THE HILL

Look to Supreme Court for answers on whether Trump can fire Mueller

BY RICHARD PIERCE, OPINION CONTRIBUTOR — 04/12/18 12:00 PM EDT
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On April 23, the Supreme Court will hear oral arguments in Lucia v. Securities and Exchange Commission. The solicitor general has taken a strange position in the case. His otherwise inexplicable argument makes sense only if you view it through the prism of the possibility of President Trump removing Robert Mueller as special counsel.

The Lucia case involves only one issue: Are administrative law judges employed by the Securities and Exchange Commission inferior officers of the United States? That issue is of interest only to a few administrative law scholars and firms that have been penalized in Securities and Exchange Commission proceedings in which administrative law judges preside.

The solicitor general has done everything in his power to turn the case into something else: an advisory opinion in which the court provides cover for the removal of the special counsel. The solicitor general first asked the court to include as an issue in the case the question of whether the statute that limits the ability of an agency head to remove an administrative law judge by requiring that the agency prove that it has "cause" for such a removal is constitutional.

The court refused to take that action for the good reason that the parties had not raised the issue and the lower court had not addressed the issue. Thus, the court would be issuing a prohibited advisory opinion if it addressed the issue. That rejection by the court did not stop the solicitor general. He devoted 17 pages of his brief to the question of whether

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Congress can limit the power of the president or his appointees to remove an administrative law judge and, if it can, what qualifies as "cause" for such a removal.

The solicitor general argued that Congress cannot limit the power of the president or his immediate subordinates to remove an officer and, even if Congress has that power, the court should interpret "for cause" to include virtually any reason a government official gives for removing an administrative law judge. This position is strange in many ways.

The solicitor general rarely argues that a federal statute is unconstitutional. The solicitor general rarely asks the court to decide an issue that was not raised by a party or addressed in the lower court opinion that the Court is reviewing. The solicitor general rarely asks the court to announce an interpretation of a statutory provision that was not at issue in the case. The solicitor general rarely defies the court by addressing an issue the court specifically refused to consider.

Moreover, the 75-year-old statutory limit on the power of regulatory agencies to remove administrative law judges was the product of a lengthy lobbying campaign by regulated firms, an important constituency of the Republican Party. Regulated firms will be shocked and angered to learn that the Republican solicitor general is trying to persuade the court to eliminate or to emasculate that statutory safeguard.

The reason for the bizarre position in the Lucia case becomes clear after listening to the White House press secretary assert that the president believes he has the power to fire Mueller. The Department of Justice regulation that protects Mueller from being fired authorizes his removal "for cause." Any potential statute that Congress enacts to protect Mueller from being fired must have a similar provision to be consistent with the court's opinions with respect to the power of the president to control the executive branch.

Thus, if the court were to accept the solicitor general's argument in Lucia, it would give the president a green light to fire Mueller either by referring to the court's opinion holding that Congress cannot limit the power of an agency head to remove an administrative law judge or by referring to the court's opinion interpreting "for cause" to include virtually any reason given by an agency head. It will be interesting to see whether the justices refer to the obvious link between the solicitor general's position in Lucia and the president's belief that he can fire Mueller when they hear the arguments this month.

Richard J. Pierce is the Alverson Professor of Law at George Washington University. He is the author of several books on administrative law and government regulation that have been cited in Supreme Court opinions.

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