# The Re-"Tooling" of Federal ALJs: *Lucia v. SEC* and Executive Order 13,843*

> *[In formal administrative adjudication], it is necessary that the evidence be heard and the facts be reported to the agency head by an official who shall command public confidence both by his capacity to grasp the matter at issue and by his impartiality in dealing with it.*[1]

## INTRODUCTION

When Congress established the position of the administrative law judge ("ALJ") via the Administrative Procedure Act ("APA") in 1946,[2] it sought to address concerns that persons hearing administrative cases lacked sufficient independence from the agencies that employed them.[3] Indeed, prior to the APA, agencies controlled the compensation and promotion of the very officials tasked with presiding over hearings to which the agencies were parties.[4] This structure led to the perception that hearing examiners were "mere tools" of agencies whose factual and legal determinations were compromised by their "subservien[ce] to agency heads."[5]

To remedy this problem, Congress wrote into the APA several provisions intended to insulate ALJs from agency coercion or influence.[6] For instance, the APA eliminates agencies' powers to



1. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 43 (1941).

2. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 500–596 (2012)); *see also* 1 CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMINISTRATIVE LAW AND PRACTICE § 2:31, at 161 (3d ed. 2018). ALJs were referred to as "hearing examiners" until an APA amendment in 1978. 2 KOCH & MURPHY, *supra*, § 5:24, at 62.

3. *E.g.*, Butz v. Economou, 438 U.S. 478, 513–14 (1978).

4. *E.g.*, Ramspeck v. Fed. Trial Exam'rs Conference, 345 U.S. 128, 130 (1953). Prior to the APA, the Classification Act of 1923 governed the terms of employment for hearing examiners. Classification Act of 1923, ch. 265, 42 Stat. 1488; *Ramspeck*, 345 U.S. at 130. Pursuant to that statute, hearing examiners were classified on the basis of ratings that agencies gave them, and their salaries and promotions in turn depended on their classification. *Ramspeck*, 345 U.S. at 130.

5. *Id.* at 131.

6. *See Butz*, 438 U.S. at 514 ("[T]he Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners."); VANESSA K. BURROWS, CONG. RESEARCH SERV., RL34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW 1 (2010) ("[O]ne of the primary goals behind the creation of the

determine ALJ salaries and grants the task instead to the Office of Personnel Management ("OPM"),[7] an agency independent of presidential control. Furthermore, the APA provides that ALJs may not be subject to the supervision of agency prosecutors or investigators[8] and may not engage in ex parte communication.[9]

Notably, the APA also provides significant protections to ALJs against removal from their positions. ALJs may be removed only for "good cause" after a formal administrative hearing before the Merit Systems Protection Board ("MSPB" or "the Board").[10] Members of the Board, in turn, "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office."[11] Thus, although ALJs structurally remain part of agencies under the APA, the Act's provisions secure them a high degree of independence from agency interference in their decisionmaking.[12]

For seven decades,[13] the manner of ALJ recruitment and hiring has provided additional safeguards to ALJ "decisional independence."[14] Although agencies appoint ALJs,[15] the APA delegates authority to the OPM to determine who is qualified for ALJ positions.[16] The OPM classifies ALJs as members of the "competitive service"[17] and, accordingly, requires ALJ candidates to meet certain professional criteria[18] and attain a sufficient score on a competitive

position of ALJs was to ensure that such hearing officers are able to conduct trial-like hearings free from agency coercion or influence.").

7. *See* 5 U.S.C. § 5372(b)(2), (4) (2012).

8. *Id.* § 554(d)(2).

9. *See id.* § 554(d)(1).

10. *Id.* § 7521(a).

11. *Id.* § 1202(d).

12. 2 KOCH & MURPHY, *supra* note 2, § 5:24, at 61–62. Note, however, that ALJs' "good cause" removal protection is a lower standard than the "during good Behavior" standard that applies to Article III judges. Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 808 (2013) [hereinafter Barnett, *Resolving the ALJ Quandary*]. For example, ALJs have been removed for extended absences, failing to set hearing dates, and making a high number of adjudicatory errors. *Id.* at 807.

13. The OPM's predecessor, the Civil Service Commission, adopted the civil service appointment process for hearing examiners in 1947. Civil Service Commission, 12 Fed. Reg. 6321, 6321 (Sept. 23, 1947).

14. 2 KOCH & MURPHY, *supra* note 2, § 5:24, at 65–66.

15. 5 U.S.C. § 3105 (2012).

16. *Id.* § 5372(b)(2).

17. Three types of services comprise the federal government: the competitive service, the excepted service, and the senior executive service. *Hiring Information: Competitive Hiring*, U.S. OFF. PERSONNEL MGMT., https://www.opm.gov/policy-data-oversight/hiring-information/competitive-hiring/ [https://perma.cc/3RYR-EGDK]. Most civil service positions in the executive branch are part of the competitive service. *Id.*

18. ALJ applicants must be licensed attorneys with seven years of experience "preparing for, participating in, and/or reviewing formal hearings or trials involving

examination.[19] On the basis of exam performance, the OPM assigns rankings to candidates and provided a list of three eligible candidates from which agencies have to choose when they seek to hire an ALJ.[20] This competitive hiring process, while not without its critics,[21] both ensures that ALJs have a certain level of experience and largely shields ALJ appointments from political considerations.

Today, we find ourselves in a situation in which the decisional independence of ALJs is of increasing importance. Their prevalence in the federal government has greatly increased alongside the development of the "administrative state": they now outnumber Article III judges by more than two to one,[22] and they decide many

litigation and/or administrative law at the Federal, State, or local level." *Qualification Standard for Administrative Law Judge Positions*, U.S. OFF. PERSONNEL MGMT., https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/ [https://perma.cc/2XME-HABR].

19. *Id.*

20. *See* John C. Holmes, *Becoming a U.S. Administrative Law Judge*, *in* ADMINISTRATIVE LAW & REGULATORY PRACTICE 121, 123 (James T. O'Reilly ed., 2010). Note that, until the mid-1980s, agencies were able to circumvent the three-candidate restriction through "selective certification." Barnett, *Resolving the ALJ Quandary*, *supra* note 12, at 805. Selective certification allowed agencies, out of necessity and with the approval of the OPM, to appoint specially certified ALJ candidates regardless of their ranking. *Id.* The OPM discontinued selective certification in 1984 after significant criticism that the process enabled agencies to hire ALJs with "pro-enforcement attitude[s]." *See id.* (quoting Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 118 (1981)).

21. *See, e.g.*, Robin J. Artz, David H. Coffman & Pamela L. Wood, *Advancing the Judicial Independence and Efficiency of the Administrative Judiciary: A Report to the President-Elect of the United States*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 93, 105–06 (2009) (arguing that the OPM's actions in the 2000s, which abolished the office responsible for ALJ selection, reduced candidate qualification criteria, and kept the ALJ examination open only for brief periods of time, "undermine[d] ALJs[']  independence and downgrade[d] ALJs' level of experience and competence"); Kent Barnett, *Raiding the OPM Den: The New Method of ALJ Hiring*, YALE J. ON REG.: NOTICE & COMMENT (July 11, 2018), http://yalejreg.com/nc/raiding-the-opm-den-the-new-method-of-alj-hiring-by-kent-barnett/ [https://perma.cc/845B-872U] [hereinafter Barnett, *Raiding the OPM Den*] (contending that the written examination requirement is not "that useful in deciding who's a good judge" and that the OPM's view that it should dictate when agencies need to hire an ALJ is incorrect); William Funk, *Trump's Politicization of the Administrative Judiciary*, AM. CONST. SOC'Y: ACSBLOG (July 19, 2018), https://www.acslaw.org/acsblog/trumps-politicization-of-the-administrative-judiciary/ [https://perma.cc/4GCL-E652] (noting longstanding criticisms that the competitive hiring process has caused "inordinate delays" in ALJ appointments and almost completely precludes hiring ALJs with subject matter expertise).

22. As of March 2017, there were 1931 federal ALJs. *Administrative Law Judges: ALJs by Agency*, U.S. OFF. PERSONNEL MGMT., https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency [https://perma.cc/JXX5-2V5V]. Article III judges numbered only 860. ADMIN. OFFICE OF THE U.S. COURTS,

more cases.[23] The scope of ALJs' responsibilities has also grown, as they now hear and decide a wide variety of matters that affect the national economy and the rights of individuals.[24]

This piece focuses on two recent developments that, in combination, greatly increase the degree of control that agency heads have over the hiring of ALJs. The first is the Supreme Court's June 2018 decision in *Lucia v. SEC*[25] wherein the Court held that the Securities and Exchange Commission's ("SEC" or "the Commission") ALJs are "Officers of the United States" within the meaning of the Constitution's Appointments Clause and thus must be appointed by agency heads rather than agency staff.[26] The second development is President Trump's July 2018 executive order that responded to *Lucia* by excluding *all* ALJs from the competitive civil service[27] and thus handing agency heads nearly full discretion over the ALJ hiring process.

The primary and overarching consequence of *Lucia* and the executive order is that, taken together, they jeopardize the continued impartiality of ALJs by rendering those important decisionmakers vulnerable to political influence. Within this broad theme, the two developments raise three somewhat overlapping problems. First, with *Lucia* as a springboard, the executive order's exception of ALJs from the competitive civil service was a wrongheaded move to provide agency heads greater hiring discretion at the expense of ALJ decisional independence. Second, the executive order's directive that *all* federal ALJs are "Officers of the United States" and, therefore, excepted from the competitive civil service goes much farther than *Lucia*'s narrow holding. Because not all ALJs exercise the significant authority necessary to make them "Officers of the United States," and because *Lucia*'s holding does not require any change to the service status of ALJs, the executive order is an overbroad and ill-

AUTHORIZED JUDGESHIPS 8, http://www.uscourts.gov/sites/default/files/allauth.pdf [https://perma.cc/AXD9-PFQ5].

23. Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 97 TEX. L. REV. 1097, 1109 (2018).

24. Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 110 (1981). The matters over which ALJs preside include Social Security disability benefits, Daniel F. Solomon, *Summary of Administrative Law Judge Responsibilities*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 475, 517–18 (2011), "black lung" disease compensation, *id.* at 481, interstate oil pipeline rates, *id.* at 489, FCC mergers and acquisitions, *see id.* at 500, Medicare appeals, *id.* at 500–01, and application of occupational safety and health standards, *see id.* at 513.

25. 138 S. Ct. 2044 (2018).

26. *Id.* at 2049, 2055.

27. Exec. Order No. 13,843, 83 Fed. Reg. 32,755, 32,756 (July 10, 2018).

considered policy decision. Third, *Lucia* and the executive order pave the way for a finding that the APA's "for cause" removal protection for ALJs is unconstitutional. This is important because such a finding would eliminate one of the most significant protections of decisional independence that the APA confers on ALJs.

Note that this Recent Development does not argue that *Lucia* was wrongly decided; it may very well be the case that *Lucia*'s holding was compelled by the Court's precedents.[28] Furthermore, this piece does not question the President's authority to issue Executive Order 13,843.[29] The following discussion focuses only on the ramifications of the two developments for ALJ decisional independence and *Lucia*'s importance as a backdrop for the subsequent ill-conceived policy changes in the executive order.

The following discussion proceeds in three parts. Part I describes the facts and the Court's reasoning in *Lucia*. Then, Part II discusses the mandates and underpinnings of President Trump's executive order. Finally, Part III analyzes the three problems associated with *Lucia* and the executive order outlined above.

## I. *LUCIA* AND THE "OFFICER" STATUS OF SEC ALJS

In *Lucia*, the Supreme Court addressed one narrow question: are the SEC's ALJs "Officers of the United States" within the meaning of the Appointments Clause, or are they "mere employees"?[30] If they constitute "Officers," the Constitution requires that they be appointed by the "President," "Courts of Law," or "Heads of Department."[31] If instead they are "mere employees," the Constitution does not dictate how they are hired.[32]

### *A. Facts and Procedural History of* Lucia

The SEC, charged with enforcing securities laws, can initiate administrative hearings against alleged violators.[33] It frequently delegates the task of presiding over such proceedings to one of its five

28. *See* Ronald Mann, *Opinion Analysis: Justices Invalidate Civil-Service Appointments of Administrative Law Judges*, SCOTUSBLOG (June 21, 2018), http://www.scotusblog.com/2018/06/opinion-analysis-justices-invalidate-civil-service-appointments-of-administrative-law-judges/ [https://perma.cc/U2U2-RD2D].

29. Provisions of the APA grant the President authority to determine whether a position is included in or excepted from the civil service and to set the qualifications for employment for civil servants in the executive branch. *See* 5 U.S.C. §§ 3301–3302 (2012).

30. *Lucia*, 138 S. Ct. at 2050–51.

31. *Id.* at 2050 (quoting U.S. CONST. art. II, § 2, cl. 2).

32. *Id.*

33. *Id.* at 2049.

ALJs.[34] SEC staff members, rather than the Commission itself, hired all five ALJs.[35] An SEC ALJ has the "authority to do all things necessary and appropriate to discharge his or her duties"[36] and to ensure a "fair and orderly" adversarial proceeding[37] by, for instance, issuing subpoenas, deciding motions, ruling on the admissibility of evidence, and imposing sanctions.[38] Once a hearing concludes, the ALJ issues an "initial decision" that sets out the ALJ's findings and conclusions as well as any order, sanction, or relief.[39] A party may then petition the Commission to review an initial decision, or the Commission may opt to review it on its own initiative.[40] In situations where no appeal is filed and the Commission chooses not to review the initial decision, the Commission issues an order finalizing the ALJ's decision, "deem[ing it] the action of the Commission."[41] Consequently, an ALJ's initial decision does not take effect unless the Commission takes some action to adopt it as its own.[42]

In *Lucia*, the SEC charged an investment company and its owner, Raymond Lucia, with violating the Investment Advisers Act.[43] According to the charges, Lucia used deceptive slideshow presentations to market a retirement savings program and attract prospective clients.[44] The Commission assigned one of its ALJs, Cameron Elliot, to hear the case, and Judge Elliot issued an initial decision in which he concluded that Lucia violated the Act.[45] The initial decision also imposed on Lucia a $300,000 fine and a lifetime ban from the securities industry.[46] The SEC reviewed the decision and

34. *Id.*

35. *Id.* The SEC is composed of five commissioners who are appointed by the President with the advice and consent of the Senate. 15 U.S.C. § 78d(a) (2012).

36. 17 C.F.R. § 201.111 (2018).

37. *Id.* § 200.14(a).

38. *Id.* §§ 201.111, 201.180.

39. *Lucia*, 138 S. Ct. at 2049.

40. 17 C.F.R. §§ 201.360(d), 201.410, 201.411 (2018).

41. *Lucia*, 138 S. Ct. at 2049; *see also* 15 U.S.C. § 78d-1(c) (2012); 17 C.F.R. § 201.360(d)(2) (2018).

42. *See Lucia*, 138 S. Ct. at 2049. After the Commission issues its final order, a party to the proceeding may appeal that decision to an appropriate court of appeals. *See* 28 U.S.C. § 2112(a) (2012); 17 C.F.R. § 201.490 (2018).

43. *Lucia*, 138 S. Ct. at 2049.

44. *Id.*

45. Raymond J. Lucia Cos., Initial Decision Release No. 495, 106 SEC Docket 3613, at 37 (July 8, 2013).

46. *Lucia*, 138 S. Ct. at 2050.

remanded for additional factfinding, after which Judge Elliot issued a revised initial decision with the same sanctions.[47]

Lucia appealed the decision to the SEC, arguing that the administrative procedure was invalid.[48] He contended that the SEC ALJs are "Officers of the United States" and thus subject to the command of the Appointments Clause that they be appointed by the "President," "Courts of Law," or "Heads of Departments."[49] Notably, the Commission itself constitutes a "Head[] of Department[]" and, therefore, could constitutionally appoint ALJs.[50] However, because Judge Elliot was appointed by SEC staff members, rather than by the Commission itself or one of the other constitutionally sanctioned actors, Lucia argued that Judge Elliot did not have the constitutional authority to preside over administrative hearings.[51]

The SEC rejected Lucia's argument, and the D.C. Circuit subsequently rejected it as well.[52] A three-judge panel of the court agreed with the SEC that its ALJs were not "Officers" but rather "mere employees" not subject to the Appointments Clause because they do not issue final decisions.[53] The panel, like the SEC, found that the Commission retains the ability to review all ALJ initial decisions, and this lack of "sovereign authority to act independently of the Commission"[54] indicates that the ALJs fall outside the ambit of the Appointments Clause.[55] As a result, the panel denied Lucia's petition for review.[56] The D.C. Circuit agreed to rehear the decision en banc, which resulted in a five-to-five split and a per curiam order again denying the petition for review.[57]

47. Raymond J. Lucia Cos., Initial Decision Release No. 540, 107 SEC Docket 4365, at 57 (Dec. 6, 2013).

48. *Lucia*, 138 S. Ct. at 2050. Challenges to the constitutionality of SEC ALJ appointments have been unsuccessfully raised in previous collateral litigation. *See, e.g.*, Hill v. SEC, 825 F.3d 1236 (11th Cir. 2016); Tilton v. SEC, 824 F.3d 276 (2d Cir. 2016); Jarkesy v. SEC, 803 F.3d 9 (D.C. Cir. 2015); Bebo v. SEC, 799 F.3d 765 (7th Cir. 2015). But the challenge was successful in *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), creating a contradiction between the Tenth Circuit's decision in that case and the D.C. Circuit's decision in *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *rev'd*, 138 S. Ct. 2044 (2018).

49. *Lucia*, 138 S. Ct. at 2050 (quoting U.S. CONST. art. II, § 2, cl. 2).

50. *Id.*

51. *Id.*

52. *Id.* (noting that "[t]he Commission rejected Lucia's argument" and his "claim fared no better in the Court of Appeals for the D.C. Circuit").

53. *Lucia*, 832 F.3d at 286.

54. *Id.*

55. *Id.* at 289.

56. *Id.* at 296.

57. Raymond J. Lucia Cos. v. SEC, 868 F.3d 1021 (D.C. Cir. 2017) (en banc).

The Supreme Court ultimately took up *Lucia* to resolve a circuit split[58] between the D.C. Circuit's decision and the Tenth Circuit's 2016 decision in *Bandimere v. SEC*.[59] The only issue addressed in *Lucia* was whether the SEC's ALJs are "Officers" or "mere employees."[60] Interestingly, the Department of Justice ("DOJ") changed its previous position in the case in response to Lucia's petition for writ of certiorari to the Supreme Court.[61] Under the Obama administration, the DOJ had argued before the D.C. Circuit that the SEC ALJs were "mere employees."[62] However, the DOJ under the Trump administration announced in a brief to the Court that it now held the view that the SEC ALJs are "Officers" but provided little explanation for switching sides in the case.[63] In line with the DOJ's new stance, the SEC promptly ratified its appointments of the five ALJs.[64]

The DOJ also requested that the Court consider whether the APA's "for cause" removal protection for ALJs comports with the Constitution.[65] The DOJ expressed concern that the SEC ALJs' two,[66] and possibly three,[67] layers of insulation from removal by the President conflicts with Article II of the Constitution and that the Court's refusal to address the issue would lead to continuing "uncertainty and turmoil caused by litigation of [the removal issue]."[68] The Court, however, declined to address the removal issue because no lower court has yet dealt with the question, and the

58. *See* Lucia v. SEC, 138 S. Ct. 2044, 2050 (2018).

59. 844 F.3d 1168 (10th Cir. 2016). In *Bandimere*, the court held that the SEC's ALJs are "Officers" rather than employees. *Id.* at 1179.

60. *Lucia*, 138 S. Ct. at 2051.

61. *Id.* at 2050.

62. *See id.*

63. The DOJ very briefly stated its rationale for changing its position in the case: "Upon further consideration, and in light of the implications for the exercise of executive power under Article II, the government is now of the view that such ALJs are officers because they exercise 'significant authority pursuant to the laws of the United States.'" Brief for Respondent at 9–10, *Lucia*, 138 S. Ct. 2044 (No. 17-130). Because the DOJ switched sides, the Court appointed an amicus curiae to defend the SEC's position that SEC ALJs are employees. *Lucia*, 138 S. Ct. at 2050–51.

64. *Id.* at 2055 n.6.

65. Brief for Respondent, *supra* note 63, at 18.

66. The two layers of insulation from removal that the DOJ referred to are those protections the APA confers to federal ALJs and members of the MSPB. *Id.* at 20.

67. The DOJ stated that the SEC's Commissioners may be insulated from removal in a similar way as the MSPB members, although it conceded that the Securities Exchange Act does not directly address the issue. *Id.*

68. *Id.* at 21.

Supreme Court generally "await[s] 'thorough lower court opinions'" before considering the merits of an issue.[69]

### *B. The Court's Reasoning in* Lucia

The Court employed a surprisingly straightforward test to resolve the dispute in this case. It first determined that its 1991 decision in *Freytag v. Commissioner*[70] controlled the decision.[71] In *Freytag*, the Court applied a framework for determining whether "special trial judges" ("STJs") of the United States Tax Court are "Officers" or "employees."[72] The *Freytag* Court held that STJs are "Officers" because (1) they "hold a continuing office established by law,"[73] and (2) they exercise "significant authority."[74]

The *Lucia* Court then applied the *Freytag* framework to the SEC ALJs and compared the features, duties, and authorities of Tax Court STJs to the SEC ALJs.[75] First, like the STJs, the SEC ALJs clearly hold a "continuing office established by law" because, rather than holding "temporary" or "episodic" employment,[76] they receive a career appointment to a position created by statute.[77]

The second element, "significant authority," required more in-depth analysis but was ultimately satisfied as well.[78] The Court found that the SEC ALJs have the same "significant discretion" as STJs and carry out the same four "important functions"[79]: both sets of judges "take testimony,"[80] "conduct trials,"[81] "rule on the admissibility of evidence,"[82] and "have the power to enforce compliance with discovery orders."[83] Thus, like the STJs, the SEC ALJs have "nearly all the tools of federal trial judges."[84] Moreover, in one respect ALJs

69. *See Lucia*, 138 S. Ct. at 2051 n.1 (quoting Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012)); *see infra* Section III.C.

70. 501 U.S. 868 (1991).

71. *Lucia*, 138 S. Ct. at 2052.

72. *See id.* The test was developed in two prior cases. *Id.* at 2051 (noting that *United States v. Germaine*, 99 U.S. 508 (1879), and *Buckley v. Valeo*, 424 U.S. 1 (1976), established a "basic framework for distinguishing between officers and employees").

73. *Id.* at 2052 (citing *Freytag*, 501 U.S. at 881).

74. *Id.* (citing *Freytag*, 501 U.S. at 882).

75. *Id.* at 2053–54.

76. *Id.* at 2053.

77. *Id.*

78. *See id.* at 2053–54.

79. *Id.* at 2053 (quoting *Freytag*, 501 U.S. at 878).

80. *Id.* (quoting *Freytag*, 501 U.S. at 881).

81. *Id.* (quoting *Freytag*, 501 U.S. at 882).

82. *Id.* (quoting *Freytag*, 501 U.S. at 882).

83. *Id.* (quoting *Freytag*, 501 U.S. at 882).

84. *Id.*

have a more autonomous role than STJs: while all STJ decisions must be reviewed by a Tax Court judge, the SEC can choose not to review an ALJ's decision, therefore making the ALJ's decision "final" and the "action of the Commission."[85] The Court determined that the "last-word capacity" of ALJs cinched the case: "[i]f the Tax Court's STJs are officers, . . . then the Commission's ALJs must be too."[86]

The Court consequently rejected the argument—put forward by the government in the court below and Justice Sotomayor's dissent—that the agency's ability to review ALJ decisions is a significant factor in determining the constitutional status of the ALJs.[87] Rather, because the SEC ALJs, like the STJs in *Freytag*, exercised "significant discretion" while carrying out significant duties,[88] they are "'Officers of the United States' subject to the Appointments Clause."[89] Judge Elliot's appointment was therefore invalid and his adjudication of Lucia's hearing was as well.[90]

## II. PRESIDENT TRUMP'S EXECUTIVE ORDER GIVING AGENCY HEADS DISCRETION TO SELECT ALJS

Less than one month after the Supreme Court's decision in *Lucia*, President Trump issued an executive order exempting all federal ALJs from the competitive civil service.[91] The President expressly based the executive order on *Lucia*'s holding, stating the decision indicates that "at least some—and perhaps all—ALJs are 'Officers of the United States' and thus subject to the Constitution's

85. *Id.* at 2053–54.

86. *Id.* at 2054.

87. *See id.* at 2052 n.4. The Court rejected two arguments made by the amicus curiae for distinguishing between the SEC ALJs and Tax Court STJs. First, although the SEC ALJs have less authority than the STJs to sanction misconduct, the SEC ALJs still satisfy the "power to enforce compliance with discovery orders," *id.* at 2054 (quoting *Freytag*, 501 U.S. at 882), factor because they can exclude wrongdoers from proceedings, "[s]ummarily suspend" an attorney from representing his client, *id.* (alteration in original) (quoting 17 C.F.R. § 201.180(a)(1)(i) (2018)), and issue opinions "complete with factual findings, legal conclusions, and sanctions," *id.* Second, the fact that the SEC reviews ALJs' decisions de novo, rather than under a more deferential standard, has no bearing on the ALJs' constitutional status under *Freytag*. *Id.* at 2054–55.

88. *Id.* at 2053 (quoting *Freytag*, 501 U.S. at 878).

89. *Id.* at 2055.

90. *Id.* By way of remedy, the Court held that Lucia was entitled to a new hearing either before the Commission itself or before a properly appointed ALJ. *See id.* The Court held that Judge Elliot could not reconsider Lucia's case, even though the SEC had ratified his appointment by the time the Court decided the case. *Id.* The fact that Judge Elliot had already heard Lucia's case and had issued an initial decision precluded his ability to "consider the matter as though he had not adjudicated it before." *Id.*

91. Exec. Order No. 13,843, 83 Fed. Reg. 32,755, 32,756 (July 10, 2018).

Appointments Clause."[92] According to the President, the case "may also raise questions about the method of appointing ALJs, including whether competitive examination and competitive service selection procedures are compatible with the discretion an agency head must possess under the Appointments Clause in selecting ALJs."[93]

Removing ALJs from the competitive civil service eliminates almost all of the hiring requirements and procedures that OPM regulations previously imposed on ALJs. This includes mandates that candidates have seven years of litigation or administrative law experience[94] and achieve a sufficient score on an exam assessing "knowledge, skills and abilities (KSAs) essential to performing the work of an Administrative Law Judge."[95] The executive order also does away with the requirement that agencies appoint ALJs from a list of ranked candidates provided by the OPM.[96] Instead, under the executive order, ALJ "appointments . . . shall be made in accordance with such regulations and practices as the head of the agency concerned finds necessary."[97] The only qualification that the executive order leaves intact is that candidates "must possess a professional license to practice law";[98] the remaining hiring criteria and procedures are left to the discretion of the agencies.[99]

Even if the competitive service procedures do not violate the Constitution, the President asserted in the executive order that "sound policy reasons" necessitate removing all ALJs from the civil service.[100] One of these considerations is a concern about an increase in legal challenges to the legitimacy of ALJs hired through the civil service process in the wake of *Lucia*.[101] Moreover, the President emphasized the need to "give agencies greater ability and discretion to assess critical qualities in ALJ candidates, such as work ethic,

92. *Id.* at 32,755.

93. *Id.*

94. *Qualification Standard for Administrative Law Judge Positions*, *supra* note 18.

95. *Id.*

96. *See* Exec. Order No. 13,843, 83 Fed. Reg. 32,755, 32,755 (July 10, 2018).

97. *Id.* at 32,756.

98. *Id.*

99. *See id.* at 32,757 ("Th[e] requirement [of a law license] shall constitute a minimum standard for appointment . . . and such appointments may be subject to additional agency requirements where appropriate.").

100. *Id.* at 32,755.

101. *See id.* ("Placing the position of ALJ in the excepted service will mitigate concerns about undue limitations on the selection of ALJs, reduce the likelihood of successful Appointments Clause challenges, and forestall litigation in which such concerns have been or might be raised.").

judgment, and ability to meet the particular needs of the agency."[102] Because ALJs "wield[] . . . significant authority[,] . . . each agency should be able to assess [those qualities] without proceeding through complicated and elaborate examination processes or rating procedures that do not necessarily reflect the agency's particular needs."[103] Thus, in the President's view, agencies are better equipped than the OPM to determine the appropriate qualifications for their own ALJs, and the competitive service requirements are a needless, and potentially unconstitutional, obstacle to the hiring process.[104]

The executive order directs an additional change relevant to ALJ employment: it strips ALJs of protective removal procedures provided by the civil service regulations.[105] The consequences of this alteration are not entirely clear, and the executive order provides no explicit justification for the change. The executive order does not alter in any way the APA provision prohibiting the removal of ALJs except for "good cause" or the provision entitling ALJs to a formal appeal hearing before the MSPB.[106] The only direct effect of the executive order is to eliminate the MSPB's *procedural* requirements for such a removal appeal hearing as they apply to ALJs.[107] It remains to be seen what effect, if any, this change will have on ALJ removal procedures going forward.

## III. "MERE TOOLS" ONCE AGAIN? THE CONSEQUENCES OF *LUCIA* AND EXECUTIVE ORDER 13,843

The clearest and most direct consequence of *Lucia* and the executive order is that, taken together, they increase the amount of control that agency heads have over ALJs. After *Lucia*, SEC staff members no longer have the authority to appoint ALJs; that power rests in the hands of the agency heads alone.[108] More strikingly, following the executive order, the state of affairs for ALJ hiring looks quite a bit different than the civil service process that was in place for

102. *Id.*

103. *Id.* at 32,756.

104. *See id.*

105. *Id*. at 32,757. The executive order adds ALJs, placed in a new "Schedule E" category, to the list of employees to whom the removal civil service regulations do not apply: "5 CFR 6.4 is amended to read: Except as required by statute, the Civil Service Rules and Regulations shall not apply to removals from positions listed in Schedules A, C, D, *or E*, or from positions excepted from the competitive service by statute." *Id.* (emphasis added).

106. *See* 5 U.S.C. § 7521 (2012).

107. *See* 5 C.F.R. § 930.211 (2018).

108. *See* Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018).

over half a century. With the OPM's involvement in the ALJ hiring process largely abolished, and with a law license as the only baseline requirement for candidates, agency heads may now hire an ALJ applicant of any competence level and any experience level *so long as the person is a lawyer*.[109] There is no dispute that these developments mark a shift in the power agency heads wield over ALJs.[110]

What is in dispute, however, is the significance of this shift in power, which can be distilled into three key questions. First, is the change in the ALJ hiring process a positive step toward agency accountability or, instead, a dangerous departure from ALJ decisional independence and political impartiality? Second, was the executive order a necessary, logical move toward implementing *Lucia*'s holding or an unjustified extension of a narrow Supreme Court decision? Finally, does *Lucia*'s result, and the executive order's exemption of ALJs from civil service removal regulations, signal a future successful challenge to ALJs' statutory "for cause" removal protection? The following discussion will address each of these questions in turn.

### *A.* Lucia *and the Executive Order Threaten ALJ Impartiality*

In the wake of *Lucia* and the executive order, one camp has argued that these two developments constitute a step toward the political accountability that the Constitution requires with respect to executive officials.[111] This view is premised on the purpose of the Appointments Clause to guarantee that government officials remain "accountable to political force and the will of the people."[112] Thus, where a government employee is an "Officer" within the meaning of

109. Exec. Order No. 13,843, 83 Fed. Reg. 32,755, 32,756 (July 10, 2018).

110. Experts with diametrically opposed views on the consequences of *Lucia* and the executive order agree on this point. *See, e.g.*, Letter from Hilarie Bass, President, Am. Bar Ass'n, to Honorable Pete Sessions, Chairman, U.S. House Comm. on Rules, & Honorable James McGovern, Ranking Member, U.S. House Comm. on Rules (July 16, 2018), https://www.americanbar.org/content/dam/aba/uncategorized/GAO/ALJlettertorulescommitteeaboutEO.authcheckdam.pdf [https://perma.cc/8VR5-Z5YW] (acknowledging the significant change and opposing the executive order); Joel S. Nolette, *The ALJ Executive Order: A Modest Step Towards Re-Integrating the Executive Branch*, FEDERALIST SOC'Y (July 24, 2018), https://fedsoc.org/commentary/blog-posts/the-alj-executive-order-a-modest-step-towards-re-integrating-the-executive-branch [https://perma.cc/V77X-6CBQ] (acknowledging the significant change but supporting the executive order).

111. *See, e.g.*, The Editorial Bd., Opinion, *Administrative Law Smackdown*, WALL ST. J. (July 21, 2018), https://www.wsj.com/articles/administrative-law-smackdown-1529622701 [https://perma.cc/3XKW-EBLC (dark archive)] ("The ruling is a victory for political accountability in an administrative state that is ever more sprawling and opaque."); Nolette, *supra* note 110.

112. Brief for Petitioners at 17, *Lucia*, 138 S. Ct. 2044 (No. 15-1345) (quoting Freytag v. Comm'r, 501 U.S. 868, 878 (1991)).

the Appointments Clause, his or her appointment must be placed "squarely on the shoulders of either the President, or else someone the President has appointed"[113] in order to ensure the public has political recourse for "bad" appointments.[114]

In light of this constitutional mandate, supporters of this position contend that the Court's determination that ALJs are "Officers" justifies exempting ALJs from the competitive civil service.[115] In their view, the competitive hiring process is constitutionally suspect because it allows a third party independent of the agency head (i.e., the OPM) to determine which candidates are qualified and eligible for agency consideration.[116] Consequently, the civil service status of ALJs is thought to interfere with the public's ability to trace responsibility for hiring decisions to a politically accountable actor (i.e., agency heads or the President).[117] Exempting ALJs from a process that "unduly interfere[s]" with the hiring discretion of agency heads purportedly remedies that constitutional problem.[118]

This argument fails to sufficiently consider the unique role that ALJs play within their agencies. First, agency heads are, in fact, ultimately accountable for decisions that flow from ALJs because ALJs only have *initial* decisional or recommendation authority.[119] Under the APA, federal agencies retain the power to review ALJs' initial determinations and, in conducting that review, are generally afforded the right to exercise "all the powers which [they] would have in making the initial decision."[120] Although ALJs' initial decisions may become final if not appealed or subjected to discretionary review by the agency, agencies always have the opportunity to review an ALJ's initial decision.[121] This structure confers some responsibility on the agency head for the ALJ's findings. Thus, the fact that agency

113. Nolette, *supra* note 110.

114. *See Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring) (noting that "by specifying only a limited number of actors who can appoint inferior officers without Senate confirmation, the Appointments Clause maintains clear lines of accountability" in part by providing "the public someone to blame for bad ones").

115. *See* Nolette, *supra* note 110.

116. *Id.*

117. *Id.*

118. *Id.*

119. 5 U.S.C. § 554(d) (2012). This point should not be confused with the *Lucia* Court's reasoning that the "last-word capacity" of SEC ALJs under certain circumstances supports the conclusion that the ALJs are "Officers." *See Lucia*, 138 S. Ct. at 2053–54. The Court recognized that the SEC ALJs do not have final decisionmaking authority. *See id.* at 2052 n.4.

120. 5 U.S.C. § 557(b) (2012).

121. *See id.*

heads lacked complete discretion to hire whomever they wanted prior to the executive order did not render them unaccountable to the American people. If the public disapproved of the decisions coming out of a given agency, they had the agency head, and by extension the President, to blame.

Second, the viewpoint above does not take into account the value of an objective preselection process in ensuring that ALJs have a degree of independence from politically oriented agency heads. As discussed earlier, a central aim of the APA was to loosen the grip that agency heads previously had over ALJs in order to safeguard ALJs' independence as finders of fact and initial decisionmakers in proceedings to which agencies were often parties.[122] One of Congress's instruments for achieving this goal was to grant the OPM, rather than the agency heads themselves, the authority to determine "the qualifications to be required for appointment . . . ."[123] Although criticisms that the competitive civil service process is slow and cumbersome for agencies may have some legitimacy, the OPM system at the very least introduced objective criteria into the ALJ hiring process and placed some distance between agency heads, as political actors, and the individuals intended to be neutral factfinders in agency adjudications.[124]

The executive order abolished this hiring scheme entirely and instead entrusted agency heads with virtually unfettered discretion to determine the qualifications for ALJ candidates. Several legal experts have decried this sea change as problematic. For instance, the President of the American Bar Association ("ABA"), Hilarie Bass, wrote a letter to the House Rules Committee six days after the issuance of the executive order urging members of Congress to support a bill that would prohibit the OPM from using federal funds to implement the executive order.[125] Bass called the executive order an "ill-considered and legally vulnerable" response to *Lucia* and expressed concern that "giving agency heads sole discretion to hire ALJs . . . has the potential to politicize the appointment process and interfere with the decisional independence of ALJs."[126] Furthermore, Professor Andrew Hessick argued that "the executive order makes it more likely that ALJs will be hired based on 'favoritism and a

122. *See supra* notes 6–12 and accompanying text.

123. 5 U.S.C. § 5372(b)(2) (2012).

124. *See supra* notes 13–21 and accompanying text.

125. Letter from Hilarie Bass to Honorable Pete Sessions & Honorable James McGovern, *supra* note 110.

126. *Id.*

political desirability for achieving particular outcomes' . . . . It makes it so you can pick particular people who you know or at least strongly believe will rule a particular way."[127]

Indeed, the exemption of ALJs from the civil service removes an important safeguard that stood in the way of politically motivated appointments for over half a century. It disrupts a balance that existed between the political accountability of agency heads on the one hand, and the decisional independence of ALJs on the other. President Trump's executive order ushered in a transformation of the ALJ hiring scheme, which places the American people at risk of having inexperienced or politically biased decisionmakers determine their rights. And it risks returning administrative adjudicators to their pre-1940s position as "mere tools" of federal agencies.[128]

### *B. The Executive Order Went Too Far, Too Fast*

A second issue that has arisen after the executive order is whether the wholesale exemption of ALJs from the civil service, and the implicit extension of *Lucia*'s holding to *all* federal ALJs, is a prudent remedy to potential constitutional violations or a disproportionate response to a narrow Supreme Court decision. Some commentators have suggested that eliminating the competitive hiring process for ALJs is the appropriate way to implement *Lucia*'s holding.[129] The argument here presumably is the same as the express rationale of the executive order: if ALJs are "Officers" and therefore must be directly appointed by agency heads, then agency heads must have wide latitude to determine exactly whom to hire, and their discretion cannot be bogged down by qualifications imposed by another agency or restricted to choosing from a limited list of candidates.[130]

The executive order, however, likely exceeds the bounds of *Lucia* in two important respects. First, the President unnecessarily extended the executive order's reach to *all* federal ALJs when not all

127. Dunstan Prial, *Executive Order Boosts Fears of Politically Influenced ALJs*, LAW360 (July 16, 2018), https://lawlibproxy2.unc.edu:2147/articles/1063701/executive-order-boosts-fears-of-politically-influenced-aljs [https://perma.cc/CWK6-SRYF (dark archive)] (quoting Professor Andrew Hessick).

128. *See supra* text accompanying note 5.

129. *See* Andrew Hessick, *Changes to the Independence of Administrative Law Judges*, YALE J. ON REG.: NOTICE & COMMENT (July 11, 2018), http://yalejreg.com/nc/changes-to-the-independence-of-administrative-law-judges/ [https://perma.cc/R2XS-9AZA]; Nolette, *supra* note 110.

130. *See* Exec. Order No. 13,843, 83 Fed. Reg. 32,755, 32,755 (July 10, 2018); Nolette, *supra* note 110.

ALJs have the same authority or perform the same duties as the SEC ALJs involved in *Lucia*. Consider, for instance, the ALJs in the Social Security Administration ("SSA"), who comprise eighty-five percent of all federal ALJs and number over *fifteen hundred* compared to the SEC's five.[131] Unlike SEC ALJs, who oversee proceedings involving the prosecution of securities laws violations, the benefits determination hearings over which SSA ALJs preside are not "adversarial hearings."[132] Rather, in SSA hearings the judge's role is more "inquisitorial" and "investigative";[133] he or she acts as "(1) a judge, (2) a representative of the government who cross examines the claimant, and (3) an adviser to the claimant . . . [who ensures] that the claimant has a fair hearing."[134]

In *Lucia*, the similarly adversarial nature of the SEC's and Tax Court's administrative hearings appeared to be important to the Court's conclusion that SEC ALJs are "Officers."[135] In fact, the majority mentioned five times throughout the opinion that SEC ALJs oversee adversarial proceedings.[136] While the Court did not expressly state that this factor was central to its holding, its repeated emphasis on this characteristic of *Freytag*'s STJs and the SEC ALJs suggests that the SSA ALJs may be meaningfully distinct from those officials. Thus, while SEC ALJs have sufficiently similar "significant authority" to *Freytag*'s STJs to be considered "Officers,"[137] SSA ALJs may not.[138] Even if the executive order does appropriately remedy a constitutional infirmity with respect to SEC ALJs, it purports to solve

131. There are currently 1655 ALJs in the SSA and 1931 total ALJs in all federal agencies. *Administrative Law Judges: ALJs by Agency*, *supra* note 22.

132. Brief of Ass'n of Admin. Law Judges as Amicus Curiae in Support of Affirming the Judgment Below at 20, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130).

133. *Id.* at 21 (citing Sims v. Apfel, 530 U.S. 103, 110–11 (2000)).

134. *Id.* at 20 (quoting Salling v. Bowen, 641 F. Supp. 1046, 1053 (W.D. Va. 1986)).

135. *See* Leading Case, Lucia v. SEC, *138 S. Ct. 2044 (2018)*, 132 HARV. L. REV. 287, 295–96 (2018).

136. *Id.* at 295 n.89; *see also Lucia*, 138 S. Ct. at 2049 ("An ALJ assigned to hear an SEC enforcement action has extensive powers . . . [to] ensure a 'fair and orderly' adversarial proceeding." (quoting 17 C.F.R. § 200.14(a) (2018))); *id.* at 2052 (describing the *Freytag* Court's discussion of "the responsibilities involved in presiding over adversarial hearings"); *id.* at 2053 ("Both sets of officials have all the authority needed to ensure fair and orderly adversarial hearings . . . ."); *id.* ("[P]oint for point . . . [the] SEC['s] ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries."); *id.* at 2054 (discussing the powers that may be "necessary for someone conducting adversarial hearings to count as an officer").

137. *See supra* text accompanying notes 78–86.

138. For a more in-depth discussion of the executive order's implications for the SSA's ALJs, see Leading Case, *supra* note 135, at 292–96, which argued that *Lucia*'s emphasis on adversarial hearings may indicate that SSA ALJs do not constitute "Officers of the United States."

a constitutional problem for other federal ALJs that may not actually exist.

Additionally, the executive order goes too far because, although the President claimed to ground the executive order in *Lucia*'s holding, the Court's holding does not necessarily implicate the OPM hiring procedures. Again, commentators disagree on this point.[139] It suffices to say here that the Court's holding in *Lucia* was narrowly written: SEC ALJs are "Officers" and so must be appointed by the Commission itself rather than by SEC staff. The Court did not suggest that the civil service hiring process posed an Appointments Clause problem—in fact, the Court did not mention the civil service at all. Consequently, one plausible interpretation of *Lucia*'s holding is that so long as the Commission itself ultimately makes ALJ appointments, then limits on its hiring discretion are consistent with the Appointments Clause.[140] The Commission's subsequent ratification of the appointments of its ALJs arguably resolved the constitutional problem present in *Lucia*, and the executive order thus might be a gratuitous disruption of a hiring process that did not need to be altered.

To be sure, the President would have had authority to issue the executive order without predicating it on the *Lucia* decision.[141] The fact remains, however, that the executive order reflects a poor policy choice. The executive order refers rather vaguely to the fact that agency heads have more insight into the "needs" of their respective agencies than does the OPM and thus should have greater hiring discretion.[142] This likely refers, at least in part, to the agency heads having an interest in ensuring that their ALJs have certain subject-matter expertise.[143] While ideally ALJs *would* have subject-matter

139. *Compare* Barnett, *Raiding the OPM Den*, *supra* note 21 (arguing that the "constitutional violation [addressed in *Lucia*] did not implicate the OPM-led process"), *with* Hessick, *supra* note 129 ("The natural way to implement [the *Lucia*] holding is to exempt ALJs from the competitive selection process and leave the appointment of ALJs to the discretion of agency heads.").

140. This view is based on *Myers v. United States*, 272 U.S. 52 (1926), in which the Court stated in dicta that Congress has the authority to determine hiring qualifications for "Officers" so long as "the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation." *Id.* at 128; Barnett, *Raiding the OPM Den*, *supra* note 21. If the Constitution permits Congress to limit discretion for the hiring of "Officers," arguably it also permits Congress to delegate that authority to agencies in the executive branch. Barnett, *Raiding the OPM Den*, *supra* note 21.

141. *See* 5 U.S.C. §§ 3301, 3302 (2012).

142. Exec. Order No. 13,843, 83 Fed. Reg. 32,755, 32,756 (July 10, 2018).

143. There has been a longstanding attempt by agencies to avoid the three-candidate restriction and appoint ALJs with particular specializations. *See* Barnett, *Resolving the ALJ Quandary*, *supra* note 12, at 805.

expertise, in addition to being neutral fact finders and highly experienced in presiding over hearings, eliminating the OPM hiring procedures jeopardizes the latter considerations in order to achieve the former.

In other words, the President's decision strikes the wrong balance between protecting ALJs' decisional independence and promoting a good fit between ALJs and their respective agencies. Under the OPM-administered process, agencies were able to choose from three highly experienced candidates, which ensured that agencies had some discretion to choose ALJs well suited to the needs of the agency. Furthermore, agency heads themselves are likely to have substantive experience in the matters arising before their agencies[144] and also have the opportunity to review ALJ decisions.[145] Thus, there is already a built-in safeguard for an ALJ's potential lack of subject-matter experience. The decision to scrap the entire existing process consequently places too much importance on the nebulous "needs" of agencies at the expense of the continued competence and political neutrality of ALJs.

At the very least, the decision to abolish the longstanding appointment process for ALJs merited a broader discussion that involved interested parties such as ALJs, administrative law scholars, and potentially Congress. The executive order's hasty imposition of a top-down solution to what may or may not be a constitutional problem has resulted in an outcry from federal ALJs.[146] In addition, it has caused further entrenchment of the divide between those critical of the power of the "administrative state" and those concerned about the continued independence of administrative adjudicators.[147] As the ABA President asserted, changes to the ALJ hiring process should await "an opportunity for Congress and the public to engage in an open and deliberative process that considers possible options for curing the constitutional defects in the current process."[148]

144. William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 161 (1991).

145. *See* 5 U.S.C. § 557(b) (2012).

146. *ALJs Decry Executive Order Ending Merit-Based Appointment Process*, NAT'L JUD. C.: JUD. EDGE (July 25, 2018), https://www.judges.org/aljs-decry-executive-order-ending-merit-based-appointment-process/ [https://perma.cc/77T8-BPPG].

147. *Compare* Press Release, Am. Constitution Soc'y, ACS Statement on the Executive Order Regarding ALJ Appointments (July 13, 2018), https://www.publicnow.com/view/125882C41EF9883451890A1A6D1E240620A1DCD7 [https://perma.cc/P3KZ-ASR8], *with* Nolette, *supra* note 110.

148. Letter from Hilarie Bass to Honorable Pete Sessions & James McGovern, *supra* note 110.

### *C.* Lucia *and the Executive Order Pave the Way for the At-Will Removal of ALJs*

*Lucia* and President Trump's executive order leave unanswered a final question, the answer to which will have serious ramifications for ALJ impartiality: is the APA's requirement that ALJs can only be removed "for cause" constitutional?[149] Much of the conversation occurring among legal experts in the wake of *Lucia* has focused on this issue due to its import and the fact that the Supreme Court left it an open question.[150]

Although the majority declined to address the removal issue,[151] Justice Breyer wrote about it at length in his concurrence in the judgment and partial dissent.[152] There, he expressed concern that, in light of the SEC ALJs' "Officer" status, the Court's prior decision in *Free Enterprise Fund v. Public Co. Oversight Board*[153] might compel the conclusion that the APA's "for cause" removal provision for ALJs violates separation of powers principles.[154] In *Free Enterprise Fund*, the Court struck down a statutory scheme that provided members of the Public Company Accounting Oversight Board with "two levels of protection from removal" by the President.[155] As part of its reasoning that the removal protections were unconstitutional,

149. Commentators and scholars writing pre-*Lucia* have disagreed about whether the removal provision is constitutional. *Compare* Linda D. Jellum & Moses M. Tincher, *The Shadow of* Free Enterprise*: The Unconstitutionality of the Securities & Exchange Commission's Administrative Law Judges*, 70 SMU L. REV. 3, 55–60 (2017) (arguing that ALJs' removal protection is unconstitutional), *with* Jerome Nelson, *Administrative Law Judges' Removal "Only for Cause": Is That Administrative Procedure Act Protection Now Unconstitutional?*, 63 ADMIN. L. REV. 401, 412–13 (2011) (arguing that ALJs' removal protection is constitutional).

150. *See, e.g.*, Jack Beermann, Lucia *and the Future of Administrative Adjudication*, HARV. L. REV. BLOG (July 13, 2018), https://blog.harvardlawreview.org/lucia-and-the-future-of-administrative-adjudication/ [https://perma.cc/UFR8-TZW4]; Hessick, *supra* note 129.

151. The brief explanation that the Court gave for declining to address the removal question is contained in a footnote: "No court has addressed that question, and we ordinarily await 'thorough lower court opinions to guide our analysis of the merits.'" Lucia v. SEC, 138 S. Ct. 2044, 2050 n.1 (2018) (quoting Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012)).

152. *Id.* at 2059–64 (Breyer, J., concurring in part and dissenting in part). Justice Breyer concurred with the judgment but would have avoided the constitutional issue by resting the Court's conclusion on statutory grounds. *Id.* at 2057.

153. 561 U.S. 477 (2010).

154. *Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring in part and dissenting in part).

155. *Free Enter. Fund*, 561 U.S. at 514.

the *Free Enterprise Fund* Court emphasized that the board members were "Officers" within the meaning of the Appointments Clause.[156]

Justice Breyer stated that the significance of the Board members' "Officer" status to the Court's analysis in *Free Enterprise* is "not entirely clear."[157] However, if that fact was an important component in the Court's decision in that case, the determination in *Lucia* that the SEC ALJs are "Officers" would bring with it the implication that the APA's "for cause" removal requirement is likewise unconstitutional because ALJs also have two layers of protection from removal—they can only be removed "for cause" by the MSPB whose members, in turn, can only be removed by the President for "inefficiency, neglect of duty, or malfeasance in office."[158]

Justice Breyer's worry, echoed in several of the amicus briefs filed in *Lucia*,[159] is that invalidating ALJs' removal protections "would risk transforming administrative law judges from independent adjudicators into *dependent* decisionmakers, serving at the pleasure of the Commission."[160] Moreover, it "threatens to change the nature of our merit-based civil service as it has existed from the time of President Chester Alan Arthur."[161]

President Trump's executive order brings those concerns into even sharper focus. For one, the executive order eliminates the civil service removal regulations as they apply to ALJs. It is unclear what this action accomplishes because the APA still affords ALJs a formal removal hearing before the MSPB.[162] Nonetheless, it may signal that the Trump administration views the statutory removal protections as unconstitutional; the government may be priming the pump, so to speak, to argue that the APA provision should be struck down.

Second, with the exemption of ALJs from the civil service hiring process, the executive order has already chipped away at ALJ decisional independence. The statutory removal protection remains an important safeguard against further encroachment on ALJ

156. *See id.* at 492–95, 504–05; *Lucia*, 138 S. Ct. at 2059 (Breyer, J., concurring in part and dissenting in part).

157. *Lucia*, 138 S. Ct. at 2059 (Breyer, J., concurring in part and dissenting in part).

158. *Id.* at 2060 (quoting 5 U.S.C. § 1202(d) (2012)).

159. *See, e.g.*, Brief of Amicus Curiae the Forum of U.S. Admin. Law Judges in Support of Neither Party at 20–24, *Lucia*, 138 S. Ct. 2044 (No. 17-130); Brief Amicus Curiae of Admin. Law Scholars in Support of Neither Party at 19–21, *Lucia*, 138 S. Ct. 2044 (No. 17-130).

160. *Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring in part and dissenting in part).

161. *Id.* (citing *Free Enter. Fund*, 561 U.S. at 540–42 (Breyer, J., dissenting)).

162. 5 U.S.C. § 7521 (2012).

political impartiality.[163] If the "for cause" removal provision goes the same way as the civil service hiring process, agency heads will not only have the freedom to hire ALJs for political reasons but they will also have the opportunity to hold an at-will removal authority over the heads of those judges as they decide agency cases and remove ALJs for failing to come to the agency's preferred conclusions.

## CONCLUSION

As ALJs have assumed a larger role in the executive branch, their decisional independence is more important than ever. Regardless of whether *Lucia* was correctly decided, President Trump took a plausible interpretation of the Court's holding and ran with it in the July 2018 Executive Order. If at least "some"[164] ALJs exercise "significant authority,"[165] the decision to abolish a hiring scheme that placed distance between political actors and designedly neutral decisionmakers moves the "independence" dial in precisely the wrong direction. And the potential for eliminating ALJs' removal protections threatens to make the situation even more dire. If Americans hope to strike a better balance between ALJ independence and agency accountability, we would do well to keep in mind the principles that motivated Congress to enact the APA in the first place.

SHANNON M. SMITH**

163. *See Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring in part and dissenting in part) ("The substantial independence that the Administrative Procedure Act's removal protections provide to administrative law judges is a central part of the Act's overall scheme.").

164. Exec. Order No. 13,843, 83 Fed. Reg. 32,755, 32,755 (July 10, 2018).

165. *See supra* text accompanying notes 78–86.

** I would like to thank my Primary Editor, Tom Zamadics, as well as the entire *North Carolina Law Review* Volume 97 Board of Editors and staff for their diligent editing of this piece. I am also forever grateful for my mom and dad, who ingrained in me an interest in law and politics, encouraged me to write about this topic, and continuously support me in everything I do. Finally, I would like to thank my partner, Justin, who frequently reminds me that there are more important things in life than law school.