

Tenth Circuit Rejects SEC's Use of Administrative Law Judges

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On December 27, 2016, the *10th Circuit Court of Appeals* ruled in favor of a *Colorado* businessman in [*Bandimere v. U.S. Securities and Exchange Commission*](#). The decision is a major setback for the SEC. In Bandimere's case, the SEC accused him of acting as an unregistered broker from 2006 to 2010 in making sales of securities in two entities that enabled Ponzi schemes. He denied wrongdoing. An SEC Administrative Law Judge (ALJ) presided over a trial-like hearing. In 2013, the ALJ's initial decision concluded Bandimere was liable for violating securities laws, barred him from associating with any broker, dealer, or investment adviser, and ordered him to pay nearly \$1.03 million. The SEC reviewed the initial decision and reached a similar result in a separate opinion. During the SEC's review, the agency addressed Bandimere's argument that the ALJ was an inferior officer who had not been appointed under the Appointments Clause. The SEC conceded that the ALJ had not been constitutionally appointed, but rejected Bandimere's argument because, in its view, the ALJ was not an inferior officer.

Bandimere filed a petition for review with the 10th Circuit which allows an aggrieved party to obtain review of an SEC order. In his petition, Bandimere raised the Appointments Clause argument and challenged the SEC's conclusion regarding securities fraud liability and sanctions.

Other SEC respondents have attacked the validity of the SEC's ALJs by filing collateral lawsuits attempting to enjoin administrative enforcement actions. Circuit courts have rejected these attempts, holding that federal courts lacked jurisdiction because the respondents had failed to raise and exhaust the argument in administrative proceedings. In Bandimere's case, the respondent did not file a collateral lawsuit. Instead, he raised his constitutional argument before the SEC, which rejected it. The 10th Circuit held that it therefore had jurisdiction to address the Appointments Clause issue in Bandimere's petition for review.

Speaking for the 2-1 majority, U.S. Circuit Judge Scott Matheson said the SEC's ALJs held their offices in violation of the U.S. Constitution's Appointments Clause. Matheson said the SEC's in-house judges were not employees but "inferior officers" who had not, as required, been appointed by the president, a court, or a department head. The SEC's commissioners, who heard the initial appeal of the ALJ's 2013 ruling, previously held the in-house judges were not inferior officers because they issued non-final decisions subject to commission review. The 10th Circuit disagreed and set aside the SEC's opinion.

This decision creates a circuit split on the underlying Appointments Clause question. See *Raymond J. Lucia Companies, Inc. v. SEC*, No. 15-1345 (D.C. Cir. Aug. 9, 2016) (finding SEC ALJs did not violate of the Appointments Clause).

U.S. Circuit Judge Monroe McKay filed a dissent stating the "sweeping" holding had "effectively rendered invalid thousands of administrative actions" through its potential impact on in-house judges at agencies beyond the SEC. The case is [*Bandimere v. U.S. Securities and Exchange Commission*](#), 10th U.S. Circuit Court of Appeals, No. 15-9586.

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