

[Securities Regulation Daily Wrap Up, TOP STORY—U.S.: Court-appointed amicus says lack of sovereign power key to SEC ALJs' constitutional status, \(Mar. 27, 2018\)](#)

Securities Regulation Daily Wrap Up

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

The battle over the fate of the SEC's administrative law judges has been fully joined now that the court-appointed amicus curiae defending the judgment below has weighed in: the SEC's ALJs are employees, not officers, because the ALJs do not exercise significant authority with the power to bind the government or others in their own name. Raymond J. Lucia had already sought to upend the Commission's final judgment against him by emphasizing the weighty powers he said the SEC's ALJs possess, while the Solicitor General, following a change of Administration, ceased defending the SEC's view of its ALJs as employees and instead [confessed error](#) by arguing that the appointment of the SEC's ALJs' ran afoul of the U.S. Constitution's Appointments Clause.

What remains to be seen is whether the Supreme Court will also take up the question of how SEC ALJs might be [removed](#) from their positions, a question that was posed by the Solicitor General, given somewhat tepid treatment by Lucia (against adding question but may raise later), not explicitly required to be addressed by the justices in their certiorari grant, and which was urged against by the [court-appointed amicus](#). The answers to both the Appointments Clause and removal issues may begin to emerge when the justices hear oral argument on April 23 ([Lucia v. SEC](#), March 26, 2018).

An overarching principle. The amicus grounded his argument for affirming the D.C. Circuit's decision that the SEC's ALJs are employees on a single overarching principle: the "significant authority" rubric contemplated by the Supreme Court's decisions in, for example, *Buckley v. Valeo*, requires the exercise by an office holder of a portion of the federal government's sovereign power. Accordingly, the amicus said, a person is an "Officer[] of the United States" only if they are able to bind the government or other third parties in their own name rather than in the name of a superior officer.

The amicus then suggested numerous activities that one might do that would bind the federal government and/or private parties. But holding a continuing position in the government with de facto power to bind others, yet without the ability to bind others in one's own name, still would not be enough to make that person a constitutional officer. Moreover, the amicus said the Supreme Court's recent cases stand for the proposition that constitutional officers must have the power to bind the government or others.

With respect to the SEC's ALJs, the amicus, in a later section in the brief, disputed Lucia's and the Solicitor General's characterization of certain of the SEC's ALJs' powers. For example, the SEC's ALJs' decisions are reviewed de novo by the Commission (either plenary or on the Commission's initiative). The amicus also said it is "irrelevant" whether the Commission defers to ALJs' credibility findings because there is no legal duty to defer to the ALJs and the Commission would speak for itself if it did defer. Initial decisions issued by an ALJ, continued the amicus, have no force until the Commission issues a final order. According to the amicus, even the power to deal with "contemptuous conduct" is reviewable by the Commission. The amicus also cast aside still more attempts by Lucia and the Solicitor General to compare the SEC's ALJs to Article III judges.

Lastly, the amicus's brief noted in several places that the Commission issues final orders in matters that come to it from different procedural stances. The Commission may grant plenary review (or not), and the Commission must deal with numerous matters that come to it from defaults before an ALJ. Both Lucia and the Solicitor

General argued that SEC ALJ initial decisions often have the effect of being final because nearly 90 percent of these matters never receive plenary review by the Commission.

In a footnote within the amicus's statement of the case, the amicus cited a [blog post](#) by SEC Commissioner Robert Jackson, which the amicus said may explain the 90 percent figure. Commissioner Jackson had reviewed SEC ALJ decisions for 2014 and 2015 and noted, among other things, that 80 percent of initial decisions involved defaults; that in the 10 percent of matters where plenary review was sought, the Commission always granted review; and that in the remaining matters, no review was sought. Although not cited directly by the amicus brief, Commissioner Jackson's blog post went on to make this observation: "In fact, the *only* proceeding of which I am aware during this time period where review of an ALJ's decision was timely sought and the commission refused review was one in which the *SEC's own enforcement division* made the request."

Whither Landry? The D.C. Circuit's decision in *Lucia* leaned heavily on that circuit's [Landry](#) decision (emphasizing whether an ALJ decision is final), in which the court upheld the employee status of the Federal Deposit Insurance Corporation's ALJs. But that decision also drew a lengthy concurrence from Judge Randolph on the Appointments Clause issue. According to Judge Randolph, the Supreme Court's *Freytag* opinion, holding that the Tax Court's special trial judges were officers subject to the Appointments Clause, could be understood to have also rested on the special trial judges' authorities that were not final in character and, thus, suggested an "alternative holding" by the justices.

The court-appointed amicus in *Lucia* never cited the *Landry* case, although the amicus's brief does counter the theory suggested by Judge Randolph's concurrence in *Landry* regarding the scope of *Freytag*. The amicus noted that *Freytag* can be read broadly, but *Freytag* still supports the overarching principle that allows courts to distinguish between "Officers of the United States" and employees of the federal government.

Specifically, the amicus urged the justices not to expand the meaning of "Officers of the United States," as both *Lucia* and the Solicitor General have suggested the court should do. The amicus focused on several aspects of special trial judge powers, including their power to sometimes issue final decisions, their power to punish contempt, and the deference owed to their findings (*i.e.*, a clearly erroneous standard).

The amicus went on to suggest that a broader reading of "Officers of the United States" could have a serious impact on many government functions, such as presidential and congressional investigative commissions. Moreover, the amicus noted the potential consequences for government employees (*e.g.*, attorneys and law enforcement officers) who may become subject to the Appointments Clause; the amicus also noted that an expansion of "Officers of the United States" might upend how civil servants across the government are appointed. Many of the amicus's concerns are reminiscent of Justice Breyer's dissent in [Free Enterprise](#), in which he outlined the possible consequences for government employees, including ALJs, across federal administrative agencies.

Remedies and removal. One question that has lingered since the Supreme Court granted certiorari in *Lucia* is whether the court will address the remedies and "good cause" removal issues, if a majority of the justices conclude that the SEC's ALJs, as currently constituted, violate the Appointments Clause. *Lucia*'s brief only tangentially raised the issue and suggested that removal would only become an issue (*i.e.*, raised as a defense) if the SEC re-charged him. By contrast, the Solicitor General asked the justices to explicitly address the removal question.

The court appointed amicus, however, took a narrower view of his duty to defend the judgment below. Specifically, the amicus said that questions about remedies would spring to the fore upon reversal of the D.C. Circuit's decision; similarly, addressing the removal issue now would not aid the Court's purpose in appointing an amicus: to defend the judgment below.

Moreover, the court-appointed amicus draws support for a narrow interpretation of his duties by looking to the language of the certiorari grant. In [granting certiorari](#), the justices sometimes will modify the question presented, limit the grant to one of several questions presented, or may ask the parties to address an additional question. The grant in *Lucia* made no reference to a qualified, different, or additional question presented. From the court-

appointed amicus's viewpoint, the justices' decision not to alter the question presented means that the removal issue is beyond the scope of the grant.

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

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Companies: Raymond J. Lucia Companies, Inc.

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