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# Presidential Administration, the Appointment of ALJs and the Future of For Cause Protection

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

We will punish bureaucrats who “lack boldness” – Xi Jinping\*

Paul R. Verkuil\*\*

Few exercises of the President’s appointment power are more essential than the Executive Branch’s identification and designation of members of the administrative judiciary, especially deciders labeled Administrative Law Judges (ALJs) under the Administrative Procedure Act (APA).<sup>1</sup> These civil servants have a special responsibility to serve the public that appears before them, in that they must make factual determinations that assure fairness and are largely outside politics. This is a due process dimension that other government officials are unburdened by. Most civil servants operate in the realm of policy (which is ideally fact based) and their decisions are judged primarily in political terms. The purpose of the APA, enacted by Congress in 1946 after decades of political controversy,<sup>2</sup> was to ensure that decisions affecting the public were not the result of “administrative absolutism.”<sup>3</sup> ALJs were specifically given impartiality protections much like federal judges, including separation of functions requirements, *ex parte* practice restrictions and tenure status.<sup>4</sup> These protections were upheld by the Supreme Court shortly after the APA was enacted.<sup>5</sup> While ALJs do not have lifetime tenure like federal judges, they are rarely removed. Indeed, it is about as

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<sup>1</sup> 5 U.S.C. § 554, 556-57.

<sup>2</sup> See Paul Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM.L.REV.258, 276-79 (1978); (Walter-Logan Act and the ABA compromise on administrative procedures that resulted in the APA); See also, George B. Shepard, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1995-1996).

<sup>3</sup> John D. O’Reilly, Jr., *Administrative Absolutism*, 7 FORDHAM L. REV. 310 (1938) (quoting from Roscoe Pound’s 1939 ABA Report on administrative process).

<sup>4</sup> 5 U.S.C. § 551, *et seq.*

<sup>5</sup> *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128,142 (1953); *Wong yang Sung v. McGrath*, 339 U.S. 33 (1950); *see also*, Brief Amicus Curiae of Administrative Law Professors in Support of Neither Party in *Lucia v. SEC* (2018), available at [https://www.supremecourt.gov/DocketPDF/17/17-130/36658/20180226154829341\\_FederalAdministrativeLawJudgesConference.pdf](https://www.supremecourt.gov/DocketPDF/17/17-130/36658/20180226154829341_FederalAdministrativeLawJudgesConference.pdf) (collecting sources).

likely that a federal judge would be removed through impeachment as that an ALJ would be removed through statutory processes.<sup>6</sup>

Still, they are members of the executive branch under Article II, not the judiciary under Article III, and within the President's appointment and removal power like all other government employees. A President who believes he is the top legal officer could conceivably, like Chairman Xi, remove an administrative judge who "lacks boldness" or its opposite, obsequiousness. Moreover, recent judicial and executive decisions are raising fundamental questions about the independent role of ALJs. These actions create a fascinating framework for reassessing the president's power over administrative deciders and over the administrative state itself.

### **The Lucia Case, the SG's Memo and Executive Order 13843**

In *Lucia v. Securities & Exchange Commission*,<sup>7</sup> the Court held that ALJs working at the SEC were (inferior) "officers of the United States" under the Appointments Clause (not employees) and must be appointed by the Commission itself, not SEC staff. This aspect of the decision was supported by the nature of the ALJ's duties and connected directly to *Freytag v. Comm'r*,<sup>8</sup> held IRS special trial judges to be inferior officers. Also, the case provided a quick fix, since all the SEC had to do (which it did during litigation) was have the Commissioners revalidate staff appointments. But what makes *Lucia* a fascinating case is its further implications. Justice Breyer, concurring and dissenting in part, brought them out. He wanted to address removal of ALJs as well as appointment, since he feared the decision "would risk transforming administrative law judges from independent adjudicators into *dependent* decisionmakers, serving at the pleasure of the Commission."<sup>9</sup> As the Court chose not to resolve this point directly, it potentially raises challenges to for-cause removal restrictions of agency heads and commissioners under

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<sup>6</sup> The Federal Judicial Center lists 11 federal judges who have been removed by impeachment. FED. JUDICIAL CENTER, *Impeachments of Federal Judges* (last visited Dec. 8, 2019), <https://www.fjc.gov/history/judges/impeachments-federal-judges>.

<sup>7</sup> 138 S.Ct. 2044 (2018).

<sup>8</sup> 501 U.S. 868 (1991)

<sup>9</sup> 138 S.Ct. at 2060 (emphasis in original).

prior cases like *Free Enterprise Fund*<sup>10</sup> and *Humphrey's Executor*,<sup>11</sup> and conceivably to the civil service system itself. Thus *Lucia*, modest in its holding, may become a first step in the transformation of presidential management of the bureaucracy.

It did not take the Trump Administration long to expand *Lucia's* possibilities. In near simultaneous actions, the Solicitor General in a memo<sup>12</sup> to agencies, and the White House in Executive Order 13,843,<sup>13</sup> used *Lucia* to dramatically expand executive control over administrative adjudicators.

The Solicitor General's memo advising agency general counsels proposed three significant steps: it expanded the covered inferior officer category from ALJs to all administrative deciders, thereby increasing the number of deciders from about 1,930 ALJs to over 10,000 administrative judges; it proposed to include deciders in both adversarial and non-adversarial contexts, even though Justice Kagan's *Lucia* majority was based on adversarial decisions alone; and it sought to limit "good cause" removal restrictions for ALJs to those that are "suitably deferential" to department heads.<sup>14</sup> While the SG's memo only expresses litigation positions, the Executive Order ("E.O.") took legal actions. In a desire to "mitigate concerns" about the reach of *Lucia* under the Appointments Clause, the E.O. deprived the Office of Personnel Management ("OPM") of hiring authority over ALJs, transferred that power to agency heads and removed ALJs from the competitive service, placing them in a new Schedule E.<sup>15</sup> OPM immediately endorsed these steps and gave up ALJ selection authority.<sup>16</sup> In taking these steps, the E.O. took pains to refer to ALJs as a group of professionals who "are impartial

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<sup>10</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

<sup>11</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

<sup>12</sup> SOLICITOR GENERAL, GUIDANCE ON ADMINISTRATIVE LAW JUDGES AFTER *LUCIA* V. SEC (S. CT.) (2018), available at <https://static.reuters.com/resources/media/editorial/20180723/ALJ--SGMEMO.pdf> [hereinafter GUIDANCE].

<sup>13</sup> *Excepting Administrative Law Judges from the Competitive Service*, 83 Fed. Reg. 32755 (July 10, 2018).

<sup>14</sup> See *supra* n. 10.

<sup>15</sup> See *supra* n. 11.

<sup>16</sup> Memorandum from Dr. Jeff T.H. Pon, Dir., U.S. Office of Pers. Mgmt., to Heads of Exec. Dep'ts & Agencies Regarding Executive Order – Excepting Administrative Law Judges from the Competitive Service (July 10, 2018) [hereinafter OPM Memorandum], <https://chcoc.gov/content/executive-order-%E2%80%93-excepting-administrative-law-judges-competitive-service> [<https://perma.cc/SH3X-HQCL>].

and committed to the rule of law.”<sup>17</sup> There is no doubt that the President has statutory authority under 5 U.S.C. § 3301 to make regulations for the admission of individuals into the civil service, which E.O. 13,843 does. OPM is an executive agency whose duties can be changed or eliminated, albeit with congressional oversight and approval. After considering what the E.O. seeks to achieve on a policy basis, the implications of the SG’s Memo will be considered.

### **Consequences of Transferring OPM ALJ Selection Authority to Agencies**

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

In 2015 when I was Chairman of ACUS, the Obama White House asked ACUS to help OPM increase the number of ALJs available to conduct Social Security Disability hearings as the backlog had reached over 2 million cases. As I wrote in *VALUING BUREAUCRACY*,<sup>18</sup> the OPM examination process had become rigid and unresponsive. It was immersed in process and elaborate testing mechanisms that could not be reused more than once and took years and millions of dollars to reconstruct. When ACUS tried to convince the bureaucrats that speed and new ideas were essential, our suggestions were politely ignored. OPM officials clung to a system that could only produce about 100 candidates per year when 250 to 500 were needed. As a result, disability hearing lines grew longer and eligible applicants were denied dispositions for years. It was embarrassing to tell White House and congressional officials that we had failed to solve this crisis. In addition, the Social Security Administration (“SSA”) failed in its attempts to gain a separate register for disability ALJs which would have let them expedite the

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<sup>17</sup> See *supra* n. 11.

<sup>18</sup> PAUL R. VERKUIL, *VALUING BUREAUCRACY* 106 (2017)(detailing efforts to streamline the OPM selection process).

process. So the Trump E.O. has achieved something the prior Administration could not: agency controlled appointment processes that permit agency flexibility and innovation.

Of course, the Trump Administration could have tried reforming OPM's selection process first, since the Executive Order's reasoning that *Lucia* mandated agency control of ALJ selections is unpersuasive.<sup>19</sup> Since OPM is an executive agency subject to presidential control, it could still have presented agency heads with a list of eligibles to choose from, much like agency subordinates will now do. In these circumstances, the Appointments Clause would not have been offended. But that assumes the OPM bureaucracy is reformable on this issue. It also assumes the elaborate testing system OPM created is necessary or desirable. By using a strict score system and granting veterans a five or ten (for disabled veterans) point preference over other applicants, OPM virtually assured that successful applicants would be veterans if they were in the pool of eligibles. The approach the E.O. took, using the veterans' preference as a tie breaker, is better suited to producing the most qualified candidates while still respecting a deserving class of applicants.<sup>20</sup>

Also E.O. 13,843, by devolving the selection and choice to agencies, eliminates the need for separate registers that OPM was reluctant to grant. This really applies most to SSA and the Department of Health and Human Services ("HHS") where the vast majority of ALJs reside. Since these agencies use a non-adversarial (or "inquisitorial") decision framework, trial experience was never as important a selection criterion. Rather, mass decisionmaking skills and sensitivity to claimants' needs and limitations, are more predictable indicators of superior performance.<sup>21</sup> Thus, even if not constitutionally compelled, the E.O. has made a positive move in favor of efficient government by transferring selection power to agencies. But that move must still be

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<sup>19</sup> The White House has also proposed reorganizing OPM, more broadly, by transferring its security clearance duties to the Department of Defense and other duties to the General Services Administration. [cite kevin].

<sup>20</sup> Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 U.C.L.A. L. REV. 1341 (1992)

<sup>21</sup> See Jack M. Beermann & Jennifer L. Mascott, RESEARCH REPORT ON FEDERAL AGENCY ALJ HIRING AFTER *LUCIA* AND EXECUTIVE ORDER 13843 (2019), available at <https://www.acus.gov/sites/default/files/documents/Submitted%20final%20draft%20JB.pdf>. In any event, SSA would often find its experienced ALJs plucked by transfer to the regulatory agencies.

balanced against the troubling possibility of increasing political influence over the selection process.

Once agency officials have control, the selection process becomes potentially more discretionary and political. Obviously, agency heads (and often deputies) are political appointees<sup>22</sup> and would be expected to respond positively to White House requests for personnel actions, especially in a new administration where jobs must be found for campaign aides and other loyalists. While there are examples where it has occurred with non-ALJ deciders,<sup>23</sup> the ALJ agency-based selection process might be more resistant to political manipulation. First of all, these are not just political jobs (of which there are several thousand in the Plum Book), these are judicial-type positions that require experienced and qualified attorneys to fill them.<sup>24</sup> It is in agencies' self-interest to adopt hiring standards that approximate what OPM previously mandated. Not all agencies have established selection criteria, but some show an awareness of the dangers of politicizing the process. The Department of Labor, one of the most politically contested agencies, has created criteria that in some respects even exceed those previously required by OPM (e.g., requiring 10, not 7, years of relevant litigation experience) and placed the screening panel under the aegis of the DOL Chief ALJ, a non-political figure.<sup>25</sup>

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<sup>22</sup> Interestingly, agencies that are independent commissions typically are politically balanced, which may moderate political influence.

<sup>23</sup> In the administration of George W. Bush, the Department of Justice Inspector General found such influence in IJ appointments, Jeffrey S. Lubbers, *The Regulatory Accountability Act Loses Steam but the Trump Executive Order on ALJ Selection Upturned 71 Years of Practice*, 94 CHI-KENT L. REV. 741 (2019) (documenting political influence in the appointment of administrative judges in the Bush II administration).

<sup>24</sup> U.S. SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS, UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS (PLUM BOOK) (2016), <https://www.govinfo.gov/app/details/GPO-PLUMBOOK-2016/>. Every four years, just after the Presidential election, the United States Government Policy and Supporting Positions, commonly known as the Plum Book, is published, alternately, by the Senate and the House. The Plum Book is used to identify presidentially appointed positions within the Federal Government.

<sup>25</sup> Procedures for Appointment of Administrative Law Judges for the Department of Labor, 83 Fed. Reg. 44,307 (Aug. 30, 2018).

Importantly, ACUS has offered advice on how affected agencies might create recruitment and selection guidance in Recommendation 2019-2.<sup>26</sup> The Conference emphasizes “impartiality and the appearance of impartiality” among its recommendations. In this way, it echoes E.O. 13,843 which called ALJs “impartial and committed to the rule of law.” These are high minded phrases, of course, that inspire but may well not control agency action. Still, they have the advantage of making sense pragmatically.

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

## **The Solicitor General’s Memo and the Expansion of Presidential Authority**

If *Lucia* were only taken on its own terms there would still be issues to deal with, like the future of for-cause removal raised by Justice Breyer, but the SG’s Memo elevates the case into a whole new legal and policy stratosphere. The SG’s guidance to agency

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<sup>26</sup> ACUS, Agency Recruitment and Selection of Administrative Law Judges, Recommendation 2019-2 (June 24, 2019), <https://www.acus.gov/recommendation/agency-recruitment-and-selection-administrative-law-judges>.

counsels (1) extended *Lucia*'s reach from ALJs to all "similarly situated" non-ALJ decisionmakers; (2) added ALJ non-adversarial decisions to the covered adversarial decision universe; and (3) agreed to defend ALJ removal protections only if they are "suitably deferential" to agency heads.<sup>27</sup> These positions had also been previewed in the Solicitor General's briefing in *Lucia*<sup>28</sup> which the Court refused to address. They now appear to be Administration policy and connect directly to E.O. 13,843. As such, the SG's positions could have transformative effects on the administrative state.<sup>29</sup> Consider first the expansion of the Appointments power to all administrative deciders. That move alone increases the universe of deciders by at least 10,000 more administrative judges (AJs).<sup>30</sup> Indeed, the true number may be unknowable if non-adversary hearings are included.<sup>31</sup> This is why the APA long ago limited the ALJ category to formal hearings.<sup>32</sup> Expanding the inferior officer category could produce untold amounts of litigation into the future. Presumably the Supreme Court will step in to explain the limits of *Lucia* before things go too far.

The SG's third point of guidance is its most controversial and highlights Justice Breyer's concerns in *Lucia*. By requiring removal restrictions to be deferential to the

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<sup>27</sup> Guidance, *supra* n. 8; see also *RECENT GUIDANCE: ADMINISTRATIVE LAW -- APPOINTMENTS CLAUSE-- SOLICITOR GENERAL ISSUES GUIDANCE ON ADMINISTRATIVE JUDGES*. -- *Guidance on Administrative Law Judges After Lucia v. SEC* (S. Ct.), 132 HARV. L. REV. 1120 (2018). Oddly, when the Solicitor General opened a "Summit on Modernizing the Administrative Procedure Act" on December 6, 2019 at DOJ, he did not mention the reforms proposed in his earlier, *Lucia*-inspired memo. Attendance by author at event; see U.S. DEP'T OF JUSTICE, *Solicitor General Noel Francisco Delivers Remarks at Department of Justice Summit on Modernizing the Administrative Procedure Act* (Dec. 6, 2019), <https://www.justice.gov/opa/speech/solicitor-general-noel-francisco-delivers-remarks-department-justice-summit-modernizing> (press release containing remarks of SJ as prepared for delivery).

<sup>28</sup> See Lubbers, *supra* n. 19.

<sup>29</sup> Oddly, when the Solicitor General opened a "Summit on Modernizing the Administrative Procedure Act" on December 6, 2019 at DOJ, he did not mention the reforms proposed in his earlier, *Lucia*-inspired memo. Attendance by author at event; see U.S. DEP'T OF JUSTICE, *Solicitor General Noel Francisco Delivers Remarks at Department of Justice Summit on Modernizing the Administrative Procedure Act* (Dec. 6, 2019), <https://www.justice.gov/opa/speech/solicitor-general-noel-francisco-delivers-remarks-department-justice-summit-modernizing> (press release containing remarks of SJ as prepared for delivery).

<sup>30</sup> See Beermann & Mascott, *supra* n. 17.

<sup>31</sup> This move may have been intended to encompass SSA disability ALJs who preside over inquisitorial type hearings with legislative approval, but could reach thousands more, *e.g.* the proverbial park ranger at Yosemite.

<sup>32</sup> See RICHARD PIERCE JR., SIDNEY SHAPIRO, & PAUL VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 265-69 (6th Ed. 2015).

Executive authority, it challenges established statutory schemes. The statutory framework surrounding ALJ removal involves a hearing on the record before the Merit Systems Protection Board (“MSPB”).<sup>33</sup> The E.O. acknowledges, as it must, the role of MSPB in the removal process, but the SG’s memo (and his brief in *Lucia*<sup>34</sup>) suggested that the ALJ for-cause removal statute might be a constitutional problem under the *Free Enterprise Fund* dual for-cause rationale. Instead, the SG Memo would change the burden of proof and eliminate the de novo review power of the MSPB. This may make the review “sufficiently deferential” but it ignores statutory language and purpose. Moreover, it in effect leaves ALJs with less protection against removal than civil servants generally, surely the opposite of what due process would demand. Of course there must be an MSPB to appeal to and it has been several years since the agency has had a quorum.<sup>35</sup> The Senate has yet to confirm three members<sup>36</sup> and agencies are beginning to challenge the jurisdiction of the MSPB itself.<sup>37</sup> The 2,529 cases in MSPB’s backlog at the end of 2019 will take the Board time to catch up, however, and along with judicial challenges it is unlikely the Board will turn to revising its procedures for review any time soon.

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<sup>33</sup> See 5 U.S.C. § 7521(a)

<sup>34</sup> Brief for the Respondent at 45, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130), 2017 WL 5899983, at \*35

<sup>35</sup> See Nicole Ogrysko, *Senate forces ‘first’ for MSPB as the agency loses all members*, FED. NEWS RADIO (March 1, 2019), <https://federalnewsnetwork.com/workforce-rightsgovernance/2019/03/senate-forces-first-for-mspb-as-the-agency-loses-all-members/>.

<sup>36</sup> FEDWEEK, *Key Positions Still Unfilled* (July 30, 2019), <https://www.fedweek.com/fedweek/key-positions-still-unfilled/> (“The committee early this year approved nominations for two of the MSPB seats and more recently approved a nominee for the other. Their confirmation would allow the MSPB to return to normal operations after having lacked a quorum since January 2017.”).

<sup>37</sup> Current practitioners have reported that agencies are regularly filing appeals to the full Board of the MSPB appealing favorable outcomes for employees facing proposed disciplinary actions, and “that these MSPB judges exercise the same significant authority as these administrative law judges do – and just like the ALJs their appointments are unconstitutional and they have no authority.” See Nicole Orgysko, *Why recent constitutional challenges may have implications for agencies and their administrative judges*, FEDERAL NEWS NETWORK (Dec. 30, 2019), <https://federalnewsnetwork.com/workforce/2019/12/why-recent-constitutional-challenges-may-have-implications-for-agencies-and-their-administrative-judges/>.

Because judges at MSPB are appointed through Human Resources departments exercising the delegated authority of the Board, agencies argue that their appointments are invalid, and they have no authority to render decisions. As the Board currently has no members to hear these appeals, the disciplinary actions and removals of federal employees are taking place regardless with the expectation that affected employees will move on to other work before MSPB is able to hear those appeals.

There have been ALJ removal fights over the years, especially with ALJs at the SSA, over how much control management should exert over ALJ disability caseloads and decision times.<sup>38</sup> A removal standard that requires compliance with agency authority is both appealing and dangerous. Some ALJs clearly don't carry their share of the decision load, but removal on that basis alone can be onerous and threatening. And now that the SG wants all administrative judges under the same inferior officer umbrella, the caseload of immigration judges (IJs), which has been radically increased by DOJ,<sup>39</sup> becomes another vehicle for removal. IJs currently have nothing like the independence protections of ALJs, but they could gain independence depending on which direction the for-cause debate goes. The SG's position might ultimately be to strengthen the independence of thousands more administrative judges rather than reduce that of ALJs alone. The judicial instinct is to ensure due process for judges, of whatever stripe. Justice Scalia's observation in *The ALJ Fiasco*<sup>40</sup> that issues of ALJ quality as well as impartiality must be equally considered supports management efforts to achieve the removal of bad performers. Removal power is a drastic way to ensure ALJ quality and it should be used as a last resort. Professional training can do much to improve performance as can better selection processes at the outset. The APA's formulation of ALJ independence may leave on duty some bad actors, and improvements can be made, but the public will surely not benefit from the elimination of the for cause removal requirement. It is hard to see *Lucia* and related cases being taken this far but the Court could conceivably draw the line at for cause protections for administrative adjudicators based on due process considerations.<sup>41</sup> This would leave

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<sup>38</sup> See generally SOC. SEC. ADMIN. OFFICE OF INSPECTOR GENERAL, *Congressional Response Report: Oversight of Administrative Law Judge Workload Trends*, A-12-11-01138 (2012), [https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-11-01138\\_0.pdf](https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-11-01138_0.pdf).

<sup>39</sup> See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, ADJUDICATION STATISTICS, *New Cases and Total Completions* (average total completions per month has increased from 11,959 in 2016 to 20,907 in the first three quarters of 2019), <https://www.justice.gov/eoir/workload-and-adjudication-statistics>.

<sup>40</sup> Antonin Scalia, *The ALJ Fiasco--A Reprise*, 47 U. CHI. L. REV 57 (1979).

<sup>41</sup> The future of cases like *Humphrey's Executor* remain in jeopardy if the due process rationale does not apply to Commissioners. See *PIERCE*, *supra* n. 34.

the vast majority of career civil servants, who are policymakers not adjudicators, unprotected by civil service tenure rules despite statutory provisions now in place.

## Are Civil Servant Tenure Protections in Jeopardy?

New questions are being raised whether civil service tenure protections are themselves unconstitutional as they deprive the President of his constitutional power to hold the bureaucracy accountable. One such provocative suggestion comes from Phillip Howard and Don Elliott.<sup>42</sup> While Howard and Elliott divide on the extent of the President's Article II power, they raise a relevant and timely question: Does the Supreme Court's jurisprudence on ALJ for-cause removal leave room for protecting non-adjudicative deciders? Should civil servants have tenure? This question rises at a dramatic time, just as career foreign service officials have defied executive orders to testify before Congress in impeachment proceedings.<sup>43</sup>

Could it be that the employee removal protections in the Civil Service Reform Act are "clearly unconstitutional," as Phillip Howard has argued?<sup>43</sup> An irate President Trump, emboldened by his Senate acquittal, surely will do his best to punish or terminate those "disloyal" officials who testified against him or leaked damaging information. It is not hard to see how a case raising tenure for policy officials could reach the Court.

The Court's willingness to embrace for-cause limits on civil servants with adjudicative powers is bolstered by the unanimous opinion in *Weiner v. United States*<sup>44</sup>

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<sup>42</sup> Phillip Howard & Don Elliott, *Restoring Accountability to the Executive Branch*, CSAS Working Paper 20-02 (forthcoming 2020), available at <https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2020/02/Howard-Restoring-Accountability-to-the-Executive-Branch.pdf>

<sup>43</sup> Ambassadors to Ukraine Yavanovich and Taylor stand out. The American Foreign Service Association, the professional association for Foreign Service Officers, has raised more than \$250,000 for a legal-defense fund for nine of the 17 witnesses who testified about whether Trump and the White House pressured Ukraine to investigate the president's political opponents. See Lisa Rein, *As impeachment hurtles forward, a plea for legal help for government witnesses*, WASH. POST (Dec. 8, 2019), [https://www.washingtonpost.com/politics/as-impeachment-hurdles-forward-a-plea-for-legal-help-for-government-witnesses/2019/12/07/3053d6ae-1857-11ea-9110-3b34ce1d92b1\\_story.html](https://www.washingtonpost.com/politics/as-impeachment-hurdles-forward-a-plea-for-legal-help-for-government-witnesses/2019/12/07/3053d6ae-1857-11ea-9110-3b34ce1d92b1_story.html).

<sup>44</sup> 357 U.S. 349, 353 (1958).

where Justice Frankfurter refused to allow removal of a quasi-judicial war claims commissioner due to “the nature of the function” he was performing. But policy making officials fall outside this protective umbrella and justifications for their tenure status must be drawn from elsewhere in the Constitution. From the earliest days under the Pendleton Act<sup>45</sup> the Court indicated support of “for cause” removal of non-adjudicatory officials.<sup>46</sup> But that bulwark may have to be built anew in an era where the Court seems more concerned with the President’s executive power under Article II. Does the ability to “speak truth to power” justify a comparable protection for policy officials much like the adjudicative function does for decisional officials? Ultimately, the arguments must confront *Marbury v. Madison*<sup>47</sup> and the level of policymaking involved. Secretary of State Pompeo cannot enjoy tenure in-office protections for speaking his mind to the President, but can foreign service officers do so at a lower level of authority? Call this the Pompeo/Yovanovitch-Taylor line. Ambassadors operate under the protection of the Department of State’s “Dissent Channel” which enables U.S. citizen employees to express alternative views on substantive issues of policy that must be addressed in high level review and protected against retribution.<sup>48</sup> The career officials<sup>49</sup> who testified in the impeachment proceedings against the wishes of the White House acted in this tradition. Could President Trump retaliate beyond offensive tweets and remove them? He has already acted to reassign those who have not retired.<sup>50</sup> In

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<sup>45</sup> The Pendleton Civil Service Reform Act, 22 Stat. 403 (1883), was the first federal civil service statute which mandated that most civil service positions be awarded based on merit instead of political patronage.

<sup>46</sup> See *United States v. Perkins*, 116 US 483 (1886) (involving removal of a naval officer).

<sup>47</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>48</sup> U.S. DEP’T OF STATE, DISSENT CHANNEL, 2 FAM 70, 71-79 (2018), <https://fam.state.gov/fam/02fam/02fam0070.html>.

<sup>49</sup> Career civil servants, military personnel, and foreign service officers appearing in the impeachment hearings included William B. Taylor, George Kent, Marie Louise "Masha" Yovanovitch, Jennifer Williams, Lt. Col. Alexander Vindman, Laura Cooper, David Hale, Peter Michael McKinley, Philip Reeker, Catherine M. Croft, Christopher Anderson, and David Holmes. Several of these officials served in politically appointed roles but were appointed from the career service to which they would normally return when dismissed from their political appointment.

<sup>50</sup> See Toluse Olorunnipa, Tom Hamburger, Josh Dawsey & Greg Miller, *Trump ousts Vindman and Sondland, punishing key impeachment witnesses in post-acquittal campaign of retribution*, WASH. POST (Feb. 7, 2020), <https://www.washingtonpost.com/politics/trump-ousts-vindman-and-sondland-punishing-key->

these circumstances, how secure is the Civil Service Reform Act of 1978<sup>51</sup> and its creation of the Senior Executive Service (SES)? SES members are senior civil servants who are primarily policy makers and enjoy tenure protections by statute based on their GS civil service rank.<sup>52</sup>

Since they are outside the due process-based protections accorded adjudicators, they are susceptible to being deprived of protections along the lines Phillip Howard has offered. His mantra is lack of accountability in government which means that “public service is a dead end.”<sup>53</sup> Howard proposes to make the civil service more accountable by creating something like “at will” public employment at the federal level.<sup>54</sup> This is a controversial step some states have taken with unpromising results.<sup>55</sup> Public at will employment poses two perils: the indiscriminate use of contractors to fill permanent positions, creating management inefficiencies, and a potential return to the spoils system, which is why we got the Pendleton Act in the first place.<sup>56</sup>

Howard’s view of the civil service uses the accountability value to eradicate the values of bureaucratic independence and dedication. Moreover, it does not comport with my experience in government. Where I find responsible civil servants the rule, he finds them the exception. Howard admits there are “pockets of excellence that exist throughout government”; to me those pockets are much deeper and broader than he realizes.<sup>57</sup> Whoever is correct on the empirical question, however, does not answer the larger theoretical one – why give tenure to non-adjudicatory civil servants at all? One response comes from Jon Michaels. In his influential book, *Constitutional Coup*, Professor

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[impeachment-witnesses-in-post-acquittal-campaign-of-retribution/2020/02/07/dafbdb90-49be-11ea-bdbf-1dfb23249293\\_story.html](https://www.washingtonpost.com/news/powerpost/wp/2020/02/07/dafbdb90-49be-11ea-bdbf-1dfb23249293_story.html).

<sup>51</sup> P.L. 95-454 (S. 2640).

<sup>52</sup> *Id.*

<sup>53</sup> Howard, *supra* n. 43, at 13.

<sup>54</sup> See H.R. 6278, “Promote Accountability and Government Efficiency Act,” 114th Cong. 2d Sess. (discussed by Joe Davidson, *New feds could be fired for ‘no cause at all’ by Trump under planned legislation*, WASH. POST (Jan. 12, 2017), <https://www.washingtonpost.com/news/powerpost/wp/2017/01/12/new-feds-could-be-fired-for-no-cause-at-all-under-planned-legislation/>).

<sup>55</sup> VERKUIL, n. 18, *supra*, at 20-22.

<sup>56</sup> *Id.*

<sup>57</sup> Howard, *supra* n. 40, at 13.

Michaels has answered this question by positing a theory of administrative separation of powers.<sup>58</sup> He sees a tenured and politically insulated civil service “as the administrative counterpart to the federal judiciary.”<sup>59</sup> Michaels views the civil service as providing a counter-majoritarian check on the executive (represented by agency heads) that assures a stable democratic state. His fear is that absent independent civil servants, government contractors will do the bidding of the agency heads and administrative separation of powers will disappear.<sup>60</sup> Doubtless Phillip Howard would find Michaels’s arguments unconvincing, if not anathema. Where Michaels favors “multiple veto points” to stabilize the bureaucracy, Howard would probably say that *is* the problem. But Michaels’s constitutional defense of the civil service is a necessary step to consider once the clash becomes inevitable. My inclination is to side with Michaels at least some of the way. Civil service independence makes sense just because giving objective advice is good government. Whether “good government” can be defended as a constitutional value outside the administrative adjudicative context is something the Supreme Court will ultimately weigh in on.<sup>61</sup> But the Court does not act in a vacuum. Congress is a coequal constitutional branch and it is time to see whether it wants to step forward.

### **Conclusion: Help Us Congress**

Congress’s long involvement in the management of the administrative state has inspired needed reforms to the civil service, but it has been over 40 years since it has acted comprehensively. When both sides of the aisle see the dangers to our government that lie ahead, Congress can act. It has done so recently. In the Veterans Affairs Accountability Act of 2017,<sup>62</sup> Congress sought to get rid of the unethical managers who

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<sup>58</sup> JOHN D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC* (2017).

<sup>59</sup> Jon Michaels, *A Constitutional Defense of the Administrative State*, *THE REGULATORY REVIEW* (Dec. 17, 2019), <https://www.theregreview.org/2019/12/17/michaels-constitutional-defense-administrative-state/>.

<sup>60</sup> *Id.*

<sup>61</sup> One case that bears watching is *Seila Law LLC v. Consumer Financial Protection Bureau*, 923 F.3d 680 (9th Cir. 2019), cert. granted 140 S. Ct. 427, which will decide whether the single head of the agency, a policy making official, is entitled to for cause removal protections like multi headed agencies under *Humphreys Exec.*

<sup>62</sup> S.1094 – 115th Congress (2017-2018), Public Law No: 115-41

created the VA wait list scandal. While its effectiveness has not been fully evaluated,<sup>63</sup> the mere fact that Congress *could* act and act fast on this important personnel issue offers hope for greater civil service reforms. While removing bad managers is not the same as protecting good managers, Congress's prior bipartisan work on Whistleblowers<sup>64</sup> is a promising indicator.

For the reform effort to be bipartisan, two things need to happen. Republicans need to value the historic independence of civil servants and the protections provided by Inspectors General as well as whistleblowers. Democrats must bring the public sector unions to the table, since they often support regulations that serve to thwart reform and innovation. Other players like the National Academy for Public Administration and the Partnership for Public Service, who have studied civil service reform in a deep and unbiased manner, should also be involved.<sup>65</sup>

Can Congress rise to the challenge in this contentious environment? Does it want to govern? There are ways forward from the Executive perspective and OMB has already made some suggestions.<sup>66</sup> We are at a crucial stage in the history of the administrative state. As Gillian Metzger has shown, we are in a period not unlike the

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<sup>63</sup> So far, according to the VA, 8,630 lower employees have been fired, but only three members of the SES. See Glenn Kessler, *President Trump's claims about VA firings*, Wash. Post (Sept. 19, 2019), <https://www.washingtonpost.com/politics/2019/09/17/president-trumps-claims-about-va-firings/>.

<sup>64</sup> See, e.g. S. 743 – 112th Cong., 2d Sess., Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199; but see Kyle Cheney & Burgess Everett, *Rand Paul reads alleged whistleblower's name and Republicans 'fine' with it*, POLITICO (Feb. 4, 2020), <https://www.politico.com/news/2020/02/04/rand-paul-reads-alleged-whistleblowers-name-senate-floor-110684>.

<sup>65</sup> NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, NO TIME TO WAIT PT. 2 (2018), <https://www.napawash.org/studies/academy-studies/no-time-to-wait-part-2-building-a-public-service-for-the-21st-century> (containing links to part 1, the framework for rebuilding the public service, and part 2, building a more detailed “plan of action to transform the public service:

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

<sup>66</sup> See Nicole Ogrysko, *Here's what civil service modernization looks like in Trump's 2020 budget request*, FEDERAL NEWS NETWORK (Mar. 18, 2019), <https://federalnewsnetwork.com/workforce/2019/03/heres-what-civil-service-modernization-looks-like-in-trumps-2020-budget-request/> (describing civil service reform proposals included in the President's Fiscal Year 2020 Budget Request by OMB).

New Deal itself, and the stakes today are enormous for our democracy.<sup>67</sup> The role of the Court in this undertaking is as pivotal as it was in the 1930s, and cases like *Lucia* and *Gundy* could be used either to limit civil service tenure or to vindicate it. Broader reform efforts directed at protecting policy officials will surely spark contentious debate. While it is not clear where this will end, it is clear where it must begin, with Congress and the Executive, not with the Judiciary.

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<sup>67</sup> See generally Gillian Metzger, *1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1 (2017).