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Supreme Court Decides Lucia – But The Saga Continues

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After almost two years (and six blog posts), we have reached the conclusion of the *SEC v. Lucia* saga. Except we haven't. The U.S. Supreme Court decided *Lucia* on June 21, 2018. However, just as Marvel movies now are simply prequels to the next action movie, the fractured collection of opinions in *Lucia* is simply a cliffhanger that sets the stage for sequel cases in future Terms. Justice Kagan authored the six-Justice majority opinion and was joined by the Chief, and Justices Kennedy, Thomas, Alito, and Gorsuch. Justice Thomas, joined by Justice Gorsuch, concurred separately, offering their own expansive take on the Appointments Clause. Justice Breyer concurred in part and dissented in part. Justices Sotomayor and Ginsburg joined in the dissenting portion of Justice Breyer's opinion, and penned their own completely dissenting opinion. Got that? Justice Kagan's majority opinion concluded that SEC ALJs were in fact inferior officers – not merely employees as the SEC had long asserted -- and so must be appointed consistent with the Appointments Clause, meaning by the President, or the "head" of a department (which, here, means a majority of the five-member Securities and Exchange Commission). Since SEC ALJs are not appointed by the Commission itself, and instead are hired through the normal civil service process, SEC ALJs are unconstitutionally appointed. The majority reached this conclusion by focusing on two things. First, an SEC ALJ holds a "continuing office established by law" because they receive a career appointment and are not simply performing tasks episodically. Second, the Court examined the powers an SEC ALJ possessed. Like many, if not all, adjudicative ALJs in other agencies, the SEC's five ALJs conduct adversarial proceedings in which they supervise discovery, decide motions, hear and examine witnesses, rule on the admissibility of evidence, regulate the course of proceedings and conduct of parties and counsel, and even impose sanctions. The majority noted that, in these ways, an SEC ALJ's powers were "comparable to" a federal district judge. An SEC ALJ issues an initial decision, with findings of fact and conclusions of law, and a preliminary order. That initial decision can (but need not be) reviewed by the entire Commission. If the Commission does not review the ALJ's initial decision, it is "deemed the action of the Commission." In the majority's view, the SEC ALJs' responsibilities made them "near-carbon copies" of the special tax judges of the United States Tax Court the Court found to be inferior officers in *Freytag v. Commissioner* back in 1991. The "significant discretion" SEC ALJs wield when carrying out these "important functions" means that, like *Freytag*'s special tax judges, they are inferior officers, not simply SEC employees. In fact, because SEC ALJs' decisions can become the Commission's decisions absent further review, SEC ALJs are more officer-like than *Freytag*'s judges.

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Appointments Clause

In reaching its decision, the majority did not decide several things. First, despite the Solicitor General's urging, it did not consider whether the procedure by which SEC ALJs can be removed also rendered them unconstitutionally appointed. Second, the majority did not conclusively decide the issue of remedy. The majority stated that the case could not simply return to the ALJ (Judge Elliot) who originally presided over the proceedings, even though during the pendency of the appeal, the Commission attempted to "ratify" the ALJs' appointments – or even if the Commission chose to appoint him afresh in response to the Court's opinion. Instead, the Commission must either conduct the hearing itself or assign the hearing to an ALJ who has received an appointment "independent of the ratification," which probably means a newly appointed ALJ since the SEC "ratified" the appointments of all the extant ALJs including Judge Elliot at one time. Justice Thomas (with Justice Gorsuch) offered a broader view of the Appointments Clause. According to them, the Appointments Clause provides the "exclusive process" for appointing Officers of the United States. This means that any federal civil official "with responsibility for an ongoing statutory duty" is at least an "inferior officer" and so must be appointed by the President, Courts of Law, or "Heads of Departments." So "all federal civil officials who perform an ongoing, statutory duty – no matter how important or significant the duty" must be appointed this way. People who "performed only ministerial statutory duties" like "recordkeepers, clerks, and tidewaiters" fall within this definition. In their view, this ensures the necessary political accountability for executive action. Justice Breyer went his own way (with Justices Ginsburg and Sotomayor along for part of the ride). Drawing on his administrative law background, he would have decided the case on statutory, not constitutional, grounds. He believed that the Administrative Procedures Act, which governs the appointment of adjudicative ALJs, like SEC ALJs, does not permit an agency, like the SEC, to delegate its appointment function to its human resources staff (though many agencies beyond the SEC do just that). He sought to resolve this case statutorily because he believes that the APA also provides that ALJs can only be removed for cause which, according to the *Free Enterprise* case, could also render them unconstitutional (since the *Free Enterprise* case concluded that two-level protections from removal without cause are unconstitutional). Justice Breyer worried that, if SEC ALJs are inferior officers, their protection from removal without cause under the APA could be jeopardized, thus rendering them less independent and more dependent on the approval of the SEC. He then tried to explain why that would not be true, but nonetheless, he laid some of the groundwork for arguing that SEC ALJs, or any other adjudicative ALJs appointed pursuant to the APA, could be unconstitutionally appointed. He ultimately acknowledged that this decision, when read with *Free Enterprise*, risks "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-service system in general." Justice Sotomayor's dissent tried to underscore that an officer of the United States should exercise "significant authority." She interpreted this to require "the ability to make final, binding decisions on behalf of the Government." For this reason, she believed that SEC ALJs were not officers because they only make initial decisions or recommendations that the full Commission either accepts or rejects. Her view of what authority an officer of the United States must have contrasts sharply with Justice Thomas's (and Justice Gorsuch's) view that every recordkeeper for any statutorily required government record is an inferior officer who must be appointed by the head of an executive department. Undoubtedly, this patchwork of positions will foment additional litigation. Any respondent in an

SEC enforcement action, at whatever stage, will cite *Lucia* in every filing it makes to argue that the SEC must start from scratch no matter where it is in its case. Presumably, regulated entities who are the subject of enforcement proceedings before any other agency's administrative ALJs are right now poring over that agency's enabling legislation to see if that agency parallels the SEC. Any agency whose head has not expressly appointed all its adjudicative ALJs will certainly be mired in litigation over the constitutionality of those ALJs' appointments going forward. Such agencies would do well to have their "heads" immediately appoint their ALJs so that, at least prospectively, those ALJs can function constitutionally. What happens to pending enforcement actions will be messier though since wholesale "ratification" of ALJ appointments apparently does not satisfy *Lucia*'s interpretation of the Appointments Clause. Perhaps *Lucia*'s most important implications stem from the concurrences of Justice Thomas and Justice Breyer. If Justice Thomas and Justice Gorsuch's view of the Appointments Clause gains any traction, thousands and thousands of low-level government functionaries may need to be expressly appointed by the heads of their executive departments. Imagine the diminished efficiency of, for example, the Commerce Department if every recordkeeper for every statutorily-required record of interstate or international transactions must be appointed by the Commerce Secretary. Or if every EPA inspector who keeps records required by any federal environmental statute had to be appointed by the EPA Administrator. Similarly, if Justice Breyer's view of the combination of *Lucia* and *Free Enterprise* catches hold, any agency with adjudicative ALJs who are hired pursuant to the APA may need to restructure its adjudications to make those ALJs more accountable to – and therefore less independent from – the head of that agency or the President. Increasing political accountability necessarily means decreasing adjudicative independence. In Justice Breyer's view, and perhaps the majority's also, the Appointments Clause could well diminish the independence of formerly "independent" administrative agencies. *Lucia* could therefore have long-lasting impact on the administrative state, particularly with a new Supreme Court Justice.