



BURR ALERT

Antennas up, Employers: Are ALJs History?

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January 2017

The Supreme Court of the United States is, of course, known for landmark decisions affecting the lives of Americans. When we hear "SCOTUS" we think of famous civil rights cases such as *Marbury v. Madison*, (1803) which established the Supreme Court's power of judicial review over Congress, *Loving v. Virginia*, (1967) which invalidated state laws prohibiting interracial marriage and *Obergefell v. Hodges*, (2015), which legalized same-sex marriage across all fifty states. And, this year, the Supreme Court is poised to review a case with broad implications for Employers' rights.

The Tenth Circuit Court of Appeals recently decided a case that could change employer's relationship with Federal Agencies. See *Bandimere v. SEC*, No. 15-9586, U.S. Court of Appeals for the Tenth Circuit (Denver) (Dec. 27 2016). The Court found the use of in-house administrative law judges ("ALJs")¹ by the U.S. Securities and Exchange Commission ("SEC") to be unconstitutional. What's more, *Bandimere* is not the first case objecting to the SEC's use of ALJs. In August of 2016, the U.S. Court of Appeals for the D.C. Circuit reached the opposite conclusion in *Raymond J. Lucia Cos. v. SEC*², accepting the SEC's argument that ALJs are mere "employees," not officers, and therefore constitutionally appointed.³ With a Circuit Split ripe on this constitutional interpretation question, this case is likely on its way to the Supreme Court.

The key issue in *Bandimere* is whether ALJs are "inferior officers" or "employees." The distinction is more than mere wordsmithing: "Officers of the United States" (which include inferior officers), must be appointed under the Appointments Clause of the Constitution (either by the President or by Congress's designated appointee), while "employees" are hired through the normal civil service process. U.S. Const. art II, § 2, cl. 2.⁴ The Supreme Court has ruled that an "inferior officer" is "any appointee exercising significant authority pursuant to the laws of the United States."⁵ The Tenth Circuit held that Constitution's Appointments Clause *does* apply to the SEC's ALJs because they are "inferior officers" who exercise "significant discretion" when presiding over enforcement hearings.

Bandimere's implications extend beyond the SEC as numerous federal agencies have similar ALJs, such as:

¹ The Administrative Procedures Act created the position of Administrative Law Judge in 1946. *Classification & Qualifications General Schedule Qualification Standard*, Office of Personnel Management <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/>.

² *Raymond J. Lucia Cos. v. SEC*, 832 F. 3d 277 (D.C. Cir. 2016).

³ A petition for rehearing en banc in *Raymond J. Lucia Cos.* is currently pending before the D.C. Circuit.

⁴ "[The President] 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." (emphasis added).

⁵ *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

- Federal Reserve Board
- Federal Deposit Insurance Corporation
- National Labor Relations Board
- Equal Employment Opportunity Commission
- Social Security Administration

Why is this case raising so many antennas? First, the perception that unfairness might be remedied. According to some sources, “most defendants don’t believe [ALJ hearings are] an inherently fair process. The SEC wins somewhere in the neighborhood of 95% of their cases that are brought in front of an SEC ALJ, whereas when they bring cases in federal court, they are down around the 70% mark... There are some ALJs who have never decided for anyone but the SEC.”⁶ This-perception is not limited to the SEC’s forum.

And second, this decision could affect ALJ jurisprudence.⁷ As Judge Monroe McKay pointed out in his dissent, “*all federal ALJs are at risk of being declared inferior officers . . . [Bandimere] is quite sweeping, and I worry that it has effectively rendered invalid thousands of administrative actions.*” (emphasis added). The logic applies to countless federal agencies - most agencies have the authority to bring an administrative action before an ALJ. What the Tenth Circuit has done is force this question to the forefront: are ALJ appointments going to survive scrutiny? And, what impact would invalidating unconstitutionally appointed ALJs (and therefore their decisions spanning 71 years) have?

For now, employers who have upcoming hearings in front of an agency’s ALJ should consider this decision’s impact as a potential defense. (*Bandimere*’s holding currently only applies in the 10th Circuit.⁸) We will monitor this decision closely to see if it is appealed and keep you apprised of any changes. However, regardless of whether the decision ultimately survives appellate review, employers and counsel should consider how litigation strategy may be impacted by this decision. For more information, or to examine the 10th Circuit’s decision, the full text is available [here](#).

If you would like more information, please contact:

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or the Burr & Forman attorney with whom you regularly work.

No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.

⁶ “SEC Loses Case Over In-House Judges”, *Bloomberg*, Prod. David Sucherman (Dec. 29, 2016) available at <https://www.bloomberg.com/news/audio/2016-12-29/sec-loses-case-over-in-house-judges-audio>.

⁷ *Bandimere* should not be construed as curtailing federal agencies’ from issuing citations or employing ALJs to adjudicate enforcement proceedings.

⁸ District of Colorado, District of Kansas, District of New Mexico, Eastern District of Oklahoma, Northern District of Oklahoma, Western District of Oklahoma, District of Utah and the District of Wyoming.