

RECENT DEVELOPMENTS

PRESIDENTIAL ADMINISTRATION, THE APPOINTMENT OF ALJS, AND THE FUTURE OF FOR CAUSE PROTECTION

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INTRODUCTION

We will punish bureaucrats who “lack boldness.”

—Xi Jinping[†]

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[†] Sui-Lee Wee, *Beijing Sees ‘Major Test’ as Doors to China Close and Coronavirus Deaths Surpass SARS*, N.Y. TIMES (Feb. 3, 2020), <https://www.nytimes.com/2020/02/03/world/asia/coronavirus-deaths-sars.html>.

Few exercises of the President's appointment power are more essential than the Executive Branch's identification and designation of members of the administrative judiciary, especially deciders labeled Administrative Law Judges (ALJs) under the Administrative Procedure Act (APA).¹ These civil servants have a special responsibility to serve the public with factual determinations that assure fairness and are largely outside politics. This responsibility adds a due process dimension that does not burden other government officials. Most civil servants operate in the realm of policy (which is preferably fact-based), and their decisions are judged primarily in political terms. The purpose of the APA, enacted by Congress in 1946 after decades of political controversy,² was to ensure that decisions affecting the public were not the result of "administrative absolutism."³ Much like federal judges, ALJs were specifically given impartiality protections, including separation of functions requirements, ex parte practice restrictions, and tenure status.⁴ These protections were upheld by the Supreme Court shortly after the APA was enacted.⁵ While ALJs do not have lifetime tenure like federal judges, they are rarely removed. Indeed, it is not much more likely that a federal judge would be removed through impeachment than that an ALJ would be removed through statutory processes.⁶

Still, ALJs are members of the Executive Branch under Article II, not the judiciary under Article III, and within the President's appointment and removal power like all other government employees. Any President who believes he is the top legal officer could conceivably, like Chairman Xi, remove an administrative judge who "lacks boldness" or its opposite,

1. See Administrative Procedure Act (APA), 5 U.S.C. §§ 554, 556–57.

2. See Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 276–79 (1978) (discussing Walter-Logan Act and the American Bar Association's (ABA's) compromise on administrative procedures that resulted in the APA); see also George B. Shepard, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U.L. REV. 1557, 1560, 1581 (1996) (describing the APA as a "bitter compromise" resulting from a "pitched political battle").

3. John D. O'Reilly, Jr., *Administrative Absolutism*, 7 FORDHAM L. REV. 310, 311–15 (1938) (quoting Roscoe Pound's 1939 ABA Report on administrative process).

4. 5 U.S.C. §§ 551, 556–57.

5. *Ramspeck v. Fed. Trial Exam'rs Conf.*, 345 U.S. 128, 142 (1953); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 52–53 (1950); see also Brief Amicus Curiae of Administrative Law Judges Conference in Support of Neither Party at 9, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130).

6. The Federal Judicial Center lists eight federal judges who have been removed by impeachment. *Impeachments of Federal Judges*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/impeachments-federal-judges> (last visited Aug. 6, 2020).

obsequiousness.⁷ Moreover, recent judicial and executive decisions are raising fundamental questions about the independent role of ALJs. These actions create a fascinating framework for reassessing the President's power over administrative deciders and over the administrative state itself.

I. THE *LUCIA* CASE, THE SOLICITOR GENERAL'S MEMO, AND EXECUTIVE ORDER 13,843

In *Lucia v. Securities and Exchange Commission* (SEC),⁸ the Court held that ALJs working at the SEC were (inferior) "officers of the United States" under the Appointments Clause (not employees) and must be appointed by the Commission itself, not SEC staff. This aspect of the decision was supported by the nature of the ALJ's duties and connected directly to the holding in *Freytag v. Commissioner*,⁹ that Special Trial Judges of the U.S. Tax Court are inferior officers. The case also provided a quick fix, since all the SEC had to do (which it did during litigation) was have the Commissioners revalidate staff appointments.¹⁰ What makes *Lucia* a fascinating case, however, is its further implications, which Justice Breyer, concurring and dissenting in part, addressed. Justice Breyer wanted to consider both the removal and appointment of ALJs, since he feared the decision "would risk transforming administrative law judges from independent adjudicators into *dependent* decisionmakers, serving at the pleasure of the Commission."¹¹ As the Court chose not to resolve this point directly, it potentially raises challenges to for-cause removal restrictions of agency heads and commissioners under prior cases, like *Free Enterprise Fund v. Public Co. Accounting Oversight Board*¹² and *Humphrey's Executor v. United States*,¹³ and conceivably to the civil service system itself. Thus, *Lucia*, although modest in its holding, may become a first step in the transformation of presidential management of the bureaucracy.

It did not take the Trump Administration long to expand *Lucia*'s possibilities. In near simultaneous actions, the Solicitor General (SG), in a memo to agencies,¹⁴ and the White House, in Executive Order (E.O.)

7. Chairman Xi became the leader of the ruling Chinese Communist Party in 2012 and his ascent to power has ushered in an era of markedly increased authoritarianism. *Profile: China's President Xi Jinping*, BBC NEWS (Feb. 25, 2018), <https://www.bbc.com/news/world-asia-pacific-11551399>.

8. 138 S. Ct. 2044 (2018).

9. 501 U.S. 868 (1991).

10. *Lucia*, 138 S. Ct. at 2055.

11. *Id.* at 2060 (Breyer, J., concurring in part and dissenting in part).

12. 561 U.S. 477 (2010).

13. 295 U.S. 602 (1935).

14. See Memorandum from the Solic. Gen., U.S. Dep't of Just., to Agency Gen. Counsels,

13,843,¹⁵ used *Lucia* to dramatically expand executive control over administrative adjudicators.

The Solicitor General's memo advising agency general counsels proposed three significant steps: it expanded the covered inferior officer category from ALJs to all administrative deciders—thereby increasing the number of deciders from about 1,930 ALJs to over 10,000 administrative judges;¹⁶ it proposed to include deciders in both adversarial and non-adversarial contexts, even though Justice Kagan's *Lucia* majority was based on adversarial decisions alone; and it sought to limit “good cause” removal restrictions for ALJs to those that are “suitably deferential” to department heads.¹⁷ While the SG's memo only expresses litigation positions, E.O. 13,843 took legal actions. In a desire to “mitigate concerns” about the reach of *Lucia* under the Appointments Clause, the E.O. deprived the Office of Personnel Management (OPM) of hiring authority over ALJs, transferred that power to agency heads, and removed ALJs from the competitive service, placing them in a new Schedule E.¹⁸ OPM immediately endorsed these steps and gave up ALJ selection authority.¹⁹ In taking these steps, the E.O. referred to ALJs as a group of professionals who “are impartial and committed to the rule of law.”²⁰ There is no doubt that the President has statutory authority under 5 U.S.C. § 3301(1) to make regulations to admit individuals into the civil service, as E.O. 13,843 provides. OPM is an executive agency whose duties can be changed or eliminated, sometimes with the necessity for congressional oversight and approval. After considering what E.O. seeks to achieve on a policy basis, the implications of the SG's Memo will be considered.

Guidance on Administrative Law Judges after *Lucia v. SEC* (S. Ct.) (July 2018) [hereinafter Solic. Gen. Guidance], <https://static.reuters.com/resources/media/editorial/20180723/ALJ--SGMEMO.pdf>. (conceding the ruling in *Lucia* was narrow, but applying its reasoning to a broader swath of administrative adjudicators).

15. See, Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 10, 2018) (directing that the holding in *Lucia* apply broadly to preempt potential questions the holding left unresolved).

16. *Administrative Law—Appointments Clause—Solicitor General Issues Guidance on Administrative Judges*. — Guidance on Administrative Law Judges After *Lucia v. SEC* (S. Ct.), 132 HARV. L. REV. 1120, 1124–25 (2018) [hereinafter *Appointments Clause*].

17. Solic. Gen. Guidance, *supra* note 14, at 2–3, 9.

18. See Exec. Order No. 13,843, 83 Fed. Reg. at 32,755–56.

19. Memorandum from Dr. Jeff T.H. Pon, Dir., U.S. Off. of Pers. Mgmt., to Heads of Exec. Dep'ts & Agencies, Executive Order—Excepting Administrative Law Judges from the Competitive Service (July 10, 2018) [hereinafter OPM Memorandum], <https://chcoc.gov/content/executive-order-%E2%80%93excepting-administrative-law-judges-competitive-service> [<https://perma.cc/SH3X-HQCL>].

20. Exec. Order No. 13,843, 83 Fed. Reg. at 32,755.

II. CONSEQUENCES OF TRANSFERRING OPM'S ALJ SELECTION AUTHORITY TO AGENCIES

The main concerns are efficiency of selection and politicization of hiring. The first is easy to resolve; the second is more complicated. OPM has long determined who qualified to serve as ALJs by creating a certificate system that limited agency choice to three candidates selected after elaborate written examinations, writing samples, and interviews. OPM created a rigid selection system and refused requests to tailor the qualifications of ALJ candidates to the special needs of agencies or to produce a list of adequate numbers of ALJ candidates when agency staffing needs arose.

In 2015, when I was Chairman of Administrative Conference of the United States (ACUS), the Obama White House asked ACUS to help OPM increase the number of ALJs available to conduct Social Security Disability hearings as the backlog had reached over two million cases. As I wrote in *Valuing Bureaucracy*,²¹ the OPM examination process had become rigid and unresponsive. OPM had created elaborate testing mechanisms that could not be reused more than once, and that took years and millions of dollars to reconstruct.²² When ACUS tried to convince the bureaucrats that speed and new ideas were essential, our suggestions were politely ignored. OPM officials clung to a system that could only produce about 100 candidates per year when 250 to 500 were needed. As a result, disability hearing lines grew longer and eligible applicants were denied dispositions for years.²³ It was embarrassing to tell White House and congressional officials that we had failed to solve this crisis. In addition, the Social Security Administration (SSA) failed in its attempts to gain a separate register for disability ALJs, which would have let them expedite the process.²⁴ So, the Trump E.O. has achieved something the prior Administration could not: agency-controlled appointment processes that permit agency flexibility and innovation.

Of course, the Trump Administration could have tried reforming OPM's selection process first, since E.O. 13,843's reasoning that *Lucia* mandated agency control of ALJ selections seems unpersuasive.²⁵ Since OPM is an

21. See PAUL R. VERKUIL, *VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT* 105–06 (2017) (detailing efforts to streamline the OPM selection process).

22. *Id.* at 105.

23. *Id.* at 104.

24. See *Role of Social Security Administrative Law Judges: Joint Hearing Before the Subcomm. on Cts., Com. & Admin. Law of the H. Comm. on the Judiciary and the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 112th Cong. (2011) (statement of Christine Griffin, Deputy Dir., U.S. Off. of Pers.).

25. The White House has also proposed reorganizing OPM, more broadly, by transferring its security clearance duties to the Department of Defense and other duties to the General Services Administration. Letter from Russell T. Vought, Acting Dir., Off. of Mgmt.

executive agency subject to presidential control, it could still have presented agency heads with a list of eligible candidates to choose from, much like agency subordinates will now do. In these circumstances, the Appointments Clause would not have been offended. But that assumes the OPM bureaucracy is reformable on this issue. It also assumes the elaborate testing system OPM created is necessary or desirable. By using a strict score system and granting veterans a five or ten (for disabled veterans) point preference over other applicants, OPM virtually assured that successful applicants would be veterans if they were in the pool of eligibles.²⁶ The approach the E.O. took, using the veterans' preference as a tie breaker, is better suited to producing the most qualified candidates while still respecting a deserving class of applicants.²⁷

Also, by devolving the selection and choice to agencies, E.O. 13,843 eliminates the need for separate registers that OPM was reluctant to grant. This applies most to SSA and the Department of Health and Human Services (HHS), where the vast majority of ALJs reside.²⁸ Since these agencies use a non-adversarial (or inquisitorial) decision framework, trial experience was never as important a selection criterion. Rather, mass decisionmaking skills and sensitivity to claimants' needs and limitations are more predictable indicators of superior performance.²⁹ Thus, even if not constitutionally compelled, E.O. 13,843 has made a positive move in favor of efficient government by transferring selection power to agencies. But that move must still be balanced against the troubling possibility of increasing political influence over the selection process.

Once agency officials have control, the selection process becomes potentially more discretionary and political. Obviously, agency heads (and

& Budget, to Nancy Pelosi, Speaker, House of Representatives (May 16, 2019), https://federalnewsnetwork.com/wp-content/uploads/2019/05/OMB_OPM_GSA_Merger_Legislative_Proposal_FNN.pdf.

26. JACK M. BEERMANN & JENNIFER L. MASCOTT, ADMIN. CONF. OF THE U.S., RESEARCH REPORT ON FEDERAL AGENCY ALJ HIRING AFTER LUCIA AND EXECUTIVE ORDER 13843, at 11–12 (rev. version 2019), <https://www.acus.gov/sites/default/files/documents/Submitted%20final%20draft%20JB.pdf>.

27. Paul R. Verkuil, *Reflections upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1360 (1992).

28. See *ALJs by Agency*, OFF. PERS. MGMT., <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> (last updated Mar. 2017) (reporting that, of the 1,931 ALJs, the SAA employs 1,655 and HHS employs 106).

29. See BEERMANN & MASCOTT, *supra* note 26, at 1–2, 7, 36. In any event, the Social Security Administration (SSA) would often find its experienced ALJs plucked by transfer to the regulatory agencies.

often deputies) are political appointees³⁰ and would be expected to respond positively to White House requests for personnel actions, especially in a new administration where jobs must be found for campaign aides and other loyalists. While there are examples where it has occurred with non-ALJ deciders,³¹ the ALJ agency-based selection process might be more resistant to political manipulation. First of all, these are not just political jobs (of which there are several thousand in the Plum Book³²); rather, these are judicial-type positions that require experienced and qualified attorneys to fill them. It is in agencies' self-interest to adopt hiring standards that approximate what OPM previously mandated. Not all agencies have established selection criteria, but some show an awareness of the dangers of politicizing the process. The Department of Labor (DOL), one of the most politically contested agencies, has created criteria that in some respects even exceed those previously required by OPM (e.g., requiring ten, not seven, years of relevant litigation experience) and placed the screening panel under the aegis of the DOL's Chief ALJ, a nonpolitical figure.³³

Importantly, ACUS has offered advice on how affected agencies might create recruitment and selection guidance in Recommendation 2019-2.³⁴ The Conference emphasizes "impartiality and maintain[ing] the appearance of impartiality" among its recommendations.³⁵ In this way, it echoes E.O.

30. Interestingly, agencies that are independent commissions typically are politically balanced, which may moderate political influence. Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 81 (2018).

31. In the administration of George W. Bush, the Department of Justice (DOJ) Inspector General found such influence in Immigration Judge appointments. Jeffrey S. Lubbers, *The Regulatory Accountability Act Loses Steam but the Trump Executive Order on ALJ Selection Upturned 71 Years of Practice*, 94 CHI-KENT L. REV. 741, 749–50 (2019) (documenting political influence in the appointment of administrative judges in the Bush II Administration).

32. S. COMM. ON HOMELAND SEC. & GOV'T AFFS., 114TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS iii (Comm. Print 2016), <https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2016/pdf/GPO-PLUMBOOK-2016.pdf>. "Every four years, just after the Presidential election, the 'United States Government Policy and Supporting Positions,' commonly known as the Plum Book, is published, alternately, by the Senate . . . and the House . . ." *Id.* The Plum Book is used to identify presidentially appointed positions within the federal government.

33. Procedures for Appointment of Administrative Law Judges for the Department of Labor, 83 Fed. Reg. 44,307, 44,307 (Aug. 30, 2018).

34. ADMIN. CONF. OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2019-2: AGENCY RECRUITMENT AND SELECTION OF ADMINISTRATIVE LAW JUDGES (2019), https://www.acus.gov/sites/default/files/documents/ALJ%20Selection%20Recommendation%20FINAL_August%202019.pdf.

35. *Id.* at 5.

13,843 which called ALJs “impartial and committed to the rule of law.”³⁶ These are high-minded phrases, of course, that inspire but may well not control agency action. Still, such phrases make sense pragmatically.

For an agency head, hiring decisions based on competence, not sinecures, best serve agency interests. If you administer the SSA Disability program or HHS’s Medicaid appeals program, your biggest issue is the million-plus case backlog that keeps you up at night, and Congress, the White House, and the public on your calendar. You have the budget for only so many ALJs—why would you waste any one of them on a political payoff? If a judge cannot carry his or her weight, you will hear about it from all sides, including career managers who track individual judge performance. The question could be closer at regulatory agencies where the numbers are smaller and political bias in favor of deregulation, say, might affect choices. But even here, competence should rule. As a commissioner, you do not want to have to set aside decisions of your own ALJs, or worse, have the courts do so. What is needed is someone who can find facts accurately, without bias, and leave the policymaking to the agency heads. Remember, the role of ALJs under the APA, unlike their judicial counterparts, is to make independent factual assessments to which the commission or agency head would apply the law.

III. THE SOLICITOR GENERAL’S MEMORANDUM AND THE EXPANSION OF PRESIDENTIAL AUTHORITY

If *Lucia* were only taken on its own terms, there would still be issues to deal with (like the future of for-cause removal raised by Justice Breyer), but the SG’s Memo elevates the case into a whole new legal and policy stratosphere. The SG’s guidance to agency counsels (1) extended *Lucia*’s reach from ALJs to all “similarly situated” non-ALJ decisionmakers; (2) added ALJ non-adversarial decisions to the covered adversarial decision universe; and (3) agreed to defend ALJ removal protections only if they are “suitably deferential” to agency heads.³⁷ These positions had also been previewed in the SG’s brief in *Lucia*, which the Court refused to address. They now appear to be Administration policy and connect directly to E.O. 13,843.³⁸ As such,

36. *Id.* at 2–3; Exec. Order No. 13,843, 83 Fed. Reg. 32,755, 32,755 (July 13, 2018).

37. Solic. Gen. Guidance, *supra* note 14, at 3, 9; see also *Appointments Clause*, *supra* note 16, at 1120. Oddly, when the Solicitor General opened a “Summit on Modernizing the Administrative Procedure Act” on December 6, 2019 at the DOJ, he did not mention the reforms proposed in his earlier, *Lucia*-inspired memo. See *Solicitor General Noel Francisco Delivers Remarks at Department of Justice Summit on Modernizing the Administrative Procedure Act*, U.S. DEP’T OF JUST. (Dec. 6, 2019) [hereinafter *Francisco Remarks*], <https://www.justice.gov/opa/speech/solicitor-general-noel-francisco-delivers-remarks-department-justice-summit-modernizing>.

38. See Lubbers, *supra* note 31, at 747.

the SG's positions could have transformative effects on the administrative state.³⁹ Consider first the expansion of the Appointments power to all administrative deciders. That move alone increases the universe of deciders by at least 10,000 more administrative judges (AJs).⁴⁰ Indeed, the true number may be unknown if non-adversary hearings are included.⁴¹ This is one reason why the APA limited the ALJ category to formal hearings long ago.⁴² Expanding the inferior officer category could produce significant amounts of litigation in the future. Presumably, the Supreme Court will step in to explain the limits of *Lucia* before things go that far.

The SG's third point of guidance is its most controversial and highlights Justice Breyer's concerns in *Lucia*. By requiring removal restrictions to be deferential to the executive authority, it challenges established statutory schemes. The statutory framework surrounding ALJ removal involves a hearing on the record before the Merit Systems Protection Board (MSPB).⁴³ E.O. 13,843 acknowledges, as it must, the role of MSPB in the removal process, but the SG's memo (and his brief in *Lucia*⁴⁴) suggested that the ALJ for-cause removal statute might be a constitutional problem under the *Free Enterprise Fund* dual for-cause rationale.⁴⁵ Instead, the SG Memo would change the burden of proof and eliminate the de novo review power of the MSPB. This may make the review "sufficiently deferential," but it ignores statutory language and purpose.⁴⁶ Moreover, it in effect leaves ALJs with less protection against removal than civil servants generally, surely the opposite of what due process would demand. Of course, there must be an MSPB to appeal to: it has been several years since the agency had a quorum.⁴⁷ The Senate has yet to confirm three members,⁴⁸ and agencies

39. *Francisco Remarks*, *supra* note 37.

40. See BEERMANN & MASCOTT, *supra* note 26, at 3–4.

41. This move may have been intended to encompass SSA disability ALJs who preside over inquisitorial type hearings with legislative approval, but could reach thousands more, e.g., the proverbial park ranger at Yosemite.

42. See RICHARD PIERCE JR., SIDNEY SHAPIRO, & PAUL VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 265–69 (6th ed. 2014).

43. See 5 U.S.C. § 7521(a).

44. Brief for the Respondent at 19–20, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130).

45. See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492–508 (2010) (analyzing why dual for-cause protection improperly restricts the President's Article II powers).

46. Solic. Gen. Guidance, *supra* note 14, at 9.

47. See Nicole Ogrysko, *Senate Forces 'First' for MSPB as the Agency Loses All Members*, FED. NEWS NETWORK (Mar. 1, 2019, 10:49 AM), <https://federalnewsnetwork.com/workforce-rights/governance/2019/03/senate-forces-first-for-mspb-as-the-agency-loses-all-members/>.

48. *Key Positions Still Unfilled*, FEDWEEK (July 30, 2019), <https://www.fedweek.com/fedweek/key-positions-still-unfilled/> ("The committee early this year approved nominations for two

are beginning to challenge the jurisdiction of the MSPB itself.⁴⁹ The 2,818 cases in MSPB's backlog, as of June 30, 2020, will take the Board time to resolve.⁵⁰ This backlog, however, coupled with the judicial challenges, makes it unlikely that the Board will turn to revising its procedures for review any time soon.

There have long been ALJ/agency disputes over independence issues, especially with SSA's management control of ALJ disability workloads and decision times.⁵¹ A removal standard that requires compliance with agency authority is both appealing and dangerous. Some ALJs clearly do not carry their share of the decision load, but removal on that basis alone can be onerous and threatening. And now that the SG wants all administrative judges under the same inferior officer umbrella, the caseload of Immigration Judges (IJs), which DOJ has radically increased,⁵² becomes another vehicle for removal. IJs currently have nothing like the independence protections of ALJs, but they could gain independence depending on which direction the for-cause debate goes. The SG's position might ultimately be to strengthen the independence

of the [Merit Systems Protection Board (MSPB)] seats and more recently approved a nominee for the other. Their confirmation would allow the MSPB to return to normal operations after having lacked a quorum since January 2017.”)

49. Current practitioners have reported that agencies are regularly filing appeals to the full Board of the MSPB appealing favorable outcomes for employees facing proposed disciplinary actions, and “that these MSPB judges exercise the same significant authority as these administrative law judges do — and just like the ALJs their appointments are unconstitutional and they have no authority.” See Nicole Ogrgysko, *Why Recent Constitutional Challenges May Have Implications for Agencies and Their Administrative Judges*, FED. NEWS NETWORK (Dec. 30, 2019, 5:47 PM), <https://federalnewsnetwork.com/workforce/2019/12/why-recent-constitutional-challenges-may-have-implications-for-agencies-and-their-administrative-judges/>. Because judges at MSPB are appointed through Human Resources departments exercising the delegated authority of the Board, agencies argue that their appointments are invalid and that they have no authority to render decisions. As the Board currently has no members to hear these appeals, the disciplinary actions and removals of federal employees are taking place regardless, with the expectation that affected employees will move on to other work before MSPB is able to hear those appeals.

50. *Pending PFR Data*, MSPB, https://www.mspb.gov/FOIA/files/June_2020_PFRs_Received_and_Pending_Counts.pdf (last updated July 6, 2020).

51. See generally OFF. OF THE INSPECTOR GEN., SOC. SEC. ADMIN., A-12-11-01138, CONGRESSIONAL RESPONSE REPORT: OVERSIGHT OF ADMINISTRATIVE LAW JUDGE WORKLOAD TRENDS (2012), https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-11-01138_0.pdf (discussing productivity and management controls that preside over ALJs).

52. See *Adjudication Statistics: New Cases and Total Completions*, EXEC. OFF. FOR IMMIGR. REV., <https://www.justice.gov/eoir/page/file/1060841/download> (last updated July 14, 2020) (average total completions per month has increased from 11,958 in 2016 to 23,825 in the third quarter of 2020).

of thousands more AJs rather than reduce that of ALJs alone. The judicial instinct is to ensure due process for judges, of whatever stripe.

Justice Scalia's observation in *The ALJ Fiasco*⁵³—that issues of ALJ quality as well as impartiality must be equally considered—supports management efforts to achieve the removal of bad performers. Removal power is a drastic way to ensure ALJ quality and it should be used as a last resort. Professional training can do much to improve performance as can better selection processes at the outset. The APA's formulation of ALJ independence may leave on duty some bad actors, and reforms can be made, but no one will benefit from the elimination of the for-cause removal requirement. It is hard to see *Lucia* and related cases being taken this far. Conceivably, however, the Court could draw the line at for-cause protections for administrative adjudicators based on due process considerations.⁵⁴ This would leave the vast majority of career civil servants, who are policymakers rather than adjudicators, unprotected by civil service tenure rules despite statutory provisions now in place.

IV. ARE CIVIL SERVANT TENURE PROTECTIONS IN JEOPARDY?

New questions are being raised concerning whether civil service tenure protections are themselves unconstitutional, as they deprive the President of his constitutional power to hold the bureaucracy accountable. One such provocative suggestion comes from Phillip Howard.⁵⁵ Howard raises a relevant and timely question: Does the Supreme Court's jurisprudence on ALJ for-cause removal leave room for protecting non-adjudicative deciders? Should civil servants have tenure? This question rises at a dramatic time, just as career foreign service officials have defied executive orders to testify before Congress in impeachment proceedings.⁵⁶

53. Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57, 57–58 (1979).

54. The future of cases like *Humphrey's Executor* remain in jeopardy if the due process rationale does not apply to commissioners. See PIERCE JR., SHAPIRO, & VERKUIL, *supra* note 42, at 265–69.

55. Phillip K. Howard, *Restoring Accountability to the Executive Branch* (C. Boyden Gray Ctr. for the Study of the Admin. State, Working Paper 20-02, 2020), <https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2020/02/Howard-Restoring-Accountability-to-the-Executive-Branch.pdf>.

56. Ambassadors to Ukraine Yovanovitch and Taylor stand out. The American Foreign Service Association, the professional association for Foreign Service Officers, “has raised more than \$250,000 for a legal-defense fund for nine of the 17 witnesses who testified about whether Trump and the White House pressured Ukraine to investigate the president's [sic] political opponents.” See Lisa Rein, *As Impeachment Hurdles Forward, a Plea for Legal Help for Government Witnesses*, WASH. POST (Dec. 8, 2019, 2:00 PM), https://www.washingtonpost.com/politics/as-impeachment-hurdles-forward-a-plea-for-legal-help-for-government-witnesses/2019/12/07/3053d6ae-1857-11ea-9110-3b34ce1d92b1_story.html.

Could it be that the employee removal protections in the Civil Service Reform Act are “clearly unconstitutional,” as Phillip Howard has argued?⁵⁷ Conceivably, an irate President Trump could decide to punish or terminate those “disloyal” officials who testified against him or leaked damaging information. In this event, a case raising tenure for policy officials could reach the Court and the due process limits on removal could be addressed.

The Court’s willingness to embrace for-cause limits on civil servants with adjudicative powers is bolstered by the unanimous opinion in *Weiner v. United States*,⁵⁸ where Justice Frankfurter refused to allow removal of a quasi-judicial war claims commissioner due to “the nature of the function” he performed. But policymaking officials fall outside this protective umbrella, and justifications for their tenure status must be drawn from elsewhere in the Constitution. From the earliest days under the Pendleton Act,⁵⁹ the Court indicated support of for-cause removal of non-adjudicatory officials.⁶⁰ But that bulwark may have to be built anew in an era where the Court seems more concerned with the President’s executive power under Article II. Does the ability to ‘speak truth to power’ justify a comparable protection for policy officials much like the adjudicative function does for decisional officials? Ultimately, the arguments must confront *Marbury v. Madison*,⁶¹ and the level of policymaking involved. Secretary of State Pompeo cannot enjoy tenure in-office protections for speaking his mind to the President, but can foreign service officers do so at a lower level of authority? Call this the Pompeo/Yovanovitch-Taylor line. Ambassadors operate under the protection of the Department of State’s “Dissent Channel,” which enables U.S. citizen employees to express alternative views on substantive issues of policy that must be addressed in high level review and protected against retribution.⁶² The career officials,⁶³ who

57. See Howard, *supra* note 55, at 17–19.

58. 357 U.S. 349, 353 (1958).

59. The Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403, 403–04 (1883), was the first federal civil service statute to mandate that most civil service positions be awarded based on merit instead of political patronage.

60. See *United States v. Perkins*, 116 U.S. 483, 484–85 (1886) (involving removal of a naval officer).

61. 5 U.S. (1 Cranch) 137, 155 (1803).

62. 2 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL AND HANDBOOK § 071.1–.2 (2018), <https://fam.state.gov/fam/02fam/02fam0070.html>.

63. Career civil servants, military personnel, and foreign service officers appearing in the impeachment hearings included William B. Taylor, George Kent, Marie Louise “Masha” Yovanovitch, Jennifer Williams, Lt. Col. Alexander Vindman, Laura Cooper, David Hale, Peter Michael McKinley, Philip Reeker, Catherine M. Croft, Christopher Anderson, and David Holmes. Several of these officials served in politically appointed roles but were appointed from the career service to which they would normally return when dismissed from their political

testified in the impeachment proceedings against the wishes of the White House, acted in this tradition. Could President Trump retaliate beyond offensive tweets and remove them? He has already acted to reassign those who have not retired.⁶⁴ In these circumstances, how secure is the Civil Service Reform Act of 1978 and its creation of the Senior Executive Service (SES)?⁶⁵ SES members are senior civil servants who are primarily policymakers and enjoy tenure protections by statute based on their GS civil service rank.⁶⁶

Since they are outside the due process-based protections accorded adjudicators, they are susceptible to being deprived of protections along the lines Phillip Howard has offered. His mantra is lack of accountability in government, which means that “public service is a dead end.”⁶⁷ Howard proposes to make the civil service more accountable by creating something like “at-will” public employment at the federal level.⁶⁸ This is a controversial step some states have taken with unpromising results.⁶⁹ Public at-will employment poses two perils: the indiscriminate use of contractors to fill permanent positions, creating management inefficiencies, and a potential return to the spoils system, which is why we got the Pendleton Act in the first place.⁷⁰

Howard’s view of the civil service uses the accountability value to eradicate the values of bureaucratic independence and dedication. Moreover, it does not comport with my experience in government. Where I find responsible civil servants the rule, he finds them the exception. Howard admits there are “pockets of excellence that exist throughout government”;

appointment. See Patricia Zengerle & Doina Chiacu, *Witnesses in the Trump Impeachment Inquiry*, REUTERS (Nov. 14, 2019, 3:58 PM), <https://www.reuters.com/article/us-usa-trump-impeachment-witnesses-factb/witnesses-in-the-trump-impeachment-inquiry-idUSKBN1XO2UN>.

64. See Toluse Olorunnipa et al., *Trump Ousts Vindman and Sondland, Punishing Key Impeachment Witnesses in Post-Acquittal Campaign of Retribution*, WASH. POST (Feb. 7, 2020, 8:45 PM), https://www.washingtonpost.com/politics/trump-ousts-vindman-and-sondland-punishing-key-impeachment-witnesses-in-post-acquittal-campaign-of-retribution/2020/02/07/dafb90-49be-11ea-bdbf-1dfb23249293_story.html.

65. Pub. L. No. 95-454, § 3(6), 92 Stat. 1111, 1113 (1978).

66. *Id.* § 402(a), 92 Stat. at 1154–55 (to be codified at 5 U.S.C. § 3131).

67. Howard, *supra* note 55, at 14.

68. See Promote Accountability and Government Efficiency Act, H.R. 6278, 114th Cong. § 2(a) (2016), criticized in Joe Davidson, *New Feds Could be Fired for ‘No Cause at All’ by Trump Under Planned Legislation*, WASH. POST: POWER POST (Jan. 12, 2017, 7:00 AM), <https://www.washingtonpost.com/news/powerpost/wp/2017/01/12/new-feds-could-be-fired-for-no-cause-at-all-under-planned-legislation/> (arguing in favor of the bill, Congressman Rokita believes the bill would “protect employees against favoritism, political coercion and arbitrary action and prohibit abuse of authority”).

69. VERKUIL, *supra* note 21, at 107.

70. *Id.*

to me, those pockets are much deeper and broader than he realizes.⁷¹ Whoever is correct on the empirical question, however, does not answer the larger theoretical one: why give tenure to non-adjudicatory civil servants at all? One response comes from Jon Michaels. In his influential book, *Constitutional Coup*, Professor Michaels has answered this question by positing a theory of administrative separation of powers.⁷² He sees a tenured and politically insulated civil service as “the administrative counterpart to the federal judiciary.”⁷³ Michaels views the civil service as providing a counter-majoritarian check on the executive (represented by agency heads) that assures a stable democratic state.⁷⁴ His fear is that absent independent civil servants, government contractors will do the bidding of the agency heads and administrative separation of powers will disappear.⁷⁵ Doubtless Howard would find Michaels’s arguments unconvincing, if not anathema. Where Michaels favors “multiple veto points” to stabilize the bureaucracy,⁷⁶ Howard would probably say that *is* the problem.⁷⁷ But Michaels’s constitutional defense of the civil service is a necessary step to consider once the clash becomes inevitable. My inclination is to side with Michaels, at least some of the way. Civil service independence makes sense just because giving objective advice is good government. Whether “good government” can be defended as a constitutional value outside the administrative adjudicative context is something the Supreme Court will ultimately have to consider.⁷⁸ But the Court does not act in a vacuum. Congress is a coequal constitutional branch and it is time to see whether it wants to step forward.

71. Howard, *supra* note 55, at 13.

72. JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC* 8–9 (2017).

73. JON D. MICHAELS, *A Constitutional Defense of the Administrative State*, REG. REV. (Dec. 17, 2019), <https://www.thereview.org/2019/12/17/michaels-constitutional-defense-administrative-state/>.

74. *Id.*

75. *Id.*

76. *Id.*

77. See Howard, *supra* note 55, at 22.

78. In the course of deciding *Seila Law LLC v. CFPB*, No. 19-7 (U.S. June 29, 2020) (holding the single headed CFPB Director unconstitutional (and the for-cause provision severable)), the Court reaffirmed both *Humphrey’s Executor* and *United States v. Perkins*, and cited *Perkins* as ensuring “tenure protections for certain *inferior* officers with narrowly defined duties.” See *Selia Law LLC*, slip op. at 2, 16 (citing *United States v. Perkins*, 116 U.S. 483 (1886) and then *Morrison v. Olsen*, 487 U.S. 654 (1988)). The latter category should include civil servants, including members of the Senior Executive Service.

CONCLUSION: HELP US, CONGRESS!

Congress's long involvement in the management of the administrative state inspired needed reforms to the civil service, but it has been over 40 years since it has acted comprehensively. When both sides of the aisle see the dangers to our government that lie ahead, Congress can act. Indeed, it has done so recently. In the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017,⁷⁹ Congress sought to get rid of the unethical managers who created the Veteran Affairs's wait list scandal.⁸⁰ While its effectiveness has not been fully evaluated,⁸¹ the mere fact that Congress *could* act, and act fast, on this important personnel issue offers hope for greater civil service reforms. While removing bad managers is not the same as protecting good managers, Congress's prior bipartisan work on whistleblowers⁸² is a promising indicator.

For the reform effort to be bipartisan, two things need to happen. Republicans need to value the historic independence of civil servants and the protections provided by Inspectors General as well as whistleblowers. Democrats must bring the public sector unions to the table because they often support regulations that serve to thwart reform and innovation. Other players who have studied civil service reform in a deep and unbiased manner, like the National Academy for Public Administration and the Partnership for Public Service, should also be involved.⁸³

79. Pub. L. No. 115-41, 131 Stat. 862 (2017).

80. *Id.* §§ 101-02, 201-02, 131 Stat. at 863, 865, 868-69.

81. So far, according to the Department of Veterans Affairs (VA), 8,630 lower employees have been fired, but only three members of the SES. See Glenn Kessler, *President Trump's Claims About VA Firings*, WASH. POST (Sept. 17, 2019, 3:00 AM), <https://www.washingtonpost.com/politics/2019/09/17/president-trumps-claims-about-va-firings/>.

82. See, e.g., Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 (2012). But see Kyle Cheney & Burgess Everett, *Rand Paul Reads Alleged Whistleblower's Name and Republicans 'Fine' with It*, POLITICO (Feb. 4, 2020, 1:16 PM), <https://www.politico.com/news/2020/02/04/rand-paul-reads-alleged-whistleblowers-name-senate-floor-110684>.

83. *No Time to Wait Pt. 2: Building a Public Service for the 21st Century*, NAT'L ACAD. OF PUB. ADMIN. (Sept. 21, 2018), <https://www.napawash.org/studies/academy-studies/no-time-to-wait-part-2-building-a-public-service-for-the-21st-century> (containing links to part 1, the framework for rebuilding the public service, and part 2, building a more detailed plan of action to transform the public service:

- Build flexibility in the pursuit of mission.
- Replace the over-defined job specifications of the current system with a competency-based, talent-management model.
- Reinforce the pursuit of merit-system principles.
- Lead from the center.
- Transform the federal government's human capital backbone).

Can Congress rise to the challenge in this contentious environment? Does it want to govern? There are ways forward from the executive perspective, and the Office of Management and Budget⁸⁴ and Department of Justice⁸⁵ have already made some suggestions. We are at a crucial stage in the history of the administrative state. As Gillian Metzger has taught us, we are in a period not unlike the New Deal itself, and the stakes are enormous for our democracy.⁸⁶ The role of the Court in this undertaking can be as pivotal as it was in the 1930s, and cases like *Lucia* and *Gundy v. United States*⁸⁷ could be used either to challenge civil service tenure or to vindicate it. Broader reform efforts directed at protecting the independence of policy officials will surely spark contentious debate. The role of government health officials, like Dr. Anthony S. Fauci, has taught us the value of expertise and commitment to science that many can see and appreciate. While it is unknown where reform efforts will end, it is apparent where they must begin: with Congress and the Executive. This leaves the Judiciary with the responsibility to interpret the resulting legislation, but not the final say.

84. See Nicole Ogrysko, *Here's What Civil Service Modernization Looks Like in Trump's 2020 Budget Request*, FED. NEWS NETWORK (Mar. 18, 2019, 5:22 PM), <https://federalnewsnetwork.com/workforce/2019/03/heres-what-civil-service-modernization-looks-like-in-trumps-2020-budget-request/> (describing civil service reform proposals included in the President's Fiscal Year 2020 Budget Request by the Office of Management and Budget).

85. See generally OFF. OF THE DEPUTY ATT'Y GEN., U.S. DEP'T OF JUST., MODERNIZING THE ADMINISTRATIVE PROCEDURE ACT 3–8 (2020), <https://www.justice.gov/file/1302321/download> (foreword by Jeffrey A. Rosen, Deputy Attorney General) (summarizing ideas discussed by panelists during summit on *Modernizing the Administrative Procedure Act*, and calling for Congress to reform the regulatory process to improve “economic opportunity, policy accountability, due process, transparency, and the rule of law.”).

86. See generally Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 6, 8 (2017) (demonstrating modern day parallels to the New Deal era).

87. See generally 139 S. Ct. 2116 (2019) (challenging provisions of the Sex Offender Registration and Notification Act as violative of the nondelegation doctrine).