

[Securities Regulation Daily Wrap Up, TOP STORY—U.S.: Justices take blockbuster Lucia case to decide status of SEC’s law judges, \(Jan. 12, 2018\)](#)

Securities Regulation Daily Wrap Up

[Click to open document in a browser](#)

By [Mark S. Nelson, J.D.](#)

The Supreme Court agreed to hear Raymond Lucia’s case alleging that the SEC’s administrative law judges were appointed in violation of the U.S. Constitution’s Appointments Clause because they are inferior officers of the U.S. government and not merely employees. Lucia’s case potentially has ramifications for other federal agencies that utilize ALJs. But the Supreme Court’s order granting certiorari in Lucia’s case did not mention its disposition of a similar case brought by David Bandimere whose petition for certiorari also was pending before the court. Moreover, the court’s order, at least for now, leaves open some questions raised by the briefing in Lucia’s case. The decision to grant certiorari in *Lucia* comes as the court firms up the remainder of its OT17 schedule ([Lucia v SEC](#), January 12, 2018).

Are ALJs officers? The Solicitor General’s brief in *Lucia* (essentially confessing error) may have spurred enough justices to agree that the court should hear the case. Contrary to its earlier arguments, the government recently [changed](#) its position in *Lucia*, where it had been defending the SEC’s ALJs, to instead argue that the court should decide whether the SEC’s ALJs are inferior officers who must be appointed in compliance with the requirements of the Appointments Clause.

The answer to that question turns largely on how the justices apply several key precedents. In one case, *Buckley v. Valeo*, the Court indicated that officer status depends on whether an individual exerts significant authority. Lucia and others challenging the status of the SEC’s ALJs had argued that the ALJs exercise significant authority because they have wide latitude to oversee in-house enforcement cases and that any Commission review of ALJs’ decisions is minimal or, in some instances, nonexistent. By contrast, the government previously countered that the SEC’s ALJs are employees who lack final authority because the Commission ultimately must make an ALJ’s initial decision final.

The finality issue derives from the D.C. Circuit’s [Landry](#) opinion in which it interpreted the Supreme Court’s *Freytag* decision (Tax Court’s special trial judges were inferior officers). In *Landry*, a D.C. Circuit panel majority found that the Federal Deposit Insurance Corporation’s ALJs were employees because they lacked finality. But a concurring opinion by Judge Randolph urged a more nuanced reading of *Freytag*. Judge Randolph concurred in *Landry* to make the point that *Freytag* did not make finality the sole touchstone regarding officer status, something Judge Randolph called the "alternative holding" in *Freytag*.

Unanswered questions about grant. The Supreme Court’s decision to hear Lucia’s case, however, left open, at least temporarily, some questions raised by the Solicitor General’s and Lucia’s briefing in the case.

For one, the Solicitor General had [previously](#) asked the Supreme Court to hold the [Bandimere](#) case, in which a divided Tenth Circuit panel found the SEC’s ALJs were inferior officers, in the event that the justices decided to take the *Lucia* case. One reason cited by the government was the possibility that Justice Gorsuch (then a nominee to the Supreme Court) may have participated in the decision to [deny](#) rehearing en banc in *Bandimere*. The order granting certiorari in *Lucia* does not state a disposition of the *Bandimere* petition, which also was distributed for the January 12 conference. It is possible that the court will answer that question when it updates the docket in *Bandimere*.

Another open question is whether the justices will consider the removal question. The Solicitor General had asked the court to either reframe the question presented in *Lucia* or to add a second question regarding whether

applicable provisions regarding the removal of the SEC's ALJs satisfy separation of powers principles. Again, the order granting certiorari in *Lucia* does not mention whether the justices will hear this question. Lucia had [opposed](#) the Solicitor General's attempt to get the removal question before the court. The court often will limit the questions presented or explicitly revise the questions presented when it grants certiorari.

Yet another question is whether the court will appoint an amicus to argue in defense of the judgment below in *Lucia*. The Solicitor General, given the government's new conclusion that the SEC's ALJs are officers, had urged the court to appoint an amicus to present the argument that the SEC's ALJs are mere employees beyond the reach of the Appointments Clause. It is possible the court will issue a further order making such appointment.

Lastly, whatever the decision in *Lucia*, it could impact other federal agencies. In [Free Enterprise](#), in which the Supreme Court left for another day the constitutional status of ALJs, Justice Breyer dissented and cited research showing how the thousands of ALJs employed across the federal government could be impacted by a decision that they are officers. Justice Breyer was joined in dissent by current Justices Ginsburg and Sotomayor, and by now-retired Justice Stevens. A decision in *Lucia* also could impact the Commission's recent attempt to [ratify](#) its prior appointment of ALJs with respect to pending administrative proceedings.

The case is [No. 17-130](#).

Attorneys: Mark Perry (Gibson, Dunn & Crutcher LLP) for Raymond J. Lucia and Raymond J. Lucia Companies, Inc. Noel J. Francisco, Solicitor General, for the SEC.

Companies: Raymond J. Lucia Companies, Inc.

MainStory: TopStory DoddFrankAct Enforcement FedTracker Securities SupremeCtNews