



# Supreme Court Holds That SEC Administrative Law Judges Are “Officers” Subject to the Appointments Clause

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On June 21, 2018, the Supreme Court released its opinion in *Lucia v. Securities and Exchange Commission (SEC)*, holding that SEC administrative law judges (ALJs) are “Officers of the United States” within the meaning of the Appointments Clause and, as such, must be appointed by the Commission rather than SEC staff. The Court granted Mr. Lucia—whose [challenge](#) concerned an adverse decision by an SEC ALJ who was not so appointed—a new hearing before a different ALJ. The Supreme Court’s decision is as significant for the questions that it resolves (i.e., the officer status of SEC ALJs and the remedy in Mr. Lucia’s case) as for the legal issues it leaves for later cases. With [over 100 SEC cases involving ALJs](#) pending before the agency when the SEC acted to “[ratify](#)] the agency’s prior appointment” of its five ALJs, and [nearly 2,000 ALJs](#) situated in over twenty-five agencies across the federal government (the vast majority of whom serve the Social Security Administration), the specter of challenges to other ALJ proceedings and decisions looms large, as agencies and lower courts begin to examine *Lucia*’s scope.

## Background

The [Appointments Clause](#) provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States”—which the Court refers to as “[principal officers](#)”—but allows Congress to vest the appointment of “inferior” officers “in the President alone, in the Courts of Law, or in the Heads of Departments.” (The Commission falls into the last category of department head.) The Constitution does not establish an appointment requirement for [non-officer employees](#) in the federal workforce.

The [central question](#) in *Lucia* was whether SEC ALJs are *inferior officers* or *mere employees*, calling into

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focus the distinctions made in prior Court decisions—three of which took center stage in the *Lucia* opinion. First, in its 1879 decision in *United States v. Germaine*, the Court held that a civil surgeon appointed by the pension commissioner to perform examinations on an episodic basis was not an officer because, among other reasons, his duties were not “continuing and permanent” in nature. Much later, in its 1976 decision in *Buckley v. Valeo*, the Court held that “any appointee [to a federal office] exercising significant authority pursuant to the laws of the United States” is an officer—a test that the Court applied to determine that members of the Federal Election Commission, who exercised “direct and wide-ranging” enforcement powers and “broad administrative powers,” were officers. Then, in 1991, the Court held in *Freytag v. Commissioner* that special trial judges of the U.S. Tax Court (STJs) were officers because: (1) their office is “established by Law” with statutorily prescribed duties, salary, and means of appointment; (2) the judges perform “important functions” in that they “take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders”; and (3) the judges “exercise significant discretion” in performing these tasks. The Court further reasoned that even if the STJs’ duties were not so significant, they would still qualify as officers because they could render final decisions in certain types of cases.

### **The Lucia Decision**

In an opinion authored by Justice Kagan (and joined by Chief Justice Roberts and Justices Kennedy, Thomas, Alito, and Gorsuch), the Court held that SEC ALJs are officers subject to the Appointments Clause. The opinion began by noting that the *Germaine* and *Buckley* decisions “set out [the] basic framework for distinguishing between officers and employees.” Because no party disputed that SEC ALJs met *Germaine*’s requirement of occupying a “‘continuing’ position established by law,” the Court observed that the “central” concern was the meaning of *Buckley*’s “significant authority” test. While acknowledging that the “standard is no doubt framed in general terms,” the Court declined to “refine or enhance” *Buckley*’s test, reasoning that the later *Freytag* decision “says everything necessary to decide this case.”

In the Court’s view, SEC ALJs are “near-carbon copies” of the STJs at issue in *Freytag*. Setting forth the “important functions” listed in *Freytag* “point for point,” the Court observed that like STJs, SEC ALJs: (1) take testimony, (2) conduct trials, and (3) rule on the admissibility of evidence. The Court did not find differences in the manner in which the two types of officials enforce compliance with discovery orders (the fourth function in *Freytag*’s list) or between the Commission’s and the Tax Court’s standards of review for factual findings (a consideration not relied on in the *Freytag* decision) dispositive. In addition, the Court reasoned that SEC ALJs “issue decisions much like [those of STJs]—except with potentially more independent effect.” Whereas STJs prepare proposed findings and decisions that a Tax Court judge must review and adopt in a “major case like *Freytag*,” SEC ALJs issue initial decisions that the Commission has discretion to review. Moreover, once the Commission issues an order declining review, an SEC ALJ’s decision, by statute, is “deemed the action of the Commission.” Although noting the parallels in decisionmaking authority, the Court rejected the conclusion of the appellate panel and two dissenting Justices that “final decisionmaking authority is a *sine qua non* of officer status,” reasoning that the *Freytag* Court discussed STJs’ ability to render final decisions in certain types of cases as an “alternative basis” for viewing those judges as officers. In doing so, the Court resolved a circuit split on the significance of final decisionmaking authority to officer status.

Having found that SEC ALJs are officers and noting that the ALJ who presided over Mr. Lucia’s case was not appointed as such, the Court proceeded to address the remedy for the Appointments Clause defect. Citing its prior decision in *Ryder v. United States*—which involved improperly appointed judges of a Coast Guard court—for the principle that “‘one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case’ is entitled to relief,” the Court adopted *Ryder*’s remedy of a new hearing. However, the Court held that a different ALJ or the Commission itself

must preside over Mr. Lucia’s new hearing because the ALJ who issued the initial decision “cannot be expected to consider the matter as though he had not adjudicated it before.” This additional prescription, the Court [reasoned](#), although perhaps not strictly necessary to resolve the constitutional defect, is the best means to incentivize litigants to bring Appointments Clause violations to the courts’ attention.

## **Open Issues**

The Court’s opinion left open several issues that are likely to be the subject of future litigation.

### ***What Else and What Alone Constitutes Significant Authority?***

As previously noted, the Court declined to further elucidate *Buckley*’s significant authority test in light of the close fit it perceived between SEC ALJs and the STJs at issue in *Freytag*. And even in discussing the overlap between the functions of SEC ALJs and STJs, the Court declined to decide which, if any, of *Freytag*’s “important functions” are [necessary](#) to officer status. Several Justices took aim at this approach in two separate opinions. Justice Thomas (joined by Justice Gorsuch), while agreeing that SEC ALJs are officers under *Freytag*, argued that the Court’s precedents are ill-suited to resolving all Appointments Clause questions because they “discuss what is *sufficient* to make someone an officer,” instead of delineating what is “*necessary*” to do so. Justice Thomas proposed a [definition of officer](#) “based on the original public meaning of ‘Officers of the United States,’” which he [distilled to](#) any federal civil official who performs a “continuous” statutory duty, regardless of the “importance or significance” of the official’s functions. Like Justice Thomas, Justice Sotomayor (in a dissenting opinion joined by Justice Ginsburg) expressed concern that the “Court’s decisions have yet to articulate the types of powers that will be deemed significant enough to constitute ‘significant authority.’” However, in contrast to Justice Thomas’s concurrence, Justice Sotomayor argued, in line with the lower court that adjudicated Lucia’s appeal, that “[one requisite component](#) of ‘significant authority’ is the ability to make final, binding decisions on behalf of the Government,” meaning that “a person who merely advises and provides recommendations to an officer would not herself qualify as an officer.” Applying this test, Justice Sotomayor concluded that SEC ALJs are *not* officers because the Commission retains “[plenary authority](#)” over ALJ proceedings and because an ALJ’s initial decision does not become final until the Commission issues a [finality order](#).

The majority’s adherence to *Buckley*’s “significant authority” standard is potentially narrower than Justice Thomas’s proposed test and broader than Justice Sotomayor’s, and it is unclear at this stage how many of the [nearly 2,000 ALJs](#) situated across the federal government—to the extent they have not been appointed—exercise *Freytag*-like functions or other important duties and discretion that might rise to the level of significant authority. In addition, it is unclear whether: (1) the nature of SEC adjudications, which the Court [repeatedly described](#) in its opinion as “[adversarial](#),” or (2) the role of the ALJ in such proceedings, which the Court likened to a [federal trial judge](#), would provide a basis for distinguishing between ALJs who preside over hearings in enforcement proceedings and those, such as the [1600 or more Social Security Administration ALJs](#), who typically render decisions in benefits determinations. Mr. Lucia’s counsel drew this distinction at [oral argument](#), but Justices Kagan and Sotomayor seemed to express skepticism that this factor alone could provide a principled basis to distinguish between officers and non-officers. Nonetheless, in line with *Freytag* and *Lucia*, it does appear that when an ALJ has “[significant discretion](#)” in carrying out a host of “important functions” in a trial-like setting, such authority is sufficient to require an appointment that comports with the Appointments Clause.

### ***Are Statutory Limitations on the Removal of SEC ALJs Constitutional?***

Perhaps an even bigger question looming after *Lucia* pertains to the constitutionality of how ALJs, including SEC ALJs, are *removed* from office. Currently, SEC ALJs, unlike officers performing [core executive functions](#), are not removable from office at the discretion of their superior officer. Instead, the Commission may remove an ALJ “only for [good cause](#) established and determined by the Merit Systems

Protection Board,” an [independent agency](#) that oversees the federal civil service system and likewise enjoys [for-cause removal protections](#). Congress [created this structure](#) to provide ALJs with “[independence and tenure](#) within the existing Civil Service system,” in response to criticisms that these officials were “[mere tools](#) of the agency concerned” and “subservient to the agency heads.”

This structure, coupled with *Lucia*’s conclusion that SEC ALJs constitute officers, raises a separate constitutional question: whether the removal protections for SEC ALJs violate separation-of-powers principles enunciated by the Court’s decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB)*. In *Free Enterprise Fund*, the Court held that Congress, by providing for two layers of removal protection for PCAOB members in the Sarbanes-Oxley Act, violated Article II of the Constitution by interfering with the President’s non-delegable duty to ensure the faithful execution of the laws. In fact, the [U.S. Solicitor General](#) urged the Court to opine in *Lucia* not only on the appointment of ALJs, but also on their removal.

Notwithstanding [Justice Breyer’s separate opinion](#) arguing that the removal question is integral to deciding the Appointments Clause question and could have been avoided by deciding the case on statutory, rather than constitutional grounds, the *Lucia* majority [expressly declined](#) to address the constitutionality of limitations on SEC ALJs’ removal because the lower courts had not done so. Going forward, however, the question of the propriety of the removal provisions for SEC ALJs (and potentially other ALJs) will likely be the subject of further litigation. On the one hand, SEC ALJs perform adjudicative functions, and several Supreme Court [removal decisions](#) have provided Congress more leeway in crafting removal protections for executive branch officers that perform adjudicative functions to prevent such officers from control or coercive influence in adjudicating disputes before them. On the other hand, such cases did not arise in the context of dual layers of removal protection, and it remains to be seen whether *Free Enterprise Fund*’s holding prohibiting the specific tenure protections for PCAOB members would control with respect to ALJs who are deemed officers and can only be removed from office for cause by the MSPB. While the Solicitor General’s office [argues](#) that the removal provisions for ALJs raise serious separation-of-powers concerns by leaving neither the President nor the Commission politically accountable for ALJ decisions, [other commentators](#) and [amici](#) have raised concerns that eliminating removal protections for ALJs would threaten the independence of executive branch adjudications.

The appointments and removal issues are only two of several unanswered questions from the *Lucia* opinion. Questions also remain as to whether ALJs within the SEC are properly appointed following a [ratification order](#) that the Commission issued shortly before the Court granted certiorari in *Lucia*. The *Lucia* opinion also raises questions about the remedy for Appointments Clause violations in other cases. In this vein, *Lucia*, while providing some answers, leaves open many other issues for future litigation that will inform the future of administrative adjudications.