



July 16, 2018

**Board of Directors**

John Applegate  
Alyson Flournoy  
Robert Glicksman  
Alice Kaswan  
Thomas McGarity  
Sidney Shapiro  
Amy Sinden  
Robert R.M. Verchick

**Advisory Council**

Patricia Bauman  
Frances Beinecke  
Eula Bingham  
W. Thompson Comerford, Jr.  
Sally Greenberg  
John Passacantando  
Henry Waxman  
Robert Weissman

Hon. Robert Scott, Ranking Member  
Education and Workforce Committee  
U.S. House of Representatives  
2101 Rayburn House Office Building  
Washington, DC 20515

Dear Ranking Member Scott:

We write to express our support for your amendment to prohibit funding for the implementation of President Trump’s “Executive Order Excepting Administrative Judges from the Competitive Service” (July 10, 2018). Removing federal agency administrative law judges (ALJs) from the competitive service to the excepted service, as Trump’s Executive order mandates, is contrary to established law and is bad policy.

President Trump wrongly asserts that the E.O. is a necessary response to the Supreme Court decision this term in *Lucia v. SEC*, 585 U.S. \_\_\_\_ (2018). This case was a narrow decision and does not mandate the extreme response that Trump claims is required. In fact, Trump’s response to the case outlined in his E.O. is illegal, as it conflicts with established law under the Administrative Procedure Act (APA).

In *Lucia v. SEC*, the Court decided only one question — that the authority of administrative law judges utilized by the Securities and Exchange Commission (SEC) makes them (inferior) officers of the United States. This means that SEC ALJs can only be appointed by the president, the courts of law, or heads of departments. The responsibilities of ALJs within other federal agencies vary by statute and regulation such that some ALJs may not be “officers of the United States.”

Even if *all* ALJs were to be considered officers across *all* federal agencies, this does not invalidate Congress’s requirement that they have independence as set out in 5 U.S.C. Sec. 7521 and that they can only be removed for cause as determined by the Merit Systems Protection Board. Agency heads may still look to the competitive roster of ALJs assembled by the U.S. Office of Personnel Management (OPM) to appoint ALJs to their ranks.

The majority of the *Lucia* court declined to answer the Trump administration's question about whether or not the removal provisions under 5 U.S.C. Sec. 7521 are constitutional. And as noted by Justice Breyer in his dissent and concurrence, the Court majority in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477 (2010), suggested in dicta that these removal provisions were constitutional. As such, 5 U.S.C. Sec. 7521 remains valid, and it cannot be abridged by the president or executive order. Additionally, 5 C.F.R. Part 302, promulgated pursuant to 5 U.S.C. Sec. 7521, which subjects ALJs to independent examination and rating, cannot be overturned by mere executive order.

The Administrative Procedure Act is not just any statute. For over 70 years, this statute has established the settled rules that govern our administrative state. As Justice Breyer notes in his concurrence and dissent in *Lucia*:

Before the Administrative Procedure Act, hearing examiners 'were in a dependent status' to their employing agency, with their classification, compensation, and promotion all dependent on how the agency they worked for rated them. As a result of that dependence, 'many complaints were voiced against the actions of the hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations.'

*Lucia*, Breyer Concurring in Part and Dissenting in Part, slip op. at 6.

While ALJs that have responsibilities in agencies to classify them as inferior officers (such as the SEC) will need to be appointed by heads of agencies, the insulated feature for ALJs from interference required by 5 U.S.C. Sec. 7521 should still be respected, for policy reasons as well as legal requirement. Such independence fosters trust in agency decision-making and takes away likely legal challenges to agency action based on the perception that they may be acting arbitrarily or capriciously in violation of Section 706 of the APA.

The competitive examination and competitive service selection procedures ensure that ALJs are not subject to political influence and interference by presidential administrations. By removing them to the excepted service, Trump is seeking to pack the administrative courts with ALJs that may be removed for any reason at all, such as if they disagree with the administration's politics. This is evident in his executive order where he claims that the current selection procedures are too complicated because they limit agency heads from considering subjective and ill-defined qualities such as "work ethic, judgment, and ability to meet the particular needs of the agency." The current procedures are comprehensive and elaborate to ensure ALJs are impartial decision-makers and to prevent the president and his appointed agency heads from interfering with Americans' right to due process.

If the E.O. stands as is, worker safety, whistleblower, environmental, wage and hour complaints, Social Security decisions, and many other critical adjudications may no longer be decided by an impartial ALJ. Rather, ALJs will be forced to consider their own personal employment interests in every decision they render.

For these reasons, we support your amendment and urge the Rules Committee and all members of the House of Representatives to support it.

Sincerely,

**Victor B. Flatt**

Dwight Olds Chair in Law and Faculty Director,  
Environment, Energy, and Natural Resources (EENR) Center  
University of Houston Law Center  
Distinguished Scholar, Global Energy Management Institute (UH)

**Robert L. Glicksman**

J.B. and Maurice C. Shapiro Professor of Environmental Law  
The George Washington University Law School

**Thomas O. McGarity**

Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law  
University of Texas at Austin School of Law

**Matthew Shudtz**

Executive Director  
Center for Progressive Reform

**Katie Tracy**

Policy Analyst  
Center for Progressive Reform