

Yale University

EliScholar – A Digital Platform for Scholarly Publishing at Yale

Harvey M. Applebaum '59 Award

Library Prizes

2020

Against Executive-Controlled Administrative Law Judges

Stephanie N. Higginson
Yale University

Follow this and additional works at: https://elischolar.library.yale.edu/applebaum_award



Part of the [Administrative Law Commons](#), [Constitutional Law Commons](#), [Judges Commons](#), [Legal History Commons](#), [President/Executive Department Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

Higginson, Stephanie N., "Against Executive-Controlled Administrative Law Judges" (2020). *Harvey M. Applebaum '59 Award*. 20.
https://elischolar.library.yale.edu/applebaum_award/20

This Article is brought to you for free and open access by the Library Prizes at EliScholar – A Digital Platform for Scholarly Publishing at Yale. It has been accepted for inclusion in Harvey M. Applebaum '59 Award by an authorized administrator of EliScholar – A Digital Platform for Scholarly Publishing at Yale. For more information, please contact elischolar@yale.edu.

Against Executive-Controlled Administrative Law Judges

A senior essay by

Stephanie Noelle Higginson

in partial fulfillment of the requirements

for the degree of Bachelor of Arts in Political Science

Advised by Stephen Skowronek

27 April 2020

“I’d give the Devil benefit of law, for my own safety’s sake!”

—Robert Bolt, *A Man for All Seasons*

This paper examines the application of unitary executive theory in the administrative state. As a case study, the status of administrative law judges (“ALJs”) will be examined and shown to be indicative of the statutory and practical shortcomings of unitary executive theory as manifested in 2018 by Executive Order 13843 and the appointment process prescribed therein. Indeed, the history and statutory protections afforded to ALJs, as adjudicators, resist executive control. Nevertheless, following the Supreme Court’s ruling in *Lucia*, appointments of ALJs must be made consistent with the Appointments Clause, and this paper offers an alternative to that of the Executive Order: appointment by a Court of Law, which best balances the office’s appointments and impartiality concerns. At issue is the status of ALJs as “independent adjudicators” or “dependent decision-makers,”¹ and quite clearly first principles of adjudication—whether in administrative agencies or in Article III courts—require that ALJs remain the former.

a. Introduction and Issues

Administrative law judges comprise a small section of the federal administrative judiciary, yet, compared to their administrative counterparts, administrative judges (“AJJs”), they occupy a standard and formal position across the administrative agencies under which they operate. The powers and protections of their office are codified in the Administrative Procedures Act (APA), through which they enjoy salary, tenure, and removal protections. Their dockets

¹ *Lucia vs. Securities and Exchange Commission*, 138 S. Ct. at 2060 (2018) (Breyer, J., concurring in the judgement in part and dissenting in part).

consistently outsize those of Article III judges.² Certain ALJs preside over trial-like hearings with the power to adjudicate in litigation involving deprivations of liberty and property interests, sans agency reversal. For these and other reasons, elaborated below, certain ALJs are “comparable to” federal district court judges conducting bench trials.³ As their history and present position will show, ALJs *qua* adjudicators are entitled to the degree of independence appropriately matching the significance of their adjudicative decision-making power.

However, ALJs have been increasingly viewed as, first and foremost, administrators. Rulemaking is subject to the control of the agencies and agency heads to whom that policymaking power has been delegated, and ALJs are situated in an uncomfortable middle ground on account of their role in rulemaking. Indeed, ALJs *qua* administrators often do apply and interpret agency rules through their written decisions. Thus, pursuant to administrative control of policymaking, Executive Order 13843 leverages the decision in *Lucia* to exempt ALJs from competitive service and place appointment power in the hands of agency heads and Heads of Departments. The change circumvents an Office of Personnel Management (OPM) selection process and endows those administrators with control over the formation of policy through both traditional formal and informal rulemaking *and* adjudications. Unitary executive theory underlies the rationale for the appointment structure as chosen. Unitary executive theorists, believing that unilateral presidential control of administration is a constitutional imperative, call for a structure that provides for ALJ appointment by political appointees of the President: agency heads and

² Paul R. Verkuil, “Reflections upon the Federal Administrative Judiciary,” 39 UCLA L. Rev. (1992): 1343.

³ *Butz v Economou*, 438 U.S. 478, 513 (1978) (“There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is ‘functionally comparable’ to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions.”).

Heads of Departments. In doing so, however, the Executive Order strips the office of a layer of congressionally intended independence.

Thus, Executive Order 13843 (“the EO”) has become the latest iteration in the push-and-pull between judicial independence and administrative control that has characterized the creation and continued existence of the ALJ corps. Perpetuating these issues with ALJs—from appointment to salary to removal—is the office’s dual role: ALJs are simultaneously administrative officers within a specified agency and presumably impartial adjudicators of litigation pitting citizens and private interests against federal administrative agencies.

Succinctly, unitary executive theory, manifested by the President and Office of the Solicitor General, upends the congressional imperative that the “duties of the ALJ delicately balance the development and implementation of agency policy against judicial remedies for alleged abuses of power or injury improperly inflicted by agency rulemaking or enforcement actions.”⁴ Here, unitary executive theory with increased agency control compromises independent and full judicial remedies for perceived abuses of power.

It is the effort here to understand the history and development of the office—from “hearing examiner” to “administrative law judge”⁵ and from “employee” to “inferior Officer”⁶—in order to assess the merits of the EO. We will see that that development has reflected political reform and constitutional development over the last century yet has always strived to stay true to constitutional and common law principles. The position of hearing examiners originates in the

⁴ Cole B. Graham, “The Changing Role of the Administrative Law Judge,” *Public Administration Quarterly* 9, no. 3 (1985): 261. <https://www.jstor.org/stable/40861098>

⁵ *An Act to amend title 5, United States Code, to provide that hearing examiners shall be known as administrative law judges, and to increase the number of such positions which the Civil Service Commission may establish and place at G-16 of the General Schedule*, Public Law 95-251, *U.S. Statutes at Large* 92 (1978): 183.

⁶ See generally *Lucia*, 585 U.S. ____ (2018).

heyday of the Progressive Era championed by Roosevelt. The subsequent decline of the Progressives' ideal of "neutral competence" in administration has been followed by the ascendance of unitary executive theory,⁷ by which presidential control of administration has legitimated interference in ALJ adjudicative responsibilities.⁸ ALJs still attempt to balance administrative expertise, judicial independence, and agency policymaking within a single office, but that increasingly is a tall and threatened order.

The long-term impacts of the EO remain to be seen; however, the exemption raises ever-present constitutional, legal, and political/administrative questions. Appointment is just one area in which the tension between executive control, judicial independence, and administrative expertise becomes clear—removal, salary, and review/supervision create their own problems along similar lines. As this paper proceeds, we will see that the EO extends direct executive control too far with respect to fundamental principles of adjudication and statutory intent. Instead, and as with their doctrinal precursors in *Freytag v. Commissioner of the IRS*, ALJs as Officers are most appropriately appointed by an independent body, a Court of Law, designated by Congress rather than an agency head through presidential directive.

Part I of this paper will outline the jurisprudential basis upon which the Executive Order rests its directives through the decisions in *Freytag* and *Lucia*. The original OPM process will be briefly analyzed insofar as it will demonstrate the aspects of the traditional appointments process that are foregone. The EO, and the subsequent memorandum by the Office of the Solicitor

⁷ See generally, Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 Harv. L. Rev. 2070 (2008).

⁸ See generally, Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. (1994), (explaining the President's broad grant of power to execute all laws and control administration); *Guidance on Administrative Law Judges After Lucia v. SEC (S. Ct.)*, July 2018. 123 Harv. L. Rev. 1120 (2018) (indicating how *Lucia* and the SG memorandum create "a more unitary Executive").

General (hereafter “the SG memorandum”) elaborating thereupon, will be explicated with a focus on the unitary executive undercurrents in each directive. Part II will shift to the statutory basis for ALJs: the Administrative Procedure Act of 1946 (APA). The history and codification in the APA will demonstrate clear statutory intent to realize independence in the office of ALJs, despite its clear and well-acknowledged role in agency rulemaking. Part III will turn to adjudicative and administrative roles and principles. By focusing on fact-finding and impartiality, I demonstrate that both as a matter of doctrine and a matter of due process ALJs must be afforded judicial protections that may be abridged by the appointments process in the EO. Following that, however, the administrative aspects of ALJs and the shortcomings of the OPM process will be assessed. Finally, Part IV will offer an appropriate appointment alternative that reconciles administrative expertise and judicial independence in ALJs, relieving, though not altogether eliminating, some of the issues inherent to the office. On these grounds, an act of Congress should designate an appointment process either through an independent body or “Court of Law” similar to the appointment of special trial judges in *Freytag* and United States magistrate judges or by Heads of Departments and equivalent agency heads following nomination by an independent body.

Part I: Appointments

In the wake of *Lucia v. Securities and Exchange Commission*, establishing that SEC ALJs are “inferior Officers” rather than “mere employees” under the Constitution and therefore are subject to the Appointments Clause,⁹ President Trump issued Executive Order 13843 exempting ALJs from competitive service classification.¹⁰ In a memorandum issued shortly

⁹ *Lucia*, *supra* note 6.

¹⁰ Donald J. Trump, “Executive Order 13843 — Excepting Administrative Law Judges from the Competitive Service,” The White House, July 10, 2018,

thereafter, the Office of the Solicitor General indicated that by the reasoning used in *Lucia* that status likely applied equally to other federal ALJs, as well as some administrative judges (AJs), and would be enforced accordingly.¹¹ With the EO’s exemption, the traditional OPM selection process is eliminated, and ALJ appointment processes henceforth are subject to the discretion of the individual agencies.¹²

By its most basic reading, the EO simply exempts ALJs from competitive service and eliminates the OPM appointment process. Although the OPM process had its faults, the alternative provided for in the EO evidences the pervasive influence of unitary executive theory in the modern presidency and, unsurprisingly, compromises much-needed independence for executive policy control. The following analysis will delve into the understandings in *Lucia*, and its precursor *Freytag*, as well as the understanding in the EO and the SG memorandum. As we will see, what is at stake here is a layer of independence between ALJs and the Administration, generally referring to the President and political appointees in the various administrative agencies, which raises concern for the continued independence of ALJs.

a. Lucia and Freytag

The Court in *Lucia* held that by the same reasoning used in *Freytag v. Commissioner of the IRS* SEC ALJs were “inferior Officers” under the Constitution because they possessed similar powers to those of the special trial judges of the Tax Court.¹³ That is, SEC ALJs “take

<https://www.whitehouse.gov/presidential-actions/executive-order-excepting-administrative-law-judges-competitive-service/>.

¹¹ “Memorandum from Solicitor General to Agency General Counsels on ‘Guidance on Administrative Law Judges after *Lucia v SEC* (S. Ct.),” Office of the Solicitor General, Department of Justice (2018) (hereafter “SG memo”).

¹² This spring, the Supreme Court will decide *Seila Law LLC v. Consumer Financial Protection Board*, addressing parallel executive power as to the removal, not appointment, of agency heads.

¹³ *Lucia*, *supra* note 6; *Freytag v. Commissioner of the IRS*, 501 U.S. 868 (1991), citing *Buckley v. Valeo*, 424 U.S. 1 (1976) and *United States v. Germaine*, 99 U.S. 508 (1878).

testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance discovery orders.”¹⁴ Exercising these powers, SEC ALJs “have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges.”¹⁵ The Court relies heavily upon the significance of the adjudicative powers and responsibilities of SEC ALJs in hearings to reach the conclusion that they are “inferior Officers” similar to special trial judges.

Simultaneously, the decision observes that “after a hearing ends, the ALJ issues an ‘initial decision.’”¹⁶ Therein, the ALJ sets out findings of fact and law and includes “appropriate order, sanction, relief, or denial thereof.”¹⁷ Justice Kagan, writing for the majority, reaffirms statutory language dictating that this initial decision is always reviewable by the Commission upon request or *sua sponte*. Moreover, the initial decision becomes “the action of the Commission” when the Commission both opts out of review and issues an order stating that the ALJ decision has become final.¹⁸ This aspect of “finality” both relates to an older test of “inferior Officer” status under the Constitution¹⁹ and forms the basis for the President’s order insofar as it encapsulates how ALJs may implement final agency policy through their decision-making.

Relevant to the analysis here, SEC ALJs—and other similarly situated ALJs and AJs in adversarial proceedings—may be constitutionally similar to special trial judges in the *powers they exercise*. However, ALJs and special trial judges are markedly different in the *protections they are afforded*. Special trial judges in Tax Court are appointed by the Chief Judge of the

¹⁴ *Lucia*, *supra* note 6.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ 17 C.F.R. § 201.360(d)(2).

¹⁹ *United States v. Germaine*, 99 U.S. 508 (1878).

United States Tax Court, whose appointment, in many ways, matches that of federal Article III judges. That is, United States Tax Court judges are appointed “by the President, by and with the advice and consent of the Senate.”²⁰ By contrast and through the President’s unilateral edict, ALJs will be appointed directly by the Heads of Departments or agencies in which they serve, both politicized agents with no pretensions of intra-branch consensus as is necessary in appointments of special trial judges and independent Article III judges. Unlike with the special trial judges, ALJ appointment maintains little semblance of independence from the institutions whose disputes and enforcement actions they are called upon to preside over.

At issue here is how the status of an Officer or “inferior Officer” depends upon how an officer is selected as much as it depends upon the powers that officer exercises once selected. In *Freytag*, the Court’s reasoning relied on the fact that “[special trial judges] serve on an ongoing [basis]...and their ‘duties, salary, and means of appointment’ are all specified in the Tax Code” (emphasis added).²¹ If indeed the selection and protections of the office matter as much as the powers do, then SEC ALJs are comparable to special trial judges if their appointment is similarly subject to a relatively independent institution, either through the OPM selection process first (as was the case at the time the Supreme Court issued the *Lucia* decision) or a Court of Law.

b. Office of Personnel Management Process

The Court opened the door for a new process for appointing ALJs by ruling that ALJs are “inferior Officers” in *Lucia*. Soon thereafter, the President issued the EO commanding that ALJs instead be appointed directly by the agencies and Heads of Departments, as they see fit.²² The

²⁰ 26 U.S.C. §§ 7443(a), (b), and (e) (2011).

²¹ *Lucia*, *supra* note 6. (citing *Freytag v. Commissioner of the IRS*, 501 U.S. at 881 and *Germaine*, *supra* note 19).

²² Executive Order 13843, *supra* note 10.

OPM selection process was by no means perfect, yet the EO tacks too far to the opposite. Whereas the OPM selection process failed to select for administrative expertise, the EO overcompensates in allowing agencies to self-select, ostensibly on the basis of expertise, and consequently imperils independence. Furthermore, the EO contains none of the assurances of litigation experience or expertise that were assessed in the OPM process.

Calls to adjust the OPM process are not new. Since the procedures for appointment of “hearing examiners” (now ALJs) were codified, the appointment process has been a source of continual contention and adjustments.²³ The OPM process has been denounced repeatedly for its inefficiencies, constraints, and preferences, particularly veteran preference and the “rule of three.”²⁴ Several proposals have been offered in its place: (i) an independent agency authorized to appoint ALJs,²⁵ (ii) an appointment by a Court of Law, specifically the D.C. Circuit,²⁶ (iii) a re-structuring of the OPM selection process that eliminates veteran preference and bolsters agency discretion,²⁷ and (iv) a complete elimination of the OPM process and vesting of appointment power in agency hands.²⁸

Traditionally, the OPM hiring process involved several steps. First an agency in need of additional ALJs would express this need, and standing applications would go through the OPM

²³ See generally, Antonin Scalia, “The ALJ Fiasco—A Reprise,” 47 U. Chi. L. Rev. (1979).

²⁴ Jeffrey S. Lubbers, “Federal Administrative Law Judges: A Focus on Our Invisible Judiciary,” 33 Admin. L. Rev. 109 (1981): 115-16.

²⁵ See generally, Attorney General’s Committee on Administrative Procedure, *Final Report of Attorney General’s Committee on Administrative Procedure* (Washington DC: Department of Justice, 1941) (hereafter “the Final Report”).

²⁶ See generally, Kent Barnett, “Resolving the ALJ Quandary,” *Journal of the National Association of Administrative Law Judiciary*, 33 (2) (2013).

²⁷ Office of the Chairman, *Administrative Conference of the United States: Recommendations and Reports*, Administrative Conference of the United States, 2 (1992): 962-964. (hereafter “the 1992 ACUS Report”)

²⁸ Executive Order 13843, *supra* note 10.

process. Applicants under consideration had to meet a licensure and experience standard, mandating a bar license and seven years of experience in litigation or administrative law at a federal, state, or local level. Applicants also underwent a competitive examination, testing “competencies/knowledge, skills, and abilities (KSAs) essential to performing the work of an Administrative Law Judge.”²⁹ Applicants were ranked on a point rating system based upon these qualifications and their examination with preference given to veterans.³⁰ After this process, agencies were given a list of the top three candidates from which to hire. Agencies maintained the ability to reject the list, in which case the process would start anew, or to hire an existing ALJ from another agency. (The practice of hiring across agencies—implicitly detaching ALJs from one specific agency in which they presumably maintain special knowledge—in some cases contradicted original understandings of the ALJ position as specialized in a particular agency.³¹) Otherwise, the agency would hire one of the three candidates presented by the OPM.

This system, of course, had its advantages and disadvantages. Pertaining to the APA intent we will see later, relative independence from agency political influence at the hiring stage satisfied impartiality concerns, and requirements for litigation experience bolstered appearances of legitimacy and competency in administrative functions. At the same time, a lack of testing for subject-matter expertise meant the process insufficiently hired based upon expertise and competency. Meanwhile, the veteran preference has long been the subject of ire.³²

²⁹ “Administrative Law Judges: Fact Sheet,” *Office of Personnel Management*, [opm.gov](https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=Fact-Sheet), last updated July 10, 2018. <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=Fact-Sheet>.

³⁰ *See generally*, Veterans’ Preference Act, 5 U.S.C. § 3309.

³¹ 1992 ACUS Report, *supra* note 27, at 830.

³² 1992 ACUS Report, *supra* note 27, at 962.

Overall, competitive service classification mandated a specific, and indeed lengthy, hiring procedure carried out by the OPM.³³ By re-classifying ALJs to the “excepted service,” the EO vests within agencies the flexibility and discretion to formulate new processes of their own, tailored to their needs. The only minimum requirement under the EO is license to practice law.³⁴ Litigation experience and competency testing are no longer formally required. By placing hiring more immediately in the hands of agencies, the EO provokes concern that agencies will have undue influence in ALJs decision-making, a concern that was foremost on the minds of the legislators enacting the APA and providing for the now defunct OPM process, but it also increases agency control of sources of policymaking. I will now turn to the EO’s directive with an emphasis on the justifications that re-focus the policy change away from concerns for adjudicative fairness and towards claims of administrative policymaking control.

c. Executive Order 13843

The EO alters federal hiring policy for ALJs, exempting the office from competitive service under the APA and nullifying the OPM process just described. Citing presidential power to provide for “necessary exceptions” to competitive service,³⁵ the EO leverages both past criticisms of the OPM process and the decision in *Lucia* in order to place appointments in the hands of administrative agency heads, themselves political appointees of the President. In order to do so, the EO strengthens ALJs ties to administrative policymaking and justifies itself on the proposition that these powers are properly exercised by agents closely tied to the agencies whose powers center upon that policymaking.

³³ 5 C.F.R. § 930.201(b).

³⁴ Executive Order 13843, *supra* note 10.

³⁵ 5 U.S.C. §§ 3302(1).

Section One of the EO begins with the expression that ALJs are “impartial and committed to the rule of law.”³⁶ Citing *Lucia*, the EO further observes that ALJs discharge “significant duties and exercise significant discretion in conducting proceedings.”³⁷ Coupled with this discretionary authority, the policy change is motivated by the recognition that “the role of ALJs have increased over time and ALJ decisions have, with increasing frequency, become the final word of the agencies they serve.”³⁸ Formally, the invoked “increase” in finality is probably inaccurate.³⁹ Nonetheless, empowered with discretionary and presumed final authority, these “inferior Officers,” subject to the Appointments Clause, are now appointed by the agencies they serve on the justification that policymaking through adjudication is properly controlled by the agency head. The President, as ultimate executor of the law and administrative policymaking, therefore, replaces OPM from the process of appointing ALJs.

d. Unitary Theory and the Office of the Solicitor General’s Memorandum

The presidential action taken by the EO is paradigmatic of unitary executive theory. It licenses the president with unfettered and presumed constitutionally-sanctioned control of the administrative apparatus. Unitary theory relies heavily on a particular reading of the Vesting Clauses.⁴⁰ As opposed to the understanding favored by Hamilton that the vesting clauses enumerated a number and method of selection of officers,⁴¹ unitary executive theorists

³⁶ Executive Order 13943, *supra* note 10.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ 1992 ACUS Report, *supra* note 27, at 801 (“in the 1930’s, adjudication was the principle method agencies used to promulgate policies” and later describing how this principal function lessened as agencies began the practice of formal and informal rulemaking).

⁴⁰ See generally Calabresi and Prakash, *supra* note 8.

⁴¹ Alexander Hamilton, *The Federalist Papers: Number 82*, The Avalon Project, Yale Law School (2008).

understand the Vesting Clause to be a broad grant of power in Article II.⁴² From this perspective, the president is entitled to unilateral control over the administrative state and may manifest that control in a variety of ways.⁴³ Critics of this theory—Hamilton himself notwithstanding—reject this understanding on constitutional, historical, and pragmatic grounds.⁴⁴ Yet, unitary executive theory has manifested itself throughout executive action in recent decades.⁴⁵

To understand how unitary executive theory pervades this action, consider the SG memorandum accompanying the EO. The memorandum spelled out the positions the Solicitor General was prepared to take in future litigation concerning ALJ appointments. Therein the Court's ruling is translated into an extension of *Lucia* and the EO to appointments of all ALJs, including ALJs presiding over non-adversarial proceedings, which are un contemplated by the majority opinion in *Lucia*. Thus, the holding in *Lucia* will extend past SEC ALJs and even past all federal ALJs: “the Department of Justice understands the Court’s reasoning, however, to encompass all ALJs in traditional and independent agencies who preside over adversarial proceedings and possess the adjudicative powers highlighted by the *Lucia* majority” and that “many [other non-ALJ officials—often termed “administrative judges” or “administrative appeals judges”] will qualify as inferior officers under *Lucia*.”⁴⁶ What this memorandum does in practice is rein in much of the federal administrative judiciary, positioning it under the control and supervision of the President and the President’s appointees whose enforcement actions ALJs are tasked with adjudicating.

⁴² See generally, Calabresi and Prakash, *supra* note 8.

⁴³ *Id.*

⁴⁴ See generally, Cass R. Sunstein and Lawrence Lessig, “The President and Administration,” 94 *Columbia Law Review* 1 (1994).

⁴⁵ See generally Peter M. Shane, *Madison’s Nightmare: How Executive Power Threatens American Democracy*, (Chicago: University of Chicago Press, 2009).

⁴⁶ SG memo, *supra* note 11, at 2.

That reining in is unitary executive theory, in vivid, present-day practice. It is, indeed, a “move toward a more unitary Executive.”⁴⁷ And it does what Justice Breyer cautioned against in his concurrence: it “risk[s] transforming administrative law judges from independent adjudicators into *dependent* decisionmakers.”⁴⁸ It does so precisely because independence is antithetical to unitary theory—a truly unitary Executive leaves little to no space for independence.

In the remaining parts of this paper, I demonstrate that—even accepting the unconvincing Vesting Clause argument offered by unitary executive theorists—over-interpreting *Lucia*, as unitary executive theory does in the EO and SG memorandum, is untenable as a matter of history, statute, and doctrine in the case of ALJs. The argument against executive control of appointments for ALJs applies equally or more forcefully to appointments of AJs, whom the Office of the Solicitor General seeks to sweep into the fold by the memorandum. AJs maintain few of the statutory protections for independence that ALJs enjoy in terms of appointment, salary, tenure, and removal, yet the body of AJs in the administrative agencies has grown considerably, outstripping ALJs and certainly Article III judges in case load per year. Not only is independence baked into our constitutional commitments to due process and separation of powers, but, as a matter of judicial legitimacy, it is a cornerstone of the common law tradition.

e. Summary

Thus far the jurisprudential motivation for the EO, the defunct OPM selection process, and unitary executive theory have been discussed in relation to the EO’s alteration of ALJ

⁴⁷ Guidance on ALJs, *supra* note 8, at 1123.

⁴⁸ *Lucia*, *supra* note 1, at 6 (Justice Breyer, concurring in part and dissenting in part, cautions that this may result if the ruling in *Free Enterprise Fund v. Public Company Accounting Oversight Board* also applies to ALJs following *Lucia*).

appointments. Jurisprudence tied SEC ALJs to special trial judges, ruling them “inferior officers” and therefore subject to the Appointments Clause. The EO then exempted ALJs from the competitive service hiring done by the OPM, which carried out an extensive examination of candidates and, crucially, provided a layer of separation from agency influence. Finally, the SG memorandum extended *Lucia* and the EO’s directive to nearly all agents in the federal administrative judiciary. I have sought to succinctly explain what is new in the federal administrative judiciary and will now turn to what is lost and why it should remain intact, contrary to unitary executive theory and the EO-SG memorandum.

Part II: Administrative Procedures Act

The Administrative Procedures Act (APA) forms the basis for administrative adjudications. It defines the powers and protections of ALJs, the form of proceedings over which they generally preside, and the methods of review available to agencies.⁴⁹ However, the developmental origin of the federal administrative judiciary lies with agency examiners.⁵⁰ These officers, later termed “hearing examiners” and ultimately renamed “administrative law judges,” operated as both adjudicators and rule-makers.⁵¹ A report on the subject of hearing examiners was written by the Attorney General’s Committee on Administrative Procedure (hereafter “the Final Report”), among several things in response to concerns about the reality of a fair trial and unbiased evidentiary fact-finding under hearing examiners closely aligned with the agencies over whom they were supposed to be impartially adjudicating.⁵² This report would ultimately inform the APA on the topic of hearing examiners. By tracing this development below, it will become

⁴⁹ 5 U.S.C. § 554 (a), (b), (c), and (d).

⁵⁰ 1992 ACUS Report, *supra* note 27, at 799.

⁵¹ 1992 ACUS Report, *supra* note 27, at 800-801.

⁵² 1992 ACUS Report, *supra* note 27, at 801; the Final Report, *supra* note 25, at 1-2.

clear that the lessons of the early 20th century called for a clear division between the commissioners who investigated and prosecuted cases pursuant to a rule or regulation and the hearing examiners who tried cases arising under those regulatory policies.⁵³ When the two powers were united in a single hearing examiner, as they originally were, adjudicative fairness concerns rightfully arose.⁵⁴ There is little reason to believe similar objections will not resurface with the EO's vesting of both powers in agency heads as rule-makers and appointers of ALJs. That structure reintroduces ominous concerns about governmental overreach, agency influence, and biased (for job security) evidentiary fact-finding.

a. Hearing Examiners

Administrative “examiners” first appeared in 1906 when Congress authorized the Interstate Commerce Commission (ICC) to appoint examiners under the Interstate Commerce Act, and in 1914 the Federal Trade Commission (FTC) was authorized to appoint similar examiners.⁵⁵ These examiners were quite unlike modern ALJs. Although they presided over hearings, examiners were not confined to APA-codified, “judge-like” roles.⁵⁶ They often investigated cases themselves and discussed case outcomes with agency heads, two practices explicitly removed from the office in subsequent legislation.⁵⁷

⁵³ *Ramspeck v. Federal Trial Examiners Conference* 345 U.S. 128 (1953) (indicating that hearing examiners were dependent before the APA, but the APA addressed concerns by adding independence and tenure to the office).

⁵⁴ *Lucia*, *supra* note 1 at 6, (Justice Breyer concurring and citing *Wong Yang Sung v. McGrath*, 339 U.S. 46 (1950), “referring to removal protections as among the Administrative Procedure Act’s ‘safeguards...intended to ameliorate’ the perceived ‘evils’ of commingling of adjudicative and prosecutorial functions in agencies”).

⁵⁵ 1992 ACUS Report, *supra* note 27, at 799.

⁵⁶ *Id.*

⁵⁷ 5 U.S.C. § 554(d).

At this time, agencies primarily used adjudication to promulgate rules. Agency heads sat on tribunals, oversaw investigations and prosecutions, and generally used adjudication to issue rules and regulations.⁵⁸ However, the concentration of investigative, prosecutorial, and adjudicative powers in one tribunal or agency head drew criticism for the apparent unfairness of a trial under such conditions.⁵⁹ To these criticisms, the report of the Committee on Administrative Procedure of the Attorney General was to respond. Upon those findings and suggestions, Congress divided investigative and policymaking authority from fact-finding and adjudicative authority and vesting it in the agency head and the hearing examiner, respectively, although some overlap remains.⁶⁰

b. Report of the Attorney General's Committee on Administrative Procedure

Observing administrative experience with hearing examiners, the Final Report provided guidance and recommendations for the Attorney General and Congress on the state of administrative procedures, including administrative justice.⁶¹ Although not all recommendations were translated into law, the Final Report formed the foundation upon which statutory administrative procedures were considered and enacted. The Final Report considered the “advantages of administration as compared to executive action.”⁶² Referring to the differences between administrative adjudication and executive action, the Committee observed that “administrative adjudication, where practicable, insures greater uniformity and impersonality of action.”⁶³ The very fact that this distinction existed between administration and the executive

⁵⁸ 1992 ACUS Report, *supra* note 27, at 801.

⁵⁹ 1992 ACUS Report, *supra* note 27, at 800.

⁶⁰ 1992 ACUS Report, *supra* note 27, at 801.

⁶¹ *See generally*, Final Report, *supra* note 25.

⁶² Final Report, *supra* note 25, at 11.

⁶³ *Id.*

runs contrary to unitary executive theory, as embodied in the EO and was a conscious divide in the minds of the legislators and administrators who created and formalized administrative adjudication.

From the Final Report, three important understandings come across: (i) that hearing examiners/commissioners were known to be acting as essential parts in agency policymaking, (ii) that the criteria for hearing examiner/commissioner was independence and expertise, and (iii) that those criteria would facilitate “public confidence” in administrative adjudication.

The Final Report acknowledged that, although agency heads technically reserved the power to preside in formal hearings, pragmatism and necessity meant that hearing examiners presided over formal hearings.⁶⁴ However, the Report acknowledged that “the hearing commissioner is in a very real sense acting for the head of the agency.”⁶⁵ On that basis, “the Committee concludes that the agencies themselves should have an important share of the responsibility of selecting the persons who shall be hearing commissioners. *But it concludes also that before anyone should undertake these highly responsible duties of a hearing commissioner his judicial qualifications and capacity should be investigated and approved by a body independent of the agency*” (emphasis added).⁶⁶

Further complicating matters, the role of hearing examiners in the several agencies varied in duties and powers.⁶⁷ However, procedurally, certain principles applied throughout. At that

⁶⁴ Final Report, *supra* note 25, at 43, (“The heads of the agency cannot, through press of duties, sit to hear all the cases which must be decided. *Their function is to supervise and direct and to hear protests of alleged error*” (emphasis added)).

⁶⁵ Final Report, *supra* note 25, at 47.

⁶⁶ *Id.*

⁶⁷ *Id.*, at 44-45 (“In most of the agencies the person who presides is an adviser with no real power to decide. In a few agencies the hearing officer’s or board’s decision is conclusive unless appealed by the parties to the head of the agency or unless the agency head itself takes the case up for consideration after the initial decision.”).

formal hearing, “it is necessary that the evidence shall be heard and the facts shall be reported to the agency head by an official who shall command public confidence both by his capacity to grasp the matter at issue and by his impartiality in dealing with it.”⁶⁸ The observations were thus two-fold: evidentiary fact-finding was done by an *impartial* and *expert* official and that these imperatives were largely driven by the need to legitimate administrative adjudication in the eyes of the public—to “command public confidence.”

On the basis of these observations, first and foremost, the Final Report suggested appointment of hearing examiners by an Office of Federal Administrative Procedure, comprised of a director appointed by the President with the advice and consent of the Senate, a Justice of the D.C. Court of Appeals, and the Director of the Administrative Office of the United States Court, an appointee of the United States Supreme Court.⁶⁹ This structure intended to “assure that these hearing commissioners will be independent and of high calibre commensurate with their duties and powers.”⁷⁰ After a broad and thorough analysis of hearing examiners, the Committee conceived of hearing examiners as primarily adjudicators, notwithstanding their well-acknowledged rulemaking authority, requiring selection after assessment by a body independent of their agency.

Although Congress did not adopt the recommendation completely, this method is essentially what was adopted in the OPM selection process followed by agency appointment, but it is a far cry from the EO’s appointment by a political appointee of the President alone. From the observations and recommendations of the Final Report, it is clear that consensus upheld

⁶⁸ *Id.*, at 43.

⁶⁹ *Id.*, at 6.

⁷⁰ *Ibid.*

independence and expertise in hearing examiners. These characteristics, certainly not executive or agency control, molded the office.

c. Statutory Provisions

Acting upon the recommendations in the Final Report, the APA conferred upon ALJs their exercisable adjudicative authority while patently ensuring some level of expertise and protecting them from agency influence. Under the APA, (i) the agency, (ii) one or more members of the agency, or (iii) one or more ALJs may preside over formal hearings.⁷¹ In their capacity presiding over these hearings, the agency, some subgroup of members of the agency, or ALJs are empowered to administer oaths, issue subpoenas, rule on evidence, take depositions, and make decisions.⁷² As stated above, at the passage of the APA and as a matter of practicality, all or most agencies operated such that ALJs, not members of the agency and almost never the agency, presided over these formal hearings.⁷³ Thus, the protections afforded to ALJs were reasonably expected to apply to nearly all administrative adjudications at the time. Agencies have been more open to alternative presiding options since that time, and use of the aforementioned, and even-less-independent AJs has grown considerably.⁷⁴

When a presiding ALJ decides upon a case, that decision “becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency.”⁷⁵ This provision empowers ALJs with the authority of the federal government to adjudicate (potentially with finality) over deprivations of individual property interests. Crucially, however, the agency itself always reserves review power and may reverse the ALJ decision

⁷¹ 5 U.S.C. § 556(b).

⁷² 5 U.S.C. § 556(c).

⁷³ Final Report, *supra* note 25, at 43.

⁷⁴ See generally, Kent Barnett, “Against Administrative Judges,” 49 UC Davis. L. Rev. 5 (2016).

⁷⁵ 5 U.S.C. § 557(b).

pursuant to stated or unstated policy. This review power recognizes that promulgation of rules is the prerogative of the agency under its delegated statutory authority.

Immediately following the subsections codifying the above powers, the APA enumerates the manner in which these presiding officers (originally, employees) shall be made independent of sources of potential bias: some external and some internal to the agency under which the proceeding is carried out.

The APA stipulates that no “interested person” make an *ex parte* communication on the merits nor can any member, ALJ, or other officer make an *ex parte* communication with an interested person outside of the agency.⁷⁶ These prohibitions guard against internal bias in the proceeding itself. But, a second and more relevant layer of independence separates ALJ presiders from the agency. In nearly every structure defining the office of an ALJ, the APA protected ALJs from agency influence and direction. These protections, too, follow from the Final Report.⁷⁷ Before the EO, ALJs were hired through a long and fine-tuned OPM selection process, described above. ALJ salary was and is similarly controlled by statute and the OPM.⁷⁸ “For cause” removal means that agencies may not unilaterally remove ALJs.⁷⁹ Instead, agencies must convince another body, the Merit Systems Protection Board (MSPB), that good cause exists for removal.⁸⁰

In all of these provisions, the APA “protects ALJs...from their agencies.”⁸¹

d. Summary of Statute and Intent

⁷⁶ 5 U.S.C. § 557(d)(1).

⁷⁷ Final Report, *supra* note 25, at 46.

⁷⁸ 5 C.F.R. § 930. 201(e)(2)

⁷⁹ 5 U.S.C. § 7521(a).

⁸⁰ *Ibid.*

⁸¹ Kent H. Barnett, “Why Bias Challenges to Administrative Adjudication Should Succeed,” 81 Mo. L. Rev. 1023 (2016): 102 (comparing AJ and ALJ protections and indicating that, while AJs are dependent, ALJ independence is protected by the APA).

In the language of the Final Report and provisions in the APA, the Committee and Congress were evidently aware of hearing examiners' roles in agency policymaking when mandating that appointments go through the OPM process. Of primary concern was the need to provide for selection of impartial and expert persons. ALJs appointed with those criteria would realistically be afforded "public confidence." Moreover, as the title change from "hearing examiner" to "administrative law judges" suggests, subsequent developments motivated a need to alter ALJs' title in recognition of the prestige and actual practices of the office.⁸² Thus, throughout the reports and committees concerned with identifying the position of ALJs it is clear that ALJs consistently occupied an adjudicative and administrative in-between that required a delicate balance. Dual OPM-agency selection process attempted to achieve that balance.

Part III: Adjudication and Administration

Despite the division between administration and executive action that animated legislators, in the modern era of presidentialism, unitary executive theory has surged into prominence, including, indeed, recent headlines about the derogation of inspectors general, as well as executive branch whistleblower protections.⁸³ Modern unitary executive theory insists that the President is empowered by the Constitution to nearly unfettered discretionary control of administration.⁸⁴ On the question of administrative law judges, however, unitary executive theorists must reconcile claims to near absolute control in law execution with administrative

⁸² *See generally*, Roger C. Cramton, "A Title Change for Federal Hearing Examiners? 'A Rose by Any Other Name...,'" 40 *Geo. Wash. L. Rev.* 5 (1972): 1 (citing the 1955 Hoover Commission's Task Force on Legal Services and Procedures wherein the Task Force observed that hearing examiners act with "independence of judgment which is expected of judges," Cramton insists that similar understandings of the practices of hearing commissioners motivated the push that eventually convinced Congress to formally adopt the title change).

⁸³ Natasha Bertrand, "A searing time for whistleblowers': Ousted intel watchdog wrote letter to Schumer," *Politico*, April 4, 2020.

⁸⁴ *See generally*, Calabresi and Prakash, *supra* note 8.

officers more closely tied in power, in practice, and in protections to the judicial branch.⁸⁵ This modern executive-judicial conflict—or, in more common parlance, the fox guarding the henhouse—is the source of tension within the EO-SG memorandum and independence issues assessed here. Programmatic and distinctly political top-down control is incompatible with first and continuing principles of fair adjudication in the common law and American constitutional framework.

Up to this point, I have assessed the doctrinal, historical, and statutory basis for the office of ALJs. I will now turn to modern practices—in adjudication and in administration—which complicate the status as described. Part III hereafter describes judicial first principles and their application to the position of ALJs. While the EO is correct to base its assertion of executive control on the observation that ALJs often issue decisions carrying rulemaking authority,⁸⁶ an equally legitimate appeal to fundamental principles of fair adjudication perseveres both as a question of constitutional principles and current doctrine. ALJ written decisions, albeit controversially, are afforded deference in Article III courts and have the power, sans agency reversal, to deprive individuals of their property interests. ALJ fact-finding is necessarily severed from executive control, and impartiality doctrine is uncondusive to an agency that can unilaterally appoint its own adjudicators as well as investigate and prosecute its cases. After all, no man is to be judge in his own case. Yet, in the final section, we will see that the OPM selection process is a form of outdated and ineffective administration, which likely needs to be updated.

a. Fact-finding and Fact Deference

⁸⁵ *Butz v Economou*, *supra* note 3.

⁸⁶ 5 U.S.C. § 557(b).

The practice of evidentiary fact-finding poses an interesting and unsettling issue in administrative law and the federal government more broadly. Unitary executive theory postures itself as a source of increased accountability. The argument follows that the Presidency is the office best able to be held electorally accountable to the people and public opinion, a consequence of being the sole nationally elected representative of the people.⁸⁷ As applied to presidential control of administrative fact-finding, however, unitary executive theory falls short on accountability. Elections are not the only source of (distant and delayed) accountability available to the public. Juries “pitt[ing] liberty-loving localists against an oppressive imperial center...embodied all that patriots held dear.”⁸⁸ Right to a trial by jury is constitutionally protected.⁸⁹

Juries decide facts, a practice, indeed dating back to the Magna Carta, originating in outcries *against* executive control.⁹⁰ To assert greater executive control over finders of fact contradicts both our common law tradition and expectations and bedrock constitutional and pre-constitutional authority as the Supreme Court elaborated in its decision in *Duncan v. Louisiana*.⁹¹ Juries have two advantages as finders of fact:⁹² (i) traditionally, they were locals of the area in

⁸⁷ *Madison's Nightmare*, *supra* note 45, at 144.

⁸⁸ Akhil R. Amar, *The Constitution Today: Timeless Lessons for the Issues of Our Era*, (New York: Basic Books, 2016), 170.

⁸⁹ U.S. Const. amend. VI. (“The accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed”); U.S. Const. amend. VII (“In Suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved”).

⁹⁰ Evan Bernick, “Is Judicial Deference to Agency Fact-Finding Unlawful?,” 16 *Geo. J.L. & Pub. Pol’y* 27 (2018), 50. (citing Philip Hamburger, *Is Administrative Law Unlawful?* (2015), “due process of law was forged in England in the context of opposition to royal prerogative courts—courts staffed not by common-law judges with a duty of independent judgement but by royal officials who were far from neutral concerning the exercise of monarchical power”).

⁹¹ *Duncan v. Louisiana*, 391 U.S. 145 (1968).

⁹² Juries themselves are sometimes dangerous institutions and known to enact racial and other biases. However, reform movements, like the Vera Institute’s Juror Project, recognize the need

which the crime took place and therefore could be better positioned to assess testimony and witnesses and (ii) juries are deliberative. “Twelve heads in the jury box would often be better—less idiosyncratic, more representative, less corruptible—than one head on the judicial bench. Juries...might be more skeptical of central-government edicts than might a federal judge appointed in the national capital.”⁹³ Idiosyncrasies and unilateral edicts are inherent to a unitary executive, and a unitary executive is, on those counts, ill-suited to accountability through evidentiary fact-finding in adversarial proceedings.

Federal judges, cognizant of faithful interpretation of the Constitution and Bill of Rights, disclaim fact-finding power. On occasion, judges do assume a quasi-fact-finding function—in summary judgments, for example—however, these practices are often criticized.⁹⁴ ALJs do, of course, act as finders of fact.⁹⁵ They take testimony and rule on evidence. Pragmatically, we cannot have juries present in every administrative adjudication. But the principled advantages of a jury—expertise and independence—in fact-finding continues to guide best practices when executive agency control is denounced. Subject-matter expertise in the technical milieu of administrative agencies does justify removal of civic participation from ALJ fact-finding, but it does not follow that the officers, operating as fact-finders in cases where the power of the federal government agencies operates against private citizens, should be appointed directly by those same litigating-party agencies.

for and the advantages of juries in court. Additionally, courts uphold procedural steps, like *Batson* challenges, to end explicit partiality in jurors.

⁹³ Akhil R. Amar, “The Law of the Land: A Grand Tour of Our Constitutional Republic, (New York: Basic Books, 2015), 237.

⁹⁴ *See generally*, John Bronsteen, “Against Summary Judgment,” 75 *Geo. Wash. L. Rev.* 522 (2007).

⁹⁵ 20 CFR § 416.1453(a); 5 U.S.C. § 557(c)(A).

Evidentiary fact-finding is perhaps the ALJ's most unique and useful attribute. ALJs owe much of their title and prestige to their capacity to grasp technicalities in particular industries and areas of law and translate them into factual determinations.⁹⁶ As seen in the 1992 ACUS study, hearing examiners' evidentiary fact-finding was foremost on the minds of the committee members and administrators concerned with impartiality in administrative justice.⁹⁷ Facts, after all, determine outcomes. Clearly, from the discussion of the Final Report and APA above, ALJs were important and appropriate finders of fact, and protecting their independence from prosecutorial and investigative agents in carrying out that function was imperative.

Today, not only do ALJs rightfully continue to be the first finders of fact in administrative proceedings, but factual determinations in formal adjudications are afforded deference upon review in Article III courts and may only be overturned if determined to be "unsupported by substantial evidence."⁹⁸ In informal adjudications, fact-finding, although unnecessary, is generally reviewed under the "arbitrary and capricious" standard by Article III courts.⁹⁹ Again, this "fact-deference" is a source of some contention in the administrative state.¹⁰⁰ Indeed, for people facing regulatory violations, a structure in which "judges broadly defer to the factual findings made by agency adjudicators...and those findings can be determinative of whether a regulatory violation has taken place"¹⁰¹ appears partial to their adversary, the agency, if that agency directly appointed those agency adjudicators.

⁹⁶ Scalia, *supra* note 23, at 73.

⁹⁷ 1992 ACUS Report, *supra* note 27, at 801.

⁹⁸ 5 U.S.C. § 706(2)(E).

⁹⁹ 5 U.S.C. § 706(2)(A); Bernick, *supra* note 90, at 41.

¹⁰⁰ *See generally*, Bernick, *supra* note 90.

¹⁰¹ *Id.*

In order to maintain a degree of faith to the principles behind jury fact-finding, ALJs must strive to embody the quality that is unique to a jury: independence from the government who is prosecuting the case. In this context, fact-deference continues to be appropriate, but when administrative adjudicators are partial then fact-deference may introduce pro-agency bias.

b. Bias

Powerful concerns for impartiality underlie many of the issues that arise when an ALJ is appointed directly by an agency with no independent intermediary. An institution or person making a final decision in a case must be unbiased with respect to the parties present. Although much of the bias concern focuses on removal protections, appointments likewise create the opportunity for biased adjudication. Whether focusing on removal or appointment independence, both indicate that unitary theory's direct executive control is conducive to "agency-party" bias and the subordination of due process in favor of government overreach.

Administrative bias concerns have been raised against AJs, but ALJs have avoided similar condemnation because "AJs lack the statutory independence of ALJs."¹⁰² That independence results, in part, from the old appointment structure: "a merit-focused statutory selection process" wherein the OPM "limits the choice to three highest-scoring candidates."¹⁰³ By contrast, AJs, accused of appointment by a structure that lends itself to partiality, are appointed directly by agencies "not constrained by similar statutory procedures or an independent agency's oversight."¹⁰⁴ While removal protections are also an important guarantee against bias, the appointment structure directed by the EO does bring ALJs a bit closer to their

¹⁰² Barnett, *supra* note 81.

¹⁰³ *Id.*, at 1025.

¹⁰⁴ *Id.*, at 1025.

counterparts, AJs, thereby bringing them closer to the bias concerns directed against similarly situated administrative adjudicators.

The Supreme Court has insisted that ALJ appointment structures predating the EO “assure that the hearing examiner exercises his independent judgement on the evidence before him, free from pressures by the parties or other officials within the agency.”¹⁰⁵ In *Free Enterprise Fund*, the Court, addressing removal protection, observed that “many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions...or possess purely recommendatory powers.”¹⁰⁶ In adjudication, “one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter’s will.”¹⁰⁷ Indeed, this premise is the cornerstone of our constitutional commitment to separation of powers and checks and balances. Essentially, the status quo before the EO properly protected against biased adjudicators, but with *Lucia* disrupting appointments (and potentially removal, too) the new processes will have to remain consistent with precedent dictating where bias seeps into administrative adjudications. The EO is inconsistent insofar as it introduces agency influence.

c. Expertise and Selective Certification

Although the argument thus far has been against the EO’s appointment policy, the OPM process fares only slightly better from an administrative perspective. It has been the attention of numerous critics throughout its operating life, and the EO’s firmest basis is in its objective to provide for a better administrative process. From the “rule of three” to veteran preference to

¹⁰⁵ *Butz v Economou*, *supra* note 3.

¹⁰⁶ *Free Enterprise Fund et al. v. Public Company Accounting Oversight Board*, 561 U.S., at 507 (2010).

¹⁰⁷ *Humphrey’s Executor v. United States*, 295 U.S. 630 (1935).

general selection procedure, the Civil Service Commission (CSC) was almost immediately criticized for its failures.¹⁰⁸

Despite adjustments in response to these criticisms, it has long been argued that the Civil Service Commission (now, the Office of Personnel Management) is unable to properly assess the qualifications needed for adequate service as an ALJ. Pragmatically, OPM personnel, who are often several tiers below ALJs on the General Schedule (GS) pay scale, do not have the background knowledge to accurately assess the qualities and standards of a good ALJ candidate.¹⁰⁹ Moreover, difficulties in maintaining quality arise over questions as to who may handle promotions and tenure.¹¹⁰ Veteran preference is an outdated practice and can be too determinative of outcomes, considering that veteran status does not necessarily translate into ability and talent as an adjudicator.¹¹¹ These issues, and the length of the OPM process, frustrated agencies and ALJs alike, as caseloads rose and quality became more important.

By the 1960's, agencies were avoiding hiring from the OPM register.¹¹² Due to frustrations with the OPM procedure, two avoidance methods had been used: selective certification and lateral transfers, both of which allowed agencies greater discretion in filling their ALJ positions. Lateral transfers involve the transfer of an ALJ from one agency to

¹⁰⁸ See generally, President's Conference on Administrative Procedure, "Report of the Committee on Hearing Officers," 51 (1954).

¹⁰⁹ Scalia, *supra* note 23, at 67. ("Roving officials from the Civil Service Commission—generally of a grade level much lower than that of the examiners themselves—with no first-hand knowledge of the substantive or procedural aspects of the matters with which the examiners had to deal, were to recommend to the Commission...the ranking of the individual examiners for the purposes of promotion").

¹¹⁰ *Ibid.*

¹¹¹ 1992 ACUS Report, *supra* note 27, at 841. ("to select a candidate from among the top three on the register combined with the mechanics of Veterans preference (which adds 5 to 10 points to a score) critically distorted the supposedly merit-based system of appointment.").

¹¹² *Id.*, at 954 ("the problem, in a nutshell, is that the hiring agencies do not feel that the current rating system and selection process permits them to hire the best qualified applicants.")

another.¹¹³ Selective certification allowed agencies to essentially keep their own lists of selectively certified candidates from which to choose if an ALJ position opened or was added. Selective certification was granted to agencies who, like the SEC, successfully argued the need for their ALJs to have “specialized experience.”¹¹⁴ This practice allowed agencies to respond quickly to administrative needs and also introduced specialization as a metric for assessing candidates. The advantages were two-fold: (i) agencies could easily manage caseloads, improving existing ALJs’ capacity to meaningfully assess each case, and (ii) it circumvented the OPM hiring process, which too often was skewed toward generalists or veterans due to the point preference system. However, in 1984, the practice was discontinued by OPM due to concerns about “‘inbreeding’ of pro-agency lawyers,” although “priority consideration” was still permitted.¹¹⁵

d. Summary

Administrative experience since the formal creation of ALJs and their selection process reveals two lessons. First, the OPM selection process was cumbersome, lengthy, and often too constrained by other qualifications and preferences to select for expertise. Second, many agencies preferred other registers, then lateral transferring, to hire new ALJs, or they avoided hiring ALJs altogether. That is, the OPM selection process was falling into disuse from a pragmatic standpoint. That being said, abdication to agencies was un contemplated and crucially threatens adjudicatory impartiality in fact-finding, introducing the appearance or even actuality of bias to the public and interests involved. Thus, while the OPM selection process should be

¹¹³ *Id.*, at 942.

¹¹⁴ Office of Personnel Management, “Announcement No. 318, Administrative Law Judge,” (1979), 18-21.

¹¹⁵ 1992 ACUS Report, *supra* note 27, at 964-65.

revised and improved, appointment by agencies introduces far more dangerous concerns than bureaucratic inefficiency: biased adjudication and fact-finding, and government overreach.

Part V: Appointment Alternative

Discretionary ALJ (and AJ) appointment by agency heads counteracts the protections set in place by Congress. The independence instituted by an OPM nomination process, from which agencies would choose to appoint, qualified ALJs for their adjudicative function. That appointment process is a necessary but insufficient protection for ALJs: tenure, salary, and removal are equally as important. Although tenure and salary protections are relatively settled, layered independence in appointment is likely threatened by an over-expansive interpretation of *Lucia*. Although I have chosen to focus on appointment, other protective provisions are equally constitutive of the judicial role, with its imperatives of independence and expertise.

Not only does discretionary ALJ (and AJ) appointment contradict congressional intent, but discretionary appointment by agency heads delegitimizes the basis for fact-deference in Article III courts. On these grounds, the EO and SG memorandum is poor policy although it asserts its jurisdiction under a provision for presidential control “as conditions of good administration warrant.”¹¹⁶

Before delving into alternatives, formal distinctions must be made. The EO and SG memorandum assert that the majority of the federal administrative judiciary are subsumed under the Court’s ruling in *Lucia*. However, the Court specifically addressed the employee-officer question on the topic of ALJs presiding over adversarial hearings.

Modern administration is much more complex than it originally was. The number of agencies and type of agencies employing ALJs and AJs have grown. The Social Security

¹¹⁶ 5 U.S.C. §§ 3302(1).

Administration (SSA), for example, now employs more ALJs than any other agency, but its hearings are non-adversarial.¹¹⁷ Often determinations of SSA ALJs require an assessment of medical records in order to accurately apply the law.¹¹⁸ The ALJs presiding over these hearings exercise different powers than do the ALJs presiding over regulatory enforcement actions by the SEC. Unitary executive theory views both as administrative functionaries and claims undifferentiated control over both; however, the Court’s decision is more precise and did not extend its ruling to non-adversarial ALJs.

The divide between ALJs and AJs is even more dramatic. As noted above, AJs are significantly closer to dependent deciders than ALJ-esque adjudicators, regardless of the powers they exercise.¹¹⁹ Both non-adversarial ALJs and AJs are, so far, unaffected by the decision in *Lucia*. Although the OPM selection process is not perfect—and in all likelihood should be amended—the holding in *Lucia* does not sanction or justify the action taken in the EO and SG memorandum to upend appointments of non-adversarial ALJs and AJs.

a. Alternatives

Neither agency- nor OPM- led appointment procedures are desirable. One replacement option would be appointment by an independent agency, specifically overseeing federal ALJs.¹²⁰ The advantage of an independent agency specifically tasked with ALJ appointments would lie in

¹¹⁷ 1992 ACUS Report, *supra* note 27, at 863. (“The Social Security Administration employs more than 850 ALJs, almost three-quarters of all of the ALJs in the federal government... The hearing at SSA is a nonadversarial hearing in the sense that no one serves as an advocate for denial of the claim.”).

¹¹⁸ *Id.*, at 1050 (“Benefits decisions are characterized by large volume caseloads and the application of a complicated legal standard to a variety of medical conditions.”).

¹¹⁹ Barnett, *supra* note 74.

¹²⁰ See generally, Federal Administrative Law Judges Conference, *Advancing the Judicial Independence and Efficiency of the Administrative Judiciary: A Report to the President-Elect of the United States*, 29 J. Nat’l Ass’n Admin. J. Judiciary Iss. 1 (2009).

its ability to adequately select for expertise. However, some of the Appointments Clause issues invoked in the EO would apply equally to a structure under which ALJ appointments were made by an independent agency.

Alternatively, the path forward may, as it often does, lie behind us, in lessons from history. Instead, of agency-led appointment, ALJs could be appointed by an independent body, as is the case for special trial judges in United States Tax Court. The *Lucia* decision relied upon comparisons to special trial judges in *Freytag*. These Tax Court judges are appointed by an independent Board. Congress could fortify judicial independence similarly by delegating ALJ appointments to a Court of Law, resolving Appointments Clause issues and maintaining a layer of adjudicatory independence from agency control.¹²¹ Presumably, the responsibility would fall to the United States Court of Appeals for the District of Columbia Circuit. As with the selection by Article III judges of United States magistrate judges, pursuant to the Federal Magistrates Act, a Court of Law would be more knowledgeable on the qualities and skills that make for a good judge than a G-13 level civil servant in the OPM and would uphold the need for ALJ independence and impartiality. In this way, administrative expertise and adjudicative independence would be maintained, while still allowing agencies review power and guaranteeing executive control of policymaking.

e. Conclusion

As observed, there are hybrid aspects of both policymaking and adjudication in the role of ALJs. This combination of functions and powers is common in a modern administrative state where execution, legislation, and adjudication are delegated to agencies whose expertise in the milieu of an industry or policy arena situates them best to create and carry out policy. Foregoing

¹²¹ See generally, Resolving the ALJ Quandary, *supra* note 26.

appropriate structural judicial protections need not follow from the importance of administrative expertise, however. If we still maintain allegiance to fundamental principles of fairness in fact-finding and adjudication, ALJs must not be selected with discretion by political appointees in administrative agencies, despite unitary theory claims that the President can so direct. It is the aim here to point to the improvidence of rendering administrative justice directly subservient to federal executive control. Realistically, appointment alone will not determine the dependency of ALJs upon their agency. However, it is one step in the wrong direction, and if Justice Breyer's apprehensions in *Lucia* are valid,¹²² removal protections may similarly be threatened, as could occur in the forthcoming *Seila Law* decision.

At its most basic theoretical level, unitary executive theory is improperly applied to an administrative apparatus that was conceived and built by legislators operating under a different theoretical understanding of the Constitution, administration, and the executive branch. Whether unitary executive theory has formalistic appeal should not be determinative and invalidate the vast regime of administrative justice created by Congress. If ALJs are now officers of the United States, then Congress must act to adjust the provisions for the appointment (and removal) of these vital judicial offices, created under different circumstances and functioning well for decades. Until that time, and although some imperfections and inefficiencies are evident, the well-tested OPM process remains intact and has given our country decades of adjudicatory independence, which should not be swept aside by an over-interpretation of *Lucia*.

At a practical level, Executive Order 13843 claims to advance the interests of good administration by aligning agency heads and agency ALJs more directly. Agencies appointing ALJs, subject to their own discretion, presumably have greater control over the rulemaking

¹²² *Lucia*, *supra* note 1.

function exercised by their ALJs. However, it has become clear that agency heads have always had and will continue to have adjudicative rulemaking authority through review power. This review and reversal power was sufficient to satisfy the needs for concentration of policymaking at the agency level in the eyes of Congress. As much as the Office of the Solicitor General's memorandum declared its intent to limit litigation on the ground of improper appointments, it has opened the door to the peril of partiality and overreach. The problem the EO solves is hardly a problem at all; the solution threatens more grave problems; its application exceeds the Supreme Court's ruling in *Lucia*; and a ready and workable and time-tested alternative exists. But all of this should come as no surprise when a new theory attempts to apply itself to old institutions.