

[Securities Regulation Daily Wrap Up, TOP STORY—U.S.: Lucia asks justices to decline government’s invitation to decide ALJ removal question, \(Dec. 13, 2017\)](#)

Securities Regulation Daily Wrap Up

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

Lawyers for Raymond J. Lucia urged the Supreme Court to still take his case regarding the appointment of the SEC’s administrative law judges despite the Commission’s recent order ratifying the appointment of its ALJs in pending administrative matters, which Lucia said had not mooted the case. But Lucia also urged the justices to decline the government’s invitation to decide a question about the removal of the SEC’s ALJs. Lucia, who is appealing a decision by the D.C. Circuit, filed his reply brief making these arguments on the same day his case was distributed for the justices’ January 5, 2018 conference; the *Bandimere* case from the Tenth Circuit, which raises the same issues as Lucia does, was also distributed for the second time for the same January conference ([Lucia v. SEC](#), December 13, 2017).

Case not moot; *Marbury* reference. Lucia told the court that his case is not moot as a result of the government’s [changed position](#) or because of the Commission’s attempt to ratify the prior appointment of its ALJs in pending cases. The government, on the SEC’s behalf, had previously argued that the SEC’s ALJs are employees beyond the reach of the U.S. Constitution’s Appointments Clause, but in Lucia’s case, the government changed its view to match Lucia’s and now argues that the SEC’s ALJs exercise significant authority and, thus, are inferior officers subject to the Appointments Clause.

With respect to the government’s new position, Lucia said he is still subject to SEC sanction and that the government’s latest argument offers him no redress. Similarly, Lucia posited that because the government has not dismissed its case against him, there is still a live case or controversy, as required for purposes of Article III standing.

Moreover, Lucia argued that the Commission’s ratification order does not impact his case. For one, Lucia posited that the SEC is still free to conclude that its ALJs are employees instead of inferior officers. Lucia also noted that the order applies only to pending administrative matters. Lucia further argued that the government had now conceded that Lucia deserves a hearing before an ALJ who was appointed consistent with the Appointments Clause.

Lucia relied on the law of agency for one last critique of the Commission’s ratification order. Under agency principles, there must be an unauthorized act to be ratified and given retroactive effect, but the Commission’s lack of involvement in hiring (not appointing) its ALJs, Lucia argued, means there was no appointment to be ratified. The purported lack of an appointment or commission to the ALJ from the Commission would violate the constitutional requirement that an officer receive a commission (See Art. II, §3: "He [the president]...shall Commission all the Officers of the United States."). For this last point, Lucia cited the foundational case of modern judicial review, *Marbury v. Madison*, holding that one of the "midnight judges" appointed immediately before a change of administration had a right to his commission, was entitled to redress, but could not have the remedy sought (mandamus) because the law providing that remedy was unconstitutional.

Court should avoid removal issue. Lucia noted that while he preserved the question of removal of SEC’s ALJs, that question was not ruled upon by the lower courts in his case. Lucia cited the court’s jurisprudence for several principles that caution against it taking up the removal question. First, Lucia cited the general admonition that the Supreme Court is a court of review and is not a court of first review. Second, Lucia posited that the

government's re-framed question presented including the removal issue is not only too broad, but it is in fact a request for the Supreme Court to issue an advisory opinion.

But, as an alternative, Lucia said if the court chooses to decide the removal question presented by the government, it should pose a separate question: "Whether limitations on the removal of SEC ALJs violate the separation of powers." The Supreme Court's opinion in [Free Enterprise](#) dodged the removal question with respect to ALJs, thus leaving for another day whether ALJs are officers subject to the Appointments Clause and whether their removal must obey separation of powers principles. Even if the justices decline to take Lucia's case or *Bandimere*, there are other cases in the D.C. and Fifth Circuits that may eventually get to the High Court.

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

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Companies: Raymond J. Lucia Companies, Inc.

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