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## Constitutionality of SEC Judges Questioned

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These provisions resulted in alarming results, including a 90% success rate for the SEC in front of its own newly-minted administrative law judges.<sup>[ii]</sup> For comparative purposes, the SEC's previous success rate was below 70%.<sup>[iii]</sup>

A legal challenge brought against the SEC argued that these judges are "inferior officers" that, pursuant to the Appointments Clause of the U.S. Constitution,<sup>[iv]</sup> must be appointed by an executive branch member and approved by the Senate. Because such steps were never taken, the judges' actions would be unconstitutional if they are, in fact, found to be "inferior officers". The 10th Circuit has agreed with the plaintiffs, but the SEC is expected to appeal.<sup>[v]</sup> If the challenge is ultimately successful, there will be two significant impacts. First, the cases decided by the SEC's judges may be void. Second, the SEC will be forced to use the old, less certain procedure of bringing enforcement actions in federal district court. If you'd like to know more, I encourage you to read a succinct review of the matter in [today's Wall Street Journal](#).<sup>[vi]</sup> **John I. Sanders** is an associate based in the firm's Winston-Salem office. <sup>[i]</sup> Giles D. Beal IV, *Judge, Jury, and Executioner: SEC Administrative Law Judges Post-Dodd Frank*, 20 N.C. Banking Inst. 413 (2016), available at <https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=20+N.C.+Banking+Inst.+413&srctype=smi&srcid=3B15&key=e7ef73edd6e64a6ec56e122360340a35>. <sup>[ii]</sup> Jean Eaglesham, *SEC Wins with In-House Judges*, Wall St. Journal (May 6, 2015), <http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803>. <sup>[iii]</sup> *Id.* <sup>[iv]</sup> U.S. Const. art. II, sec. 2, cl. 2. <sup>[v]</sup> Alison Frankel, *10<sup>th</sup> Circuit Strikes Down SEC ALJ Regime, Debates Reach to Other Agencies*, Reuters (Dec. 28, 2016), <http://www.reuters.com/article/otc-sec-idUSKBN14H1S3>. <sup>[vi]</sup> David B. Rivkin Jr. and Andrew M. Grossman, *When is a Judge Not Really a Judge?*, Wall St. Journal (Jan. 23, 2017), <http://www.wsj.com/articles/when-is-a-judge-not-really-a-judge-1485215998>.