Spring 2021
Vol. 30, No. 3

pass it on

The newsletter of the American Bar Association's Government and Public Sector Lawyers Division

Are Statutory Restrictions on Removing ALJs Constitutional?

Judicial Independence Questions Remain after *Lucia v SEC*

By Hon. Timothy Nemechek

Two and one half years ago, the United States Supreme Court issued its decision in *Lucia v. SEC*, 585 U.S.__, 138 S. Ct. 2044 (2018). The Court decided the issue of whether Administrative Law Judges (ALJs) were "Officers" under the Appointments Clause of the U.S. Constitution.[1] Answering in the affirmative, the Court decided that Securities and Exchange Commission's (SEC) ALJs were Officers of the United States because they exercised significant authority and occupied a position established by law. This article will review the significant question *Lucia* left unanswered as well as the potential long-term implications of the *Lucia v. SEC* decision.

Lucia v. SEC was an enforcement action the SEC filed against Petitioner, Raymond Lucia. The action alleged a violation under the Investment Advisers Act over a retirement savings strategy presentation Petitioner was using called "Buckets of Money". The SEC assigned ALJ Cameron Elliot to adjudicate the case, who held a hearing. After nine days of testimony and argument, ALJ Elliot imposed a $300,000 fine, along with a lifetime ban from the investment industry. Petitioner appealed to the SEC, arguing that the administrative hearing was invalid because the ALJ was not constitutionally appointed, as he was appointed by SEC staff members. The SEC rejected this argument and upheld the penalty. Petitioner appealed and ultimately cert was granted by the United States Supreme Court.

Writing for the 7-2 majority, Justice Kagan concluded that the SEC's ALJs were "Officers of the United States" and not simply employees of the Federal Government. Only the President, a court of law, or a head of department could appoint SEC ALJs under Art. II, § 2, cl. 2 [*Lucia* 138 S. Ct. at 2055] and the appointment of ALJ Elliot was unconstitutional. Justice Kagan, citing *Freytag v. Commissioner*, 501 U.S. 868 (1991), utilized that case's framework when it delineated between an officer and employee. The Court noted ALJs had "all the authority needed to ensure fair and orderly adversarial hearings". This included administering oaths, ruling on motions, regulating the course of a hearing, and regulating the conduct of parties and counsel. [*Lucia* 138 S. Ct. at 2053]. The Court found SEC ALJs had equivalent duties and powers as Special Trial Judges in *Freytag*, as they conducted adversarial inquiries, held a continuing office established by law (seen as an equivalent to lifetime appointment), and exercised significant discretion. The Court held ALJs were "inferior officers" and subject to the Appointments Clause. The Court of Appeals decision was reversed, and the case remanded for further proceedings.[2]

Justice Thomas wrote a concurrence (joined by Justice Gorsuch) in which he concluded that the original public meaning of "Officers of the United States" under the Appointments Clause should be utilized in deciding the question. Justice Breyer concurred in the judgment, but dissented, as he disagreed with the majority's failure to address job protections and removal of ALJs. Justice Sotomayor dissented and concluded federal ALJs were employees and not subject to the requirements of the Appointments Clause. Justice Ginsburg joined in this dissent.

In the immediate aftermath of *Lucia*, the SEC rectified the constitutional infirmity and all ALJs were appointed by the head of the SEC. Other federal agencies, including the Social Security Administration (which employs the most federal ALJs) followed suit. In addition, there were hundreds of pending cases in which non-constitutionally appointed ALJs had issued orders that were now null and void. These cases were directly impacted by the *Lucia* holding and required either re-hearing or other resolution.

On July 10, 2018, then-President Trump issued Executive Order No. 13843, titled "Excepting Administrative Law Judges from the Competitive Service". (83 Fed. Reg.

ABA AMERICAN BAR ASSOCIATION
Government and Public Sector Lawyers Division

32,755 (July 13, 2018.) Citing *Lucia*, the Executive Order noted: "at least some-and perhaps all-ALJs are 'Officers of the United States' subject to the Constitution's Appointments Clause". This included merit-based hiring and removal, which was administered by the Office of Personnel Management ("OPM"). Specifically, Executive Order No. 13843 noted: "that conditions of good administration make necessary an exception to the competitive hiring rules and examinations for the position of ALJ. These conditions include the need to provide agency heads with additional flexibility to assess prospective appointees without the limitations imposed by competitive examination and competitive service selection procedures." A new classification—Category F—was created that covered ALJs (by Executive Order No. 13957)[3] and, pursuant to a subsequent Memorandum issued by the Office of the Solicitor General, the heads of executive departments were authorized to make ALJ appointments without OPM approval.

Prior to Executive Order No. 13843, civil service protections were given to ALJs under the Administrative Procedure Act.[4] These protections have been in place for decades. Under these rules, ALJs were to be removed only on a showing of good cause, as found by the Merit Systems Protections Board (MSPB). The President has authority to remove members of the MSPB only for "inefficiency, neglect of duty or malfeasance in office". Executive Order No. 13843 exempted ALJs from the competitive civil service process, including competitive selection and examination. Coupled with the direction provided by the Memorandum issued by the Office of the Solicitor General, ALJs' merit-based job protections were very much in question over the past two years. Congress also did not take up the question of the federal job protections to which ALJs were entitled following *Lucia* and Executive Order No. 13843. Given President Biden's recent issuance of Executive Order 14003 (eliminating Category F), it appears that federal job protections have been restored to ALJs. However, the constitutional issue left unresolved by *Lucia* stands a very good chance to be taken up by the courts in the near future.

The *Lucia* Court specifically declined to decide the issue of whether statutory restrictions on removing Commission ALJs were constitutional. Justice Breyer called this the "embedded constitutional question" in *Lucia*. [*Lucia* 138 S. Ct. at 2057].[5] In this regard, Justice Breyer's dissent framed the most significant remaining issue which followed the Court's decision in *Lucia*. More particularly, are the statutory job protections established by Congress under the APA and MSPB in conflict with the holding that ALJs are Article II "Officers"? Justice Breyer noted that the elimination of job protections for SEC ALJs "would risk transforming administrative law judges from independent adjudicators to dependent decisionmakers, serving at the leisure of the Commission". [*Lucia* 138 S. Ct. at 2060]. This would allow "the Commission to remove an administrative law judge with whose judgments it disagrees—say because the judge did not find a securities law violation where the Commission thought there was one or vice versa". *Id.* The constitutionality of the "for cause" protections for removal of ALJs remains an issue to be decided. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010).

Most recently, this constitutional issue has been raised in two cases, *Cochran v. United States Securities and Exchange Commission* (U.S.C.A Case No.19-10396) and *Fleming, et al. v. United States Department of Agriculture* (U.S.C.A Case Nos. 17-1246, 171249 and 17-1250, consolidated). *Fleming, et al. v. United States Department of Agriculture* has been pending in the U.S. Court of Appeals for the District of Columbia. *Cochran v. United States Securities and Exchange Commission* is pending in the U.S. Court of Appeals for the Fifth Circuit. In both cases, the attorneys representing Petitioners have averred that the job protections for ALJs, as Officers of the United

Member Editor
Abbie Gruwell

Staff Editor
Susan Kidd

Comments, letters to the editor and other suggestions
Editor, Government and Public Sector Lawyers Division
American Bar Association
1050 Connecticut Ave., NW, Suite 400
Washington, DC 20036
202-662-1020

E-mail
GPSLD@americanbar.org

Visit our homepage
www.governmentlawyer.org

Editorial Statement

Pass It On provides a forum for the discussion of issues of special concern to government and public sector lawyers. *Pass It On* is edited by members and staff of the Government and Public Sector Lawyers Division. Publishing and editorial decisions are based on the editors' judgment of the quality of the writing, the timeliness of the article, and the potential interest to the readers of *Pass It On*. The views in *Pass It On* are those of the authors and may not reflect the official policy of the American Bar Association or the Government and Public Sector Lawyers Division. No endorsement of the views should be inferred unless specifically identified as the official policy of the American Bar Association or the Government and Public Sector Lawyers Division.

ABA AMERICAN BAR ASSOCIATION
Government and Public Sector Lawyers Division

States, are unconstitutional. In both appeals, Petitioners have cited *Free Enterprise Fund v. Public Company Accounting Oversight Bd. supra*, 561 U.S. 477 and requested that the appeals court strike down agency action as unconstitutional. Oral argument was just heard in *Cochran v. United States Securities and Exchange Commission* (on a Petition for Rehearing *En Banc*) in January 2021.

On February 16, 2021, a decision was issued in *Fleming, et al. v. United States Department of Agriculture*, -F.3d.-, No. 17-1246 (D.C. Cir. 2021). This case arose out of sanctions imposed on Petitioners for violating the Horse Protections Act. These penalties were imposed for a practice known as "soring" in which horses' forelimbs are intentionally injured to make them step higher at shows or auctions. Administrative complaints were filed against Petitioners, who failed to file timely answers. Default orders were issued by an ALJ, which were then appealed. The USDA rules provide that an ALJ decision may be appealed to a department officer known as the Judicial Officer, who renders the final agency decision. In these cases, the Judicial Officer affirmed the default orders.

Petitioners initially argued that the ALJ who presided over the cases was improperly appointed and this was before the Supreme Court's decision in *Lucia*. Petitioners also argued that the Judicial Officer's appointment was invalid under the Appointments Clause and asserted that the dual layers of "for cause" protection were unconstitutional, as it constrained the President's power. Ultimately, the Court of Appeals declined to rule on that issue, although it noted that Petitioners did not raise the "for-cause" removal issue before the ALJ or Judicial Officer. The case was remanded for further proceedings before either the Secretary of the USDA or another officer with properly delegated authority. The Court also declined to address the other arguments raised by Petitioners, including the question of exhaustion, except to reject their contention that the Department's ALJs were principal officers under the Appointments Clause.

It is unknown when the decision will be rendered in *Cochran v. United States Securities and Exchange Commission*. Also, it is unclear whether the U.S. Supreme Court will take up either of these cases in the near future.

In the meantime, there are specific steps Congress could take by enacting amendments to the APA, which would secure job protections for ALJs while balancing the need for agencies to appoint ALJs in a constitutional fashion and, where appropriate, remove them for cause. Statutory protections could provide more stability and foster the policy of judicial independence. Individual federal agencies can also provide job protections by adopting additional personnel rules that protect ALJs. Congress could establish a federal central panel of ALJs, similar to many states. Regardless of whether any of these steps are taken, the role of and job protections for federal ALJs will continue to be a source of controversy and litigation for the foreseeable future.

Hon. Timothy Nemechek is an Administrative Law Judge with the Colorado Office of Administrative Courts.

Endnotes

1. "Powers of the President. (2) He shall have power, by and with the advice and consent of the senate…to appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments". *U.S. Constitution Art. II, §2, cl 2*

2. After the Order of Remand, the SEC planned to have the case decided by a different ALJ. The *Lucia* case was settled by the parties in June 2020. As part of the agreement, Mr. Lucia neither admitted nor denied any wrongdoing and paid a $25,000.00 fine. The agreement imposed associational bars on Mr. Lucia and an investment company prohibition, with a right to apply for reentry after three (3) years from an effective date of September 3, 2015. Since this time had already run, he was allowed to immediately reapply for registration and no further litigation has ensued.

3. As of the date of writing of this article, President Biden has not issued an Executive Order vacating Executive Order No. 13843. However, he issued Executive Order No. 14003 on January 22, 2021, which vacated Executive Order No. 13957, including the new Category F for federal employees. Most probably, the effect of Executive Order No. 14003 is to denude Executive Order No. 13843 of any impact on the selection of federal ALJs.

4. § 11, 60 Stat. 244 (1946).

5. Justice Breyer also disagreed as to the proper remedy in *Lucia*, namely whether a hearing was required before a different ALJ.

MESSAGE TO THE MEMBERS

Steve Vieux
Chair, 2020–2021

If you are anything like me, you are craving social interaction with other humans. One of the most telling conclusions from the pandemic is that people need people, including those of us who are more introverted. When the pandemic is over, I am sure there will be a flurried rush to return to in-person meetings, and I will join them. But virtual meetings do have their advantages. Virtual meetings often attract a much wider audience. Attendance is more convenient and less costly. In addition, you can attract more prominent and hard-to-get speakers, because they do not have travel constraints. A case in point is the book discussion with Scott Turow that took place during the Midyear Meeting a few weeks ago.

As I mentioned last issue, we will be presenting a virtual skills conference on June 9–11, 2021, partnering with the Young Lawyers Division. See p. 7 which outlines the details. We are pleased to also offer wellness programs and networking sessions. To register, visit www.governmentlawyer.org.

Feel free to reach out to me at GPSLD@americanbar.org. I always enjoy hearing from our members.

Division Delegate Report

By Alexander W. Purdue

The Midyear Meeting of the House of Delegates took place via Zoom on Monday, February 22, 2021. Although everyone would have preferred meeting in person in Orlando as was originally planned, one benefit of the virtual meeting was that it was conducted under rules of limited debate. Those rules allowed no more than 6 speakers (3 in favor, and 3 opposed) for each resolution and resulted in a significantly shorter meeting than might otherwise have been the case. There were very few technical glitches, voting was actually easier than it might have been in person, and the Chair was able to report on the exact number of votes for and against every resolution. A list of all resolutions addressed by the House, and the final action taken can be found here. Revised resolutions can be found here.

Remarks by the ABA President and the Executive Director

Most of the ABA leadership addressed the House during the meeting, including President Patricia Lee Refo. President Refo's address focused on the ABA's continuing efforts to defend the rule of law and its many successes in furthering diversity. Executive Director Jack Rives spoke about the effects of the pandemic on membership, the current state of the ABA's "Value Proposition," and the association's finances. He noted that a year ago we were on track to meet all of our goals, but the pandemic had a major impact on the ABA as it has on so many other organizations. While revenue last FY was down almost $36 million, expense cuts of over $33 million led to a budget deficit of only $3 million. Similarly, although the ABA lost 575 dues paying members last fiscal year, it reversed a 13 year trend of losing over 5,000 dues paying members per year. Notably, last year the ABA exceeded its new, dues paying member goal by 18,000, and we have added over 2,000 new, dues paying members per month so far this fiscal year. He concluded by saying that, while challenges remain, both financial and membership trends are headed in the right direction.

Action on Resolutions

Although several resolutions were withdrawn prior to consideration by the House (101B, 106B), all of those that made it to the floor passed—some with relatively minor revisions and most by very comfortable margins. Resolution 107C (HIV status alone should not be a bar to military service, etc.) sparked significant opposition by all of the ABA's military groups, but still passed by vote of 237 to 117. Somewhat surprisingly, Resolution 101A (co-sponsored by GPSLD and advocating the expanded use of specially trained "facility dogs" to assist victims and vulnerable witnesses while testifying) was probably the most contentious resolution of the day. After spirited opposition by the defense bar, it eventually passed by a vote of 202 to 135—but only after GPSLD Delegate Greg Brooker spoke eloquently in support of the resolution. Other significant resolutions that were passed included 106C (recommending the extension of repayment terms for student loans, allowing them to be re-financed on better terms, and urging suspension or forgiveness in certain circumstances) and 11-1 (a change in House procedural rules that will require all future resolutions to demonstrably advance 1 or more of the ABA's 4 goals.)

It is unclear whether the Annual Meeting in August 2021 will be live or virtual. Arrangements for the planned meeting in Toronto were cancelled just before the midyear meeting. We believe it is likely that the annual meeting will again be virtual, with live meetings returning (pandemic permitting) in the Fall of 2021 or in 2022.

Alexander W. Purdue, Colonel, USAF (ret.) of Santa Fe, NM is a Division delegate. He is a former chair of the Division.

ABA'S GROUP MEMBERSHIP PROGRAM

Did you know that the ABA has a public service group program for lawyers employed in the courts, government, legal services and non-profits? ABA dues are $95 for group members under this program. Program Requirements: Each office, agency or organizational group seeking membership under this program must have five or more participants. 50% of the group must be new members of the ABA at the time of the group's formation. For example, a group with five current ABA members who are interested in creating a group would need to recruit five new members for a group total of 10. Each group must identify a single point of contact (Group Administrator) to promote the program and handle all ABA billing, informational and collection activities. Each individual participant must belong to at least one Section, Division or Forum during every year of membership through this program.

FOR MORE INFORMATION:
contact Kevin Henderson at kevin.henderson@americanbar.org or visit public-service-group-form.pdf (americanbar.org).

TechTips

Why You Need Filters or Rules

Do you get bombarded by press releases that have no bearing on your practice? Do vendors pester you to try their products? Would you like to keep all e-newsletters messages from a particular sender grouped together so you can read them at your leisure? If you've answered yes to any of these questions, perhaps setting up some filters is in order. Almost all email systems allow you to use filters (sometimes called rules) to help better manage your inbox.

- If it's spam you're after, you can set up a rule to have all messages containing certain keywords go directly into your junk or trash folder. You can also filter based on a sender's email address, or words in the subject line.
- If you want to group e-newsletter messages together to read them later, you can set up a filter that will move these messages into a "To Read" folder.
- When we get back to traveling, and you want to keep up-to-date on an important matter while you are out of the office, you can set up a rule so that emails on that matter or from a particular person are sent as a text message to your phone.
- If certain tasks or processes such as meeting invitations, are always handled by your administrative assistant, set up a filter to forward such emails to him or her.
- If you want to prioritize messages from your section chief or department head, you can set up a rule for a special chime to play when that person's email is received.

To start the process in Outlook, right click on your inbox and then scroll down to Rules>Create Rules. Outlook will then open a Rules Wizard. Follow the prompts and you will be on your way to a more manageable inbox.

Want More TechTips?
Visit ABA's Legal Technology Resource Center.

Upcoming Division Events

Villainy Gone Viral: The Many Faces Of Fraud In A Pandemic

Cosponsored by the ABA Antitrust Law Section

Tuesday, May 4, 2021

1 pm–2:30 pm ET

In addition to the many challenges federal, state, and local governments have had to face arising from the pandemic, fraud has been among the most difficult. Just as COVID-19 has seen mutations, the myriad ways in which bad actors have sought to unlawfully benefit from the pandemic at taxpayers' expense have become too numerous to count—from procurement fraud to price gouging, you name it, they've tried it! Join our panelists, representing federal, state, and local government enforcers as well as the corporate and on-line seller community relegated to policing the marketing and sale of their goods as they discuss the many faces of fraud in the pandemic, ways to detect it, what has been or can be done to deter or prevent it, and lessons learned for our next public health crisis.

Visit the Division website to register

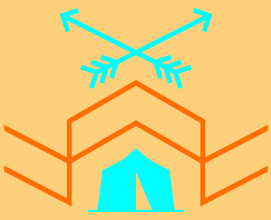
Virtual Summer Camp Skills Conference

June 9–11, 2021

See info, p. 7

GPSLD, in partnership with the Young Lawyers Division is pleased to present this dynamic, interactive program during which expert faculty will provide strategies and practical information to sharpen key legal competencies. Skills building sessions include: deposition, ethics, negotiations, writing, and tips for remote hearings.

Visit the Division website to register



GPLSD ETHICS CORNER[1]

By Wendy J. Muchman

This month, our ethics corner focuses on two recent opinions of the ABA Standing Committee on Ethics and Professional Responsibility. The first relates to guidance on when remote practice is allowed and when it might be considered the unauthorized practice of law. The second opinion will thrill all lawyers who have ever tried to determine the meaning of the words "materially adverse" in the former and prospective client Rules.

In this electronic world we live in, what's a lawyer to do? Don't want to spend the winter in your freezing state? Can you spend the winter in a sunny state and represent only your clients on the law of your freezing state?

ABA Formal Opinion 495, issued December 16, 2020, gives needed guidance on these issues. Lawyers may remotely practice the law of a jurisdiction in which they are licensed (freezing state) while physically present in another jurisdiction (sunny state) where they are not licensed, as long as that conduct is not the unauthorized practice of law in the latter jurisdiction (sunny state). A couple of caveats: the lawyer cannot hold out as licensed in the jurisdiction, have an office in the jurisdiction, advertise in that jurisdiction, or have business cards, letterhead, or a website listing the presence or provide legal services in the local jurisdiction.[2]

If you have ever grappled with the language of Rules 1.9(a) and 1.18(c) regarding conflicts with "materially adverse" interests, you will appreciate the guidance of Formal Opinion 497 issued February 10, 2021. Rules 1.9(a) and 1.18(c) address representing a current client with interests that are "materially adverse" to the interests of a former client or prospective client on the same or substantially related matter. Neither rule specifies when clients' interests are "materially adverse". The Opinion assists in clarifying this term. Some situations are obvious, such as where a lawyer is directly adverse to a former client on the same or substantially related matter. But material adverseness can be present where direct adverseness is not. The Opinion gives examples of situations where "material adverseness" may be found including suing or negotiating against a former client, attacking lawyer's own prior work, and often where a lawyer is cross-examining a former client. "'Material adverseness' may exist when the former client is not a party or witness in the current matter if the former client can identify some specific material, legal, financial or other identifiable concrete detriment that would be caused by the current representation."[3] "Generalized financial harm or a claimed detriment not accompanied by demonstrable and material harm or risk of harm to the former or prospective client's interests does not suffice."[4]

Wendy J. Muchman is the Harry B. Reese Professor of Practice at Northwestern University Pritzker School of Law.

Endnotes

1. This piece is meant as a summary of the Ethics Opinions. It is not legal advice of the author or a substitute for reading the entire Opinion.
2. https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-495.pdf
3. ABA Formal Op. 497 at 9. https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-497.pdf
4. Id.

Virtual Summer Camp Skills Conference

June 9–11, 2021 **REGISTER TODAY!**

The Government and Public Sector Lawyers Division, in partnership with the Young Lawyers Division will present a virtual legal skills conference June 9–11, 2021. This CLE conference will provide strategies and practical information to sharpen key legal competencies. Skills building sessions include:

Deposition: This session will examine common deposition tactics and hazards using an illustrative hypothetical. Faculty will role play portions of a deposition to illustrate the following topics: eliciting exhaustive answers and obtaining admissions; dealing with disruptive counsel; knowing when and how to object; qualifying experts; theory testing and using exhibits.

Ethics: Using an entertaining, interactive format, expert panelists will dramatize hypothetical scenarios followed by a discussion session after each hypo. Program topics include special conflicts of interest for former and current government lawyers, responsibilities of supervisory lawyer, organization as a client, and more.

Writing: A well-written legal document is one of the most important tools in a lawyer's arsenal. The goal is to create clear and concise writing that is easily understood. This session will teach five important tips and attendees will try their hand at editing short pieces of legal writing.

Negotiation: Using a real-life scenario, faculty will provide an overview of the art of negotiation including preparation methods, tried and true tactics to improve bargaining position, and concession strategies.

Tips for Virtual Hearings: Participating in remote hearings presents new challenges and some unexpected opportunities. Learn best practice skills from experienced practitioners who will pass on what they had to learn in crisis mode.

Conference includes evening networking and social events, and morning mindfulness sessions.

Register Today! **https://cvent.me/WYBDnG**