Chicago-Kent Law Review

Volume 94
Issue 3 *The Trump Administration and Administrative Law: Commentary & Responses*

Article 14

4-13-2020

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THE REGULATORY ACCOUNTABILITY ACT LOSES STEAM BUT THE TRUMP EXECUTIVE ORDER ON ALJ SELECTION UPTURNED 71 YEARS OF PRACTICE

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I. PROFESSOR LEVIN'S DECONSTRUCTION OF THE REGULATORY ACCOUNTABILITY ACT

My original assignment was to comment on Professor Levin's paper,[1] but I am only going to spend a little time on that, because like Professor Funk, I do not have much by way of a critique. I think it is a polite, but masterful and almost irrefutable repudiation of the Regulatory Accountability Act (RAA). Thank goodness that bill will likely die on the vine now.

In both 2011 and 2015, I helped draft a letter from a group of Administrative Law professors to the House Judiciary Committee opposing enactment of the versions of the bill pending at those times. It was not difficult to find signatories to those letters—42 for the first one and 84 for the second.[2] Many of the presenters at this symposium, including Professors Levin and Funk, signed one or both of them. The reason I wanted to send these letters was because I thought that the ABA Adlaw Section's letters of opposition were insufficiently negative and in some cases too positive. That is not a criticism I have of Professor Levin's piece, although I have a slight disagreement in one area—which I will come to in a minute.

At any rate, in our letter, we wanted to emphasize that "any positive aspects of the bill identified by the Section are greatly outweighed by the damage this bill would cause to administrative agencies and the public welfare they promote if it were enacted."[3]

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1. Ronald M. Levin, *The Regulatory Accountability Act and the Future of APA Revision*, 94 CHI.-KENT L. REV. 487 (2019).

2. Letter from William R. Andersen, et al. to the Hon. Lamar Smith, Chairman of the House Judiciary Comm., and the Hon. John Conyers, Jr., Ranking Member of the House Judiciary Comm. (Oct. 24, 2011), https://democrats-judiciary.house.gov/letter/letter-admin-law-reg-pub-admin-teachers-practictioners-opposing-hr-3010-provisions [https://perma.cc/3ZGV-S9FF]. The second one is not on the Committee's website, perhaps because no hearings were held in 2015 (on file with author).

3. *Id.*

I thought it was almost enough to point out that the 2015 version of the House bill would have substituted for the current Administrative Procedure Act (APA) Section 553 a new version that was approximately ten times longer, adding 74 new procedural and analytical requirements to the agency rulemaking process—many of which would apply to all non-exempt rulemaking. But we also criticized the inflexible mandates to undertake cost-benefit analyses for all rules and alternatives, to require advance notices of proposed rulemakings for all rules, to require formal rulemaking for high-impact rules, to inject the Information Quality Act into the rulemaking process, and to subject many of these new requirements to judicial review. This in our minds was a recipe for paralysis by analysis.

The later Senate version of the RAA was perhaps only half as bad, but I think Professor Levin does a great job of highlighting its shortcomings as well.

The one area I tend to disagree with him concerns his qualified support for extending Office of Information and Regulatory Affairs (OIRA) review over the independent regulatory agencies.[4] I realize that the ABA and Administrative Conference of the United States (ACUS) have supported this idea, and that Professor Strauss has written persuasively that doing so is constitutional.[5] But is it a good idea? The Portman-Warner bill that Professor Levin and 12 other professors supported would allow a President by executive order to require all independent agencies to "comply, to the extent permitted by law, with *regulatory analysis requirements applicable to other agencies*."[6] Written that broadly, it would seem to potentially extend beyond E.O. 12,866, which, after all, could be replaced any time by this or future presidents.

Would it apply to other currently effective executive orders and Office of Management and Budget (OMB) memoranda? Would it apply to the OMB peer review bulletin? How about President Trump's two-for-one order? Or his Executive Order on the social cost of carbon that Professor Farber writes about in his piece?[7] The bill contains a long list of eleven (apparently non-exclusive) tasks that such agencies could be specifically required to undertake in their rulemakings, along with the requirement that

4. *See* Levin, *supra* note 1, at 531–35.

5. Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 204 (1986) (analyzing decision in *Humphrey's Executor*, arguing that decision should not be construed to prevent application of Executive orders to independent agencies).

6. Independent Agency Regulatory Analysis Act of 2017, S. 1448, 115th Cong. § 3 (2017) (emphasis added).

7. Daniel A. Farber, *Regulatory Review in Anti-Regulatory Times*, 94 CHI.-KENT L. REV. 383, 416 (2019) (discussing Exec. Order No. 13,783).

the agencies do cost-benefit analyses. Granted, OIRA would not be given a veto power over these agencies, but this still would significantly extend the time and complexity of rulemaking for these agencies.

And these agencies are quite varied. Measuring costs and benefits is especially tricky in the arena of financial regulation, yet the bill would cover numerous independent agencies engaged in such regulation.[8] Harvard Professor John Coates has written quite persuasively about the difficulties of applying CBA to financial regulatory agencies, which he called CBA/FR. He undertook several case studies and concluded that the studies "suggest that the capacity of anyone—including financial regulatory agencies, OIRA, academic researchers, CBA/FR proponents, and courts—to conduct quantified CBA/FR with any real precision or confidence does not exist for important, representative types of financial regulation."[9] Another quirk that might be a problem for another independent agency, the National Labor Relations Board (NLRB), is that it is barred by statute from hiring economists.[10] So, I would not be so sanguine about this idea. I would rather see a study of the comparative quality and timeliness of rulemakings by independent versus purely executive agencies, before one cheers Congress's attempt to codify these requirements while also ceding to the White House some of its authority over independent agencies.

II. PRESIDENT TRUMP'S DECONSTRUCTION OF ALJ SELECTION

The federal rulemaking process is probably safe from the RAA for now, but I would like to turn to another part of the administrative process that has been suddenly transformed by President Trump, with a hockey assist from the U.S. Supreme Court—administrative adjudication, specifically administrative law judges (ALJs). As then-Professor Antonin Scalia began his 1979 article, *The ALJ Fiasco—A Reprise,* "The subject of administrative hearing officers is once again on the agenda of federal regulatory reform."[11]

8. S. 1448, § 2(4). The Act's definition of "independent regulatory agencies" tracks that of The Paperwork Reduction Act, 44 U.S.C.A. § 3502(5) (West 2019), so would include the Bureau of Consumer Financial Protection, Commodity Futures Trading Commission, Federal Deposit Insurance Corporation, Federal Housing Finance Agency, Securities and Exchange Commission, and two independent bureaus of the Department of the Treasury (the Office of Financial Research and the Office of the Comptroller of the Currency).

9. John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 997–98 (2015).

10. *See* Section 4 of the NLRA, 29 U.S.C.A. § 154 (West 1978) ("Nothing in this subchapter shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.").

11. Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57, 57 (1979).

The APA created the position of ALJs (originally called "examiners") in section 11 of the 1946 Act. It provided for various aspects of independence for these judges in terms of their tenure, salary, job duties, etc. When the Supreme Court reviewed the ALJ program in *Ramspeck v. Federal Trial Examiners Conference* in 1953, the Court rejected several claims by the ALJs, including one that contended that their for-cause removal protection should protect them from reductions in force.[12] In rejecting that claim the Court said, "Congress intended to provide tenure for the examiners in the tradition of the Civil Service Commission. They were not to be paid, promoted, or discharged at the whim or caprice of the agency or for political reasons."[13] But they, like other civil servants, could be RIFed. (Note that Justices Black, Douglas, and Frankfurter dissented on this point.)

As to ALJ selection, the APA in 5 U.S.C. § 3105 states (in language similar to old § 11) "Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title." The House and Senate committee reports provided that "the Civil Service Commission [should] fix appropriate qualifications and the agencies [should] seek fit persons."[14]

As Professor Scalia wrote, "In other words, it was evidently contemplated that the Civil Service Commission would establish qualifying requirements by general rule, and that the agencies would then select from among all individuals who met those requirements."[15] But he explains:

> This is not, however, what occurred. The regulations issued by the Commission in September of 1947 adopt the principle that has been uniformly followed since: not merely the establishment of qualifying requirements, but also the ranking of individual applicants, would be the responsibility of the Commission, and the agency role would be limited to selecting among the three applicants certified by the Commission as best qualified.[16]

Thus, for 71 years, the Commission (and its successor, the Office of Personnel Management (OPM)) administered a complex hiring process that

12. Ramspeck v. Fed. Trial Exam'rs Conf., 345 U.S. 128, 142 (1953).

13. *Id.* at 142.

14. H.R. REP. NO. 79-1980, at 280 (1946), *reprinted in* Senate Comm. on the Judiciary, Administrative Procedure Act Legislative History, S. DOC. NO. 79-248, at 235, 280 (1946). The Senate Committee Report is identical, except for omission of the phrase "in matters of tenure and compensation," which limitation is treated in the next paragraph of the report, S. REP. NO. 79-752, at 215 (1945) (as cited in Scalia, *supra* note 11, at 59 n.14).

15. Scalia, *supra* note 11, at 59.

16. *Id.* at 60 (citation omitted).

was intended to be a merit selection process.[17] Basically, OPM provided applicants (who had to meet the threshold requirement of being a lawyer for at least 7 years with two years of litigating or administrative law experience) with a score on a 100-point scale after rating their experience, references, and conducting a written exam and panel interview. After that, any veterans' preference points (5, or 10 for disabled vets) were added—thus giving veterans quite a large advantage. For a time, OPM allowed agencies to hire from the top three applicants on the list who were selectively certified as experts in the agency's field, but OPM ended that program after the ABA complained that agencies were hiring too many of their own employees as judges.[18]

The end of selective certification exacerbated the lasting problem with this merit selection process: agencies chafed at having to hire applicants based solely on their OPM scores—since many of them had little background in the agency's area of law. Washington-based agencies began to maneuver to avoid ALJ adjudication as much as possible, and, when they could not, to circumvent the register by hiring laterally ALJs who had been already hired around the country by the Social Security Administration (SSA), which came to have eighty-five percent of all the ALJs.[19] The scoring system was also a handicap for women (most of whom were not veterans) in rising to the top of the register.[20] Thus, the system, despite its merit selection intentions, had begun to break down.

In 1992, the Administrative Conference of the U.S. (ACUS) launched a study at OPM's request of the "Federal Administrative Judiciary," which I helped to undertake.[21] Our report was the basis for an ACUS recommendation for a revised selection process that would (1) remove veterans' preference from this program; (2) leave with OPM the responsibility for preparing the register of eligibles (i.e., for determining the basic qualifications for the position and rating the applicants); and (3) expand the choices that agencies would have in selecting from among those qualified appli-

17. *See* Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 112–16 (1981).

18. *See* John T. Miller, Jr., *Some Reflections on OPM's Administration of Its APA ALJ Functions*, 30 ADMIN. & REG. L. NEWS 6 (Winter 2005) (describing the ABA's, and Mr. Miller's, successful opposition to selective certification).

19. *See* Paul Verkuil et al., *The Federal Administrative Judiciary*, 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 942–43 (1992), https://www.acus.gov/sites/default/files/documents/1992-2%20ACUS%20%28Green%20Book%29.pdf [https://perma.cc/LWP7-JJG9] (detailing statistics that show the prevalence of hiring by transfer).

20. *See id.* at 944–49.

21. *See generally id.* at 771–1139.

cants, allowing agencies to select any eligible applicant from the top 50 percent of the register.[22]

ACUS's recommendation fell on deaf ears, and not much had changed until this year. The catalyst was *Lucia v. Securities and Exchange Commission* in the Supreme Court.[23]

The SEC bar had for years been opposed to the notion of SEC ALJs hearing and deciding SEC enforcement cases. Their due process challenges to this APA adjudication procedure had repeatedly failed,[24] but then they discovered the Appointments Clause—which requires that "officers" of the United States had to either be appointed by the President and confirmed by the Senate, or, if they were "inferior officers," their appointment could be assigned by Congress to the President alone, head of a department, or a court of law.[25] On that point, it appears pretty clearly that in the APA, Congress had assigned the hiring of ALJs to each agency, so if the SEC were a head of a department, it could apparently appoint its ALJs even if they were considered inferior officers.

Conveniently, the Supreme Court in its 2010 decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*[26] had declared the SEC's Commission was a head of a department for Appointments Clause purposes. So the SEC should have been home free. But, unfortunately for it, the Commission had delegated the appointing to the Chief ALJ and a personnel office, so its only recourse was to argue that its ALJs were not actually officers at all, on the ground that they could not make a final decision without the Commission signing off. The D.C. Circuit accepted that argument, but the Tenth Circuit did not,[27] and the Supreme Court resolved the split by finding them to be officers.[28] That meant that the Commission

22. Recommendations and Statements of the Administrative Conference Regarding Administrative Practice and Procedure, The Federal Administrative Judiciary (Recommendation No. 92-7), 57 Fed. Reg. 61,759, 61,760 (Dec. 29, 1992).

23. Lucia v. SEC, 138 S. Ct. 2044 (2018).

24. 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).

25. U.S. CONST. art II, § 2, cl. 2.

26. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 514 (2010).

27. *Compare* Raymond J. Lucia Cos., Inc. v. SEC, 832 F.3d 277, 296 (D.C. Cir. 2016), *with* Bandimere v. SEC, 844 F.3d 1168, 1194 (10th Cir. 2016).

28. *Lucia*, 138 S. Ct. at 2053–54.

itself had to reappoint its existing judges, change its appointment process going forward, and rehear over 100 cases that had been heard by these unconstitutionally appointed judges.[29] So, this was a narrow ruling that benefited the SEC bar in some cases but didn't really affect most agencies—though it left some important unanswered questions about the status of a lot of non-ALJ adjudicators who would also seem to qualify as officers under the ruling in *Lucia*.[30]

So what's the big deal? The problem is that President Trump seized on the *Lucia* decision as an opportunity to drastically change the process for hiring ALJs. On July 10, 2018, he issued Executive Order 13,483.[31] In it he said, "*Lucia* may . . . 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."[32] Of course, *Lucia* did not raise those questions at all.

Nevertheless, President Trump determined to exercise his statutory authority over what positions are in the competitive civil service by removing the ALJs from it and placing them in a new "Schedule E."[33] The Order went on to say that starting immediately, the only minimum qualification for the position was that newly appointed ALJs "must possess a professional license to practice law and be authorized to practice law under the laws" of a State, D.C., Puerto Rico, or a territory of the United States.[34] Significantly, agencies may use additional criteria if they wish.[35]

As one of the authors of the ACUS study, I normally would be glad to see a Presidential order that made ALJ hiring more flexible. But not this flexible! While I am all in favor of giving agencies more leeway to hire their ALJs, and even for taking them out of the competitive civil service, I think some office (logically OPM, but maybe even ACUS) should develop government-wide minimum qualifications for the position, and organize a

29. *See generally* SEC Order, In re: Pending Administrative Proceedings, Securities Act Release No. 10536, Exchange Act Release No. 83907, Investment Company Act Release No. 33211, Investment Advisors Act Release No. 4993, 2018 WL 4003609 (Aug. 22, 2018).

30. *See* William Funk, *Fallout from* Lucia*—Radioactive?*, 36 YALE J. ON REG.: NOTICE & COMMENT (Oct. 24, 2018), https://yalejreg.com/nc/fallout-from-lucia-radioactive-by-william-funk/ [https://perma.cc/L76G-MCL4] (pondering *Lucia*'s seeming effect on AJ appointments).

31. Exec. Order No. 13,843, Excepting Administrative Law Judges From the Competitive Service, 83 Fed. Reg. 32,755 (July 10, 2018).

32. *Id.* at § 1.

33. *Id.* at §§ 2–3.

34. *Id.* at § 2(b).

35. *Id.*

list of eligible applicants from which agencies could select.[36] And, I certainly think that one of those qualifications should be a certain level of experience (7-10 years) as a practicing lawyer.

In short, I think President Trump needlessly swung the pendulum too far and opened up the program to potential cronyism or political favoritism in the hiring of new ALJs. An ALJ position is a plum position for many lawyers—it is almost life tenure in practice (absent a RIF or misconduct) and the salary ($174,500 after five years in office) is at the top of the civil service pay scale,[37] which makes it very desirable, especially in the smaller cities where many SSA ALJs are located.

As the Federal Bar Association's Statement on Executive Order 13,483 said:

> Critics of the executive order have questioned whether the change to excepted service appointments of ALJs may lead to a politicized appointment process and an administrative judiciary lacking the necessary experience, judgment and skills to adjudicate a wide range of administrative disputes. Indeed, the lone requirement that an ALJ need only be authorized to practice law raises legitimate concerns over the prospect of abuse in the exercise of agency hiring authority.[38]

The President of the Association of Administrative Law Judges, which represents the many administrative law judges employed at the SSA, was even more blunt in an op-ed: "Now, as a result of the president's executive order, an agency that wants to employ an ALJ can recruit any attorney regardless of skill or experience. Competence and impartiality apparently are no longer essential; cronyism and political interference will no longer be taboo."[39]

These concerns might seem far-fetched. After all, wouldn't these newly freed up agencies look for the best qualified ALJs they could find to help carry out their programs? Most agencies probably would, but I worry about

36. *See* Verkuil et. al., *supra* note 19, at 958 (suggesting that "perhaps it is time for OPM to take the position that ALJs (like other attorneys in the federal government) are in the 'excepted' service (i.e., excepted from the competitive service)"). The report, however, made clear its desire for OPM to "continue to determine the minimum qualification requirements for the ALJ position" and to "continue to rate the experience of applicants." *Id.* at 956.

37. *See* U.S. Office of Pers. Mgmt., *2018 Locality Rates of Pay for Administrative Law Judges*, https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2018/ALJ_LOC.pdf [https://perma.cc/B7Z9-5YX3].

38. Statement of the Fed. Bar Ass'n on Executive Order 13,843 Regarding the Hiring of Federal Administrative Law Judges (Aug. 10, 2018), http://www.fedbar.org/Advocacy/FBA-Statements/FBA-Statement-on-Executive-Order-13843.aspx [https://perma.cc/VV6G-5T4M].

39. Marilyn Zahm, *Do you have a Social Security card? Then take this executive order personally.*, WASH. POST (July 18, 2018), https://www.washingtonpost.com/opinions/do-you-have-a-social-security-card-then-take-this-executive-order-personally/2018/07/18/4d66339c-89d6-11e8-85ae-511bc1146b0b_story.html?utm_term=.6bc9bd244bb7 [https://perma.cc/4X84-5VQX].

the aftermath of an election when the White House Office of Personnel receives bags of résumés from campaign supporters who want to serve in the new Administration. Now there will be a strong temptation for that office to call a friendly agency head with a request—"please hire so-and-so for your next ALJ vacancy." Or, more generally, is it not likely that a pro-regulatory administration would seek to quietly staff the administrative judiciary with former enforcement officials, while anti-regulatory administrations would hire skeptics of regulation? Nor would benefit programs be immune. An administration bent on cutting back on benefits might want to staff the adjudication program with judges who are tight-fisted with benefits.

This kind of political manipulation of the administrative judiciary has been prevented by the OPM rating process for ALJs, but it would not be unprecedented if one looks at several episodes involving the hiring of non-ALJ adjudicators such as immigration judges (IJs) and veterans law judges, who, for the most part can be hired without many restrictions. In the Bush II Administration, the Department of Justice's Inspector General found that "[t]he evidence showed that the most systematic use of political or ideological affiliations in screening candidates for career positions occurred in the selection of IJs, who work in the Department's Executive Office for Immigration Review (EOIR)."[40] According to the report:

> [T]he [Office of the Attorney General] solicited candidates for IJ positions and informed EOIR who was to be hired for each position. The principal source for such candidates was the White House, although other Republican sources provided politically acceptable candidates to [three named senior DOJ officials]. All three of these officials inappropriately considered political or ideological affiliations in evaluating and selecting candidates for IJ positions. For example, we found that [one of them] screened the candidates using a variety of techniques for determining their political affiliations, including researching the candidates' political contributions and voter registration records, using an Internet search string with political terms, and asking the candidates questions regarding their political affiliations during interviews.[41]

Moreover, the report found that

> Not only did this process violate the law and Department policy, it also caused significant delays in appointing IJs. These delays increased the burden on the immigration courts, which already were experiencing an

40. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL, SPECIAL REPORT 137 (July 28, 2008), https://oig.justice.gov/special/s0807/final.pdf [https://perma.cc/JHG7-5U3A].

41. *Id.*

> increased workload and a high vacancy rate. [The EOIR Deputy Director] repeatedly requested candidate names to address the growing number of vacancies, with little success. As a result of the delay in providing candidates, the Department was unable to timely fill the large numbers of vacant IJ positions.[42]

Although some reforms were made after this episode, in May 2018, eight Democratic members of the House asked the current DOJ IG to investigate similar complaints by whistleblowers about politicized hiring of IJs and members of the Board of Immigration Appeals.[43]

A similar case of political hiring (or, in this case, non-hiring) was reported later this year concerning the hiring of "Veterans Law Judges" who sit on the VA's Board of Veterans Appeals.[44] According to the *Washington Post*, the White House rejected four of the eight candidates selected by the board chairwoman to serve as administrative judges. "The rejections came after the White House required them to disclose their party affiliation and other details of their political leanings, according to documents viewed by The Washington Post."[45] "Such questions had not been asked of judge candidates in the past, according to former judges and board staff."[46]

One encouraging sign is that one of the biggest employers of ALJs, the Department of Labor (DOL), already has taken steps to create supplemental hiring requirements,[47] which is permitted, but not required by the Executive Order.[48] DOL established a set of qualifications, including being a member of a bar in good standing "for at least ten years total in at least one jurisdiction in which the applicant is admitted; seven years of relevant litigation or administrative law experience; and knowledge of statutes enforced by the Department of Labor."[49] It also assigned an office to screen candidates' applications and set up a panel made up of the Department's

42. *Id.* at 138.

43. *See* Letter from Eight Members of the House of Representatives to Hon. Michael E. Horowitz, Inspector Gen. (May 8, 2018), https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Dems%20to%20Horowitz.pdf [https://perma.cc/3298-KZZ8].

44. Lisa Rein, *'I've never seen these positions politicized': White House rejection of veterans judges raises concerns of partisanship*, WASH. POST (Oct. 23, 2018), https://www.washingtonpost.com/politics/ive-never-seen-these-positions-politicized-white-house-rejection-of-veterans-judges-raises-concerns-of-partisanship/2018/10/23/f488046a-ce51-11e8-920f-dd52e1ae4570_story.html?utm_term=.c57b88ba86c9 [https://perma.cc/L9AA-CW4M].

45. *Id.*

46. *Id.*

47. *See* Procedures for Appointment of Administrative Law Judges for the Department of Labor, 83 Fed. Reg. 44,307 (Aug. 30, 2018).

48. Exec. Order No. 13,843, 83 Fed. Reg. 32,755, 32,757 (July 13, 2018) ("This requirement shall constitute a minimum standard for appointment to the position of administrative law judge, and such appointments may be subject to additional agency requirements where appropriate.").

49. 83 Fed. Reg. at 44,307–08.

Chief ALJ, Chief Human Capital Officer, the Assistant Secretary for Policy, and a Member of the Employees' Compensation Appeals Board. This panel will review and rank the qualified applications, interview the top-ranked candidates, and forward their recommended candidates to the Deputy Secretary. The Deputy Secretary in consultation with a career ethics attorney from the Office of the Solicitor will provide the Secretary with the names of the recommended candidate(s) for appointment as well as resumes of the other top-ranked candidates interviewed but not recommended. The Secretary shall make the final decision and appointment, but may also order another candidate search be completed.[50]

Another encouraging sign is that Senators Collins (R-ME) and Cantwell (D-WA) have introduced a bill[51] to restore ALJs to the competitive civil service. The operative provision on appointment reads: "Administrative law judges shall be appointed by the head of an agency from a list of eligible candidates provided by the Office of Personnel Management or based upon approval of the qualifications of the individual by the Office of Personnel Management."[52] While this clean bill would be a quick fix, and it would also allow OPM to allow agencies more flexibility in selecting eligible candidates, I would prefer making this change without reinserting ALJs into the competitive service.[53]

Finally, it should be noted that questions have been raised about the legality of the President's Order. While it is clear that the President has the authority to determine which employees are included in the competitive civil service,[54] one analyst for the Congressional Research Service, noted, "Somewhat unusually, the order directly amends three provisions in the CFR, rather than directing an agency to amend the regulations."[55] It also directs OPM to "adopt such regulations as the Director determines may be necessary to implement this order."[56] Because this would entail revising existing regulations, it would require a notice-and-comment proceeding,

50. *Id.* at 44,307.

51. S. 3387, 115th Cong. (2018).

52. *Id.* § 1(c).

53. The competitive civil service brings with it the need to add veterans' preference points, which is not well suited to judicial positions and tends to discriminate against women and may also lead to other restrictions pertaining to the examination, and selection off the register. Better to simply direct OPM (or perhaps ACUS) to develop an appropriate set of hiring qualifications, and to screen applicants based on such qualifications.

54. 5 U.S.C. § 3302 (2012) ("The President may prescribe rules governing the competitive service.").

55. Valerie C. Brannon, *Can a President Amend Regulations by Executive Order?*, CONGRESSIONAL RESEARCH SERV.: LEGAL SIDEBAR (July 18, 2018), https://fas.org/sgp/crs/misc/LSB10172.pdf [https://perma.cc/PX8T-X4VB].

56. 5 U.S.C. § 3302.

and because the Civil Service Reform Act requires notice and comment for OPM rulemaking, the APA's personnel rule exemption would not apply.[57] OPM issued a guidance document shortly after the issuance of the Executive Order, terminating the existing register of candidates and pledging to "promulgate proposed regulations to address any provisions in the regulations, including those at 5 C.F.R. part 930 and others identified in Section 3(b)(i) of the EO, that are inconsistent with service in the excepted service or use language that is generally inapplicable to the excepted service (e.g., references to the concepts of 'probation' or 'suitability')."[58] It would certainly be tidier for OPM to amend its regulations before agencies begin hiring new ALJs, but given the President's delegated rulemaking power in this area, I don't think it is legally necessary. Moreover, given the caselaw finding that the President is not an "agency" under the APA,[59] and the difficulty of obtaining standing to challenge the order, it is likely that any successful challenge to the Order will be a legislative one rather than one brought about by litigation.

III. THE DEPARTMENT OF JUSTICE'S ATTEMPTS TO DILUTE ALJS' FOR-CAUSE REMOVAL PROTECTION[60]

Although Executive Order 13,843's establishment of an almost unrestricted selection process for ALJs can be seen as an indirect dilution of their independence, even more concerning is the seeming campaign by the Department of Justice (DOJ) to weaken ALJs' for-cause protection from

57. *See* 5 U.S.C. § 1103(b)(1) (2012) ("The Director shall publish in the Federal Register general notice of any rule or regulation which is proposed by the Office and the application of which does not apply solely to the Office or its employees. Any such notice shall include the matter required under section 553(b)(1), (2), and (3) of this title.").

58. Memorandum from Dr. Jeff T.H. Pon, Dir., U.S. Office of Pers. Mgmt., to Heads of Exec. Dep'ts & Agencies Regarding Executive Order—Excepting Administrative Law Judges from the Competitive Service (July 10, 2018) [hereinafter OPM Memorandum], https://chcoc.gov/content/executive-order-%E2%80%93-excepting-administrative-law-judges-competitive-service [https://perma.cc/SH3X-HQCL].

59. *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) ("The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.").

60. Some of the following discussion is adapted from my blogpost, 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*, 36 YALE J. ON REG.: NOTICE & COMMENT (Apr. 10, 2018), https://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/TLY3-9RCK].

discipline and removal. This protection also derives from the APA, as now codified in 5 U.S.C. § 7521(a), which states:

> An action [ranging from a furlough to a removal] may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.[61]

Because this protection is statutory, Executive Order 13,843 can have no effect on it, and OPM's guidance memo made clear that this section of the APA still applies to ALJs.[62]

But there are still lingering questions about the constitutionality of ALJ for-cause protection after the Supreme Court's earlier decision in the *Free Enterprise Fund* case.[63] In that case, the Court reviewed the statutory scheme by which the Public Company Accounting Oversight Board (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.[64] 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."[65] Justice Breyer, for four dissenters, disagreed that the double-for-cause protection found by the majority rose to the level of a constitutional infirmity, questioned how 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 nu-

61. 5 U.S.C. § 7521(a) (2012).

62. *See* OPM Memorandum, *supra* note 58.

63. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 514 (2010).

64. *Id.* at 509; *see also* Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332, 1334 (D.C. Cir. 2012) (following the Supreme Court's approach in *Free Enterprise Fund* by invalidating and severing the restrictions on the Librarian of Congress's ability to remove Copyright Royalty Judges).

65. *Free Enter. Fund*, 561 U.S. at 511–13.

merous 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.[66] In response, Chief Justice Roberts disclaimed any intention to cover ALJs: "Nothing in our opinion, . . . should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies."[67] More specifically, in footnote 10 of his opinion, he wrote:

> [O]ur holding also does not address the subset of independent agency employees who serve as administrative law judges. . . . [U]nlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, . . . , or possess purely recommendatory powers. The Government below refused to identify either "civil service tenure-protected employees in independent agencies" or administrative law judges as "precedent for the PCAOB."[68]

Questions about the ALJ's double for-cause protection (deflected by Chief Justice Roberts in *Free Enterprise Fund*) were not part of the *Lucia* case, 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 (SG) switched positions and sided with Lucia. 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.[69] 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 (MSPB), which is itself an independent agency whose members have for-cause protection from removal by the President.[70] The Court granted cert but only on the Appointments Clause issue.

But the SG was not deterred and filed a brief continuing to urge the Court to take up that issue.[71] His arguments made in that portion of his brief (at pages 45-55) are especially troubling. He complained that the MSPB not only has "reserve[d] to itself the final decision on [whether]

66. *Id.* at 514–49 (Breyer, J., dissenting).

67. *Id.* at 507.

68. *Id.* at 507 n.10.

69. Brief for the Respondent at 26, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130), 2017 WL 5899983, at *35.

70. *Id.* at 20.

71. Brief for Respondent Supporting Petitioners at 45, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130), 2018 WL 1251862, at *57.

good cause" for discipline exists, but also has asserted the right to determine "the appropriate penalty if it finds good cause."[72] With this complaint, and his later suggestion that this MSPB authority be excised from the statute, the SG was 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 federal employees. It also ignores the fact that under 5 U.S.C § 7521, the hearing procedure at the MSPB covers other disciplinary actions brought by agencies, such as suspensions, and even reprimands.

More specifically, the SG argued that:

> 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 the agency's proffered, good-faith grounds. That construction differs from the MSPB's current practice of determining not simply whether facts exist to support the agency's determination, but whether in the MSPB's view those facts amount to "good cause" and also warrant removal or other sanctions sought by the agency. . . . 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.[73]

This very low standard of proof advocated by the SG, mixed with his 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.

The SG then asserted that 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. He argued that:

> 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 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."

72. *Id.* at 46–47.
73. *Id.* at 52–53.

> *Ibid.* (describing holding of *Nephew v. Willis*, 298 N.W. 376 (Mich. 1941)).[74]

The SG's view that a 1941 Michigan case, cited in the 1951 *Black's Law Dictionary*, represents the best view of what the MSPB's test should be for removing or disciplining ALJs not only would overturn 72 years of understanding, but also would make it exceedingly difficult for ALJs to defend themselves before the MSPB.

The SG goes on to argue that:

> 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).[75]

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.

The SG's brief also states that "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."[76] It conceded that "the President, acting through his principal officers, would be restrained from removing an ALJ in order to influence the outcome in a particular adjudication."[77] But then it contended that "*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.'"[78]

It would be a serious inroad into ALJ independence to understand the removal power to mean that while 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

74. *Id.* at 48–49.
75. *Id.* at 49.
76. *Id.* at 47.
77. *Id.* (citing Myers v. United States, 272 U.S. 52 (1926)).
78. *Id.* at 50–51.

demonstrate[ing] deficient job performance,"[79] he or she could be removed for it after the case was over.

Two other contentions in the brief raise concerns. First, "[E]ven 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."[80] This sounds like it might be 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 in such an agency, should he have the authority to fire agency commissioners for refusing to bring charges against that ALJ? Second, 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.[81] Such a change from existing practice would allow agencies to engage in constructive removal of any ALJ simply by filing a charge against the judge.

Fortunately, in its *Lucia* opinion, the Court rejected the SG's entreaties,[82] but the issue is far from settled. In a memo to agency general counsels, providing "Guidance on Administrative Law Judges after Lucia v. SEC,"[83] that was mostly directed to how agencies should comply with its holding on ALJ selection, the SG urged agencies to notify DOJ of any challenges to "to the statutory removal restrictions for ALJs."[84] But more portentously, the SG said:

> As the government argued in the Supreme Court in *Lucia*, Section 7521's "good cause" standard for removal is properly read to allow for removal of an ALJ who fails to perform adequately or to follow agency policies, procedures, or instructions. Resp. Br. 50. An ALJ cannot, however, be removed for any invidious reason or to influence the outcome in a particular adjudication. As so construed, and provided MSPB review is suitably deferential to the determination of the Department Head, the Department of Justice will argue that Section 7521 gives the President a constitutionally adequate degree of control over AIJs. This is true of

79. *Id.* at 47.

80. *Id.* at 51.

81. *Id.* at 53–55.

82. *Lucia*, 138 S. Ct. at 2050 n.1 ("The Government's merits brief now asks us again to address the removal issue. See Brief for United States 39–55. We once more decline. No court has addressed that question, and we ordinarily await 'thorough lower court opinions to guide our analysis of the merits.'").

83. Memorandum from the Solicitor General to Agency General Counsels Regarding Guidance on Administrative Law Judges after *Lucia v. SEC*, https://static.reuters.com/resources/media/editorial/20180723/ALJ—SGMEMO.pdf [https://perma.cc/Y2TW-BUD9].

84. *Id.*

> ALJs who work at independent agencies, as well as ALJs at traditional Executive Branch agencies.[85]

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, such a stance provides less protections for 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 federal statutes and 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."[86]

The Chief Justice 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).[87]

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."[88] ALJs are clearly distinguishable.

85. *Id.*

86. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 507 n.10 (2010).

87. *Id.* at 503.

88. Charles Levinson, *Accounting industry and SEC hobble America's audit watchdog*, REUTERS (Dec. 16, 2015), https://www.reuters.com/investigates/special-report/usa-accounting-PCAOB/ [https://perma.cc/A782-QAPL].

CONCLUSION

The 2018 election may have pushed the pause button on attempts by Congress to saddle the APA rulemaking process with a plethora of additional procedures and analysis requirements. But White House orders and DOJ litigating positions still constitute a serious threat to the integrity of the APA's adjudication process.