

XIV. Can the SEC Hold onto its Home Court Advantage? An Analysis of the SEC's Administrative Court

In order to facilitate the enforcement of securities laws, the Securities and Exchange Commission (SEC) brings some of its cases before independent administrative law judges (ALJs) who rule on securities allegations.¹⁴³² The ALJ holds a public hearing where he or she can issue subpoenas, rule on motions, and prepare initial decisions reviewable by the SEC.¹⁴³³ Aside from certain restrictions, including those barring corporate officers or directors from the securities industry, there is no clear limit to the types of actions the SEC can bring in an administrative proceeding.¹⁴³⁴ While the SEC touts its ALJs as independent arbiters, concerns have been raised about the fairness of the SEC's in-house administrative court.¹⁴³⁵

From October 2010 through May 2015, 90 percent of cases that the SEC brought before ALJs were decided in favor of the SEC.¹⁴³⁶ Appeals of those decisions failed 95 percent of the time, with fifty-three out of fifty-six appeals heard by the SEC in that period decided in favor of the SEC.¹⁴³⁷ In federal court, the SEC only has an 84 percent success rate, giving it good cause to favor its home field advantage.¹⁴³⁸ SEC cases are increasingly brought before ALJs as opposed to federal courts; while the SEC sent only 60 percent of its cases to ALJ hearings in 2011, by 2014, that figure rose to over 75 percent.¹⁴³⁹ As a result, defendants of SEC actions are finding ways to

¹⁴³² See *What We Do*, U.S. SEC. & EXCH. COMM'N (June 10, 2013), <https://www.sec.gov/about/whatwedo.shtml> [<https://perma.cc/3SQE-UMCB>].

¹⁴³³ *Id.*

¹⁴³⁴ See *id.*

¹⁴³⁵ *Id.* (indicating repeatedly that the office of Administrative Law Judges are "independent" from the Commission); see Robert Anello, *Addressing the SEC's Administrative "Home Court" Advantage in Enforcement Proceedings*, FORBES (Sept. 7, 2015), <https://www.forbes.com/sites/insider/2015/09/07/addressing-the-secs-administrative-home-court-advantage-in-enforcement-proceedings/#cf4ad0448881>, [<https://perma.cc/PJP7-WZYF>].

¹⁴³⁶ See Jean Eaglesham, *SEC Wins With In-House Judges*, WALL ST. J. (May 6, 2015), <https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803>, [<https://perma.cc/E8PX-4TLM>].

¹⁴³⁷ *Id.*

¹⁴³⁸ *Id.*

¹⁴³⁹ *Id.*

challenge the validity of ALJ decisions,¹⁴⁴⁰ claiming that the SEC's 90 percent success rate in ALJ hearings demonstrates the inherent unfairness of the administrative court.¹⁴⁴¹

The Administrative Procedure Act (APA) gives an administrative agency the authority to appoint ALJs as it deems necessary.¹⁴⁴² To become an SEC ALJ, a judge must first pass an exam administered by the U.S. Office of Personnel Management.¹⁴⁴³ Then, the SEC Human Resources Department (HRD) can hire any of the top three candidates.¹⁴⁴⁴ After a chief ALJ has been selected by the HRD, the chief SEC ALJ can select any new candidates that qualify under the exam criteria, and recommend them to the SEC HRD, which issues final approval and appointment.¹⁴⁴⁵ The SEC currently has five ALJs appointed for life terms.¹⁴⁴⁶ The powers of an ALJ are far reaching; an ALJ can issue sanctions, issue a cease and desist, and assess penalties.¹⁴⁴⁷ These decisions, or recommendations, are then reviewable by the SEC, which can overturn, modify, affirm, or remand the ALJ decision.¹⁴⁴⁸ The SEC has the authority to enforce these decisions.¹⁴⁴⁹

This article discusses the constitutionality of the current appointment process of SEC ALJs, and will address the issue of whether SEC ALJs are officers or employees. Section A of this article discusses the Appointments Clause of the Constitution and its applicability to SEC ALJs, and the precedent upon which current challenges to the SEC ALJ appointment process are based. Section B analyzes a current circuit split on the issue of whether SEC ALJs are

¹⁴⁴⁰ *Id.*

¹⁴⁴¹ See Gretchen Morgenson, *Crying Foul on Plans to Expand the S.E.C.'s In-House Court System*, N.Y. TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/28/business/secs-in-house-justice-raises-questions.html> [<https://perma.cc/34V7-5Y7F>].

¹⁴⁴² See generally 5 U.S.C. § 556(b)(3) (2010).

¹⁴⁴³ 5 C.F.R. § 337.101 (2007).

¹⁴⁴⁴ See VANESSA K. BURROWS, CONG. RESEARCH SERV., RL340607 ADMINISTRATIVE LAW JUDGES: AN OVERVIEW (2010), <http://ssaconnect.com/tfiles/ALJ-Overview.pdf> [<https://perma.cc/T8YY-EE7F>].

¹⁴⁴⁵ *Bandimere v. SEC*, 844 F.3d 1168, 1177 (2016).

¹⁴⁴⁶ See *id.*

¹⁴⁴⁷ *Office of Administrative Law Judges*, U.S. SEC. & EXCH. COMM'N (Jan. 26, 2017), <https://www.sec.gov/alj> [<https://perma.cc/H4S5-XZBQ>].

¹⁴⁴⁸ See *What We Do*, *supra* note 1.

¹⁴⁴⁹ See *id.*

officers or employees. Section C discusses the potential future of this issue in the Supreme Court and its implications.

A. The Appointments Clause of the Constitution

The Appointments Clause of the Constitution gives the President the power to appoint officers of the United States with advice and consent of the Senate.¹⁴⁵⁰ This clause makes clear that officers of the United States can *only* be appointed by the President and approved by the Senate, while appointment of inferior officers may be delegated to heads of departments, courts of law, or the President alone.¹⁴⁵¹ Still, there is another category of officials—employees—who do not “exercise significant authority” pursuant to the laws of the United States, and whose appointment is not restricted by the Constitution.¹⁴⁵² It is often difficult to draw the line between inferior officer and employee, but the Supreme Court decided in *Freytag v. Commissioner of Internal Revenue* that there are certain factors to help resolve this issue.¹⁴⁵³ While the test in *Freytag* is not explicit, whether an official’s position is established by law, whether the official exercises significant discretion, and whether the official has final decision-making authority are factors that bear on the determination.¹⁴⁵⁴ Accordingly, if SEC ALJs are inferior officers¹⁴⁵⁵ then the SEC HRD constitutionally cannot

¹⁴⁵⁰ U.S. CONST. art. II § 2, cl. 2 (“The President shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

¹⁴⁵¹ *Id.*

¹⁴⁵² *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

¹⁴⁵³ *See Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868 (1991) (holding that tax judges should be considered inferior officers due to their ability to exercise significant authority and discretion).

¹⁴⁵⁴ *See id.* at 881

¹⁴⁵⁵ For the purposes of this article, I will assume that SEC ALJs are not superior officers. However, if they were considered superior officers then according to the Constitution they could only be appointed by the President; *See* U.S. CONST. art. II § 2, cl. 2; *see* *Edmonds v. United States*, 520 U.S. 651 (1997) (holding that offices subject to removal by a higher power or limited

appoint them; their appointment must either be through the President or otherwise delegated by Congress.¹⁴⁵⁶

In *Freytag*, the Supreme Court addressed whether tax trial judges presiding over a Tax Court created by Congress should be classified as inferior officers or employees.¹⁴⁵⁷ Congress created the Tax Court, and granted authority to a chief tax judge to choose and appoint trial judges to hear matters designated by the chief judge.¹⁴⁵⁸ Similar to SEC ALJs, if the tax trial judges are classified as mere governmental employees and not inferior officers, then their appointment would not be subject to the restrictions itemized in the Appointments Clause.¹⁴⁵⁹ The tax judges exercise similar authority to SEC ALJs: the tax judges “take testimony, conduct trials, rule on the admissibility of evidence,” and issue decisions that are subject to the ultimate authority of the Tax Court, which has the power to affirm or overturn them.¹⁴⁶⁰ In *Freytag*, to determine if an official is an officer of the United States, the Supreme Court applied the test laid out in *Buckley v. Valeo*, which asks whether the official exercise significant discretion and authority pursuant to the laws.¹⁴⁶¹

The Commission of Internal Revenue argued that because the tax trial judges do not issue final decisions, and engage in ministerial employee-like tasks, they should be considered employees.¹⁴⁶² The Supreme Court rejected these arguments.¹⁴⁶³ It held that neither an inability to issue a final opinion, nor the performance of ministerial tasks, is dispositive of whether the tax trial judges should be classified as employees.¹⁴⁶⁴ The Court focused on the significant independent discretion that the tax trial judges hold, and concluded that under *Buckley*, it is this authority that makes them officers.¹⁴⁶⁵ Because the judges can rule on evidence, enforce compliance with discovery, take

in duties and authority cannot be considered Officers of the United States, and thus because SEC ALJs are subject to removal and the authority of the SEC itself it is unlikely that they be classified as superior officers).

¹⁴⁵⁶ *Id.*

¹⁴⁵⁷ *See Freytag*, 501 U.S. at 868.

¹⁴⁵⁸ *Id.* at 870–71.

¹⁴⁵⁹ *Id.* at 880.

¹⁴⁶⁰ *Id.* at 873–82.

¹⁴⁶¹ *Id.* at 881 (citing *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

¹⁴⁶² *Id.*

¹⁴⁶³ *See generally id.*

¹⁴⁶⁴ *Id.*

¹⁴⁶⁵ *Id.*

testimony, and issue initial decisions, the Supreme Court reasoned that these judges possess enough discretion and authority to be categorized as inferior officers.¹⁴⁶⁶ After already explicitly concluding that the trial judges exercise significant discretion based solely on their duties and authority, the Court observed that it could have found the judges to be inferior officers based simply on the grounds that in some cases, the special judges had final decision-making authority.¹⁴⁶⁷ Accordingly, while final authority may be sufficient to conclude that an official is an inferior officer, it is not necessary.¹⁴⁶⁸

The *Freytag* Court then determined whether Congress could vest the power appointment of these inferior officers in the chief tax judge. The Appointments Clause states that Congress may vest the appointment of inferior officers in the President alone, the courts of law, or in heads of departments.¹⁴⁶⁹ Therefore, the issue focused on whether the chief tax judge is a “head of department” or whether the tax court is a “court of law.” The Framers restricted the delegation of appointments to these specific entities because they believed that widely distributed appointment power diffuses the efficiency and effectiveness of government.¹⁴⁷⁰ Justice Blackmun wrote that the Tax Court operates functionally like a judicial court, insofar as it does not make political decisions and punishes contempt by imposing fines and imprisonment.¹⁴⁷¹ The Supreme Court ruled that the Tax Court is a court of law due to its innately judicial capacity, and thus the delegation of appointments accordingly was consistent with the Constitution.¹⁴⁷²

Nine years after *Freytag*, the D.C. Circuit Court held that Federal Deposit Insurance Corporation (FDIC) ALJs are employees and not inferior officers.¹⁴⁷³ The petitioner in *Landry v. FDIC* had argued that the appointment of FDIC ALJs was unconstitutional.¹⁴⁷⁴ Like the tax judges, FDIC ALJs can hear trials and issue recommendations to the FDIC, which ultimately renders a final decision.¹⁴⁷⁵ The *Landry*

¹⁴⁶⁶ *See generally id.*

¹⁴⁶⁷ *Id.* at 882.

¹⁴⁶⁸ *See id.*

¹⁴⁶⁹ U.S. CONST. art. II, § 2, cl. 2.

¹⁴⁷⁰ *Freytag*, 501 U.S. at 885.

¹⁴⁷¹ *Id.* at 891.

¹⁴⁷² *Id.*

¹⁴⁷³ *See generally* *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000).

¹⁴⁷⁴ *Id.* at 1128.

¹⁴⁷⁵ *See id.* at 1133.

Court distinguished *Freytag* by pointing out that in some cases, the tax trial judges in *Freytag* could exercise final discretion, while FDIC ALJs can only recommend but never dictate enforcement action.¹⁴⁷⁶ Because the ALJs can only recommend action, the *Landry* Court found that allowing the judges to be overturned by the Commission does not upset the structural balance of powers that the Appointments Clause seeks to protect.¹⁴⁷⁷ The D.C. Circuit accordingly interpreted *Freytag* to mean that final decision-making authority is the dispositive factor in determining if an official is an officer or employee.¹⁴⁷⁸ Although the *Landry* Court argued that final decision-making authority was “crucial” to the *Freytag* decision,¹⁴⁷⁹ the *Freytag* Court stated clearly and directly the argument that a “lack of authority to issue a final decision” is dispositive of whether an official is an officer “ignores the significance of the duties and discretion that special trial judges possess.”¹⁴⁸⁰

B. Applying *Freytag* to SEC ALJs

While many alleged securities violators have challenged the SEC ALJ process, most such cases have been dismissed for lack of subject matter jurisdiction.¹⁴⁸¹ However, two circuit courts of appeals have ruled on the matter. The Tenth Circuit held in the *Bandimere v. SEC* that SEC ALJs are inferior officers and thus improperly appointed.¹⁴⁸² On the other hand, the D.C. Circuit held that SEC ALJs are employees and not inferior officers.¹⁴⁸³ However, on February 16, 2017 the D.C. Circuit vacated this decision and elected to review the case en banc.¹⁴⁸⁴ Therefore, the issue remains unsettled until the D.C. Circuit issues a new opinion.

¹⁴⁷⁶ *See id.*

¹⁴⁷⁷ *Id.* at 1132.

¹⁴⁷⁸ *See id.* at 1134. (“Accordingly, we believe that the STJs’ power of final decision in certain classes of cases was critical to the Court’s decision. As the ALJs... have no such powers, we conclude that they are not inferior officers.”).

¹⁴⁷⁹ *Id.*

¹⁴⁸⁰ *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 881 (1991).

¹⁴⁸¹ *See, e.g., Bennett v. SEC*, 844 F.3d 174 (2016); *Tilton v. SEC*, 824 F.3d 276 (2016).

¹⁴⁸² *See generally Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016).

¹⁴⁸³ *See generally Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (2016).

¹⁴⁸⁴ *Carmen Germaine, DC Circ. Agrees to Rethink SEC Judges’ Constitu-*

In *Bandimere*, the appellant was accused of violating various securities laws.¹⁴⁸⁵ After losing his initial case at an ALJ hearing, on appeal to the Tenth Circuit, Bandimere challenged the constitutionality of the ALJs themselves.¹⁴⁸⁶ After citing a laundry list of officials the Supreme Court has classified as inferior officers in the past, the *Bandimere* court noted that the distinction between inferior officer and employee is not a bright line and that *Freytag* provides the best “guidance” for navigating these murky waters.¹⁴⁸⁷

The Tenth Circuit derived a three-part test from *Freytag* to determine if a position should be considered an inferior officer (the Bandimere Test).¹⁴⁸⁸ The Bandimere Test asks three questions: (1) Is the office established by law?¹⁴⁸⁹ (2) Are the duties, salaries, and means of appointment established by statute?¹⁴⁹⁰ (3) Does the official exercise significant discretion in carrying out their functions?¹⁴⁹¹ The *Bandimere* court found that if all three prongs are satisfied, under *Freytag*, that official is an inferior officer.¹⁴⁹²

Under the first prong, the *Bandimere* court concluded that because the SEC ALJ position is established by the APA, it is established by law.¹⁴⁹³ Next, the *Bandimere* court concluded that because U.S. law also defines ALJ salaries, appointment process, and duration, the second prong of the Bandimere Test was satisfied.¹⁴⁹⁴ Finally, the *Bandimere* court concluded that SEC ALJs exercise significant authority and discretion in performing important functions such as taking testimony, regulating document production and evidence admissibility, issuing subpoenas, entering default judgments, and presiding over hearings.¹⁴⁹⁵ After satisfying all three prongs of the Bandimere Test, the *Bandimere* court held that SEC ALJs carry out

tionality, LAW360 (Feb. 16, 2017, 3:02 PM), <https://www.law360.com/articles/893045/dc-circ-agrees-to-rethink-sec-judges-constitutionality>, [<https://perma.cc/B2HV-QFSA>].

¹⁴⁸⁵ *Bandimere*, 844 F.3d at 1171.

¹⁴⁸⁶ *Id.*

¹⁴⁸⁷ *Id.* at 1174.

¹⁴⁸⁸ *Id.* at 1179.

¹⁴⁸⁹ *Id.* (citing *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868 (1991)).

¹⁴⁹⁰ *Id.*

¹⁴⁹¹ *Id.*

¹⁴⁹² *Id.*

¹⁴⁹³ *Id.*

¹⁴⁹⁴ *Id.*

¹⁴⁹⁵ *Id.*

important functions pursuant to the laws of the United States, and thus must be classified as inferior officers who must be appointed pursuant to the Constitution, rather than by the HRD.¹⁴⁹⁶ Like the *Freytag* court, the *Bandimere* court did not consider the lack of final decision-making authority to be conclusive on whether a federal official is an employee or inferior officer.¹⁴⁹⁷

In *Lucia*, after being charged with violating various antifraud provisions of the securities laws, the defendant appealed an ALJ ruling against him on the grounds that the ALJs themselves were unconstitutionally appointed.¹⁴⁹⁸ Unlike the Tenth Circuit, the D.C. Circuit panel decided that SEC ALJs are employees.¹⁴⁹⁹ While the majority in *Bandimere* derived a three-part test from *Freytag*,¹⁵⁰⁰ the *Lucia* court applied a different analysis.¹⁵⁰¹ It posited that *Freytag* established that an inferior officer is one who exercises “significant authority.”¹⁵⁰² The court then set forth three factors, which it derived from *Landry* (not *Freytag*), to determine if significant authority is manifested in the position (1) the significance of the matters resolved by the office; (2) the discretion exercised in reaching decisions; and (3) the finality of the decisions.¹⁵⁰³

Because SEC ALJs can only *recommend* enforcement action and do not have the congressional authority to “bind third parties,” the third element of this analysis could not be satisfied for SEC ALJs. Accordingly, the D.C. Circuit found that SEC ALJs are employees.¹⁵⁰⁴ Like *Landry*, the *Lucia* court distinguished its case from *Freytag* on the ground that the tax judges in *Freytag* could issue some final decisions.¹⁵⁰⁵ However, the D.C. Circuit has now vacated this decision and has elected to review the case en banc.¹⁵⁰⁶

¹⁴⁹⁶ *Id.* at 1188.

¹⁴⁹⁷ *Id.* at 1182.

¹⁴⁹⁸ Raymond J. Lucia Cos. v. SEC, 832 F.3d 277, 283 (2016).

¹⁴⁹⁹ *See generally id.*

¹⁵⁰⁰ *Bandimere*, 844 F.3d at 1197.

¹⁵⁰¹ *Lucia*, 832 F.3d at 284.

¹⁵⁰² *See id.* (noting that the first two parts to the *Bandimere* understanding of the *Freytag* test are simply “threshold requirements,” and the main discussion revolves around whether significant discretion is exercised at all).

¹⁵⁰³ *Id.* (citing *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000)).

¹⁵⁰⁴ *Id.* at 286 (holding that because SEC ALJs have no congressional authority to act independently of the Commission they cannot be inferior officers).

¹⁵⁰⁵ *Id.* at 284 (citing *Landry*, 204 F.3d 1125).

¹⁵⁰⁶ *See Germaine*, *supra* note 53.

Now that *Lucia* is up for re-hearing, it is unlikely that the Supreme Court will grant certiorari to hear this issue unless the D.C. Circuit decides once again that SEC ALJs are employees and reaffirms the circuit split.¹⁵⁰⁷ If the issue does end up before the Supreme Court, some argue that President Trump's new conservative appointee, Neil Gorsuch, might sway the holding against the SEC.¹⁵⁰⁸ Although the D.C. Circuit stated in both *Landry* and *Lucia* that final decision-making authority is crucial to the Supreme Court's decision in *Freytag*,¹⁵⁰⁹ the Supreme Court was clear that final decision-making authority is not dispositive when determining if an official exercises significant authority.¹⁵¹⁰ *Freytag* established that duties, authority, and power alone can determine if significant discretion is manifested,¹⁵¹¹ and that decision-making authority is sufficient, but not necessary to find that an official is an officer.¹⁵¹² Therefore, if the D.C. Circuit reaffirms the split, because SEC ALJs perform these same functions, it is likely that the Supreme Court will hold that SEC ALJs also exercise significant authority discretion and must be considered inferior offices and not employees under *Freytag*.¹⁵¹³

Even if the Supreme Court were to hold that SEC ALJs are unconstitutionally appointed, its decision would not likely invalidate all prior decisions made by SEC ALJs, because such decisions were approved of by the SEC and constitute valid enforcement processes

¹⁵⁰⁷ *See id.*

¹⁵⁰⁸ *See* Carmen Germaine, *Gorsuch Could Tip Scales Against SEC's Admin Court*, LAW360 (Feb. 2, 2017, 11:27 PM), <https://www.law360.com/articles/887745/gorsuch-could-tip-scales-against-sec-s-admin-court> [<https://perma.cc/2YQU-FXRP>] (indicating that Gorsuch's prior decisions suggest that he is extremely critical of the SEC's administrative process).

¹⁵⁰⁹ *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 284 (2016) (citing *Landry*, 204 F.3d 1125).

¹⁵¹⁰ *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 881 (1991) (“[T]rial judges may be deemed employees... because they lack authority to enter a final decision. But this argument ignores the significance of the duties and discretion that special trial judges possess.”).

¹⁵¹¹ *Id.* at 882.

¹⁵¹² *Id.* at 881–82 (“They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.”).

¹⁵¹³ *Id.* at 882.

according to formal administrative procedure.¹⁵¹⁴ The only real change in outcome would be that Congress and the SEC would be forced to change the appointment scheme of ALJs going forward if the SEC wished to continue using administrative proceedings.¹⁵¹⁵

C. What Comes Next? The Easy Fix, and The Harder Fix

If SEC ALJs are deemed inferior officers, Congress would have to change the appointment scheme.¹⁵¹⁶ This could be achieved in two ways. The first, more simple approach would be to vest the appointment of SEC ALJs in the Commission itself as opposed to the SEC's HRD.¹⁵¹⁷ However, while this solution would easily solve the Appointments Clause issue,¹⁵¹⁸ it presents the same concerns of fairness and independence if the ALJs remain subject to the power of the Commission.¹⁵¹⁹ If the Commission appoints the ALJs directly,¹⁵²⁰ it might select ALJs who align with its agenda, or lessen ALJs' independence, thus magnifying securities violators' initial concerns.¹⁵²¹

The more difficult solution would be for Congress to create a completely separate department, or agency of ALJs that has the responsibility of selecting and appointing new ALJs for multiple agencies.¹⁵²² This solution would be an attempt to satisfy the claims of defendants of SEC actions who argue that the current administrative procedure process is stacked against them when the SEC has control over the administrative court.¹⁵²³ However, it might actually raise the

¹⁵¹⁴ See *Bandimere v. SEC*, 844 F.3d 1168, 1179 (10th Cir. 2016).

¹⁵¹⁵ Darryl G. Stein et al., *The Future of SEC Administrative Proceedings*, LAW360 (Jan. 4, 2017, 11:20 AM), <https://www.law360.com/articles/876875/the-future-of-sec-administrative-proceedings> [<https://perma.cc/FW5B-FH-CX>].

¹⁵¹⁶ See U.S. CONST. art. II § 2, cl. 2.

¹⁵¹⁷ See *id.*

¹⁵¹⁸ See *id.*

¹⁵¹⁹ See Anello, *supra* note 4.

¹⁵²⁰ This might also raise constitutional concerns regarding the removal process for ALJs, but that is a discussion for another time. See *generally* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) (indicating restrictions on removal authorities when it comes to inferior officers).

¹⁵²¹ See *id.*

¹⁵²² See U.S. CONST. art. II § 2, cl. 2.

¹⁵²³ See Eaglesham, *supra* note 5 (discussing how the current scheme favors the SEC in administrative proceedings).

Appointments Clause issue once again as to whether Congress can vest appointment power of inferior officers in such a department or agency.

D. Conclusion

The resolution of the issue of whether SEC ALJs are officers or employees will depend in large part on whether or not the D.C. Circuit reaffirms its decision or sides with the Tenth Circuit.¹⁵²⁴ If the split is reaffirmed, the Supreme Court will be left with the task of discerning whether final decision-making authority is the dispositive factor to determine if an official exercises significant authority pursuant to the laws of the United States, or if the power to “recommend” action coupled with other powers inherent in presiding over hearings is enough to classify an ALJ as an inferior officer rather than employee.¹⁵²⁵ If the D.C. Circuit reverses its decision and sides with the Tenth Circuit, it would open the door to more challenges to ALJ proceedings.¹⁵²⁶ In that case, the SEC and Congress would have to rethink the ALJ appointment process, or abandon the project of administrative proceedings, effectively sending all their enforcement agency actions directly to federal court.¹⁵²⁷

Jonathan Assia¹⁵²⁸

¹⁵²⁴ Germaine, *supra* note 53.

¹⁵²⁵ See *Bandimere v. SEC*, 844 F.3d 1168, 1188 (10th Cir. 2016).

¹⁵²⁶ See Stein et al., *supra* note 84 (“Although the majority was careful to note that its decision concerned only the SEC’s administrative judges, U.S. Circuit Judge Monroe G. McKay warned in dissent that the same logic could well apply to hundreds of ALJs employed by other agencies.”).

¹⁵²⁷ See U.S. CONST. art. II § 2, cl. 2.

¹⁵²⁸ Student, Boston University School of Law (J.D. 2018).