STATEMENT OF RONALD A. CASS
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ON SOCIAL SECURITY OF THE
HOUSE COMMITTEE ON WAYS AND MEANS

"Administrative Adjudication after *Lucia v. SEC*"

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Thank you, Mr. Chairman and Committee members, for giving me the opportunity to submit testimony on this important issue. Let me begin by emphasizing that this testimony reflects only my own, personal views, not those of any entity or organization with which I am affiliated.

Personal Qualifications.

I am President of Cass & Associates, PC, Dean Emeritus of Boston University School of Law, Chairman and Resident Scholar at the Center for the Rule of Law, and a Senior Fellow at the C. Boyden Gray Center for the Study of the Administrative State at Antonin Scalia Law School. I also serve as a Council member of the Administrative Conference of the United States.

I have been a lawyer for forty-five years, a judicial clerk, practiced law in Washington, D.C., and have served in various capacities in the federal government, having been honored with six presidential appointments spanning Presidents Ronald Reagan to Barack Obama. I taught law school classes over a period of forty years (and counting), including serving as a faculty member at the University of Virginia and at Boston University (where I held a chaired professorship and also served fourteen years as Dean) and as visiting professor or lecturer at other schools in the United States, Europe, Central and South America, and Australia.

I have taught and written about administrative law, constitutional law, the separation of powers (a course I have taught with Justice Antonin Scalia and Justice Clarence Thomas), the judicial process, and the performance and selection of judges. I have authored or co-authored more than 140 books, articles, professional papers, and chapters in edited anthologies. Some of these writings deal expressly with administrative law issues, with the manner in which judicial decisions are made and the relation between judicial decision-making and political decision-making, and with distinctions between the roles of judges and administrative officers.

I am a member of the bars of the Commonwealth of Virginia, the D.C. Circuit, and the United States Supreme Court, among others. I am a past President of the American Law Deans Association, past Chair of the Section of Administrative Law and Regulatory Practice of the American Bar Association, past Chairman of the Federalist Society's Practice Group on Administrative Law and Regulation, past Chair of the Administrative

Law Section of the Association of American Law Schools, a former member of the ABA's House of Delegates, and a life member of the American Law Institute.

These comments draw on my experiences in these different capacities but reflect only my own judgments. They have not been screened by and are not endorsed by any organization with which I am or have been associated.

Background on Administrative Adjudication

Administrative adjudication is very important. The vast majority of federal administrative decisions are classified as adjudications by the Administrative Procedure Act (which provides the background, general legal framework for federal administrative procedures). Administrative adjudications are determinations of how broad rules, directives, or legal principles apply to specific individuals and entities; and they are made by a wide variety of government officials respecting an array of different statutes, contentions, and subjects.

Among the relatively formal types of administrative adjudications — in which there are more or less court-like hearings based on evidence taken and evaluated by an agency official — hearings generally are conducted by one of two sorts of specially designated administrative officers: administrative law judges (ALJs) or administrative judges (AJs). The United States government employs roughly 2,000 officials designated as administrative law judges and approximately 10,000 other officials designated as administrative judges (or equivalent titles).

Administrative law judges are selected by a process that requires candidates to be screened by the Office of Personnel Management (OPM), and they enjoy statutory protections that limit agency officials' authority to remove or discipline them for various reasons related to their performance. Administrative judges, in contrast, are hired by agency personnel and are more broadly subject to agency supervision and control. The great majority of ALJs (more than three-fourths) are employed by the Social Security Agency, while the great majority of AJs (more than 70 percent) are employed by the Commerce Department's Patent and Trademark Office.

Academic commentators, practitioners, and government officials have debated what the right procedures are for particular administrative adjudications, including the right role for adjudicating officials, the right degree of independence of those officials from policy-making officials, and the right amount of separation or integration of adjudicating officials and officials engaged in enforcement activity or other activities. This includes debates over the degree to which hiring should be delegated to (or substantially constrained by decisions of) officials outside the normal line of agency control. Aspects of these debates have been subject to study by the Administrative Conference periodically over the past 40 years and occasionally to challenges in court.

Lucia v. SEC — Constitutional Constraint on ALJ Hiring

The most recent, notable challenge to administrative adjudication was decided by the Supreme Court this past Term in *Lucia v. Securities and Exchange Commission*, an ap-

peal from a finding that Mr. Lucia had engaged in deceptive conduct that violated the Investment Advisers Act. Prior to the *Lucia* case (and including the SEC's hiring of the ALJ who heard the administrative proceeding at issue in *Lucia* and submitted an initial decision), the SEC hired ALJs by having its Chief ALJ select one of the three ALJ applicants determined by the Office of Personnel Management to be at the top of its ranking of ALJ candidates and then having that selection confirmed by the SEC's Office of Human Resources (presumably to assure only that the hiring did not contravene specific agency rules, for example rules respecting unlawful discrimination).

Lucia challenged the finding against him (first before the SEC and subsequently in court) on the ground that this process violated the "appointments clause" of the Constitution, Art. II, § 2, cl. 2. This clause states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" all "Officers of the United States" whose appointments are "established by Law" (apart from those, such as the President and Vice President, whose selection process is provided for separately in the Constitution); it then adds "but the Congress may by Law vest 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."

Traditionally, the Court has treated this clause as creating three categories of federal officials. First, *principal officers* of the United States must be appointed by the President and confirmed by the Senate. That includes ambassadors, heads of executive departments, Supreme Court justices and other federal judges appointed to lower courts created by Congress (the various circuits of the U.S. Court of Appeals and the U.S. district courts). Second, *inferior officers* may be appointed under the *excepting* part of the appointments clause by the President without Senate confirmation, by the Courts of Law, or by the Heads of Departments. Third, mere *employees* may be hired by lower-ranking officials. The clause has given rise to argument over identifying the dividing line between principal and inferior officers, over whether there is indeed a third "employee" category, and over what the dividing line would be between inferior officers and employees.

Lucia accepted the tripartite division of federal officials and decided that the dividing line between inferior officers and employees turned on two factors. To be an inferior officer, under *Lucia*, one must (1) have a continuing position established by law and (2) exercise significant authority under the law. Accepting much of what the Supreme Court had said in its earlier decision in *Freytag v. Commissioner of Internal Revenue* (decided in 1991), the Court in *Lucia* decided that an adjudicating official, like the ALJ in that case, could satisfy the two-part requirement for being an inferior officer without having final decisional authority. It concluded that the SEC's ALJs, like the officials (special trial judges) at issue in *Freytag*, are inferior officers. As such, they must be appointed by the Head of the Department for which they work, rather than by subordinate officials.[1] In that particular case, the appointment should have been made by the SEC Commissioners

[1] Although this is not, strictly speaking, what is required — for example, the President acting alone could make the appointment — but it is the most natural appointment process that would meet constitutional requirements. Argument about exactly what is required is more complicated but generally not of concern to the issues pertinent to this hearing.

(who collectively constitute the Head of that agency).

Although the *Lucia* decision, written by Justice Kagan, commanded a broad consensus, three separate opinions indicate potential avenues of dispute. Justice Thomas (joined by Justice Gorsuch) would not accept the construction of a category of employees that exercised continuing legal authority but whose responsibilities were not deemed sufficiently significant to rise to the "officer" category under the majority's approach. Justice Breyer (joined by Justices Ginsburg and Sotomayor) would favor an approach that gives more leeway to Congress to determine which officials exercise authority that requires appointment under the excepting part of the appointments clause and which should be treated as mere employees. Justice Sotomayor (joined by Justice Ginsburg) would require at a minimum that officials exercise final, binding decisional authority to constitute "officers."

After Lucia — ALJ Appointments

The *Lucia* decision should not be a cause for alarm. In a very important sense, it is an entirely predictable decision that confirms the most significant feature of ALJ-centric administrative adjudication.

The central premise of *Lucia* is that ALJ's exercise significant authority that is established by law. Every ALJ and every observer of administrative adjudication should agree to that premise. Because the appointments clause by its terms applies to *all* officers of the United States whose terms of appointment are not otherwise provided for in the Constitution — and because the term "officer of the United States" certainly was intended to cover everyone exercising legal authority apart from Congress, the President, and the Vice President — it follows fairly clearly that ALJs must be appointed under the terms of the appointments clause. That requires agency head appointments authorized by statute.

Lucia, of course, does not say that this is the requirement for *all* ALJs. The Court's decision only deals with the facts before it, those pertaining to the SEC's ALJs. But the logic of the decision does in fact apply to all ALJs as those positions are presently constituted (or, more accurately, all of the ALJs whose work assignments I know).

Appointment of ALJs, then must be done through a process that makes the agency head the appointing authority. As with most of what agency heads do, that does not require that the agency head perform all the acts — research into particular individuals' qualifications, ranking individuals to determine which is most qualified, interviews with the applicants, etc. — that might be useful to the ultimate act of appointment. Nor will courts probe the mind of an agency head to see what he, she, or they (where the agency is a multi-member organization with a collective "agency head") knew when making an appointment. But ultimate control over the appointment of each ALJ must rest in the agency head.

The President's July 10, 2018 Executive Order excepting ALJs from competitive service hiring rules permits agencies to adopt rules that comply with that command. Placing a position in the excepted service permits both control over hiring outside the standardized OPM processes and flexibility in pay and recruitment requirements that more fully

can align the person with the office. A very large number of positions — including a large number of professional positions — fall within the excepted service for just that reason.

Fairness, Efficiency, and Agency Control of Adjudications — Starting Points

The principal concerns after *Lucia* are not likely to be the increased impositions on agency heads' time and attention. Instead, the concerns will be with the implications of different selection methods for adjudications' *fairness* and *efficiency*. After all, the selling point for having ALJs was that they brought increased *efficiency* in being experts in the adjudication process (and, at least after a time, in the substance of the adjudications they oversaw) and that they brought increased *fairness* to administrative adjudications because of their separation from agency personnel whose jobs generated interests adverse to those of private litigants.

Before discussing those issues, it is important to understand the nature of *administrative* adjudications, because concepts such as fairness and efficiency require definition with respect to particular contexts. The first essential point to make in this regard is the difference between administrative adjudications and what almost all of us turn to as the template for understanding them.

Administrative adjudications naturally are analogized to *adjudications in court*. But judicial adjudications are critically different. Judicial adjudications at the federal level *only* take place under the auspices of Article III of the Constitution. The vesting clause of Article III, Art. III, § 1, cl. 1, declares: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The remainder of that section states that the judges of both the Supreme Court and the inferior courts established under Article III have life tenure (except for removal through impeachment) and irreducible pay. Art. III, § 1, cl. 2. These features are intended to assure that judges are insulated against political influence.

The subjects assigned to these courts and judges are set forth in the next section of Article III, which states that "The judicial Power shall extend to *all Cases, in Law and Equity*, arising under this Constitution, the Laws of the United States," or under treaties made pursuant to those laws, and to controversies involving the United States, two or more states, or citizens of different states (among other matters). Art. III, § 2, cl. 1. The Supreme Court has on several occasions insisted that only judges appointed pursuant to the appointments clause and having the specific protections of life tenure and irreducible pay can exercise the power to decide these matters *as an exercise of the federal judicial power*.

Adjudications that are not exercises of Article III power — of the *judicial* power of the United States — are exercises of other powers or of no federal power. For example, two private citizens who have a dispute that arises under the laws of the United States, that concerns rights created by those laws, could agree to private, binding arbitration of that dispute. Although the arbitration may be similar to a judicial proceeding and concern exactly the same legal issue, it is not an exercise of federal judicial power; the arbitrator's

appointment does not need to follow the same steps as the appointments clause of Article II would require, and the arbitrator does not need to have the same job protections as required of federal judges by Article III.

The same is true of adjudication that takes place as an adjunct to the exercise of powers that are vested by law in executive branch officials. Probably the best explanation of this is provided by Justice Scalia's dissent in *Mistretta v. United States* (a 1989 challenge to the constitutionality of the Sentencing Guidelines crafted by the United States Sentencing Commission). Justice Scalia explains that making rules to guide decisions is part of the natural *tool kit of administrators exercising executive power*, even though it looks similar to what the legislature does, and making decisions on individual matters based on resolution of disputed facts or on the specific application of rules to particular facts also is part of the natural tool kit of administrators exercising executive power, even though it looks similar to what courts do.

But in neither case is that activity the exercise of the power that looks similar, the legislative power (in the case of rule-making) or of the judicial power (in the case of adjudication).

The first of those powers is specifically committed to legislators selected in ways prescribed by the Constitution and using the law-making process prescribed by the Constitution.

The second of those powers is specifically committed to judges appointed under Article II's terms and given protections required by Article III. *Administrators* cannot be given authority to make decisions in constitutional cases and controversies; they *cannot exercise authority to compel acceptance of decisions* that look backward at conduct already undertaken or actions already performed and impose resolutions on them, apart from disposition of matters entirely within the discretion of the government.[2]

This means that what is needed for fairness and efficiency in *administrative adjudications* does not need to replicate what is required for courts. Administrative adjudicators do not need to have the same sorts of independence and insulation. A degree of independence and of insulation from policy-makers may be a good idea, but the goal should not be to make administrative adjudicators as close as possible to Article III judges.

Fairness, Efficiency, and Agency Control of Adjudications — Next Steps

For some types of administrative adjudication, efficiency is advanced by closer relationship between adjudicators and policy-makers. If adjudication is conceived not as a mechanism for neutral resolution of conflicts between agency and outsider but as a way of completing a task set for the agency under the framework of agency policy, separating

[2] A long line of court decisions distinguishes matters of public right from matters of private right, with administrative authorities having power (where directed by law) to make decisions on matters of public right (things like the terms for access to public lands and, traditionally, public benefits) but not on matters of private right. While decisions over the past 30 years have muddied the waters on the line between what matters can and what cannot be given to administrative adjudicators, the public right-private right division should be recognized as retaining importance to this division.

adjudicators from policy-makers may make it harder for adjudicators to gain a full understanding of agency policy and to apply agency policy correctly.

In other settings, the administrative adjudication seems more like a means of settling disagreements between an agency official and an outsider where there is no strong overriding agency policy interest. In these settings, an official pushing one side of the dispute might have no better understanding of agency policy than a neutral arbiter and the official's judgment might be biased against an outsider challenging the official's interpretation or application of policy. Think, for example, of a contest between an IRS auditor and a taxpayer, each of whom might have a strong background in the underlying legal rules but dramatically different goals in applying them. In those settings, a degree of separation of adjudicating officials from officials charged with enforcing the law — if not from officials charged with adopting rules to guide discretionary judgments under law — may advance both efficiency and fairness goals.

Nothing in the terms of the Supreme Court's decision in *Lucia* or in the President's Executive Order following *Lucia* directly constrains agencies from tailoring procedures (within the scope of an agency's specific legal mandate) to advance efficiency and fairness, either through greater integration of adjudicating officials with other agency officials or through greater separation and insulation of those officials.

Tailoring Adjudication Procedures and Assignments — A Cautionary Note

The use of the word "directly" in the preceding sentence recognizes a complicating factor that might indirectly constrain agencies. If officials are given broad authority over an adjudication, are separated from other agency personnel and insulated against control from other agency personnel, they may enjoy sufficient authority to move from being "*inferior Officers*" of the United States to being *principal officers*.

That dividing line has been at issue in some disputes over the legality of particular administrative assignments, including most notably in the dispute over the independent counsel's appointment and potential control from other officials, including through removal. Although the Supreme Court's decisions are not all in agreement on how to resolve the matter, a fairly clear test has now emerged that could put an expansive, insulated authority for adjudicators over the *principal* side of the divide.

The Supreme Court's general approval, in the 1989 decision in *Morrison v. Olson*, of a law granting broad power to the independent counsel and constraining presidential ability to instruct, control, or remove the independent counsel, should not be regarded as a statement of where the dividing line between principal and inferior officers would be located today. A strong majority of the Court (seven of the eight participating justices) determined that, notwithstanding the limitations on executive control — exercised directly by the President or by subordinates accountable to the President — the independent counsel was not a principal officer.

Justice Scalia, dissenting in *Morrison*, suggested that the absence of control was the essential attribute that made an official a principal officer. The Supreme Court adopted exactly that test eight years later in *Edmond v. United States*, in an opinion written by

Justice Scalia and joined in full by eight of the nine justices.

Even so, agencies have a range of options for more or less insulation of ALJs from other officials and more or less authority devolved to ALJs without turning them into principal officers. The exact degree of independence and of insulation and the specific mechanisms for review are matters that need to be addressed in the context of each particular agency and agency adjudication program — and doubtless will provide grounds for further study, consideration, and debate.

Conclusion

The status of ALJs after *Lucia v. SEC* should not be a matter of alarm. Administrative adjudication programs in general will continue to function as they did before. But the particular arrangements for ALJ appointment and the specific attributes of ALJ integration into their employing agencies will need attention in the months ahead.

Special attention should be paid to assuring that the appropriate steps are taken to have ALJs appointed consistent with constitutional commands and that the matters committed to ALJ decision are within the constitutionally limited scope of *administrative* adjudication. Concerns for fairness and efficiency in administrative adjudication can be accommodated within the constitutional framework laid down in *Lucia* and other cases.

I appreciate the opportunity to submit these remarks and would be happy to expand on any issue that interests the Committee.