

## GIVE GRANDMA HER DAY IN COURT: IN DEFENSE OF COMPETITIVE SELECTION OF ADMINISTRATIVE LAW JUDGES FOR THE SOCIAL SECURITY ADMINISTRATION

*Ryan Weitendorf*

*As the number of Americans filing for Social Security disability benefits has increased, so has the pressure on the Social Security Administration to resolve cases in an efficient manner. Unfortunately, the Social Security Administration has fallen behind, leaving Social Security disability applicants to suffer the consequences. This Note proposes several measures to alleviate the backlog problem while upholding judicial integrity: first, the Social Security Administration should reimplement competitive selection for administrative law judges, and second, the hiring requirements for Social Security administrative law judges should focus on relevant work experience rather than arbitrary conditions. While excepting administrative law judges from competitive selection increases the Social Security Administration's flexibility in hiring judges, competitive selection is a necessary safeguard for judicial independence. Competitive selection protects the administrative law judge selection process from improper political influence and avoids the separation of powers concerns. This Note argues that removing arbitrary prerequisites to administrative law judge hiring, such as minimum years of work experience or active bar membership, would allow the Social Security Administration to mitigate the backlog problem by hiring more administrative law judges. Instead of arbitrary criteria, the Social Security Administration should focus on relevant work product to ensure qualified administrative law judges are selected.*

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Ryan Weitendorf, Notes Editor 2019–2020, Member 2018–2019, *The Elder Law Journal*; J.D. 2020, University of Illinois, Urbana-Champaign; B.A. 2017, Political Science, Knox College.

## I. Introduction

The Social Security Administration is one of the most recognizable agencies in the United States because it provides benefits to roughly nine out of ten individuals age sixty-five and older.<sup>1</sup> The United States Supreme Court once called the Social Security Administration “probably the largest adjudicative agency in the Western world,” and yet, the agency is not immune from the contentious political atmosphere that is a staple in American politics, especially in recent times. The Social Security Administration, which has approximately 1900 administrative law judges (“ALJs”) who oversaw almost 700,000 cases last year, is now facing a major change in how disputes will be handled.<sup>2</sup>

The United States Supreme Court’s ruling in *Lucia v. SEC* in June 2018 and President Trump’s subsequent executive order shifts the hiring of Social Security ALJs from the competitive service and moves the system to one in which the Commissioner of the Social Security Administration can directly appoint ALJs.<sup>3</sup>

The change in the hiring process for ALJs has been met with an intense public outcry and has led to a rethinking of how the three branches of government are able to interact and change the administrative state. Legislation was introduced in Congress to annul Trump’s executive order.<sup>4</sup> This fundamental change in the selection of ALJs to the Social Security Administration could produce dire consequences to the faith that the American public has in the Social Security Administration and the administrative state as a whole. It could also lead to a shift, instituted by the Executive Branch, in how benefits are handed out to a wide range of American citizens. This shift disproportionately affects the elderly since elderly citizens relying on Supplemental Security In-

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1. *Fact Sheet*, SOC. SEC. ADMIN., <https://www.ssa.gov/news/press/factsheets/basicfact-alt.pdf> (last visited Sept. 23, 2019) [hereinafter *Fact Sheet*].

2. Joe Davidson, *Trump order risks ‘politicization’ of administrative, mostly Social Security, judiciary*, WASH. POST (July 13, 2018), [https://www.washingtonpost.com/news/powerpost/wp/2018/07/13/trump-order-risks-politicization-of-administrative-judiciary/?utm\\_term=.c04a358599f0](https://www.washingtonpost.com/news/powerpost/wp/2018/07/13/trump-order-risks-politicization-of-administrative-judiciary/?utm_term=.c04a358599f0).

3. *Lucia v. SEC*, 138 S.Ct. 2044 (2018); Exec. Order No. 13842, 83 Fed. Reg. 32753 (July 10, 2018).

4. Exec. Order No. 13842, 83 Fed. Reg. 32753 (July 10, 2018); Erich Wagner, *Bipartisan Bill Would Restore ALJs to Competitive Service*, GOV’T EXEC. (Aug. 1, 2019), <https://www.govexec.com/management/2019/08/bipartisan-bill-would-restore-administrative-law-judges-competitive-service/158884/>.

come or older Americans seeking disability benefits are faced with potential changes in how benefits are handled due to this new policy for hiring ALJs.<sup>5</sup>

This Note proposes that the selection of ALJs revert back into the competitive service to ensure the independence and impartiality of the administrative state. Part II of this Note will discuss the background of ALJ jurisprudence and provide relevant information into the Social Security Administration and the current backlog problem. Part II will examine the legal landscape leading up to *Lucia v. SEC* and explain President Trump's executive order excepting ALJs from competitive selection. Part III will analyze potential concerns with excepting ALJs including bias and separation of power concerns. Part IV will recommend a return to competitive selection. It will also recommend that the amount of experience needed to be a Social Security ALJ be altered to a focus on relevant past work product and for the elimination of the active bar requirement. These changes are necessary to alleviate the backlog problem.

The competitive selection of ALJs ensures fairness in a system that should not be shaken by radical change. Nevertheless, the selection requirements for ALJs in the Social Security Administration should not be as stringent as it is in the public's interest to decrease the backlog of cases that currently plagues the Social Security Administration.

## II. Background

### A. Social Security Administration Mechanics and How It Helps the Elderly

The Social Security Administration provides a crucial source of income for many elderly Americans and any changes to the Social Security Administration may impact the ability of elders to make ends meet.<sup>6</sup> Nine out of ten individuals age sixty-five or older receive Social Security benefits.<sup>7</sup> Also, approximately 89% of workers are protected

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5. Barbara A. Butrica et al., *The Changing Impact of Social Security on Retirement Income in the United States*, SOC. SEC. BULL. (2003/2004), <https://www.ssa.gov/policy/docs/ssb/v65n3/v65n3p1.html>.

6. *Fact Sheet*, *supra* note 1 (concerning a FAQ panel that explains the services that the Social Security Administration provides and the potential issues that the Social Security Administration might face in the future).

7. *Id.*

by Social Security benefits in the event of a severe and prolonged disability.<sup>8</sup> Social Security benefits represent approximately 33% of the income of the elderly.<sup>9</sup>

Many elderly Americans also rely on Supplemental Security Income to strengthen their financial position later in life. Supplemental Security Income pays “benefits to low-income people who are sixty-five or older; to adults who are disabled or blind; and to children who are disabled and blind.”<sup>10</sup> Supplemental Security Income provides a supplement for some people who already receive Social Security benefits but still have very low incomes.<sup>11</sup> More than one-third of Social Security Income beneficiaries are people who receive small Social Security benefits and still live below the poverty line.<sup>12</sup> Some seniors are ineligible for Supplemental Security Income at age sixty-five because they have other resources, however, they may become eligible in later years when those resources are drained from basic living expenses and health care.<sup>13</sup> ALJs handle the disputes from this program.<sup>14</sup>

About half of all Social Security benefits applicants are eventually allowed disability benefits.<sup>15</sup> Many Americans over the age of fifty rely on Social Security disability payments until they can request early Social Security benefits at age sixty-two, or Social Security retirement benefits at age sixty-five.<sup>16</sup> Once a person reaches age sixty-five, the Social

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8. *Id.*

9. *Id.*

10. See *Supplemental Security Income Home Page*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/> (last visited Sept. 23, 2019) [hereinafter *Supplemental Security Income Home Page*].

11. *Supplemental Security Income (SSI) Overview*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/text-over-ussi.htm> (last visited Sept. 23, 2019).

12. Kathleen Romig, *Social Security Lifts More Americans Above Poverty Than Any Other Program*, CTR. ON BUDGET AND POL’Y PRIORITIES, <https://www.cbpp.org/research/social-security/social-security-lifts-more-americans-above-poverty-than-any-other-program> (last visited Sept. 23, 2019).

13. *Supplemental Security Income (SSI) Eligibility Requirements*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/text-eligibility-ussi.htm> (last visited Sept. 23, 2019).

14. Form HA-501 Request For Hearing By ALJ, SOC. SEC. ADMIN., <https://www.ssa.gov/forms/ha-501.html> (last visited Sept. 23, 2019) (“If you do not agree with the reconsideration determination we made on your application for benefits, you may request a hearing before an [ALJ]. To request a hearing, you may use this form or write a letter.”).

15. *Policy Basics: Social Security Disability Insurance*, CTR. ON BUDGET AND POL’Y PRIORITIES, <https://www.cbpp.org/research/retirement-security/policy-basics-social-security-disability-insurance> (last visited Sept. 23, 2019) (“Ultimately, fewer than 4 in 10 applicants are awarded benefits....”).

16. Christy Bieber, *Social Security Disability: Everything You Need to Know*, THE MOTLEY FOOL, <https://www.fool.com/retirement/social-security-disability-what->

Security disability benefits automatically turn into retirement benefits.<sup>17</sup> The amount of Social Security disability benefits a person receives does not change once a person hits the age of sixty-five.<sup>18</sup>

The appeals process for individuals who have been denied Social Security benefits (for disability or Supplemental Security Income) occurs in four steps:<sup>19</sup> reconsideration (initial step); hearing by an ALJ; review by the Appeals Council; and federal court review (last option).<sup>20</sup> This can end up being a very expensive process for people trying to receive benefits. Attorneys may increase the likelihood of a person receiving Social Security benefits, but attorneys can be costly.<sup>21</sup> Individuals may not pursue all four steps due to the financial and emotional burden that the process creates.

To receive disability benefits, a person must meet the definition of “disabled” under the Social Security Act.<sup>22</sup> A person is disabled under the Act “if he or she can’t work due to a severe medical condition that has lasted, or is expected to last, at least one year or may result in the death of the individual.”<sup>23</sup> The person’s medical condition must prevent him or her from working, and it must prevent the person from being able to complete other work.<sup>24</sup>

Because the Social Security Act defines “disabled” so narrowly, Social Security disability beneficiaries are usually the most severely impaired in the country.<sup>25</sup> In fact, Social Security disability beneficiaries are “more than three times as likely to die in a year” than people who are also of the same age.<sup>26</sup> Among those who start receiving disability benefits at the “age of fifty-five, one in six men and one in eight women

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you-need-to-know.aspx (last visited Sept. 23, 2019); *The Faces and Facts of Disability, Facts*, SOC. SEC. ADMIN., <https://www.ssa.gov/disabilityfacts/facts.html> (last visited Sept. 23, 2019).

17. *Do Social Security Disability Benefits Switch to Retirement Benefits When You Turn 65*, DISABILITY BENEFITS HELP, <https://www.disability-benefits-help.org/blog/disability-benefits-switch-retirement-65> (last visited Sept. 23, 2019).

18. *Id.*

19. *The Appeals Process*, SOC. SEC. ADMIN., <https://www.ssa.gov/pubs/EN-05-10041.pdf> (last visited Sept. 23, 2019).

20. *Id.*

21. See Javier Meseguer, *Outcome Variation in the Social Security Disability Insurance Program: The Role of Primary Diagnoses*, 73 SOC. SEC. BULL. 39 (2013).

22. See *The Faces and Facts of Disability*, SOC. SEC. ADMIN., <https://www.ssa.gov/disabilityfacts/facts.html> (last visited Sept. 23, 2019).

23. *Id.*

24. See *id.*

25. See *id.*

26. *Id.*

die within five years of the onset of their disabilities."<sup>27</sup> ALJs hear the appeals of these disability cases and determine if a person shall receive benefits.<sup>28</sup> Disability cases are the most common issue that ALJs of the Social Security Administration have to decide.<sup>29</sup>

ALJs who work for the Social Security Administration make decisions on Social Security disability claims at the hearings level.<sup>30</sup> The hearing level is the second step in the appeals process. These ALJs work at the Office of Disability Adjudication and Review ("ODAR") locations (formerly the Office of Hearings and Appeals).<sup>31</sup> States have many ODAR offices with a different number of judges assigned to each.<sup>32</sup>

### **B. Social Security Administration and the Backlog Problem**

The Social Security Administration experiences difficulty keeping up with the sheer number of claims that it must deal with on a yearly basis.<sup>33</sup> Over 900,000 people have been waiting more than 600 days for an ALJ to rule on their claim for Social Security benefits.<sup>34</sup> In 2017, this resulted in more than 10,000 people dying while waiting for a ruling on

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27. *Id.*

28. *See id.*

29. *See id.*

30. *See Disability Judges: ALJ Case Statistics*, DISABILITY JUDGES, <https://www.disabilityjudges.com/> (last visited Sept. 23, 2019).

31. *See id.*

32. *See id.*

33. *See* Carolyn Puckett, *Administrating Social Security: Challenges Yesterday and Today*, 70 SOC. SEC. BULL. 3 (2010).

34. Press Release, Nat'l Org. of Soc. Sec. Claimants' Representative, Statement of NOSSCR Executive Director Barbara Silverstone Concerning Executive Order Changing Hiring of ALJs (July 12, 2018), <https://nossr.org/statement-of-nossr-executive-director-barbara-silverstone-concerning-executive-order-changing-hiring-of-administrative-law-judges/> (explaining the issue that the Social Security Administration faces with the backlog problem).

their adjudication.<sup>35</sup> The line is quickly approaching one million applications long.<sup>36</sup> The length of time it took potential Social Security recipients to get their cases decided increased from 353 in 2012 to 605 days in 2017.<sup>37</sup>

Researchers found that staff shortages were most commonly cited as the cause of the long wait times.<sup>38</sup> Other factors included low morale and camaraderie because teleworking can wear employees down.<sup>39</sup> Managers of the Social Security Administration said, “Low pay scale and challenging workloads made it difficult to retain support staff, whose responsibilities range from scheduling hearings to screening cases to determine which ones are most urgent.”<sup>40</sup>

Part of the exacerbation of the backlog problem is a direct result of the lack of funding for the Social Security Administration.<sup>41</sup> From 2010 to 2018, Congress reduced the agency’s budget by 9%; at the same time, the number of people receiving benefits rose 17%.<sup>42</sup> However, Congress approved an increase in the agency’s budget in 2019.<sup>43</sup> For 2019, the Social Security Administration’s budget was around \$12.8 billion, which is an increase from \$12.6 billion in 2018.<sup>44</sup> Social Security Administration field office closures is the likely culprit for why funding has been increased.<sup>45</sup> Since 2010, the Social Security Administration has closed more than sixty field offices nationwide and laid off more than 3500 field office employees.<sup>46</sup> This increase in funding could allow the

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35. *Id.*

36. Lisa Rein, *The biggest government backlog is getting worse, watchdog says, but Social Security has a plan*, WASH. POST (Oct. 19, 2015), [https://www.washingtonpost.com/news/federal-eye/wp/2015/10/19/the-biggest-government-backlog-is-getting-worse-watchdog-says-but-social-security-has-a-plan/?noredirect=on&utm\\_term=.120fe9f91a09](https://www.washingtonpost.com/news/federal-eye/wp/2015/10/19/the-biggest-government-backlog-is-getting-worse-watchdog-says-but-social-security-has-a-plan/?noredirect=on&utm_term=.120fe9f91a09) [hereinafter Rein].

37. Kenneth Terrell, *Social Security Probed For Disability Case Delays*, AARP (May 24, 2018), <https://www.aarp.org/retirement/social-security/info-2018/inspector-general-reports-backlog.html> [hereinafter Terrell].

38. *Id.*

39. *Id.*

40. *See id.*

41. Mark Miller, *Have a Social Security Question? Please Hold*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/business/social-security-service-backlog-delays.html> [hereinafter Miller].

42. *Id.*

43. *Id.*

44. *Fiscal Year 2020 Budget Overview*, SOC. SEC. ADMIN., [https://www.ssa.gov/budget/FY20Files/2020BO\\_1.pdf](https://www.ssa.gov/budget/FY20Files/2020BO_1.pdf) (last visited Oct. 18, 2019).

45. Max Richtman, *Social Security Administration should stop closing field offices*, THE HILL (May 4, 2018), <https://thehill.com/opinion/white-house/386240-social-security-administration-should-stop-closing-field-offices>.

46. *Id.*

Social Security Administration some needed flexibility in hiring more ALJs and allow for streamlining the hearings process through increased use of technology.

The Social Security Administration's plan to fix the backlog problem revolves around the ability to hire more ALJs and to increase efficiency throughout the Agency.<sup>47</sup> The Social Security Administration additionally plans on incorporating new video technology that allows judges in remote locations to decide issues from outside the office.<sup>48</sup> Now, most ALJs telework; unless there is a hearing or a reason to go into the office, the judge usually works from the comfort of their own home, which allows for a more convenient and efficient way of deciding issues.<sup>49</sup>

### C. Legal Authority for ALJs

ALJs are responsible for resolving disputes in the Social Security Administration.<sup>50</sup> Interestingly, the United States Constitution does not mention agencies at all.<sup>51</sup> This has not stopped agencies from becoming an integral part of the American political fabric.<sup>52</sup> Professor Erwin Chemerinsky has noted that "in many ways [agencies] are in tension with basic constitutional principles."<sup>53</sup> Agencies can make rules that have the force of law, and many scholars argue that this conflicts with the basic separation-of-powers notion that "Congress alone should ultimately possess."<sup>54</sup> The Administrative Procedure Act is the strongest

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47. *Id.*

48. Hon. Susan L. Biro et al., *Work in Their Own Words: ALJs*, FED. LAW. MAG., (May 2015), [http://www.fedbar.org/Resources\\_1/Federal-Lawyer-Magazine/2015/May/Work-in-Their-Own-Words-Administrative-Law-Judges.aspx?FT=.pdf](http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2015/May/Work-in-Their-Own-Words-Administrative-Law-Judges.aspx?FT=.pdf) [hereinafter Biro et al.] ("All of our files are electronic, which makes telework incredibly convenient and efficient, saving me two-plus hours of a commute each day.")

49. *Id.*

50. Mitch Wertlieb, *Breaking Down The Change In How Federal ALJs Are Chosen*, VT. PUB. RADIO (July 17, 2018), <http://digital.vpr.net/post/breaking-down-change-how-federal-administrative-law-judges-are-chosen#stream/0> [hereinafter Wertlieb] (explaining how ALJs are chosen and the impacts that can have on their decisions).

51. Donald S. Dobkin, *The Rise of the Administrative State: A Prescription for Lawlessness*, 17 SPG KAN. J. L. & PUB. POL'Y 362, 363 (2008) [hereinafter Dobkin].

52. U.S. CONST. art. II, § 2; Dobkin, *supra* note 51.

53. Dobkin, *supra* note 51.

54. *Id.*

statutory source for agencies in the United States, which includes the Social Security Administration.<sup>55</sup>

The Administrative Procedure Act of 1946 established the way in which administrative agencies of the United States propose and establish regulations.<sup>56</sup> The power and formation of the ALJ position were crafted through this statute.<sup>57</sup> Each agency “shall appoint as many [ALJs] as are necessary for proceedings which are required to complete adjudications.”<sup>58</sup> As shown above, the Social Security Administration has routinely failed to meet this requirement.<sup>59</sup>

Despite large numbers of ALJs and enormous caseloads, which are substantially larger than Article III courts (federal district courts had only about 375,000 civil and criminal felony case filings in 2015),<sup>60</sup> the power of ALJs has long been understated.<sup>61</sup> Most people are oblivious to ALJs’ existence, since ALJs work in the murky background of agency rulemaking. The powers of the ALJ are fundamentally similar to the powers of the Article III judge.<sup>62</sup> In *Butz v. Economou*, the Supreme Court defined an ALJ’s powers as “functionally comparable” to that of an Article III judge.<sup>63</sup> ALJs’ powers are generally comparable to a trial judge: “[h]e may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions.”<sup>64</sup>

More importantly, the process of agency adjudication is currently structured to assure that the ALJ “exercises his independent judgment on the evidence before him, free from pressures by the parties or other

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55. See generally Jeffrey S. Lubbers, *Federal ALJs: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 110–11 (1981) (explaining how the ALJ position did not exist before the APA).

56. 5 U.S.C. § 552 (2018).

57. See generally *id.*

58. *Id.* § 3105.

59. See generally Terrell, *supra* note 37.

60. Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1648 (2016) [hereinafter *Against Administrative Judges*] (regarding the increased caseloads that ALJs have to deal with).

61. *Id.* at 1652.

62. *Butz v. Economou*, 438 U.S. 478, 513 (1978); DUTY TO FULLY AND FAIRLY DEVELOP RECORD, 4 SOC. SEC. LAW & PRAC. § 52:23 (2018); *Hearing Office Chief ALJ, ALJ, and Hearing Office Staff Responsibilities*, SOC. SEC. ADMIN., [https://www.ssa.gov/OP\\_Home/hallex/I-02/I-2-0-5.html](https://www.ssa.gov/OP_Home/hallex/I-02/I-2-0-5.html) (last visited Sept. 23, 2019) (“When a case is assigned to an [ALJ] for a hearing and decision, the [ALJ] is responsible for all actions necessary to process the case. An [ALJ]’s principal responsibilities are to hold full and fair hearings and to issue legally sufficient and defensible decisions.”).

63. *Economou*, 438 U.S. at 513.

64. *Id.*

officials within the agency.”<sup>65</sup> Aside from adjudicating factual disputes, ALJs also have the ability to change social policy in the country by interpreting statutes and agency regulations.<sup>66</sup> Even the title has changed throughout the years: it evolved from “examiners,” to “hearing examiners,” to “administrative law judges.”<sup>67</sup>

Since establishing fair and competent hearing procedures is regarded as a vital part of the adjudicatory hearing, the Administrative Procedure Act (“The Act”) contains provisions designed to establish the independence of ALJs.<sup>68</sup> For example, the Act explains that judges “[m]ay not perform duties inconsistent with their duties as [ALJs].”<sup>69</sup> When conducting a hearing under § 5 of the Act, an ALJ is “not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency.”<sup>70</sup> Nor may an ALJ consult “any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate.”<sup>71</sup> ALJs can only be removed “for cause” and ALJs are entitled to a hearing at the Merit Systems Protection Board before they can be removed from their position.<sup>72</sup> Additionally, ALJs have protection from performance reviews.<sup>73</sup> They are exempt from the Civil Service Reform Act’s performance appraisal requirements, which apply to almost all federal employees.<sup>74</sup> As a result of this painstaking attention to independence, ALJs’ decisions are given much deference in federal courts.<sup>75</sup>

*Butz* also held that persons “performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts.”<sup>76</sup> The same rule has been applied

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65. *Id.*

66. *Against Administrative Judges*, *supra* note 60, at 1655.

67. Jeffrey S. Lubbers, *Federal ALJs: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 110 n.8 (1981); *see also* K.G. Jan Pillai, *Rethinking Judicial Immunity for the Twenty-First Century*, 39 HOW. L.J. 95, 123 (1995).

68. *Economou*, 438 U.S. at 514.

69. *Id.*

70. *Id.*

71. *Id.*

72. 5 U.S.C. § 7521 (2018).

73. *Against Administrative Judges*, *supra* note 60, at 1658.

74. *Id.*

75. *Id.*

76. *Economou*, 438 U.S. at 513; *Against Administrative Judges*, *supra* note 60, at 1658.

to the state administrative judiciary.<sup>77</sup> Consequentially, ALJs have significant protections from any outside party that may try to exert their influence.

#### D. Appointment of ALJs

The United States Constitution is largely silent about the appointment of ALJs, except for one sentence:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: 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.<sup>78</sup>

The Constitution lays out the procedures that shall be followed when a person is appointed as a United States official.<sup>79</sup> Whether an ALJ is an officer of the United States under the Appointment Clause has been subject to intense debate by the Supreme Court throughout the years.<sup>80</sup> A war has been fought between the branches of the federal government to determine the power of appointment to agencies and departments such as the Social Security Administration.<sup>81</sup>

#### E. Requirements to Be an ALJ

Before *Lucia v. SEC* and President Trump's Executive Order changed the way ALJs are appointed, a potential applicant had to meet the experience requirements and pass the Office of Personnel Management ("OPM") ALJ competitive examination to qualify for an ALJ position.<sup>82</sup> Applicants had to be licensed and authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth

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77. *Id.*

78. U.S. CONST. art. II, § 2.

79. *Id.*

80. *Lucia v. SEC*, 138 S.Ct. 2044, 2049 (2018).

81. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 643 (1984) [http://heinonline.org/HOL/Page?handle=hein.journals/clr84&div=29&g\\_sent=1&casa\\_token=&collection=journals](http://heinonline.org/HOL/Page?handle=hein.journals/clr84&div=29&g_sent=1&casa_token=&collection=journals).

82. *Qualification Standard For ALJ Positions*, OFFICE OF PERSONNEL MANAGEMENT, <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/> (last visited Sept. 23, 2019).

of Puerto Rico, or any territorial court established under the United States Constitution.<sup>83</sup>

A “full seven years of experience as a licensed attorney preparing for, participating in, and/or reviewing formal hearings or trials involving litigation and/or administrative law at the Federal, State, or local level” was required of ALJs.<sup>84</sup> Applicants were required to pass an examination to demonstrate the requisite competencies, knowledge, and skills essential to the work of an ALJ.<sup>85</sup> The examination had a written and an oral component.<sup>86</sup> The written component consisted of a Situational Judgment Test, a Writing Sample, and an Experience Assessment.<sup>87</sup>

Based on their experiences, examination scores, and veteran statuses, the highest-scoring candidates for new ALJs were placed on a list.<sup>88</sup> Agencies, under what was known as the “Rule of Three,” could then select from the three highest-ranking candidates.<sup>89</sup>

Agencies have long sought to avoid the Rule of Three.<sup>90</sup> They instead desired a process based on “selective certification.”<sup>91</sup> Selective certification permits an agency, “upon a showing of necessity and with the prior approval of OPM, . . . to appoint specially certified eligible [candidates] without regard to their ranking in relation to other eligible [candidates] . . . who lack the special certification.”<sup>92</sup> Selective certification is generally justified by the need for ALJs with technical knowledge and experience.<sup>93</sup> The most prevalent issue with selective certification is that it allows agencies to hire ALJs with a more “pro-

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83. *Id.*

84. *Id.*

85. *Id.*

86. *ALJ Examination*, OFFICE OF PERSONNEL MANAGEMENT, [https://staffing.opm.gov/pdf/2b\\_ALJ2017\\_847661\\_How\\_You\\_Will\\_Be\\_Evaluated.pdf](https://staffing.opm.gov/pdf/2b_ALJ2017_847661_How_You_Will_Be_Evaluated.pdf) (last visited Sept. 23, 2019).

87. *Id.*

88. Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 804 (2013) [hereinafter Barnett].

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

enforcement attitude.”<sup>94</sup> The OPM ended selective certification and replaced it with the Rule of Three.<sup>95</sup> Much to ALJs’ concern, certain agencies have recently sought to obtain waivers from the OPM to engage in selective certification once again.<sup>96</sup>

Despite the OPM’s rejection of selective certification, ALJs in the past have been displeased with the OPM.<sup>97</sup> In a 2008 report to President-elect Obama, the Federal Administrative Law Judges Conference argued that the OPM should be divested of its authority to appoint and review ALJs.<sup>98</sup> The ALJs complained that the OPM eliminated the requirement for ALJ candidates to have litigation experience, altered the exam schedule in a manner that made it “difficult for private sector attorneys to apply,” and sought to “reward [ALJs] based on an agency’s political goals.”<sup>99</sup> Ultimately, the ALJs reported that “the OPM . . . has sought to undermine ALJ independence and downgrade ALJ level of experience and competence.”<sup>100</sup> With the elimination of the OPM supervision by President Trump, however, ALJs have become outspoken in their defense of the OPM.<sup>101</sup>

#### F. *Lucia v. SEC*

The entire landscape changed for ALJs when *Lucia v. SEC* was decided in June 2018. In 2012, Ray Lucia ran a retirement investment strategy called “Buckets of Money” through seminars that he had given throughout the years.<sup>102</sup> The Securities Exchange Commission (“SEC”) believed Lucia was offering misleading information and charged Lucia under the Investment Advisers Act of 1940.<sup>103</sup> SEC ALJ Cameron Elliot was assigned the case and ruled against Lucia, fining him \$300,000 and barring him for life from participating in the investment industry.<sup>104</sup> Lu-

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94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 806.

98. *Id.*

99. *Id.*

100. *Id.*

101. Debra Cassens Weiss, *Trump Tosses the Process for ALJs, Gives Agency Chiefs Selection Power*, ABA JOURNAL (July 11, 2018, 10:58 AM), [http://www.abajournal.com/news/article/trump\\_tosses\\_hiring\\_process\\_for\\_administrative\\_law\\_judges\\_gives\\_agency\\_chie](http://www.abajournal.com/news/article/trump_tosses_hiring_process_for_administrative_law_judges_gives_agency_chie).

102. *Lucia v. SEC*, 138 S.Ct. 2044, 2049 (2018).

103. *Id.*

104. *Id.*

cia argued the appointment of Cameron Elliot as an ALJ was unconstitutional under the Appointment Clause of the United States Constitution.<sup>105</sup> The Commissioners of the SEC, who are officers under the Appointment Clause, did not individually appoint Elliot to his position and instead delegated it to other employees within the SEC.<sup>106</sup> Scholars were concerned that a Supreme Court ruling that establishes an ALJ as an officer under the Appointment Clause would invite scrutiny of the OPM and allow the President to appoint ALJs directly, effectively bypassing the OPM.

In a 7–2 decision on June 21, 2018, the Court affirmed Lucia’s statement that ALJs are officers of the United States since they are given judicial power in the form of adjudication.<sup>107</sup> Thus, ALJs must be appointed by the President or a delegated officer under the Appointment Clause of the Constitution.<sup>108</sup> The Court ruled that Lucia was due a new hearing on his issue before a properly appointed officer from the SEC.<sup>109</sup>

In a dissenting opinion, Justice Breyer offered a fiery rebuke to the majority.<sup>110</sup> Justice Breyer stated that securing the independence of ALJs is a significant purpose of the Administrative Procedure Act.<sup>111</sup> Applying this ruling to ALJs “would risk transforming [ALJs] from independent adjudicators into *dependent decisionmakers*.”<sup>112</sup> As Justice Breyer stated, this holding threatens to change the “nature of our merit-based civil service as it has existed from the time of President Chester Alan Arthur.”<sup>113</sup>

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105. *Id.*

106. *Id.*

107. *Id.* at 2056.

108. *Id.* at 2055.

109. *Id.* at 2048.

110. *Id.* at 2058 (Breyer, J., dissenting in part and concurring in part); Kirk McGill & Ben McGill, *Lucia v. SEC: Justice Breyer Warns of a Dramatic Expansion of The President’s Control Over The Federal Civil Service*, 96 DENV. L. REV. 91, 108 (2018).

111. *Lucia*, 138 S.Ct. at 2058 (Breyer, J., dissenting in part and concurring in part).

112. *Id.*

113. *Id.*

### G. President Trump Acts

Shortly after *Lucia v. SEC* was decided, President Trump signed an Executive Order stating that “conditions of good administration make necessary an exception to the competitive hiring rules and examinations for the position of [ALJ].”<sup>114</sup> The Executive Order stated that “these conditions include the need to provide agency heads with additional flexibility to assess prospective appointees without the limitations imposed by competitive examination and competitive service selection procedures.”<sup>115</sup> “Placing the position of [ALJ] in the excepted service will mitigate concerns about undue limitations on the selection of [ALJs], reduce the likelihood of successful Appointments Clause challenges, and forestall litigation in which such concerns have been or might be raised.”<sup>116</sup> The Executive Order did not change the bar requirement from the OPM standards.<sup>117</sup> The Executive Order ended the OPM process in selecting future ALJs.

The Executive Order was followed by a massive outcry from people on both sides of the issue.<sup>118</sup> Articles from newspapers across the country pointed out the potential negative effects that this executive order could cause to the administrative state.<sup>119</sup> Some said the Executive Order would help the Social Security Administration become more ef-

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114. EXECUTIVE ORDER – EXCEPTING ALJS FROM THE COMPETITIVE SERVICE, THE OFFICE OF PERSONNEL MANAGEMENT, July 10, 2018, <https://chcoc.gov/content/executive-order—excepting-administrative-law-judges-competitive-service> [hereinafter OPM Memo] (explaining the reasoning behind President Trump’s decision to take ALJs out of the selective appointment process).

115. *Id.*

116. *Id.*

117. *Id.* (“[T]he requirement that, at the time of application and any new appointment, the individual, other than an incumbent ALJ, must possess a professional license to practice law and be authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the United States Constitution.”).

118. Eric Yoder, *Trump moves to shield ALJ decisions in wake of high court ruling*, WASH. POST (July 10, 2018), [https://www.washingtonpost.com/news/powerpost/wp/2018/07/10/trump-moves-to-shield-administrative-law-judge-decisions-in-wake-of-high-court-ruling/?utm\\_term=.91244a386a04](https://www.washingtonpost.com/news/powerpost/wp/2018/07/10/trump-moves-to-shield-administrative-law-judge-decisions-in-wake-of-high-court-ruling/?utm_term=.91244a386a04).

119. *Id.*; L.A. Times Editorial Board, *Trump just politicized the entire field of federal administrative law*, L.A. TIMES (July 20, 2018), <https://www.latimes.com/opinion/editorials/la-ed-trump-judges-20180720-story.html>; see also Alison Frankel, *As Trump claims power to pick federal agency judges, skeptics fear court-packing*, REUTERS (July 11, 2018), <https://www.reuters.com/article/us-otc-alj-idUSKBN1K12YA>.

ficient, while others voiced concerns that it would lead to the politicization of Social Security Benefits.<sup>120</sup> In September 2018, Senator Maria Cantwell and Senator Susan Collins introduced a bill that would restore ALJs to the competitive service and under the auspices of the OPM.<sup>121</sup> Interestingly, the two senators belonged to opposing parties.<sup>122</sup> The bill, S.3387, stated that ALJs shall be appointed by the head of an agency from a list of eligible candidates provided by the OPM or based upon the qualifications of the individual as determined by the OPM.<sup>123</sup> After Congress failed to act on S.3387, Senators Cantwell and Collins reintroduced the bill (now called S.2348) in July 2019.<sup>124</sup>

After President Trump passed his Executive Order excepting ALJs from the competitive service, the OPM published a memorandum that established their new protocol.<sup>125</sup> The OPM said that incumbent ALJs will remain in a competitive service as long as the judge remains in their current position.<sup>126</sup> ALJs appointed to positions in the excepted service will be covered by the agency's excepted service hiring policies.<sup>127</sup>

The OPM also stated that OPM's regulations continue to govern some aspects of ALJ employment, including those related to reassignments,<sup>128</sup> intra-agency details,<sup>129</sup> interagency loans,<sup>130</sup> senior ALJs,<sup>131</sup> and

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120. Press Release, Nat'l Org. of Soc. Sec. Claimants' Representative, Statement of NOSSCR Executive Director Barbara Silverstone Concerning Executive Order Changing Hiring of ALJs (July 12, 2018), <https://nossr.org/statement-of-nossr-executive-director-barbara-silverstone-concerning-executive-order-changing-hiring-of-administrative-law-judges/> (explaining the issue that the Social Security Administration faces with the backlog problem).

121. Jessie Bur, *Bipartisan bill would counter ALJ executive order*, FED. TIMES, <https://www.federaltimes.com/federal-oversight/congress/2018/09/04/bipartisan-bill-would-counter-administrative-law-judge-executive-order/> (last visited Sept. 23, 2019) [hereinafter Bur].

122. *Id.*

123. S.3387, 115th Cong. (2018).

124. Erich Wagner, *Bipartisan Bill Would Restore ALJs to Competitive Service*, GOV'T EXECUTIVE (Aug. 1, 2019), <https://www.govexec.com/management/2019/08/bipartisan-bill-would-restore-administrative-law-judges-competitive-service/158884/>.

125. See OPM Memo, *supra* note 114.

126. *Id.*

127. *Id.*

128. 5 C.F.R. § 930.204(f) (2019).

129. *Id.* § 930.207.

130. *Id.* § 930.208.

131. *Id.* § 930.209.

reductions in force.<sup>132</sup> The bar requirement is kept in full force, and the OPM announced the closing of the ALJ register.<sup>133</sup>

### III. Analysis

Competitive selection of ALJs provides many protections to the integrity of the Social Security Administration. Under the old competitive selection criteria, having experienced ALJs is not a concern. It also allows for qualified judicial independence for ALJs, as expressed in the goals set forth in the Administrative Procedure Act.<sup>134</sup> The competitive selection of ALJs largely eliminated public uneasiness surrounding potential ALJ bias and was justified under separation-of-powers principles. Yet, President Trump's Executive Order could have beneficial outcomes as it grants agencies much needed flexibility in being able to hire an adequate number of ALJs to meet the agencies' needs.

#### A. Bias Concerns

Social Security may experience a radical change caused by changes to how ALJs are selected. Competitive selection can provide greater certainty to the impartiality of ALJs. Judges with particular views on Social Security might be the only ones selected, which could lead to either more or less claims being awarded. Of course, this would have a direct effect on elderly Americans as they might see their benefits be ruled against by an ALJ who believes the Social Security Administration's goal should be a reduction in the giving out of benefits.

Bias has always seemed to be a problem with federal agencies and has led to some egregious situations.<sup>135</sup> For example, The New York Times and The Wall Street Journal reported that the "Securities and Exchange Commission wins much more frequently, sometimes even 100% of the time in a given year, in its inhouse enforcement proceedings than when the dispute is handled in an outside court."<sup>136</sup> This calls into question whether ALJs face undue pressure from agency heads to always side with the agency they represent.<sup>137</sup>

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132. *Id.* § 930.210.

133. *Id.*

134. 5 U.S.C. § 552 (2016).

135. See Jason D. Vendel, *General Bias and ALJs: Is There a Remedy for Social Security Claimants?*, 90 CORNELL L. REV. 769 (2005).

136. *Against Administrative Judges*, *supra* note 60, at 1654.

137. *Id.*

The Social Security Administration has also faced publicized cases involving unfair bias toward people applying for Social Security.<sup>138</sup> In the early 2000s, thousands of people's disability benefits claims were improperly denied by ALJs in New York in a pattern of "repeated, glaring, and often intentional legal errors."<sup>139</sup> This resulted in *Padro v. Colvin*, a case against the Social Security Administration for failing to provide full and fair hearings.<sup>140</sup> The lawsuit alleged that ALJs in the Social Security Administration's Queens hearing office were biased against potential Social Security disability benefit claimants.<sup>141</sup> This culminated in a publicized settlement agreement in which the Social Security Administration ordered new hearings for the plaintiffs.<sup>142</sup>

The solutions available to stop Social Security Administration ALJs from entirely exhibiting bias are not all attractive or even realistic. One solution would be to eliminate all administrative proceedings and have all cases and complaints go directly to federal district courts.<sup>143</sup> Another potential solution would be to allow claimants the ability to choose to go to an administrative proceeding or federal district court.<sup>144</sup> These solutions may lead to catastrophic consequences because they

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138. Emilia Sicilia, *Combating Biased Adjudication in Claims for Social Security Disability Benefits*, CLEARINGHOUSE COMMUNITY (May 2014), <http://povertylaw.org/clearinghouse/stories/sicilia> (regarding the current policy the Social Security Administration has in place to combat bias).

139. *Id.*

140. *Id.*

141. *Id.*

142. Press Release, Gibson Dunn, *Historic Class Action Settlement Provides New Hearings and Protections to Thousands of Disabled New Yorkers Wrongly Denied Soc. Sec. Benefits* (Jan. 14, 2013), <http://www.gibsondunn.com/news/Pages/HistoricClassActionSettlementProvidesNewHearingsandProtections.aspx> ("[L]awyers for the Urban Justice Center's Mental Health Project and the international law firm Gibson, Dunn & Crutcher reached a major settlement of a class action lawsuit brought against the Social Security Administration based on systematic bias against disabled claimants. Under the settlement, approximately 4000 New Yorkers denied Social Security disability benefits in Queens will be entitled to receive new hearings. It also includes measures to protect due process rights and ensure the provision of fair and full hearings in future claims. The settlement is the largest of its kind and provides unprecedented relief.").

143. Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 *FORDHAM L. REV.* 1143, 1153–54 (2016) (analyzing the feasibility of allowing this solution as it would inundate the courts and lead to even longer delays).

144. Jean Eaglesham, *SEC Faces "Crisis of Confidence" Over In-House Court, Ex-Official Says*, *WALL ST. J.* (Dec. 2, 2015, 3:45 PM), <http://www.wsj.com/articles/sec-faces-crisis-of-confidence-over-in-house-court-ex-official-says-1449089157>.

would flood the court system and create delays that will only increase the backlog problem.

There are mechanisms in place to combat bias concerns in federal agencies. All agencies are subject to audits by the Office of the Inspector General.<sup>145</sup> The Office of the Inspector General routinely audits ALJs' training at the Office of Disability Adjudication and Review to check up on the procedures that the Social Security Administration has in place to ensure that the judges are being objective.<sup>146</sup> All new ALJs are assigned a mentor to teach them how to rule fairly.

Moreover, the Social Security Administration has a procedure in place to address bias concerns. The Social Security Administration's procedure was created by a rule that "(1) established an Appeals Council to review for unfairness, prejudice, partiality, or bias in ALJ decisions, (2) allowed ODAR Division Quality Service to assess complaints regarding ALJ conduct from non-parties present at the hearings, and (3) permitted parties to file discrimination complaints."<sup>147</sup> As seen in the SEC, an ALJ's bias is a constant issue regardless of the method of selecting judges.<sup>148</sup> The Social Security Administration has a procedure in place that allows potentially aggrieved parties to seek recourse if they believe that this has occurred. As a result, the Social Security Administration is at the forefront of stopping bias, especially compared to other agencies.<sup>149</sup> Despite these mechanisms, discrimination claims can

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145. OFF. OF THE INSPECTOR GEN., AUDIT REPORT A-12-11-11126, *Training of New Administrative Judges at the Office of Disability Adjudication and Review* (Oct. 2011), <https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-11-11126.pdf>.

146. *Id.* ("In collaboration with the Hearing Office Chief ALJ, the mentor plays an important role in the new [ALJ's] training and development. In partnership with the hearing office management team, the following activities are conducted to every extent possible.").

147. SSR 13-1p, 78 Fed. Reg. 6168 (Jan. 29, 2013).

148. Lucille Gauthier, Comment, *Insider Trading: The Problem with the SEC's In-House ALJs*, 67 EMORY L.J. 123, 127 (2017) ("This Comment argues that SEC ALJs are still biased, despite a neutral hiring process. This Comment further argues that this systemic bias should be removed by restructuring the ALJ program to function as a neutral pool of available ALJs employed by the Office of Personnel Management (OPM) instead of by particular agencies.").

149. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM, GN 03103.300, COMPLAINTS OF ALLEGED BIAS OR MISCONDUCT BY ALJS (2017), <https://secure.ssa.gov/apps10/poms.nsf/lrx/0203103300> ("SSA is committed to providing every claimant and his/her representative fair and unbiased treatment in the handling of all claims by its Office of Hearings Operations (OHO) hearing offices, and ensuring that they are afforded timely opportunities to raise any complaints that they may have about alleged bias or misconduct by ALJs, and to have their complaints investigated.").

lengthen the time it takes for a claimant to receive the financial help they need and bring unwanted public attention to a federal agency.

One of the main reasons for federal legislation to reinstate the competitive selection of ALJs is centered around bias and the politicization of the agency. Senator Collins explained the reasoning behind her proposed legislation, stating that ALJs are tasked with “making important decisions every day; they are intensely vetted and put through a competitive application process before being hired.”<sup>150</sup> Senator Cantwell also stated that the “bipartisan legislation would ensure that [ALJs] remain well qualified and impartial, while this crucial process remains nonpartisan and fair.”<sup>151</sup> If the government politicizes agencies, then they could lose their impartiality and ability to use their technical expertise.<sup>152</sup> Special interests could potentially work their way into ALJs’ decisions.<sup>153</sup>

## B. Separation of Powers Concern

The competitive selection of ALJs could also violate separation of powers principles.<sup>154</sup> A central constitutional principle is that no particular branch of government should be the dominant branch or subjugate other branches.<sup>155</sup> When the executive branch has the power to influence all levels of agency decisions, the executive branch becomes dominant in a way that violates separation of powers principles through its ability to undermine the other branches.<sup>156</sup> President Trump’s executive order calls this into question. Through bypassing the OPM, President

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150. See Bur, *supra* note 121.

151. *Id.*

152. See Wertlieb, *supra* note 50 (comparing the politicization of administrative agencies and the powers they have during adjudications and hearings).

153. *Id.*

154. Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357, 358–59 (1990) (“In recent years, commentators by the host have challenged the constitutional authority of the federal government to vest legislative or executive powers in agencies that are formally independent of legislative or executive control. According to these critics, the rise of what has come to be called the administrative state is inconsistent with the separation of powers. Back at the dawn of the New Deal, one corner of this position, the non-delegation doctrine, was even pronounced as constitutional law.”).

155. Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 10 (2007) (explaining the role of the executive branch in the American political system and how it can potentially become unequal).

156. Dobkin, *supra* note 51 (speaking specifically about the dangers of having a too powerful executive).

Trump has given his appointed agency heads the power to select ALJs. Agency heads may only select ALJs with the most similar stance of the current Presidential Administration. It is an overarching principle that judicial independence is foundational to any effort to adjudicate matters fairly and without bias.<sup>157</sup>

The drafters of the Constitution required that all federal judges be protected from political influence by creating rules such as life tenure and salary protection.<sup>158</sup> Similarly, the first Canon of the Code of Conduct for United States Judges requires the following of all federal judges: “[a]n independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved.”<sup>159</sup> Courts around the country have demanded that due process requires an independent judiciary.<sup>160</sup>

Judges cannot resolve issues impartially if members of the legislature lobby them for a particular result or if donors threaten to withhold support unless the judge decides to resolve a dispute in a specific way.<sup>161</sup> This is a central principle of the fair and steady administration of the laws. This concept can be compared to political attacks on the judicial branch. The increasing political attacks on the judiciary by other parts of the government and by candidates for judicial office are damaging the independence of the judiciary and eroding the public’s confidence in it.<sup>162</sup> The public has an interest in an unintimidated judiciary, and as a result, they have an interest in an unintimidated ALJ.

President Trump has established that he wants Social Security to have less funding, which could play a role in who President Trump

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157. *Id.*

158. U.S. CONST. art. III, § 1.

159. See MODEL CODE OF JUDICIAL CONDUCT, Canon 1 (2000).

160. *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (“Trial before an unbiased judge is essential to due process.”).

161. Harold J. Krent & Lindsay DuVall, *Accommodating ALJ Decision Making Independence with Institutional Interests of the Administrative Judiciary*, 25 J. NAT’L ASS’N ADMIN. L. JUDGES 1 (2005) (concerning how ALJs’ independence allows them to be insulated from the political process and special interests that could potentially affect how they make decisions in certain hearings or adjudications).

162. Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 (1997) (concerning how the public needs to have faith in judicial decisions in order for justice to actually be accomplished and to last).

wants to be appointed to ALJ positions.<sup>163</sup> A way to possibly cut funding is to grant fewer benefits. Agency heads may want to further this policy goal by only selecting ALJs who hold the same view as the Presidential Administration. There will be no question that politics has crept into the administrative state through the selection of ALJs.

### C. Potential Positive Effects of President Trump's Executive Order

Some agencies, however, may welcome a different selection process. Laurie Beyranvand, an administrative law professor at Vermont Law School, explained that agencies in the United States handle many different types of technical matters,<sup>164</sup> so "an ALJ at the Securities and Exchange Commission might need a very different set of qualifications than an ALJ at the Social Security Administration" and allowing the Social Security Administration to decide the qualifications could help the process become more efficient and fair.<sup>165</sup> For example, at the Executive Office for Immigration Review, immigration judges are hired much like government attorneys who are part of the exempt service.<sup>166</sup> The candidates are selected by a process that seeks to determine who is the most qualified and well versed on immigration issues. This is particularly important when looking into the issues associated with the backlog problem.<sup>167</sup>

It is understandable why agencies would prefer to avoid the ALJ hiring process if they are not forced to use it.<sup>168</sup> Agencies may be dissatisfied with the OPM selection process that requires them to select ALJs from among a restricted list of candidates who may not best meet what the agency is looking for.<sup>169</sup> Therefore, reform of the selection process should be a concern for OPM as well as for the agencies and Congress.<sup>170</sup>

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163. Tara Golshan, *Trump's 2020 Budget Proposal Seriously Cuts the Nation's Safety Net*, VOX (Mar. 11, 2019), <https://www.vox.com/policy-and-politics/2019/3/11/18259789/trumps-2020-budget-proposal-cuts> ("If Trump's budget were to be enacted, some of the biggest policy changes would include: . . . \$25 billion in cuts to Social Security over ten years, including cuts to disability insurance.").

164. See Wertlieb, *supra* note 50.

165. *Id.*

166. Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1361 (1992) (explaining how ALJs differ in the context of other agencies).

167. See Rein, *supra* note 36.

168. *Id.*

169. *Id.* at 1360.

170. *Id.*

Additionally, allowing agency heads to directly appoint ALJs could allow for public accountability in the agencies.<sup>171</sup> Many of the rules that ALJs establish in adjudications become final rules that affect citizens across the nation, especially in the Social Security Administration.<sup>172</sup> The independence of the OPM in deciding which people are qualified to become ALJs creates a situation where citizens are not sure who to blame when agency decisions are moving away from the goal of that agency.<sup>173</sup> When an agency head selects judges, this allows for the public to be able to point to a specific person and hold them accountable.<sup>174</sup> The public accountability argument does not solve the problem of helping people currently in need. The Social Security Administration helps people with debilitating disabilities and elders in need of extra income to sustain themselves. Voting may be the only way to enact change in the system, which may take years. Claimants for Social Security disability and Supplemental Income may not be able to wait for this change to occur.

#### IV. Resolution and Recommendation

The competitive selection of ALJs should be kept in place in order to keep confidence in the agency and to prevent a change in ALJ jurisprudence, but the standards should be changed by which Social Security ALJs are chosen in order to solve the backlog problem. The proposed legislation in Congress to retain the competitive selection of ALJs is a good start, but the OPM should modify its qualifications.<sup>175</sup> ALJs need to be impartial, qualified, and independent in order for judges to be able to perform their job at the highest levels. This would be called into question if politics were a factor in judges' selection.

Overturning the competitive selection of ALJs would most likely result in an increase in discrimination claims and would keep public attention on the agency. This fear could nag the agency and could keep

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171. Jim Rossi, *Final, But Often Fallible: Recognizing Problems with ALJ Finality*, 56 ADMIN. L. REV. 53, 71 (2004) [hereinafter Rossi].

172. See Bur, *supra* note 121.

173. See Rossi, *supra* note 171.

174. *Id.* at 71.

175. See Bur, *supra* note 121 (“[ALJs] make decisions every day that affect people’s lives like Social Security and Medicare benefits, workers’ compensation claims, and even licenses for radio stations and nuclear power plants. We must ensure these judges are fair, impartial and qualified, said Cantwell.”).

it from effectively doing its job of serving Americans. Also, current existing bias, even with the competitive selection, shows that removing competitive selection may cause even more discrimination claims. An increase in discrimination claims would only serve to increase the backlog problem and cause the agency to have to expend funds to adequately solve the issue. Keeping the OPM as the neutral arbiter in selecting ALJs for the Social Security Administration will prevent any of these issues from arising in the future and will allow the Social Security Administration to avoid attacks on its impartiality and potential political views. It also ensures that the political process will not seep into the hearing process and cause a radical change in how benefits are granted, potentially to the detriment of elderly Americans.

The backlog of cases in the Social Security Administration is a problem in desperate need of a solution.<sup>176</sup> The Social Security Administration would benefit from hiring more ALJs to alleviate this backlog.<sup>177</sup> The current qualifications impede the Social Security Administration's goal.<sup>178</sup> The seven years of experience required ensures that candidates are qualified.<sup>179</sup> But, a focus on a specific number of years of experience may be too limiting to be able to solve the backlog problem.<sup>180</sup> Reviewing relevant past work product is a better and more efficient way of determining if an ALJ candidate can meet the requirements of the position. Reviewing past work product does not require an arbitrarily set number of years to be able to determine if an ALJ candidate is qualified. The Social Security Administration can craft specifics on the past work product they want a candidate to possess, and the OPM can incorporate this into their hiring qualification.

The active bar membership requirement also creates an unnecessary burden on ALJ candidates. David Agatstein in the *Journal of the National Association of Administrative Law Judiciary* states the OPM should not attempt to regulate the bar status of sitting judges at all.<sup>181</sup>

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176. See Rein, *supra* note 36.

177. *Id.* (concerning the serious issue that has developed in the Social Security Administration due to the backlog problem).

178. See *Standard For ALJ Positions*, U.S. OFFICE OF PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/> (last visited Sept. 23, 2019).

179. *Id.*

180. See Rein, *supra* note 36.

181. David J. Agatstein, *Active Bar Membership October 15, 2007 Federal ALJs: A Critique of the "Active" Bar Membership Regulation*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 496, 524 (2007).

Rather, he states that a court should declare that it is the responsibility of state licensing authorities alone to determine what is necessary to preserve judicial independence and to decide what constitutes an appropriate bar status for sitting federal ALJs.<sup>182</sup> Some ALJs have to pay hundreds of dollars in bar association payments.<sup>183</sup> Agatstein states, “Many Judges no longer have any connection to the state they [were] licensed in and it would not make much sense to comply with that state’s requirements.”<sup>184</sup> The current OPM procedure that ALJs have to be in good bar standing is still in effect even after President Trump’s Executive Order.<sup>185</sup>

While the legislation introduced by Senators Cantwell and Collins takes an important step to ensure ALJs’ independence, the Social Security Administration still faces the backlog issue.<sup>186</sup> The backlog can be lessened by hiring more ALJs to be able to hear the issues. With the budget set to increase for the Social Security Administration, this can be accomplished as support staff can be increased and new technologies instituted to help ALJs.<sup>187</sup> Qualifications focused on past work product and not a set number of years of experience, however, is necessary to allow more applicants to enter the pool. For Social Security ALJs, the arbitrary seven year experience requirement and active status in a state bar should be removed to help with the selection of more judges in order to help the dire issues that the Administration faces in being able to handle its work load.<sup>188</sup> Selective certification should also be allowed so agencies can pick the most desirable candidate from the OPM without having to abide by the “Rule of Three.”<sup>189</sup> This would

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182. *Id.*

183. *Id.* at 522.

184. *Id.* at 520.

185. *Qualification Standard For ALJ Positions*, U.S. OFFICE OF PERS. MGMT., <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/> (last visited Sept. 23, 2019); *Executive Order—Excepting ALJs from the Competitive Service*, CHIEF HUMAN CAPITAL OFFICERS COUNCIL, <https://chcoc.gov/content/executive-order-%E2%80%93-excepting-administrative-law-judges-competitive-service> (last visited Sept. 23, 2019).

186. S. 3387, 115<sup>th</sup> Cong. (2018) (Senator Collins and Senator Cantwell’s legislation is silent regarding how this issue could help resolve the backlog issue.).

187. See Miller, *supra* note 41.

188. Joe Davidson, *Short staffing leads to long waits for Social Security disability hearing decisions*, WASH. POST. (Apr. 3, 2018), <https://www.washingtonpost.com/news/powerpost/wp/2018/04/03/short-staffing-leads-to-long-waits-for-social-security-disability-hearing-decisions/>.

189. Barnett, *supra* note 88.

ensure that qualified candidates are being selected that can meet the complexities of what the job entails.

Removing the Rule of Three will allow the Social Security Administration some flexibility in being able to choose more ALJs, which will help rectify the backlog problem. This does not need to be a permanent change, but helps manage the situation until the backlog issue is mitigated. Federal courts have already established that the experience requirement set forth by the OPM is under the complete discretion of the OPM.<sup>190</sup> The obstacles the Social Security Administration faces have changed, and as a result, this calls for a change in the hiring process of ALJs in order to help alleviate the backlog issue and to allow people to get benefits they desperately need to live.

## V. Conclusion

President Trump's Executive Order excepting ALJs from the competitive selection presents significant problems for not only the elderly but the public at large. The potential threat of the politicization of the Social Security Administration has the ability to put an added financial strain on people who can ill afford it. Only selecting ALJs who possess the same Social Security views as the current Presidential Administration eliminates faith in an institution that has become a bulwark for people in the later stages of their lives. The Competitive Selection of ALJs ensures a qualified independent voice on Social Security claims and should remain in place. Yet, removing the arbitrary seven years of experience requirement and eliminating the active bar requirement in order to qualify as an ALJ is needed to minimize the backlog of cases that have arisen over the last decade. A flexible standard with a focus on past work product and no active bar requirement will allow the Social Security Administration to hire more ALJs. The influx of qualified staff will get to work in ending the blight that has been the Social Security backlog and give financial help to people who have been waiting years for needed relief.

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190. *Meeker v. Merit Sys. Prot. Bd.*, 319 F.3d 1368, 1378 (D.C. Cir. 2003) (“Given the important role that relevant experience has always played in the selection of [ALJs], we are not prepared to conclude that the use of experience as establishing a baseline of minimal qualification is inconsistent with the integrity of the competitive service or OPM’s regulations governing employee selection.”).