Securities Regulation Daily Wrap Up, ENFORCEMENT—U.S.: Justices hear oral argument on constitutionality of SEC ALJs, (Apr. 24, 2018)

Securities Regulation Daily Wrap Up

Click to open document in a browser

The Supreme Court has heard oral argument in Raymond Lucia's case disputing the constitutionality of the SEC's administrative law judges. Lucia has asked the court to reverse a D.C. Circuit holding that the ALJ's are employees beyond the reach of the Appointments Clause. Following a change of administration, the Solicitor General makes the same case. Finally, in defense of the current system, a court-appointed amicus defends the judgment below, arguing that the SEC's ALJs are employees, not officers, because they do not exercise significant authority with the power to bind the government or others in their own name (*Lucia v. SEC*, April 23, 2018).

ALJs are officers. Mark Perry, on behalf of Lucia, opened by stating that SEC ALJs are officers under all the Court's precedents. He was quick to point out that the petitioner's stance is that the ALJs are inferior officers, but not employees, because their work is supervised by principal officers. He noted further that the ALJs have sovereign powers that are given to judges, powers that, as the Court recognized in *Freytag*, make them officers. In response to a question by Chief Justice Roberts, Perry maintained that ALJs have the power to make final decisions on behalf of the SEC. While the Commission can review an ALJ's decision, those decisions are deemed to be final if not reviewed within 42 days, and 90 percent of ALJ decisions become final with no review.

Justice Kennedy expressed concern about the effect that a ruling in favor of Lucia would have on ALJs in other agencies. Perry responded that his position was limited to a group of 150 ALJs in 25 agencies who decide adversarial proceedings subject to Sections 556 and 557 of the Administrative Procedure Act, some of whom may already have been properly appointed. Here, Perry distinguished other agencies, such as Social Security, that do not, he said, conduct adversarial hearings, in the sense that a private citizen will have his or her "fate" decided.

The government's position. Arguing for the government, Deputy Solicitor General Jeffrey Wall Wall enunciated the test that the government hopes the Court will adopt: "Under *Buckley* and *Freytag*, a constitutional officer occupies a continuing position that's been vested by law with significant discretion to do one of two things: Either to bind to the government or third-parties on important matters or to undertake other important sovereign functions." The Commission ALJs, he continued, have both powers, so there is no meaningful difference between this case and *Freytag*.

The government tests leaves room for discretionary review, but the point, Wall said, is that the ALJs issue decisions which the Commission can review if it wishes. At the end of the day, though, the ALJs decision, if not reviewed, binds the parties, and this is what makes them officers, Wall said.

Effect on independence. Justice Kagan expressed concerns about the ALJ's independence throughout the session. She noted that decision makers should be insulated from political pressures and asked Perry if "putting those decision makers even closer to the political body" would only exacerbate the problem of bias. Returning to the point during an exchange with Wall, Justice Kagan said that having power over pay, removal, or employment can interfere with decisional independence. The APA, she said, provides for insulation from the political system, but the government's position would "ratchet that down."

Finality. Anton Metlitsky, the Court-appointed amicus arguing in support of the existing system, faced an immediate challenge from Chief Justice Roberts. The amicus's theory is that the SEC's ALJs are employees, not officers, because they do not exercise significant authority with the power to bind the government or others in their own name. Justice Roberts, however, said that this test does not jibe with *Freytag's* laundry list of particular authorities. Justice Kagan joined in, noting the commonalities of the ALJs at issue and the judges in *Freytag*:

"If you had a list and you said top 10 attributes of the judges that were involved in *Freytag* and the judges that are involved here, you'd pretty much say that nine of them are the same." Metlitsky countered that the power to bind is crucial, prompting Justice Alito to counter that this test seems broad and vague because "an enormous number" of executive branch officials have this power.

Near the end of Metlitsky's time, Justice Kagan observed that, in comparison to the other tests on offer, there is a "good deal to be said" for the amicus's argument, but she wondered what the source of the test is. Metlitsky said that the idea of binding authority has been accepted for nearly 100 years. And, the question of authority to act in one's own name reflects a principle "ubiquitous in actual government practice."

In rebuttal, Perry argued that SEC ALJs do meet the finality test. He analogized the Commission's discretionary right to review to having certiorari denied by the Court: the Commission is not reviewing, and the decision stands in the ALJ's name. Turning to the issue of remedies, Perry said that the Constitution requires a new proceeding, with the prior acts stripped of validity. In response to a question by Justice Sotomayor about the effect on already completed cases, Perry said that general principles would "kick in," and distinguished this case, and 13 other similarly-situated cases, as being on direct review and never having gone final.

The petition is No. 17-130.

Attorneys: Mark Perry (Gibson, Dunn & Crutcher LLP) for Raymond J. Lucia and Raymond J. Lucia Companies, Inc. JeffreyB. Wall, U.S. Department of Justice, for the SEC. Anton Metlitsky (O'Melveny & Myers LLP), court-appointed amicus curiae defending the judgment below.

LitigationEnforcement: Enforcement SupremeCtNews