

# *LUCIA V. SEC*: JUSTICE BREYER WARNS OF A DRAMATIC EXPANSION OF THE PRESIDENT’S CONTROL OVER THE FEDERAL CIVIL SERVICE<sup>1</sup>

## I. INTRODUCTION

The “Appointments Clause” mandates that “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed by” the United States Constitution.<sup>2</sup> Thus, the Constitution requires Officers of the United States to receive a commission from a “higher officer.”<sup>3</sup> Accordingly, the President appoints the heads of the “Great Departments” (e.g. cabinet secretaries) with the advice and consent of the Senate, and either these “principal officers,” or the President as Chief Executive, appoint their respective subordinates.<sup>4</sup> This ensures that each officer is accountable to a single superior, and that single superior is either the President or accountable (directly or indirectly) to the President<sup>5</sup> and ultimately to the American electorate.<sup>6</sup> For the first 150 years of the Republic’s history, the vast majority of the Executive Branch consisted of officers, inferior and superior (principal), appointed pursuant to the Constitution and subject to removal by the President or the appointing principal officer at any time and for any reason.<sup>7</sup> In contrast, upon entering

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1. The authors wish to thank Breanna A. Symmes, Ph.D. on the faculty of the University of Colorado at Denver for editing this article.

2. *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

3. U.S. Const. art. II, § 2, cl. 2; *ex parte Hennen*, 38 U.S. 230, 260 (1839) (“These clerks fall under that class of inferior officers, the appointment of which the Constitution authorizes Congress to vest in the head of the department.”).

4. *Hennen*, 38 U.S. at 260.

5. *Myers v. United States*, 272 U.S. 52, 135 (1926) (holding that the President “may consider the decision [of an officer] after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised”). But *cf.* *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935) (approving Congress’s power to limit the President’s removal power over officers at quasi-judicial and quasi-legislative agencies by requiring a showing of good cause). *Cf.* also, *Morrison v. Olson*, 487 U.S. 654 (1988); *United States v. Perkins*, 116 U.S. 483 (1886) (both sustaining similar Congressional restrictions on the power of principal officers, themselves responsible to the President, to remove their own inferiors).

6. *Free Enter. Fund v. Pub Co. Accounting Oversight Bd.*, 561 U.S. 477, 499, 501 (2010) (“Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.”).

7. See Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 *Stan. L. Rev.* 443, 507–45 (2018) (noting the vast majority of Executive Branch positions under the First Congress were appointed as officers) [hereinafter Mascott].

office, President Donald Trump had only 554 appointments to make in the Executive Branch<sup>8</sup> out of 2,087,747 nonmilitary Executive Branch employees in Federal Fiscal Year 2017.<sup>9</sup>

The expansion of the federal bureaucracy during the American Civil War, followed by the impeachment of President Andrew Johnson—ostensibly for abuse of the appointment and removal power—foreshadowed a dramatic shift away from direct Presidential appointments and the patronage system that accompanied them. That shift began in earnest with the move towards a professional civil service under President Chester A. Arthur and reached full momentum as a result of the Roosevelt Administration’s “New Deal” policies, which dramatically expanded the Federal Civil Service. In 1946, Congress passed the Administrative Procedure Act (APA) and created the position of “Administrative Law Judge” (ALJ). Pursuant to the Constitution’s Article I, Congress authorized administrative agencies to employ ALJs in the Executive Branch.<sup>10</sup> Subsequently, ALJs began to perform a significant portion of the adjudicative functions of these agencies, replacing the appointed officers (who were previously charged with adjudicative duties) as those officers emphasis moved to rulemaking because the APA<sup>11</sup> shifted legislative power from Congress to administrative agencies.<sup>12</sup> To protect their independence during adjudications, ALJs enjoy *significant* statutory job protection under the APA, including “for-cause” removal protection which guarantees that they may only be removed by the Merit Systems Protection Board (the members of which also have for-cause protection), not their employing agency or the President.

Thus, ALJs are hired as employees pursuant to the APA, not appointed as officers; however, until recently there was little case law addressing the constitutional implications of the widespread use of un-appointed ALJs to adjudicate administrative proceedings rather than officers appointed under the Constitution. This is important because if a mere employee, like an ALJ, is performing duties vested by the Constitution (implicitly or explicitly) in an Officer of the United States, then that ALJ’s

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8. Sonam Sheth & Skye Gould, Who’s Running the Government? Trump has yet to fill 85% of key executive branch positions, *Business Insider* (Apr. 22, 2017, 10:53 AM), <http://www.businessinsider.com/whos-running-the-government-trump-unfilled-executive-branch-positions-2017-4>.

9. Office of Pers. Mgmt., Office of Mgmt. and Budget, *Sizing Up the Executive Branch* (2018).

10. 5 U.S.C. § 3105 (2018).

11. And court decisions subsequent to the enactment of the APA that granted significant authority and deference to administrative agencies. See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989) (allowing federal criminal sentencing policies to be consigned to an administrative agency); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (curtailing judicial review of agencies’ interpretations of their governing statutes); *INS v. Chadha*, 462 U.S. 919 (1983) (requiring both houses of Congress agree in order to overrule an agency regulation); *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978) (limiting judicial review of agencies’ procedures).

12. Richard A. Posner, Introduction: The Rise and Fall of Administrative Law, 72 *Chi.-Kent L. Rev.* 953, 960 (1997).

actions are unconstitutional, and any decisions rendered by that ALJ are generally void regardless of whether a party can show actual harm from the constitutional violation.<sup>13</sup> In short, if ALJs are Officers of the United States, then the adjudicatory system established by the APA is operating on very shaky ground.

Today, there are nearly two thousand ALJs spread across the federal government<sup>14</sup> including, of particular import, all of the trial judges of the United States Merit Systems Protection Board (MSPB), which is charged with adjudicating virtually all employment claims by Executive Branch employees.<sup>15</sup> If these ALJs are improperly appointed Officers of the United States, then all of their decisions are void and the adjudicatory functions of the Executive Branch—nearly all of which are overseen (at least at the trial/hearing level) by ALJs—will be buried under a massive backlog of cases requiring retrial/rehearing.<sup>16</sup>

Two Circuit Courts of Appeal made forays into this Appointments Clause issue in 2016, both on the question of whether the ALJs of the Securities and Exchange Commission (SEC) were improperly appointed Officers of the United States when they oversaw regulatory hearings regarding alleged violations of the securities laws. First, the D.C. Circuit heard *Lucia v. SEC* (*Lucia* Appeal) and held that the SEC's ALJ's are *not* Officers of the United States, confirming the ALJ's ruling against Mr. Lucia.<sup>17</sup> Immediately thereafter, the Tenth Circuit decided *Bandimere v. SEC* on the same facts as the *Lucia* Appeal and came to the opposite conclusion, holding that the SEC's ALJs were improperly appointed officers, invalidating the ALJ's decision against Mr. Bandimere.<sup>18</sup> Subsequently, the full D.C. Circuit, sitting en banc, upheld their panel's decision by an equally divided court (*Lucia* En Banc Order).<sup>19</sup>

The Supreme Court granted certiorari in *Lucia*, and reversed the D.C. Circuit.<sup>20</sup> On appeal, the Solicitor General himself reversed course and agreed with Mr. Lucia that the ALJs were improperly appointed Officers

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13. *Ryder v. United States*, 515 U.S. 177, 180–88 (1995).

14. Office of Pers. Mgmt., Administrative Law Judges, OPM.gov (June 25, 2018), <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency>.

15. U.S. Merit Sys. Prot. Bd., About, MSPB.gov, <https://www.mspb.gov/About/about.htm> (last visited Jun. 25, 2018). Note that the Board 'leases' ALJs from other agencies, which is why the Board is not shown as having any ALJs in the OPM statistics cited in Note 16.

16. Presuming, of course, that the controlling agencies even have the authority to appoint the ALJs as officers to cure the constitutional defect going forward.

17. *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), reh'g en banc granted, judgment vacated (Feb. 16, 2017), judgment aff'd per curiam by an equally divided court, 868 F.3d 1021 (D.C. Cir. 2017), rev'd sub nom. *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

18. *Bandimere v. SEC*, 844 F.3d 1168, 1181 (10th Cir. 2016).

19. *Raymond J. Lucia Cos. v. SEC*, 868 F.3d 1021 (D.C. Cir. 2017) (per curiam).

20. Presumably choosing it over *Bandimere* to avoid recusing Justice Gorsuch, who was still on the Tenth Circuit when *Bandimere* was decided.

of the United States.<sup>21</sup> Significantly, the Solicitor General argued that because ALJs are officers, the for-cause removal protection for ALJs established by the APA is unconstitutional and that the President should be able to remove ALJs at his sole discretion.<sup>22</sup> The Supreme Court declined to address this argument in *Lucia* because removal was not an issue argued below, but if and when the Court hears this argument in a later case, the President may gain significant influence over administrative adjudications by virtue of his constitutional power (absent job protections established by Congress) to remove any Officer of the United States (or direct his principal officers to do so)—a power that is currently checked by the classification of ALJs as mere employees, and the corresponding for-cause removal protection established by the APA.<sup>23</sup> Therefore, *Lucia* may be a turning point away from the maintenance of an “administrative state” within the Executive Branch shielded from Presidential control.<sup>24</sup>

## II. BACKGROUND

### a. *The Appointments Clause*

The history and purpose of the Appointments Clause demonstrates that it covers a broad range of officials who exercise significant authority pursuant to the laws of the United States.<sup>25</sup> Indeed, many of the Founders considered the “manipulation of official appointments” one of the greatest threats to the freedom of the American Colonists posed by the British Crown.<sup>26</sup> King George and his ministers abused the power to appoint officers as “the most insidious and powerful weapon of eighteenth century despotism.”<sup>27</sup> The Declaration of Independence itself charged that the King had “erected a multitude of New Offices, and sent hither swarms of Officers to harass our people”—essentially using the British Empire’s own administrative state as a hammer to smash resistance by the Colonies to British demands that they obey the mandates of Crown and Parliament.<sup>28</sup>

viii. However, the Founders recognized that the sheer number of officers was not the only (or even the most concerning) problem, but instead that the “excessively diffuse” nature of appointments and the tangled chains of command resulting therefrom made it impossible to hold

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21. Reply Brief for Respondent Supporting Petitioners at 3, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130), [https://www.supremecourt.gov/DocketPDF/17/17-130/43495/20180416131807945\\_17-130rbUnitedStates%20reply.pdf](https://www.supremecourt.gov/DocketPDF/17/17-130/43495/20180416131807945_17-130rbUnitedStates%20reply.pdf) (Apr. 16, 2018).

22. *Id.* at 15–17.

23. It is also worthy of note that only Officers of the United States may be impeached by Congress, so classifying ALJs as mere employees also shields them from Congressional ire.

24. Moreover, should ALJs be classified as officers, Congress too gains significant control through the impeachment power.

25. *Buckley v. Valeo*, 424 U.S. 1, 131 (1976) (holding that officer status attaches to “all appointed officials exercising responsibility under the public laws of the Nation”).

26. *Freytag v. Comm’r*, 501 U.S. 868, 883 (1991) (quoting Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 79, 143 (1969)).

27. *Id.*

28. The Declaration of Independence, para. 12 (U.S. 1776).

appointing officials accountable for the actions of their subordinates.<sup>29</sup> In other words, the Colonists were hampered in effectively resisting administrative overreach because they often could not identify *who* was responsible for oversight of the offending officer, and thus, to whom they should address their grievances.<sup>30</sup> Indeed, “[w]hen citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owing up to the consequences.”<sup>31</sup> As Alexander Hamilton explained: the public cannot “determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall” without clear lines of accountability.<sup>32</sup> Thus, “a fundamental precondition of accountability in administration” is enabling the public to “understand the sources and levers of bureaucratic action,”<sup>33</sup> which requires “clear lines of command and to simplify and personalize the processes of bureaucratic governance.”<sup>34</sup> Lacking such accountability, citizens are entirely at the mercy of faceless bureaucrats over whom neither the People, nor their representatives, can exercise any effective control.<sup>35</sup>

The Founders—all of whom were painfully familiar with the Crown’s abuses—enshrined in the Constitution accountability for officers of the new Republic by “carefully husbanding the appointment power to limit its diffusion.”<sup>36</sup> Thus, the Constitution requires that principal officers be appointed by the President with the advice and consent of the Senate, while inferior officers may be appointed by the President, or if authorized by Congress, a head of department<sup>37</sup> or a court of law.<sup>38</sup> By vesting the appointment power in such visible, high-ranking officials—and only in such officials—the Appointments Clause “subjects the selection process

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29. Freytag, 501 U.S. at 885.

30. *Morrison v. Olson*, 487 U.S. 654, 729 (1988) (Scalia, J., dissenting) (noting that the President is “directly dependent on the people, and since there is only one President, he is responsible. The people know whom to blame.”).

31. *Dep’t of Transp. v. Ass’n of Am. R.R.s*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring).

32. *The Federalist* No. 70, at 476 (Alexander Hamilton) (J. Cooke ed., 1961).

33. Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2332 (2001).

34. *Id.*

35. *Freytag v. Comm’r*, 501 U.S. 868, 883 (1991) (holding that “by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people”).

36. *Id.* Thus, the Appointments Clause “prevents Congress from dispensing power too freely” by “limit[ing] the universe of eligible recipients of the power to appoint,” and setting forth clear lines of accountability so that the People will always know who bears responsibility for the actions of a given officer and, thus, to whom they can address their grievances (i.e. the superior that appointed that officer) regarding that officer’s behavior. *Id.* at 880.

37. Which includes the heads of independent “principal” agencies. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 498 (2010).

38. U.S. Const. art. II, § 2, cl. 2.

to public scrutiny”<sup>39</sup> and makes clear “where the appointment buck stops.”<sup>40</sup>

Consistent with the purposes of the Appointments Clause, early authorities took a broad view of the term “Officers of the United States.”<sup>41</sup> The First Congress, for example, subjected more than *ninety percent* of executive branch positions to Article II selection mechanisms, including clerks in the cabinet departments, customs inspectors who weighed and gauged imports, internal revenue officials, and many others holding federal “offices.”<sup>42</sup> The practices of the First Congress, which included many of the Founders who wrote the Constitution, provides “contemporaneous and weighty evidence of the Constitution’s meaning.”<sup>43</sup> Case law from that time and thereafter recognized that holders of even relatively minor government offices qualified as “officers,” particularly when those officers performed an adjudicative function. In 1806, Chief Justice Marshall explained for a unanimous Supreme Court that a Justice of the Peace qualified as an “officer” for precisely this reason.<sup>44</sup> So too did District Court Clerks,<sup>45</sup> Circuit Court Commissioners,<sup>46</sup> and various other officials including an Assistant-Surgeon, an Election Supervisor, a Federal Marshal, a Cadet Engineer, and a Vice Consul exercising the duties of Consul.<sup>47</sup> Indeed, the courts held virtually anyone who performed “continuing” duties for the United States upon assuming a position which Congress prescribed by law to be an “officer.”<sup>48</sup>

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39. *Olympic Fed. Sav. and Loan Ass'n v. Dir., Office of Thrift Supervision*, 732 F. Supp. 1183, 1189 (D.D.C. 1990).

40. *Bandimere v. SEC*, 844 F.3d 1168, 1181 (10th Cir. 2016). Such clear lines of authority enable the people to trace government action back to responsible officials, thereby allowing citizens to “pass judgment on” the appointing official’s performance and providing “long term, structural protections against abuse of power . . . critical to preserving liberty.” *Free Enterprise*, 561 U.S. at 498, 501. See also *Edmond v. United States*, 520 U.S. 651, 659 (1997) (Appointments Clause is “among the significant structural safeguards of the constitutional scheme”); *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) (Appointments Clause serves “not merely to assure effective government but to preserve individual freedom.”).

41. See *Mascott*, supra note 9.

42. *Id.*

43. *Free Enterprise*, 561 U.S. at 492.

44. *Wise v. Withers*, 7 U.S. 331, 336 (1806).

45. *Ex parte Hennen*, 38 U.S. 230, 258 (1839).

46. *United States v. Allred*, 155 U.S. 591, 594 (1895).

47. *Bandimere v. SEC*, 844 F.3d 1168, 1173–74 (10th Cir. 2016).

48. See, e.g., *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (opinion of Marshall, Circuit Justice) (“An office is defined to be ‘a public charge or employment,’ and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States. Although an office is ‘an employment,’ it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer.”). Cf. *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (applying *Maurice* to determine whether a merchant appraiser was an officer). See also *United States v. Hartwell*, 73 U.S. 385, 393

As the federal government expanded during and after the American Civil War, the number of personnel “subordinate to officers of the United States” expanded exponentially.<sup>49</sup> To avoid the growing burden on the President, Congress authorized the heads of the “Great Departments” to appoint their own subordinates (the numbers of whom were becoming far too numerous for the President to appoint directly).<sup>50</sup> The constitutional challenge embodied in this trend was highlighted by the Supreme Court in *Buckley v. Valeo*, which held that an “officer of the United States” subject to the Appointments Clause is any person who “exercis[es] significant authority pursuant to the laws of the United States.”<sup>51</sup> Meanwhile, “employees of the United States” not subject to appointment under the Constitution include “lesser functionaries subordinate to officers of the United States.”<sup>52</sup> The *Buckley* Court reiterated the Founding-era understanding that the term “officer” is “intended to have substantive meaning,” as opposed to “merely dealing with etiquette or protocol.”<sup>53</sup> The Court also expressly incorporated its earlier decisions finding officials ranging from District Court Clerks to Postmasters to be officers subject to the Appointments Clause.<sup>54</sup>

Applying *Buckley* in subsequent cases, the Supreme Court extended officer status to a wide range of quasi-judicial officials.<sup>55</sup> In its most extensive discussion of the officer/employee divide in the administrative adjudication sphere, the Court held in *Freytag v. Commissioner* that Special Trial Judges of the Tax Court who “take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders” are officers subject to the Appointments Clause because they possess significant “duties and discretion” and “perform more than ministerial tasks.”<sup>56</sup> The Court reached that conclusion notwithstanding that Special Trial Judges “lack authority to enter a final decision” in all cases.<sup>57</sup> The Court likewise held that certain military judges are officers subject to the Appointments Clause, even though their decisions are subject to review by superiors.<sup>58</sup> Magistrate judges are also officers subject

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(1867) (“an office is a public station, or employment, conferred by the appointment of government . . . [t]he term embraces the ideas of tenure, duration, emolument, and duties”).

49. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

50. *Mascott*, supra note 9.

51. *Id.*

52. *Id.*

53. *Id.* at 125–26.

54. *Id.* at 126. See *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 86 (2007) (*Buckley*'s definition incorporates historical understanding which treats some “arguably insignificant positions as offices”).

55. See *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 86 (2007).

56. *Freytag v. Comm’r*, 501 U.S. 868, 881–82 (1991).

57. *Id.* at 881.

58. See *Edmond v. United States*, 520 U.S. 651, 662 (1997); *Weiss v. United States*, 510 U.S. 163, 169–70 (1994).

to the Appointments Clause.<sup>59</sup> And, of particular relevance here, several Supreme Court opinions have concluded that various administrative judges are officers for purposes of the Appointments Clause.<sup>60</sup>

Thus, in light of the history and purpose of the Appointments Clause in ensuring accountability for government action, “efforts to define” the range of “officers” subject to the Clause “inevitably conclude that the term’s sweep is unusually broad.”<sup>61</sup>

*b. Freytag Opens the Door to Appointments Clause Challenges to Article I Judges*

The Supreme Court held in *Freytag v. Commissioner* that the Tax Court’s Special Trial Judges were inferior officers based on three characteristics: (1) the position is “established by Law”<sup>62</sup>; (2) “the duties, salary, and means of appointment . . . are specified by statute”<sup>63</sup>; and (3) the individuals “exercise significant discretion” in “carrying out . . . important functions.”<sup>64</sup> Thus, the *Freytag* Court held that the degree of authority exercised by Special Trial Judges at the Tax Court was so “significant” that it was inconsistent with the classifications of “lesser functionaries” or employees;<sup>65</sup> and the Court agreed “with the Tax Court and the Second Circuit that a special trial judge is an ‘inferior Office[r]’ whose appointment must conform to the Appointments Clause.”<sup>66</sup>

Therefore, the Supreme Court unanimously held that a Tax Court Special Trial Judge is an “inferior officer” because his or her position is “established by Law . . . and the duties, salary, and means of appointment for that office are specified by statute.”<sup>67</sup> “These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute.”<sup>68</sup> The Supreme Court further noted that the Special Trial Judges “perform more than ministerial tasks . . .”<sup>69</sup> “They take testimony, conduct trials,

59. See *Landry v. FDIC*, 204 F.3d 1125, 1143 (D.C. Cir. 2000) (Randolph, J., concurring); *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 545 (9th Cir. 1984) (en banc) (Kennedy, J.).

60. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 542 (2010) (Breyer, J., dissenting); *Freytag*, 501 U.S. at 910 (Scalia, J., concurring); see also *Butz v. Economou*, 438 U.S. 478, 513 (1978) (role of administrative judge is “functionally comparable to that of a judge”).

61. *Free Enterprise*, 510 U.S. at 539.

62. *Freytag*, 501 U.S. at 881 (quoting U.S. Const. art. II, § 2, cl. 2).

63. *Id.*

64. *Id.* at 882.

65. *Id.* at 881; Cf. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352–53 (1931) (United States commissioners are inferior officers), abrogated on other grounds by *Harris v. United States*, 331 U.S. 145 (1947).

66. *Freytag*, 501 U.S. at 881 (alteration in original).

67. *Id.* at 881–82 (referencing *Burnap v. United States*, 252 U.S. 512, 516–17 (1920); *United States v. Germaine*, 99 U.S. 508, 511–12 (1879)).

68. *Id.* at 881.

69. *Id.*

rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.”<sup>70</sup>

*c. The 2016 Circuit Split*

Like the Special Trial Judges at issue in *Freytag*, ALJs perform more than ministerial tasks: they take testimony,<sup>71</sup> conduct hearings,<sup>72</sup> rule on the admissibility of evidence,<sup>73</sup> and have the power to enforce compliance with discovery orders.<sup>74</sup> In the course of carrying out these important functions, they exercise significant discretion, and their superiors ordinarily defer to their findings on review.<sup>75</sup> Specifically, at the end of most administrative proceedings, the ALJ prepares an Initial Decision containing his or her conclusions as to the factual and legal issues presented, and issues an order establishing his or her decision.<sup>76</sup> If neither party appeals to the head of the agency (which may be an individual, or a board/commission), an ALJ’s order may become final automatically, or the head of the agency may be required to confirm the decision.<sup>77</sup> Thus, *Freytag* opened the door to challenging ALJ actions as violations of the Appointments Clause because the authority of many ALJs are at *least* as significant as the Special Trial Judges the Supreme Court held were officers therein.<sup>78</sup>

i. The D.C. Circuit Established a Decade Ago in *Landry* that Final Decision-Making Authority is a Necessary Element of Officer Status

The Court of Appeals for the District of Columbia Circuit considered the constitutional issues surrounding ALJ appointments in *Landry v. FDIC*.<sup>79</sup> The D.C. Circuit concluded that Administrative Judges of the Federal Deposit Insurance Corporation (FDIC) were not inferior officers<sup>80</sup> because its ALJs can never render a final decision of the FDIC, but only *recommend* a decision (and the FDIC Board makes its own factual findings

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70. *Id.*

71. 5 U.S.C. § 556(c)(4) (2018).

72. 5 U.S.C. § 556(c)(3), (5) (2018).

73. 5 U.S.C. § 556(c)(9) (2018).

74. 5 U.S.C. § 556(c)(2) (2018).

75. See, e.g., *Bandimere v. SEC*, 844 F.3d 1168, 1176–77 (10th Cir. 2016) (discussing the independence of ALJs).

76. 5 U.S.C. § 556(c)(10) (2018).

77. Compare 17 C.F.R. § 201.411 (2018) (mandatory review by the SEC Commissioners for some decisions of SEC ALJs), with 5 C.F.R. § 1201.155 (2018) (MSPB reviews are discretionary).

78. See *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991).

79. See *Landry v. FDIC*, 204 F.3d 1125, 1143 (D.C. Cir. 2000) (Randolph, J., concurring); *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 545 (9th Cir. 1984) (en banc) (Kennedy, J.).

80. Though the position was established by law, as were its specific duties, salary, and means of appointment; and even though administrative judges take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders, and exercise significant discretion in doing so.

and final decision thereafter).<sup>81</sup> In short, the D.C. Circuit concluded that de novo review following an ALJ's Initial Decision reduces the status of that ALJ to a mere "lesser functionary" (i.e. an employee).<sup>82</sup> To put in another way, the D.C. Circuit concluded that final decision-making authority, which the Supreme Court identified as sufficient to establish officer status in *Freytag*, was in fact a necessary *element* of officer status.

## ii. The *Lucia* Appeal

Applying *Landry*, the D.C. Circuit held in the *Lucia* Appeal that Securities and Exchange Commission ALJs were not "inferior officers" who must be appointed under the Constitution, and could instead be hired as mere employees.<sup>83</sup> The *Lucia* Panel found that the Initial Decisions of the SEC's administrative judges do *not* become final by lapse (i.e. merely through the passing of time), but only after the Commission *affirmatively* determines that it will not review the ruling and issues an order to that effect.<sup>84</sup> The Panel further noted that "the Commission could have chosen to adopt regulations whereby an ALJ's initial decision would be deemed a final decision of the Commission upon the expiration of a review period, without any additional Commission action. But that is not what the Commission has done."<sup>85</sup>

## iii. The Tenth Circuit Strictly Applies the *Freytag* Test in *Bandimere*

The Tenth Circuit in *Bandimere v. SEC* considered the same constitutional question contemporaneously with the D.C. Circuit's consideration in the *Lucia* Appeal and, applying *Freytag*, came to the opposite conclusion regarding the SEC's ALJs.<sup>86</sup> The court strictly applied the *Freytag* test, finding such application mandatory as a matter of precedent, and held that the ALJs are Inferior Officers of the United States.<sup>87</sup>

The Tenth Circuit held that the SEC's ALJs met all three prongs of the *Freytag* test. First, the SEC's ALJ positions were established by law—the court found that the Securities and Exchange Act of 1934 authorized the SEC to delegate "any of its functions," with the exception of

81. *Bandimere v. SEC*, 844 F.3d 1168, 1133–34 (10th Cir. 2016).

82. *Id.* See also *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 117 (D.C. Cir. 2015) ("This court has twice before considered the validity of decisions made after the replacement of an improperly appointed official. Both cases support the validity of a subsequent determination when—as here—a properly appointed official has the power to conduct an independent evaluation of the merits and does so.")

83. *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), reh'g en banc granted, judgment vacated (Feb. 16, 2017), judgment aff'd per curiam by an equally divided court, 868 F.3d 1021 (D.C. Cir. 2017), rev'd sub nom. *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

84. *Lucia*, 832 F.3d at 286.

85. *Id.* The *Lucia* Panel's decision is consistent with the D.C. Circuit's test established in *Landry* in that it found that the "de novo" review of every SEC administrative judge's decision by the Commission rendered its ALJs mere employees.

86. *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016).

87. *Id.* at 1179–80.

rulemaking, to its administrative judges.<sup>88</sup> Second, the governing statutes set forth the ALJ's duties, salaries, and means of appointment.<sup>89</sup> The SEC's judges are not "hired . . . on a temporary, episodic basis."<sup>90</sup> They receive career appointments and can be removed only for good cause.<sup>91</sup> Therefore, the court found that the SEC's ALJs meet the second prong of the *Freytag* test.<sup>92</sup> Third, the SEC's ALJs "exercise significant discretion in performing 'important functions' commensurate with the special trial judges functions described in *Freytag*."<sup>93</sup> Thus, the *Bandimere* court held that the SEC's ALJs are inferior officers requiring appointment.<sup>94</sup> Because the ALJs were not appointed, the proceedings they conducted were void as a matter of constitutional law.<sup>95</sup>

#### iv. The D.C. Circuit Itself Splits on *Lucia*

Perhaps recognizing the semantical illogicality of requiring an *inferior* officer to have final decision-making authority *superior* to anyone else, the D.C. Circuit vacated *Lucia* pending rehearing en banc to reconsider its conclusion that the SEC's Administrative Judges were not inferior officers.<sup>96</sup> This rehearing order added the question of whether the D.C. Circuit should overrule *Landry* in addition to the initial question of whether the SEC's ALJs are inferior officers.<sup>97</sup> Therefore, it initially appeared that the D.C. Circuit was poised to strike down the 'de novo review cures' test entirely, recognizing, as the Tenth Circuit did, that most ALJs "exercise significant discretion over issues of credibility, unchecked by faux 'de novo' review."<sup>98</sup>

However, on June 26, 2017, the en banc panel split five to five (with Chief Judge Garland recused) and the decision below (following *Landry*

88. *Id.* at 1179 ("17 C.F.R. § 200.14, a regulation promulgated under the [1934 Securities Exchange] Act, gives the agency's 'Office of Administrative Law Judges' power to 'conduct hearings' and 'proceedings.'").

89. 5 U.S.C. § 556(b)(3) (2018).

90. *Freytag*, 501 U.S. at 881.

91. 5 U.S.C. § 7521 (2018); 5 C.F.R. § 930.204(a) (2018).

92. *Bandimere*, 844 F.3d at 1179.

93. *Id.* (quoting *Freytag*, 501 U.S. at 882).

94. *Id.* at 1179, 1182.

95. *Id.* at 1188.

96. *Raymond J. Lucia Cos. v. SEC*, No. 15-1345, 2017 WL 631744 (D.C. Cir. Feb. 16, 2017), judgment aff'd per curiam by an equally divided court, 868 F.3d 1021 (D.C. Cir. 2017), rev'd sub nom. *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

The D.C. Circuit also granted en banc review in a similar case (which on appeal came to the opposite conclusion of the *Lucia* Appeal in an opinion by Judge Kavanaugh) addressing the Consumer Financial Protection Bureau, reversed the judgment below, and held that the director of the Bureau did not violate the Appointments Clause. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016), vacated, reh'g en banc granted, No. 15-1177, 2017 WL 631740 (D.C. Cir. Feb. 16, 2017), judgment rev'd in part and aff'd in part, 881 F.3d 75 (D.C. Cir. Jan. 31, 2018).

97. *Raymond J. Lucia Cos, Inc. v. SEC*, No. 15-1345, 2017 WL 631744 (D.C. Cir. Feb. 16, 2017).

98. *Bandimere*, 844 F.3d at 1181 (Briscoe, J., concurring).

and finding that the SEC's ALJs were *not* officers) was affirmed.<sup>99</sup> Mr. Lucia subsequently filed a Petition for Certiorari with the Supreme Court.<sup>100</sup> On September 29, 2017, the SEC also filed for certiorari in *Bandimere*,<sup>101</sup> and the Supreme Court denied cert after deciding *Lucia*, effectively affirming the Tenth Circuit's finding of officer status for SEC ALJs.

*d. The Job Protection Issue*

Part and parcel with the Appointments Clause is the President's ability to remove Officers of the United States. In *Free Enterprise v. PCAOB*,<sup>102</sup> the Supreme Court held that Congress violated the Executive Vesting Clause of the Constitution<sup>103</sup> when it barred removal of the Public Company Accounting Oversight Board's (PCAOB) members by the President.<sup>104</sup> Specifically, the Court found that providing the PCAOB's members for-cause job removal protection, and then vesting the authority for removal in the SEC's Commissioners, who themselves had for-cause removal protection, created "dual" for-cause protection that insulated the members from the President's constitutional powers by *two* layers of tenure.<sup>105</sup> Critical to this holding was the Court's finding that the members were "inferior officers"<sup>106</sup> of the United States.<sup>107</sup>

This holding is explosive in the ALJ arena because the APA protects ALJs from removal without cause.<sup>108</sup> Thus, the APA authorizes ALJ removal only "for good cause" found by the Merit Systems Protection Board; and the Board's members are in turn protected from removal.<sup>109</sup> Thus, ALJs appear to be provided with the same "dual" job removal protection (their own and that of the Board's members) that the Court struck down in *Free Enterprise*. Therefore, the Supreme Court's decision in *Lucia* may ultimately effect far more than *who* is classified as an Officer of

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99. Raymond J. Lucia Cos, Inc. v. SEC, No. 15-1345, 2017 WL 631744 (D.C. Cir. Feb. 16, 2017).

100. Petition for Writ of Certiorari, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130).

101. Petition for Writ of Certiorari, Bandimere v. SEC, 844 F.3d 1168 (2017) (No. 17-475), cert. denied, 138 S. Ct. 2706 (2018) (thereby leaving intact the 10th Circuit's decision finding that the SEC's ALJs are officers).

102. Free Enter. Fund v. Pub Co. Accounting Oversight Bd., 561 U.S. 477, 499, 501 (2010).

103. U.S. Const. art. II, § 1 ("[t]he executive Power shall be vested in a President of the United States of America").

104. Free Enterprise, 561 U.S. at 501, 514 ("Congress cannot limit the President's authority" by providing "two levels of protection from removal for those who . . . exercise significant executive power").

105. Id. at 495-98.

106. By virtue of their subordination to the SEC Commissioners.

107. Free Enterprise, 561 U.S. at 492-95, 504-05.

108. 5 U.S.C. § 7521(a) (2018) ("[A]ction may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.").

109. 5 U.S.C. § 1202(d) (2018) (The President may remove members of the Merit Systems Protection Board only for "inefficiency, neglect of duty, or malfeasance in office.").

the United States—it may also *significantly* reduce the job protections from both the President and Congress that many Executive Branch personnel presently enjoy.

### III. DISCUSSION—THE *LUCIA* DECISION

On June 21, 2018, the Supreme Court of the United States decided *Lucia v. SEC* and held that the SEC’s ALJs are Inferior Officers of the United States requiring an appointment comporting with the Appointments Clause.<sup>110</sup> Because the ALJ conducting Mr. Lucia’s proceeding was not properly appointed at the time of the proceeding, the Court invalidated the proceeding and remanded his case for a new hearing before a constitutionally appointed arbiter.<sup>111</sup> However, the Court declined to rule on the Solicitor General’s argument regarding the ALJs for-cause removal protection, leaving that issue for another day.<sup>112</sup>

In the majority opinion, Justice Kagan<sup>113</sup> explicitly stated that “Freytag says everything necessary to decide this case,”<sup>114</sup> and held that the ALJs are officers because they “hold a continuing office established by law”<sup>115</sup> and “exercise . . . significant discretion when carrying out . . . important functions.”<sup>116</sup> The Court further noted that ALJs have even greater independent authority than the Special Trial Judges (STJs) in *Freytag* because the STJs’ decisions always require review by higher authority to be binding, whereas ALJ decisions can be final if not appealed or if review is rejected by higher authority.<sup>117</sup> The Court overruled the D.C. Circuit’s ‘final decision-making authority’ test established in *Landry* (and applied in the *Lucia* Appeal), and approved instead the straight-forward application of *Freytag* as utilized by the Tenth Circuit in *Bandimere*.<sup>118,119</sup>

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110. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).

111. *Id.* at 2049–50.

112. *Id.* at 2050 n.1.

113. Joined by Chief Justice Roberts and Justices Kennedy, Thomas, Alito, and Gorsuch. Justice Breyer concurred in the judgment only.

114. *Lucia*, 138 S. Ct. at 2053.

115. *Id.*

116. *Id.* (citing *Freytag v. Comm’r*, 501 U.S. 868, 882 (1991)) (internal quotation marks omitted).

117. *Id.* at 2053–54.

118. *Id.* at 2052.

119. Justice Thomas, joined by Justice Gorsuch, would take an even more expansive view of officer status. *Id.* at 2056–57 (Thomas, J., concurring). Specifically, they would hold that any Executive Branch official charged with “responsibility for an ongoing statutory duty” is an officer. *Id.* at 2056 (Thomas, J., concurring).

a. *Impact of the Majority Opinion*

i. Failure to Properly Appoint an Officer is a Structural Constitutional Error Requiring *Automatic* Voiding of Any Proceedings Conducted by Such Officer

Prior to *Lucia*, the Supreme Court had not explicitly stated whether an Appointments Clause violation requires reversal where it appears to have done a party no direct harm.<sup>120</sup> However, the Supreme Court in *Freytag* reached the Appointments Clause issue despite it not having been raised before the trial court and classified the clause as “structural” because of its purpose to prevent encroachment of one branch on another, and to preserve the Constitution's structural integrity.<sup>121</sup> The Supreme Court uses the term structural for a set of errors for which no direct injury is necessary—such as a criminal defendant's indictment by a grand jury chosen in a racially or sexually discriminatory manner.<sup>122</sup> “The D.C. Circuit discussed in *Landry* the Supreme Court’s use of the label ‘structural,’ observing that only in a limited class of cases has it ‘found an error to be “structural,”’ and thus subject to automatic reversal.”<sup>123</sup> A violation of the Appointments Clause fits within that doctrine because “it will often be difficult or impossible for someone subject to a wrongly designed scheme to show that the design—the structure—played a causal role in his loss.”<sup>124</sup> “[S]eparation of powers is a structural safeguard rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified . . . .”<sup>125</sup> “[I]t is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.”<sup>126</sup> “For Appointments Clause violations, demand for a clear causal link to a party's harm will likely make the Clause no wall at all.”<sup>127</sup> “*Freytag* itself indicates that judicial review of an Appointments Clause claim will proceed even where any possible injury is radically attenuated . . . [and] a defect in the appointment of an ‘examiner’<sup>128</sup> was . . . ‘an irregularity which would invalidate a resulting order.’”<sup>129</sup>

120. *Ryder v. United States*, 515 U.S. 177, 182–83 (1995).

121. *Freytag v. Comm’r*, 501 U.S. 868, 878–79 (1991).

122. See, e.g., *Vasquez v. Hillery*, 474 U.S. 254, 261, 261 n.4, 263 (1986) (race); *Ballard v. United States*, 329 U.S. 187, 195 (1946) (sex).

123. *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000) (quoting *Neder v. United States*, 527 U.S. 1 (1999)).

124. *Id.*

125. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995).

126. *Id.*

127. *Landry*, 204 F.3d at 1131.

128. The precursor of today's ALJ.

129. *Landry*, 204 F.3d at 1132 (quoting *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952)). See also *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 123 (D.C. Cir. 2015) (“[A]n Appointments Clause violation is a structural error that warrants reversal regardless of whether prejudice can be shown.”).

This explicit constitutional limitation is much “more than a matter of ‘etiquette or protocol’ . . . . It is a crucial “structural safeguar[d] of the constitutional scheme.”<sup>130</sup> The Appointments Clause’s restrictions “preserv[e] . . . the Constitution’s structural integrity by preventing the diffusion of the appointment power.”<sup>131</sup> The Founders “understood . . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people.”<sup>132</sup> That limitation applies to the appointment of both principal and inferior officers.<sup>133</sup> In short, where a proceeding is conducted by an improperly appointed officer, whether a principal or inferior officer, those proceedings are void as a matter of law.<sup>134</sup>

The Supreme Court strictly applied these precedents in *Lucia* and held that the proceedings below were void and Mr. Lucia was entitled to new proceedings.<sup>135,136</sup>

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130. *Edmond v. United States*, 520 U.S. 651, 659 (1997).

131. *Freytag v. Comm’r*, 501 U.S. 868, 878 (1991).

132. *Id.* at 884.

133. *Id.* at 886. (“Cabinet-level departments are limited in number and easily identified,” and “[t]heir heads are subject to the exercise of political oversight and share the President’s accountability to the people”); *Dep’t of Transp. v. Ass’n of Am. R.R.s*, 135 S. Ct. 1225, 1239 (2015) (Alito, J., concurring) (the “exception from the ordinary rule of Presidential appointment for ‘inferior Officers,’ . . . has accountability limits of its own”).

134. Another question raised by but unanswered in *Lucia* is whether an action pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) is available against an improperly appointed ALJ and the agency official(s) which failed to make a proper appointment if the unconstitutional proceeding is conducted after *Lucia* was decided. The Supreme Court held in *Butz v. Economou*, 438 U.S. 478 (1978) that ALJs enjoy absolute immunity from a *Bivens* suit for damages; however, it is unclear whether an improperly appointed ALJ loses his or her immunity by virtue of unlawfully occupying the office. If the Court ultimately holds that an improperly appointed ALJ has no immunity, then a *Bivens* action may lie and ALJs who are not properly appointed after *Lucia* was decided may be liable for damages (including potentially damages in their personal capacities). The appointing officials, whose failure to make a proper appointment would violate a well-established constitutional right post-*Lucia*, are likely liable under *Bivens* regardless as such officers are unlikely to have immunity in the Appointments Clause context.

135. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).

136. In a new twist, the *Lucia* Court barred the same ALJ from rehearing Mr. Lucia’s case, even if the ALJ was properly appointed. *Id.* The Court flatly rejected the SEC’s attempted ratification of the ALJ’s authority by properly appointing all of the SEC ALJs while *Lucia* was pending. *Id.* The Court explicitly limited its holding to cases where another constitutionally appointed official (either another ALJ, or the principal officer(s) of that agency or department) is available. *Id.* at 2055 n.5. Nevertheless, this holding is likely to significantly increase the disruption caused by the decision by requiring ALJs with no prior knowledge of a case to conduct the required re-hearings. Of the thirty-one agencies with ALJ authority, only four have a single ALJ, and all four of those have constitutionally appointed officers which could conduct the re-hearings themselves. Office of Pers. Mgmt., Administrative Law Judges, OPM.gov (June 25, 2018), <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency>. In other words, this part of the holding is likely to apply to all ALJs. Therefore, not only will departments and agencies have to appoint their ALJs as officers, but they must also undertake a ‘Case Swap’ so that all cases currently pending are re-heard by a constitutionally appointed arbiter different than the original ALJ—a time consuming endeavor.

ii. The Courts May Hear Appointments Clause Challenges at Virtually Any Stage of Proceedings—Dramatically Increasing the Impact of Lucia

The Supreme Court granted review in *Freytag* despite the Petitioner therein failing to raise the constitutional challenge in the administrative proceedings below, and actually *consenting* to the assignment of the case to the Special Trial Judge whose appointment the petitioner later challenged before the Supreme Court.<sup>137</sup> The Supreme Court noted that “[t]his Court in the past, however, has exercised its discretion to consider non-jurisdictional claims that had not been raised below.”<sup>138</sup> The Court continued: “*Glidden* [Co. v. Zdanok]<sup>139</sup> expressly included Appointments Clause objections to judicial officers in the category of non-jurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below.”<sup>140</sup> Further, in *Lamar v. United States* “the claim that an intercircuit assignment . . . usurped the presidential appointing power under Art. II, § 2, was heard here and determined upon its merits, despite the fact that it had not been raised in the District Court or in the Court of Appeals or even in this Court until the filing of a supplemental brief upon a second request for review.”<sup>141</sup>

Thus, the Supreme Court held that where “a constitutional challenge . . . is neither frivolous nor disingenuous” and the “alleged defect in the appointment of the [adjudicator] goes to the validity of the . . . proceeding that is the basis for [the] litigation” the result is “one of those rare cases in which we should exercise our discretion to hear petitioners’ challenge to the constitutional authority of the [Judge].”<sup>142</sup> “The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic,”<sup>143</sup> and courts should hear such claims, even when not raised below, because of “the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers.”<sup>144</sup>

The Supreme Court in *Lucia* did not disturb the precedents above; it merely noted that because Mr. Lucia *had* made a timely objection to the ALJ’s appointment at the ALJ’s hearing, he was certainly entitled to voiding of the proceedings below as relief.<sup>145</sup> While some commentators interpret the opinion as limiting the decision to only those circumstances where

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137. *Freytag*, 501 U.S. at 878.

138. *Id.* (“See *Grosso v. United States*, 390 U.S. 62, 71–72 . . . (1968); *Glidden* [Co. v. Zdanok], 370 U.S. 530, 535–36]; *Hormel v. Helvering*, 312 U.S. 552, 556–560 . . . (1941)”).

139. *Glidden Co. v. Zdanok*, 370 U.S. 530, 535–36 (1962).

140. *Freytag*, 501 U.S. at 878–79.

141. *Glidden*, 370 U.S. at 536 (Harlan, J., announcing the judgment of the Court) (citing *Lamar v. United States*, 241 U.S. 103, 117 (1916)).

142. *Freytag*, 501 U.S. at 879.

143. *Id.* at 880.

144. *Id.* at 879.

145. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).

a contemporaneous objection was made,<sup>146</sup> there is no indication that the majority intended to overturn precedent permitting (and, indeed, strongly encouraging) review of Appointments Clause challenges raised for the first time on appeal. Instead, Justice Kagan merely acknowledged that since Mr. Lucia *had* made a contemporaneous objection, he was “*entitled to relief.*”<sup>147</sup>

Therefore, *Lucia* impacts *all* ALJ decisions—a titanic disruption of the administrative state’s system of internal adjudication—regardless of the state of proceedings those cases may be in at the time of the decision. This potentially includes *thousands* of cases in areas as diverse as federal employment disputes,<sup>148</sup> social security benefit adjudications,<sup>149</sup> enforcement activities by the SEC, and other federal agencies that use ALJs to adjudicate cases or enforce regulatory power. As counsel becomes aware of the availability of a *Lucia*-based objection both at the hearing phase and on appeal, the number of such objections is likely to rise exponentially until the appointment defects are corrected. And, even then, *Lucia* forces the government to rehear (with a different arbiter) all of the cases that were heard or adjudicated by an improperly appointed officer—a massive undertaking.

*b. Justices Thomas and Gorsuch Would Broaden Officer Status Even Further*

Justice Thomas, joined by Justice Gorsuch, argues in his concurrence that officer status should apply to all executive branch officials “with responsibility for an ongoing statutory duty.”<sup>150</sup> Thomas argues, with significant historical support, that the Founders recognized that officer status applied to any official performing an ongoing statutory duty “no matter how important or significant the duty.”<sup>151</sup> In short, Justices Thomas and Gorsuch would dispose of the “significant responsibility” test set forth in *Buckley* and applied in *Freytag* and *Lucia* in favor of the test set forth in *United States v. Maurice* requiring only that the office be a continuing one set forth in statute.

Justice Thomas’s position may be compelling to those jurists who favor an originalist interpretation of the Constitution because it most closely adheres to the Founders stated concepts and the practices of the

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146. See, e.g., Alan Morrison, Symposium: *Lucia v. SEC* – more questions than answers, SCOTUSblog (Jun. 22, 2018, 8:57 AM), <http://www.scotusblog.com/2018/06/symposium-lucia-v-sec-more-questions-than-answers> (Lucia “applies only if a proper objection was timely made . . .”).

147. *Lucia*, 138 S. Ct. at 2055 (citing *Ryder v. United States*, 515 U. S. 177, 182–183 (1995)) (emphasis added).

148. Merit System Protection Board.

149. Social Security Administration.

150. *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring) (quoting *Mascott*, supra note 9, at 564).

151. *Mascott*, supra note 9, at 454.

First Congress.<sup>152</sup> In particular, “[t]he Founders considered individuals to be officers even if they performed only ministerial statutory duties . . . .”<sup>153</sup> If the law once again requires “all federal officials with ongoing statutory duties to be appointed in compliance with the Appointments Clause,”<sup>154</sup> a significant portion of Federal employees will be officers.<sup>155</sup>

*c. Justice Breyer Predicts Disaster*

Justice Breyer concurred in the judgment on statutory grounds to avoid the constitutional issue entirely.<sup>156</sup> He did so, by his own admission, because he predicted disaster should the Court ultimately hold in a future case that the dual for-cause removal protection for ALJs set forth in the APA also violates the Constitution.<sup>157</sup>

i. The Administrative Procedure Act was Designed to Shield ALJs from the Power of the President and His or Her Officers

Securing independence of ALJs is a significant purpose of the APA<sup>158</sup> because the ALJs were intended to replace the hearing examiners who worked directly for their employing agencies.<sup>159</sup> However, applying the *Free Enterprise* rule to ALJs “would risk transforming administrative law judges from independent adjudicators into dependent decisionmakers.”<sup>160</sup> As Justice Breyer wrote, “to apply *Free Enterprise Fund*’s holding to high-level civil servants threatens to change the nature of our merit-based civil service as it has existed from the time of President Chester Alan Arthur.”<sup>161</sup>

ii. *Lucia* Upsets the Exclusion of ALJs from the *Free Enterprise* Rule

The Court in *Free Enterprise* distinguished the PCAOB members from ALJs on three grounds. First, the Court noted that ALJs were not necessarily Officers of the United States.<sup>162</sup> Second, the Court noted ALJs perform solely adjudicative functions, rather than enforcement or

152. Id.

153. *Lucia v. SEC*, 138 S. Ct. 2044, 2057 (2018) (Thomas, J., concurring).

154. Id.

155. As discussed below, there is significant reason to believe that Judge Kavanaugh, if confirmed to the Court, would side with Justices Thomas and Gorsuch on this question—thus requiring only two more votes for the Court to return to the earlier and significantly broader definition of “officer”.

156. He would hold that the ALJ appointments at the SEC violated the APA because the SEC Commissioners improperly delegated the appointment authority for ALJs to the Commission’s staff. *Lucia*, 138 S. Ct. at 2057 (Breyer, J., concurring).

157. Id.

158. See *Ramspeck v. Federal Trial Examiners Conf.*, 345 U.S. 128, 130 (1953); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46 (1950).

159. *Ramspeck*, 345 U.S. at 130.

160. *Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring in the judgment).

161. *Free Enter. Fund v. Pub Co. Accounting Oversight Bd.*, 561 U.S. 477, 540–42 (2010) (Breyer, J., dissenting).

162. Id. at 507 (majority opinion).

policymaking like the PCAOB members.<sup>163</sup> And third, the Court found that the PCAOB members enjoyed “unusually high”<sup>164</sup> for-cause removal protection.<sup>165</sup>

However, as Justice Breyer points out, *Lucia* torpedoes the first distinction by holding that ALJs are officers.<sup>166</sup> The other two distinctions arguably remain.<sup>167</sup> However, the Solicitor General argued in *Lucia* that dual for-cause protection itself is sufficient to violate the Constitution under the *Free Enterprise* standard.<sup>168</sup> Indeed, the Solicitor General went so far as to argue that the appointing officer(s) (there, the SEC Commissioners) must have direct removal authority,<sup>169</sup> leaving the MSPB to review only whether the appointing official properly followed procedure in removing an ALJ, not whether the facts found by the official *actually* constituted “good cause” for removal.<sup>170</sup>

Justice Breyer correctly concludes that eliminating the dual for-cause protection<sup>171</sup> significantly weakens the statutory job protections for ALJs set forth in the APA.<sup>172</sup> The pre-*Lucia* law permits the agency appointing ALJs to overrule their decisions—it does not permit the agency to fire an ALJ.<sup>173</sup> An application of *Free Enterprise* to ALJs would change all that.<sup>174</sup>

In short, if *Free Enterprise* applies to ALJs, and *Lucia* does indeed render all ALJs Officers of the United States, then the entire statutory job protection scheme for ALJs set forth in the APA is unconstitutional. Currently, ALJs answer only to the Merit Systems Protection Board, whose own members enjoy for-cause removal protection, which insulates the Board Members from the power of the President and his principal officers. However, the application of *Free Enterprise* necessarily leads to one of two scenarios. If the ALJ is subject to removal by someone who already has job protection (e.g. the SEC’s Commissioners and the MSPB members), then the ALJ will lose his or her removal protection *entirely*—which is what happened to the PCAOB’s members in *Free Enterprise*.<sup>175</sup> Alternatively, if the ALJ is subject to removal by someone who does *not* have

163. *Id.*

164. *Id.* at 503.

165. *Id.* at 506.

166. *Lucia v. SEC*, 138 S. Ct. 2044, 2061 (2018) (Breyer, J., concurring in the judgment).

167. *Id.* See also *Wiener v. United States*, 357 U. S. 349, 355–56 (1958) (holding that Congress is free to protect bodies tasked with “‘adjudicat[ing] according to law’ . . . ‘from the control or coercive influence, direct or indirect,’ . . . of either the Executive or Congress”) (quoting *Humphrey’s Ex’r v. United States*, 295 U. S. 602, 629 (1935)).

168. Brief of Respondent at 45–55, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130).

169. *Id.* at 48.

170. *Id.* at 52–53.

171. *I.e.* that the SEC Commissioners cannot fire an ALJ, but can only put in a request for termination to the MSPB, which makes the decision.

172. *Lucia v. SEC*, 138 S. Ct. 2044, 2061 (2018) (Breyer, J., concurring in the judgment).

173. *Id.* See also 5 U.S.C. § 7521 (2018).

174. *Lucia*, 138 S. Ct. at 2061–62 (Breyer, J., concurring in the judgment).

175. *Free Enter. Fund v. Pub Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010).

job protection (e.g. a cabinet secretary), then the ALJ will retain his or her removal protection, but the good cause decision will be at the sole discretion of the removing official, not the MSPB.<sup>176</sup> In other words, ALJs either have no removal protection, or have removal protection but the decision lies in the hands of an official who lacks such protection and is, therefore, more vulnerable to pressure from above. In either case, the application of *Free Enterprise* “leaves the President separated from [the ALJs] by only a single level of good-cause tenure.”<sup>177</sup>

*d. Judge Kavanaugh Would Almost Certainly Support the Broad Application of Lucia and Application of the Free Enterprise Rule if Confirmed to the Supreme Court*

Judge Kavanaugh, nominated by President Trump to replace Justice Kennedy, has a strong record in favor of strict application of the Appointments Clause to administrative officials. Kavanaugh dissented from the D.C. Circuit’s opinion in *Free Enterprise*,<sup>178</sup> and the Supreme Court ultimately sided with him and directly quoted his opinion when it reversed the Circuit Court.<sup>179</sup>

More recently, Kavanaugh voted against affirmance in the *Lucia* En Banc Order and also wrote the panel decision in *PHH Corp. v. Consumer Financial Protection Bureau*. The D.C. Circuit later reversed Kavanaugh’s opinion in *PHH* six to four whilst sitting en banc; a decision which resulted in three concurring opinions (one on the judgment only) and three dissents (including one by Kavanaugh).<sup>180</sup> Both in his vacated opinion below, and in dissent, Judge Kavanaugh expressed strong skepticism towards the Bureau’s director possessing for-cause removal protection.<sup>181</sup> Indeed, Kavanaugh opens his dissent by stating: “This is a case about executive power and individual liberty.”<sup>182</sup> Kavanaugh then found that “independent agencies collectively constitute, in effect, a headless fourth branch of the U.S. Government.”<sup>183</sup> Applying this logic, he would have held that the use of a single agency head (rather than a board like the

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176. Because the MSPB members have for-cause protection, permitting them to review ALJ terminations violates the Free Enterprise rule if the ALJ also has for-cause protection as there would then be two levels of for-cause protection between the ALJ and the President.

177. *Free Enterprise*, 561 U.S. at 509.

178. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

179. *Free Enterprise*, 561 U.S. at 505.

180. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016), vacated, reh’g en banc granted, No. 15-1177, 2017 WL 631740 (D.C. Cir. Feb. 16, 2017), judgment rev’d in part and aff’d in part, 881 F.3d 75 (D.C. Cir. Jan. 31, 2018).

181. *Id.* See also Sarah Harrington, Kavanaugh on the executive branch: *PHH Corp. v. Consumer Financial Protection Bureau*, SCOTUSblog (Aug. 8, 2018, 10:25 AM), <http://www.scotusblog.com/2018/08/kavanaugh-on-the-executive-branch-phh-corp-v-consumer-financial-protection-bureau/>.

182. *PHH Corp. v. Consumer Fin. Prot. Bureau*, No. 15,1177, slip op. at 2 (D.C. Cir. Jan. 31, 2018) (Kavanaugh, J., dissenting), [https://www.cadc.uscourts.gov/internet/opinions.nsf/B7623651686D60D585258226005405AC/\\$file/15-1177.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/B7623651686D60D585258226005405AC/$file/15-1177.pdf).

183. *Id.*

SEC Commissioners) with for-cause removal protection violated the *Free Enterprise* rule, even though the director was directly removable by the President (i.e. protected by only a single layer of for-cause protection), thus requiring removal of that protection so that the director would be subject to at-will removal by the President.<sup>184</sup>

Though predicting the alignment of judges elevated to the Supreme Court is fraught with uncertainty,<sup>185</sup> Judge Kavanaugh's open hostility to shielding the administrative state from the power of the President as Chief Executive bodes well for broader application of officer status and greater restriction on job protections for Officers of the United States should he be confirmed to the high court.

#### IV. CONCLUSION

The Supreme Court in *Lucia* followed precedent in holding that Administrative Law Judges are Inferior Officers of the United States because they "are more than mere aids" to their employing agencies<sup>186</sup> and because they "perform more than ministerial tasks."<sup>187</sup> The governing statutes (principally the Administrative Procedure Act) and regulations give many (if not all) ALJs duties "comparable to those of Special Trial Judges who were held to be officers in *Freytag*." ALJs carry out "important functions"<sup>188</sup> and "exercis[e] significant authority pursuant to the laws of the United States."<sup>189</sup> An agency's power (often deferential and discretionary) to review actions by its ALJs does not transform them into "lesser functionaries."<sup>190</sup> Rather, it shows that they are inferior officers subordinate to the appointing department or agency's principal officers.<sup>191</sup> Therefore, the Supreme Court's decision in *Lucia* means that most, if not all, Administrative Law Judges are *improperly* appointed Officers of the United States, rendering the administrative records they create and the decisions thereby rendered *automatically* void as a matter of constitutional law. The impact of this holding on administrative adjudications is likely to be substantial, immediate, and ongoing—and those that hold the contrary belief are likely to be disappointed.

Further, if Justice Breyer's concern proves prescient so that the Court's holding in *Free Enterprise* means that ALJs for-cause removal protections set forth in the APA are unconstitutional, then a significant restraint upon the President's power over administrative adjudications will be eliminated. Regardless of the method of appointment of a particular

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184. *Id.* at 3–7.

185. See, e.g., Souter, D.

186. *Samuels, Kramer & Co. v. Comm'r*, 930 F.2d 975, 986 (2d Cir. 1991).

187. *Freytag v. Comm'r*, 501 U.S. 868, 881 (1991).

188. *Id.* at 882.

189. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

190. *Freytag*, 501 U.S. at 880 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976)).

191. *Edmond v. United States*, 520 U.S. 651, 662–63 (1997); *Buckley*, 424 U.S. at 126, 139–40; *Bandimere v. SEC*, 844 F.3d 1168, 1173 n.7 (10th Cir. 2016).

ALJ (i.e. whether the appointing official has for-cause protection), only one level of for-cause protection can separate an ALJ from a President's authority to withstand constitutional muster.<sup>192</sup> This suggests significant damage to the system of independent administrative adjudication on regulatory matters created by Congress in the APA by making administrative adjudications subject to significantly greater Presidential influence.

Finally, if officer status becomes more widely applied by the courts after *Lucia*, and especially if Justice Thomas's concurrence (setting forth the Founders' broad view of officer status) is adopted by the Court, a huge swath of the Executive Branch previously classified as mere employees will find themselves classified as officers. This scenario has the potential to upend protections for many civil service employees who currently have some level of job protection subject to the oversight of the Merit Systems Protection Board (the members of which, as noted above, have for-cause removal protections themselves). In short, any tenured civil service employee classified as an officer post-*Lucia* stands to lose his or her tenure protection pursuant to the *Free Enterprise* rule.

For good or ill, the President (and Congress through the impeachment power) stands to gain significantly more authority over a much larger portion of Executive Branch employees if *Lucia* and *Free Enterprise* are combined, as Justice Breyer prophesizes (and Judge Kavanaugh apparently desires)—and the broader the definition of officer (one might say the closer the Court holds to the definition applied by the First Congress), the greater the impact. Clearly, there are interesting times ahead for the Administrative State.

*\*J. Kirk McGill and Ben K. McGill*

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192. And, if Judge Kavanaugh is correct, no for-cause protection is permissible for a single agency head whose power is not 'checked' by other officers such as a board or commissioners.

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