

IS THE ENVIRONMENTAL APPEALS BOARD UNCONSTITUTIONAL OR UNLAWFUL?

BY

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**Request Abstract.*

I. INTRODUCTION

Under various statutes, the Environmental Protection Agency (EPA) conducts adjudications, some of which are formal adjudications under the Administrative Procedure Act (APA) and some of which are informal adjudications under agency regulations. Administrative Law Judges (ALJs) decide formal adjudications and other officers or employees decide informal adjudications. A person unhappy with these initial decisions may appeal them within the agency. Prior to 1992 the Administrator of the EPA had delegated the authority to make the agency's final decision in certain cases to Judicial Officers and had retained final decision authority in other cases. In 1992, however, he created the Environmental Appeals Board (EAB) by "internal agency action"¹ to replace the Judicial Officers and to have final decisional authority for the agency in all cases. The EAB consists of four Senior Executive Service career persons appointed by the Administrator of EPA.²

In 2018 the Supreme Court decided *Lucia v. Securities and Exchange Commission*,³ in which it held that ALJs are constitutional officers, despite a half century of characterization of ALJs as mere employees by Congress,⁴ the Executive,⁵ and the Supreme Court.⁶ Believing ALJs

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² Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320, 5321-22 (Feb. 13, 1992).

³ See The EPA's Environmental Appeals Board at Twenty-five: An Overview of the Board's Procedures, Guiding Principles, and Record of Adjudicating Cases (hereafter EAB at Twenty-five), at 2, available at [https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/381acd4d3ab4ca358525803c00499ab0/\\$FILE/The%20EAB%20at%20Twenty-Five.pdf](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/381acd4d3ab4ca358525803c00499ab0/$FILE/The%20EAB%20at%20Twenty-Five.pdf).

⁴ 138 S.Ct. 2044 (2018).

⁵ See 5 U.S.C. § 556(c) (referring to ALJs as "employees").

⁶ See, e.g., Brief for the government in *Landry v. SEC*, available at 2000 WL 34013905, at 8 ("the ALJ who conducted the administrative hearing in this case is properly regarded as an employee rather than an 'inferior Officer'").

⁷ See *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 507 n. 10 (2010) ("that subset of independent agency employees who serve as administrative law judges").

to be employees, rather than officers, agencies had routinely provided for their appointment by persons other than the head of the agency. This, however, was at odds with the constitutional requirement that inferior officers be appointed by the President with the advice and consent of the Senate, unless “Congress . . . by law vest[s] the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.”⁷ Fortunately, the APA provides for agencies to appoint ALJs,⁸ and that is easily construed to mean the head of the agency, so that, if an agency is a “department” for constitutional purposes, the head of the agency could appoint ALJs. Following *Lucia*, heads of agencies reappointed their ALJs.

If the half century assumption that ALJs were mere employees could be overturned as unconstitutional, is it possible that administratively created agency appellate bodies of much shorter vintage could also be found to be unconstitutional or unlawful? This article addresses that question.

II. ARE EAB JUDGES OFFICERS OF THE UNITED STATES?

The initial issue is whether the EAB judges are constitutional officers. It seems that they clearly must be. In *Lucia*, the Court found ALJs to be officers because they were indistinguishable from the Special Trial Judges of the United States Tax Court,⁹ who had been found to be officers in *Freytag v. Commissioner*.¹⁰ In *Freytag*, as described by the Court in *Lucia*, the Court looked to two cases to determine the line between employees and officers. One case was *United States v. Germaine*.¹¹ In *Lucia*, the Court said that *Germaine* “made clear that an individual must occupy a ‘continuing’ position established by law to qualify as an officer.”¹² The members of the EAB hold a continuing position. Whether that position is “established by law” is another issue to be addressed later.

⁷ U.S. Const., Art. II, Sec. 2, cl. 2.

⁸ 5 U.S.C. § 3105.

⁹ See *Lucia*, 138 S.Ct. at 2052.

¹⁰ 501 U.S. 868 (1991).

¹¹ 99 U.S. 508 (1878).

¹² *Lucia*, 138 S.Ct. at 2051.

The second case the Court in *Freytag* relied upon was *Buckley v. Valeo*.¹³ There the Court said that if a person “exercis[es] significant authority pursuant to the laws of the United States,”¹⁴ the person must be an officer, not a mere employee. Given the functions of the Federal Elections Commission at issue in *Buckley*, there was little question that the Commissioners exercised significant authority, so the Court did not elaborate on what might be the line between exercising significant authority and not. In *Freytag*, the Court was forced to address that standard as applied to the Special Trial Judges of the United States Tax Court. The Court found two different aspects of their job to compel the conclusion that they were officers. First, the Court said that “[t]hey take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders,”¹⁵ and “[i]n the course of carrying out these important functions, the special trial judges exercise significant discretion.”¹⁶ Second, the Special Trial Judges had to be officers because in certain cases they could make the final decision for the agency.¹⁷ The opinion in *Freytag* was not crystal clear as to whether these two factors were individually sufficient to require an officer, or whether the two factors together were required. In *Lucia*, the Court clarified that these were alternative bases for finding a person an officer. Therefore, the ALJs in *Lucia*, who could not make final decisions for the agency, were required to be officers because, like the Special Trial Judges in *Freytag*, they could take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders, and in the course of carrying out these important functions exercise significant discretion.

The members of the EAB, as an appellate body, do not take testimony, conduct trials, initially rule on the admissibility of evidence, or have the power to enforce compliance with discovery orders. Nevertheless, they do make final decisions for the agency, and under *Freytag*

¹³ 424 U.S. 1 (1976).

¹⁴ *Id.*, at 126.

¹⁵ *Freytag*, 501 U.S. at 881-882.

¹⁶ *Id.*, at 882.

¹⁷ *See id.*

as clarified by *Lucia*, that is enough to require them to be officers. Even if it were not, however, the fact that the EAB has the power to reverse the decisions of ALJs in the agency, who themselves are inferior officers, would seem to satisfy the requirement that the EAB exercises significant authority.

If members of the EAB must be officers, the question is then whether they must be principal officers or only inferior officers. An argument could be made that they are principal officers inasmuch as they have the authority to overrule the decisions of the agency’s ALJs, who are inferior officers. Moreover, because they make the final decision for the agency in a vast swath of cases, they are acting at the same level as the Administrator of EPA, who without question is a principal officer. Nevertheless, in *Edmond v. United States*,¹⁸ the Court said that “the term ‘inferior officer’ connotes a relationship with some higher ranking officer or officers below the President: Whether one is an ‘inferior’ officer depends on whether he has a superior.”¹⁹ In *Edmond*, the Court noted that the judge in question was removable without cause, and the Court said the “[t]he power to remove officers . . . is a powerful tool for control.”²⁰ The Administrator of EPA may remove members of the EAB if he believes they are not performing adequately. In *Edmond*, the Court also noted that the judge in question was subject to rules of procedure adopted by the Judge Advocate General, which also suggested he was an inferior officer.²¹ Similarly, the Administrator of EPA adopts procedural rules that govern the EAB, and which he may amend without the leave of the members of the EAB.²² Therefore, it seems quite certain that EAB members are inferior officers, not principal officers.

¹⁸ 520 U.S. 651 (1997).

¹⁹ *Id.*, at 662.

²⁰ *Id.*, at 664.

²¹ *Id.*

²² See Regulations Governing Appeals, available at https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Regulations+Governing+Appeals?OpenDocument.

III. ARE THE MEMBERS OF THE EAB APPOINTED IN ACCORDANCE WITH THE REQUIREMENTS OF THE APPOINTMENTS CLAUSE?

If the members of the EAB are inferior officers, then according to the Constitution they must be appointed by the President with the advice and consent of the Senate, *unless* “Congress . . . by law vest[s] the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in heads of departments.”²³ The Court has held that if an agency is “a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a ‘Departmen[t]’ for the purposes of the Appointments Clause.”²⁴ Therefore, the Administrator of the EPA is deemed the head of a “department” for constitutional purposes, and the Administrator does appoint the members of the EAB. The Appointments Clause, however, states that Congress must vest this appointment power in the head of a department “by law.” Inasmuch as Congress never created the EAB, much less provided for the appointment of members to it by the Administrator, there would seem to be a constitutional problem. But things are not so simple; after all Congress never created the EPA itself or the office of the Administrator.

President Nixon, pursuant to authority granted to him by the Reorganization Act of 1949, as amended,²⁵ adopted Reorganization Plan No. 3 of 1970,²⁶ creating EPA and establishing the Administrator as the head of the agency.²⁷ However, inasmuch as the Reorganization Plan was not an Act of Congress, one could argue that it could not create any office or vest the appointment of any officer in the Administrator. But that is not the end of the story.

The Reorganization Act of 1949, as amended, provided that reorganization plans adopted by the President were subject to a legislative veto.²⁸ Consequently, in 1984, after the Supreme Court held that legislative vetoes were unconstitutional in *Immigration and Naturalization*

²³ U.S. Const., Art. II, Sec. 2, cl. 2.

²⁴ *Free Enterprise Fund*, 561 U.S. at 511.

²⁵ See 5 U.S.C. §§ 901 *et seq.* (1970).

²⁶ 84 Stat. 2086 (1970) (codified as amended at 5 U.S.C. App.).

²⁷ Reorg. Plan No. 3 of 1970, Sec. 1(a) & (b).

²⁸ See Reorganization of the Executive Branch, Weekly Compilation of Presidential Documents (Feb. 3, 1969) at 190-191.

Service, v. Chadha,²⁹ Congress acted to ratify all existing reorganization plans.³⁰ Thus, it is fair to say that the terms of the Plan have been effectively passed by Congress.

This still leaves the question: does the Plan establish the office filled today by the members of the EAB, authorize the Administrator to appoint officers, or to delegate his functions to subordinate officers? The Reorganization Plan transferred functions from various agencies that had been performing them to the now created EPA.³¹ In addition, the Plan authorized the Administrator to “make such provisions as he shall deem appropriate authorizing the performance of any of the functions transferred to him by the provisions of this reorganization plan by any other officer, or by any organizational entity or employee, of the Agency.”³² In other words, the Plan authorized the Administrator to delegate the functions transferred to him by the Plan to other officers, organizational entity, or employee. However, virtually none of the adjudications that are reviewed by the EAB were functions transferred to the Administrator by the Plan. That is, the Clean Air Act of 1970, the Clean Water Act of 1972, the Resource Conservation and Recovery Act of 1976, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, the Federal Insecticide, Fungicide, and Rodenticide Act amendment of 1972 all post-date the Plan, so adjudicatory decisions called for under various provisions of those acts could not have been functions transferred to the Administrator or the EPA.

Moreover, by its terms, the Plan did not establish any new office to adjudicate administrative cases, although it did establish several offices in the new EPA.³³ Nor did it authorize the Administrator to appoint any officer, much less an officer to act on a board to hear appeals from ALJs and other judicial officers in the agency. At most, the Plan authorized the Administrator to delegate functions transferred to him by the Plan to any existing officer, entity,

²⁹ 462 U.S. 919 (1983).

³⁰ Pub. L. No. 98-532, 98 Stat. 2705 (1984).

³¹ *Id.*, at Sec. 2.

³² *Id.*, at Sec. 3.

³³ See Reorg. Plan No. 3 of 1970, Sec. 1 (c) &(d) (establishing the offices of the Deputy Administrator and five Assistant Administrators).

or employee of the agency, and the persons appointed to the EAB were not officers or employees of EPA at the time of the Plan. The “power to delegate duties to an existing officer is not the same as the power to appoint the officer in the first place.”³⁴ Thus, the Plan, even as enacted into law by Congress, did not create the office of the EAB or authorize the Administrator either to create it or appoint persons to it.

Even if the Plan does not authorize the Administrator to delegate functions later placed in the Administrator, perhaps another statute does. Section 301 of Title 5, sometimes referred to as the Housekeeping Statute,³⁵ provides that: “The head of an *Executive department* or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.”³⁶ This broad authorization has at least once been interpreted to allow the head of a department to create offices and appoint persons to them,³⁷ although that conclusion has been questioned in other cases.³⁸ In any event, EPA is not an “Executive department” within the meaning of Section 301. Section 101 of Title 5,³⁹ specifically names the departments that are “Executive departments” under Section 301, and it does not include EPA. Rather EPA would fall under the term “independent establishment,” defined in Section 104,⁴⁰ which explicitly distinguishes such establishments from Executive departments. Consequently, EPA cannot utilize Section 301 to justify the creation of the EAB or

³⁴ United States v. Concord Management & Consulting LLC, 317 F.Supp.3d 598, 622 (D.D.C. 2018).

³⁵ See Chrysler Corp. v. Brown, 441 U.S. 281, 309 (1979).

³⁶ 5 U.S.C. § 301 (emphasis supplied).

³⁷ See, e.g., Willy v. Administrative Review Board, 423 F.3d 483, 491-92 (5th Cir. 2005) (relying on both section 301 and a 1950 reorganization act in finding that the Secretary of Labor could create and appoint inferior officers to an administrative review board with final decisional authority); In re Sealed Case, 829 F.2d 50 (D.C. Cir. 1987) (relying on section 301 and 28 U.S.C. §§ 509, 510, and 515).

³⁸ See United States v. Concord Management & Consulting, LLC, 317 F.Supp.3d 598, 622 (D.D.C. 2018); United States v. Janssen, 73 M.J. 221, 224-25 (U.S. Ct. App. A.F. 2014) (noting, and roundly rejecting, a claim by the government that section 301 authorizes appointment of a civilian to a military court of appeals).

³⁹ 5 U.S.C. § 101.

⁴⁰ 5 U.S.C. § 104 (“an establishment in the executive branch (other than the United States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment.”).

to authorize the appointment of members to it. And there is no statutory equivalent to Section 301 applicable to independent establishments.

Section 302 of Title 5,⁴¹ explicitly authorizes the head of an “agency,” which would include EPA,⁴² to delegate his authority to subordinate officials “to take final action on matters pertaining to the employment, direction, and general administration of personnel under his agency; and by section 3702 of title 44 to authorize the publication of advertisements, notices, or proposals.” This limited authorization to delegate certain specific functions would not include the Administrator’s delegation to the EAB, because the EAB’s decisional authority does not relate to the employment, direction, or general administration of personnel in the EPA, nor to the publication of advertisements, notices, or proposals. Moreover, the provision says nothing about appointing officers to perform those limited functions.

In short, there is no statutory authority to EPA or its Administrator to create the office of the EAB, to delegate his functions to it, or to appoint officers to it.

Statutes creating various agencies and executive departments often contain general authorizations that might suffice to justify the heads of agencies or departments to delegate their functions and to appoint persons to carry out those functions. For example, Congress specifically granted the Secretaries of Agriculture, Education, Health and Human Services, and Transportation the authority to appoint officers to carry out the functions of their departments.⁴³ But Congress did not grant such authority to the Administrator of EPA. Instead, in enacting the Plan into law, Congress only authorized the Administrator to delegate his functions to the Deputy Administrator and the five Assistant Administrators.⁴⁴ And when Congress decided that additional Assistant Administrators were necessary, it provided for them as well.⁴⁵ Nowhere,

⁴¹ 5 U.S.C. § 302.

⁴² Section 302 adopts the definition of “agency” in 5 U.S.C. § 5721, which provides that an agency is an “Executive agency,” which EPA surely is.

⁴³ See 7 U.S.C. § 610(a) (2012) (Agriculture); 20 U.S.C. § 3461(a) (2012) (Education); 42 U.S.C. § 913 (2012) (Health and Human Services); 49 U.S.C. § 323(a) (2012) (Transportation).

⁴⁴ See Reorg. Plan No. 3 of 1970, Sec. 1 (c) &(d) (establishing the offices of the Deputy Administrator and five Assistant Administrators).

⁴⁵ See Pub. L. No. 98-80, 97 Stat. 485 (1983).

however, has Congress provided for the Administrator generally to delegate his functions or to appoint persons to carry out those functions.

Is there a statute that generally authorizes heads of agencies to appoint inferior officers? The Civil Service Reform Act of 1978⁴⁶ created the Senior Executive Service (SES). Under that Act, a member of the SES must be “an employee [who]– (A) directs the work of an organizational unit; (B) is held accountable for the success of one or more specific programs or projects; (C) monitors progress toward organizational goals and periodically evaluates and makes appropriate adjustments to such goals; (D) supervises the work of employees other than personal assistants; or (E) otherwise exercises important policy-making, policy-determining, or other executive functions.”⁴⁷ Members of the EAB clearly exercise important policy-making, policy-determining, or other executive functions, and indeed all the current judges are career members of the SES.⁴⁸ Thus, if the Civil Service Reform Act’s creation of the SES constitutes the vesting of the appointment of members of the SES in the heads of departments, this would seem to satisfy the Appointments Clause.

The Act does not specify *who* appoints career members of the SES, instead referring to the “appropriate appointing authority” within the agency.⁴⁹ This suggests that the Act does not specify the head of the agency as the appointing authority. Indeed, some agencies apparently do not have the head of the agency appoint their SES members.⁵⁰ As such, it would not seem to satisfy the Appointments Clause’s requirement to vest the appointment in the head of a department (even reading department broadly). On the other hand, it could be that the reference to the appropriate appointing authority is intended to take account of the possibility that not all SES personnel would qualify as officers and be subject to the requirements of the Appointments

⁴⁶ Pub.L. 95-454, 92 Stat. 1111 (1978).

⁴⁷ 5 U.S.C. § 3132 (a)(2).

⁴⁸ See EAB at Twenty-five, at 2.

⁴⁹ See, e.g., 5 U.S.C. § 3393 (b)(2).

⁵⁰ See Jennifer Mascott, *Who Are “Officers of the United States”?*, 70 Stanford L.Rev. 443, 549 (2018) (noting that SES personnel in the IRS’s Chief Counsel’s Office are appointed by the General Counsel of the Treasury Department).

Clause. Thus, by implication the appropriate appointing authority for an SES official who is an inferior officer would be the head of the department (read broadly).

Nor does the Act specify what functions the SES personnel will perform, other than the broad statement of what responsibilities qualify for SES status. Historically, officers were appointed to offices created in a statute. For example, *United States v. Hartwell*⁵¹ discussed Assistant Treasurers, whose positions were created by statute, which specified how they were to be appointed.⁵² This is consistent with the Appointments Clause provision that it applies to “appointments . . . which shall be established by law.”⁵³ This practice continues today, as in the Department of Energy Organization Act,⁵⁴ which establishes a Deputy Secretary, Under Secretaries, a General Counsel, and Assistant Secretaries and then provides for how they are to be appointed.⁵⁵ In addition, it specifies that they shall perform such duties as assigned or delegated to them by the Secretary of Energy.⁵⁶ Even, the Reorganization Plan No. 3 of 1970 creating EPA follows this pattern. It first created the offices of Administrator, Deputy Administrator, and Assistant Administrators, stated how these officers were to be appointed, and specified that the Deputy and Assistant Administrators should “perform such functions as the Administrator shall from time to time assign or delegate.”⁵⁷

While the above examples all involve appointments by the President with advice and consent of the Senate, this pattern is not limited to such appointments or to appointments of principal officers. In *Freytag v. Commissioner of Internal Revenue*,⁵⁸ for instance, the office was that of a Special Trial Judge, which Congress had established in the Tax Reform Act of 1984,⁵⁹

⁵¹ 73 U.S. 385 (1867).

⁵² See An Act to provide for the better Organization of the Treasury, and for the Collection, Safe-Keeping, Transfer, and Disbursement of the public Revenue, Sec. 5, 9 Stat. 59, 60 (1846).

⁵³ U.S. Const., Art. II, Sec. 2, cl. 2.

⁵⁴ 42 U.S.C. §§ 7101 *et seq.*

⁵⁵ See 42 U.S.C. §§ 7132-7133.

⁵⁶ *Id.*

⁵⁷ See Reorg. Plan No. 3 of 1970, at Sec. 1 (b)-(d).

⁵⁸ 501 U.S. 868 (1991).

⁵⁹ § 464(a), 98 Stat. 824, codified at 26 U.S.C. § 7443A.

specifying appointment by the Chief Judge of the Tax Court and identifying what particular proceedings such judges could conduct. In *Morrison v. Olson*,⁶⁰ the office of the independent counsel was authorized by the Ethics in Government Act,⁶¹ which also specified the appointment process as by a particular court. *Free Enterprise Fund v. Public Company Accounting Oversight Board*⁶² involved members of that Board, whose duties and appointment by the Securities and Exchange Commission were specified in the Sarbanes-Oxley Act of 2002.⁶³ In *Lucia v. Securities and Exchange Commission*,⁶⁴ the office was that of an Administrative Law Judge, whose duties and method of appointment are specified by statute.⁶⁵

Not all inferior offices are specified by statute. As noted earlier, some Secretaries have been granted blanket authorization to appoint persons to carry out their functions.⁶⁶ Nevertheless, even these general authorizations are explicit statutory grants to appoint officers and to delegate functions to them. Moreover, most of them either explicitly or implicitly provide that the appointments must be consistent with the Civil Service laws,⁶⁷ suggesting that the Civil Service laws, under which the Senior Executive Service exists, are not themselves authority for the appointments and delegations. Indeed, if the creation of the Senior Executive Service is viewed as granting the heads of all agencies the authority to appoint inferior officers and delegate functions to them, then the various statutes that specifically grant such authority would be redundant.

One might imagine that if Congress had intended through the creation of the Senior Executive Service to establish new offices and authorize the heads of agencies to appoint persons

⁶⁰ 487 U.S. 654 (1988).

⁶¹ 28 U.S.C. §§ 591-599.

⁶² 561 U.S. 477 (2010).

⁶³ 116 Stat. 745 (2002), codified at 15 U.S.C. § 7211.

⁶⁴ 138 S.Ct. 2044 (2018).

⁶⁵ See 5 U.S.C. §§ 554, 556-557, 3105.

⁶⁶ See text at note 41 and note 41.

⁶⁷ See 7 U.S.C. § 610(a) (2012) (requiring appointments to be consistent with chapter 51 and subchapter III of Chapter 53 of Title 5, U.S. Code); 20 U.S.C. § 3461(a) (2012) (requiring appointments to be consistent with the civil service laws); 42 U.S.C. § 913 (2012) (by excepting appointments of attorneys and experts from the requirements of the civil service laws, it suggests the other appointments are to be consistent with the civil service laws).

to them, that intent might be evidenced somewhere in the legislative history. However, nowhere in the legislative history of the Civil Service Reform Act is there any mention of the Appointments Clause or how the Act might satisfy that Clause with respect to SES personnel qualifying as officers of the United States.

Finally, even if one reads the creation of the Senior Executive Service as authorization to agency heads to appoint officers, thereby satisfying the Appointments Clause, there is nothing in the Civil Service Reform Act authorizing heads of agencies to delegate their functions to members of the Senior Executive Service.

IV. CONCLUSION

The above discussion strongly suggests that, using traditional tools of statutory and constitutional interpretation, the Administrator's creation of the EAB and the delegation to the EAB of his functions as final decisional authority over agency adjudications are unconstitutional or unlawful. This is not to suggest, however, that the EAB's creation and functions are bad policy. To the contrary, it makes little or no sense to require the Administrator to review and decide all appeals from ALJs, given his other duties. The agency, the litigants before the agency, and the general public are all better served by an institutionalized, professional appellate body acting for the agency. Moreover, the problems identified with the EAB may not be limited to the EAB. The Department of Interior's Interior Board of Land Appeals (IBLA)⁶⁸ shares many of the same characteristics as the EAB. It is an appellate review body that exercises the delegated authority of the Secretary of the Interior to issue final decisions for the Department of the Interior, but which is neither created nor recognized in statute, instead having been created by regulation.⁶⁹ And there may be other similar entities.⁷⁰ Is there a way to save these institutions from a finding of unconstitutionality or illegality?

⁶⁸ See <https://www.doi.gov/oha/organization/ibla>.

⁶⁹ See 35 Fed. Reg. 12081 (1970) (codified at 43 CFR § 4.1 (b)(2)).

⁷⁰ But not the Health and Human Services Appeals Board. Although it too was created by regulation rather than by statute, the Congress authorized the Secretary of Health and Human Services "to appoint . . . such officers and employees . . . as may be necessary for carrying out the functions of the Secretary." 42 U.S.C.

The simplest solution from a legal point of view would be for Congress explicitly to authorize the Administrator to create the EAB, appoint its members, and delegate his adjudicatory decisional functions to it. Congress was able to act swiftly to re-create the Federal Election Commission (FEC) after the Court held its membership unconstitutional in *Buckley v. Valeo*.⁷¹ Of course, that action was taken only after the Court had found the FEC unconstitutional.

Absent congressional action, however, the only other way to save the EAB is through a liberal interpretation of the Reorganization Plan No. 3 of 1970 and the Civil Service Reform Act of 1978. Recall that the Plan authorized the Administrator to delegate any of the functions *transferred by the Plan* to any officer or employee of the new EPA. However, if one read the Plan not just to authorize the delegation of functions transferred by the Plan but also to authorize the delegation of any other function subsequently placed in the Administrator, this would cure the delegation problem. It would not, however, by itself necessarily cure the appointments problem. That is, even if the Plan could be read to authorize the Administrator to delegate his final decisional authority in agency adjudications, he would have to delegate it to an officer of the United States. Nothing in the Plan mentions or suggests granting any power of appointment to the Administrator. It is at this point that the creation of the Senior Executive Service in the Civil Service Reform Act might come into play. The earlier analysis of that Act suggested that its terms do not appear to constitute the vesting of appointment of inferior officers by heads of departments. Again, however, if one strains somewhat, one might conclude that it does constitute such an authorization of appointments. Thus, by stretching both the Reorganization Plan's language and that of the Civil Service Reform Act, one could find that the EAB is constitutional and lawful.

§ 913. *See also* Pennsylvania v. HHS, 80 F.3d 796, 800 (3d Cir.1996) (upholding the lawfulness of the Board).

⁷¹ 424 U.S. 1 (1976). *See* Federal Elections Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976).

There is some evidence that courts might be willing to construe laws liberally to uphold appointments and delegations by heads of agencies. For example, two courts utilizing a liberal approach to several statutes have upheld the Department of Labor’s Administrative Review Board (ARB) against an attack based on the Appointments Clause.⁷² In both, the courts cited to 5 U.S.C. § 301 and the terms of the Reorganization Plan No. 6 of 1950⁷³ as vesting the power of appointment of inferior officers in the Secretary and the authorization to delegate his functions to the ARB; one also cited to the Civil Service Reform Act of 1970. As noted earlier, 5 U.S.C. 301 has been cited to authorize delegations by heads of “Executive Departments,” but it cannot be applied to the Administrator of the EPA, who is not the head of an “Executive Department.”⁷⁴ Moreover, the terms of the Reorganization Plan No. 6 of 1950, which made certain changes to the organization of the Department of Labor, differ in a critical manner from the Reorganization Plan No. 3 of 1970 that created EPA. Specifically, Reorganization Plan No. 6 of 1950 stated “The Secretary of Labor may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Labor of *any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan.*”⁷⁵ That is, unlike the Plan that created EPA, which only referred to the Administrator authorizing performance by any other officer of functions transferred by the Plan, the Plan applicable to the Department of Labor specifically said the Secretary could authorize performance of *any function* of the Secretary, which clearly included functions not transferred by the Plan, because it clarified that “any function” *included* functions transferred by the Plan. Consequently, unlike the EAB, the ARB stands on solid ground at least for the delegation of the Secretary’s functions. However, the one court concluded without explanation that this was also statutory authorization for appointment of

⁷² Willy v. Administrative Review Board, 423 F.3d 483 (5th Cir. 2005); Varnadore v. Secretary of Labor, 141 F.3d 625 (7th Cir. 1998).

⁷³ 15 Fed.Reg. 3174 (1950), 64 Stat. 1263 (codified at 5 U.S.C. App).

⁷⁴ See *supra*, note 39.

⁷⁵ Reorganization Plan No. 6 of 1950, *supra*, at Section 2.

officers even though neither 5 U.S.C. § 301 nor the Reorganization Plan mention appointments,⁷⁶ and it is not clear that the authorization to delegate a function to an officer also authorizes the appointment of that officer.⁷⁷ The other court, also without any explanation, included a citation to the Civil Service Reform Act’s provisions.⁷⁸

In addition, the D.C. Circuit recently upheld the appointment of Special Counsel Robert Mueller against an Appointments Clause challenge.⁷⁹ That appointment did not involve interpretation of the statutes relevant to the EAB, but one could claim that the court’s opinion also reflected a judicial willingness to interpret statutes broadly to authorize the appointment of inferior officers. The opinion indicated it was bound by two precedents: *United States v. Nixon*⁸⁰ and *In re Sealed Case*.⁸¹ In *Nixon* the Supreme Court held that the Attorney General had the authority to appoint Leon Jaworski as Special Prosecutor. It stated that Congress had “vested in [the Attorney General] the power to appoint subordinate officers to assist him in the discharge of his duties. 28 U.S.C. §§ 509, 510, 515, 533.”⁸² However, the issue of the validity of the Special Prosecutor’s appointment was apparently not raised in the *Nixon* case, so the question as to how these several statutes vested that power was not analyzed or discussed. While there are arguments that the Court’s interpretation of these statutes was strained, to say the least,⁸³ it cannot be denied that one of the statutes provides: “The Attorney General may appoint officials— (1) to detect and prosecute crimes against the United States.”⁸⁴ And another provides:

⁷⁶ See *Willy v. Administrative Review Board*, 423 F.3d at 491.

⁷⁷ See *Concord Management & Consulting*, 317 F.Supp.3d at 622 (stating that the “power to delegate duties to an existing officer is not the same as the power to appoint the officer in the first place”).

⁷⁸ See *Varnadore v. Secretary of Labor*, 141 F.3d at 631.

⁷⁹ See *In re Grand Jury Investigation*, – F.3d —, 2019 WL 921692 (February 26, 2019). See also *Concord Management & Consulting*, 317 F.Supp. 3d 598 (D.D.C. 2018); *In re Grand Jury Investigation*, 315 F.Supp.3d 602 (D.D.C. 2018).

⁸⁰ 418 U.S. 683 (1974).

⁸¹ 829 F.2d 50 (D.C. Cir. 1987).

⁸² *Nixon*, 418 U.S. at 694.

⁸³ See Steven Calabresi and Gary Lawson, *Why Robert Mueller’s Appointment as Special Counsel Was Unlawful*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3324631 (arguing that the statutes relied upon for the Special Counsel’s appointment do not authorize his appointment). See also *United States v. Concord Management & Consulting LLC*, 317 F.Supp.3d 598 (D.D.C. 2018) (in which the court appeared skeptical as to the validity of the Court’s conclusions but believed it was binding precedent in the case before it).

⁸⁴ 28 U.S.C. § 533.

The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrate judges, which United States attorneys are authorized by law to conduct.⁸⁵

Consequently, the Court’s conclusion facially seems sound. The other case, *In re Sealed Case*, involved a challenge to the constitutionality of the appointment by the Attorney General of the Independent Counsel investigating the Iran/Contra Affair. The D.C. Circuit stated:

We have no difficulty concluding that the Attorney General possessed the statutory authority to create the Office of Independent Counsel: Iran/Contra and to convey to it the “investigative and prosecutorial functions and powers” described in 28 C.F.R. § 600.1(a) of the regulation. The statutory provisions relied upon by the Attorney General in promulgating the regulation are 5 U.S.C. § 301 and 28 U.S.C. §§ 509, 510, and 515. While these provisions do not explicitly authorize the Attorney General to create an Office of Independent Counsel virtually free of ongoing supervision, we read them as accommodating the delegation at issue here.⁸⁶

As the court noted, the provisions in question do not “explicitly” authorize the Attorney General to create the Office of Independent Counsel, but the court was still willing to read them as so authorizing him.

And finally there is the Supreme Court’s decision in *Lucia*.⁸⁷ Section 3105 of the Administrative Procedure Act provides that “[e]ach agency shall appoint as many administrative law judges as are necessary for” hearings governed by the APA.⁸⁸ Inasmuch as no one at the time of the passage of the APA thought the then hearing examiners⁸⁹ were officers of the United States, it is doubtful that this provision was intended to comply with the Appointments Clause.⁹⁰ Nevertheless, although the Court did not address this provision in *Lucia*, it seemed to imply that

⁸⁵ 28 U.S.C. § 515 (a).

⁸⁶ 829 F.2d at 55 (footnotes omitted).

⁸⁷ 138 S.Ct. 2044 (2018).

⁸⁸ 5 U.S.C. § 3105.

⁸⁹ In 1978 Congress changed the title of hearing examiner in the original APA to Administrative Law Judge. See Pub. L. No. 95-251, 92 Stat. 183 (1978).

⁹⁰ The text of the APA refers to ALJs as “employees.” See 5 U.S.C. §§ 554 (d), 556 (b), (c), 557 (b), (c).

the provision satisfies the Appointments Clause’s requirement that Congress vest the appointment of inferior officers in the heads of departments.⁹¹

These cases may suggest some willingness by courts to address pragmatically whether Congress has vested the head of an agency with the power to make appointments of inferior officers. And using a pragmatic approach might be enough to save the EAB. However, in most of these cases the statutory language authorizing appointment or delegation is clearer than that available to the EAB. Moreover, the Supreme Court’s conclusion in *Nixon* and suggestion in *Lucia* were all made without argument and without analysis concerning the adequacy of the statutes to satisfy the Appointments Clause. Consequently, the strength of that precedent may be subject to question. Therefore, the ultimate decision regarding the constitutionality or lawfulness of the EAB is open to doubt. This uncertainty of outcome is a strong reason for congressional action before such action would become practically necessary – upon a final judicial determination that the EAB is unlawful.

⁹¹ See *Lucia*, 138 S.Ct. at 2050 (suggesting that the SEC, as the “head of a department” for purposes of the Appointments Clause, could appoint ALJs in the SEC).