

DC Circuit Split Tees Up Supreme Court Review of SEC Judges

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June 26, 2017

The Supreme Court may have to decide the future of the SEC's administrative law judges after a rare 5-5 split between the judges on the U.S. Court of Appeals for the D.C. Circuit.

The court said the 10 judges who participated in the case, *Lucia v. SEC*, were equally divided Monday, with Chief Judge Merrick Garland recused. That means the court's original three-judge panel decision from last August, which upheld the U.S. Securities and Exchange Commission's hiring of ALJs, stays in place. The D.C. Circuit reheard the case en banc last month.

Meanwhile, the 10th Circuit last year created a circuit split when it found the SEC's hiring process unconstitutional.

Gibson, Dunn & Crutcher's Mark Perry, who argued the case against the SEC, said he will appeal to the Supreme Court.

"The D.C. Circuit hears more petitions for review of agency action, and is thus more familiar with the workings of administrative agencies and their officials, than any other court," Perry said. "Given that the D.C. Circuit has deadlocked on the constitutionality of the SEC's ALJs, only the Supreme Court can resolve the issue."

Lawyers following the issue said it was destined for the high court. Alex Lipman of Brown Rudnick represents several clients challenging the SEC on the same issue in the D.C. Circuit, and filed an amicus brief on behalf of investor Mark Cuban in the *Lucia* case. Lipman said the split in D.C. highlights the need for Supreme Court review.

"I think it shows that this is really the kind of issue on which the Supreme Court needs to weigh in on because the Courts of Appeal and even the individual judges are on both sides of this," he said.

The case hinges on whether the SEC's administrative law judges are "inferior officers" under the Constitution's appointments clause, as opposed to employees. The clause states that inferior officers must be appointed by the president, agency or department heads, or the courts. At the SEC, ALJs are hired by the commission's Office of Administrative Law Judges, which picks from a pool of candidates submitted by the Office of Personnel Management.

Opponents of the SEC argue this method renders the agency unaccountable to the voters, because the ALJs are given broad discretion in enforcement proceedings. In oral arguments last month, government lawyers noted that every action taken by an SEC ALJ is subject to review by the commissioners, who are political appointees.

“It’s easy to dismiss appointments questions as just technical, but there’s a reason the appointments clause works the way it does and that is to give some accountability back to the people,” said Thaya Brook Knight, associate director of financial regulation studies at the Cato Institute, an amici in the *Lucia* case.

Knight said it’s likely the Supreme Court will pick up the case given the circuit split and the intriguing constitutional question.

Michael Kelly, a partner at Hogan Lovells who follows the case, added that the court would probably want to take the case “sooner rather than later,” because of the broad implications of any decision.

“It’s [an issue] that very much might affect the SEC and other administrative agencies in their day-to-day work,” Kelly said.

He noted it’s unclear, however, what the SEC would do if it loses the case. If the judges are appointed unconstitutionally, then any prior proceedings before them could be rendered invalid. But the court may decide otherwise, or choose not to apply the decision retroactively. There’s also the possibility of further litigation over the scope of the decision and how to apply it.