Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

Carr v. Saul: Supreme Court to Decide When Social Security Claimants Must First Raise Appointments Clause Challenges

March 12, 2021

In 2018, the Supreme Court in *Lucia v. Securities and Exchange Commission (SEC)* held that administrative law judges (ALJs) of the SEC are "Officers of the United States"—government officials who, under the Appointments Clause of the U.S. Constitution, must be appointed by the President "with the Advice and Consent of the Senate," or, in the case of "inferior" officers (but only when Congress so provides), "the President alone," "the Courts of Law," or "the Heads of Departments." Since *Lucia*, litigants have continued to raise Appointments Clause challenges regarding ALJs at other agencies. *Carr v. Saul* (consolidated with *Davis v. Saul*), a case pending before the Supreme Court, concerns parties who contend that Social Security Administration (SSA) ALJs who presided over their administrative proceedings were unconstitutionally appointed. The issue in *Carr*, however, is not whether SSA's ALJs are officers under the Appointments Clause, but whether the petitioners are barred from raising those challenges in federal court because they did not raise them during their ALJ proceedings.

The outcome in *Carr* will likely determine whether a Social Security claimant's constitutional challenge to an ALJ's appointment must first be raised during administrative proceedings before that challenge can be raised in federal court. It is also possible that *Carr* will provide clearer guidance on courts' ability to hear certain other claims that were not first raised in administrative proceedings before the SSA and, perhaps, other agencies. And even if the *Carr* decision only directly affects the SSA, it still could have consequential effects on the federal government's administrative adjudication system: The SSA is "probably the largest adjudicative agency in the western world," annually adjudicating an enormous number of claims for benefits, and it employs the vast majority of the federal government's ALJs. The Court heard oral argument in *Carr* on March 3, 2021.

Issue Exhaustion

In administrative law, there are two "exhaustion" doctrines that implicate the availability of judicial review of an agency decision. Under the doctrine of *exhaustion of administrative remedies*, a party typically must "complete the agency's internal remedial steps (including administrative appeals) before

Congressional Research Service
https://crsreports.congress.gov
LSB10579

turning to the judiciary." For example, a claimant's failure to seek review of SSA's denial of benefits through each step of its adjudicative process, as is generally required by statute and SSA regulations, is a failure to exhaust administrative remedies. Conversely, *issue exhaustion*—the doctrine at issue in *Carr*—refers to the oft-imposed requirement that a party seeking judicial review of an agency's adverse determination raise all arguments before the agency that it may wish to raise on appeal in federal court. (Many courts also describe the failure to raise an argument before an agency as a *waiver* or *forfeiture* of the argument.)

Exceptions to issue-exhaustion requirements may be found in statute, regulation, or judicially created doctrines. Some statutes or regulations that impose issue-exhaustion requirements may contain exceptions, such as when "extraordinary circumstances" prevented a party from raising a challenge in the administrative proceedings. And courts have sometimes excused a failure to exhaust issues where, for example, raising an issue to an agency would be futile.

Over two decades ago, in *Sims v. Apfel*, the Supreme Court explained that issue-exhaustion requirements generally stem from statutes or regulations, but acknowledged that courts often impose such a requirement when a governing statute or regulation is silent on the matter. Yet the "desirability" of a judicially created issue-exhaustion requirement depends on how similar the agency proceeding is to typical "adversarial litigation" in court. The Court explained that "the rationale for requiring issue exhaustion is at its greatest" when "the parties are expected to develop the issues in an adversarial administrative proceeding." But the rationale is "much weaker" when the underlying adjudicative proceeding is not adversarial.

Courts' willingness to recognize exceptions to issue-exhaustion requirements may be particularly relevant to claims under the Appointments Clause. In *Freytag v. Commissioner*, the Supreme Court considered the petitioners' Appointments Clause challenge, even though they had not timely objected to their cases' assignment to the adjudicator in question and had consented to the adjudicator. The Court explained that the asserted constitutional defect went "to the validity of the . . . proceeding that" was "the basis for [the] litigation," and concluded it was "one of those rare cases" where the Court should exercise its discretion to hear the challenge. But as one court has explained, "*Freytag* treated the exhaustion mandate in that [case] as arising on purely prudential grounds," and lower courts "have not read *Freytag*'s exception broadly and have regularly declined to consider unexhausted Appointments Clause challenges," such as when a case is governed by a statutory exhaustion requirement. For reasons that will be explained below, some courts have refused to hear challenges when parties have not raised "timely" Appointments Clause challenges.

Relevant Prior Supreme Court Decisions

Two previous Supreme Court decisions form the backdrop for *Carr*. First, *Carr* follows specifically from *Lucia*, where the Court held that SEC ALJs are "Officers of the United States" under the Appointments Clause. The *Lucia* Court further held that the petitioner was entitled to relief based on the Court's decision in a prior case that relief is available to a party "who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case." The Court determined that the petitioner had made a timely challenge (and so was entitled to a new hearing before a new and properly appointed adjudicator) because he had "contested the validity" of the SEC ALJ's "appointment before the Commission, and continued pressing that claim" in federal court. However, the Court did not explain how this "timely challenge" standard applies to parties in other contexts or how it corresponds with the issue-exhaustion doctrine.

Second, in *Sims v. Apfel*, decided nearly twenty years before *Lucia*, the Court held that a Social Security claimant is not barred from raising a claim in federal court that she did not raise before the SSA Appeals Council—the administrative tribunal that reviews appeals from ALJ determinations and is the final

agency decisionmaker in SSA proceedings. The Court determined that no statute or regulation required issue exhaustion. And the Court found no basis to impose such a requirement—though from here, the Justices in the majority parted ways in their reasoning. Notably, the Court did not decide "[w]hether a claimant must exhaust issues before the ALJ," limiting its decision to Appeals Council proceedings.

Writing for a four-Justice plurality, Justice Thomas argued that "the differences between courts and agencies are nowhere more pronounced than in Social Security proceedings," asserting that "Social Security proceedings are inquisitorial rather than adversarial." He explained that SSA ALJs have a "duty to investigate the facts and develop the arguments both for and against granting benefits," and that the Appeals Council has a similarly expansive ambit for review. He also noted that the SSA Commissioner does not act in an adversarial manner during ALJ proceedings, and does not appear to do so before the Appeals Council, either. The plurality maintained that several SSA regulations and procedures underscore the non-adversarial nature of SSA proceedings, including the three-line form claimants may use to request Appeals Council review, which SSA advises should take no more than 10 minutes to complete.

Justice O'Connor agreed with the Court's holding, but she did not concur with Justice Thomas's rationale regarding the inquisitorial nature of Appeals Council proceedings. Instead, in a concurring opinion, Justice O'Connor wrote that SSA's "failure to notify claimants of an issue exhaustion requirement in this context is a sufficient basis for our decision." In fact, she reasoned that SSA's regulations and procedures "affirmatively suggest that specific issues need not be raised before the Appeals Council" because a claimant seeking Appeals Council review may simply submit the three-line form mentioned above, and because the Council's review is plenary—that is, it is not confined by the issues raised at the ALJ level.

Carr v. Saul

Petitioners in *Carr* are several claimants who sought disability benefits or supplemental security income under the Social Security Act. All petitioners were denied benefits by the SSA and all exhausted their available administrative appeals. After petitioners reached federal court on appeal from SSA's determinations, the Supreme Court issued its decision in *Lucia*. Because SSA's ALJs had been appointed by agency staff and not by an entity identified in the Appointments Clause at the time of petitioners' administrative proceedings, each petitioner subsequently argued in federal court that the ALJs who decided their claims were unconstitutionally appointed officers. The government did not dispute that SSA's ALJs were subject to the Appointments Clause, instead arguing that petitioners had forfeited their challenges by failing to first raise them at the administrative level. Ultimately, the U.S. Courts of Appeals for the Eighth Circuit and Tenth Circuit agreed. In November 2020, the Supreme Court granted petitioners' requests for review of whether they did not exhaust their Appointments Clause challenges and consolidated the cases.

Petitioners' main argument for why they did not waive their Appointments Clause claims rests on *Sims*, where the Court recognized that petitioners could bring certain claims in federal court that they had not raised during the SSA administrative adjudication process. Petitioners explain that, as the *Sims* Court found regarding Appeals Council proceedings, no statute or regulation requires issue exhaustion at the ALJ level. Invoking Justice Thomas's opinion from *Sims*, they argue that, just like Appeals Council proceedings, ALJ proceedings are non-adversarial, inquisitorial proceedings that mainly rely on the adjudicator—not the claimant—to spot issues for decision. And invoking Justice O'Connor's concurrence, they assert that SSA regulations fail to notify petitioners of an issue-exhaustion requirement. They also note that a majority of Justices in *Sims* signed on to the explanation discussed above that court-crafted issue-exhaustion requirements are less desirable in inquisitorial administrative proceedings.

Petitioners assert other arguments in support of their position. For example, they claim it would have been futile to raise their Appointments Clause challenges during their ALJ proceedings because SSA ALJs lack the power to determine such challenges. SSA itself acknowledged that its ALJs have no power to decide

Appointments Clause challenges in emergency messages it directed to ALJs (after petitioners had reached federal court) in anticipation of and in response to *Lucia*. Petitioners also argue that, even if an issue-exhaustion requirement applies in petitioners' cases, the Court should excuse their failures to exhaust, as it did in *Freytag*, due to courts' "strong interest" in upholding the separation of powers.

The Acting U.S. Solicitor General (acting SG), who represents SSA before the Supreme Court, contends that the petitioners forfeited their Appointments Clause challenges. Notably, she does not argue that SSA ALJs are *not* subject to the Appointments Clause, nor does she assert that a regulation or statute applicable to SSA proceedings requires issue exhaustion. Instead, she argues that petitioners violated the "general rule" imposed by Supreme Court precedent that "a party who fails to raise an objection in administrative proceedings may not raise it for the first time in court." The Acting SG also asserts that petitioners violated the "timely challenge" standard applied in *Lucia*, mentioned above. The acting SG claims that the standard mandates that parties raise Appointments Clause challenges in "agency proceedings, not just later in court." *Sims*, she contends, does not preclude holding that petitioners violated these principles.

Carr's Potential Impact

The parties dispute the possible consequences of the Court's decision in *Carr*. For example, petitioners contend that recognition of an issue-exhaustion requirement for SSA ALJ proceedings would move SSA's adjudicative system from one "where requesting ALJ review takes under 10 minutes to a system where claimants must identify complex legal issues on pain of forfeiture." They assert that this result "would impose extreme, unfair burdens on people who are seeking SSA assistance"—many of whom are not represented before the agency—and increase ALJs' workloads and "existing delays." Conversely, the acting SG argues that the Court's acceptance of petitioners' "expansive theory" that issue exhaustion does not govern SSA proceedings would burden courts by forcing them to consider questions raised initially in court about "technical and often fact-based issues that the agency has never considered."

During oral argument in *Carr*, the Justices asked counsel for petitioners and for the government a number of questions that underscored the potential importance of the case's outcome. For example, Justice Barrett asked counsel for petitioners whether SSA proceedings are unique enough such that a decision that no issue-exhaustion requirement applies to SSA ALJ proceedings would be limited to SSA, or whether it could be extended to other agencies. Justice Breyer said that he "thought that there was a pretty well-established exception to the need to exhaust an issue where it is a constitutional issue." And some Justices expressed concern that, should the Court find for petitioners, claimants would be encouraged to "sandbag"—that is, withhold arguments before the agency only to later raise objections if the agency rendered an unfavorable decision.

To date, some courts have applied statutory and regulatory issue-exhaustion requirements to parties' Appointments Clause challenges. For example, the U.S. Court of Appeals for the Sixth Circuit recently read a statutory issue-exhaustion requirement as applying to the petitioner's Appointments Clause challenge concerning an agency's compliance with a statute governing ALJ appointments (although the court excused the lack of exhaustion under a statutory exception). The court stated, however, that the exhaustion requirement at issue in that case would not extend to a facial challenge to the constitutional validity of the statute.

Congress may opt to consider clarifying legislation. Congress can and has imposed issue-exhaustion requirements by statute in other contexts. Lawmakers might also consider a statutory issue-exhaustion provision to govern SSA proceedings, which could include exceptions to that requirement. Congress could also, by statute, direct SSA to impose a regulatory issue-exhaustion requirement (which the agency likely is authorized to do). Such codified requirements could potentially apply to a variety of legal challenges, including those under the Appointments Clause.

Author Information

Daniel J. Sheffner
Legislative Attorney

Disclaimer