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RESOLVING ALJ REMOVAL PROTECTIONS PROBLEM FOLLOWING *LUCIA*

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ABSTRACT

When the Supreme Court decided Lucia v. SEC *and held that administrative law judges (ALJs) are Officers under the Constitution, the Court opened a flood of constitutional issues around the status of ALJs and related government positions. One central issue relates to ALJs' removal protections. ALJs currently have two layers of protection between them and the President. In an earlier Supreme Court decision, the Court held that two layers of tenure protection between an "Officer of the United States" and the President was unconstitutional as it deprived the President the power to hold his officers accountable. As impartial adjudicators, ALJs need those layers of protection to ensure fair adjudicative hearings.* Lucia *now threatens ALJ protections. This Note argues that implementing a peremptory challenge system which would allow each party in an adjudicative hearing to remove the ALJ from hearing its case would create an avenue in which the Court could justify the removal issue. Such a proposal would fix executive oversight concerns about the President being unable to properly implement his policy. Additionally, peremptory challenges would allow litigants in front of an agency be able to remove ALJs they feel are predisposed to the agency. By addressing both constitutional issues, the Court may be more likely to find that the two layers of tenure protection in place are permissible for those in adjudicatory positions.*

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INTRODUCTION

In a term with decisions impacting immigration,[1] voting,[2] and privacy rights,[3] there might not have been a more important Supreme Court decision in 2018 than *Lucia v. SEC*.[4] In the end, Lucia won his claim as the Court found that the administrative law judges (ALJs) of the Securities and Exchange Commission (SEC) qualify as "Officers" of the United States and are subject to the Appointments Clause of the United States Constitution.[5] Prior to the ruling, SEC staff, not the SEC's presidentially appointed commissioners, hired the SEC's ALJs and considered them only ordinary federal "employees."[6] The

1. Trump v. Hawaii, 138 S. Ct. 2392 (2018).
2. Gill v. Whitford, 138 S. Ct. 1916 (2018).
3. Carpenter v. United States, 138 S. Ct. 2206 (2018)
4. Lucia v. Sec. and Exch. Comm'n, 138 S. Ct. 2044 (2018).
5. *Id.* at 2047.
6. *Id.* at 2051.

Court's ruling meant that SEC ALJs must be appointed in the future by the President, "Courts of Law," or "Heads of Departments."[7]

At first glance, *Lucia* seems like a case that only those in the financial industry would care about. The Court narrowly confined its decision to SEC ALJs and the case involved an agency function that involved an agency function about which many Americans are unaware. Nonetheless, it only took a few weeks for the Supreme Court's opinion to have consequences within the agency adjudication system.

On July 10, 2018, President Trump signed an executive order which moved ALJ hiring from the competitive service into the excepted service.[8] President Trump issued the order to ensure that agencies hired ALJs in a manner consistent with the Appointments Clause.[9] The decision also gave heads of agencies greater control in the selection of ALJs.[10]

Lurking alongside *Lucia* are questions of both policy and constitutional significance. The issue that is likely most significant is that ALJ removal protections may be inconsistent with the Supreme Court's earlier decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[11] In *Free Enterprise Fund*, the Court held that dual for-cause limitations on removal violated the President's supervisory authority over executive branch officers.[12] ALJs also have two layers of protection in place, as they can only be dismissed for good cause by the Merit Systems Protection Board (MSPB), whose members themselves are protected, as the President may remove them only for enumerated reasons.[13] To comply with the Court's holding in *Free Enterprise Fund*, one layer of for-cause ALJ protection needs to be

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7. U.S. CONST. art. II, § 2, cl. 2. ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

8. Exec. Order No. 13843, 83 Fed. Reg. 32,755 (July 10, 2018). Excepted service positions are positions that are "excepted" from the rules governing the hiring of competitive service. *See Hiring Information*, OPM.GOV, https://www.opm.gov/policy-data-oversight/hiring-information/excepted-service/ (last visited Jan. 16, 2020). For competitive service positions, individuals must go through a hiring process which is open to all applicants. *Id.* Excepted service positions allow agencies to have their own hiring systems and evaluation criteria. *Id.*

9. *See* Exec. Order No. 13843, 83 Fed. Reg. 32,755 (July 10, 2018).

10. *See id.*

11. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).

12. *Id.* at 496.

13. 5 U.S.C. § 7521 (2018).

removed. However, such a move would create serious concerns about ALJ impartiality and independence.[14]

This Note proposes a remedy that would allow parties in an administrative hearing to remove the presiding ALJ for any reason. Permitting a "peremptory challenge" of ALJs would resolve executive branch supervision concerns while also assuaging due process fears related to ALJ bias. Under this system, the President and agency could remove the ALJ from a case without going through the formal removal process of the MSPB. Private parties also could remove the ALJ from their hearing. Such a remedy would provide a significant thumb on the scale for the Supreme Court to keep ALJ dual-layer removal protection.

Part I of this Note provides background on ALJs and describes their status following *Lucia* and the Court's earlier decision in *Free Enterprise Fund*. Part II describes how these decisions make ALJ removal protections unconstitutional under the Appointments Clause and how constitutional issues of executive oversight and due process arise from *Lucia*. In Part III, this Note examines several proposed solutions and assesses their viability. Ultimately, these proposed solutions do not adequately address executive supervision concerns and ALJ independence concerns. Finally, Part IV proposes that peremptory challenges would address Appointments Clause concerns in *Lucia* and *Free Enterprise Fund*, while also addressing executive oversight and due process concerns.

I. APPOINTMENT AND REMOVAL OF ALJS AND *LUCIA*

Part I begins with an overview of the role of ALJs, their selection, and removal. This Part then discusses the *Lucia* decision and ALJs' new designation as Article II officers. As discussed below, President Trump's subsequent executive order following *Lucia* poses a risk to ALJs' impartiality. Finally, Part I examines the President's removal power since *Free Enterprise Fund*, in which the Court held that two layers of removal protection of executive officers were unconstitutional. Given that ALJs also have two layers of removal protection, it is likely that the *Lucia* decision makes their removal process unconstitutional.

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14. Kent Barnett, *Resolve the "ALJ Quandary": Let the D.C. Circuit Appoint and Remove ALJs.* YALE J. ON REG. (Jan. 2, 2017), http://yalejreg.com/nc/resolve-the-alj-quandary-let-the-d-c-circuit-appoint-and-remove-aljs-by-kent-barnett/.

A. *Congress Enacted Protections to Keep ALJs Independent from their Agency*

An ALJ is a judge and trier of fact who presides over formal adjudicatory and rulemaking proceedings for administrative agencies.[15] ALJs oversee all formal administrative adjudications under the Administrative Procedure Act (APA).[16] ALJs adjudicate claims ranging from providing Medicaid benefits to issuing professional licenses to making decisions on environmental violations.[17]

Recognizing that ALJs preside over important cases imposing significant consequences on regulated parties, Congress accorded ALJs statutory protections guaranteeing their decisional independence.[18] Although each federal agency is responsible for selecting its ALJs,[19] agencies do not have carte blanche in their selection. Instead, they must follow standards that the Office of Personnel Management (OPM) create.[20] OPM's hiring guidelines require ALJ candidates to be lawyers with at least seven years of experience.[21] OPM then gives candidates a score based on experience, recommendations, and a written and oral examination.[22] After the scores are tabulated, the OPM provides agencies with a list of three qualified ALJs, from which the agency chooses.[23]

Once selected, ALJs are afforded certain statutory protections keeping them independent from the agency. The APA provides that ALJs are exempt from evaluations and bonuses, which supports the thinking that independent arbitrators should not be able to receive bonuses from their agencies for their decisions.[24] Nor are ALJs subject to the supervision of employees or agents of the agency who work in an investigatory or prosecutorial function.[25]

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15. 5 U.S.C. §§ 554, 556–57 (2018).
16. *Id.* (detailing requirements for formal rulemaking and adjudication).
17. Lisa Needam, *How a Brand-New Executive Order Could Seat Judges Who Are Eager to Deny Immigrant Rights*, REWIRE.NEWS (July 11, 2018), https://rewire.news/article/2018/07/11/how-a-brand-new-executive-order-could-seat-judges-who-are-eager-to-deny-immigrants-rights/.
18. *See* 5 U.S.C. §§ 554, 556–57 (2018).
19. 5 U.S.C. § 3105 (2018).
20. VANESSA K. BURROWS, CONG. RESEARCH SERV., RL34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW 2 (2010).
21. Hon. John C. Holmes, *Becoming a U.S. Administrative Law Judge, in* CAREERS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 121 (American Bar Association, 2010).
22. *Id.* (describing that the OPM sends out questionnaires to at least "adversaries, judges, or others affiliated with cases and legal work").
23. Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797 (2013). Alternatively, agencies could bypass the OPM process and hire an ALJ directly from another agency. Holmes, *supra* note 21.
24. 5 U.S.C. § 5372 (2018).
25. *Id.*

Most importantly, ALJs have absolute immunity from liability for their judicial acts and are "insulated from political influence."[26] This means that ALJs can only be removed for "good cause."[27] Moreover, while agencies initiate the removal of ALJs, agencies cannot themselves remove ALJs. Instead, ALJs are removable only for cause which must be established and determined by the MSPB,[28] whose members also enjoy "good cause" removal protection from the President.[29] Congress implemented these protections because of the concern that hearing examiners "were mere tools of the agency concerned and subservient to the agency heads" in deciding cases.[30] In theory, these protections bolsters ALJs' independence and impartiality.[31] However, ALJ independence is now threatened by the Court's recent decision in *Lucia*.

B. Lucia *Designated ALJs as Officers of the United States*

Raymond J. Lucia was a financial advisor who marketed a retirement savings strategy called "Buckets of Money."[32] The SEC charged Lucia with violating the Investment Advisers Act,[33] alleging that he offered misleading information to prospective clients about his investment strategy.[34] After the hearings, SEC ALJ Cameron Elliot concluded that Lucia had violated the Act and imposed a $300,000 penalty on him. Worse, Lucia received a lifetime ban from participating in the investment industry.[35]

Lucia appealed, arguing that the SEC's ALJs are "Officers" of the United States and must be appointed by the President, "Courts of Law," or "Heads of Departments."[36] Since SEC department staff hired Elliot, Lucia argued that Elliot lacked the constitutional au-

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26. Butz v. Economou, 438 U. S. 478, 513 (1978) (hinting that ALJs had enough impartiality as they held absolute judicial immunity "functionally comparable" to judges).

27. 5 U.S.C. § 7521(a) (2018).

28. *Id.*

29. Bandimere v. Sec. and Exch. Comm'n, 844 F.3d 1168, 1191 (10th Cir. 2016) (Briscoe, J., concurrence)

30. Ramspeck v. Fed. Trial Exam'rs Conference, 345 U.S. 128, 131 (1953).

31. *But see* Barnett, *supra* note 23, at 807 (noting that the good cause standard that governs MSPB proceedings has been criticized as it has permitted removal for absence over extended periods, declining to set hearing dates, and having a "high rate of significant adjudicatory errors.").

32. Raymond J. Lucia Cos. v. Sec. and Exch. Comm'n, 832 F.3d 277, 282 (D.C. Cir. 2016), *overruled by* Lucia v. SEC, 138 S. Ct. 2044 (2018).

33. 54 STAT. 789, 847, 15 U.S.C. § 80b-1 (2018) (monitoring those who advise people, pension funds, and institutions on investment manners).

34. *Raymond J. Lucia Cos.*, 832 F.3d at 290.

35. *Id.* at 283.

36. *Id.*

thority to do his job.[37] Both the SEC and D.C. Circuit rejected his argument, reasoning that SEC ALJs were "mere employees" with responsibilities that fell outside of the Appointments Clause.[38]

In December 2016, *Bandimere v. SEC*, a Tenth Circuit case, reached the opposite conclusion from the D.C. Circuit, holding that SEC's ALJs were officers under the Appointments Clause.[39] The court concluded that the ability to make final decisions was not dispositive and that the responsibilities of ALJs were analogous to the officers in the Supreme Court's 1991 ruling in *Freytag v. Commissioner of Internal Revenue*.[40] Since the SEC ALJ presiding over the hearing was an inferior officer and was not constitutionally appointed, "he held his office in violation of the Appointments Clause."[41]

When Lucia's appeal reached the Supreme Court, Justice Kagan's opinion for the majority sided with Lucia and the Tenth Circuit; the majority held that the SEC's ALJs are officers of the United States, "subject to the Appointments Clause."[42] Kagan found that the special trial judges (STJs) whom the court held to be officers in *Freytag* were "near-carbon copies of the [SEC's] ALJs."[43] Like STJs, ALJs held a "continuing office established by law; exercise[d] significant discretion in holding adversarial hearings, and use[d] nearly all of the same tools utilized by federal judges; and issue[d] decisions that contain factual and legal findings, and appropriate remedies."[44] Given the characteristics of ALJs, the Court concluded that "[i]f the Tax Court's STJs are officers, as *Freytag* held, then the Commission's ALJs must be too."[45]

C. *President Trump's Executive Order Makes ALJ Hiring More Partisan*

After *Lucia*, SEC ALJs are now inferior officers and must be appointed through the procedures listed in Article II of the Constitu-

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37. *Lucia*, 138 S. Ct. at 2050.
38. *Raymond J. Lucia Cos.*, 832 F.3d at 283, 289.
39. *Bandimere*, 844 F. 3d at 1179.
40. *Id.* at 1179–82.
41. *Id.* at 1170. Following *Bandimere*, Lucia petitioned for rehearing en banc. The D.C. Circuit split evenly 5–5 and issued a per curiam denying Lucia's claim. Raymond J. Lucia Cos. v. Sec. and Exch. Comm'n , 868 F.3d 1021, 2021 (D.C. Cir. 2017) (en banc) *overruled by* Lucia v. SEC, 138 S. Ct. 2044 (2018). Lucia petitioned for certiorari review to resolve the split between the circuits, and the Supreme Court granted the petition.
42. *Lucia*, 138 S. Ct. at 2047. Interestingly, Lucia was joined by the Solicitor General who argued that the Constitution required treatment of ALJs as officers, subject to the Appointments Clause. Anton Metlitsky, a partner at O'Melveny & Myers, filed the brief arguing that the existing appointments of ALJs were accord with the Constitution.
43. *Id.* at 2052.
44. *Id.* at 2053.
45. *Id.* at 2054.

tion.[46] Though the Court limited its decision to SEC ALJs, it is likely that the duties and responsibilities of other agency ALJs are so similar that the Court would also classify them as inferior officers. The natural way to implement *Lucia*'s holding is to exempt ALJs from the competitive selection process under the OPM and give discretion to agency heads.[47] Shortly after the Court's decision, President Trump issued an executive order effectively doing this.[48] In the executive order, President Trump said that ALJ candidates will now be hired based on considerations "such as work ethic, judgment, and ability to meet the particular needs of the agency."[49] By changing the standard, agencies have more discretion in evaluating and selecting candidates that best suit the agencies' subject-matter expertise.[50]

The danger with the executive order is that the new hiring guidelines conceivably allow agencies to hire ALJs who are predisposed to rule in favor of them.[51] The executive order also appears to give agency heads discretion over the need to bring in additional ALJs.[52] Under the old system, the OPM decided when federal agencies needed new judges.[53] By cutting the OPM out of the hiring process, the order shifts that power to agency heads who could conceivably pack the agency with ALJs in line with the current administration's

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46. U.S. CONST. art. II, § 2, cl. 2. Agencies that previously delegated the power to appoint ALJs to their staff will withdraw those delegations and will have to reappoint the same people based on the recommendations of the staff who had previously appointed the ALJs.

47. Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (2018). *But see* VALERIE BRANNON, CONG. RESEARCH SERV., LSB10172, CAN A PRESIDENT AMEND REGULATIONS BY EXECUTIVE ORDER? (2018) (arguing that court precedent and the Administrative Procedures Act may significantly limit President Trump's executive order's legal authority).

48. Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (2018).

49. *Id.*

50. *Id. See also* Kent Barnett, *Raiding the OPM Den: The New Method of ALJ Hiring*, YALE J. ON REG. (July 11, 2018), https://www.yalejreg.com/nc/raiding-the-opm-den-the-new-method-of-alj-hiring-by-kent-barnett/ (arguing that the executive order may prove beneficial as it will allow agencies to decide when they need to hire a new ALJ and that the agency can consider subject-matter expertise, something that was not considered before under OPM).

51. *See* Eric Yoder, *Trump Moves to Shield Administrative Law Judge Decisions in Wake of High Court Ruling*, WASH. POST (July 10, 2018), https://www.washingtonpost.com/news/powerpost/wp/2018/07/10/trump-moves-to-shield-administrative-law-judge-decisions-in-wake-of-high-court-ruling (reporting that the American Constitution Society's Carol Fredrickson opined that the executive order "could have a stunning impact on how myriad administrative claims are handled," because "[p]olitical appointment could . . . lead to more administrative law judges with pro-corporate anti-worker biases"; *see also* William Funk, *Trump's Politicization of the Administrative Judiciary*, AM. CONST. SOC'Y (July 19, 2018), https://www.acslaw.org/acsblog/trumps-politicization-of-the-administrative-judiciary/ (explaining that the President of the American Bar Association wrote to members of the House of Representatives, urging legislation to prevent implementation of the executive order because of its potential to "interfere with the decisional independence of ALJs.").

52. Barnett, *supra* note 50.

53. *See* Alison Frankel, *As Trump Claims Power to Pick Federal Agency Judges, Skeptics Fear Court-Packing*, REUTERS (July 11, 2018, 5:10 PM), https://www.reuters.com/article/us-otc-alj/as-trump-claims-power-to-pick-federal-agency-judges-skeptics-fear-court-packing-idUSKBN1K12YA.

policies.[54] Because there is no longer a prescribed vetting process, there is now a perception that agencies will select judges who are sympathetic to the sitting administration's policy preferences. Since ALJs are supposed to be impartial and independent adjudicators, this is obviously worrisome.

C. *The President Has the Power to Remove His Officers Which Now Includes ALJs*

Though President Trump's executive order addressed ALJ appointment, it did not address ALJ removal.[55] While promoting ALJ independence and impartiality through the dual-layer removal protections is certainly desirable, ALJ protections must comport with the United States Constitution's Article II and the separation of powers.

Specifically, Article II confers on the President the duty to "take Care" that the laws are faithfully executed.[56] While the Constitution does not explicitly define the President's power to remove officers, the Court has held that the President must be able to oversee and supervise the officers and departments helping him perform his duties. Thus, the President must also be able to remove officers who ignore his direction.[57]

The Supreme Court has found, however, that Congress can place limits on the President's removal power.[58] In *Morrison v. Olson*,[59] the Court held that one level of for-cause removal between the President and an inferior officer was constitutional. In 2010, the Court addressed the question of whether more than one layer of removal limitations restricted the President's removal power too much in *Free Enterprise Fund*.[60] There, the Court examined the validity of the for-cause removal provision in the Sarbanes-Oxley (SOX)

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54. Barnett, *supra* note 50.

55. *Id. But see* Andrew Hessick, *Changes to the Independence of Administrative Law Judges,* YALE J. ON REG. (July 11, 2018), https://www.yalejreg.com/nc/changes-to-the-independence-of-administrative-law-judges/.

56. U.S. CONST. art. II, § 3.

57. *The Removal Power,* JUSTIA, https://law.justia.com/constitution/us/article-2/28-the-removal-power.html (last visited Jan. 17, 2020). *See* Myers v. United States, 272 U.S. 52 (1926) (holding that the President has the exclusive power to remove executive branch officials).

58. *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935). The Court found that the Federal Trade Commission Act which limited the President's power to remove an FTC member for political reasons was constitutional. The Supreme Court distinguished between executive officers and quasi-legislative or quasi-judicial officers. The Court opined that the latter may be removed only with procedures consistent with statutory conditions enacted by Congress. Because the FTC was a quasi-legislative body, the President could not fire an FTC member solely for political reasons.

59. Morrison v. Olson, 487 U.S. 654 (1988).

60. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U. S. 477 (2010).

Act.[61] As part of the Act, SOX created the Public Company Accounting Oversight Board (PCAOB),[62] an administrative body which provided independent oversight of public accounting firms.[63] Congress vested the SEC with the power to appoint and remove the Board members only "for good cause shown."[64] In turn, the SEC commissioners enjoyed similar protection from presidential removal.[65] The Court found that more than one layer of limits on the President's removal power left the President unable to adequately exercise his constitutional duties and held the protections unconstitutional.[66]

II. ALJ REMOVAL PROTECTIONS VIOLATE THE APPOINTMENTS CLAUSE

Against the backdrop of *Free Enterprise Fund*, *Lucia*'s removal problem emerges. This Part explains how the Court's decision not to clarify the definition of an officer could jeopardize the protection status of other agency staff. Moreover, it examines why the multilayer removal provisions protecting ALJs are unconstitutional. This Part will show that the removal provisions present executive oversight problems as well as due process concerns. These constitutional issues mean the current removal provisions cannot stay in place nor can they simply be stripped away without any reform.

A. *The Court's Decision to Not Define "Significant Authority" Threatens the Independence of Hundreds of Agency Employees*

The Court's decision to leave unexplained the meaning of "significant authority" raises the questions of who qualifies as an officer and how far the constitutional requirement for officer appointment extends. Significant to the majority was the fact that SEC ALJs oversee adversarial hearings.[67] Court jurisprudence has consistently distinguished between "adversarial and nonadversarial hearings."[68] The

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61. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 107 H.R. 3763, § 4010 (2002).
62. Pronounced "peek-a-boo."
63. Sarbanes-Oxley Act of 2002 §§ 201(g)(1)–(9).
64. *Free Enter. Fund*, 561 U.S. at 479.
65. *Id.*
66. *Id.* at 487.
67. See *Lucia*, 138 S. Ct. at 2049.
68. *See The Supreme Court 2017 Term: Leading Case: Constitutional Law: Article II – Appointments Clause – Officers of the United States* – Lucia v. SEC, 132 HARV. L. REV. 287, 294–96 (2018).

Court's emphasis on the adversarial nature of the hearings overseen by SEC ALJs suggests a potential limitation on who are defined as "Officers of the United States."

Justice Thomas, in a concurring opinion joined by Justice Gorsuch, expressed support for the definition of an "Officer" to change to its original public meaning.[69] For Justices Thomas and Gorsuch, an individual who maintains an ongoing responsibility for a task or power authorized by a statute is an officer.[70] This definition would "encompass all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty."[71] Individuals would be officers "even if they performed only ministerial duties—including recordkeeping, clerks and tidewaiters (individuals who watched goods land at a customhouse)."[72]

Under Thomas and Gorsuch's definition, administrative judges (AJs), a group of government officials totaling three times the number of ALJs, would be the first group defined as officers. Though they have less decisional independence than ALJs, they still carry out many of the same adjudicatory functions as ALJs and occupy vital positions within agencies as immigration judges, patent examiners, or Veterans Affairs regional administrators.[73]

In a separate opinion, Justice Breyer expressed concern about the Court's move towards an originalist conception of an officer in classifying ALJs as "Officers of the United States."[74] Breyer's *Lucia* opinion builds off his dissent in *Free Enterprise Fund*, in which he criticized the Court's ruling as failing to define who qualified as an inferior officer.[75] In that dissent, Breyer argued that without a limiting principle to the scope of the decision, "hundreds, perhaps thousands of high-level government officials" could have their job security and decisions at risk.[76] Now, following *Lucia*, Breyer's premonition seems to be coming true. While the *Free Enterprise Fund* majority noted that most federal government employees are not "Officers of the United States,"[77] Thomas and Gorsuch's *Lucia* concurrence has aroused fear about the expanding definition of an officer.

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69. *Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring).

70. Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 454 (2018) (opining that within the original public meaning of the definition would be tax collectors; federal law enforcement officers; officials responsible for government investigations, audits, or cleanup; and ALJs).

71. *Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring).

72. *Id.* at 2057.

73. Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1657–59 (2016).

74. *See Lucia*, 138 S. Ct. at 2057–58 (2018) (Breyer, J., concurring in the judgment and dissenting in part).

75. *Free Enter. Fund*, 561 U.S. at 539–40 (Breyer, J., dissenting).

76. *Id.*

77. *Id.* at 506 n.9 (indicating that well over 90% of those who render services to and are paid by the federal government are not constitutional officers).

While expanding officer status to more agency employees may have little effect on the appointment process, there are larger implications on the tenure status agency employees enjoy. If most agency employees are now removable at-will, there is a justifiable fear that independent agencies will be more partisan in their decision-making as the President will be able to remove agency employees who were supposed to be insulated from the influences of political pressure.[78]

B. *Removal Protections Raise Constitutional Issues*

Though pressed by the Solicitor General to resolve the multiple for-cause removal protections for SEC ALJs, the Court dodged the issue as it is fraught with separation of powers implications.[79] With the current removal protections, the President lacks supervisory authority over ALJs. At the same time, ALJs' relationship with the agencies in which they sit creates impartiality concerns. Had the Court decided that the ALJ removal scheme was unconstitutional, the due process concerns would grow as it would transform ALJs from "independent adjudicators into *dependent* decisionmakers, serving at the pleasure of the Commission."[80] Any reform to the ALJ removal scheme needs to address the competing constitutional concerns of appointment, removal, and impartiality.

1. Removal Protections Limit Presidential Supervisory Oversight

As discussed above, Article II confers on the President the ability to oversee those who execute the laws. Given the Court's invalidation of the two layers of removal protections in *Free Enterprise Fund* as a hindrance to executive oversight, that same logic would seem to render ALJs' two layers of removal protection also unconstitutional.

There are some who argue that *Free Enterprise Fund* only applies to officers who perform quasi-executive and quasi-legislative functions,

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78. *But see* Mascott, *supra* note 70, at 563 (arguing that there is a possibility that as the definition of an officer changes, the conception of an officer will change from an inherently political position to a more neutral one because the President could not clear house every time because of the sheer amount of employees that would fall under an originalist definition of an officer).

79. *See generally Lucia*, 138 S. Ct. at 2050 n.1. Since the founding, there have been concerns about the concentration of political power. The Framers structured the government in order to "avoid undue concentrations of power by resort to institutional devices designed to foster three political values: checking, diversity, and accountability." Martin Redish & Elizabeth Cisar, *"If Angels were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 451 (1991).

80. *Lucia*, 138 S. Ct. at 2060 (Breyer, J., dissenting).

whereas ALJs exercise purely adjudicatory powers.[81] This argument is rooted in dicta in the decision. In a footnote, the Court noted that their holding "does not address that subset of independent agency employees who serve as administrative law judges. Whether administrative law judges are necessarily 'Officers of the United States' is disputed. And unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement functions . . . ."[82]

District courts have used this footnote in *Free Enterprise Fund* to find that ALJ removal protections are not unconstitutional. In *Duka v. SEC*,[83] the Southern District of New York held that *Free Enterprise Fund* did not create a "categorical rule forbidding two levels of 'good-cause' tenure protection."[84] What matters is not the number of layers of protection per se, but whether the PCAOB's removal scheme was so structured as to "infringe" on the President's duty to ensure that the laws are faithfully executed.[85] Because the SEC's ALJs only perform "adjudicatory functions, and are not engaged in policymaking or enforcement,"[86] the President's ability to remove an ALJ is not so fundamental to the functioning of the executive branch as to require that the ALJ be terminable at-will by the President.[87]

Reading *Free Enterprise Fund* this way is appealing as it brings coherence to an incoherent body of law and protects officers who solely adjudicate, such as ALJs. However, at the heart of *Free Enterprise Fund* is whether the arrangement interferes with Article II's vesting of the executive power in the President. When it comes to the "responsibility to take care that the laws be faithfully executed," Arti-

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81. Even before *Free Enterprise Fund*, some scholars argued that *Wiener v. United States,* 357 U.S. 349 (1958) already distinguished adjudicatory positions from executive and legislative positions. In *Wiener*, the Court upheld limits on the President's removal power for a member of the War Claims Tribunal because Congress intended the commission to operate independently of the will of the President. In the same way, the APA reflects Congress's intent to set up an independent adjudicatory body apart from executive agencies. Though the President could obtain a favorable result from an ALJ without adjudication, he could not do so under the APA.

82. *Free Enter. Fund*, 561 U.S. at 506 n.10. Since the Court's decision, some scholars have found that the decision to invalidate the removal protection of PCAOB's members "depends in part on the combination of functions of the officials whose tenure those provisions protect." Kevin M. Stack, *Agency Independence After PCAOB,* 32 CARDOZO L. REV. 2391, 2399 (2011) (arguing that *Free Enterprise Fund* examines the validity of the two layers of protections by examining different functions within the agency).

83. Duka v. SEC, No. 15 Civ. 357, 2015 WL 5547463 (S.D.N.Y. Sept. 17, 2015).

84. *Id.* at *15.

85. *Id.* at *17.

86. *Id.*

87. *Id.*; *see also* Hill v. SEC, 114 F. Supp. 3d 1297, 1319 n.12 (N.D. Ga. 2015), *vacated on other grounds and remanded by* Hill v. SEC, 825 F.3d 1236 (11th Cir. 2016) (expressing doubts about the constitutionality of the SEC's removal scheme as ALJs do not function in a solely executive position, and that the protections "do not interfere with the President's ability to perform" his constitutional duties).

cle II of the Constitution means that the "buck stops with the President."[88] This means that the President should still be able to oversee all officers that implement his executive power and make policy.[89] Without the ability to oversee ALJs, the President is no longer the judge of ALJ conduct.[90] This is problematic because the people did not vote for ALJs nor did they vote for the members of the MSPB. With no "clear and effective chain of command," ALJs lack accountability to the public.[91] The purpose "of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom."[92] Without presidential oversight of ALJs, there is legitimate concern about effective governance in implementing presidential policies.

2. Removing ALJ Tenure Protections Raise Due Process Concerns

The dissenting judges in *Free Enterprise Fund* noted that Congress implemented ALJ tenure protections for the purpose of "impartial adjudication."[93] If the current Court decides that the ALJ removal protections are unconstitutional, there is justifiable concern about the integrity of adjudication as presidential supervisory power expands.

Due process demands impartiality and fairness of ALJs. Even before *Lucia*, some scholars argued that ALJs lack independence from the agencies in which they sit, and that was a due process violation.[94]

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88. *Free Enter. Fund*, 561 U.S. at 493.

89. *See generally id.*(removing tenure protection for inferior officers that an independent agency appointed). Since SEC v. Chenery Corp., 332 U.S. 194 (1947), agencies have discretion whether to proceed through rulemaking or adjudication. For example, the National Labor Relations Boards creates policy almost exclusively through adjudication.

90. *Id.* at 497.

91. *Id.* at 498.

92. Morrison v. Olson, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting).

93. *Free Enter. Fund*, 561 U. S. at 522 (Breyer, J., dissenting).

94. *See* John L. Gedid, *ALJ Ethics: Conundrums, Dilemmas, and Paradoxes*, 11 WIDENER J. PUB. L. 33, 54 (2002); Harold Levinson, *The Status of the Administrative Judge,* 38 AM. J. COMP. L. (Supp.) 523, 537–38 (1990) (expressing uncertainty with ALJ impartiality); Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary,* 33 ADMIN. L. REV. 109, 110 (1981) (describing the doubts some have around the independence of ALJs); James P. Timony, *Disciplinary Proceedings Against Federal Administrative Law Judges,* 6 W. NEW ENG. L. REV. 807, 828 (1984) (arguing that because agencies initiate removal proceedings, the removal process calls into question the independence of ALJs); Karen Y. Kauper, Note, *Protecting the Independence of Administrative Law Judges: A Model Administrative Law Judge Corps Statute*, 18 U. MICH. J.L. REFORM 537, 544 (1985) (arguing that ALJs' biases have led to poor decision-making); Jason D. Vendel, Note, *General Bias and Administrative Law Judges: Is there a Remedy for Social Security Disability Claimants?*, 90 CORNELL L. REV. 769, 777–86 (2005) (detailing two cases, *Grant* and *Pronti*, that show ALJ bias). *See also* W. Michael Gillette, *Administrative Law Judges, Judicial Independence, and Judicial Review: Qui Custodiet Ipsos Custodes,* 20 J. NAT'L ASS'N ADMIN. L. JUDICIARY 95, 117

Though OPM vets ALJ candidates, the agency still picks the candidate it believes will be most sympathetic to its policies. Alternatively, agencies can hire ALJs directly from another agency, meaning they can choose an ALJ that they know possesses a certain policy preference.[95] Even though ex parte contact is prohibited,[96] the fact that the agency often serves as a party to an administrative proceeding also raises questions about the impartiality of ALJs.[97] While challenges to ALJ impartiality have been unsuccessful so far,[98] the Court's recent decision in *Caperton* tees up the issue again, especially if ALJs' removal protections are stripped.[99]

In *Caperton*, the Supreme Court held that the Due Process Clause required the recusal of a West Virginia Supreme Court Justice from a case involving a major donor to his election campaign. The Court held that actual bias was unnecessary for his recusal.[100] Instead, the Court indicated that the contributions constituted "extreme facts" that created an unconstitutional "potential for bias" that could "tempt adjudicators to disregard neutrality."[101]

(2000) (arguing that judges need to have qualities of diligence, equality, and courage for the public to believe in ALJs).

95. *See* Lubbers, *supra* note 94, at 117 (describing how agencies can seek "selective certification" which permits an agency to bypass the rule of three for selecting a candidate); Holmes, *supra* note 21, at 121 (arguing for a creation of an ALJ corps that would allow for their independence and impartiality); *see also* Padro v. Astrue, No. 11-CV-1788 E.D.N.Y. (2013), in which plaintiffs brought a class action for Social Security disability benefits that were denied by one of five Administrative Law Judges in Queens. Under the settlement, approximately 4,000 individuals denied disability benefits will be entitled to receive new hearings.

96. 24 C.F.R. § 180.215 (2018).

97. *See Jean Eaglesham, SEC Is Steering More Trials to Judges It Appoints,* WALL ST. J. (Oct. 21, 2014), https://www.wsj.com/articles/sec-is-steering-more-trials-to-judges-it-appoints-1413849590 (finding that during the fiscal years 2012 and 2013, the SEC prevailed in 90% and 100% of trials before ALJs. In front of Article III judges, the SEC prevailed 75% and 63% of the time, respectively. *But see* Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315 (2017); Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 FORDHAM L. REV. 1143 (2016). Both Velikonja and Grundfest argue that there was no robust evidence to support the contention that the SEC was more likely to prevail in enforcement actions decided by ALJs than in similar actions decided by federal judges. They argue that the disparity is due to the different characteristics of cases filed in each type of forum.

98. Grant v. Shalala, 989 F.2d 1332 (3d Cir. 1993) (finding that the claimant's interests were adequately protected by the ad hoc panel that was convened by the agency to investigate an ALJ). *But see id.* at 1355 (Higginbotham, J., dissenting) (arguing that the agency procedure "was not established by regulation or statute; it lacked any procedural rules . . .").

99. Caperton v. A. T. Massey Coal Co., 556 U.S. 868 (2009). In *Caperton*, the defendant A.T. Massey Coal Company was found liable for $50 million in damages. While the case was being appealed, Don Blankenship, the CEO of A.T. Massey, contributed three million dollars to have Justice Benjamin elected to West Virginia Supreme Court of Appeals. Despite recusal motions from plaintiffs, Justice Benjamin declined to recuse himself, claiming that he had no actual bias. Justice Benjamin was ultimately part of the 3-2 majority that overturned the verdict. *See also* Williams v. Pennsylvania, 136 S. Ct. 1899 (2016) (concluding there was a Due Process violation when Pennsylvania's chief justice failed to recuse himself in a case involving a prisoner he had prosecuted).

100. *Caperton*, 556 U.S. at 883.

101. *Id.* at 878, 887.

Though the Court cabined its decision within the context of judicial elections, *Caperton* bolsters scholars' claims that hearings in front of ALJs are unfair and violate the due process of private parties. The implications of *Caperton* feel especially important following *Lucia*. If ALJs lose one of their two layers of removal protection, there are two possible outcomes: first, either ALJs will become removable at-will by the MSPB; alternatively, ALJs will retain their for-cause protections from the MSPB, but the President could remove the MSPB members at-will. Either way, ALJs will be at risk of being "discharged at the whim or caprice of the agency or for political reasons."[102] The agency's greater role in selecting and removing ALJs would now be more direct than the judge in *Caperton* because they can directly choose the ALJ, are parties in front of them, and then can remove them. The agency's entanglement with the supposedly independent ALJ raises substantial due process concerns.

III. PROPOSED SOLUTIONS TO THE APPOINTMENT AND REMOVAL OF ALJS

A solution to ALJ appointment and removal must balance ALJ independence and due process concerns while resolving the President's need for supervisory control over his executive branch officers. Some popular proposals, discussed below, include changing the standard of good cause removal, creating an ALJ corps, and even moving the appointment and removal power to Article III courts. Ultimately, each of these proposals is inadequate for either failing to resolve one of the constitutional problems, or for being politically infeasible.

A. *Removing MSPB's For-Cause Layer of Tenure Protection*

The simplest solution would be to have the Court find that the two layers of ALJ removal protection is unconstitutional and remove one of the layers. Most likely, the MSPB members would become removable at-will, while ALJs would maintain their for-cause removal layer between them and the MSPB.[103] This solution resolves *Free Enterprise Fund*'s removal issue while also providing the President more oversight of his officers.

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102. Ramspeck v. Federal Trial Examiners Conf., 345 U.S. 128,142 (1953).

103. Since the focus is on maintaining the independence of ALJs, it is likely that they would receive the most protection and the MSPB would receive less stringent protections.

At first glance, it also appears that changing the MSPB layer of protection would not have deleterious effects on ALJ decision-making because ALJs would still have a for-cause layer between them and the MSPB. However, the two layers of for-cause removal protection may be more meaningful than many believe. Since 2006, the MSPB has only brought a total of twenty-four removal actions against ALJs.[104] Of those, the MSPB has removed five of the subject ALJs.[105] While the total number of removal actions taken by agencies is unknown, the figure is surely higher than the number of claims brought by the MSPB. The value of the two layers of protection is clear especially considering the Solicitor General's *Lucia* brief, in which he argued that agencies are often unable to properly sanction ALJs when they violate agency policy because of the MSPB.[106] This suggests that the MSPB has served as a bulwark against agency removal attempts to remove ALJs who do not always rule in favor of the agency.

B. *Changing the Good Cause Standard*

Writing in support of Lucia, the SG argued that the government would avoid the removal problem by having the Court construe "good cause" in the APA[107] to include when the ALJ has engaged in personal "misconduct" or has failed "to follow lawful agency directives or to perform his duties adequately."[108] The SG argued that without this authority, the President could not "properly supervise those who exercise executive authority."[109] While more than one layer of tenure protection would still be in place, the government argued that it would comport with the President's constitutional obligation to faithfully execute the laws and "safeguard the President's power to control and supervise the Executive Branch."[110]

The SG urged the Supreme Court to expand the definition of "good cause" removal to include the ability to remove an ALJ that is

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104. James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1222 n.150 (2006); s*ee also* Brief for Respondent Supporting Petitioners Lucia at 52–54, Lucia v. Sec. and Exch. Comm'n, 238 S. Ct. 2044 (2018) (No. 17-130) (describing instances in which the MSPB has not supported agency's push for ALJ removal).

105. Moliterno, *supra* note 104, at 1222 n.150.

106. Brief for the Respondent SEC Supporting Petitioners at 46–48, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130) (merits brief).

107. 5 U.S.C. § 7521 (2018).

108. Brief for the Respondent SEC Supporting Petitioners at 13, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130) (merits brief).

109. *Id.* at 48.

110. *Id.* at 45.

not following the agency's vision.[111] If adopted, agencies would be able to remove ALJs who "refuse[d] to follow agency policies and procedures, who frustrate[d] the proper administration of adjudicatory proceedings, or who demonstrate[d] deficient job performance."[112] Removal would occur only after the MSPB has determined that factual evidence exists to support the agency's "prof- "proffered, good-faith grounds."[113] The government contended that these changes would give agencies and the executive branch enough supervisory powers over ALJs.[114]

Such a change would be a radical departure from the current practice in which the MSPB determines the facts, whether those facts amount to "good cause," and whether the violations warrant removal or other sanctions.[115] The government's proposal would change this to allow agencies to determine the appropriate sanctions for ALJs, while the MSPB would only opine as to whether there was a violation, not if the violation counted as "good cause."[116] This low standard of proof, along with the agency's ability to determine the sanction, would make the MSPB into "little more than a rubber stamp" for the agency's decisions.[117]

C. *Establishing an ALJ Corps*

One popular proposed remedy is to establish an ALJ corps, appointed and supervised by an existing or newly created independent agency.[118] Under this proposal, ALJs would not hear cases from a specific agency.[119] Instead, the ALJ corps would hear cases from various agencies.[120] ALJs would still only be removable for cause by the agency head of the ALJ corps, who would also be removable for

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111. *Id.* at 50.
112. *Id.* at 47.
113. *Id.* at 52.
114. *Id.* at 45.
115. *See* Jeffrey S. Lubbers, *SG's Brief in Lucia Could Portend the End of the ALJ Program as We Have Known It*, YALE J. REG.: NOTICE & COMMENT (Feb. 26, 2018), http://yalejreg.com/nc/sgs-brief-in-lucia-could-portend-the-end-of-the-alj-program-as-we-have-known-it-by-jeffrey-s-lubbers/.
116. *Lucia*, 138 S. Ct. at 2061 (Breyer, J., concurring in part and dissenting in part).
117. Lubbers, *supra* note 112; Justice Breyer also opined in *Lucia* that the government's proposal would permit "the Commission to remove an administrative law judge with whose judgments it disagrees—say, because the judge did not find a securities-law violation where the Commission thought there was one, or vice versa." 138 S. Ct. at 2061 (Breyer, J., dissenting).
118. *See, e.g.*, Lubbers, *supra* note 94, at 123–24 (discussing support for a unified administrative trial court); Moliterno, *supra* note 104, at 1227–33 (explaining support for a corps of ALJs).
119. *See* Kent Barnett, *supra* note 23, at 828.
120. *See* Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 568 (2001) (arguing that a corps of ALJs would promote adjudicative independence).

cause.[121] The appeal is clear; this suggestion would remove ALJs from specific agencies, likely leading to more independence in ALJ decision-making.

Nonetheless, this proposal comes with serious problems as it does not address appointment or presidential supervision concerns. First, this proposal does not resolve the two-layer protection problem on a formalist level, nor does it functionally resolve the two layers of protection. The two tiers of protection between the ALJs and the President might be acceptable if they came with presidential supervision, but an ALJ corps does not offer such supervision.

Moreover, implementing an ALJ corps might come with the cost of more incorrect decisions. ALJs are generally thought to have a certain level of expertise as they decide cases with due regard to the specialized nature of the agency. An ALJ corps would mean rotating ALJs from agency to agency, which would lead to less ALJ expertise. This could lead to more biased decisions as ALJs opt to defer to the agency that has the supposed expertise in that area of the law.

Finally, the establishment of an ALJ corps has been adopted in many states and has been introduced in Congress during almost every session.[122] Despite the positive reception it has received on the state level, it has gained little traction in Congress and by 1992, the Administrative Conference of the United States recommended that Congress should shelve the creation of an ALJ corps citing concerns about expertise.[123]

D. *Providing ALJs with Article III Tenure Protections*

Another proposal would provide ALJs with the same tenure protections as Article III judges. Two legal scholars have suggested that implementing lifetime salary protection and permitting their removal only through an impeachment process would better preserve ALJ independence.[124] Under this proposal, there would no longer be two tiers of protection, thus resolving the Appointments Clause issue. Moreover, moving the removal power to the House of Repre-

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121. *See* Barnett, *supra* note 23, at 828–29.

122. JERRY MASHAW ET AL, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS 547 (7th ed. 2018).

123. *See generally* 2 PAUL R. VERKUIL ET AL, ADMIN. CONF. OF THE U.S., THE FEDERAL ADMINISTRATIVE JUDICIARY 1044 (1992) (noting that each agency is governed by a "different body of substantive law" and encounters systematically different procedural problems).

124. Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process,* 95 YALE L.J. 455, 499 (1986) (arguing that providing ALJs with similar protections to Article III judges would preserve due process).

sentatives allows the public to hold ALJs more accountable than under the current two-tier system.

Though it resolves the formalist *Free Enterprise Fund* issue, this proposal exacerbates executive branch concerns over the lack of presidential oversight. Though agency heads can still appoint ALJs, removal is entirely out of the executive branch's control and placed in the House of Representatives.[125] To be sure, this proposal would resolve due process concerns, but it would exacerbate president supervision concerns.

E. *Move Appointment and Removal to Article III Courts*

One of the best proposed solutions is to have Congress move the appointment and removal of ALJs from agencies to Article III courts.[126] The D.C. Circuit would appoint ALJs with the help of OPM and the court could discipline or remove ALJs upon the request of the ALJs' agencies. The Appointments Clause allows Congress to permit "courts of law," such as the D.C. Circuit, to appoint inferior officers.[127] Article III courts are well-suited for the task as they already perform the interbranch appointment and removal of Article I bankruptcy judges and magistrate judges.[128] Moreover, courts such as the D.C. Circuit are already well-versed in administrative law, meaning they have the expertise needed to appoint ALJs.[129]

This solution is appealing because it neatly resolves the Appointments Clause problem while preserving ALJ independence. Agencies, as well as the President, would be able to request that the D.C. Circuit discipline or remove an ALJ for "incompetence, misconduct, neglect of duty, or physical or mental disability," which is the same standard that governs bankruptcy judges and is a similar process to the one already in place for ALJs.[130]

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125. Barnett, *supra* note 23, at 831.

126. *Id.* at 802.

127. *Id.* at 836–37 (arguing that the interbranch appointments of ALJs may not impede the functioning of the judiciary or the executive branch); *see* U.S. CONST. art II, § 2, cl. 2; *see e.g.*, *Ex Parte* Hennen, 38 U.S. (13 Pet.) 230 (1839); *Ex Parte* Siebold, 100 U.S. 371 (1879); Morrison v. Olson, 487 U.S. 654 (1988).

128. Stern v. Marshall, 564 U.S. 462, 514 (2011).

129. *See, e.g.*, John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View,* 92 VA. L. REV. 375, 376–77 (2006) (explaining that a large share of the D.C. Circuit appeals cases are from agency decisions). Under this proposal, ALJ candidates would go through a similar process to the one they went through with OPM, with a preliminary examination under the court's auspices. *See* Barnett, *supra* note 23, at 833 (proposing a notice and comment procedure that would allow interested parties to provide comments and indicate the preferred candidate for the agency).

130. 28 U.S.C. § 152(e) (2018).

Yet, this proposal seems unlikely amid negative perceptions of agencies. On Capitol Hill, the trend in administrative law consists of attempts to assert more control in agency decision-making.[131] For proponents of these bills, it is necessary to load the rulemaking process with additional procedural requirements because agencies "circumvent the will of the people."[132] While these proposals do not focus on agency adjudication, they likewise reflect the distrust that politicians express for relatively permanent, influential decision-makers who operate without appropriate oversight. The reactive nature of the Courts may not provide the level of oversight that elected officials in the executive branch would provide.

There are also still presidential supervision concerns by moving ALJ supervision to Article III courts as the executive branch would lose its remaining removal powers. Moreover, the executive branch would also lose its newfound appointment powers. Though this proposal solves the formal problem of two layers of protection, there is a substantial conceptual change of the role of the branches of government as well as the executive oversight concerns presented in *Free Enterprise Fund*.

IV. SOLUTION TO APPOINTMENT AND REMOVAL

Though deficient, these proposals suggest widespread recognition that the ALJ system needs reforming. Striking a balanced approach between ALJ independence, presidential oversight, and due process for individuals appearing before an agency requires a multi-faceted solution. To address ALJ appointments, this Part suggests that Congress should pass hiring guidelines that agencies must follow when hiring ALJs, limiting the effects of President Trump's executive order.

This Part next addresses ALJ removal. First, this Part will outline a statutory proposal of peremptory challenges, which would allow the President and agencies, as well as the private party, to dismiss the ALJ hearing the case without cause. Next, this Part will explain why this proposal resolves constitutional issues and provides a proper balance between ALJ impartiality and executive supervision. Finally, Part IV examines possible consequences that would come from introducing peremptory challenges and how policies can mitigate

131. The Separation of Powers Restoration Act, the Regulatory Accountability Act, the Regulations Endanger Democracy Act, and the Regulations from the Executive in Need of Scrutiny Act are just a few examples.

132. Nicole Duran, *Rep. John Ratcliffe: Fighting the 'Fourth Branch of Government'*, WASH. EXAMINER (Jan. 23, 2017) (quoting Rep. John Ratcliffe), https://www.washingtonexaminer.com/rep-john-ratcliffe-fighting-the-fourth-branch-of-government.

those concerns. Peremptory challenges offer a significant thumb on the scale for the Court to allow a carveout to keep ALJ protections.

A. *Defining an Officer for Appointment*

The first problem that arises from *Lucia* is how lower courts will apply the decision in future cases to determine whether an agency staff member is an "Officer of the United States."[133] For agency employees, it no longer appears essential that they have final decisional authority to qualify as an officer. If designated as officers, this would take them out of the competitive service and move them into excepted service. As discussed earlier, the fear is that the more influence the agency has in selecting its employees, the greater chance that agencies exhibit bias toward ALJs.

Though this problem seems big, it is one that could be relatively easy to solve. Throughout all stages of litigation in *Lucia*, the discussion centered around the distinction between adversarial and non-adversarial adjudication.[134] Congress can use this distinction to pass legislation that exempts from officer status any employee who works in a non-adversarial role. This rule would then classify administrative judges and other employees who oversee adjudication as "Officers." For non-ALJ adjudicators, their classification as "inferior officers" would be more of a formal distinction than a functional one; the only thing that would change is the appointment process. Department heads could always appoint adjudicators of their choosing without worrying about the statutory restrictions that apply to ALJs. Therefore, requiring department heads to appoint non-ALJ adjudicators such as AJs does not increase the agency's power to control adjudication. Agency staff will likely continue to make tentative selections and the department heads will sign off on them.

To limit the selection of underqualified ALJs, Congress could also pass a law that requires agencies to implement hiring standards akin to those of the OPM.[135] Shortly after President Trump's executive order, senators introduced a bipartisan bill to restore ALJs to the

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133. *See supra* Part II. A.

134. Transcript of Oral Argument at 9, Lucia v. Sec. & Exch. Comm'n, 138 S. Ct. 2044 (No. 17-130), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-130_1p23.pdf ("[O]ur submission is limited to ALJs who decide adversarial proceedings subject to . . . the APA.").

135. *See* Mascott, *supra* note 70, at 454. This would be well within Congress' powers as courts have allowed Congress to impose limits on the scope of the power of appointment by qualifying it in various ways; Mitchell A. Sollenberger, *Statutory Qualifications on Appointments: Congressional and Constitutional Choices*, 34 PUB. ADMIN. Q. 202 (2010).

competitive service.[136] Though it has not passed yet, it suggests there is a recognition of the problem that *Lucia* and the executive order created. Such a solution would still allow agencies to have control over the hiring process while mitigating the concern that agencies are hiring unqualified adjudicators.

B. *At-Will Removal of ALJs with Peremptory Challenges in a Hearing*

Lucia's larger problem is the constitutional issues with the two-layers of removal protection. To remedy this, this Note proposes that Congress implement a system which allows the private party in a proceeding, along with the agency and President, to have a peremptory challenge to remove the ALJ presiding over its case. Section B first examines the peremptory challenge system that some states have adopted and how a legislature could use its success to implement a similar system in adjudicative proceedings. Next, this Section shows how this proposal resolves constitutional concerns of presidential supervision while balancing impartiality and due process concerns. This Section then explores how litigants have abused the system on the state level and how Congress could mitigate those abuses on the administrative level. Finally, this Sections suggests how the Court could shape discussions on removal for future decisions. This proposal may gain more traction as it addresses the concerns of both agencies and private parties.

1. Mechanics of a Peremptory Challenge System

Peremptory challenges are most commonly known as the ability for a party, in either a civil or criminal case, to strike a potential juror. The challenge is "peremptory" because it requires no reason for its use.[137] Peremptory challenges are not limited to juries. Currently, there are eighteen states that allow litigants to remove a judge from a case for any reason.[138] For states, standard disqualification proce-

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136. A Bill to Restore Administrative Law Judges to the Competitive Service, S. 3387, 115th Cong. (2018). Senator Cantwell [WA] reintroduced the bill in August 2019. ALJ Competitive Service Restoration Act, S. 2348, 116th Cong. (2019).

137. There has been much discussion on the use of peremptory challenges to remove jurors and whether the system should be abolished because they frequently undermine the balance of representation on a jury. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79, 80–81 (1986) (concluding that the use of peremptory challenges to remove persons from a cognizable group is unconstitutional).

138. *See Resolution Adopted by the House of Delegates*, A.B.A. REP. 107 (Aug. 8–9. 2011), https://www.americanbar.org/content/dam/aba/directories/policy/2011_am_107.pdf. *See generally* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF

dures failed to provide effective relief for parties. States have found that introducing peremptory challenges has given litigants more of an opportunity to "improve the quality of trial court judging."[139] Attorneys in those states have largely welcomed the introduction of these challenges as enhancing access to justice.[140] State success with the system leads to some hope that it could be implemented in the administrative setting.

There is additional evidence to suggest that Congress could pass peremptory challenge reform. Already on the federal level, 28 U.S.C. § 144 appeared to dictate peremptory disqualification for charges of personal bias or prejudice in federal courts. Because the Supreme Court has read in a requirement of "fair support" for all charges,[141] public policy groups in recent years have advocated for a peremptory challenge system to be implemented on the federal level.[142] Many public policy groups favor peremptory challenges because they provide one of the easiest ways to combat impartiality and addresses political concerns. For conservatives, peremptory challenges prevent agency power from going unchecked. Liberals can similarly appreciate the check on agency power, and also perceive peremptory challenges to preserve due process for private individuals.

As noted with the proposals above, congressional support may be difficult for any administrative reform in this political climate. Re-

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JUDGES ch. 26 (2d ed. 2007); ALASKA STAT. § 22.20.022 (2002); ALASKA R. CIV. P. 42(C); ARIZ. R. CRIM. P. 10.2; CAL. CODE CIV. PROC. § 170.6 (2004); MONT. CODE ANN. § 3-1-805 (2003), available at http://data.opi.state.mt.us/bills/mca/3/1/3-1-805.htm; MO. R. CIV. P. 51.05; N.M. R. CIV. P. 1-088.1; N.M. R. CRIM. P. 5-106; NEV. SUP. CT. R. 48.1; OR. REV. STAT. § 14.260 (2003); WIS. STAT. ANN. § 971.20 (1998) (applying to criminal cases only); WYO. R. CIV. P. 40.1(b). California also allows state ALJs to be removed via peremptory challenge, provided the challenge is before a hearing or the commencement of a prehearing conference. CAL. CODE REGS. tit. 13, § 551.12 (2018).

139. Jeffrey W. Stempel, *Judicial Peremptory Challenges as Access Enhancers*, 86 FORDHAM L. REV. 2263, 2270 (2018).

140. *See id.* at 2274 (citing FLAMM, *supra* note 135, at 754–56).

141. Berger v. United States, 255 U.S. 22, 33–34 (1921). Critics have argued that the language and intent of § 144 allowed for peremptory disqualification of judges. *See, e.g.*, Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1224 (2002); John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 629 (1947). There has been subsequent federal legislation introduced allowing parties to peremptorily challenge federal judges, but none have passed. *See, e.g.*, H.R. 3125, 98th Cong. (1983); H.R. 1649, 97th Cong. (1981).

142. Among groups that have pushed for judicial reform, the Brennan Center for Justice has emerged as perhaps the strongest consistent voice. Most of its efforts have focused on judicial accountability and facilitating disqualification more easily in cases where there are concerns about judicial impartiality. Peremptory challenges are a way to achieve those goals and could mean support from those groups. *See, e.g.*, Deborah Goldberg et al, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503 (2007); MATTHEW MENENDEZ & DOROTHY SAMUELS, JUDICIAL RECUSAL REFORM: TOWARD INDEPENDENT CONSIDERATION OF DISQUALIFICATION, (2016), https://www.brennancenter.org/sites/default/files/2019-08/Report_Judicial_Recusal_Reform.pdf.

cent administrative reform has largely come as a result of strong lobbying groups which gives ALJ reform some hope. For example, in 2000, Congress adopted the Information Quality Act which allowed people and companies to petition an agency to obtain correction of information they believe to be inaccurate. This reform was only a two-sentence rider in a spending bill by an industry lobbyist.[143]

Following *Lucia*, Congress initiated a bill to restore ALJs to the competitive service and ensure their independence.[144] A joint statement behind the bill was to "protect[] the due process rights of the American people."[145] While due process concerns are surely a motivating interest for Congress, corporations also have a pecuniary interest as they often serve as private parties in agency adjudication. It would be unsurprising if corporate interest in the agency process is why ALJ removal reform passes.

The peremptory challenge system would work as follows: The chief ALJ would provide the name of the administrative law judge assigned to the proceeding along with the order of time and place of the hearing. Both the private party as well as the agency or President would be able to remove the assigned ALJ, provided that the party filed the challenge within fourteen days after the initial assignment of the case.[146] Once a party removed the ALJ, the chief ALJ would assign a new ALJ to hear the case. The other party would then be able to remove the newly assigned ALJ if it files its challenge no later than fourteen days from the date of the notice identifying the subsequent ALJ. If a party fails to file a peremptory challenge within the time limit, then the chief ALJ would not grant its challenge. Once both sides in the hearing have used their peremptory challenges, the selected ALJ would hear the case, unless one of the parties removes the ALJ for cause.

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143. Pub. L. No. 106–554, § 515, 114 Stat. 2763 (2000) (H.R. 5658 incorporated by reference into H.R. 4577). Another example of strong lobby groups and administrative reform came in 2012 when Congress altered how the Veterans Administration would adjudicate certain claims. Among the changes, the legislation requires the MSPB to hear an appeal within twenty-one days. *See* Veterans Access, Choice, and Accountability Act of 2014, Pub. L. No. 113–146, § 707, 128 Stat. 1754, 1798–99 (Aug. 7, 2014).

144. H.R. Res. 2429, 116th Cong. (2019).

145. *Bipartisan Group Introduces Legislation to Ensure the Integrity and Independence of Administrative Law Judges*, GERRY CONNOLLY (May 1, 2019), https://connolly.house.gov/news/documentsingle.aspx?DocumentID=3627.

146. Some states require a party to file an affidavit asserting the party's belief that the judge cannot conduct a fair trial. Often, the affiant does not need to state the facts underlying their claim. Other states do not require an affidavit and only require a filing to be made to remove the judge. Under this proposal, there would only need to be a filing with no affidavit required.

2. Peremptory Challenges Resolve Competing Constitutional Concerns

Because peremptory challenges substantially mitigate concerns related to oversight, independence, and impartiality, there is significant justification behind implementing the system. Allowing agencies and private parties to remove an ALJ from a hearing provides a proper balance of executive supervision and ALJ impartiality, albeit in an unconventional way.

a. *Challenges Increase Executive Oversight*

With the ability for the President or agency to remove an ALJ that is inconsistently applying agency policy, the President gains oversight powers, a major concern of the Court in *Free Enterprise Fund* and *Lucia*. Executive oversight was also a major concern for the government in *Lucia*, as the SG opined in his brief that there are often enough facts to show ALJ wrongdoing, but the MSPB rarely issues sanctions against ALJs.[147] Though there are still two layers of removal protection, this does not appear to be problematic for the executive branch which itself proposed keeping two layers of protection.[148] This suggests that the two layers of protection are not a problem themselves, but rather the problem is that the two layers prevent the President from being able to properly oversee his officers.

Peremptory challenges provide executive oversight by allowing the President and agencies to remove ALJs they feel are incorrectly applying agency policy. States that have implemented the peremptory challenge system have extolled its value in correcting judicial behavior. Appearing before the Senate Committee on the Judiciary, John Paul Frank collected letters from nine chief justices of states that allow peremptory challenges.[149] Of those nine, eight wrote letters expressing support for the system. Justice Fred C. Struckmeyer, Jr. of Arizona wrote that the system provides valuable information for judges because "when a judge is disqualified for bias or prejudice, it gives him reason to examine his personal idiosyncrasies and attitudes. Disqualification has a salutatory effect upon a judge since it tends to restrain arbitrariness and intolerance."[150] Consistent re-

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147. *See* Brief for the Respondent SEC Supporting Petitioners at 46, Lucia v. Sec. and Exch. Comm'n, 138 S. Ct. 2044 (2018) (No. 17-130) (merits brief); *supra* Part III(A)(1).

148. *See supra* Part III, Section B.

149. *See Hearings on S. 1064 Before the Subcommittee on Improvement in Judicial Machinery of the Senate Committee on the Judiciary*, 93d Cong., 1st Sess. 63. (1973) [hereinafter *Judicial Machinery Hearings*].

150. *Id.* at 66.

moval from cases provides ALJs feedback and allows them the opportunity to adjust their decision-making.[151] Agencies and the President benefit as they no longer need to go through the formal removal process each time they want to discipline an ALJ, while the ALJs are still protected from agency overreach.[152]

b. *Challenges Preserve Due Process*

Many of the proposals discussed above remedy presidential supervision concerns but do nothing to address due process concerns associated with ALJ independence. The difficulty is that "[s]upervision is merely the flipside to independence."[153] If the President's supervision increases, there should be a similar, inverse impact on ALJ independence. Peremptory challenges offer a unique way to provide for presidential oversight while offering due process for private parties.

While under the current system a litigant is entitled to a new trial if they can establish an ALJ's prejudice,[154] prejudice is difficult to prove. Moreover, even if a litigant proves prejudice, the post-trial remedy of allowing re-litigation before a different ALJ is both wasteful of judicial time and unfair to the litigant.

Under a peremptory challenge system, private parties would be able to remove an impartial ALJ before the hearing takes place. Justice Struckmeyer, Jr. wrote that peremptory challenges provided a litigant "the feeling that he will get at least an even break in the courtroom and the proceeding, therefore, takes on for him the appearance of justice."[155] With this system, private parties will feel more confident that the executive branch has less control over the ALJ's decision as they can remove any given ALJ. Of course, litigants would still be able raise the issue of prejudice if the ALJ that hears the case is biased.

c. *Challenges Improve Executive Branch Functioning*

While the executive branch's formal removal power would remain the same, its functional removal power would expand through its

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151. *See* ALAN J. CHASET, FED. JUDICIAL CTR., DISQUALIFICATION OF FEDERAL JUDGES BY PEREMPTORY CHALLENGE 34 (1981).

152. Even ALJs who are consistently removed by the agency will hear cases because they could always be the selected ALJ following the agency's removal of a previous ALJ.

153. Barnett, *supra* note 23, at 826.

154. 20 C.F.R. § 404.940 (2018).

155. *See Judicial Machinery Hearings*, *supra* note 146, at 66.

ability to remove ALJs from cases. Agencies would be able to achieve efficiency in the adjudicative system by avoiding the need to carry out removal proceedings in order to censure ALJs. Moreover, if ALJs adjust their behavior as a result of frequent removals, agencies will be able to implement their policy more easily as they will not have to divert agency time and resources toward ALJ discipline.

Though *Free Enterprise Fund* stood for the proposition that the President should be able to oversee his executive officers, ALJs are unique because removal is not necessarily needed to protect the policy goals of the executive branch; agencies can always appeal ALJ decisions to the agency head and have them overturned.[156] If ALJ hiring shifts from the OPM to agencies, agencies will be able to exert more control by selecting ALJs who will advance the agency's policy goals, provided that the selection is congruous with statutory guidelines established by Congress. Finally, agencies could still initiate forcause removal if an ALJ continues to not follow agency policies. Though the executive branch's formal removal power would remain unchanged, peremptory challenges would provide enough supervisory powers to ensure the central functioning of the executive branch.

3. Potential Challenges of a Peremptory System

Implementing judicial challenges for ALJs may raise some concern regarding administrability and judicial integrity due if perceived as a radical change to the current adjudicatory system. Though the system is a change in the context of ALJs, it is not a radical proposal as one-third of states already have the system in place. While there may be consequences from implementing peremptory challenges for ALJs, the states' experience will be instructive on the administrative level and how to mitigate some of the concerns. Moreover, distinct aspects of administrative law may also beget different results due to the expertise of agencies.

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156. *See* 5 U.S.C. § 557(b) (2006) ("On appeal from or review of the [ALJ's] initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Universal Camera Corp v. Nat. Labor Relations Bd.*, 340 U.S. 474, 493–97 (1951) (explaining that the APA allows for agencies to review an ALJ decision and decline adopting the ALJ decision if substantial evidence exists for an agency's contrary decision).

a. *Administrative Inefficiencies*

One possible concern over implementing a peremptory challenge system is that it could impose undue administrative burdens on judicial resources. The fear is that a party would make a challenge after an ALJ has invested valuable time becoming familiar with the facts and legal issues presented.[157] Critics often complain about the inefficiency of the administrative state, and by allowing parties to remove the ALJ, there is fear that little or no judicial activity would take place until the challenge date for both sides had passed.

Though a twenty-eight-day delay certainly could mean longer wait times, the administrative inefficiencies will be minimal. The fourteen-day deadline for each party is specifically in place for judicial economy.[158] Since most ALJ offices are small, transferring a case would be a matter of moving paperwork down the hall.[159] Even for larger agencies such as the Social Security Administration (SSA) where over 1,600 ALJs work, the peremptory challenges would function on an office-to-office basis to the extent possible.[160] Therefore, an ALJ removed in the Chicago SSA office would have the case transferred to another SSA ALJ in Chicago. Finally, though the length of time it takes to appear before an ALJ varies from agency to agency, the process typically lasts over a year.[161] For an individual who is deprived of his or her rights or entitlements, that additional wait period is small in the grand scheme of adjudication.

There may also be concern about parties abusing the peremptory challenge system. For the private party that may have its rights taken away, there is an obvious incentive to delay the administrative process.[162] Available data on the use of peremptory challenges over a fourteen-year period in Oregon, found that defendants were more likely to use peremptory challenges than prosecutors, filing sixty-one

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157. *See, e.g.*, TERESA WHITE CARNS, ALASKA JUDICIAL COUNCIL, PEREMPTORY CHALLENGES TO JUDGES: SURVEY OF OTHER JURISDICTIONS 10–15 (1983) (examining states' efforts to deal with administrative problems caused by judicial peremptory challenges).

158. Most states that have peremptory challenges of judges also have a deadline that requires a party to use the challenge within a certain time after judicial assignment. *See, e.g.*, WIS. STAT. § 971.20(3)(b) (1996) (request to substitute judge must be filed at least five days before the preliminary examination).

159. *See* OFFICE OF PERSONNEL MGT., ALJS BY AGENCY, https://www.opm.gov/services-for-agencies/administrative-law-judges/ (last visited Jan. 17, 2020) (tallying ALJs by federal agency).

160. *Id.*

161. *See, e.g.*, SOC. SEC. ADMIN., AVERAGE WAIT TIME UNTIL HEARING HELD REPORT (FOR THE MONTH OF DECEMBER 2019), https://www.ssa.gov/appeals/DataSets/01_NetStat_Report.html (last visited Jan. 17, 2020).

162. For example, in *Lucia*, Lucia challenged the appointment of his ALJ and did not actually challenge the merits of his case. Most likely, the reappointed ALJ will rule against Lucia, but he has bought himself some time to continue to practice and get his finances in order.

percent of the challenges in criminal cases.[163] Widespread abuse of peremptory challenges could certainly clog the administrative state's machinery.

Other data suggests, however, that parties use peremptory challenges sparingly.[164] That same Oregon study that showed defendants used the majority of peremptory challenges also found that peremptory challenges were used in less than one percent of all cases.[165] A study in New Mexico similarly found that parties used peremptory challenges in less than five percent of cases.[166] The infrequent use of peremptory challenges on the state level, even in criminal cases in which a person's freedom is at stake, suggests they may also be sparingly used in agency adjudication.

b. *Judge Shopping*

Another possible consequence of a peremptory challenge system is judge shopping—the idea that the agency or private party would be able to pick the ALJ hearing its case. In California, a questionnaire sent out to judges found that of the abuses in the peremptory challenge system, forty-five percent of judges mentioned judge shopping.[167] The potential for abuse is greater in agencies that only have one or two ALJs on staff, as the challenge could essentially guarantee the appearance of a specific ALJ. One concern is that agencies would remove ALJs that the current administration did not appoint to ensure that the ALJ hearing the case has the same policy goals as the administration. Another concern is that agencies would excessively use the challenges against an ALJ who departs from agency policy as a form of censure.

Critics of peremptory challenges are mistaken in their belief that the challenges will lead to judge shopping.[168] Due to random assignments, peremptory challenges mean that the judge ultimately hearing the case will not be selected at the whim of any party. Ra-

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163. ALAN J. CHASET, FED. JUDICIAL CTR., DISQUALIFICATION OF FEDERAL JUDGES BY PEREMPTORY CHALLENGE 30 (1981).

164. *See id.* at 27, 35–36 (finding that between 1955 and 1968 in Oregon, only 1,392 challenges were made from more than one-quarter of a million cases filed. Moreover, in New Mexico, during 1979, there were "2,199 disqualifications in 53,517 cases filed.").

165. *Id.* at 27.

166. *See id.* at 36.

167. Admin. Off. Of the [California] Courts, Report and Recommendation Concerning Peremptory Challenge of Judges—C. C. P. § 170.6 (1969) (noting that most judges felt that parties did not abuse the peremptory challenge procedure).

168. *See* Kimberly Jade Norwood, *Shopping for Venue: The Need for More Limits,* 50 U. MIAMI L. REV. 267, 295–98 (1996) (describing efforts by litigants to circumvent random assignment systems).

ther, the chief ALJ will randomly assign a judge from the pool of available ALJs. Here too, available state data suggests that critics' fear of abuse may be overblown. Of all the peremptory challenges filed in California, 15.6 percent were filed in courts with one or two judges.[169] In Oregon, one-judge districts had 19.3 percent of the cases filed and 22.3 percent of the peremptory challenges.[170] These statistics suggest that challenges are not being disproportionately used in smaller courts where there would be a greater risk of judge shopping.

To further prevent potential abuse in agencies with only one or two ALJs on staff, Congress could put in a provision that would allow for an ALJ from a similar agency to adjudicate a case. For example, since the Federal Trade Commission only employs one ALJ, they could use an ALJ from the International Trade Commission which has six ALJs.[171] The similar nature of the agencies would allow the sharing of ALJs as envisioned with the creation of an ALJ corps, but on a much smaller scale so that ALJs are able to maintain their subject-matter expertise.

Moreover, the small number of ALJs on staff cuts the other way in that parties may not use challenges recklessly.[172] Both parties would have to calculate the danger that the new judge assigned to their hearing would be worse for their case. For both sides then, they are unlikely to use the judicial challenges in an automatic or reckless manner.

Finally, concerns about using peremptory challenges to target specific ALJs may also be a feature of the system rather than a bug. In Nevada, of the 433 judicial peremptory challenges used, 117 were directed at a single judge of the eighteen-judge bench.[173] The second-most-challenged judge was removed sixty-eight times and the third-most-challenged fifty-five times.[174] With more than half of the challenges used on only three judges, the reality is that most judges were rarely removed from a case.[175] These statistics suggest that the judges who were most frequently removed were removed for rea-

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169. ALAN J. CHASET, FED. JUDICIAL CTR., DISQUALIFICATION OF FEDERAL JUDGES BY PEREMPTORY CHALLENGE 31 (1981) (citing JUDICIAL COUNCIL OF CAL., NINETEENTH BIENNIAL REPORT TO THE GOVERNOR AND THE LEGISLATURE 34–39 (1963)) (reporting that there were 738 peremptory challenges in the state's trial courts over a six-month period in 1962, of which 623 were in courts with three or more judges).

170. *Disqualification of Judges for Prejudice or Bias—Common Law Evolution, Current Status, and the Oregon Experience*, 48 OR. L. REV. 311, 392 (1969).

171. OFFICE OF PERSONNEL MGT., ALJS BY AGENCY, https://www.opm.gov/services-for-agencies/administrative-law-judges/ (last visited Jan. 17, 2020).

172. *See id.*

173. Glenn Puit, *In the Courts: Scores of Litigants Bump Walsh*, L.V. REV. J. Feb. 29, 2004 at IB.

174. *Id.*

175. *Id.*

sons that were not ideological, but rather reasons related to their abilities or tendencies as adjudicators. For agencies, having a flexible system to provide indirect feedback to ALJs is more efficient than bringing claims to the MSPB every time an ALJ misapplies agency policy.

c. *Multiple Parties in a Single Hearing*

One final possible concern with a peremptory challenge system is how to distribute the challenges when there are multiple parties in a case. In these instances, the chief ALJ needs to administer the peremptory challenge with sensitivity to fairness to the parties, while also avoiding the potential strategic advantages that multiple parties on the same side could have by exercising separate challenges. State courts have addressed this problem by allowing parties who are aligned in interest to have only one peremptory challenge.[176] For administrative hearings, allowing each side only one such challenge would minimize the inefficiencies present.

4. Carving Out an Exception to *Free Enterprise Fund*

Given the Supreme Court's and Congress' desire to provide accountability to agencies and to not hamper the President's power, the introduction of a peremptory challenge system seems to provide an adequate remedy. Under this proposal, the current dual-layer protection separating ALJs from the President would remain in place which would require the Supreme Court to carve out an exception for ALJs from *Free Enterprise Fund*'s holding.

Central to *Free Enterprise Fund* and *Lucia* is presidential control and the President's ability to oversee his officers. When hearing *Lucia* en banc, Judge Kavanaugh's concerns were the individual liberty wielded by agencies and the diminishment of the President's power to exercise influence.[177] Earlier in *Free Enterprise Fund*, the decision focused on how the removal protections had "impaired" the President's necessary authority to "hold his subordinates accountable for their conduct" and "subvert[ed] the President's ability to ensure that the laws are faithfully executed."[178]

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176. CHASET, *supra* note 160, at 24–25 (describing states that have a one challenge per side rule).

177. *Lucia*, 868 F.3d 1021 (D.C. Cir. 2017).

178. *Free Enter. Fund*, 561 U.S. 477 (2010).

Peremptory challenges properly address the Court's concerns around presidential control. The President can properly supervise his officers while the history and intent around the APA remain intact. Such a solution provides an avenue for the Court to avoid going against long-standing administrative practices. If taken seriously, the removal of ALJ protections would undo most of the work of ALJs as they make decisions in furtherance of agency policies. Because most people want to avoid that result, the peremptory challenge provision would provide a thumb on the scale for the Court to keep the removal protections.

The Court could also use future decisions to limit the scope of the removal power and focus on whether the removal protections impair the President's power to execute law. Back in *Free Enterprise Fund*, Justice Breyer put forth six criteria that lower courts could use as guidance on the removal question:

> (1) whether the agency consists of a multimember commission; (2) whether its members are required, by statute, to be bipartisan (or nonpartisan); (3) whether eligibility to serve as the agency's head depends on statutorily defined qualifications; (4) whether the agency has independence in submitting budgetary and other proposals to Congress (thereby bypassing the Office of Management and Budget); (5) whether the agency has authority to appear in court independent of the Department of Justice, cf. 28 U. S. C. §§516–519; and (6) whether the agency is explicitly classified as "independent" by statute.[179]

The Court could use Breyer's factors to find that quasi-judicial inferior officers like ALJs can be subject to removal restrictions. This is in line with modern separation of powers law which allows limited restrictions to be placed on the government when it does not require significant departures from existing practices.[180] Since ALJs were created to deliver judicially comparable, trial-type justice, maintaining their protections is imperative to prevent them from becoming biased decisionmakers for the executive branch.

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179. *Free Enter. Fund*, 561 U.S. at 588 (Breyer, J., dissenting).

180. *See* Michael B. Rappaport, *Classical Liberal Administrative Law in a Progressive World*, *in* THE CAMBRIDGE HANDBOOK OF CLASSICAL LIBERALISM 105 (M. Todd Henderson, ed., 2018).

CONCLUSION

Despite *Lucia*'s narrowness, the decision has already affected administrative law. Over the next years, it will be intriguing to watch the litigation filed to address the questions left open by the Court, including the removal protections. As discussed in this note, the issue is especially tricky because of the Court's mealy-mouthed approach to the President's removal power.

This Note has proposed a modest solution that balances the President's interest in supervising his officers while maintaining the decisional independence of ALJs. Congress provided ALJs with for-cause removal protections to ensure their independence and preserve the high quality of government service. Implementing peremptory challenges would be a way to maintain ALJs' quality while improving accountability and transparency in the administrative state. This system would provide private litigants meaningful access to their hearings as they would have a mechanism to avoid problematic ALJs who may kill their claim.