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Selina Malherbe

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## **Introduction to *Lucia et al. v. Securities and Exchange Commission***

**By Honorable Selina Malherbe**

It is hard to overstate the importance of the Supreme Court's recent decision in *Lucia v. Securities and Exchange Commission*.<sup>1</sup> By holding that the SEC administrative law judges are inferior officers who must be appointed by the agency head, the decision nullified the 70-year practice of merit selection established in the Administrative Procedure Act. Although the decision directly affects only the SEC judges, the underlying principle applies to all federal ALJs. Following *Lucia*, the Sixth Circuit has already vacated a decision of the Federal Mine Safety and Health Review Commission because the ALJ was not appointed by the agency.<sup>2</sup>

Federal agencies will no longer hire ALJs from a pool of experienced attorneys who were selected on merit. Agencies may hire any attorney to serve as an ALJ, inviting a return to the spoils system that the Civil Service Act and the APA banished. Moreover, existing ALJs' job protection may be threatened. Although the APA prescribes that ALJs may be removed only for "good cause," the logic underlying *Lucia* suggests that ALJs who are appointed by an agency may also be removed by the agency at will.

It is unclear whether the *Lucia* decision will have significant impact on state ALJs. *Lucia* is based on the U.S. Constitution's grant of executive power. Many state constitutions, patterned on the federal Constitution, contain similar grants. Central panels in these states could be in jeopardy.

Because of the decision's importance, this edition of the Journal gives special attention to *Lucia* and its implications. In addition to the opinion itself, there are amicus briefs filed by the Federal Administrative Law Judges Conference, the Forum of United States Administrative Law Judges, and a group of Administrative Law Scholars. These briefs emphasize the importance of an independent

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<sup>1</sup> 138 S. Ct. 2044 (2018).

<sup>2</sup> *Jones Bros., Inc. v. Sec. of Labor*, 2018 WL 3629059, No. 17-3483 (6th Cir. July 31, 2018).

administrative judiciary and the threat to that independence that arises when an agency can appoint ALJs at will. In addition, an article by Prof. Jeffrey S. Lubbers of the American University Washington College of Law argues that *Lucia* may signal the end of the role and concept of ALJs as we now know it.

The articles on *Lucia* in this Journal are only a beginning. It is too early to foresee what fate is in store for the administrative law judiciary. We can only be sure that things will never be the same.

August 14th, 2018

Hon. Selina Malherbe  
President  
National Association of Administrative Law Judiciary