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Legal Sidebar

Carr v. Saul: Issue Exhaustion Not Required for Social Security Claimants' Appointments Clause Challenges

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On April 22, 2021, the Supreme Court handed down its decision in *Carr v. Saul* (consolidated with *Davis v. Saul*), holding that six Social Security claimants had not forfeited their challenges to the constitutional status of administrative law judges (ALJs) employed by the Social Security Administration (SSA). The six petitioners argued for the first time in federal court that the ALJs who presided over their disability hearings were appointed in violation of the Appointments Clause of the Constitution; none of the petitioners first raised those arguments in administrative proceedings before the SSA. The Supreme Court unanimously held that the petitioners did *not* forfeit their constitutional challenges, either by failing to comply with the administrative law doctrine of "issue exhaustion" or Supreme Court precedent requiring "timely" Appointments Clause claims.

While the decision is a significant victory for the petitioners, the greater impact of *Carr* is uncertain and may be limited by key aspects of the Court's majority opinion. This Sidebar discusses the *Carr* decision, as well as background principles that inform and underlie the decision and the decision's potential impact. (An earlier Sidebar discussed the issues in *Carr* before the Court reached its decision.)

Legal Background

Issue Exhaustion

In administrative law, there are two "exhaustion" doctrines that affect whether and how a federal court will review a federal agency's decision. Under the doctrine of *exhaustion of administrative remedies*, a party typically must "complete the agency's internal remedial steps (including administrative appeals) before turning to the judiciary." Conversely, *issue exhaustion*—the doctrine at issue in *Carr*—refers to the oft-imposed requirement that a party seeking judicial review of an agency's adverse determination raise all arguments before the agency that it may wish to raise on appeal in federal court.

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Relevant Prior Decisions: *Lucia v. SEC* and *Sims v. Apfel*

Two previous Supreme Court decisions set the backdrop for *Carr*. First, *Carr* follows from the Court's 2018 decision in *Lucia v. Securities and Exchange Commission (SEC)*, where the Court held that SEC ALJs are "Officers of the United States" under the Appointments Clause. The Appointments Clause provides that "Officers of the United States" must be appointed by the President "with the Advice and Consent of the Senate," but that Congress can provide for the appointment of "inferior" officers by "the President alone," "the Courts of Law," or "the Heads of Departments." The *Lucia* Court ruled that SEC's ALJs had not been appointed in a manner prescribed by the Clause. It also held that the petitioner in *Lucia* was entitled to a remedy of a new hearing before a new and properly appointed adjudicator because he had made "'a timely challenge to the constitutional validity of the appointment of'" the ALJ who presided over his case by raising his challenge before the Commission and continuing to raise it on appeal in federal court. However, the Court did not explain how this "timely challenge" standard applies to parties in other contexts, or how it corresponds with the issue-exhaustion doctrine.

Second, in its 2000 decision in *Sims v. Apfel*, the Court held that a Social Security claimant may preserve a claim on judicial review that she did not raise before the SSA Appeals Council—the administrative tribunal that reviews appeals from SSA ALJ determinations and is the final agency decisionmaker in SSA proceedings. The *Sims* Court determined that no statute or regulation required issue exhaustion and found no basis to impose such a requirement. However, the majority in *Sims* did not agree on a rationale for the Court's conclusion. Writing for a four-Justice plurality, Justice Thomas asserted that several practices, procedures, and regulations underscore that "Social Security proceedings are inquisitorial rather than adversarial" and that, therefore, a judicially crafted issue-exhaustion rule is not warranted for Appeals Council proceedings. Justice O'Connor agreed with the Court's holding but did not concur with Justice Thomas's rationale. Instead, she opined in a concurring opinion that SSA's "failure to notify claimants of an issue exhaustion requirement in this context is a sufficient basis for our decision." Notably, the *Sims* Court did not decide "[w]hether a claimant must exhaust issues before the ALJ."

Carr v. Davis

Carr stemmed from the six petitioners' individual Social Security disability proceedings. All petitioners were denied benefits by SSA and all exhausted their available administrative appeals. After petitioners reached federal court on appeal from SSA's determinations, the Supreme Court issued its decision in *Lucia*. Because SSA's ALJs, at the time of petitioners' administrative proceedings, had been appointed by agency staff and not by an entity identified in the Appointments Clause, each petitioner subsequently argued in federal court that the ALJs who decided their claims were unconstitutionally appointed officers. The government did not dispute that SSA's ALJs were subject to the Appointments Clause, instead arguing that the petitioners had forfeited their challenges by failing to first raise them before SSA. The U.S. Courts of Appeals for the Eighth Circuit and Tenth Circuit agreed. In November 2020, the Supreme Court granted petitioners' requests for review of whether they forfeited their Appointments Clause challenges and consolidated their cases.

The Supreme Court's Decision

On review, the Supreme Court held that the petitioners had not forfeited their Appointments Clause challenges by failing to raise them before their SSA ALJ proceedings. Justice Sotomayor wrote the majority opinion in *Carr*, which Chief Justice Roberts and Justices Alito, Kagan, and Kavanaugh joined in full. Additionally, Justice Thomas (joined by Justices Barrett and Gorsuch) and Justice Breyer each concurred with the Court's ultimate conclusion—thus making the Court's judgment unanimous—but wrote separate opinions explaining that they would have rested on more limited grounds than did Justice Sotomayor. Justice Sotomayor's opinion for the majority affirmed the principle announced by the

majority in *Sims* that, in the absence of a statutorily or regulatorily imposed issue-exhaustion requirement (as is the case in SSA ALJ proceedings) the "'desirability'" of a court-established issue-exhaustion requirement depends on how similar a proceeding is to typical "adversarial litigation." In laying out this principle, the Court rejected the government's argument that issue exhaustion was required in this case by a "general rule" embodied by prior Court decisions, explaining that "[w]here claimants are not expected to develop certain issues in ALJ proceedings, it is generally inappropriate to treat those issues as forfeited."

Justice Sotomayor's analysis for the majority was in part based on *Sims*. Both Justice Thomas's plurality opinion and Justice O'Connor's concurrence in *Sims*, she wrote, largely applied to the *Carr* petitioners. She reasoned that many of the practices, procedures, and regulations that apply to ALJ proceedings are the same as or similar to those applicable to Appeals Council proceedings, which the plurality in *Sims* argued demonstrated the nonadversarial nature of Appeals Council proceedings. In line with Justice O'Connor's *Sims* concurrence, the *Carr* majority reasoned that SSA's regulations do not notify claimants that they have to raise particular arguments at the ALJ level or risk forfeiting them. Thus, the Court found that *Sims* set the "baseline" for the Court's decision in *Carr*.

The Court, however, did not rest entirely on *Sims*. The majority acknowledged that certain differences between SSA Appeals Council and ALJ proceedings *may* render the latter "relatively more adversarial." No matter to what degree SSA ALJ proceedings may be more adversarial than Appeals Council proceedings and to what extent that would affect the application of issue exhaustion to such proceedings, the Court concluded that two particular considerations tipped "the scales decidedly against imposing an issue-exhaustion requirement" in the petitioners' cases. First, the petitioners' Appointments Clause arguments were "purely constitutional" objections "about which SSA ALJs have no special expertise." Second, the Court concluded that it would have been futile for the petitioners to raise their Appointments Clause challenges before SSA's ALJs. The ALJs could not provide the requested relief because they were unable to "reappoint[] themselves," and none of their appointments had, at the time, been ratified by the SSA Commissioner. Further, SSA's adjudicative process did not permit petitioners to appeal to the Commissioner—"the one person who could remedy their Appointments Clause challenges." In sum, "the inquisitorial features of SSA ALJ proceedings, the constitutional character of petitioners' claims, and the unavailability of any remedy" clearly indicated, per the Court, that no issue-exhaustion requirement applied to petitioners' Appointments Clause challenges.

Justice Sotomayor's majority opinion also rejected the government's argument that the petitioners had violated the "timely challenge" Appointments Clause standard invoked in *Lucia*. The Court appeared to equate that standard with normal forfeiture and issue-exhaustion principles. The Court concluded that, because the petitioners in *Carr* were not under an obligation to exhaust their Appointments Clause challenges before raising them in federal court, they did not fail to "timely" raise those challenges when they raised them for the first time in federal court.

Impact of *Carr*

The Court in *Carr* did not provide explicit guidance on how its decision would apply to other parties or contexts, but certain aspects of the decision indicate that its application in other scenarios may be narrow. As an initial matter, if *Carr* is confined to Appointments Clause challenges to SSA adjudicators, it could likely have limited impact. *Lucia* was decided almost three years ago, and Social Security claimants have only 60 days to challenge an Appeals Council decision in federal court. Thus, as one court observed in 2020, "every claimant whose benefits were denied prior to *Lucia* has long since either filed an appeal in district court or become time-barred from doing so." Further, in July 2018, the SSA Commissioner ratified the appointments of SSA's ALJs and the administrative appeals judges of the Appeals Council, thus ensuring, per one court of appeals, that "there are no new Appointments Clause challenges brewing in SSA cases."

While *Carr* may not be confined solely to appointments challenges to SSA adjudicators, it is not clear how broadly the decision can be applied to SSA claimants in other contexts. The Court held that it was improper to impose an issue-exhaustion requirement in *Carr*, but the Court opined in a footnote that outside the Appointments Clause context, "such as in the sphere of routine objections to individual benefits determinations, the scales might tip differently." A determining factor in how "the scales might tip" in such a context may be the extent to which SSA ALJ proceedings are more adversarial than Appeals Council proceedings, a question left open by the Court. Even after *Carr*, there may be cases where SSA claimants still must raise issues before an ALJ to preserve those issues for judicial review.

Relatedly, *Carr* did not explain how an SSA claimant's constitutional argument might be resolved where it is neither futile nor a "structural constitutional challenge" like an Appointments Clause claim. As Justice Breyer wrote in his concurrence in *Carr*, there is a "well-established principle" that constitutional claims are generally subject to judicial review. Nonetheless, Chief Justice Roberts had inquired during oral argument in *Carr* about the prospect of distinguishing between certain constitutional questions for purposes of exhaustion, asking whether "it's one thing to expect" an unrepresented "plaintiff not to raise an obscure lawyerly issue like the Appointments Clause, but maybe different under the Due Process Clause." However, in *Mathews v. Eldridge*, in which the Court held that Social Security claimants are not entitled under the Due Process Clause of the Fifth Amendment to an evidentiary hearing before their benefits are terminated, the Court "observed" that if the plaintiff "had exhausted the full set of available administrative review procedures, failure to have raised his constitutional claim would not bar him from asserting it later in a district court."

It is also not entirely clear whether *Carr* can be applied to agency adjudicative proceedings outside of SSA where neither a statute nor regulation requires issue exhaustion. In those cases, a court must examine "'the characteristics of the particular administrative procedure'" at issue to determine whether it is appropriate for the court to craft an issue-exhaustion requirement.

Carr was influenced by the fact that there is no statutory or regulatory issue-exhaustion requirement applicable to SSA ALJ proceedings. Congress or SSA could establish an issue-exhaustion requirement by statute or regulation, respectively, which could potentially apply to a variety of legal challenges, including those under the Appointments Clause. Courts have applied statutory and regulatory issue-exhaustion requirements to parties' Appointments Clause challenges. A congressionally or agency-crafted issue-exhaustion requirement could also include exceptions to its application.

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