
RECENT GUIDANCE

ADMINISTRATIVE LAW — APPOINTMENTS CLAUSE — SOLICITOR GENERAL ISSUES GUIDANCE ON ADMINISTRATIVE JUDGES. — *Guidance on Administrative Law Judges After Lucia v. SEC (S. Ct.)*, July 2018.

Administrative judges are officials who oversee adjudications within the administrative state.¹ Administrative judges take two forms: Administrative Law Judges (ALJs), appointed under 5 U.S.C. § 3105 of the Administrative Procedure Act,² and non-ALJ adjudicators, whose appointment and removal is not uniformly governed by statute.³ Some administrative judges oversee trial-like adversarial proceedings; many do not.⁴ ALJs may be removed only for “good cause,” and their removal must be reviewed by the independent Merit Systems Protection Board (MSPB).⁵ Last Term, in *Lucia v. SEC*,⁶ the Supreme Court held that ALJs in the Securities and Exchange Commission (SEC) are inferior officers of the United States — that is, of higher status than “mere employees”⁷ — and that their appointment is therefore subject to the Appointments Clause of the Constitution,⁸ which requires the appointment of “inferior officers” to be made by the President, courts, or heads of departments.⁹ The Office of the Solicitor General subsequently issued a memo titled “Guidance on Administrative Law Judges After *Lucia v. SEC (S. Ct.)*,”¹⁰ extending *Lucia*’s reasoning to all ALJs and “similarly situated” non-ALJ adjudicators.¹¹ The memo further advised that the Solicitor General will defend ALJs’ statutory removal protections — protections not at issue in *Lucia* — only so long as the protection mechanism is “suitably deferential” to department heads.¹² This guidance

¹ See generally VANESSA K. BURROWS, CONG. RESEARCH SERV., RL34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW 1 (2010).

² 5 U.S.C. § 3105 (2012) (“Each agency shall appoint as many administrative law judges as are necessary for proceedings required . . . [by] sections 556 and 557 of this title.”).

³ KENT BARNETT ET AL., ADMIN. CONFERENCE OF THE U.S., NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL 8–9 (2018).

⁴ Compare *Butz v. Economou*, 438 U.S. 478, 513 (1978) (describing Department of Agriculture ALJs as “functionally comparable” to trial judges), with *Sims v. Apfel*, 530 U.S. 103, 110–11 (2000) (describing Social Security Administration proceedings as “inquisitorial rather than adversarial,” *id.* at 111).

⁵ 5 U.S.C. § 7521(a).

⁶ 138 S. Ct. 2044 (2018).

⁷ *Id.* at 2052.

⁸ See *id.* at 2055.

⁹ U.S. CONST. art. II, § 2, cl. 2.

¹⁰ Memorandum from the Solicitor General, U.S. Dep’t of Justice, to Agency Gen. Counsels, Guidance on Administrative Law Judges After *Lucia v. SEC (S. Ct.)* (July 2018) [hereinafter Solicitor General Guidance].

¹¹ See *id.* at 1.

¹² See *id.* at 9.

stretches *Lucia*'s logic to its limits, and, in doing so, facilitates greater executive control of the administrative state.

Under the Appointments Clause, "inferior officers" may be appointed only by the President, courts of law, or heads of department.¹³ *Lucia* concerned a constitutional challenge to an ALJ who had been appointed by SEC staff members,¹⁴ pursuant to Office of Personnel Management (OPM) procedure.¹⁵ Although the government had previously classified ALJs as employees, the Office of the Solicitor General changed position at *Lucia*'s certiorari stage, asserting that ALJs should be considered officers "in light of the implications for the exercise of executive power."¹⁶

The Supreme Court found the appointment unconstitutional.¹⁷ This decision was based on the Court's reasoning in *Freytag v. Commissioner*,¹⁸ which held that Special Trial Judges (STJs) of the U.S. Tax Court were "officers" due to the "significance of the duties and discretion" that their position entailed.¹⁹ Writing for the *Lucia* majority, Justice Kagan²⁰ reasoned that the SEC's ALJs have "equivalent duties and powers as STJs in conducting adversarial inquiries,"²¹ and that precedent therefore dictated that they be appointed by a department head, court, or the President.²² Although the government had twice asked the Court to address the constitutionality of statutory limitations on ALJ removal,²³ the Court declined to do so.²⁴

Justice Breyer²⁵ concurred in the judgment in part and dissented in part. He disagreed with the majority's decision not to address removal, arguing that, without further clarification, "to hold that the administrative law judges are 'Officers of the United States' is, *perhaps*, to hold that their removal protections are unconstitutional."²⁶ This holding, he

¹³ U.S. CONST. art. II, § 2, cl. 2.

¹⁴ *Lucia v. SEC*, 138 S. Ct. 2044, 2050 (2018).

¹⁵ See BURROWS, *supra* note 1, at 2–3.

¹⁶ Brief for the Respondent at 9–10, *Lucia*, 138 S. Ct. 2044 (No. 17–130) [hereinafter Brief for Certiorari].

¹⁷ See *Lucia*, 138 S. Ct. at 2055.

¹⁸ 501 U.S. 868 (1991).

¹⁹ *Id.* at 881; see also *id.* at 881–82.

²⁰ Justice Kagan was joined by Chief Justice Roberts and by Justices Kennedy, Thomas, Alito, and Gorsuch. Justice Thomas also authored a concurring opinion not discussed here, in which Justice Gorsuch joined.

²¹ *Lucia*, 138 S. Ct. at 2053.

²² See *id.* at 2052–53.

²³ See Brief for Certiorari, *supra* note 16, at 21; Brief for Respondent Supporting Petitioners at 39–55, *Lucia*, 138 S. Ct. 2044 (No. 17–130) [hereinafter Brief for Respondent].

²⁴ See *Lucia*, 138 S. Ct. at 2050 n.1.

²⁵ Justice Breyer was joined in part by Justices Ginsburg and Sotomayor. Justice Sotomayor also filed a dissenting opinion, not discussed here, in which Justice Ginsburg joined.

²⁶ *Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring in the judgment in part and dissenting in part). Justice Breyer's reasoning was that the removal protections face constitutional challenge *only if* ALJs are subject to the holding of *Free Enterprise Fund v. Public Co. Accounting Oversight*

warned, “would risk transforming administrative law judges from independent adjudicators into *dependent* decisionmakers, serving at the pleasure of the Commission.”²⁷ Justice Breyer argued that the appointment of the SEC ALJs was impermissible on statutory grounds, and that the Court need not have reached the Appointments Clause question.²⁸

Shortly after *Lucia* was decided, the President issued an executive order titled “Excepting Administrative Law Judges from the Competitive Service.”²⁹ The order reasoned that, as “illustrated by” *Lucia*, “at least some — and perhaps all — ALJs are ‘Officers of the United States’ . . . subject to the Constitution’s Appointments Clause.”³⁰ The case therefore cast doubt on whether the method of appointing ALJs at that time — OPM recommending appointees based on competitive service selection and examination — was “compatible with the discretion an agency head must possess under the Appointments Clause.”³¹ The order exempted all ALJs appointed under 5 U.S.C. § 3105 from competitive selection and examination.³² OPM immediately authorized heads of executive departments to make ALJ appointments without OPM approval.³³

The Office of the Solicitor General subsequently issued to agency general counsels its guidance memorandum.³⁴ The memo’s purpose was to advise agencies on best practices following *Lucia* and the executive order, and to outline which positions the Department of Justice (DOJ) is — and is not — willing to adopt in future litigation.³⁵ The memo instructed that “all ALJs and similarly situated administrative judges should be appointed as inferior officers under the Appointments Clause.”³⁶ The guidance interpreted *Lucia*’s reasoning to apply “with

Board, 561 U.S. 477 (2010), which found two levels of for-cause removal protections for executive officers unconstitutional, *see id.* at 483–84. Whether ALJs are subject to *Free Enterprise Fund*’s holding remains unresolved.

²⁷ *Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring in the judgment in part and dissenting in part).

²⁸ *See id.* at 2057.

²⁹ *See* Exec. Order No. 13,843, 83 Fed. Reg. 32,755, 32,755 (July 13, 2018).

³⁰ *Id.*

³¹ *Id.* Before the executive order was issued, the ALJ appointment process required OPM to generate a ranked list of three candidates, chosen via examination and competitive selection, from which the agency could choose one. *See* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1654 (2016).

³² Exec. Order No. 13,843, 83 Fed. Reg. 32,755.

³³ *See* Memorandum from Dr. Jeff T.H. Pon, Director, Office of Personnel Mgmt., to Heads of Exec. Dep’ts and Agencies, Executive Order — Excepting Administrative Law Judges from the Competitive Service (July 10, 2018), <https://chcoc.gov/print/9282> [<https://perma.cc/2RW9-LBMG>].

³⁴ Solicitor General Guidance, *supra* note 10. The confidential memorandum was leaked to the press on July 23, 2018. *See* Alison Frankel, *In Confidential Memo to Agency GCs, DOJ Signals “Aggressive” Stand on Firing ALJs*, REUTERS (July 23, 2018, 2:56 PM), <https://reut.rs/2LwpCnP> [<https://perma.cc/8SZD-3PYQ>].

³⁵ *See* Solicitor General Guidance, *supra* note 10, at 1, 3, 6, 9.

³⁶ *Id.* at 2.

equal force” to ALJs who preside over nonadversarial hearings³⁷ as well as to administrative judges not appointed under 5 U.S.C. § 3105 “especially if they preside over adversarial hearings.”³⁸ ALJs and “similarly situated adjudicative officers” must therefore be appointed by (or, in the case of sitting officials, ratified by) a department head.³⁹ In pending proceedings, agencies should no longer argue that ALJs are mere employees and should request that courts remand cases in which an Appointments Clause challenge has been raised.⁴⁰

Finally, the guidance instructed agencies to “notify the [DOJ] of challenges to the statutory removal restrictions for ALJs,”⁴¹ advising that the Department “is prepared to defend the constitutionality of Section 7521 [limiting ALJ removal to removal for good cause], as properly construed.”⁴² In language nearly identical to that of the Solicitor General’s *Lucia* brief,⁴³ the memo set out the position that the best reading of the “good cause” standard “allow[s] for removal of an ALJ who fails to perform adequately or to follow agency policies, procedures, or instructions,” so long as an administrative official is not “removed for any invidious reason or to influence the outcome in a particular adjudication.”⁴⁴ Provided that “review is suitably deferential to the determination of the Department Head,” the DOJ will continue to argue that “good cause” removal limitations “give[] the President a constitutionally adequate degree of control over ALJs.”⁴⁵

Lucia neither requires nor invites the changes outlined in the Solicitor General’s memo, and, in stretching *Lucia*’s reasoning, the memo enables a move toward a more unitary Executive. The guidance expands *Lucia* in two key ways: first, by understanding “inferior officers” to include both non-ALJ adjudicators and adjudicators who oversee nonadversarial proceedings; second, by reading *Lucia* as giving a green light to the Solicitor General’s position regarding removal of administrative adjudicators. In expanding *Lucia*, the Solicitor General has endorsed increased executive oversight of administrative judges, with potentially significant consequences for the administrative state as a whole.

The guidance first expands *Lucia* by applying the “inferior officer” label to non-ALJ adjudicators and to adjudicators who oversee nonadversarial proceedings. *Lucia* did not establish a general rule for

³⁷ *Id.* at 3.

³⁸ *Id.*

³⁹ *Id.* at 3–5.

⁴⁰ *See id.* at 6–7.

⁴¹ *Id.* at 9.

⁴² *Id.*

⁴³ Compare Brief for Respondent, *supra* note 23, at 39, with Solicitor General Guidance, *supra* note 10, at 9.

⁴⁴ Solicitor General Guidance, *supra* note 10, at 9.

⁴⁵ *Id.*

determining what features mark an officer,⁴⁶ but the language of the majority opinion suggested that, insofar as *Lucia*'s logic *can* be extended, it should extend only to adjudicators who oversee adversarial proceedings. Although not strictly required by *Lucia*'s holding, the distinction between adversarial and nonadversarial adjudications was present at all stages of litigation. Petitioners explicitly limited their challenge to ALJs overseeing adversarial proceedings,⁴⁷ and the Court's reasoning reflected this. In concluding that SEC ALJs were officers, Justice Kagan relied on "the responsibilities involved in presiding over adversarial hearings"⁴⁸ that they shared with *Freytag*'s STJs.⁴⁹ She found that the "significant discretion" exercised by STJs and SEC ALJs in "tak[ing] testimony, conduct[ing] trials, rul[ing] on the admissibility of evidence, and . . . enforc[ing] compliance with discovery orders"⁵⁰ — all features of adversarial hearings — was what elevated them to the position of officer subject to the Appointments Clause.⁵¹

The Solicitor General's guidance does not afford this distinction sufficient weight. The memo acknowledged *Lucia*'s emphasis on adversarial proceedings,⁵² but advised that, "taking into account . . . the importance of ensuring the President's oversight of the execution of the laws," *Lucia*'s reasoning should apply "with equal force" to ALJs "who do not preside over adversarial administrative hearings."⁵³ The memo further advised that agencies should appoint *non*-ALJ adjudicators as inferior officers, "*especially* if they preside over adversarial hearings."⁵⁴ This reasoning treats adversarial hearings as *sufficient*, rather than *necessary*, to trigger an Appointments Clause problem, and seems to invite constitutional challenges to officials not formally contemplated in *Lucia*. This broad interpretation of the Appointments Clause indicates support for expanded oversight of ALJs by politically appointed agency heads.

The guidance further extends *Lucia*'s reasoning by treating *non*-ALJ adjudicators as inferior officers. This position broadens the scope of adjudicators vulnerable to Appointments Clause challenges and, by requiring that these officials be installed by the President, courts, or a head

⁴⁶ See *Lucia v. SEC*, 138 S. Ct. 2044, 2051–52 (2018).

⁴⁷ 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/EF3V-4LMT>] ("[O]ur submission is limited to ALJs who decide adversarial proceedings subject to . . . the APA.").

⁴⁸ *Lucia*, 138 S. Ct. at 2052.

⁴⁹ See *id.* at 2052–53.

⁵⁰ *Id.* at 2053 (quoting *Freytag v. Comm'r*, 501 U.S. 868, 881–82 (1991)).

⁵¹ *Id.* at 2052–53. For a full discussion of Justice Kagan's opinion and its implications for non-adversarial ALJs, see *The Supreme Court, 2017 Term — Leading Cases*, 132 HARV. L. REV. 284 (2018).

⁵² Solicitor General Guidance, *supra* note 10, at 2.

⁵³ *Id.* at 3.

⁵⁴ *Id.* (emphasis added).

of department, indicates a preference for adjudicators more uniformly under presidential control. Neither *Lucia* nor the executive order addressed the more than 10,000 administrative adjudicators who do not bear the title “Administrative Law Judge”;⁵⁵ the Solicitor General’s guidance explicitly includes them.⁵⁶ While all administrative judges preside over intra-agency adjudicatory proceedings, ALJs are a legally distinct class of officers, appointed pursuant to the Administrative Procedure Act.⁵⁷ Removal of ALJs is limited to removal for “good cause,” and must be approved by the MSPB,⁵⁸ while non-ALJ adjudicators are not appointed by statute and lack the statutory protections against removal.⁵⁹

The decision to classify non-ALJ adjudicators as “inferior officers” may carry more weight as a signal of intent to consolidate executive power than as a legal distinction. On one hand, this reclassification could be seen as a purely formalistic change intended to preempt Appointments Clause challenges. Without the statutory provisions that attach to ALJs, there has never been any barrier to department heads appointing adjudicators of their choosing; requiring non-ALJs to be appointed by department heads therefore does not increase formal power to control adjudications.⁶⁰ On the other hand, those Appointments Clause challenges to non-ALJs have not yet occurred, and nothing in *Lucia*’s litigation suggested that they should. By reading *Lucia* to endorse the position that non-ALJs are officers who must be appointed by department heads, the Solicitor General’s guidance legitimates — perhaps even encourages — new legal challenges targeting administrative adjudicators. Moreover, establishing a single appointment standard for all administrative judges may signal a broader effort to increase presidential control. While politically appointed department heads previously had the *power* to appoint and oversee adjudicators, they are now *required* to do so, thus consolidating authority within the Executive.

Finally, the guidance departs from *Lucia* by addressing the removal of administrative adjudicators. Although the government asked the Court to consider this question both at the certiorari stage and in its

⁵⁵ See BARNETT ET AL., *supra* note 3, at 17.

⁵⁶ Solicitor General Guidance, *supra* note 10, at 3 (“[W]e recommend that agencies appoint . . . non-ALJ adjudicators as inferior officers in the same manner as ALJs . . .”).

⁵⁷ 5 U.S.C. § 3105 (2012).

⁵⁸ *Id.* § 7521. The MSPB is itself composed of nonstatutory administrative judges, see BARNETT ET AL., *supra* note 3, at 19, who may be removed only for “inefficiency, neglect of duty, or malfeasance,” 5 U.S.C. § 1202(d).

⁵⁹ Barnett, *supra* note 31, at 1660–61.

⁶⁰ See Paul R. Verkuil, *Reflections upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1347 (1992). The degree of agency control over non-ALJs has been a significant source of criticism of non-ALJs generally. See, e.g., Barnett, *supra* note 31, at 1671 (arguing that agency control of non-ALJ adjudicators creates a perception of partiality, opening the door to potential due process problems).

brief supporting the petitioners, the Court both times declined to address whether limiting the removal of ALJs to “good cause” implicates an Appointments Clause problem, on the grounds that the matter had not been sufficiently litigated in lower courts.⁶¹ The guidance acknowledges that removal protections for ALJs have not changed⁶² but nonetheless adopts the position the government asked the Court to approve in *Lucia*, announcing the Solicitor General’s intention to “defend the constitutionality of Section 7521 . . . properly construed . . . [a]s the government argued in the Supreme Court”⁶³ On this view, statutory protections for ALJs are constitutional only so long as MSPB review is “suitably deferential” to the agency seeking removal.⁶⁴

The government’s *Lucia* brief illuminates what the DOJ considers “suitably deferential.”⁶⁵ Writing in support of the petitioners, the Solicitor General asked the Court to construe § 7521 as permitting agency removal of ALJs “subject to limited review . . . consistent with a constitutionally adequate level of Executive Branch supervision.”⁶⁶ The brief urged a reinterpretation of the statutory requirement that good-cause removal be “established and determined by” the MSPB.⁶⁷ Currently, the MSPB must determine that the facts constitute “good cause” and also warrant removal.⁶⁸ The new standard would require only that the MSPB “determine[] that factual evidence exists to support the agency’s proffered, good-faith grounds.”⁶⁹ This standard grants the principal authority to determine whether there is “good cause” not to the MSPB but to the agency, substantially increasing deference to agency heads. Additionally, the brief interpreted § 7521’s “good cause” limitation as “best read” to include “failure to perform adequately or to follow agency policies, procedures, or instructions.”⁷⁰ While this interpretation restrains removal “for invidious reasons”⁷¹ or with the purpose of “influenc[ing] the outcome in a particular adjudication,”⁷² it does not obviously preclude, for instance, removing an adjudicator who consistently fails to comply with an agency’s desired policy outcomes. These

⁶¹ See *Lucia v. SEC*, 138 S. Ct. 2044, 2050 n.1 (2018). Petitioner Raymond Lucia recently filed a new suit alleging that removal protections for SEC ALJs violate Article II of the Constitution. See Complaint at 19, *Lucia v. SEC*, No. 18-cv-02692 (S.D. Cal. Nov. 28, 2018).

⁶² See Solicitor General Guidance, *supra* note 10, at 9.

⁶³ *Id.*

⁶⁴ See *id.*

⁶⁵ See Brief for Respondent, *supra* note 23, at 39–55.

⁶⁶ *Id.* at 48.

⁶⁷ 5 U.S.C. § 7521(a) (2012).

⁶⁸ Brief for Respondent, *supra* note 23, at 52.

⁶⁹ *Id.*

⁷⁰ *Id.* at 50 (citing *Morrison v. Olson*, 487 U.S. 654, 724 n.4 (1988) (Scalia, J., dissenting) (interpreting “for cause” to include “the failure to accept supervision”).

⁷¹ *Id.* That is, reasons prohibited by law, such as discrimination. See *id.*

⁷² *Id.*

stated positions suggest that the government does not consider current removal protections to be suitably deferential, and that, come the inevitable litigation, the Solicitor General will not defend those protections. *Lucia* was not a case about removal protections; the challenge to removal protections established to protect independent adjudications has recurred purely through the government's persistence, reflecting a preference for strengthened presidential oversight of the executive branch.

This guidance represents a striking step toward a more unitary Executive — that is, an administrative state reliably under presidential control.⁷³ Before this guidance was issued, both opponents and proponents of a unitary Executive speculated that the DOJ's *Lucia* brief could be a springboard to undermining the legitimacy of the administrative state as a whole.⁷⁴ Justice Breyer worried that the Solicitor General's position, if adopted, could allow agencies to fire ALJs who made undesirable rulings.⁷⁵ The guidance hardly mitigates this concern. First, the decision to expand the class of officers raises the question of just how far into the civil service the Appointments Clause extends, and will undoubtedly invite Appointments Clause challenges into new areas of the administrative state. Second, the proposed removal procedures are substantially more deferential to agency leadership than current practice is and provide little guidance as to what justifications for removal might be unacceptable.⁷⁶ These changes bolster presidential control over administrative officials and lend credence to Justice Breyer's worry that *Lucia* could be used to weaken the independence of adjudicators.⁷⁷ The ultimate impact of this guidance remains to be seen, but the government's position provides a roadmap for future litigation challenging appointments and removal protections in the administrative state. The guidance signals the Solicitor General's intention with respect to these challenges. It will be up to the Court to determine whether this intention aligns with the Constitution.

⁷³ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2001).

⁷⁴ See Jeffrey S. Lubbers, (*If the Supreme Court Agrees*) *The SG's Brief in Lucia Could Portend the End of the ALJ Program as We Have Known It*, YALE J. REG.: NOTICE & COMMENT (Apr. 10, 2018), <http://yalejreg.com/nc/if-the-supreme-court-agrees-the-sgs-brief-in-lucia-could-portend-the-end-of-the-alj-program-as-we-have-known-it-by-jeffrey-s-lubbers/> [<https://perma.cc/EV4J-HNYT>] (warning that, even if the Court were to decline to endorse the Solicitor General's position, "bad ideas, even if rejected, can keep resurfacing"); Ilya Shapiro, *Symposium: The Court Begins to Strike Back at the Administrative State*, SCOTUSBLOG (June 22, 2018, 6:22 PM), <http://www.scotusblog.com/2018/06/symposium-the-court-begins-to-strike-back-at-the-administrative-state/> [<https://perma.cc/M2P4-7SNG>].

⁷⁵ See *Lucia v. SEC*, 138 S. Ct. 2044, 2061 (2018) (Breyer, J., concurring in the judgment in part and dissenting in part).

⁷⁶ See Solicitor General Guidance, *supra* note 10, at 9.

⁷⁷ See *Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring in the judgment in part and dissenting in part) ("This would risk transforming administrative law judges from independent adjudicators into *dependent* decisionmakers.").