
*Article II — Appointments Clause —
Officers of the United States — Lucia v. SEC*

Perhaps one of the most durable effects of the Trump Administration will be its heretofore successful attempt to remake the federal judiciary. In its first two years, the Administration has appointed more federal judges than any of its recent predecessors.¹ While most attention has been paid to the Administration’s rapid appointment of Article III judges, equally significant are its efforts at gaining more control over Article I administrative law judges (ALJs). Last Term, in *Lucia v. SEC*,² the Supreme Court held that ALJs of the Securities and Exchange Commission (SEC) were “‘Officers of the United States[.]’ subject to the Appointments Clause.”³ In response, the Trump Administration issued an executive order exempting all ALJs from competitive civil service hiring requirements and requiring them to be appointed by a head of department.⁴ The executive order concludes that, under *Lucia*, “at least some — and perhaps all — ALJs are ‘Officers of the United States.’”⁵ This conclusion is defensible. But *Lucia* also includes language emphasizing the “adversarial” nature of the hearings overseen by SEC ALJs, which could provide a basis for limiting its holding in the future and protecting the decisionmaking process of ALJs from undue politicization.

Raymond Lucia came to the attention of the SEC when promoting “Buckets of Money,” a retirement wealth-management strategy, on his daily radio show, at seminars, and in several books.⁶ Alleging violations of the antifraud provisions of the Investment Advisers Act and the rule against misleading advertising, the SEC brought an administrative enforcement action against Lucia and his corporation.⁷ An ALJ subsequently found Lucia liable for fraudulent and misleading marketing practices and imposed sanctions.⁸

On appeal to the SEC, Lucia argued that SEC ALJs are “Officers of the United States” that must be appointed in accordance with the Appointments Clause.⁹ Under the Appointments Clause, the

¹ Deanna Paul, *Trump Promised to Remake the Courts. He’s Installing Conservative Judges at a Record Pace*, WASH. POST (July 19, 2018), <https://wapo.st/2LoDAYY> [<https://perma.cc/JNS9-75TY>].

² 138 S. Ct. 2044 (2018).

³ *Id.* at 2055.

⁴ See Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018).

⁵ *Id.*

⁶ Raymond J. Lucia Cos., Exchange Act Release No. 67,781, Investment Company Act Release No. 30,193, 104 SEC Docket 2130, 2131 (Sept. 5, 2012).

⁷ *Id.* at 2134–35.

⁸ Raymond J. Lucia Cos., 106 SEC Docket 3613, 3628, 3636–38 (ALJ July 8, 2013). Sanctions against Lucia included \$300,000 in civil money penalties and a lifetime industry bar. *Id.* at 3637–38.

⁹ See Raymond J. Lucia Cos., Exchange Act Release No. 75837, Investment Company Act Release No. 4190, 112 SEC Docket 1754, 1769 (Sept. 3, 2015).

appointment of inferior “Officers of the United States” may be vested by Congress “in the President alone, in the Courts of Law, or in the Heads of Departments.”¹⁰ “Officers” are distinct from “mere employees” of the executive branch, whose appointments fall outside the strictures of the Constitution.¹¹ Individuals who “exercis[e] significant authority pursuant to the laws of the United States” are considered officers.¹² And although the SEC itself is a “Head[] of Department,” the SEC had delegated the appointment of ALJs to SEC staff members.¹³ Thus, Lucia contended, the administrative proceeding was invalid because the presiding ALJ was unconstitutionally appointed.¹⁴ The SEC rejected this argument and found that SEC ALJs are employees, not officers.¹⁵ It also rejected Lucia’s challenges to the liability and sanctions determinations.¹⁶

Lucia petitioned for review in the D.C. Circuit. A panel denied Lucia’s petition, unanimously agreeing that SEC ALJs are employees.¹⁷ The court explained that SEC ALJs do not exercise “significant authority pursuant to the laws of the United States”¹⁸ because they “neither have been delegated sovereign authority to act independently of the Commission nor . . . do they have the power to bind third parties, or the government itself.”¹⁹ Undeterred, Lucia petitioned for rehearing en banc, which was granted. The ten-member en banc court divided evenly and issued a per curiam order denying Lucia’s claim.²⁰ By leaving in place the panel’s determination, the en banc order conflicted with *Bandimere v. SEC*,²¹ a Tenth Circuit case holding that SEC ALJs are officers.²² Lucia petitioned for certiorari to resolve the split between the

¹⁰ U.S. CONST. art. II, § 2, cl. 2.

¹¹ *Lucia*, 138 S. Ct. at 2049.

¹² *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam).

¹³ *Lucia*, 138 S. Ct. at 2050 (alterations in original) (citing *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010)). Throughout the *Lucia* litigation, Social Security Administration (SSA) ALJs were also not hired by the President, courts of law, or heads of department. Rather, they were selected through a competitive civil service hiring process designed to ensure their expertise and impartiality. *See, e.g.*, *O’Leary v. OPM*, DA-300A-12-0651, 2016 WL 3365404 (M.S.P.B. June 17, 2016). As such, they were vulnerable to Appointments Clause challenges asserting that, as “Officers of the United States,” they had been unconstitutionally appointed.

¹⁴ *Lucia*, 112 SEC Docket at 1769.

¹⁵ *Id.* at 1772.

¹⁶ *Id.* at 1755, 1772.

¹⁷ *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 286–89 (D.C. Cir. 2016). The panel also upheld the SEC’s liability and sanctions determinations against Lucia. *Id.* at 292–96.

¹⁸ *Id.* at 284 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)).

¹⁹ *Id.* at 286.

²⁰ *See Raymond J. Lucia Cos. v. SEC*, 868 F.3d 1021 (D.C. Cir. 2017) (en banc).

²¹ 844 F.3d 1168 (10th Cir. 2016).

²² *Id.* at 1179.

circuits,²³ and the Supreme Court granted the petition.²⁴

The Supreme Court reversed and remanded. Writing for the Court, Justice Kagan²⁵ declined to elaborate on *Buckley v. Valeo*'s²⁶ “significant authority” test for differentiating between officers and employees. Instead, she looked to *Freytag v. Commissioner*,²⁷ in which the Court had determined that “special trial judges” (STJs) of the United States Tax Court were officers that exercised “significant authority.”²⁸ In *Lucia*, there was no “need to refine or enhance” the *Buckley* test²⁹ because, the Court explained, “*Freytag* says everything necessary to decide this case.”³⁰ Proceeding “point for point,”³¹ the Court illustrated that SEC ALJs were functionally indistinguishable from *Freytag* STJs. Both “hold a continuing office established by law” and exercise “‘significant discretion’ when carrying out the same ‘important functions.’”³² Indeed, SEC ALJs possess the same four powers mentioned in *Freytag*. Specifically, they “take testimony” at hearings by “receiv[ing] evidence” and “examin[ing] witnesses;”³³ they “conduct trials” by “administer[ing] oaths, rul[ing] on motions, and generally ‘regulat[ing] the course of’ a hearing;”³⁴ they “rule on the admissibility of evidence,” thereby “critically shap[ing] the administrative record;” and they “have the power to enforce compliance with discovery orders” and “may punish all ‘[c]on-temptuous conduct.’”³⁵ And ALJs issue decisions that may become the final action of the SEC — making their decisions similar to those of the STJs in *Freytag*, but “with potentially more independent effect.”³⁶ So, because SEC ALJs “have equivalent duties and powers as STJs,” they too are officers subject to the Appointments Clause.³⁷

²³ Petition for Writ of Certiorari, *Lucia*, 138 S. Ct. 2044 (No. 17-130). At the panel and en banc stages of the D.C. Circuit litigation, the Department of Justice defended the SEC’s position, “[b]ut in responding to Lucia’s petition, the Government switched sides” and argued that SEC ALJs are officers. *Lucia*, 138 S. Ct. at 2050. When the Court granted the petition, it appointed an amicus curiae to defend the D.C. Circuit decision below. *Id.* at 2050–51.

²⁴ At both the certiorari and merits stage, the government asked the Court to consider “whether the statutory restrictions on removing the Commission’s ALJs are constitutional” and the Court twice declined. *Lucia*, 138 S. Ct. at 2050 n.1.

²⁵ Justice Kagan was joined by Chief Justice Roberts and Justices Kennedy, Thomas, Alito, and Gorsuch. Justice Breyer concurred in the judgment in part.

²⁶ 424 U.S. 1 (1976) (per curiam).

²⁷ 501 U.S. 868 (1991).

²⁸ *Id.* at 881.

²⁹ *Lucia*, 138 S. Ct. at 2052.

³⁰ *Id.* at 2053.

³¹ *Id.*

³² *Id.* (quoting *Freytag*, 501 U.S. at 882).

³³ *Id.* (original alterations omitted) (first quoting *Freytag*, 501 U.S. at 881; then quoting 17 C.F.R. § 201.111(c) (2018); and then quoting 17 C.F.R. § 200.14(a)(4)).

³⁴ *Id.* (original alterations omitted) (quoting 17 C.F.R. § 201.111).

³⁵ *Id.* (alteration in original) (first quoting *Freytag*, 501 U.S. at 882; then quoting 17 C.F.R. § 201.180(a)).

³⁶ *Id.*

³⁷ *Id.*

The Court rejected two arguments for distinguishing SEC ALJs from the *Freytag* STJs. First, even though SEC ALJs enjoy “less capacious power to sanction misconduct” than STJs, their authority to exclude wrongdoers from a proceeding, “summarily suspend” lawyers from representing their clients, and generally “issue an opinion complete with factual findings, legal conclusions, and sanctions”³⁸ is sufficient to constitute “power to enforce compliance with discovery orders” under *Freytag*.³⁹ Second, it is irrelevant under *Freytag* that the SEC reviews ALJs’ factual findings de novo, rather than under a deferential standard.⁴⁰

Having established that the ALJ who adjudicated the SEC’s administrative enforcement action against Lucia was an unconstitutionally appointed “Officer of the United States,” the Court turned to remedial concerns. The Court explained that “the ‘appropriate’ remedy for an adjudication tainted with an appointments violation is a new ‘hearing before a properly appointed’ official,”⁴¹ and clarified that the “properly appointed official” cannot be the same official who “already both heard Lucia’s case and issued an initial decision on the merits.”⁴²

Justice Thomas concurred.⁴³ He noted that “precedents like *Freytag* discuss what is *sufficient* to make someone an officer of the United States, [but] our precedents have never clearly defined what is *necessary*.”⁴⁴ Looking to the original public meaning of “Officers of the United States,” Justice Thomas argued that “[t]o the Founders, this term encompassed all federal civil officials ‘with responsibility for an ongoing statutory duty.’”⁴⁵ On that ground, he concluded that SEC ALJs were officers of the United States.

Justice Breyer concurred in the judgment in part and dissented in part.⁴⁶ He expressed three disagreements with the Court. First, although he agreed that the SEC did not properly appoint its ALJs, he would have avoided the constitutional question by reaching that outcome on statutory grounds.⁴⁷ Second, he would have addressed “the constitution-

³⁸ *Id.* at 2054.

³⁹ *Id.* at 2053 (quoting *Freytag*, 501 U.S. at 882).

⁴⁰ *Id.* at 2054–55.

⁴¹ *Id.* at 2055 (quoting *Ryder v. United States*, 515 U.S. 177, 183, 188 (1995)).

⁴² *Id.*

⁴³ Justice Thomas was joined by Justice Gorsuch.

⁴⁴ *Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring).

⁴⁵ *Id.* (quoting *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring)) (citing Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN L. REV. 443, 564 (2018)).

⁴⁶ Justice Ginsburg and Justice Sotomayor joined only Part III, which disagreed with the Court’s remedial requirement that, on remand, Lucia receive a hearing before a different ALJ.

⁴⁷ *Lucia*, 138 S. Ct. at 2057 (Breyer, J., concurring in part and dissenting in part). Specifically, as Justice Breyer read the Administrative Procedure Act (APA), the statute does not “permit[] the Commission to delegate its power to appoint its administrative law judges to its staff.” *Id.* at 2058.

ality of the statutory for cause removal protections that Congress provided for administrative law judges.”⁴⁸ Justice Breyer explained that answering the “for cause” removal question is a necessary predicate to properly deciding whether SEC ALJs are officers.⁴⁹ And he cautioned that, “[b]y considering each question in isolation, the Court risks . . . unraveling, step-by-step, the foundations of the Federal Government’s administrative adjudication system.”⁵⁰ Third, Justice Breyer argued that, because the Court’s reversal “is based on a technical constitutional question” that “implies no criticism at all of the original” ALJ, the proper remedy need not include a hearing in front of a new ALJ.⁵¹

Justice Sotomayor dissented.⁵² She noted that the Court’s decisions have not yet defined a more precise definition of “significant authority,” leading to “confusion [that] can undermine the reliability and finality of proceedings and result in wasted resources.”⁵³ She proposed a clear line between officers and employees: officers have “the ability to make final, binding decisions on behalf of the Government”; employees “merely advise[] and provide[] recommendations to an officer.”⁵⁴ Under this framework, Justice Sotomayor would have found SEC ALJs to be mere employees because they do not have the authority to make final decisions.⁵⁵

The holding of *Lucia* has modest implications for the SEC, but it threatens to alter drastically the workings of other agencies, especially the Social Security Administration (SSA). The SEC employs only five ALJs,⁵⁶ which the “head of department” had already “retroactively” appointed by the time the litigation reached the Supreme Court.⁵⁷ In contrast, the SSA is “probably the largest adjudicative agency in the western world.”⁵⁸ Of the 1931 ALJs scattered through executive agencies, 1655 of them are SSA ALJs.⁵⁹ The benefits disbursement hearings they oversee provide essential financial support to millions of Americans.⁶⁰

⁴⁸ *Id.* at 2057 (internal quotation marks omitted).

⁴⁹ *Id.* at 2059.

⁵⁰ *Id.* at 2064.

⁵¹ *Id.*

⁵² Justice Sotomayor was joined by Justice Ginsburg.

⁵³ *Lucia*, 138 S. Ct. at 2065 (Sotomayor, J., dissenting).

⁵⁴ *Id.*

⁵⁵ *Id.* at 2067.

⁵⁶ *Administrative Law Judges: ALJs by Agency and Level*, U.S. OFFICE OF PERSONNEL MGMT. (Mar. 2017), <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> [<https://perma.cc/LzT6-7EH5>].

⁵⁷ *Lucia*, 138 S. Ct. at 2055 n.6. The Court declined to address whether or not these “ratifications” were a constitutionally valid method of reappointing the ALJs. *Id.*

⁵⁸ *Heckler v. Campbell*, 461 U.S. 458, 461 n.2 (1983) (quoting *J. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS* xi (1978)).

⁵⁹ U.S. OFFICE OF PERSONNEL MGMT., *supra* note 56.

⁶⁰ In fiscal year 2017, the SSA paid approximately \$793 billion in Old-Age and Survivors Insurance benefits to 51 million beneficiaries a month, approximately \$141 billion in Disability Insurance benefits to approximately 10 million beneficiaries a month, and approximately \$51 billion

Indeed, on average, SSA ALJs conduct more than 650,000 hearings per year,⁶¹ making most Americans far more likely to encounter an SSA ALJ than an Article III federal judge over the course of their lifetime.⁶² In the weeks following *Lucia*, the Trump Administration attempted to resolve any speculation about how *Lucia* applies to SSA ALJs by issuing an executive order. The order concluded that, in light of *Lucia*, “at least some — and perhaps all — ALJs are ‘Officers of the United States’ and thus subject to the Constitution’s Appointments Clause.”⁶³ Accordingly, the executive order required all ALJs to be exempt from “competitive examination and competitive service selection procedures,” and instead to be hired at the discretion of agency heads.⁶⁴

By granting agency heads broad discretion to hire ALJs, the executive order opens the door to the politicization of the Social Security benefits disbursement procedure. Before the executive order, the Office of Personnel Management (OPM) administered a centralized ALJ hiring process and “establish[ed] a list of eligible candidates from which agencies ma[de] competitive service selections of ALJs.”⁶⁵ To be eligible, ALJ candidates had to “demonstrate an active law license in good standing, at least seven years of litigation . . . experience, and achieve a sufficient score on a multi-part competitive examination.”⁶⁶ Under the executive order, ALJ candidates need only “possess a professional license to practice law and be authorized to practice law.”⁶⁷ Moreover, agencies now design their own hiring procedures.⁶⁸ Where a politically appointed “head of department” may hire any minimally qualified ALJ candidate of her choosing, “[o]ne can envisage an anti-welfare Social Security chief selecting an ALJ who is skeptical of benefits claims.”⁶⁹

The executive order’s conclusion that SSA ALJs are “Officers of the United States” is a justifiable, but not inevitable, reading of *Lucia*. By repeatedly emphasizing the “adversarial” nature of the proceedings in

in Supplemental Security Income benefits to over 8 million recipients a month. SOC. SEC. ADMIN., ANNUAL PERFORMANCE REPORT: FISCAL YEARS 2017–2019, at 4, <https://www.ssa.gov/budget/FY19Files/2019APR.pdf> [<https://perma.cc/Q7MW-A8WP>].

⁶¹ SOC. SEC. ADMIN., *Information About SSA’s Hearings and Appeals Operations*, https://www.ssa.gov/appeals/about_us.html [<https://perma.cc/TX7L-39A3>].

⁶² Marilyn Zahm, Opinion, *Do You Have a Social Security Card? Then Take This Executive Order Personally*, WASH. POST (July 18, 2018), <https://wapo.st/2mofuXQ> [<https://perma.cc/R28U-J4AB>].

⁶³ Exec. Order No. 13,843, § 1, 83 Fed. Reg. 32,755 (July 13, 2018).

⁶⁴ *Id.*

⁶⁵ Brief Amicus Curiae of Federal Administrative Law Judges Conference in Support of Neither Party at 7, *Lucia*, 138 S. Ct. 2044 (No. 17-130); see 5 U.S.C. § 1104 (2012).

⁶⁶ Brief Amicus Curiae of Federal Administrative Law Judges Conference in Support of Neither Party, *supra* note 65, at 7–8; see 5 U.S.C. § 3304; 5 C.F.R. § 930.204 (2018).

⁶⁷ Exec. Order No. 13,843, § 3(a)(ii), 83 Fed. Reg. at 32,755.

⁶⁸ *Id.* §§ 1, 3(a)(ii) (noting “the need to provide agency heads with additional flexibility,” *id.* § 1, and requiring ALJ appointments to “be made in accordance with such regulations and practices as the head of the agency concerned finds necessary,” *id.* § 3(a)(ii)); see also Zahm, *supra* note 62.

⁶⁹ Editorial, *Trump Is Politicizing the Federal Government Even Further. Step In, Congress.*, WASH. POST (July 22, 2018), <https://wapo.st/2mAvHl5> [<https://perma.cc/7H2D-6G6A>].

Freytag and *Lucia*, the Court may have suggested a constitutional ground for distinguishing SEC ALJs and SSA ALJs. SSA ALJs oversee nonadversarial benefits disbursement hearings, while SEC ALJs oversee more adversarial, trial-like proceedings. And constitutional doctrine consistently distinguishes between adversarial and nonadversarial hearings, indicating that ALJs that oversee adversarial hearings may be more likely to be “Officers of the United States.” To prevent the politicization of the Social Security benefits-disbursement system, Congress or a future presidential administration should seek to narrowly construe *Lucia* and argue that its conclusion that SEC ALJs are “Officers of the United States” does not inevitably lead to the conclusion that SSA ALJs are also “Officers of the United States.”

The Administration’s conclusion that SSA ALJs are “Officers of the United States” under *Lucia* is doctrinally defensible. Much of *Lucia* and *Freytag* suggests that SSA ALJs are “Officers of the United States.” Like SEC ALJs, they “hold a continuing office established by law” — they “receive a career appointment” to a “position created by statute,” including its “duties, salary, and means of appointment.”⁷⁰ Moreover, SSA ALJs “issue decisions . . . [with] independent effect” that “contain[] factual findings, legal conclusions, and appropriate remedies.”⁷¹ Like the SEC, when the appellate body within the SSA declines to review an ALJ’s decision, the decision becomes final.⁷² SSA ALJs also possess each of the “four specific (if overlapping) powers *Freytag* mentioned” that allow them to exercise “significant discretion” when “ensur[ing] fair and orderly” hearings.⁷³ First, like SEC ALJs, they “take testimony” by “receiv[ing] evidence and examin[ing] witnesses,” and also by “tak[ing] pre-hearing depositions.”⁷⁴ Second, SSA ALJs “conduct trials” by “administer[ing] oaths, rul[ing] on motions, and generally ‘regulat[ing] the course of’ a hearing, as well as the conduct of parties and counsel.”⁷⁵

⁷⁰ *Lucia*, 138 S. Ct. at 2053 (internal alterations omitted) (citing *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991)); see 5 U.S.C. § 3105; 5 C.F.R. § 930.204–205.

⁷¹ *Lucia*, 138 S. Ct. at 2053; see 20 C.F.R. § 498.220 (2018).

⁷² See *Lucia*, 138 S. Ct. at 2053–54; 20 C.F.R. §§ 404.967, 416.1467 (establishing that the SSA’s Appeals Council may decline to review an ALJ’s decision); *id.* §§ 404.955, 404.969, 416.1455, 416.1469 (establishing that, if the Appeals Council does not review an ALJ decision, the decision becomes final).

⁷³ *Lucia*, 138 S. Ct. at 2053.

⁷⁴ *Id.* (internal alterations omitted) (first quoting *Freytag*, 501 U.S. at 881; then quoting 17 C.F.R. § 201.111(c) (2018); and then quoting 17 C.F.R. § 200.14(a)(4)); see 20 C.F.R. §§ 404.929, 404.935, 416.1429, 498.204(b)(10) (stating that SSA ALJs have the power to receive evidence); *id.* § 498.204(b)(9) (discussing the SSA ALJs’ power to examine witnesses); SOC. SEC. ADMIN., HEARINGS, APPEALS, AND LITIGATION LAW MANUAL I-2-6-22 (2014) (explaining the prehearing deposition power).

⁷⁵ *Lucia*, 138 S. Ct. at 2053 (first quoting *Freytag*, 501 U.S. at 882; and then quoting 17 C.F.R. § 201.111); see 20 C.F.R. § 404.950(e); *id.* § 498.204(b)(4) (discussing SSA ALJs’ power to administer oaths); *id.* § 498.204(b)(6) (establishing the power to rule on dispositive and procedural motions); *id.*

Third, they “rule on the admissibility of evidence,” thereby “critically shap[ing] the administrative record.”⁷⁶ Fourth, SSA ALJs also have the power to punish “[c]ontemptuous conduct . . . by means as severe as excluding the offender from the hearing.”⁷⁷ In short, the executive order’s determination that all ALJs, including SSA ALJs, are probably “Officers of the United States” under *Lucia* finds much support in both *Freytag* and *Lucia*.⁷⁸

But SSA ALJs are meaningfully distinct from *Freytag* STJs and *Lucia* SEC ALJs in at least one way: the benefits determination proceedings they oversee are nonadversarial.⁷⁹ In *Freytag*, the STJ presided over a U.S. Tax Court hearing in which the “Chief Counsel for the Internal Revenue Service or his delegate” was adverse to the taxpayer.⁸⁰ Likewise, the SEC prosecutes violations of securities laws in adversarial hearings.⁸¹ When a party files for reconsideration of a Social Security benefits determination,⁸² however, the resulting hearing before an ALJ is “inquisitorial rather than adversarial.”⁸³ In such a hearing, “[i]t is the ALJ’s duty to investigate the facts and develop the arguments both for and against granting benefits.”⁸⁴ “The Commissioner has no representative before the ALJ to oppose the claim for benefits” and does not “oppose[] claimants before the [Appeals] Council.”⁸⁵ Indeed, regulations governing the proceedings “expressly provide that the SSA ‘conduct[s]

§ 498.204(b)(8) (explaining that SSA ALJs “[r]egulate the course of the hearing and the conduct of representatives, parties, and witnesses”).

⁷⁶ *Lucia*, 138 S. Ct. at 2053 (quoting *Freytag*, 501 U.S. at 882); see 20 C.F.R. 498.204(b)(10) (stating that SSA ALJs have the power to “[r]eceive, exclude, or limit evidence”). Both SEC and SSA ALJs also shape the administrative record by “issuing document subpoenas.” *Lucia*, 138 S. Ct. at 2053; see 20 C.F.R. § 404.950(d)(1) (discussing SSA ALJs’ power to issue subpoenas for witnesses and documents). And both SEC and SSA ALJs rely on federal district courts to compel compliance with those subpoenas. See 42 U.S.C. § 405(e) (2012).

⁷⁷ *Lucia*, 138 S. Ct. at 2053 (first alteration in original) (quoting 17 C.F.R. 201.180(a)(1)); see SOC. SEC. ADMIN., HEARINGS, APPEALS, AND LITIGATION LAW MANUAL I-2-6-60(D) (2016).

⁷⁸ Before the executive order reformed all ALJ hiring practices to uniformly comply with the Appointments Clause, litigants noticed the parallels between SEC and SSA ALJs and began filing Appointments Clause challenges to SSA ALJs. See, e.g., *Hugues v. Berryhill*, No. CV 17-3892, 2018 WL 3239835, at *2 n.2 (C.D. Cal. July 2, 2018).

⁷⁹ See *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991) (“What makes a system adversarial rather than inquisitorial is not the presence of counsel . . . but rather, the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.”); *United States v. Loughner*, 672 F.3d 731, 762 (9th Cir. 2012) (discussing the characteristics of “adversarial” hearings).

⁸⁰ See 26 U.S.C. § 7452 (2012).

⁸¹ See 17 C.F.R. § 202.5 (describing the enforcement activities of the SEC).

⁸² See 20 C.F.R. § 416.1430 (2018).

⁸³ *Sims v. Apfel*, 530 U.S. 103, 111 (2000); see also *id.* at 110 (observing that “[t]he differences between courts and agencies are nowhere more pronounced than in Social Security proceedings”).

⁸⁴ *Id.* at 111.

⁸⁵ *Id.*

the administrative review process in an informal, nonadversary manner.”⁸⁶ Thus, unlike the STJs of the U.S. Tax Court in *Freytag* and the SEC ALJs in *Lucia*, SSA ALJs generally oversee inquisitorial, rather than adversarial, hearings.⁸⁷

Throughout the *Lucia* litigation, parties and amici suggested that the distinction between adversarial and nonadversarial hearings had constitutional salience. Specifically, they asserted that, for the purposes of the Appointments Clause, SEC ALJs could be distinguished from ALJs that do not oversee adversarial hearings.⁸⁸ The Court’s opinion may imply approval of this distinction, as it mentions that SEC ALJs and U.S. Tax Court STJs both oversee “adversarial” hearings no fewer than *five* times.⁸⁹ But neither *Lucia* nor any of the briefs squarely explain why an ALJ that oversees an adversarial hearing should be considered an “Officer of the United States,” while an ALJ that oversees a nonadversarial hearing should be considered a “mere employee.”

Although *Lucia* does not elaborate on the distinction, it is a foundational, crosscutting principle of constitutional law that adversarial proceedings like those in *Freytag* and *Lucia* are distinct from inquisitorial proceedings, like those conducted by the SSA. At least three distinct doctrinal frameworks distinguish adversarial from purely inquisitorial proceedings and further presume that adversarial hearings are more effective than nonadversarial hearings at protecting important private interests. First, the Due Process Clause entitles individuals to adversarial evidentiary proceedings only when the private interest at stake outweighs the public interest in “conserving scarce fiscal and administrative

⁸⁶ *Id.* (alteration in original) (quoting 20 C.F.R. § 404.900(b) (1999)); *see also* 20 C.F.R. § 416.1432 (2018) (specifying the parties to a proceeding before an ALJ); *id.* § 416.1444 (describing the procedures of an ALJ hearing); *id.* § 416.1449 (describing how arguments are presented in an ALJ hearing).

⁸⁷ To be sure, SSA ALJs also oversee sanctions hearings, which are adversarial. *See* 20 C.F.R. § 408.202. But the “essential[]” function of the ALJ is to oversee nonadversarial benefits disbursement hearings as an adjudicator, *Richardson v. Perales*, 402 U.S. 389, 403 (1971), thereby distinguishing them from STJs and SEC ALJs.

⁸⁸ *See, e.g.*, Transcript of Oral Argument at 9, *Lucia*, 138 S. Ct. 2044 (No. 17-130), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-130_1p23.pdf [<https://perma.cc/9W2S-S2DG>]; Brief for Petitioners at 42, *Lucia*, 138 S. Ct. 2044 (No. 17-130); Brief of Respondent Supporting Petitioners at 14, *Lucia*, 138 S. Ct. 2044 (No. 17-130); Brief of Amicus Curiae the Forum of United States Administrative Law Judges in Support of Neither Party at 1 & n.2, *Lucia*, 138 S. Ct. 2044 (No. 17-130).

⁸⁹ *See 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 (discussing “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.* (“[T]he Commission’s ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries.”); *id.* at 2054 (discussing “someone conducting adversarial hearings”). Justice Thomas also mentions “adversarial” in his concurrence. *Id.* at 2057 (Thomas, J., concurring) (“These judges exercise many of the agency’s statutory duties, including issuing initial decisions in adversarial proceedings.”).

resources.”⁹⁰ Second, in criminal trials — where the defendant’s liberty is at stake — the Sixth Amendment “right to effective assistance of counsel” ensures that “the prosecution’s case [must] survive the crucible of meaningful adversarial testing.”⁹¹ Third, before obscene materials may be seized by the government, the First Amendment requires the “procedural safeguard[]” of “a prior judicial adversarial proceeding.”⁹²

By repeatedly emphasizing the “adversarial” nature of SEC adjudications, *Lucia* gestured toward the constitutional consensus that adversarial proceedings more effectively protect private interests than nonadversarial hearings. And the Supreme Court has highlighted the role of the judge in defining a hearing as “adversarial,” explaining that “adversarial” hearings are defined by “the presence of a judge who . . . decides on the basis of facts and arguments pro and con adduced by the parties.”⁹³ Thus, in light of the significant private interests likely at issue, an ALJ overseeing an adversarial hearing is more likely to “exercis[e] significant authority pursuant to the laws” under the Appointments Clause than an ALJ overseeing a nonadversarial hearing.⁹⁴

Any potential argument that SSA ALJs are not “Officers of the United States” has little salience at the moment. As it stands, the executive order requires SSA ALJs to be appointed by an “agency head.”⁹⁵ But, because the executive order threatens the impartiality of Social Security ALJs, Congress or a future presidential administration should rescind the executive order and reinstate the merit-based civil service hiring of SSA ALJs. Such a maneuver would expose these ALJs to Appointments Clause challenges. Should the executive order be rescinded, the fact that SSA ALJs do not preside over adversarial hearings may provide a basis for future litigants to argue that SSA ALJs are not “Officers of the United States” under *Lucia* and *Freytag*.

⁹⁰ *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976); see also *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985) (“In only one case, *Goldberg v. Kelly*, has the Court required a full adversarial evidentiary hearing prior to adverse governmental action.” (internal citation omitted)).

⁹¹ *United States v. Cronin*, 466 U.S. 648, 656 (1984); cf. *McNeil v. Wisconsin*, 501 U.S. 171, 183 (1991) (Stevens, J., dissenting) (accusing the majority of “undermin[ing] the protections that undergird our adversarial system of justice” and “reflect[ing] a preference for an inquisitorial system”).

⁹² *Wallace v. Wellborn*, 204 F.3d 165, 167 (5th Cir. 2000) (citing *Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210 (1964)). Congress has also assumed that adversarial proceedings concern weightier interests than nonadversarial proceedings in crafting legislation to protect indigent parties: the Equal Access to Justice Act entitles a “prevailing party” in an “adversary adjudication” before an administrative agency to recover attorney’s fees from the government. *Ardestani v. INS*, 502 U.S. 129, 132 (1991) (citing 5 U.S.C. § 504(a)(1)).

⁹³ *McNeil*, 501 U.S. at 181 n.2.

⁹⁴ *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam).

⁹⁵ Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018).