Lucia v. SEC: Reining in the Fourth Branch

Ilya Shapiro

April 12, 2018

We begin with first principles: the Constitution created three branches of government. The legislative and executive branches are periodically checked by the electorate. To make that electoral check work for the executive branch, however, the one official actually accountable to voters, the president, is supposed to be able to supervise it. As James Madison noted during the Constitutional Convention, "if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 481 (Madison, June 16, 1789).

The president also has a duty to see that the laws be faithfully executed. To do this he must be able to remove officers who fail in their duties. And yet the president lacks the ability to remove SEC administrative law judges (ALJs) who abuse their powers or fail to use their discretion to act intelligently or wisely. These ALJs are thus insulated from electoral control and accountability.

The D.C. Circuit panel in Lucia ruled that ALJs need not be subject to presidential removal because they're not executive officers. When the case was reheard en banc, the court deadlocked 5–5, leaving in place the panel's earlier characterization of ALJs as something less than the category of officers subject to the removal power. But ALJs' duties are similar to Special Trial Judges (STJs) and court clerks, positions the Supreme Court has previously determined to be officers. If anything, ALJs have more power and exercise their duties with greater discretion and independence than STJs or court clerks.

The similarities between ALJs and court clerks or STJs are alone enough to show that ALJs are officers. Even more, ALJs fit the definitions of an "executive officer" established by legal and historical precedent. Chief Justice John Marshall articulated a test for distinguishing an officer from an employee in United States v. Maurice (1823). He explained that if a position didn't require a contract because the government had prescribed duties of the position independent of a specific position-holder—and that successive holders' duties would not change—then that position is an office, and thereby its holder an officer.

The Supreme Court would later expand on Marshall's criterion by setting parameters for the tenure, duration, compensation, and duties of an officer that are different from those of an employee. Evaluating the ALJ role against these parameters demonstrates that ALJs are officers, not employees. Most importantly, ALJs have significant discretion and perform more than ministerial duties, which, based on the Court's definitions, makes them officers.

Both Congress and the SEC have recognized that ALJs are officers, with independent judgment and discretion, rather than employees who do the bidding of certain principals. Considering how much more closely the ALJ position aligns with the definition of an officer than that of an employee, this should not be a surprise.

Nor does the quasi-judicial nature of an ALJ's role does not change their status as officers or how to analyze their office under the Appointments Clause. Indeed, the Supreme Court established that presidential accountability applies to officers with a quasi-judicial function over 90 years ago. In Myers v. United States (1926), it held that, even for a quasi-judicial executive officer, the president "may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised."

Precedent going back to the Founding also supports the notion that SEC ALJs must be subject to executive oversight. The Comptroller of the Treasury was then considered quasi-judicial for the same reasons an ALJ should be so considered today, yet still removable by the president. For that matter, the president has also removed territorial judges, demonstrating that the judicial character of an executive-branch officer doesn't change presidentials authority to remove that officer.

Lucia presents an important application of the Appointments Clause. Accepting arguments like those presented to the D.C. Circuit, the Tenth Circuit in Bandimere v. SEC (2016) rightly concluded that ALJs are officers who must be appointed in accordance with Article II. The Supreme Court should now similarly hold, ensuring proper accountability and adherence to basic constitutional principles—and help rein in administrative state that has become the fourth branch of government.

Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review. *This post is based on an amicus brief supporting the petitioners in Lucia v. SEC.*