Lucia v. SEC

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***Lucia v. SEC*, 585 U.S. ___ (2018) (Kagan, J.).**
Response by Richard J. Pierce, Jr.
Geo. Wash. L. Rev. On the Docket (Oct. Term 2017)
Slip Opinion | SCOTUSblog

Justices referred to the major issues that the Court will have to resolve in the wake of *Lucia*.

The Majority Opinion

In an opinion on behalf of six Justices, Justice Kagan resolved an issue that had split the circuits.[2] Several parties who lost cases at the SEC argued that the orders in their cases were invalid because the ALJs who presided at the hearings were unconstitutionally appointed. ALJs had been appointed by the SEC staff rather than by the SEC itself. If, as the petitioners argued, SEC ALJs are inferior officers, then that method of appointment was unconstitutional because inferior officers can only be appointed by the President, a court of law, or the head of a Department.

A panel of the D.C. Circuit held that the ALJs are employees because they do not have the power to make a final decision in any case.[3] Under 5 U.S.C. § 557(b) (2012), an agency can replace an ALJ's initial decision with its own decision. In contrast, a panel of the Tenth Circuit held that ALJs are inferior officers. The Tenth Circuit applied the test the Court had announced in *Freytag v. Commissioner*[4] as the basis for its holding that special trial judges of the Tax Court are inferior officers.[5] Under that test, an inferior officer is anyone who occupies a continuing position established by law and exercises significant authority.[6]

Justice Kagan resolved the conflict between the circuits in favor of the Tenth Circuit. She applied the *Freytag* test and held that SEC ALJs are inferior officers because they have responsibilities and powers similar to those of the special trial judges who were at issue in *Freytag*. She then held that Lucia was entitled to a new hearing before a constitutionally appointed new ALJ.

The holding only applies directly to SEC ALJs. However, its reasoning suggests that the 1,926 ALJs who preside in hearings at other agencies, and the much larger number of non-ALJ administrative judges (including 330 immigration judges) who preside in hearings conducted by a variety of agencies, are also inferior officers. The holding will have little effect on the appointment process. Agencies that previously delegated the power to appoint ALJs and administrative judges to their staff will withdraw those delegations, but they probably will appoint the same people based on

The Dissenting Opinion

Justice Sotomayor wrote a dissenting opinion, in which Justice Ginsburg joined.[7] She expressed the view that no one should be considered an inferior officer unless they have the power to make a final decision on behalf of the government. She also expressed the view that, even if SEC ALJs are inferior officers, Lucia is not entitled to the remedy of a new hearing before a new ALJ. She was joined by Justice Breyer on that issue.

The Solicitor General's Position

The SG declined to defend the government's original position in the case. He decided to join the petitioner in arguing that SEC ALJs are inferior officers. The Court appointed an amicus curiae to argue in support of the government's original position.

The SG also asked the Court to add another issue to its grant of a writ of certiorari. He asked the Court to add the question of whether the statutory limit on the power of an agency to remove an ALJ[8] is constitutional, even though the petitioner did not raise that issue and the circuit court did not address the issue. The Court refused to add that issue.

The SG devoted seventeen pages of his brief to an argument that the statutory limits on the power of an agency to remove an ALJ are unconstitutional. That action was unusual for many reasons. First, the Court had refused to add the removal power issue to its grant of certiorari. Second, the SG was challenging the constitutionality of a federal statute that no private party had challenged. Third, the statutory restriction on an agency's power to remove an ALJ was enacted by unanimous vote of both the House and the Senate as part of the Administrative Procedure Act ("APA") in 1946 after fifteen years of debate and study. Fourth, the statutory limit was enacted to protect the due process rights of regulated firms by minimizing the risk that ALJs would make rulings in hearings that reflect pro-agency bias. Fifth, the statutory limit was enacted at the urging of regulated firms—an important constituency of the Republican Party and President Trump.

Justice Breyer's Opinion

Justice Breyer wrote an opinion in which he concurred with the result but not with the reasoning of the majority opinion.[10] He would have applied the avoidance canon and decided the case based on statutory rather than constitutional reasoning. He would have held that the APA and the Securities Exchange Act require the SEC to appoint ALJs and do not authorize the SEC to delegate that authority to staff members.

Justice Breyer described in detail why he believes that the avoidance canon required the Court to refrain from deciding the case on constitutional grounds. He referred to the SG's argument that the Court's opinion in *Free Enterprise Fund* compelled the Court to hold that the statutory restriction on the power of an agency to remove an ALJ is unconstitutional. Without conceding the merits of that argument, he expressed concern that a holding that ALJs are inferior officers might lead to a later holding that the statutory limit on the power of agencies to remove ALJs is unconstitutional.

In that event, he was prepared to argue that ALJs are employees, rather than inferior officers, because Congress did not want ALJs to be removable by agencies at will. He argued that the Court should defer to Congress in deciding whether someone is an employee or an inferior officer in any close case. For that reason, he expressed the view that the Court should not resolve the Appointments Clause issue without first or simultaneously deciding whether the statutory restriction on the power of agencies to remove ALJs is constitutional.

Justice Breyer ended his opinion with an expression of concern about the way the Court approached the issue:

> The Court's decision to address the Appointments Clause question separately from the constitutional removal question is problematic. By considering each question in isolation, the Court risks (should the Court later extend *Free Enterprise Fund*) unraveling, step-by-step, the foundations of the Federal Government's administrative adjudication system as it has existed for decades, and perhaps of the merit-based civil-

foundations of the entire civil service system undoubtedly was based on the possibility that the Court might later adopt the reasoning in the separate concurring opinion of Justices Thomas and Gorsuch.

The Thomas Opinion

Justice Thomas wrote a concurring opinion in which Justice Gorsuch joined.[12] He expressed the view that the Court should replace the test the Court announced in Freytag with a test based on the original intent of the Founders. He cited an article that argues that the Founders intended the term "Officers of the United States" to include "all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty."[13] If the Court adopts the much broader definition of "officer" urged by Professor Mascott, Justice Thomas, and Justice Gorsuch and applies Free Enterprise Fund to all officers, many federal employees will be stripped of the statutory safeguards that now apply to them as a result of the civil service system.

Professor Richard J. Pierce, Jr. is the author of over twenty books and 130 articles on administrative law, government regulation, and the effects of various forms of government intervention on the performance of markets. His books and articles have been cited in hundreds of judicial opinions, including over a dozen opinions of the U.S. Supreme Court.

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1. No. 17-130 (U.S. June 21, 2018).
2. *See Lucia*, slip op. at 1.
3. Lucia v. SEC, 832 F.3d 277, 289 (D.C. Cir. 2016).
4. 501 U.S. 868 (1991).
5. Bandimere v. SEC, 844 F.3d 1168, 1170–88 (10th Cir. 2016).
6. *Id.* at 1173.
7. *See Lucia*, slip op. at 1 (Sotomayor, J., dissenting).
8. *See* 5 U.S.C. § 7521 (2012) (permitting an agency to remove an ALJ only if the Merit Systems Protection Board determines, after a formal hearing, that there is good cause to remove the ALJ).
9. 561 U.S. 477 (2010).

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