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# SG's Brief in Lucia Could Portend the End of the ALJ Program as We Have Known It

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# SG's Brief in Lucia Could Portend the End of the ALJ Program as We Have Known It[Ψ]

**By Jeffrey S. Lubbers[1]**

Anyone interested in preserving the independence of Administrative Law Judges (ALJs) should be alarmed at Solicitor General Neal Francisco's brief (nominally) on behalf of the SEC in the case pending at the Supreme Court, Raymond J. Lucia Petitioners v. The Securities and Exchange Commission. I say "nominally" because the front page of the brief itself highlights the twist: it is a "brief for respondent supporting petitioners."

If the views expressed in this brief about the APA's longstanding system of removal protection for ALJs are accepted by the Supreme Court it could portend the end of the ALJ program as we have known it.

As most readers of this blog know, the SEC bar has mounted a multi-pronged challenge to the SEC's statutory power to use APA formal adjudication to provide respondents in enforcement actions the hearing required by due process. This attack has intensified after the Dodd-Frank Act added new enforcement grounds to the SEC's arsenal, also adding to the types of cases in which the agency could choose enforcement via agency adjudication instead of an

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enforcement suit in federal district court. Due process challenges to the APA adjudication process have been unavailing, as have challenges based on the Seventh Amendment's right to a jury trial and on the Equal Protection Clause. As David Zaring has written,

> Formal adjudication under the APA, which is the process that SEC ALJs offer, has been with us for decades and has never before been thought to be unconstitutional in any way. It violates no rights, nor offends the separation of powers; if anything, scholars have bemoaned the fact that it offers an inefficiently large amount of process to defendants, administered by insulated civil servants who in no way threaten the President's control over the Executive Branch.

David Zaring, Enforcement Discretion at the SEC, 94 Tex. L. Rev. 1155, 1159-60 (2016) (footnotes omitted).

But after the Supreme Court opened a new door in Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477 (2010), challengers to the SEC process began to fix on whether the ALJs themselves were unconstitutionally appointed and/or overly protected from removal. In Free Enterprise Fund, the Court reviewed the statutory scheme by which the PCAOB was situated within the SEC, with its members appointed by the Commission and subject to removal by the Commission but only for specified causes shown after a Commission hearing. The 5 to 4 majority found that because the SEC Commissioners themselves were protected from removal except for good cause (this was assumed for the purpose of this case, although the SEC statute actually lacks such a provision for historical reasons) and the PCAOB members were also protected from removal by the SEC except for cause, this "double-for-cause" removal protection scheme went too far and violated the President's power to take care that the laws are faithfully executed. To remedy this, the Supreme Court, in a very unusual step, simply excised the PCAOB members' for-cause protection. Once that was done, the Court concluded that these members were "inferior officers" under the Appointments Clause and

that the Commission could constitutionally appoint them because it was a "head of a department."

Justice Breyer, for four dissenters, disagreed that the double-for-cause protection found by the majority rose to the level of a constitutional infirmity, demurred that the remedy really helped the President or the respondent in the case, and said that the majority's action called into question the constitutionality of numerous other federal officers and employees who might also be said to be covered by double-for-cause protection, specifically naming ALJs and members of the Senior Executive Service among others. In response, Chief Justice Roberts disclaimed any intention to cover ALJs. In footnote 10 of his opinion he wrote:

> For similar reasons, our holding also does not address that subset of independent agency employees who serve as administrative law judges. See, e.g., 5 U.S.C. §§ 556(c), 3105. Whether administrative law judges are necessarily "Officers of the United States" is disputed. See, e.g., Landry v. FDIC, 204 F.3d 1125 (C.A.D.C.2000). And unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, see §§ 554(d), 3105, or possess purely recommendatory powers . . . .

One would think that Free Enterprise Fund would insulate SEC ALJs from attack on Appointment Clause grounds, because, even if they are "inferior officers," they could be appointed by the SEC as a head of department. However, it became apparent that the Commission did not actually do the appointing itself. For years it had delegated that task to the Chief ALJ, subject to approval by the Commission's Office of Human Resources. This led to numerous challenges to the SEC ALJs by respondents in enforcement cases. The SEC opined that its ALJs were not inferior officers but were simply employees who aided the Commission in making final decisions in enforcement cases. This argument was based on Commission rules that required Commission action in every case, even cases that were not appealed or were summarily affirmed by the Commission. When the issue was brought to the D.C. Circuit in the Lucia case, 868 F.3d 1021 (2016), a

panel accepted that argument, in part relying on circuit precedent from an FDIC case, Landry v. FDIC, 204 F.3d 1125 (D.C. Cir. 2000). However, en banc review was granted and the panel opinion was vacated. Ultimately, an equally divided full court denied the petition for review, 868 F.3d 1021 (2017), so the SEC's enforcement decision stood. After the Tenth Circuit ruled against the SEC in a similar case, Bandimere v. SEC, 844 F.3d 1168 (10th Cir. 2016), the Supreme Court granted certiorari in the Lucia case on the Appointments Clause issue.

Questions about the ALJ's double for-cause protection (deflected by Chief Justice Roberts in Free Enterprise Fund) were not part of the Lucia or Bandimere cases, although these challenges were beginning to be made in some other cases, and the petitioner in Lucia indicated it would make this challenge if the case were remanded.

In his response to Lucia's cert petition, the Solicitor General switched sides and now sided with petitioner. He urged the Court to grant cert on the Appointments Clause question, but also urged the Court to take up the removal issue as well. He argued that these SEC ALJs have double- or triple-for-cause protection, because, according to the APA, ALJs cannot be removed from their positions unless an agency can show good cause to do so after a hearing before the Merit Systems Protection Board, 5 U.S.C. § 7521, an independent agency whose members themselves have for-cause protection from removal by the President. The Court granted cert but only on the following question: "Whether administrative law judges of the Securities and Exchange Commission are Officers of the United States within the meaning of the Appointments Clause."

This is the backdrop of the case as it now sits awaiting oral argument at the Supreme Court. For its part, after the SG filed its brief supporting Lucia's cert petition, the SEC decided it should ratify the appointment of its ALJs and remand any pending cases for another look by the ratified judges.

I am not overly troubled by the Appointments Clause part of this case. Most ALJs outside the SEC and FDIC can make final decisions and accordingly should be considered inferior officers. Moreover the issue can be easily addressed by the agencies. The SEC and other agencies can, going forward, make sure that the agency head (as head of a Department) actually makes the appointment of ALJs. [Although why a Commission can't properly delegate this responsibility to the

Chairman or even another appropriate agency officer is unclear to me. After all in Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991), the Supreme Court upheld appointments of Special Trial Judges by the Chief Judge of the Tax Court (not the full Tax Court) acting as a "court of law."]

But the SG's persistence in raising the removal question, especially after the Court rejected his invitation to add that issue to the question presented, is troubling. But even more troubling are the arguments made in that portion of the SG's brief (from pages 45-55). Below I highlight and comment on the parts that are most troubling:

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Pages 46-47:

> The MSPB not only has "reserve[d] to itself the final decision on [whether] good cause" for discipline exists, but also has asserted the right to determine "the appropriate penalty if it finds good cause."

My comment: With this complaint, and his later suggestion that this MSPB authority be excised from the statute, the SG is seemingly trying to reverse the 72-year history of MSPB (and Civil Service Commission before it) power to determine the appropriate sanction for the charge brought by the agency. If the MSPB's power to do that in ALJ cases were taken away, that would mean that ALJs would have less protection than rank-and-file employees. It also ignores the fact that under Section 7521, the hearing procedure at the MSPB covers other disciplinary actions brought by agencies, such as suspensions, and even reprimands.

Page 48:

> To avoid these serious constitutional concerns, the Court should construe Section 7521 to permit agency heads to remove ALJs, subject to limited review by the MSPB, in a manner that is consistent with a constitutionally adequate level of Executive Branch supervision.

> Section 7521(a) provides for the removal of ALJs for "good cause," which is most naturally read to authorize removal of an ALJ for misconduct, poor job performance, or failure to follow lawful directives. The term "good cause," which is not otherwise defined by statute, was understood at the time of the APA's enactment to refer to a "[s]ubstantial" or "[l]egally sufficient ground or reason." Black's Law Dictionary 822 (4th ed. 1951). When specifically used to refer to employer
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> actions such as the "discharg[e]" of personnel, the term's conventional meaning "include[d] any ground which is put forward by authorities in good faith and which is not arbitrary, irrational, unreasonable or irrelevant to the duties with which such authorities are charged." Ibid. (describing holding of Nephew v. Willis, 298 N.W. 376 (Mich. 1941)).

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Page 49:

> In adopting "good cause" to describe the standard for removing ALJs, Congress did not purport to deviate from that term's well-understood meaning. *** And although this Court has not previously attempted to provide a comprehensive definition of "good cause," it has rejected attempts to link that APA standard with another, more stringent standard drawn from a

> different context. See Ramspeck, 345 U.S. at 142 (rejecting argument that "good cause" for removing hearing examiners is the same as the showing required to remove Article III judges).

My comment: This is a classic straw man argument: the fact that the Supreme Court once rejected a claim that ALJs' should have the same independence as Article III judges (in an opinion rejecting a broad-based challenge to what is now the ALJ program) is hardly an argument for drastically reducing their traditional independence.

Pages 49, 50-51:

> Agency heads must be able to remove ALJs who refuse to follow agency policies and procedures, who frustrate the proper administration of adjudicatory proceedings, or who demonstrate deficient job performance.
>
> And the President, acting through his principal officers, would be restrained from removing an ALJ in order to influence the outcome in a particular adjudication [citing Myers]. …. But Myers also made clear that "even in such a case," the President "may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised…."

My comment: So an ALJ could not be removed in the middle of the case for "refus[ing] to follow agency policies and procedures, frustrate[ing] the proper administration of adjudicatory proceedings, or demonstrate[ing] deficient job performance," but could be removed for it afer the case is over?

Page 51:

> ALJs could accordingly be held accountable, by the Heads of Departments and the President who appointed them, for failure to execute the laws faithfully. And even an independent agency head with sufficiently broad authority to remove an ALJ may be held accountable by the President for failing to exercise that authority appropriately.

My comment: Is this the first shot fired by the SG on how to limit the independence of independent agency commissioners? If the President is upset by actions of an ALJ, she should have the authority to fire agency commissioners for refusing to bring charges against that ALJ?

Pages 52-53:

> To accomplish that end, Section 7521 can reasonably be interpreted to mean that the cause relied upon by the agency for removing its ALJ has been found by the MSPB—that is, the MSPB has determined that factual evidence exists to support
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> the agency's proffered, good-faith grounds.
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> ****
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> If the Court concludes that the interpretation of Section 7521 advocated here cannot be reconciled with the statute, then the limitations that the provision imposes on removal of the Commission's ALJs would be unconstitutional.

My comment: This very low standard of proof, mixed with the suggestion that the Board be stripped of its power to determine the appropriate sanction, would turn the Board into little more than a rubber stamp for the agency.

Finally, at page 54, the brief also suggests that ALJs should be removed from their job (or at least taken out of their role as ALJ)

while the "hearing on the record" at the MSPB is pending because such proceedings take too long.

Removal thus may occur only "after" an MSPB hearing regarding good cause. As a result, an ALJ may remain in office— despite the employing agency's determination that the ALJ's misconduct or poor performance warrants removal—until the MSPB has ruled on the dispute.

My comment: Such a change from existing practice would allow constructive removal of any ALJ simply by filing a charge against the judge.

Final thoughts. It is discouraging that the Solicitor General's office would lead the charge to limit ALJs' independence? Not only does it undermine decades of broad acceptance of the ALJ's role, it hardly benefits litigants like Lucia. Why would respondents in SEC enforcement actions or Social Security claimants prefer to have administrative judges who are more closely tethered to the whims, influence, and pressures of agency heads?

Moreover, it is hardly necessary for the SG (who normally defends actions of executive agencies) to take such a position. Chief Justice Roberts provided ample reasoning for distinguishing ALJs (whose sole job is to adjudicate) from the members of the PCAOB in Free Enterprise Fund when he said "[U]nlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions." 501 U.S. 507 n.10.

He also pointed out that

> Congress enacted an unusually high standard that must be met before [PCAOB] members may be removed. A Board member cannot be removed except for willful violations of the Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance—as determined in a formal Commission order, rendered on the record and after notice and an opportunity for a hearing. [15 U.S.C.] § 7217(d)(3); see § 78y(a). The Act does not even give the Commission power to fire Board members for violations of other laws that do not relate to the Act, the securities laws, or the Board's authority. The President might have less than

> full confidence in, say, a Board member who cheats on his taxes; but that discovery is not listed among the grounds for removal under § 7217(d)(3).

501 U.S. at 503.

Finally, PCAOB members are in fact highly unusual federal officers. A 2015 Reuters article pointed out that "The law's drafters gave PCAOB board members and staff some of the richest salaries in government to insulate them from the allure of private sector payouts. [Chairman] Doty makes $672,676 a year—68 percent more than the U.S. president."

So there are ample reasons for rejecting the SG's arguments and I hope and expect that the Supreme Court will refuse to entertain them. But as a former ALJ, who also hoped this would not be taken up, told me in an e-mail, "but bad ideas, even if rejected, can keep surfacing."