



AJ decisions could be open to challenge for appointments error

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Key points:

- **EEOC and MSPB AJs have discretionary authority akin to ALJs in *Lucia***
- **Agency chairs would likely have to ratify AJ appointments**
- **Any challenge must be timely or satisfy regulatory exceptions for reopening**

IN FOCUS: A recent Supreme Court decision could "grind the operation" of federal personnel agency administrative judges because their appointments could be invalid under the Constitution's Appointment Clause, attorney John Mahoney warned.

Even though the case -- *Lucia v. Securities and Exchange Commission*, 118 LRP 26727 (U.S. 06/21/18) - involved a Securities and Exchange Commission administrative law judge decision, *Lucia's* analysis arguably applies to AJs and ALJs at other agencies -- including the Equal Employment Opportunity Commission, Merit Systems Protection Board, and Federal Labor Relations Authority -- who have a similar level of "significant discretion," he said.

Like SEC ALJs, EEOC and MSPB AJs have the power to take testimony, conduct trials, rule on evidence issues, enforce discovery orders, and issue decisions with factual findings, legal conclusions, and remedies, Mahoney explained.

Therefore, based on *Lucia*, they could qualify as "officers" under the Constitution's Appointments Clause and make their appointments improper unless they were appointed by the president, courts of law, or heads of departments, he added.

However, right now, Mahoney does not believe any of the AJs at the Merit Systems Protection Board, Equal Employment Opportunity Commission, or the Federal Labor Relations Authority "are appointed as officers" under the Constitution's Appointments Clause, which means their decisions "are voidable in theory."

The MSPB, EEOC, or FLRA would not comment on the constitutionality of current AJ appointments at their agencies.

The Social Security Administration, however, has already issued [guidance](#) instructing its administrative law judges "to acknowledge Appointments Clause arguments raised in connection with the appeal of an administrative action without discussing or making any findings on any such arguments."

The SSA Office of the General Counsel is consulting with the Department of Justice "to determine whether, and to what extent, it may affect SSA."

Until their review is completed, the SSA told its ALJs to acknowledge that the argument was raised but not to discuss or make any findings related to the Appointments Clause issue on the record because "the SSA lacks the authority to finally decide constitutional issues."

The Congressional Research Service's Victoria L. Killion [said](#) that with "nearly 2,000 ALJs situated in over twenty-five agencies across the federal government (the vast majority of whom serve the Social Security Administration), the specter of challenges to other ALJ proceedings and decisions looms large, as agencies and lower courts begin to examine *Lucia's* scope."

Will challenges occur?

Joe Kaplan, the founding partner at Passman and Kaplan, told [cyberFEDS®](#) that raising a constitutional challenge may make little practical sense due to the appeals procedures -- at least at the MSPB.

If the losing party raises the challenge to the board, the petition would sit on the docket until the Senate confirms at least one additional MSPB member, he said. The "better" option would be to appeal directly to the Federal Circuit, which would find *Lucia* applies or distinguish MSPB AJs from *Lucia's* SEC ALJs, he explained.

Even if the Federal Circuit finds the AJ appointments are invalid, the remedy would be to order another hearing by a properly appointed AJ, he said.

Agencies could argue that AJs do not have the authority to overturn agency decisions, but they may need the Justice Department to sign off to make the constitutional argument, Kaplan said.

Even if the challenge is successful, the remedy would be another hearing by a constitutionally appointed AJ, but a different decision is highly unlikely, he added.

In addition, the Office of Personnel Management will likely be called upon to "weigh in on the appropriate cure."

Fixing the potential error

Even if there are constitutional issues with AJ appointments at agencies, "there is a simple fix for pending and prospective cases," Kaplan said.

Independent agencies like the MSPB or the EEOC do not fall under the jurisdiction of any other agency or department, he said. Therefore, the "heads of departments" would be the board or the commission, Kaplan noted.

The MSPB, however, does not currently have a "department head" because the only sitting member is acting Vice Chair Mark Robbins, so no one at the board is positioned to fix a potential constitutional appointments error, he said. While the EEOC is currently headed by acting Chair Victoria Lipnic, whether an acting chair may appoint AJs as "inferior" officers under the Appointments Clause is unclear, he said.

Mahoney agreed, noting that an acting chair's ability to make constitutional appointments likely would require analyzing the applicable Administrative Procedure Act provisions.

Right now, the only federal personnel adjudicatory authority that could fix any potential constitutional error would be the FLRA, which has a chair heading the agency, Mahoney added.

Which decisions may be affected?

Generally, any challenges must be made within the timeline outline in the notice of rights attached to the AJ decision after which the AJ decision becomes final, Mahoney said.

While MSPB AJ initial decisions require appeals to be filed within 35 days, the EEOC requires agencies to issue a final agency decision -- a "FAD" that either adopts or rejects the EEOC AJ decision -- within 40 days and appeals to be filed to the EEOC Office of Federal Operations within 30 days of the FAD, he explained.

However, decisions with time remaining to file a timely appeal may not be the only ones affected at least at the MSPB because the board's regulations allow an appellant to file a petition for review to reopen a case "in unusual or extraordinary circumstances," Mahoney noted. 5 CFR 1201.117 to 5 CFR 1201.118 .

So, in theory, the future board or Federal Circuit potentially could allow cases to be reopened, he added.

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