

CLIENT ALERT

If the President Can't Tell an ALJ "You're Fired," Must the ALJ be Retired?

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He's back. Raymond Lucia was the petitioner in *Lucia v. Securities and Exchange Commission*, in which the U.S. Supreme Court held that the Securities and Exchange Commission's method of hiring its administrative law judges (ALJs) violated the Constitution's Appointments Clause. We previously addressed the Court's *Lucia* decision [here](#) and [here](#). Now Mr. Lucia has filed another lawsuit against the Commission, this time contending that the Commission's ALJs lack constitutional authority to adjudicate the Commission's claims against him because the statute creating the ALJs' positions impermissibly restricts the President's power to remove ALJs from office. The outcome of Mr. Lucia's latest tilt with the Commission could have major implications for adjudications by dozens of other agencies.

Background

In the first *Lucia* case, the Supreme Court held that because ALJs are "inferior officers" within the meaning of Article II of the Constitution, they must be appointed by the President, the federal courts, or the heads of departments. The ALJ in Mr. Lucia's earlier case had been appointed by Commission staff, so the Court ordered the case reheard by a lawfully appointed ALJ.

Justice Breyer partially dissented from the holding in *Lucia* on the ground that the majority failed to address a troubling question: whether the statutes creating the Commission's ALJs unconstitutionally restrict the President's authority to **remove** those ALJs. In an earlier case — *Free Enterprise Fund v. Public Company Accounting Oversight Board* — the Court reaffirmed that the Constitution forbids Congress from placing certain restrictions on the President's power to remove Executive Branch officers. Specifically, the *Free Enterprise* Court held that Congress violates the Constitution's Take Care and Executive Vesting clauses when it provides "two levels of protection from removal for those who ... exercise significant executive power."

The Commission's ALJs, Justice Breyer pointed out in *Lucia*, are subject to two levels of protection from removal. The statute establishing the ALJs' positions authorizes the ALJs' removal "only for good cause established and determined by the Merit Systems Protection Board," whose members the President may remove only for "inefficiency, neglect of duty or malfeasance in office." If the Commission's ALJs are officers, Justice Breyer summarized, then it might well follow that the statutory limitations on removing them are unconstitutional under the logic of *Free Enterprise*.

Mr. Lucia's Latest Case

After the Supreme Court remanded his case for reconsideration by a properly appointed ALJ, Mr. Lucia filed his latest case in federal district court in San Diego. Seizing on the issue Justice Breyer raised in *Lucia*, Mr. Lucia now argues that "The [Commission's] reinstated enforcement action before a new ALJ remains constitutionally flawed because [Commission] ALJs have impermissible layers of tenure protection." Thus, he insists, the Constitution forbids the current crop of ALJs from adjudicating the Commission's charges against him.

There is no guarantee that Mr. Lucia’s latest case will generate the type of path-marking decision that his last one did, nor is it entirely clear that the district court has power to consider Mr. Lucia’s claim in the first instance. But a merits ruling on Mr. Lucia’s removability argument could have drastic implications for the scores of other agencies that employ ALJs who — like the Commission’s — are subject to two layers of for-cause removal protections. As Justice Breyer catalogued in his *Free Enterprise* dissent, a few of those agencies are:

- The Commodity Futures Trading Commission
- The Department of Agriculture
- The Department of Health and Human Services
- The Department of Homeland Security
- The Department of Housing and Urban Development
- The Department of the Interior
- The Department of Justice
- The Department of Labor
- The Department of Transportation
- The Environmental Protection Agency
- The Federal Communications Commission
- The Federal Energy Regulatory Commission
- The Federal Labor Relations Authority
- The Federal Mine Safety and Health Review Commission
- The Federal Trade Commission
- The International Trade Commission
- The National Labor Relations Board
- The National Transportation Safety Board
- The Occupational Safety and Health Review Commission
- The Social Security Administration

If Mr. Lucia prevails in his latest case, decisions from ALJs within those (and other) agencies could be invalidated. For that reason, people and businesses with matters before those agencies would do well to follow Mr. Lucia’s latest case and to consider whether they might want to raise similar claims in their own administrative proceedings.

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