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Lack of Presidential Appointment May Invalidate ALJ Decisions

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In one of its last opinions of the term, the U.S. Supreme Court held in *Lucia v. U.S. Securities and Exchange Commission (SEC)* on June 21, 2018, that administrative law judges (ALJs) are officers of the United States, not mere employees, and therefore must be appointed under the Constitution's Appointments Clause. The decision leaves important questions open for individuals that have faced or are currently facing administrative proceedings before the SEC and other government agencies.

The Constitution's Appointments Clause requires that "inferior officers" be appointed to their positions by the President, the courts or the Heads of Departments, or agency commissioners. The case at hand, *Lucia v. SEC*, concerned an administrative proceeding by the SEC against investment broker Raymond Lucia, whom the SEC accused of using misleading marketing practices to deceive prospective clients.

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Lack of Presidential Appointment May Invalidate ALJ Decisions

Mr. Lucia appealed the decision of the administrative law judge, who had fined him \$300,000 and barred him for life from the investment industry, on the grounds that the presiding judge had been unconstitutionally appointed. The judge that heard Mr. Lucia's case, along with the four other ALJs at the SEC, was not appointed by Commissioners, but by staff. Shortly after the case was filed, the SEC sought to remedy any potential constitutional violation by having the Commissioners simply appoint the five ALJs. The Court overturned the ruling against Mr. Lucia after the majority concluded that administrative law judges are "officers" of the United States. The Court went on to hold that Mr. Lucia was entitled to have his case heard before a new ALJ, despite the fact that the ALJ that heard his case had subsequently constitutionally appointed.

What remains to be seen is how federal courts will treat appeals by defendants from adverse administrative decisions in cases where an objection was made to the constitutionality of the presiding judge. Did the SEC remedy the issue in these cases completely when the Commissioners appointed the five administrative judges or will new proceedings be required? If so, can the same judge who heard a case before his/her appointment by the Commissioners, then hear the same case a second time? Perhaps most importantly, will litigants succeed in bringing challenges to the constitutionality of presiding ALJs in other governments agencies such as the Social Security Administration, which employs more than 1,400 ALJs who oversee more than 700,000 cases a year? While *Lucia* involved highly specific facts, the logic of the majority opinion would appear to apply to agencies outside the SEC.

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