Lucia v. Securities and Exchange Commission
138 S. Ct. 2044 (2018)

Justice KAGAN, delivered the opinion of the Court.

The Appointments Clause of the Constitution lays out the permissible methods of appointing "Officers of the United States," a class of government officials distinct from mere employees. Art. II, § 2, cl. 2. This case requires us to decide whether administrative law judges (ALJs) of the Securities and Exchange Commission (SEC or Commission) qualify as such "Officers." In keeping with *Freytag v. Commissioner*, 501 U. S. 868 (1991), we hold that they do.

I

The SEC has statutory authority to enforce the nation's securities laws. One way it can do so is by instituting an administrative proceeding against an alleged wrongdoer. By law, the Commission may itself preside over such a proceeding. *See* 17 CFR § 201.110 (2017). But the Commission also may, and typically does, delegate that task to an ALJ. *See ibid.*; 15 U. S. C. § 78d-1(a). The SEC currently has five ALJs. Other staff members, rather than the Commission proper, selected them all.

An ALJ assigned to hear an SEC enforcement action has extensive powers—the "authority to do all things necessary and appropriate to discharge his or her duties" and ensure a "fair and orderly" adversarial proceeding. §§ 201.111, 200.14(a). Those powers "include, but are not limited to," supervising discovery; issuing, revoking, or modifying subpoenas; deciding motions; ruling on the admissibility of evidence; administering oaths; hearing and examining witnesses; generally "[r]egulating the course of "the proceeding and the "conduct of the parties and their counsel"; and imposing sanctions for "[c]ontemptuous conduct" or violations of procedural requirements. §§ 201.111, 201.180; *see* §§ 200.14(a), 201.230. As that list suggests, an SEC ALJ exercises authority "comparable to" that of a federal district judge conducting a bench trial.

After a hearing ends, the ALJ issues an "initial decision." § 201.360(a)(1). That decision must set out "findings and conclusions" about all "material issues of fact [and] law"; it also must include the "appropriate order, sanction, relief, or denial thereof." § 201.360(b). The Commission can then review the ALJ's decision, either upon request or *sua sponte*. *See* § 201.360(d)(1). But if it opts against review, the Commission "issue[s] an order that the [ALJ's] decision has become final." § 201.360(d)(2). At that point, the initial decision is "deemed the action of the Commission." § 78d-1(c).

This case began when the SEC instituted an administrative proceeding against petitioner Raymond Lucia and his investment company. Lucia marketed a retirement savings strategy called "Buckets of Money." In the SEC's view, Lucia used misleading slideshow presentations to deceive prospective clients. The SEC charged Lucia under the Investment Advisers Act, § 80b-1 *et seq.*, and assigned ALJ Cameron Elliot to adjudicate the case. [At the conclusion of administrative proceedings, Elliot issued a decision which found that Lucia violated the Act and imposed sanctions including civil penalties of $300,000 and a lifetime bar from the investment industry.]

On appeal to the SEC, Lucia argued that the administrative proceeding was invalid because Judge Elliot had not been constitutionally appointed. [The commission concluded that its ALJs are not "Officers of the United States" but "mere employees"— officials who fall outside the Appointments Clause. Lucia petitioned for review of the Commission's order. A three-judge panel of the D.C. Circuit rejected Lucia's Appointments Clause argument. On rehearing *en banc*, the court divided 5-5 on the validity of the ALJ's appointment, leaving the panel's judgment in place.] That decision conflicted with one from the Court of Appeals for the Tenth Circuit. *See Bandimere v. SEC*, 844 F. 3d 1168, 1179 (2016).

Lucia asked us to resolve the split by deciding whether the Commission's ALJs are "Officers of the United States within the meaning of the Appointments Clause." Up to that point, the Federal Government (as represented by the Department of Justice) had defended the Commission's position that SEC ALJs are employees, not officers. But in responding to Lucia's petition, the Government switched sides.[1] So when we granted the petition, we also appointed an amicus curiae to defend the judgment below. We now reverse.

II

The sole question here is whether the Commission's ALJs are "Officers of the United States" or simply employees of the Federal Government. The Appointments Clause prescribes the exclusive means of appointing "Officers." * * * Two decisions set out this Court's basic framework for distinguishing between officers and employees. [*United States v.*] *Germaine* [99 U. S. 508, 510 (1879)], held that "civil surgeons" (doctors hired to perform various physical exams) were mere employees because their duties were "occasional or temporary" rather than "continuing and permanent." Stressing "ideas of tenure [and] duration," the Court there made clear that an individual must occupy a "continuing" position established by law to qualify as an officer. *Buckley* [*v. Valeo*, 424 U. S. 1 (1976) (per curiam)] then set out another requirement, central to this case. It determined that members of a federal commission were officers only after finding that they "exercis[ed] significant authority pursuant to the laws of the United States." The inquiry thus focused on the extent of power an individual wields in carrying out his assigned functions.

Both the amicus and the Government urge us to elaborate on *Buckley*'s "significant authority" test, but another of our precedents makes that project unnecessary. * * * [I]n *Freytag v. Commissioner*, 501 U. S. 868 (1991), we applied the unadorned "significant authority" test to adjudicative officials who are near-carbon copies of the Commission's ALJs. * * * The officials at issue in *Freytag* were the "special trial judges" (STJs) of the United States Tax Court. * * * This Court held that the Tax Court's STJs are officers, not mere employees. * * *

[1] In the same certiorari-stage brief, the Government asked us to add a second question presented: whether the statutory restrictions on removing the Commission's ALJs are constitutional. When we granted certiorari, we chose not to take that step. The Government's merits brief now asks us again to address the removal issue. We once more decline. No court has addressed that question, and we ordinarily await "thorough lower court opinions to guide our analysis of the merits."

Freytag says everything necessary to decide this case. To begin, the Commission's ALJs, like the Tax Court's STJs, hold a continuing office established by law. * * * And that appointment is to a position created by statute, down to its "duties, salary, and means of appointment." *Freytag*, 501 U. S., at 881; *see* 5 U. S. C. §§ 556-557, 5372, 3105.

Still more, the Commission's ALJs exercise the same "significant discretion" when carrying out the same "important functions" as STJs do. Both sets of officials have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges. Consider in order the four specific (if overlapping) powers *Freytag* mentioned. First, the Commission's ALJs (like the Tax Court's STJs) "take testimony." More precisely, they "[r]eceiv[e] evidence" and "[e]xamine witnesses" at hearings, and may also take pre-hearing depositions. Second, the ALJs (like STJs) "conduct trials." As detailed earlier, they administer oaths, rule on motions, and generally "regulat[e] the course of" a hearing, as well as the conduct of parties and counsel. Third, the ALJs (like STJs) "rule on the admissibility of evidence." They thus critically shape the administrative record (as they also do when issuing document subpoenas). And fourth, the ALJs (like STJs) "have the power to enforce compliance with discovery orders." In particular, they may punish all "[c]ontemptuous conduct," including violations of those orders, by means as severe as excluding the offender from the hearing. So point for point—straight from *Freytag*'s list—the Commission's ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries.

And at the close of those proceedings, ALJs issue decisions much like that in *Freytag*—except with potentially more independent effect. As the *Freytag* Court recounted, STJs "prepare proposed findings and an opinion" adjudicating charges and assessing tax liabilities. Similarly, the Commission's ALJs issue decisions containing factual findings, legal conclusions, and appropriate remedies. And what happens next reveals that the ALJ can play the more autonomous role. In a major case like *Freytag*, a regular Tax Court judge must always review an STJ's opinion. And that opinion counts for nothing unless the regular judge adopts it as his own. By contrast, the SEC can decide against reviewing an ALJ decision at all. And when the SEC declines review (and issues an order saying so), the ALJ's decision itself "becomes final" and is "deemed the action of the Commission." That last-word capacity makes this an *a fortiori* case: If the Tax Court's STJs are officers, as *Freytag* held, then the Commission's ALJs must be too. * * *

The only issue left is remedial. For all the reasons we have given, and all those *Freytag* gave before, the Commission's ALJs are "Officers of the United States," subject to the Appointments Clause. And as noted earlier, Judge Elliot heard and decided Lucia's case without the kind of appointment the Clause requires. This Court has held that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case" is entitled to relief. *Ryder v. United States*, 515 U. S. 177, 182-183 (1995). Lucia made just such a timely challenge: He contested the validity of Judge Elliot's appointment before the Commission, and continued pressing that claim in the Court of Appeals and this Court. So what relief follows? This Court has also held that the "appropriate" remedy for an adjudication tainted with an appointments violation is a new "hearing before a properly appointed" official. [*Ryder v. United States*, 515 U. S. 177, 188 (1995).] And we add today one thing more. That official cannot be Judge Elliot, even if he has by now received (or receives sometime in the future) a constitutional appointment.

Judge Elliot has already both heard Lucia's case and issued an initial decision on the merits. He cannot be expected to consider the matter as though he had not adjudicated it before. To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled.[6]

We accordingly reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

Justice THOMAS, with whom JUSTICE GORSUCH joins, concurring.

I agree with the Court that this case is indistinguishable from *Freytag v. Commissioner*, 501 U. S. 868 (1991). * * * While precedents like *Freytag* discuss what is sufficient to make someone an officer of the United States, our precedents have never clearly defined what is necessary. I would resolve that question based on the original public meaning of "Officers of the United States." To the Founders, this term encompassed all federal civil officials "'with responsibility for an ongoing statutory duty.'"

[Relying on an article written by a former clerk that aimed to identify the "original public meaning" of the Appointments Clause via the "corpus linguistics" methodology, Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443 (2018), Justice Thomas argued that "[t]he Founders considered individuals to be officers even if they performed only ministerial statutory duties—including record-keepers, clerks, and tidewaiters (individuals who watched goods land at a customhouse)." "With exceptions not relevant here, Congress required all federal officials with ongoing statutory duties to be appointed in compliance with the Appointments Clause."]

Justice BREYER, with whom JUSTICE GINSBURG and JUSTICE SOTOMAYOR join as to Part III, concurring in the judgment in part and dissenting in part.

[Justice Breyer argued that ALJ Elliot had not been validly appointed under the APA. 5 U.S.C. § 3105 provides that "[e]ach agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title." But ALJ Elliot was appointed by the SEC's staff, not the Commission itself. Justice Breyer argued that, in light of this statutory defect, the Court should not address Lucia's Appointments Clause claim.]

The reason why it is important to go no further arises from the holding in a case this Court decided eight years ago, *Free Enterprise Fund* [*v. Public Company Accounting Oversight Bd.*, 561 U. S. 477 (2010)]. The case concerned statutory provisions protecting members of the Public Company Accounting Oversight Board from removal without cause. The Court held in that case that the Executive Vesting Clause of the Constitution, Art. II, §

[6] While this case was on judicial review, the SEC issued an order "ratif[ying]" the prior appointments of its ALJs. Order (Nov. 30, 2017), online at https://www.sec.gov/litigation/opinions/2017/33-10440.pdf (as last visited June 18, 2018). Lucia argues that the order is invalid. We see no reason to address that issue. The Commission has not suggested that it intends to assign Lucia's case on remand to an ALJ whose claim to authority rests on the ratification order. The SEC may decide to conduct Lucia's rehearing itself. Or it may assign the hearing to an ALJ who has received a constitutional appointment independent of the ratification.

1, forbade Congress from providing members of the Board with "multilevel protection from removal" by the President. Because, in the Court's view, the relevant statutes (1) granted the Securities and Exchange Commissioners protection from removal without cause, (2) gave the Commissioners sole authority to remove Board members, and (3) protected Board members from removal without cause, the statutes provided Board members with two levels of protection from removal and consequently violated the Constitution. * * * In addressing the constitutionality of the Board members' removal protections, the Court emphasized that the Board members were "executive officers"—more specifically, "inferior officers" for purposes of the Appointments Clause. * * *

> [T]he Administrative Procedure Act * * * says that an
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> > "action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U. S. C. § 7521(a). * * *

The Administrative Procedure Act thus allows administrative law judges to be removed only "for good cause" found by the Merit Systems Protection Board. § 7521(a). And the President may, in turn, remove members of the Merit Systems Protection Board only for "inefficiency, neglect of duty, or malfeasance in office." § 1202(d). Thus, Congress seems to have provided administrative law judges with two levels of protection from removal without cause—just what *Free Enterprise Fund* interpreted the Constitution to forbid in the case of the Board members.

The substantial independence that the Administrative Procedure Act's removal protections provide to administrative law judges is a central part of the Act's overall scheme. *See Ramspeck v. Federal Trial Examiners Conference*, 345 U. S. 128, 130 (1953); *Wong Yang Sung v. McGrath*, 339 U. S. 33, 46 (1950). 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, "[m]any 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." The Administrative Procedure Act responded to those complaints by giving administrative law judges "independence and tenure within the existing Civil Service system." *Id.*, at 132; *cf. Wong Yang Sung*, *supra*, at 41-46 (referring to removal protections as among the Administrative Procedure Act's "safeguards . . . intended to ameliorate" the perceived "evils" of commingling of adjudicative and prosecutorial functions in agencies).

If the *Free Enterprise Fund* Court's holding applies equally to the administrative law judges—and I stress the "if"—then to hold that the administrative law judges are "Officers of the United States" is, perhaps, to hold that their removal protections are unconstitutional. * * * The *Free Enterprise Fund* Court gave three reasons why administrative law judges were distinguishable from the Board members at issue in that case. First, the Court said that "[w]hether administrative law judges are necessarily 'Officers of the United States' is disputed." Second, the Court said that "unlike members of

the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, *see* [5 U. S. C.] §§ 554(d), 3105, or possess purely recommendatory powers." And, third, the Court pointed out that the civil service "employees" and administrative law judges to whom I referred in my dissent do not "enjoy the same significant and unusual protections from Presidential oversight as members of the Board." The Court added that the kind of "for cause" protection the statutes provided for Board members was "unusually high."

The majority here removes the first distinction, for it holds that the Commission's administrative law judges are inferior "Officers of the United States." The other two distinctions remain. *See, e.g.*, *Wiener v. United States*, 357 U. S. 349, 355-356 (1958) (holding that Congress is free to protect bodies tasked with "'adjudicat[ing] according to law' . . . 'from the control or coercive influence, direct or indirect,' . . . of either the Executive or Congress") (quoting *Humphrey's Executor v. United States*, 295 U. S. 602, 629 (1935)). But the Solicitor General has nevertheless argued strongly that we should now decide the constitutionality of the administrative law judges' removal protections as well as their means of appointment. And in his view, the administrative law judges' statutory removal protections violate the Constitution (as interpreted in Free Enterprise Fund), unless we construe those protections as giving the Commission substantially greater power to remove administrative law judges than it presently has. * * *

[N]ow it should be clear why the application of *Free Enterprise Fund* to administrative law judges is important. If that decision does not limit or forbid Congress' statutory "for cause" protections, then a holding that the administrative law judges are "inferior Officers" does not conflict with Congress' intent as revealed in the statute. But, if the holding is to the contrary, and more particularly if a holding that administrative law judges are "inferior Officers" brings with it application of *Free Enterprise Fund*'s limitation on "for cause" protections from removal, then a determination that administrative law judges are, constitutionally speaking, "inferior Officers" would directly conflict with Congress' intent, as revealed in the statute. * * *

[In the remainder of his opinion, Justice Breyer argued that Congress's intent was the most important signal of whether the Appointments Clause applied to an office created by law. He also disagreed with the majority's conclusion that the proper remedy for ALJ Elliot's defective appointment was a hearing before a different administrative law judge: "The reversal here is based on a technical constitutional question, and the reversal implies no criticism at all of the original judge or his ability to conduct the new proceedings. For him to preside once again would not violate the structural purposes that we have said the Appointments Clause serves, nor would it, in any obvious way, violate the Due Process Clause."]

Justice SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

The Court today and scholars acknowledge that this Court's Appointments Clause jurisprudence offers little guidance on who qualifies as an "Officer of the United States." * * * As the majority notes, this Court's decisions currently set forth at least two prerequisites to officer status: (1) an individual must hold a "continuing" office established by law, *United States v. Germaine*, 99 U. S. 508, 511-512 (1879), and (2) an individual must wield

"significant authority," *Buckley v. Valeo*, 424 U. S. 1, 126 (1976) (per curiam). * * * To provide guidance to Congress and the Executive Branch, I would hold that one requisite component of "significant authority" is the ability to make final, binding decisions on behalf of the Government. Accordingly, a person who merely advises and provides recommendations to an officer would not herself qualify as an officer. * * *

Commission ALJs are not officers because they lack final decisionmaking authority. As the Commission explained below, the Commission retains "'plenary authority over the course of [its] administrative proceedings and the rulings of [its] law judges.'" Commission ALJs can issue only "initial" decisions. 5 U. S. C. § 557(b). The Commission can review any initial decision upon petition or on its own initiative. 15 U. S. C. § 78d-1(b). The Commission's review of an ALJ's initial decision is *de novo*. 5 U. S. C. § 557(c). It can "make any findings or conclusions that in its judgment are proper and on the basis of the record." 17 CFR § 201.411(a) (2017). The Commission is also in no way confined by the record initially developed by an ALJ. The Commission can accept evidence itself or refer a matter to an ALJ to take additional evidence that the Commission deems relevant or necessary. In recent years, the Commission has accepted review in every case in which it was sought. Even where the Commission does not review an ALJ's initial decision, as in cases in which no party petitions for review and the Commission does not act *sua sponte*, the initial decision still only becomes final when the Commission enters a finality order. 17 CFR. § 201.360(d)(2). And by operation of law, every action taken by an ALJ "shall, for all purposes, . . . be deemed the action of the *Commission*." 15 U. S. C. § 78d-1(c) (emphasis added). In other words, Commission ALJs do not exercise significant authority because they do not, and cannot, enter final, binding decisions against the Government or third parties.

The majority concludes that this case is controlled by *Freytag v. Commissioner*, 501 U. S. 868 (1991). In *Freytag*, the Court suggested that the Tax Court's special trial judges (STJs) acted as constitutional officers even in cases where they could not enter final, binding decisions. In such cases, the Court noted, the STJs presided over adversarial proceedings in which they exercised "significant discretion" with respect to "important functions," such as ruling on the admissibility of evidence and hearing and examining witnesses. That part of the opinion, however, was unnecessary to the result. The Court went on to conclude that even if the STJs' duties in such cases were "not as significant as [the Court] found them to be," its conclusion "would be unchanged." The Court noted that STJs could enter final decisions in certain types of cases, and that the Government had conceded that the STJs acted as officers with respect to those proceedings. Because STJs could not be "officers for purposes of some of their duties . . ., but mere employees with respect to other[s]," the Court held they were officers in all respects. *Freytag* is, therefore, consistent with a rule that a prerequisite to officer status is the authority, in at least some instances, to issue final decisions that bind the Government or third parties. * * *