Tenth Circuit declined to rehear *Bandimere en banc*. The D.C. Circuit, however, decided to rehear *Lucia en banc* and the full D.C. Circuit heard oral argument on May 24, 2017. Only weeks after argument, the D.C. Circuit announced that it could not form a majority opinion on the answer to the constitutional question. Accordingly, the *Lucia* decision, which upheld the appointment of SEC ALJs, remains in force. Now that the *en banc* dust has settled and the split between the Tenth and D.C. Circuits has solidified, the constitutionality of SEC ALJs' appointment appears headed for the Supreme Court.

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