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Legal Sidebar

Removal Protections for Administrative Adjudicators: Constitutional Scrutiny and Considerations for Congress

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Since the passage of the Administrative Procedure Act (APA) in 1946, administrative law judges (ALJs) across all federal agencies have enjoyed statutory removal protection. The Constitution, however, places some limits on the appointment and removal of executive branch officers, which can include ALJs. The Supreme Court's 2018 decision *Lucia v. Securities and Exchange Commission* resolved constitutional concerns about the *appointment* of Securities and Exchange Commission (SEC) ALJs but left open constitutional questions about restrictions on the President's authority to *remove* them. That question, which could have sweeping implications, is now making its way through the federal courts.

In *Jarkesy v. SEC*, issued in May 2022, a divided three-judge panel of the Fifth Circuit held that removal protections for SEC ALJs violated the President's constitutional power to take care that the laws be faithfully executed. The *Jarkesy* decision calls ALJs' statutory removal protection into question across the federal bureaucracy. Doing away with removal protections for ALJs would appear to mark a major shift in administrative law.

The practical effects of *Jarkesy*, however, may be more limited. The shift that the decision portends has been underway for decades within the federal bureaucracy. Although many federal agencies employ ALJ-like adjudicators (the names vary from administrative judge to patent examiner to investigator), most are not formally ALJs and thus are not protected by the APA's removal restrictions. Only some agencies (like the SEC) still rely on ALJs as their primary adjudicators. This Legal Sidebar provides an overview of the history of the APA's removal protections, recent case law evaluating its constitutionality, and an analysis of the uneven effects that jettisoning removal protections would have on the federal bureaucracy. The Sidebar concludes with considerations for Congress.

The APA and Administrative Adjudications

Federal agencies frequently engage in adjudication—both formal and informal—to resolve the application of a statute or regulation to a particular case. Some of these agency adjudications are governed by the APA, a law that sets out agency procedures in the absence of more specific statutes. Section 3105 of the

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APA permits federal agencies to appoint ALJs to conduct formal adjudications. The APA also provides a common set of procedures for adjudications normally presided over by ALJs.

For those adjudications presided over by an ALJ, the APA ensures ALJs some independence from their employing agency. The APA contains a number of procedures designed to reduce interference in the decisions of ALJs, including—most importantly for this Sidebar—for-cause removal protections and restrictions on performing duties inconsistent with adjudicating, such as acting as an investigator or prosecutor. Once appointed, the APA provides that ALJs are removable only for good cause "established and determined by the Merit Systems Protection Board" (MSPB). The MSPB is an independent agency that is responsible for, among other things, evaluating whether good cause exists to fire federal employees protected by for-cause removal protections. The MSPB's members, like ALJs, are removable only for cause.

The APA's formal adjudication requirements and limitations on removal of ALJs grew out of the political debate surrounding the creation of New Deal agencies during the Great Depression. At that time, there were no general background procedures regulating how agencies conducted adjudications. Formulation of adjudication procedures was left to individual agencies. This lack of direction led, in some instances, to concerns that agency adjudications were unfair, biased in favor of the agency, and violated due process. A series of Supreme Court cases in the 1930s revealed that agencies permitted investigators to act as judges, failed to provide notice of the claims of the agency, and failed to restrict ex parte communications with adjudicators. Moreover, agency adjudicators' continued employment, classification, compensation, and promotion were all dependent on how their employing agency rated them. As the Supreme Court later explained, "[m]any complaints were voiced against the actions of [ALJs], it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations."

In 1946, Congress passed the APA in part to address the shortcomings of agency adjudications. The APA's formal adjudication procedures were aimed at addressing lingering due process concerns and bolstering faith in administrative adjudications by limiting bias (both actual and the appearance of it). Creating an independent class of ALJs through removal protections served both of these purposes.

The APA, however, was only a partial solution. ALJs and the APA-governed hearings over which they preside account for a fraction of agency adjudications. A 2018 survey by the Administrative Conference of the United States (ACUS) found that there are approximately 2,000 ALJs across all federal agencies. By contrast, there are approximately 10,000 non-ALJ adjudicators. Except for some minimal procedural requirements included in the APA, non-ALJs and the hearings over which they preside do not share a common statutory framework, and almost no non-ALJ adjudicators enjoy APA-like removal protection or restrictions on performing other duties within their agencies. (Non-ALJs may be subject to civil service removal protections depending on how they are classified by their parent agency. Civil service protections, however, are outside the scope of this Sidebar).

Although ALJs subject to APA removal protections are a minority of all agency adjudicators, ALJs still play a significant role adjudicating important disputes within agencies such as the SEC, Social Security Administration (SSA), Department of Health and Human Services, National Labor Relations Board (NLRB), and the Federal Energy Regulatory Commission (FERC). In all, as of 2018, 27 agencies employed at least one ALJ. Accordingly, the APA's adjudication procedures and removal protections play an important role in federal agency adjudications. Changes to ALJ's APA removal protections (for example, from court decisions) will be felt acutely in agencies that are required by statute to abide by the APA's formal adjudication requirements, but will have little impact on agencies that engage in informal adjudications.

The *Jarkesy* Decision

The APA's removal protections for ALJs implicate the President's constitutional authority to remove executive branch officers. Article II of the Constitution limits removal protections for "officers" of the United States. Article II distinguishes principal officers (which generally includes Cabinet-level officials, heads of agencies, and the like) from inferior officers (officials who are subject to the direction of principal officers). In general, the Supreme Court has held that officers of any kind cannot be insulated from presidential control by multiple layers of for-cause removal protections. Certain inferior officers, however, may enjoy removal protections so long as their duties are narrowly defined and they are supervised by a principal officer.

Just how far Congress could go in insulating SEC ALJs from presidential removal authority is the subject of the *Jarkesy* decision. In its 2018 opinion *Lucia v. SEC*, the Supreme Court deemed ALJs employed by the SEC "inferior officers" and thus subjected them to constitutional limitations on removal protections. The Fifth Circuit in *Jarkesy* took the next step, holding that SEC ALJs were unconstitutionally insulated from presidential control by two layers of for-cause removal protections.

Jarkesy involved an SEC enforcement action for securities fraud against George Jarkesy. After an evidentiary hearing, an SEC ALJ concluded that Jarkesy committed securities fraud. Jarkesy appealed to the Commission, which affirmed the ALJ's decision and imposed various penalties on Jarkesy. Jarkesy then appealed to the Fifth Circuit, arguing, among other things, that the SEC's ALJs were unconstitutionally insulated from presidential control by multiple layers of for-cause removal protection. A divided panel of the Fifth Circuit agreed with Jarkesy, holding (among other points) that the two layers of for-cause removal protections for SEC ALJs violated Article II of the Constitution.

The *Jarkesy* panel rested its decision on two Supreme Court decisions: *Free Enterprise Fund v. Public Company Accounting Oversight Board* and *Lucia v. SEC*. *Free Enterprise Fund* involved a constitutional challenge to the removal protections of the members of the Public Company Accounting Oversight Board (PCAOB). The PCAOB is housed within the SEC, and its members could only be removed for cause by the SEC after a hearing in front of the MSPB. Moreover, the parties in *Free Enterprise Fund* stipulated that the members of the SEC could be removed only by the President for cause, effectively creating a second layer of protection for members of the PCAOB—one layer of removal protections for the members and a second layer of protections for their superiors.

The Court in *Free Enterprise Fund* held that by creating two layers of statutory removal protection, Congress had "contraven[ed] the President's constitutional obligation to ensure the faithful execution of the laws." Under Article II, the Court reasoned, the President is accountable to the electorate for the actions of the executive branch, but that accountability is undermined when the President loses the ability to control the actions of executive branch officers through the authority to remove those officers. In the case of the PCAOB, two layers of removal protections meant that the President could not remove a member of the PCAOB even if good cause existed because the Commission (with the consent of the MSPB)—not the President—was the body vested with the authority to determine when good cause existed. Accordingly, the Court explained, "[t]he result is a Board that is not accountable to the President, and a President who is not responsible for the Board."

Free Enterprise Fund did not do away with all removal protections, however. The Court re-affirmed its long-standing precedent that *one* layer of removal protection is permissible in certain circumstances. Namely, the Court said that inferior officers who do not exercise policymaking or administrative authority and are charged with only limited duties may be made removable for cause. The Court has not articulated a bright line rule that identifies which executive branch employees may be granted this protection. What is clear, however, is that if an executive branch employee is deemed an officer, that person must be appointed consistent with the requirements of the Constitution's Appointments Clause *and* cannot be unduly insulated from presidential control.

This is where *Lucia v. SEC* comes in. *Lucia* held that SEC ALJs are inferior officers for the purposes of the Appointments Clause of the Constitution. Although *Lucia* reached that conclusion in addressing a constitutional challenge to how ALJs are appointed, *Free Enterprise Fund* shows that it carries implications for how they can be *removed*. Justice Breyer raised the point in his dissent, reasoning that if *Free Enterprise Fund* applied to ALJs as inferior officers, their removal protections might also be unconstitutional.

The *Jarkesy* decision takes the step that Justice Breyer thought likely to follow from *Lucia* and *Free Enterprise Fund*—finding that SEC ALJs are unconstitutionally insulated from presidential control by two layers of for-cause removal protections.

What Is the Practical Significance of *Jarkesy*?

For agencies that use ALJs in the traditional APA sense (like the SEC), *Jarkesy* represents a significant curtailment of the independence the APA created for ALJs as a safeguard against unfair and biased adjudications. According to a 2018 Office of Personnel Management survey, the majority of ALJs are employed by agencies whose heads enjoy some level of removal protection. The SSA employs more than 1,600 ALJs, and the SSA commissioner is removable by the President only for "neglect of duty or malfeasance in office." Although the Department of Justice has interpreted the commissioner's removal restriction as unconstitutional, no court has ruled on the issue. Other agencies that employ relatively large numbers of ALJs and whose heads enjoy removal protections include the NLRB, FERC, and the Occupational Safety and Health Review Commission. A change to removal protections for ALJs within these agencies may have a significant impact on how cases are decided. There is some research demonstrating that adjudicators without removal protections are less independent from their parent agency. Based on this research, some have argued that by subjecting ALJs to greater political accountability, decisions like *Free Enterprise Fund*, *Lucia*, and *Jarkesy* may also increase the likelihood that ALJ decisions will reflect pro-agency bias.

Adjudications before non-ALJ adjudicators, however, are now common practice across the federal bureaucracy, with non-ALJ adjudicators outnumbering ALJs by a factor of five. The Patent and Trademark Office, for example, employs by far the greatest number of non-ALJs—7,856 patent examiners. The Internal Revenue Service and the Department of Veterans Affairs also employ significant numbers of non-ALJs. The 2018 ACUS survey of administrative adjudicators found, however, that three types of non-ALJ adjudicators out of the 37 types identified in the survey enjoyed some kind of removal protection. Future court decisions about the constitutionality of ALJ removal protections will likely have little impact on the vast majority of non-ALJs who already lack APA-like removal protections.

Considerations for Congress

As an initial matter, *Jarkesy* is a Fifth Circuit decision. The Supreme Court has yet to weigh in on this particular issue. Whether ALJs of any kind, and SEC ALJs in particular, can be shielded from removal by two layers of removal protections is still an open question in other jurisdictions. In jurisdictions subject to *Jarkesy* or a similar rule, Congress's ability to insulate administrative adjudicators from at-will removal is limited by Article II of the Constitution. Congress has few statutory options to enhance removal protections for ALJs (although it may have more options for non-ALJs). Existing removal protections for some ALJs, however, may still be constitutional. If an ALJ is housed in an agency whose head the President may remove at will, that single layer of protection may still be within constitutional bounds so long as the ALJ is an inferior officer, has limited duties, and does not exercise policymaking or administrative authority. ALJs are inferior officers and are limited by the APA from engaging in activities that are inconsistent with their duties as ALJs. Moreover, adjudication is traditionally seen as distinct from policymaking.

The Supreme Court, however, recently cast doubt on the distinction between adjudication and policymaking, at least for executive branch officials. In a 2020 case, the Court declared that all power wielded by the executive branch is necessarily executive, even if the duties of certain executive branch officials take on a judicial or legislative quality. Administrative adjudicators "are still exercising executive power and must remain dependent upon the President." Taken to its logical extent, this reasoning might call into question all removal protections, even those for inferior officers. When given the opportunity to strike down removal protections for patent judges (inferior officers), however, the Court declined. Instead, the Court permitted the patent judges to retain their removal protections so long as their decisions were reviewable by a principal officer. A court, however, is unlikely to uphold a statute that adds additional layers of removal protections for ALJs who already enjoy them.

Congress's ability to restrict ALJ removal at so-called independent agencies is more limited. Independent agencies are "independent" primarily because the agency heads (usually a commission or a board) enjoy some form of removal protection. In light of *Free Enterprise Fund*, *Lucia*, and *Jarkesy*, it is unlikely that Congress could provide ALJs employed by independent agencies with any kind of removal protection.

If Congress were persuaded by the Supreme Court's reasoning that the President should have more control over ALJs within executive branch agencies, it could do away with the APA's removal protections for ALJs altogether by amending the APA. Federal agencies have decades of experience using non-ALJs to preside over adjudications and may be a resource for Congress were it to decide to amend the APA in this fashion. Nevertheless, just as bestowing removal protections on agency adjudicators has constitutional implications for the President's ability to control the executive branch, stripping ALJ removal protections may also raise due process and pro-agency bias concerns like those commonly raised before the APA was enacted.

Another issue that Congress may choose to examine is removal restrictions for non-ALJs. For non-ALJs employed by agencies headed by someone the President can remove at will and who do not already enjoy some kind of removal protection, Congress might be able to increase their independence from their parent agency by affording them removal protections enjoyed by ALJs. For example, Congress could amend the APA to include non-ALJs. Nonetheless, because non-ALJs are not always subject to the same limitations on the kinds of non-adjudicatory activities they can engage in, it is not clear that every non-ALJ would be eligible for removal protections under the Supreme Court's current jurisprudence limiting removal protections to those inferior officers who do not engage in policymaking. Moreover, given the Supreme Court's recent characterization of executive power, it is still an open question whether adding even one layer of removal protection for non-ALJs classified as inferior officers would exceed Congress's constitutional authority.

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