

IS THE ENVIRONMENTAL APPEALS BOARD UNCONSTITUTIONAL OR UNLAWFUL?

BY
WILLIAM FUNK*

The Supreme Court's decision in Lucia v. SEC, holding that Administrative Law Judges are officers of the United States, raises various questions regarding other administrative officials not traditionally considered officers of the United States. This Article addresses the question whether the Environmental Protection Agency's Environmental Appeals Board (EAB) is unconstitutional or unlawful. First, the Article establishes that in light of Lucia and other case law, the members of the EAB are clearly officers of the United States, but probably inferior officers. The question then is whether Congress has provided for their appointment by the Administrator of EPA, and there is no statute clearly so providing. The Article assesses whether the creation of the government-wide Senior Executive Service could constitute such authorization. Moreover, even if it did, it is not clear that the Administrator has the authority to delegate to the EAB his final decisional authority in EPA adjudications in light of other specific statutory authorizations of delegation but the lack of such an authorization with regard to the EAB. The Article does not suggest that it is unwise policy to have the EAB act in lieu of the Administrator to make final agency decisions in adjudications, but it does suggest that the current legal authority for the EAB is on shaky ground.

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I. INTRODUCTION

Under various statutes, the U.S. Environmental Protection Agency (EPA) conducts adjudications, some of which are formal adjudications under the Administrative Procedure Act¹ (APA) and some of which are informal

* Lewis & Clark Distinguished Professor of Law, Emeritus, Lewis & Clark Law School.

¹ 5 U.S.C. §§ 554,556, 557 (2012).

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.² In 1992, however, he created the Environmental Appeals Board (EAB) by "internal agency action" to replace the Judicial Officers and to have final decisional authority for the agency in all cases.³ The EAB consists of four Senior Executive Service career persons appointed by the Administrator of EPA.⁴

In 2018 the Supreme Court decided *Lucia v. Securities and Exchange Commission*⁵ (*Lucia*), in which it held that ALJs are constitutional officers,⁶ despite a half century of characterization of ALJs as mere employees by Congress,⁷ the Executive,⁸ and the Supreme Court.⁹ Believing ALJs 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."¹⁰ Fortunately, the APA provides for agencies to appoint ALJs,¹¹ 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.¹²

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.

² See, e.g., *Panhandle Co-op. Ass'n, Bridgeport v. U.S. Envtl. Prot. Agency*, 771 F.2d 1149, 1150 (8th Cir. 1985) (authority to make final decision delegated to Chief Judicial Officer); *Envtl. Def. Fund, Inc. v. U.S. Envtl. Prot. Agency*, 489 F.2d 1247, 1250 (D.C. Cir. 1973) (authority to make final decision retained by Administrator).

³ Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320, 5320–22 (Feb. 13, 1992).

⁴ See 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, <https://perma.cc/J4N6-4S7K> (last visited July 13, 2019).

⁵ 138 S. Ct. 2044 (2018).

⁶ *Id.* at 2055.

⁷ See 5 U.S.C. § 556(c) (2012) (referring to ALJs as "employees").

⁸ See, e.g., Brief for Respondent at 8, *Landry v. FDIC*, 531 U.S. 924 (2000) (No. 99-1916), 2000 WL 34013905 ("[T]he ALJ who conducted the administrative hearing in this case is properly regarded as an employee rather than an 'inferior Officer.'").

⁹ See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 507 n.10 (2010) (referring to "that subset of independent agency employees who serve as administrative law judges").

¹⁰ U.S. CONST. art. II, § 2, cl. 2.

¹¹ 5 U.S.C. § 3105 (2012).

¹² See, e.g., Sec. & Exch. Comm'n, In re: Pending Admin. Proceedings, Release No. 33-10536 (Aug. 22, 2018).

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,¹³ who had been found to be officers in *Freytag v. Commissioner of Internal Revenue*¹⁴ (*Freytag*). In *Freytag*, as described by the Court in *Lucia*, the Court looked to two cases to determine the line between employees and officers.¹⁵ One case was *United States v. Germaine*¹⁶ (*Germaine*). 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.”¹⁷ The members of the EAB hold a continuing position.¹⁸ Whether that position is “established by law” is another issue to be addressed later.

The second case the Court in *Freytag* relied upon was *Buckley v. Valeo*¹⁹ (*Buckley*). There, the Court said that if a person “exercis[es] significant authority pursuant to the laws of the United States,” the person must be an officer, not a mere employee.²⁰ Given the functions of the Federal Elections Commission at issue in *Buckley*,²¹ 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 U.S. Tax Court.²² 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 . . . [and i]n the course of carrying out these important functions, the special trial judges exercise significant discretion.”²³ Second, the Special Trial Judges had to be officers because in certain cases they could make the final decision for the agency.²⁴ 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 to be an officer.²⁵ 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.

¹³ *Lucia*, 138 S. Ct. 2044, 2053–55 (2018).

¹⁴ 501 U.S. 868, 882 (1991).

¹⁵ *See id.* at 880–81.

¹⁶ 99 U.S. 508 (1878).

¹⁷ *Lucia*, 138 S. Ct. at 2051 (citing *Germaine*, 99 U.S. at 511).

¹⁸ *See EAB AT TWENTY-FIVE, supra* note 4, at 6.

¹⁹ 424 U.S. 1 (1976).

²⁰ *Id.* at 126.

²¹ *See id.* at 109–13.

²² *Freytag*, 501 U.S. 868, 881–82 (1991).

²³ *Id.*

²⁴ *See id.* at 882.

²⁵ *Lucia*, 138 S. Ct. 2044, 2052–54 (2018).

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* as clarified by *Lucia*, that is enough to require them to be officers.²⁶ 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.²⁷

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*²⁸ (*Edmond*), 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."²⁹ 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."³⁰ The Administrator of EPA may remove members of the EAB if he believes they are not performing adequately.³¹ 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.³² 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.³³ Therefore, it seems quite certain that EAB members are inferior officers, not principal officers.

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."³⁴ 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

²⁶ *Id.* at 2047–48.

²⁷ *Id.* at 2061.

²⁸ 520 U.S. 651 (1997).

²⁹ *Id.* at 662.

³⁰ *Id.* at 664.

³¹ *Lucia*, 138 S. Ct. at 2060.

³² *Edmond*, 520 U.S. at 664.

³³ See U.S. ENVTL. PROT. AGENCY, REGULATIONS GOVERNING APPEALS I (2019), <https://perma.cc/9TF6-TG75>.

³⁴ U.S. CONST. art. II, § 2, cl. 2.

Appointments Clause.”³⁵ 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.”³⁶ 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.³⁷

President Nixon, pursuant to authority granted to him by the Reorganization Act of 1949, as amended,³⁸ adopted Reorganization Plan No. 3 of 1970³⁹ (the Plan), creating EPA and establishing the Administrator as the head of the agency.⁴⁰ However, inasmuch as the 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.⁴¹ Consequently, in 1984, after the Supreme Court held that legislative vetoes were unconstitutional in *Immigration and Naturalization Service v. Chadha*,⁴² Congress acted to ratify all existing reorganization plans.⁴³ 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 Plan transferred functions from various agencies that had been performing them to the now created EPA.⁴⁴ 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.”⁴⁵ 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 1970,⁴⁶ the Clean

³⁵ *Free Enterprise Fund*, 561 U.S. 477, 511 (2010).

³⁶ U.S. CONST. art. II, § 2, cl. 2.

³⁷ Reorganization Plan No. 3 of 1970, 3 C.F.R. 199 (1970 Comp. 1971), *reprinted in* 5 U.S.C. app. at 698 (2012), *and in* 84 Stat. 2086 (1970).

³⁸ *See* 63 Stat. 203.

³⁹ Reorganization Plan No. 3 of 1970, *supra* note 37.

⁴⁰ *Id.* § 1.

⁴¹ *See* Reorganization of the Executive Branch: President’s Message to Congress Urging Extension of President’s Authority to Transmit Reorganization Plans, 5 WEEKLY COMPILATION PRESIDENTIAL DOCUMENTS 190–91 (Feb. 3, 1969).

⁴² 462 U.S. 919, 959 (1983).

⁴³ Act of Oct. 19, 1984, Pub. L. No. 98-532, 98 Stat. 2705.

⁴⁴ Reorganization Plan No. 3 of 1970, *supra* note 37, § 2.

⁴⁵ *Id.* § 3.

⁴⁶ Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401–7671q (2012)) (requiring states to enforce the Clean Air Act).

Water Act of 1972,⁴⁷ the Resource Conservation and Recovery Act of 1976,⁴⁸ the Comprehensive Environmental Response, Compensation, and Liability Act of 1980,⁴⁹ and the Federal Insecticide, Fungicide, and Rodenticide Act Amendment of 1972⁵⁰ 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.⁵¹ 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, 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.”⁵² 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,⁵³ 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.”⁵⁴ This broad authorization has at least once been interpreted to allow the head of a department to create offices and appoint persons to them,⁵⁵ although that conclusion has been questioned in other cases.⁵⁶ In any event, EPA is not an “Executive department” within the meaning of Section 301. Section 101 of Title 5,⁵⁷ specifically names the departments that are “Executive departments” under Section 301, and it does not include EPA. Rather EPA would fall under the

⁴⁷ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

⁴⁸ 42 U.S.C. §§ 6901–6992k (2012) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 70 Stat. 992 (1965)).

⁴⁹ *Id.* §§ 9601–9657.

⁵⁰ 7 U.S.C. §§ 136–136y (2012).

⁵¹ See Reorganization Plan No. 3 of 1970, *supra* note 37, § 1 (establishing the offices of the Deputy Administrator and five Assistant Administrators).

⁵² *United States v. Concord Mgmt. & Consulting LLC*, 317 F. Supp. 3d 598, 622 (D.D.C. 2018).

⁵³ See *Chrysler Corp. v. Brown*, 441 U.S. 281, 309 (1979).

⁵⁴ 5 U.S.C. § 301 (emphasis added).

⁵⁵ See, e.g., *Willy v. Admin. Review Bd.*, 423 F.3d 483, 491–92 (5th Cir. 2005) (relying on both 5 U.S.C. § 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, 55 (D.C. Cir. 1987) (relying on 5 U.S.C. § 301 and 28 U.S.C. §§ 509, 510, and 515 in finding that the Attorney General could create, and delegate “investigative and prosecutorial functions and powers” to an Office of Independent Counsel).

⁵⁶ See *Concord Mgmt. & Consulting*, 317 F. Supp. 3d at 622 (D.D.C. 2018); *United States v. Janssen*, 73 M.J. 221, 224–25 (C.A.A.F. 2014) (both noting, and roundly rejecting, a claim by the government that 5 U.S.C. § 301 authorizes appointment of a civilian to a military court of appeals).

⁵⁷ 5 U.S.C. § 101.

term “independent establishment,” defined in Section 104,⁵⁸ which explicitly distinguishes such establishments from Executive departments. Consequently, EPA cannot utilize Section 301 to justify the creation of the EAB or 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, explicitly authorizes the head of an “agency,” which would include EPA,⁵⁹ 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.”⁶⁰ This limited authorization to delegate certain 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.⁶¹ 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.⁶² And when Congress decided that additional Assistant Administrators were necessary, it provided for them as well.⁶³ Nowhere, 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 1978⁶⁴ created the Senior Executive Service (SES).⁶⁵ Under that Act, a member of the SES must be

⁵⁸ *Id.* § 104 (defining independent establishment as “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”).

⁵⁹ 5 U.S.C. § 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.

⁶⁰ *Id.* § 302.

⁶¹ *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) (Transportation).

⁶² *See* Reorganization Plan No. 3 of 1970, *supra* note 37, § 1 (establishing the offices of the Deputy Administrator and five Assistant Administrators).

⁶³ *See* Act of Aug. 23, 1983, Pub. L. No. 98-80, 97 Stat. 485.

⁶⁴ 5 U.S.C. § 1101 (1982).

⁶⁵ *Id.* § 2101.

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.⁶⁶

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.⁶⁷ 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.⁶⁸ 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.⁶⁹ 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 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.⁷⁰ Historically, officers were appointed to offices created in a statute. For example, *United States v. Hartwell*⁷¹ discussed Assistant Treasurers, whose positions were created by statute, which specified how they were to be appointed.⁷² This is consistent with the Appointments Clause provision that it applies to “Appointments . . . which shall be established by Law.”⁷³ This practice continues today, as in the Department of Energy Organization Act,⁷⁴ which establishes a Deputy Secretary, Under Secretaries, a General Counsel, and Assistant Secretaries and then provides for how they are to be appointed.⁷⁵ In addition, it specifies that they shall perform such duties as assigned or delegated to them by the Secretary of

⁶⁶ *Id.* U.S.C. § 3132 (a)(2).

⁶⁷ See EAB AT TWENTY-FIVE, *supra* note 4, at 1–2.

⁶⁸ See, e.g., 5 U.S.C. § 3393(b)(2).

⁶⁹ See Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. 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).

⁷⁰ See *supra* note 66 and accompanying text.

⁷¹ 73 U.S. 385 (1867).

⁷² *Id.* at 386; see also Act to Provide for the Better Organization of the Treasury, and for the Collection, Safe-Keeping, Transfer, and Disbursement of the Public Revenue, ch. 90, 29 Stat. 59, 60 (1846).

⁷³ U.S. CONST. art. II, § 2, cl. 2.

⁷⁴ 42 U.S.C. §§ 7101–7386 (2012).

⁷⁵ See *id.* §§ 7132–7133.

Energy.⁷⁶ Even the Plan 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.”⁷⁷

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* for instance, the office was that of a Special Trial Judge, which Congress had established in the Tax Reform Act of 1984,⁷⁸ specifying appointment by the Chief Judge of the Tax Court and identifying what particular proceedings such judges could conduct.⁷⁹ In *Morrison v. Olson*,⁸⁰ the office of the independent counsel was authorized by the Ethics in Government Act,⁸¹ which also specified the appointment process as by a particular court.⁸² *Free Enterprise Fund v. Public Company Accounting Oversight Board*⁸³ involved members of that Board, whose duties and appointment by the Securities and Exchange Commission were specified in the Sarbanes-Oxley Act of 2002.⁸⁴ In *Lucia*, the office was that of an ALJ, whose duties and method of appointment are specified by statute.⁸⁵

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.⁸⁶ 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,⁸⁷ 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 SES 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 SES to establish new offices and authorize the heads of agencies to appoint persons 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

⁷⁶ *Id.*

⁷⁷ See Reorganization Plan No. 3 of 1970, *supra* note 37.

⁷⁸ 98 Stat. 824 § 464 (codified as amended at 26 U.S.C. § 7456 (2012)).

⁷⁹ *Freytag*, 501 U.S. 868, 868 (1991).

⁸⁰ 487 U.S. 654 (1988).

⁸¹ 5 U.S.C. app. §§ 101–111, 401–408, 501–505 (2012).

⁸² *Id.* § 401.

⁸³ 561 U.S. 477, 485–86 (2010).

⁸⁴ 15 U.S.C. § 7201–66.

⁸⁵ *Lucia*, 138 S. Ct. 2044, 2049 (2018); see 5 U.S.C. §§ 554, 556–57, 3105.

⁸⁶ See *supra* note 61 and accompanying text.

⁸⁷ See 7 U.S.C. § 610(a) (2012) (requiring appointments to be consistent with “the provisions of chapter 51 and subchapter III of chapter 53 of title 5 [of the U.S.C.]”); 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).

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. Indeed, as a former SES appointee, it never occurred to me that I was an officer of the United States, and having spoken to several current and former SES appointees, I find they are of like mind. Perhaps most tellingly, the four members of the EAB do not hold commissions from the President, although the Constitution requires that the President commission all officers of the United States.⁸⁸

Finally, even if one reads the creation of the SES 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 SES.

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 Appeals⁸⁹ 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.⁹⁰ And there may be other similar entities.⁹¹ Is there a way to save these institutions from a finding of unconstitutionality or illegality?

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*.⁹² Of course, that action was taken only after the Court had found the FEC unconstitutional.

⁸⁸ U.S. CONST. art. II, § 3.

⁸⁹ See *About the Interior Board of Land Appeals*, U.S. DEP'T OF THE INTERIOR, <https://perma.cc/A6EY-QC4L> (last visited July 13, 2019).

⁹⁰ See Notice Amending Delegations of Authority, para. 211.12.5, 35 Fed. Reg. 12081 (July 28, 1970) (codified at 43 C.F.R. § 4.1(b)(2) (2018)).

⁹¹ But not the Health and Human Services Appeals Board. Although it too was created by regulation rather than by statute, 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. § 913 (2012). See also *Pennsylvania v. U.S. Dep't of Health and Hum. Serv.*, 80 F.3d 796, 806 (3rd Cir. 1996) (upholding the lawfulness of the Board).

⁹² *Buckley*, 424 U.S. 1, 143 (1976). See Federal Elections Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475.

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.⁹³ 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 SES 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.⁹⁴ Again, however, if one strains somewhat, one might conclude that it does constitute such an authorization of appointments. Thus, by stretching both the Plan's language and that of the Civil Service Reform Act, one could find that the EAB is constitutional and lawful.

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.⁹⁵ In both, the courts cited to 5 U.S.C. § 301 and the terms of the Reorganization Plan No. 6 of 1950⁹⁶ 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 1978.⁹⁷ 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."⁹⁸ 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

⁹³ See *supra* note 45 and accompanying text.

⁹⁴ See *supra* notes 68–69 and accompanying text.

⁹⁵ *Willy*, 423 F.3d 483, 485–86, 491–92 (5th Cir. 2005); *Varnadore v. Sec'y of Labor*, 141 F.3d 625, 631–32 (6th Cir. 1998).

⁹⁶ Reorganization Plan No. 6 of 1950, 3 C.F.R. 165 (Supp. 1950), *reprinted as amended* in 5 U.S.C. app. at 125 (2012), and in 100 Stat. 3491 (1986).

⁹⁷ *Willy*, 423 F.3d at 491–92; *Varnadore*, 141 F.3d at 631.

⁹⁸ See *supra* notes 57–58 and accompanying text.

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.⁹⁹

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,¹⁰⁰ Reorganization Plan No. 6 of 1950, 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 Reorganization Plan, because it clarified that “any function” included functions transferred by the Plan.¹⁰¹ 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 officers even though neither 5 U.S.C. § 301 nor Reorganization Plan No. 6 of 1950 mention appointments,¹⁰² and it is not clear that the authorization to delegate a function to an officer also authorizes the appointment of that officer.¹⁰³ The other court, also without any explanation, included a citation to the Civil Service Reform Act’s provisions.¹⁰⁴

In addition, the D.C. Circuit recently upheld the appointment of Special Counsel Robert Mueller against an Appointments Clause challenge.¹⁰⁵ 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*¹⁰⁶ (*Nixon*) and *In re Sealed Case*.¹⁰⁷ In *Nixon* the Supreme Court held that the Attorney General had the authority to appoint Leon Jaworski as Special Prosecutor.¹⁰⁸ The Supreme Court stated that Congress had “vested in [the Attorney General] the power to appoint subordinate officers to assist him in the discharge of his duties.”¹⁰⁹ 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,¹¹⁰ it cannot be denied that one of the statutes provides: “The Attorney

⁹⁹ Reorganization Plan No. 6 of 1950, *supra* note 96, § 2 (emphasis added).

¹⁰⁰ Reorganization Plan No. 3 of 1970, *supra* note 37, § 3.

¹⁰¹ Reorganization Plan No. 6 of 1950, *supra* note 96.

¹⁰² See *Willy*, 423 F.3d at 491–92.

¹⁰³ See *Concord Mgmt. & Consulting*, 317 F. Supp. 3d 598, 622 (D.D.C. 2018) (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.”).

¹⁰⁴ See *Varnadore*, 141 F.3d 625, 631 (6th Cir. 1998).

¹⁰⁵ *In re Grand Jury Investigation*, 916 F.3d 1047, 1054 (D.C. Cir. 2019); see also *Concord Mgmt. & Consulting*, 317 F. Supp. 3d 598, 603; *In re Grand Jury Investigation*, 315 F. Supp. 3d 602, 621, 667 (D.D.C. 2018).

¹⁰⁶ 418 U.S. 683 (1974).

¹⁰⁷ 829 F.2d 50 (D.C. Cir. 1987).

¹⁰⁸ *Nixon*, 418 U.S. at 694.

¹⁰⁹ *Id.* (citing 28 U.S.C. §§ 509, 501, 515, 533).

¹¹⁰ See Steven G. Calabresi & Gary Lawson, *Why Robert Mueller’s Appointment as Special Counsel Was Unlawful*, 95 NOTRE DAME L. REV. (forthcoming 2019) (manuscript at 15) (available at

General may appoint officials—(1) to detect and prosecute crimes against the United States.”¹¹¹ And another provides:

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.¹¹²

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. Sec. 301 and 28 U.S.C. Secs. 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.¹¹³

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*.¹¹⁴ Section 3105 of the APA provides that “[e]ach agency shall appoint as many administrative law judges as are necessary for” hearings governed by the APA.¹¹⁵ Inasmuch as no one at the time of the passage of the APA thought the then hearing examiners¹¹⁶ were officers of the United States, it is doubtful that this provision was intended to comply with the Appointments Clause.¹¹⁷ Nevertheless, although the Court did not address this provision in *Lucia*, it seemed to imply that the provision satisfies the Appointments Clause’s requirement that Congress vest the appointment of inferior officers in the heads of departments.¹¹⁸

<https://perma.cc/7QQH-6MM6>) (arguing that the statutes relied upon for the Special Counsel’s appointment do not authorize his appointment); see also *Concord Mgmt. & Consulting*, 317 F. Supp. 3d 598, 622–23 (D.D.C. 2018) (during 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).

¹¹¹ 28 U.S.C. § 533 (2012).

¹¹² 28 U.S.C. § 515(a) (2012).

¹¹³ *In re Sealed Case*, 829 F.2d 50, 55 (D.C. Cir. 1987) (footnotes omitted).

¹¹⁴ See *Lucia*, 138 S. Ct. 2044 (2018).

¹¹⁵ 5 U.S.C. § 3105 (1966).

¹¹⁶ In 1978 Congress changed the title of hearing examiner in the original APA to Administrative Law Judge. See Act of Mar. 27, 1978, Pub. L. No. 95-251, 92 Stat. 183.

¹¹⁷ The text of the APA refers to ALJs as “employees.” See 5 U.S.C. §§ 554(d), 556(b)–(c), 557(b)–(c).

¹¹⁸ See 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).

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.

If one looks to the purposes of the Appointments Clause, one may find further support for reading at least the Civil Service Reform Act liberally. If the appointment is of an inferior officer, the Appointments Clause provides as a default that it must be made by the President with the advice and consent of the Senate. Such a requirement assures public accountability for the appointment and would likely lead to better appointments. As the Supreme Court early noted, however, the provision authorizing Congress to vest the appointment of inferior officers in the President alone, the heads of departments, or the courts of law was a recognition of a need for administrative convenience that outweighed the public accountability provided by presidential appointment with Senate ratification.¹¹⁹ Nevertheless, the Appointments Clause required that Congress could vest the appointment of even inferior officers only in high ranking individuals or entities. The need for accountability for appointments remained. To read the Civil Service Reform Act liberally to authorize the Administrator to appoint members of the EAB would not result in any less accountability for the appointments than would exist under a more explicit authorization. Of course, this does not address the Administrator's ability to delegate his functions to the EAB, an ability that one could argue requires a clear statement in law. Absent a clear authorization in law for delegating the Administrator's functions, the Administrator's responsibility and accountability for those functions placed in him by law could be attenuated or diminished at will.

When all is said and done, 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.

¹¹⁹ See *Germaine*, 99 U.S. 508, 510 (1879).