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Well, That Didn't Take Long – And With No Fanfare, Decades Of Administrative Law Are Upended

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Perhaps the administration had this one in the can already. On Tuesday, less than three weeks after the U.S. Supreme Court decided *Lucia*, President Trump signed an executive order essentially applying the Supreme Court's rationale in *Lucia* to the hiring of all administrative law judges (ALJs) in the federal government. Entitled, "Executive Order Excepting Administrative Law Judges from the Competitive Service," the order creates a new exception from the federal government's typical civil service hiring process for seemingly all ALJs, or at least those that perform adjudicative functions in regulatory enforcement proceedings. And, perhaps most importantly, tucked into the very end of the order, the order seemingly applies the same exception to removal of ALJs, thus apparently eliminating the requirement that ALJs only be removed for "good cause." Just like the Solicitor General argued should happen, but which the Supreme Court in *Lucia* expressly refused to address multiple times. Relying exclusively on *Lucia*, the order states that "ALJs are often called upon to discharge significant duties and exercise significant discretion in conducting proceedings under the laws of the United States." In doing so, it cited the adjudicative functions played by the Security and Exchange Commission's ALJs. The order asserted that, because ALJs perform such important functions, they "must display appropriate temperament, legal acumen, impartiality, and sound judgment." They must also "clearly communicate their decisions to the parties who appear before them, the agencies that oversee them, and the public that entrusts them with authority." The order does not say that the current system does not produce ALJs with these qualities and abilities, but that seems to be implied. The order acknowledged that ALJs historically were appointed through the civil service's examination and competitive service procedures. But *Lucia* has called the constitutionality of that hiring process into doubt. The order then says, however, that "regardless of whether those procedures would violate the Appointments Clause as applied to certain ALJs, there are sound policy reasons to take steps to eliminate doubt" about the way that ALJs are appointed. As a result, the order creates an exception to the competitive hiring rules and examinations for ALJs. Doing so, according to the order, will alleviate future Appointment Clause challenges across administrative agencies. This exception provides agency heads "with additional flexibility to assess prospective appointees without limitations imposed by competitive examination and competitive service selection procedures." Avoiding these "complicated and elaborate examination processes" also gives agencies "greater ability and discretion to assess

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critical qualities in ALJ candidates, such as work ethic, judgment, and ability to meet the particular needs of the agency." The order asserts that this change will "promote confidence in, and the durability of, agency adjudications." Most importantly, though, the order applies the same exception to removal of ALJs and also amends 5 CFR 6.4 to read: "Except as required by statute, the Civil Service Rules and Regulations shall not apply to removals from positions" now including ALJs. Without acknowledging what this means in the order's explanation, it appears that removing ALJs will no longer be subject to the typical civil service process which requires, among other things, good cause removal. This is what the Solicitor General argued for repeatedly in *Lucia*, claiming that the two-levels of protection afforded ALJs also violated the Appointments Clause according to *Free Enterprise*. This was the result feared by Justice Breyer in his partial dissent in *Lucia*. Apparently, it did not take long for Justice Breyer's apprehensions to come to pass. This order may conceivably be subject to challenge in the courts. It would seem that these proposed regulatory changes, seemingly implemented without any notice and comment, and apparently contrary to the requirements of the Administrative Procedures Act may face some obstacles before implementation. However, one thing is certain -- the *Lucia* majority concluded that ALJs had to be more accountable to the executive branch. This order now makes them like any other political appointee – entirely beholden to the head of the agency or the president for his or her job. For good or ill, ALJ adjudicative independence may quickly be a thing of the past.