

“Officers” in the Supreme Court: *Lucia v. SEC*

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In 2013, an adjudicator determined that Raymond Lucia and his investment companies should pay a \$300,000 fine for violating securities laws.¹ Even more crippling, the adjudicator determined that for having provided erroneous information regarding the retirement earnings his prospective investors would receive, Mr. Lucia should be barred for life from providing the investor-related services that had formed the basis of his livelihood.²

One might assume that an adjudicator with the power to levy such a fine and order a man to quit his chosen profession was a judge—in particular, an Article III judge, as we call judges in the federal system.³ Indeed, Mr. Lucia referred to his adjudicator as “Judge.”⁴

But the adjudicator in Mr. Lucia’s case was an administrative law judge (ALJ) ensconced within the Securities and Exchange Commission (SEC). And the SEC itself, as represented by its commissioners, had the ultimate authority to approve or disapprove the ALJ’s initial determination before the ruling became effective.

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¹ See *Lucia v. SEC*, 138 S. Ct. 2044, 2049–50 (2018); *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 282–83 (D.C. Cir. 2016).

² See *Lucia*, 138 S. Ct. at 2049–50.

³ See U.S. Const. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

⁴ See *Lucia*, 138 S. Ct. at 2050 (referring to “Judge Elliot”).

This is the same SEC under whose authority, rules, and regulations the charges against Mr. Lucia were brought in the first place.⁵

The Constitution sharply distinguishes Article III judges from officials of the executive branch. It imbues them with independence and separates them from the political branches where decisions are made with an eye toward popular support and the next election. It accords them lifetime salary and tenure protection but subjects them to the rigorous vetting of presidential appointment and confirmation by the Senate—a process that typically involves a public hearing and thorough review of the prospective judge's prior writings and financial and employment records. At least in some cases, it further checks their discretion through the mechanism of a civil jury trial.

Executive officials, in contrast, are constitutionally held accountable to the public by way of elected officials and in particular the president, who is empowered both to appoint them and to oversee their actions.⁶ Although Congress also plays a vital oversight role in appropriations and legislation, executive officials are ultimately accountable to the people primarily to the extent that the elected president must take responsibility for their actions. The Constitution ties responsibility for executive actors to the president by giving him or his appointed department heads responsibility for the selection of all "officers" of the executive branch, as provided in Article II, section 2, clause 2 of the Constitution—the Appointments Clause.

The adjudicator in Lucia's case, however, had come to his post by a different route. He had been selected not by the SEC's presidentially appointed commissioners, but by the staff of the agency.⁷ And the Appointments Clause in relevant part provides that officers of the federal government are to be appointed only by the president, "Courts of Law," or "Heads of Departments."⁸ In this case, the latter

⁵ See *id.* at 2049–50.

⁶ See U.S. Const. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States."); *id.*, § 2, cl. 2 ("[H]e shall nominate, and . . . appoint . . . [all] Officers of the United States."); *id.* art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed.")

⁷ See Lucia, 138 S. Ct. at 2051.

⁸ U.S. Const. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior

would mean the SEC commissioners. His appointment was therefore not valid, Lucia argued.

Here was the legal sticking point: Where and when was the ALJ an “Officer[] of the United States,” in the language of the clause, as opposed to just an ordinary federal employee, regarding whose hiring the Appointments Clause had nothing distinctive to say? As it happened, whether and when ALJs were officers remained an open legal question. The Court had last taken up the scope of the Appointments Clause close to 30 years earlier in a case involving Tax Court special trial judges, a class of adjudicative actors with powers and duties similar, but not precisely identical, to those at the SEC.⁹

In the end, Lucia won his claim by a vote of 7-2 in a set of four opinions explained in depth below.¹⁰ In a narrow and fact-bound opinion by Justice Elena Kagan, six members of the Court found the SEC’s ALJs to be “officers” because of the extensive factual similarities between their responsibilities and those of the Tax Court special trial judges that the Court had labeled “officers” in 1991. The opinion took no major steps toward further defining the phrase “Officers of the United States” for future cases. Two of the six justices joining the majority opinion would have gone further and applied the original public meaning of the Appointments Clause in a broad way for future cases. Justice Stephen Breyer, the seventh vote for Lucia, ruled for him on statutory grounds, expressing discomfort about classifying ALJs as Article II “officers” based on independence concerns elaborated in more detail below. And two justices dissented, concluding that the ALJs are mere federal “employees,” beyond the reach of the Appointments Clause entirely.

Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

⁹ A separate Appointments Clause issue that is important but not directly relevant to the *Lucia* case is how to draw the line between principal officers, who must be appointed through presidential nomination subject to Senate advice and consent, and “inferior officers,” who may be appointed either in that fashion or by the president alone, by a department head, or by a court of law. See U.S. Const. art. II, § 2, cl. 2 (. . . “but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments”). No party to the *Lucia* litigation contended that SEC ALJs are principal officers, so the question instead was whether they should count as inferior officers or as government employees.

¹⁰ See *Lucia*, 138 S. Ct. at 2048.

Lurking alongside the *Lucia* case—but not part of the justices’ decision—are important questions of both policy and constitutional significance. Over the years, recognizing that ALJs preside over important cases imposing significant consequences on regulated parties, Congress accorded ALJs statutory protections to try to mimic the independence safeguards of Article III judges.¹¹ Are any of these statutory protections in conflict with the designation of ALJs as Article II “officers”? First, for example, Congress restricted the removal of ALJs by providing that ALJs may be fired only for “good cause” as “established and determined by the Merit Systems Protection Board.”¹² The government in *Lucia* contended that these tenure rules may be in tension with the “executive power” vested in the president by Article II, section 1¹³—the flip side of the appointments power, the removal power is a powerful mechanism of constitutional accountability.¹⁴ Second, Congress had provided for merit-based competitive selection of numerous executive officials, and prior to the *Lucia* decision, ALJs had been hired subject to those provisions.¹⁵ Do such restrictions on executive branch selection of officers improperly constrict department head authority under the Appointments Clause?

Before I address those questions, here is more on the background of the *Lucia* case and how it arrived at the Court.

I. Factual Background

The 2010 Dodd-Frank Act¹⁶ gave SEC enforcement actions a broader reach, and litigants subject to stringent civil penalties by SEC adjudicators responded by challenging the agency with increased vigor. One of these litigants was Raymond Lucia.

¹¹ *Id.* at 2060 (Breyer, J., concurring in the judgment in part and dissenting in part) (describing these provisions). See generally Brief of Administrative Law Scholars as Amici Curiae Supporting Neither Party, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130).

¹² 5 U.S.C. § 7521(a). See also 5 C.F.R. § 930.204(a) (2018) (granting SEC ALJs “a career appointment”).

¹³ See U.S. Const. art. II, § 1, cl. 1; Brief for Respondent SEC Supporting Petitioners at 39–55, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130) (merits brief).

¹⁴ See, e.g., *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010).

¹⁵ See Brief of Administrative Law Scholars, *supra* note 11, at 8–10.

¹⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

An SEC ALJ issued an initial decision hitting him with \$300,000 in civil penalties and a lifetime bar from his SEC-related profession.¹⁷ The commission next remanded the case for the ALJ to issue further findings of fact on several charges that the ALJ’s initial decision had left unaddressed. Following a “revised initial decision,” the commission considered the case again and ultimately imposed sanctions identical to those initially imposed by the ALJ.¹⁸ The SEC routinely gives less close review to ALJ initial decisions than it provided in this case.¹⁹ But even when the SEC chooses not to review an initial decision, the commission still must issue an order to make that decision final,²⁰ at which point “the initial decision is deemed the action of the Commission.”²¹

Lucia eventually brought his case to the D.C. Circuit, contending that the ALJ was an officer under Supreme Court precedent, and the ALJ’s appointment by staff therefore was invalid.²² If ALJs are “officers,” the Appointments Clause requires their appointment by the president or a department head²³—here, the SEC commissioners.²⁴

So, what do we know about the meaning of the word “officer” in the Appointments Clause? Well, as administrative law scholars Gary Lawson and Jerry Mashaw have observed, until recently we didn’t know much.²⁵ In its 1976 decision in *Buckley v. Valeo*, the Supreme Court determined generally that officers are those with “significant authority”—that is, those who “exercis[e] responsibility

¹⁷ See *Lucia*, 138 S. Ct. at 2050.

¹⁸ See *Raymond J. Lucia Cos.*, 832 F.3d at 283, *aff’d* by an equally divided court, 868 F.3d 1021 (D.C. Cir. 2017) (en banc), *rev’d*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

¹⁹ See Brief for Petitioners at 4, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130).

²⁰ 17 C.F.R. § 201.360(d)(2) (2018).

²¹ *Lucia*, 138 S. Ct. at 2049 (quoting 15 U.S.C. § 78d-1(c)).

²² See *Raymond J. Lucia Cos.*, 832 F.3d at 283–89.

²³ See Jennifer L. Mascott, *Constitutionally Conforming Agency Adjudication*, 2 *Loy. U. Chi. J. Reg. Compliance* 22, 27–33 (2017) (explaining that under the original meaning of the Constitution, the executive department head or the president—not a court of law—must appoint executive branch “officers”).

²⁴ See *Free Enter. Fund*, 561 U.S. at 511–13 (concluding that the commissioners are the SEC’s department head).

²⁵ See Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 *Stan. L. Rev.* 443, 451–53 & n.34 (2018) (discussing the relevant literature).

under the public laws of the Nation.”²⁶ In 1991, the Court in *Freytag v. Commissioner* filled in the lines just a little bit more by suggesting that elements like discretionary authority and the handling of important issues indicate officer status. The *Freytag* Court also thought it was indicative of officer status that the special trial judges (STJs) at issue in that case “perform[ed] more than ministerial tasks” such as taking testimony, conducting trials, ruling on evidence admissibility, and holding authority to enforce discovery orders.²⁷

The U.S. Court of Appeals for the D.C. Circuit nonetheless had interpreted some language in the alternative in *Freytag* to suggest that one additional mandatory characteristic of constitutional “officers” is that they issue final decisions for their agency. In *Freytag* the Supreme Court had said that “[e]ven if” the STJs’ duties “were not as significant” as the Court had concluded they were, the STJs would be officers in any event because they issued final decisions in a certain subset of cases.²⁸

In 2000, the D.C. Circuit had occasion to apply *Freytag*’s holding in an Appointments Clause challenge involving administrative law judges within the Federal Deposit Insurance Corporation (FDIC). In that case, *Landry v. FDIC*, the court interpreted *Freytag*’s language-in-the-alternative to mean the FDIC ALJs were not officers because unlike the *Freytag* STJs, the FDIC adjudicators did not issue final decisions for their agency in any class of cases.²⁹ The D.C. Circuit reached an analogous determination in August 2016 in *Lucia*’s case, contending that the *Freytag* Court must have seen final decisionmaking authority as critical to its officer holding because otherwise the Court would not have taken the time to discuss the limited class of cases where STJs exercised such authority.³⁰

In December 2016, the U.S. Court of Appeals for the Tenth Circuit split from the D.C. Circuit’s interpretation and held that the SEC’s ALJs are officers even though they typically issue only “initial decisions.”³¹ In contrast to the D.C. Circuit, the Tenth Circuit

²⁶ 424 U.S. 1, 126, 131 (1976) (per curiam).

²⁷ 501 U.S. 868, 881–82 (1991).

²⁸ See *id.* at 882.

²⁹ See *Landry v. FDIC*, 204 F.3d 1125, 1133–34 (D.C. Cir. 2000).

³⁰ See *Raymond J. Lucia Cos.*, 832 F.3d at 284–85.

³¹ *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016); 17 C.F.R. § 201.360.

concluded that final decisionmaking authority was not dispositive to the Court’s holding in *Freytag*, citing *Freytag*’s explanation that a focus on such authority obscured the independent officer-level significance of the STJ’s remaining duties.³² To further buttress its holding that the SEC ALJs are officers, the Tenth Circuit cited a lengthy list of officials found to be officers by the Supreme Court over a period of approximately 150 years, including officials of as low a level as administrative clerks.

In 2017, *Lucia* persuaded the D.C. Circuit to sit en banc to reconsider its “officer” standard and address the newly developed circuit split. The SEC heartily defended the D.C. Circuit’s past precedent,³³ however, and the en banc D.C. Circuit court split evenly, issuing a 5–5 judgment that essentially reaffirmed the original panel decision.³⁴ *Lucia* predictably petitioned for certiorari review in the Supreme Court.

Then the plot thickened. When the time came for the government to submit its brief in opposition to review, it instead filed a brief *supporting* review.³⁵ Although this position may have seemed surprising to some, it essentially brought the Justice Department’s position on interrelated Article II issues into greater consistency. The very same day that the en banc D.C. Circuit was hearing the *Lucia* litigation, it also heard arguments in *PHH v. CFPB*, in which the Trump administration had argued that Article II oversight authority gave it the power to remove individual agency heads from the putatively independent Consumer Financial Protection Bureau (CFPB) on the ground that to “take Care” that the laws are faithfully executed the president must have authority to oversee executive branch officials.³⁶ During the doubleheader en banc arguments that day it was striking to see the Justice Department step in to the CFPB case to assert an executive power of *removal* but leave the SEC to argue for itself that

³² Bandimere, 844 F.3d at 1172–73.

³³ See Landry, 204 F.3d at 1125.

³⁴ Raymond J. Lucia Cos., Inc. v. SEC, 868 F.3d 1021, 1021 (D.C. Cir. 2017) (en banc); D.C. Cir. R. 35(d).

³⁵ Brief for Respondent SEC, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130) (cert-stage brief).

³⁶ See, e.g., Brief for the United States as Amicus Curiae, *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (No. 15-1177).

there was no requirement of presidential authority over key administrative *appointments*.³⁷

The solicitor general's cert-stage brief in favor of Supreme Court review of *Lucia* went on record in support of the Appointments Clause as a key constitutional accountability mechanism over the selection of executive officials. Also maintaining consistency with the office's *PHH* position, the SG's brief went on to ask the Court to clarify the contours of statutory executive removal authority over ALJs,³⁸ an invitation the Court was to turn down with its narrow ultimate opinion.³⁹ But the SG's discussion of removal in its cert-stage and merits *Lucia* briefs set the stage for what will almost certainly be future challenges arguing that the open-ended-as-currently-applied, triple for-cause tenure protections for ALJs at independent agencies are a bridge too far.⁴⁰

Because both of the original parties in *Lucia* were now in agreement on the core constitutional question of whether SEC ALJs were officers, Chief Justice John Roberts appointed amicus curiae to argue in favor of the judgment below. Somewhat unexpectedly, rather than trying just to beef up the D.C. Circuit's longstanding arguments for non-officer ALJ status based on its interpretation of *Freytag*, amicus also sought to reach back into Founding-era history to support the non-officer position.

The court-appointed amicus contended that *as a historical matter*, the class of constitutional "officers" includes only those "who have the authority, in their own name, to bind[] the government or third

³⁷ See generally Jennifer Mascott, D.C. Circuit's Double-Header on Article II, 36 Yale J. on Reg.: Notice & Comment, May 26, 2017, <http://yalejreg.com/nc/d-c-circuits-double-header-on-article-ii-by-jennifer-mascott>.

³⁸ See Brief for Respondent SEC, *supra* note 35, at 18–21 (cert-stage). Contentions that the tenure protections for ALJs improperly restrict the president's executive oversight authority also formed a significant portion of the Cato Institute's arguments as amicus in *Lucia*. See Brief for the Cato Institute as Amicus Curiae Supporting Petitioners at 10–17, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130).

³⁹ See *Lucia v. SEC*, 138 S.Ct. at 2050 n.1.

⁴⁰ See Brief for Respondent SEC Supporting Petitioners, *supra* note 13, at 39–55, (merits brief); Brief for Respondent SEC, *supra* note 35, at 20 (cert-stage brief) (detailing the up to three levels of tenure protection for SEC ALJs through (1) the good cause limitations on firing ALJs themselves, (2) the Supreme Court's assumption that commissioners of independent agencies like the SEC enjoy tenure protections, and (3) the tenure protections of members of the Merit Systems Protection Board who must determine that good cause exists to fire ALJs).

parties for the benefit of the public.”⁴¹ Amicus based this argument principally on the historical example of deputy federal marshals and deputy customs collectors, who were on record as existing as early as 1789 and were not appointed as Article II officers. This particular argument had never before been raised in defense of the government’s non-officer treatment of ALJs.

If amicus’s understanding of this Founding-era history were correct, it might have provided powerful new evidence in support of a narrow conception of Article II officer status.⁴² But historical evidence suggests the deputy marshals and customs officials were not appointed independently as Article II officers because they were viewed simply as agents, or shadows, of the principal marshals and customs officials who bore personal liability for their deputies’ actions.⁴³ In other words, the deputy officials were not seen as truly independent entities at all—either as employees or “officers” separate and apart from the principal officials for whom they served as agents.⁴⁴ Moreover, as further described below, amicus’s officer test overlooked evidence of the original public meaning of

⁴¹ Brief for Court-Appointed Amicus Curiae Supporting the Judgment Below at 2, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130) (internal quotation omitted) (alteration in original).

⁴² That said, it is unclear that even amicus’s binding-order-in-her-own-name “officer” test would have excluded as many officials from the reach of the Appointments Clause as amicus seemed to suggest. For example, the SEC ALJs arguably would still be officers under this test as they made final decisions constraining third parties while presiding over formal agency adjudication. See Jennifer Mascott, *Missing History in the Court-Appointed Amicus Brief in Lucia v. SEC*, 36 *Yale J. on Reg.: Notice & Comment* (Mar. 28, 2018), <http://yalejreg.com/nc/missing-history-in-the-court-appointed-amicus-brief-in-lucia-v-sec/> (discussing ALJ-issued subpoenas and other disciplinary authority). Also, the Pacific Legal Foundation appears to have identified a lower-level Food and Drug Administration official who has been promulgating agency rules in her own name without an Article II appointment. See Todd Gaziano & Tommy Berry, *Career Civil Servants Illegitimately Rule America*, *Wall St. J.*, Feb. 28, 2018, <https://on.wsj.com/2GioaD3>.

⁴³ See Mascott, *supra* note 25, at 517–22; Aditya Bamzai, *The Attorney General and Early Appointments Clause Practice*, 93 *Notre Dame L. Rev.* 1501, 1503–04 (2018).

⁴⁴ See, e.g., Alexander Hamilton, *U.S. Sec’y of the Treasury, List of Civil Officers of the United States, Except Judges, with Their Emoluments, for the Year Ending October 1, 1792 (1793)*, in 1 *American State Papers; Miscellaneous* 57, 59–60 (Walter Lowrie & Walter S. Franklin eds., 1834) (omitting any reference to deputy marshals on a list “of the persons holding civil officers or employments under the United States” despite including the list of 16 federal marshals).

the text of the Appointments Clause⁴⁵ as well as the early practice of Article II appointments of individuals with tasks as ministerial as recordkeeping—clerks who did not issue binding orders of any kind, much less binding orders “*in their own name.*”

So what story, then, does history actually tell?

II. History of the Appointments Clause

In the *Stanford Law Review* earlier this year, I published a lengthy study on 18th-century officers and the original meaning of the phrase “Officers of the United States.”⁴⁶ Substantial Founding-era evidence suggests that if the Court ever were to take a fresh look at the Appointments Clause’s original meaning, it would find that the Clause applies to a much larger portion of the federal government than those appointed as “officers” under current practice.⁴⁷ Examination of the constitutional text, thousands of 18th-century uses of the term “officer,” and early practice indicates that the original meaning of “Officers of the United States” included every federal civil official with ongoing responsibility to carry out a statutory duty.⁴⁸ SEC ALJs carry out tasks that Congress has assigned to the SEC.⁴⁹ Therefore, the SEC’s ALJs would be constitutional officers under this standard as well as under the Court’s modern Appointments Clause jurisprudence.

The original meaning of officer “would likely extend to thousands of officials not currently appointed as Article II officers, such as tax collectors, disaster relief officials, customs officials, and administrative judges.”⁵⁰ This conclusion might sound destabilizing,

⁴⁵ See generally Mascott, *supra* note 25, at 465–507 (analyzing the original public meaning of the Article II phrase “Officers of the United States”).

⁴⁶ See generally Mascott, *supra* note 25. The material in Part II of this article is substantially derived from this *Stanford Law Review* article as well as from the amicus brief that I filed in *Lucia*. Almost all of the passages in the Part II introduction and sections II.A-B of this article are taken verbatim from my *Lucia* brief, which presented a detailed summary of the historical evidence from the *Stanford* article. A version of this section previously appeared in the *Stanford Law Review* at 70 *Stan. L. Rev.* 443 (2018). When possible and appropriate, please cite to that version. For information visit: stanfordlawreview.org.

⁴⁷ See Mascott, *supra* note 25, at 545–58, 564.

⁴⁸ See *id.* at 453–54 (“[T]he most likely original public meaning of ‘officer’ is one whom the government entrusts with ongoing responsibility to perform a statutory duty of any level of importance.”).

⁴⁹ See 15 U.S.C. § 78d-1(a); 17 C.F.R. §§ 200.14, 200.30-9 (2018).

⁵⁰ Mascott, *supra* note 25, at 443.

but significant portions of the civil-service hiring system might be brought into alignment with Article II if executive department heads provided final sign-off on job candidates vetted through merit-based selection procedures. The key component to constitutional appointments is that the president or the head of a department must sit atop an officer selection system for which he or she maintains responsibility. Article II requires a chain of accountability⁵¹ in hiring decisions from the lowest-ranking officer up to the department head and, ultimately, the elected president.

A. Original Public Meaning of the Appointments Clause

The Appointments Clause requires that all “Officers of the United States” be appointed by the president with Senate advice and consent, the president alone, “Heads of Departments,” or “Courts of Law.”⁵² This Article II limitation on the number of actors authorized to make final decisions in selecting officers helps to ensure that the public knows the identity of the official who bears ultimate responsibility for each officer appointment.⁵³

Concerns about transparency, accountability, and excellence in government service existed from the Founding. The Framers selected the mechanism of the Appointments Clause to safeguard these core values—believing that transparency in officer appointments would hold the elected executive and his or her department heads accountable for selecting well-qualified personnel.⁵⁴ Proper interpretation of which officials are encompassed by the phrase “Officers of the United States” is a fundamental component of correctly, and completely, implementing the Appointments Clause’s democratic accountability protections.

⁵¹ Cf. Dina Mishra, *An Executive-Power Non-delegation Doctrine for the Private Administration of Federal Law*, 68 *Vand. L. Rev.* 1509, 1569–70 (2015) (discussing the concept of a “chain of accountability” related to removal restrictions).

⁵² U.S. Const. art. II, § 2, cl. 2.

⁵³ Mascott, *supra* note 25, at 447.

⁵⁴ See, e.g., *The Federalist No. 76* (Alexander Hamilton) (observing that individual responsibility for governmental appointments “will naturally beget a livelier sense of duty, and a more exact regard to reputation” than appointments determined by an “assembly of men”); 1 *The Records of the Federal Convention of 1787*, at 70 (Max Farrand ed., 1911) (Mr. Wilson: “If appointments of Officers are made by a single Ex [single Executive] he is responsible for the propriety of the same.”); Mascott, *supra* note 25, at 456–58 & n.58, 552–53 & n.663, 558–59 (Part IV.B.1).

Substantial 18th-century evidence indicates that the original public meaning of the phrase was broad, encompassing every federal civil official “with ongoing responsibility for a federal statutory duty.”⁵⁵ An official’s governmental duty did not have to rise to any minimal level of significance for the official to come within Appointments Clause requirements. Nor did the term “officer” necessarily relate to an official’s power to exercise discretion or engage in final decisionmaking—in contrast to the suggestions of contemporary case law. Officials with duties as nondiscretionary as recordkeeping were considered officers. In contrast to the contemporary classification of federal officials as either employees or officers, the Founders more likely would have considered workers not rising to the level of officer to be “attendants” or “servants.”

1. Methodology

My historical study of federal officers relied on two distinct techniques: (1) corpus linguistics-style analysis of documents from the Founding era to identify the original meaning of the phrase “Officers of the United States,” and (2) detailed study of appointment practices enacted by the First Congress.⁵⁶ Corpus linguistics interpretive analysis involves the adaptation of empirically based big-data techniques to statutory and constitutional interpretation.⁵⁷ One key insight from the field is that examination of *every use* of a term in a wide variety of Founding-era documents can yield a more complete, impartial understanding of the word than cherry-picking a handful of statements to support one’s preferred interpretation.⁵⁸

This analysis suggested first that “Officers of the United States” was not a term of art setting aside a particularly important class of officers. Rather, the modifier “of the United States” denotes that the clause applies to federal, and not state, officers. The 18th-century

⁵⁵ Mascott, *supra* note 25, at 454, 465.

⁵⁶ *Id.* at 443.

⁵⁷ See generally James C. Phillips et al., Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical, 126 Yale L.J.F. 21, 27–29 (2016); see also Mascott, *supra* note 25 at 466–68.

⁵⁸ See, e.g., Randy E. Barnett, New Evidence of the Original Meaning of the Commerce Clause, 55 Ark. L. Rev. 847, 856–57 (2003); see also Mascott, *supra* note 25, at 469–70 (explaining the “officer” study’s corpus linguistics-style methodology in greater depth).

meaning of officer in turn encompassed all officials “with ongoing responsibility to perform a statutory duty.”⁵⁹ Early federal officials carrying out statutory duties were considered officers even where the statute creating the duty did not specify which officer had to perform it.

2. The constitutional text and drafting history

Even though the Constitution includes no definition of “Officers of the United States,” the president’s authority to nominate judges, certain diplomatic officers, and “all other Officers of the United States” suggests the phrase encompasses a larger group than just diplomats and judges.⁶⁰ This suggestion is further confirmed by the clause’s subsequent reference to a class of “inferior Officers.”⁶¹ The Constitution’s two additional references to “Officers of the United States” merely describe consequences that derive from Article II officer status—such as the possibility of facing impeachment and the requirement of commissioning by the president.

The Constitution uses some formulation of the terms “office(s)” and “officer(s)” 30 additional times.⁶² These references do not explicitly indicate what level of authority constitutional officers hold—although the Necessary and Proper Clause may hold some clues. That clause authorizes Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁶³ This provision could be read as permitting the authority to exercise federal power to reside only in the federal government itself or its departments or “Officer[s]”—not a lower-level non-officer class.

Even though the constitutional text itself does not make clear the precise dividing line between the level of authority held by officers

⁵⁹ See Mascott, *supra* note 25, at 454.

⁶⁰ See U.S. Const. art. II, § 2, cl. 2 (“[The President] . . . shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . .”); Mascott, *supra* note 25, at 470.

⁶¹ See U.S. Const. art. II, § 2, cl. 2 (“ . . . but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper . . .”).

⁶² See Mascott, *supra* note 25, at 470–71 n.139 (discussing this evidence and the “Necessary and Proper Clause” textual analysis).

⁶³ U.S. Const. art. I, § 8, cl. 18.

and any less important non-officer group, the text—in conjunction with significant external Founding-era evidence—indicates that the phrase “Officers of the United States” was not a new term of art for especially important officials.⁶⁴ For example, intratextual analysis⁶⁵ of the Constitution’s repeated uses of the modifying phrase “of the United States” and the Appointments Clause’s drafting history suggest that “Officers of the United States” just connotes a broad class of federal officers spanning multiple branches of the government, as distinct from purely executive officers. The earliest drafts of the Constitution apparently authorized the president to appoint only executive officers, as they gave legislators the authority to appoint non-executive officers such as judges. Appointments Clause drafts transformed from referencing just “officers” to including the full phrase “Officers of the United States” at the same near-final stage of the drafting process at which the president acquired the authority to appoint non-executive “Judges of the supreme Court” and ambassadors.⁶⁶

Several other constitutional uses of the phrase “of the United States” similarly refer to the federal, as opposed to the state, level of government. For example, Article II, section 2, clause 1 establishes the president as “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States.” The Oaths Clause requires “executive and judicial Officers, both of the United States and of the several States, [to] be bound by Oath or Affirmation, to support this Constitution.” And Article IV, section 3, clause 2 instructs that “nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.” Each of these clauses’ references to “of the United States” juxtaposed with a parallel reference to state-level government underscores the phrase’s use as a modifier setting aside a federal-level category.⁶⁷

The earliest written uses of the full phrase “Officers of the United States” confirm this analysis. Examination of every use of the phrase in the journals of the Continental Congress and a database of early

⁶⁴ Mascott, *supra* note 25, at 471–79 (Part II.A.2).

⁶⁵ See generally, Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747 (1999) (describing “intratextualism” as a technique for interpreting the Constitution).

⁶⁶ See Mascott, *supra* note 25, at 472–73.

⁶⁷ See *id.* at 473–74 et seq.

newspaper records showed the phrase arising as early as 1778 in descriptions of *continental*, as opposed to state-level, military officers. For example, a 1782 War Office report suggested that the government should not pay a military officer “as an officer of the United States” for the time period that he had served as a military officer “of a particular State.” And the minutes from a February 1778 session of the Continental Congress described continental-level civil and military officers as “officer[s] of the United States.”⁶⁸

3. Founding-era dictionaries and commentaries

If “Officers of the United States” is not a term of art for especially important officials, the late 18th-century meaning of the stand-alone term “officer” is relevant for determining the authority level of federal officials under the Appointments Clause. A survey of 10 Founding-era dictionaries indicated that a civil “officer” generally was defined as a “man employed by the public(k);” “office” typically was defined as a “public employment” or a “public charge.”⁶⁹

Eighteenth-century legal dictionaries also connected the concepts of “duty” and “office.” For example, Matthew Bacon reported that “the Word *Officium* principally implies a Duty, and . . . the Charge of such Duty” and observed that one “is not the less a Public Officer, where his Authority is confined to narrow Limits; because it is the Duty of his Office, and the Nature of that Duty, which makes him a Public Officer, and not the Extent of his Authority.”⁷⁰ Bacon’s analysis also suggests that officer status was not connected with holding discretion or binding authority. He describes a class of “Ministerial Offices” including positions that “required only the Skill of Writing after a Copy,” and chirographers who kept records of court-imposed fines.⁷¹

Nathan Bailey’s popular Founding-era dictionary used the words “officer(s)” and “office(s)” more than 500 times to define other terms, characterizing as “officers” many assistants, recordkeepers,

⁶⁸ See *id.* at 477–79 & nn. 175, 176 (discussing the evidence described in this paragraph).

⁶⁹ See *id.* at 484, 486–87.

⁷⁰ See *id.* at 488–89 (quoting 3 Matthew Bacon, *A New Abridgment of the Law* *718–19 (4th ed. 1778)).

⁷¹ See *id.* at 489 (quoting Bacon, *supra* note 70, at *734).

and other public officials engaged in menial tasks.⁷² For example, a sword-bearer was “an officer who carries the sword of state before a magistrate.” A “Swabber” was “an inferior officer on board a ship of war, whose office it is to take care that the ship be kept clean.” A “sewer” was “an officer who comes in before the meat of a King or Nobleman, and places it upon the table.” A “Gauger” was “an officer employed in gaging,” or measuring the contents of a vessel. And a Chafe-Wax was “an Officer belonging to the Lord Chancellor, who fits the wax for [the] sealing of writs.”

These dictionaries would have influenced the late 18th-century American understanding of the term “officer.” The Framers intentionally rejected the British approach for creating offices and appointing officers, but no evidence suggests the Constitution imported an altered meaning of the word “officer” itself. One complaint underlying the colonists’ war for independence was that the king had “erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people.”⁷³ Under British practice, the king had power to both create and fill public offices. The Framers rejected this potential for abuse, cleanly separating the authority to establish new offices from the power to name officers to fill them.⁷⁴ This structural safeguard promoted accountability and transparency through its broad applicability to lower-level, ministerial officials under the original meaning of the term “officer.”

4. Founding-era debates and analysis

Farrand’s records of the constitutional drafting debates, the Federalist Papers, and the Borden collection of Anti-Federalist essays contain hundreds of references to the terms “officer(s)” and “office(s).” Examination of the context of these references, as well as every mention of “Officers of the United States” in Elliot’s records of the ratification debates, strongly suggests that “officer” had a very broad scope in the late 18th century. Following are several

⁷² See *id.* at 485, 490. The dictionary definitions discussed in this paragraph and many other definitions of menial “officer” positions are detailed on pages 490–92 of Mascott, *supra* note 25.

⁷³ The Declaration of Independence para. 12 (U.S. 1776); Mascott, *supra* note 25, at 492.

⁷⁴ Hanah Metchis Volokh, The Two Appointments Clauses: Statutory Qualifications for Federal Officers, 10 U. Pa. J. Const. L. 745, 769 (2008).

illustrative examples.⁷⁵ During the North Carolina ratification debate, Archibald Maclaine described "inferior officers of the United States" as petty officers who maintained "trifling" duties.⁷⁶ Joseph Taylor observed that if the Constitution were adopted, "we shall have a large number of officers in North Carolina under the appointment of Congress" because, for example, there would be "a great number of tax-gatherers."⁷⁷ During the drafting debates, Gouverneur Morris observed that the executive would have the duty to appoint "ministerial officers of the administration of public affairs." Later in the drafting process, James Wilson observed that the appointing power would encompass even "tide-waiter[s]," a position that Samuel Johnson's dictionary described as an "officer who watches the landing of goods at the customhouse."⁷⁸

The Anti-Federalist essayist with the pseudonym "Federal Farmer" expressed concern that federal taxation powers would lead to "many thousand officers solely created by, and dependent upon the union."⁷⁹ James Madison disagreed and believed the federal government would have relatively few officers in comparison to the states.⁸⁰ But this is because James Madison had concluded that state officers might collect taxes for the federal government and that the federal government's "few and defined" powers would cause its officers to be "exceed[ed] beyond all proportion," by officers carrying out the states' "numerous and indefinite"

⁷⁵ See Mascott, *supra* note 25, at 494–504 (detailing the examples discussed in this paragraph and the next as well as additional supporting evidence and potential counter-examples).

⁷⁶ The Debates in the Several State Conventions, on the Adoption of the Federal Constitution 43–44 (Jonathan Elliot ed., 2d ed. 1836) (statement of Mr. Maclaine).

⁷⁷ Anti-Federalist No. 66: "From North Carolina"; Debate during North Carolina Ratifying Convention, in The Anti-Federalist Papers 262, 262 (Bill Bailey ed., n.d.), <https://www.thefederalistpapers.org/wp-content/uploads/2012/11/The-Anti-Federalist-Papers-Special-Edition.pdf>.

⁷⁸ See Tidewater, 2 Samuel Johnson, A Dictionary of the English Language (6th ed. 1785).

⁷⁹ See Anti-Federalist No. 41–43 (Part I): The Quantity of Power the Union Must Possess Is One Thing; The Mode of Exercising the Powers Given Is Quite a Different Consideration (Federal Farmer XVII) (1788), in The Anti-Federalist Papers, *supra* note 77, at 148, 149.

⁸⁰ See Mascott, *supra* note 25, at 502.

powers.⁸¹ Madison nonetheless understood the term “officer” itself to have a broad scope, embracing many levels of officials including “justices of peace, officers of militia, [and] ministerial officers of justice.”⁸²

This broad understanding of the meaning of “officer” extended back to the preconstitutional period under the Continental Congress.⁸³ For example, a 1778 resolution regarding military hospitals characterized “apothecaries, mates, stewards, [and] matrons” as “officers.” These individuals had nondiscretionary duties far below the level that contemporary courts have considered mandatory for “officer” status. A 1775 Continental Congress committee report indicated that the role of mates and apothecaries was to “visit and attend the sick.” The 1775 report also characterized clerks and storekeepers as “officers,” observing that storekeepers were “[t]o receive and deliver the bedding and other necessaries by order of the [hospital] director” and clerks were “[t]o keep accounts for the director and store keepers.”

B. Early Appointment Practices

The early appointment practices throughout the First Congress by and large confirm the public meaning interpretation of Article II “officers” as officials responsible for an ongoing statutory duty.⁸⁴ The only categories of civil executive officials in ongoing positions cleanly excluded from Article II appointment practices were (1) officials akin to “servants” or “attendants” and (2) several categories of deputy officials treated just as shadows of the primary officers who could face personal legal liability for their deputies’ acts. These categories of deputies have no general modern analog. The Founding-era deputies who instead acted as aides or seconds-in-command, without a similar technical liability relationship to their primary officers, were selected in compliance with the Appointments Clause.

⁸¹ See *id.* at 502 & nn.327, 329; The Federalist No. 45 (James Madison).

⁸² See Mascott, *supra* note 25, at 502 & n.329 (internal quotation omitted).

⁸³ See *id.* at 537–45 (describing the examples discussed in this paragraph, among other evidence, but also explaining that the actual appointment methods used to fill a number of these positions appeared to be in some tension with the description of them as “office[s]”).

⁸⁴ See *id.* at 507–45 (Part III) (detailing the evidence from early practice).

Officials as varied as internal revenue inspectors and supervisors, lighthouse keepers and superintendents, ship masters and first, second, and third mates on revenue cutters (although not “mariners” and “boys”), customs collectors, surveyors, and naval officers also were selected in compliance with the Appointments Clause.⁸⁵ Early Article II officers who provide some of the starkest evidence contradicting modern lower-court determinations that Article II status involves discretion are the recordkeeping clerks treated as officers from the time of the First Congress.⁸⁶ These clerks had responsibilities as menial as transcribing treasury books, copying account statements, counting money, and keeping records of the certificates given to ships authorized to import goods.

Contrary to the suggestion of some modern judicial opinions that Congress can determine “officer” status based on whether it chooses to directly tie statutory duties to a particular official, the original meaning of “officer” encompassed every official who happened to carry out a statutory task—whether Congress had explicitly assigned it to that individual or not. For example, the clerks who kept statutory records were considered officers even when the statutes simply mandated executive recordkeeping as a general matter without specifically assigning clerks to the job.⁸⁷ Analogously, today if Congress were to authorize an agency to promulgate rules, every official participating in that task would be an “officer” under the statutory duty standard.

In contrast, messengers and office-keepers did not carry out legislative tasks authorized or required by Congress, so they were not “officers” and Congress consequently did not need to establish their positions “by Law.”⁸⁸ Individuals in these positions served more as assistants and carried out nonstatutorily required tasks like arranging newspapers, preserving printed copies of statutory records, and preparing items for mail delivery.

⁸⁵ See *id.* at 523, 528 n.508, 531, 533. But see *id.* at 528–30 & n.508, 531 (explaining possible counter-examples like certain officials in the military, the Territories, and the National Bank).

⁸⁶ See, e.g., *Tucker v. Comm’r*, 676 F.3d 1129, 1133 (D.C. Cir. 2012); *Mascott*, *supra* note 25, at 510–15 (Part III.A).

⁸⁷ See *id.* at 507–08, 514–15 & n.414.

⁸⁸ See U.S. Const. art. II, § 2 (requiring that Congress establish the appointments for officers “by Law”); *Mascott*, *supra* note 25, at 459, 509–10.

Initially, seemingly inconsistent with the clerk-messenger dividing line, Congress waited 10 years to submit lower-level customs officials like weighers, measurers, gaugers, and inspectors to appointment by their department head, the treasury secretary. But numerous Founding-era writings described these individuals as “officers.”⁸⁹ And by 1799 Congress had statutorily required the treasury secretary to approve appointments of both inspectors and the weighers, measurers, and gaugers who had the nondiscretionary statutory task of measuring the quantities of goods being imported.⁹⁰ An 1843 attorney general opinion expressly clarified that customs inspectors are Article II officers and the 1799 provision mandating treasury secretary appointment of customs officials was constitutionally required.⁹¹

C. Brief History of the Appointments Clause in the Courts

Despite the apparent contemporary perception of Article II “officers” as comprising a small group, arguably the history of the Supreme Court’s judgments in Appointments Clause cases is largely consistent with a broad conception of “officer.”⁹² Several cases bear mention.

As an initial matter, in 1823 Chief Justice John Marshall espoused what was essentially the statutory duty standard for “officer” status in an opinion he drafted while presiding in circuit court. In *United States v. Maurice*, he wrote, “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.”⁹³ The only category of public employment that Marshall excluded from “officer” status was that of government contractor.⁹⁴

⁸⁹ See *id.* at 524–26.

⁹⁰ See Act of Mar. 2, 1799, ch. 22, § 21, 1 Stat. 627, 642 (amended 1811).

⁹¹ See Appointment & Removal of Inspectors of Customs, 4 Op. Att’y Gen. 162, 164–65 (1843).

⁹² See Mascott, *supra* note 25, at 463–65. See also *id.* at 463 n.99 (discussing the analysis of a 1996 Office of Legal Counsel memo canvassing the jurisprudence on Article II “officer” status, see Constitutional Separation of Powers between the President and Cong., 20 Op. O.L.C. 124, 139–48 (1996)).

⁹³ 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823).

⁹⁴ See *id.* (“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

Across decades of Supreme Court opinions—as the Tenth Circuit noted in 2016—the Court has described numerous governmental positions as offices, including a number of positions that might seem relatively insignificant.⁹⁵ For example, in 1839 the Court clarified that a district court clerk responsible for “keep[ing] the records of the Court, and receiv[ing] the fees provided by law for his services” was an Article II officer. In 1877 the Court observed that an assistant-surgeon in the navy medical corps held an office. And in 1886 the Court observed that cadet engineers studying at the Naval Academy were constitutional officers.⁹⁶

In 1878, the Court indicated in *United States v. Germaine* that “thousands of clerks in the Departments of the Treasury, Interior, and the others” were constitutional officers.⁹⁷ This further confirms the notion of Article II officer status for the earliest recordkeeping clerks. The Court’s analysis in *Germaine* bears further discussion, however. The opinion provides some color for the Court’s understanding of officer status by reiterating that the term “embraces the ideas of tenure, duration, emolument, and duties.”⁹⁸ Further, the Court emphasized the dispositive significance of duties being “continuing and permanent,” not “occasional and intermittent.”⁹⁹ Because the civil surgeon in this particular case had intermittent duties and was hired only to make periodic examinations of

be a continuing one . . . 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.”). Without exploring whether such a characteristic is necessary for “officer” status, in a subsequent passage of the opinion Marshall describes the relevant official’s duties as “important” and says they would need to be performed by an officer unless “performed by contract.” See *id.*

⁹⁵ *Bandimere v. SEC*, 844 F3d. 1168, 1173–74 (10th Cir. 2016).

⁹⁶ *Ex parte Hennen*, 38 U.S. 230, 257–58 (1839); *United States v. Moore*, 95 U.S. 760, 761–63 (1877) (observing that the position “has every ingredient of an office” without clarifying further what those ingredients are); *United States v. Perkins*, 116 U.S. 483, 483–84 (1886).

⁹⁷ See *United States v. Germaine*, 99 U.S. 508, 510–11 (1878) (describing these clerks’ appointments by the heads of departments, authorized by Article II to appoint “inferior officers”).

⁹⁸ See *id.* at 511. See also E. Garrett West, *Clarifying the Employee-Officer Distinction in Appointments Clause Jurisprudence*, 127 *Yale L.J. Forum* 42 (2017) (discussing *Germaine* and other earlier 19th-century Supreme Court cases that espouse similar reasoning, as well as providing a contrasting take on Marshall’s reasoning in *Maurice*).

⁹⁹ *Germaine*, 99 U.S. at 511–12.

pension applicants—more like a government contractor providing services—the Court concluded he was not an Article II officer.¹⁰⁰

It is worth lingering for a moment on this reasoning from *Germaine* because in recent years the opinion has been misunderstood—and even mistakenly characterized by the Court. In 2010 in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Supreme Court relied on *Germaine* to suggest that at least 90 percent of full-time government workers are non-officer civil servants.¹⁰¹ But that was a badly mistaken description of the relevant proposition in *Germaine*. Indeed, the Court in *Germaine* did say that one “may be an agent or employé working for the government and paid by it, as nine-tenths of the persons rendering service to the government undoubtedly are, without thereby becoming its officers.”¹⁰² But *Germaine* was all about non-officers hired by the government for intermittent services, channeling *Maurice’s* reasoning from a half-century earlier—not a case about a supposed large class of non-officer continuing government employees.

It is unclear when the perception first arose that the merit-based civil service is at odds with Article II officer status.¹⁰³ In 1871, the attorney general issued an opinion addressing the constitutionality of merit-based selection procedures for Article II officer clerks.¹⁰⁴ Ultimately the opinion concluded that if a department head were required to hire the one top-ranked candidate from a merit-based selection process, such a constraint would impermissibly restrict department head appointment authority. But the opinion suggested such procedures might be constitutional if they instead preserved a sufficiently broad range of multiple top-ranked candidates from which the department head could choose. Or that merit-based considerations may be appropriate to provide just a *recommendation* to

¹⁰⁰ See *id.* at 508, 512.

¹⁰¹ See *Free Enter. Fund*, 561 U.S. at 506 & n.9. See also *Lucia v. SEC*, 138 S. Ct. at 2065 (Sotomayor, J., dissenting) (citing *Free Enterprise Fund* for this same interpretation of *Germaine*).

¹⁰² *Germaine*, 99 U.S. at 509.

¹⁰³ Justice Breyer conveyed this perception during the *Lucia* oral argument. See Transcript of Oral Arg. at 16–17, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130) (tying together a determination whether ALJs are “officers” with the future existence of “the merit civil service at the higher levels”).

¹⁰⁴ See Civil-Serv. Comm’n, 13 Op. Att’y Gen. 516 (1871).

the appointing official, who then would not be “bound to abide by it, if satisfied that the appointment of another would best serve the public interests.” The opinion said it was unclear exactly how many potential candidates, and how much discretion, a constitutional appointment process would entail.

What is striking about the attorney general’s opinion, however, is that merit-based selection procedures were under consideration for government officials thought to be Article II officers—suggesting that at least as of the late 19th century, merit-based selection requirements and Article II officer appointments were thought to be potentially compatible.¹⁰⁵ It was not necessarily one or the other.

Article II authorizes Congress to establish positions “by Law,”¹⁰⁶ and there is some thought that this congressional officer-creation power carries with it a measure of authority to impose qualifications on who may fill an office.¹⁰⁷ Perhaps some type of merit-based officer selection system could be one permissible form of such a qualification, at least in a limited form. Of course, a department head must have the final say in officer selection and have a meaningful range of candidates from which to choose. Also, the individuals helping the department head to carry out the objective merit-based selection procedures would themselves need to be properly appointed, at least under the original meaning of the Appointments Clause. But if every individual involved in objective, merit-based officer hiring were properly appointed, perhaps Article II would permit at least certain inferior officers to be subject to a minimal threshold qualification requirement, or to a merit-based advisory system in which appointing officials had the benefit of information gleaned from objective merit-based vetting of potential candidates based on certain predetermined criteria.¹⁰⁸ Viewing at least some kind of merit-based officer qualifications as compatible with Article II officer status may make it more feasible, or likely, that Congress would be open

¹⁰⁵ See *id.* at 518–19 (referencing clerks and marshals).

¹⁰⁶ U.S. Const. art. II, § 2, cl. 2.

¹⁰⁷ See Mascott, *supra* note 25, at 551.

¹⁰⁸ See Civil-Serv. Comm’n, 13 Op. Att’y Gen. 516, 520, 523–24 (Attorney General Amos Akerman: “I see no constitutional objection to an examining board, rendering no imperative judgments, but only aiding the appointing power with information. A legal obligation to follow the judgment of such a board is inconsistent with the constitutional independence of the appointing power.”).

to applying the democratic accountability protections of department head appointment to a larger proportion of government officials in compliance with the original meaning of Article II.¹⁰⁹

Finally, despite the Court's apparent misinterpretation of *Germaine in Free Enterprise Fund*, even the Court's modern cases leading up to *Lucia* could be interpreted as consistent, to a degree, with a historic understanding of Article II. In *Buckley*, the Court held that the very high-level Federal Election Commissioners held sufficiently "significant authority" to qualify as officers. And then in *Freytag*, the Court found that special trial judges had sufficient discretionary involvement with significant matters that they were Article II officers. In contrast to how these cases have been interpreted in the lower courts, they did not necessarily mandate that every officer have discretion or "significant authority."¹¹⁰ Rather, those cases found that the relevant government positions before the Court satisfied sufficient, but perhaps not necessary, conditions for Article II officer status.

III. The Supreme Court Opinions in *Lucia*

The Supreme Court's consideration of *Lucia* this spring met with a lot of hype. Part of the intensity stemmed from concerns within the administrative law community that application of political appointment procedures to ALJs would undermine values of independence typically associated with judicial decisionmakers.¹¹¹

Some of the excitement surrounding the case was due simply to the solicitor general's new litigating position in the Supreme Court. But reactions to the SG's new litigation strategy were intensified by the SG's decision to move beyond challenging the ALJ appointment process to question the proper scope of ALJ removal as well.¹¹²

¹⁰⁹ See Mascott, *supra* note 25, at 551–65 (explaining the relevant considerations in reforming the civil-service system to ensure more officials are selected consistent with the chain of democratic accountability protections inherent in Article II).

¹¹⁰ See Brief of Professor Jennifer L. Mascott as Amicus Curiae Supporting Petitioners at 7, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130).

¹¹¹ See generally, e.g., Brief of Administrative Law Scholars as Amici Curiae Supporting Neither Party, *supra* note 11; Brief of Constitutional and Administrative Law Scholars as Amici Curiae Supporting Affirmance, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130).

¹¹² See Brief for Respondent SEC Supporting Petitioners, *supra* note 13, at 45–55 (merits brief).

At the height of the *Lucia* frenzy, some commentators even suggested that the SG may have planted removal questions in the *Lucia* case to intentionally lay the groundwork for a Court decision that could support the presidential firing of Special Counsel Robert Mueller.¹¹³ Such support would have been hard to derive from any decision in *Lucia*, however, even one with great breadth, as the SG’s removal challenge involved the proper interpretation of a statutory provision relevant to disciplinary action *only* for ALJs.¹¹⁴ Further, the SG did not ask for the Court to find the statutory ALJ tenure protections entirely unconstitutional. Rather, he requested that the Court give them a clarifying construction.¹¹⁵

In the end, *Lucia* went out with a whimper—at least as far as the actual holding in the case is concerned. The Court held 7-2 for the government and Mr. Lucia, concluding that the SEC’s ALJs are Article II officers.¹¹⁶ But the Court decided the case on about as narrow a basis as possible. The Court did not address the removal issues raised by the government.¹¹⁷ It did not do much at all to further clarify the elements that make a government official an officer, declining either to further explain the meaning of “significant authority”

¹¹³ See, e.g., Cary Coglianese, “Good Cause” Does Not Mean Anything Goes, The Regulatory Review Blog (Apr. 18, 2018), <https://www.theregreview.org/2018/04/18/coglianese-good-cause-not-anything-goes> (addressing these arguments).

¹¹⁴ See 5 U.S.C. § 7521(a); Jennifer Mascott, The Government and the Appointments Clause—Just the Facts, 36 Yale J. on Reg.: Notice & Comment (Apr. 23, 2018), <http://yalejreg.com/nc/the-government-and-the-appointments-clause-just-the-facts>.

¹¹⁵ See Brief for Respondent SEC Supporting Petitioners, *supra* note 13, at 12–13 (merits brief) (suggesting that the Court should construe “‘good cause’ for removing an ALJ . . . to include an ALJ’s misconduct or failure to follow lawful directives or to perform adequately” and suggesting that the Court should interpret the statutory role for the Merit Systems Protection Board in ALJ removals to consist only of “determining whether evidence exists to support the agency’s view that ‘good cause’ . . . exists”).

¹¹⁶ See *Lucia*, 138 S. Ct. at 2048.

¹¹⁷ See *id.* at 2050 n.1. The Court indicated that it would prefer to wait to address those removal issues—if at all—until the issues receive full briefing in the lower courts. The parties had not litigated the statutory removal protections for ALJs in the courts below, and the majority opinion noted that the Supreme Court “ordinarily await[s] thorough lower court opinions to guide [its] analysis of the merits” of an issue. See *id.* (internal quotation omitted). This statement may be like waving a red flag in front of regulated parties facing ALJs in administrative hearings who may be ready and willing to file claims that can give the Court the kind of record on removal that it lacked in *Lucia*.

or return to a historically grounded concept of “officer.”¹¹⁸ It did not even give much guidance about how its holding is to be implemented on remand.

Instead, it took the approach of the minimalist interpretation of its decisions in *Buckley* and *Freytag* described above. It determined just that the administrative law judges before it were officers without clarifying exactly which of the characteristics of the ALJs might be mandatory for officer status moving forward.

Here, in more depth, is what the Court said.

A. Majority Opinion

Observers at the *Lucia* oral argument on April 23, 2018, may have predicted that a narrow holding was coming. Multiple justices seemed genuinely unsure about the proper way to define the concept of “officer” in Article II. Justice Sonia Sotomayor felt the history of the meaning of the term based on early practice was unclear.¹¹⁹ Justice Breyer told the litigants that he really did not know what to do in the case because of the potential consequences of finding ALJs are officers.¹²⁰ And Justice Samuel Alito offered perhaps the most piercing question to the government in the current tense special counsel climate, asking whether federal law enforcement officials would fall within the category of appointed “officers” under the government’s conception of the term.¹²¹ Justice Kagan, the eventual author of the majority opinion, cut through the complexity, stating that the *Lucia* ALJs and *Freytag* STJs shared nine out of their “top 10 attributes” and asking the Court-appointed amicus why that did not resolve the case.¹²²

Two months later, in the *Lucia* opinion, Justice Kagan wrote that the “adjudicative officials” found to be officers in *Freytag* “are near-carbon copies of the [SEC’s] ALJs.” Thus the Court’s *Freytag* analysis “(sans any more detailed legal criteria) necessarily decides this

¹¹⁸ See *id.* at 2051 (declining to “elaborate on *Buckley*’s ‘significant authority’ test”).

¹¹⁹ See Transcript, *supra* note 103, at 23–24 (Sotomayor: “You know, a U.S. marshal was – deputy wasn’t an officer but a – and customs inspectors weren’t officers, but shipmasters were. All of this seems a little bit difficult to quantify.”).

¹²⁰ See *id.* at 16–17.

¹²¹ See *id.* at 26–29.

¹²² See *id.* at 37.

case.”¹²³ With this sentence, the Court may have been waving lower courts away from treating each ALJ characteristic described in the opinion as mandatory for Article II status across the board. Perhaps fending off future D.C. Circuit-style fossilizations of fact-bound characteristics, like the *Landry* overemphasis on occasional final decisionmaking authority, the majority here underscored that it simply found the ALJs’ characteristics to be over the “officer” threshold under a very fact-bound application of *Freytag*.

The ALJ characteristics shared with STJs that collectively cross the “officer” threshold include the following: The SEC ALJs “hold a continuing office established by law.” And they exercise “significant discretion when carrying out . . . important functions” encompassing “the authority needed to ensure fair and orderly adversarial hearings.” In particular, they take testimony, receive evidence, examine witnesses, and may take prehearing depositions. They conduct trials during which “they administer oaths, rule on motions, and generally regulat[e] the course of a hearing, as well as the conduct of parties and counsel.” They “rule on the admissibility of evidence” and “thus critically shape the administrative record.” Also, they “have the power to enforce compliance with discovery orders” through the ability to “punish all [c]ontemptuous conduct . . . by means as severe as excluding the offender from the hearing.”¹²⁴

Justice Kagan noted that in at least one respect, the SEC ALJs even surpass the *Freytag* STJs in the extent of their authority. The ALJs have a “more autonomous role” when they issue their decisions. In major cases, “a regular Tax Court judge must always review an STJ’s opinion,” but “the SEC can decide against reviewing an ALJ decision at all.” When the commission “declines review (and issues an order saying so), the ALJ’s decision itself becomes final and is deemed the action of the Commission.”¹²⁵

Fascinatingly, earlier in the opinion when Justice Kagan first described the SEC ALJs’ “extensive powers,” she went even further and characterized the ALJs as “exercis[ing] authority comparable to that of a federal district judge conducting a bench trial.”¹²⁶ With that

¹²³ *Lucia*, 138 S. Ct. at 2052.

¹²⁴ *Id.* at 2053 (internal quotations omitted).

¹²⁵ *Id.* at at 2053–54 (internal quotations omitted).

¹²⁶ *Id.* at 2049 (internal quotations omitted).

description, Justice Kagan, perhaps unintentionally, picked up on the theme that had lurked beneath the surface of the entire Supreme Court litigation—that the question whether agency adjudicators should be subject to electorally accountable executive appointments can be hard to untangle because ALJs’ modern traits often make them seem more like officials in the judicial branch.

Even though the majority opinion indicated that the Court was not establishing new legal criteria for officer status, the opinion nonetheless specified that certain criteria definitively are *irrelevant* to officer status. First, the Court noted that it is irrelevant to officer status which specific compliance enforcement powers an official holds. Second, the particular level of deference that an agency awards to ALJ factfinding generally is irrelevant to the Article II analysis.¹²⁷

One additional insight that the *Lucia* opinion provides is emphasis, or at least reaffirmation, of the Article II officer requirement that an official’s responsibilities be “continuing.”¹²⁸ When courts have evaluated officer status in recent years, they have tended to focus more on the level of importance, or significance, of an official’s duties rather than highlighting the ongoing duty aspect of officer status emphasized in the 19th-century opinions. The Court here turned attention back to the 19th-century century *Germaine* language that centrally emphasized this requirement. It is unclear exactly why the *Lucia* majority decided to shine a spotlight on the continuing nature of officer status front and center in this opinion since that element was not contested here. Perhaps the Court’s emphasis will lay the basis for the Court to impose greater limits on the officer category going forward, an approach that could have special significance as more and more government duties are privatized.¹²⁹ Or, perhaps the Court was just trying to clean up its characterization of *Germaine* in *Free Enterprise Fund* and restore the understanding of *Germaine* as a case about workers-for-hire rather than the civil service.

The Court in the end, however, left many follow-on questions unaddressed. First, how many governmental positions fall within its reach?

¹²⁷ See *id.* at 2054–55.

¹²⁸ See *id.* at 2051.

¹²⁹ See generally *Dep’t of Trans. v. Ass’n of Amer. Railroads*, 135 S. Ct. 1225, 1234–40 (Alito, J., concurring) (“[O]ne way the Government can regulate without accountability is by passing off a Government operation as an independent private concern.”).

The Court was careful not to say, explaining that “maybe one day we will see a need to refine or enhance the test *Buckley* set out so concisely. But that day is not this one.”¹³⁰ Despite the very factbound nature of the Court’s judgment, ALJs who preside over “adversarial hearings”¹³¹ in agencies other than the SEC likely have duties that are sufficiently indistinguishable from the *Lucia* ALJ that they should now be considered officers. But the question whether adjudicators in nonadversarial or informal proceedings must be treated as officers as a constitutional matter may very well be the subject of future litigation.

In addition to declining to update the *Buckley* test, the Court also declined to definitively resolve what sorts of remedies should be available in instances in which previous hearings had been held by improperly appointed ALJs. The majority opinion did specify that on remand in this specific litigation, Mr. Lucia must receive a “new hearing before a properly appointed official” who is *someone other than* the ALJ who previously heard his case.¹³² But the Court said the presence of a new decisionmaker may not always be required, if, for example, a substitute decisionmaker is unavailable. That complication could occur if “the Appointments Clause problem [were to be] with the Commission itself, so that there is no substitute decisionmaker,” in which case “the rule of necessity would presumably kick in and allow the Commission to do the rehearing.” Finally, the Court also said it saw “no reason to address” whether the SEC’s “order ‘ratif[y]ing’ the prior appointments of its ALJs” was constitutionally adequate. The Court noted that the SEC could find ways around reliance on the ratification order either by “decid[ing] to conduct Lucia’s rehearing itself” or “assign[ing] the hearing to an ALJ who has received a constitutional appointment independent of the ratification.”¹³³

B. The Separate Writings and the Dissent

Justice Clarence Thomas, joined by Justice Neil Gorsuch, joined the Court’s opinion in full but also wrote separately in concurrence.

¹³⁰ *Lucia*, 138 S. Ct. at 2052.

¹³¹ Cf. *id.* at 2048 (comparing the SEC ALJs to STJs “in conducting adversarial inquiries”).

¹³² *Id.* at 2055 & n.5 (internal quotations omitted).

¹³³ *Id.* at 2055 & n.6.

They observed the challenges of applying the majority’s factbound opinion moving forward.¹³⁴ Instead they would have further clarified the proper definition of “officer” by applying the term’s original public meaning, which they described as “encompass[ing] all federal civil officials with responsibility for an ongoing statutory duty.” This included even those officers with “ministerial statutory duties” like recordkeepers and clerks. Justices Thomas and Gorsuch emphasized the Appointments Clause’s attempt to “strike[] a balance between efficiency and accountability” with its inferior officer appointment mechanism. The Article II clause “maintains clear lines of accountability—encouraging good appointments and giving the public someone to blame for bad ones” by “specifying only a limited number of actors who can appoint inferior officers without Senate confirmation.”¹³⁵

Justice Breyer joined the majority only in the judgment. Instead of finding that the *Lucia* ALJ was unlawfully appointed as a *constitutional* matter, he would have found that the SEC’s ALJ appointments constituted a *statutory* violation.¹³⁶ He noted that the Administrative Procedure Act requires *agencies* to appoint their ALJs—and the commission did not satisfy that mandate here, leaving ALJ appointments up to staff. Justice Breyer explicitly declined to decide the constitutional “officer” status of ALJs out of concern that the ALJs’ Article II status may open up their “statutory ‘for cause’ removal protections” to constitutional concerns.

Justice Sotomayor dissented, joined by Justice Ruth Bader Ginsburg.¹³⁷ She noted that the Court’s “significant authority” jurisprudence “offers little guidance on who qualifies as an ‘Officer of the United States.’” She would try to offer further clarity by holding “that one requisite component of ‘significant authority’ is the ability to make final, binding decisions on behalf of the Government.” This test would “[c]onfirm[] that final decisionmaking authority is

¹³⁴ See *id.* at 2056 (Thomas, J., concurring) (“Moving forward, . . . this Court will not be able to decide every Appointments Clause case by comparing it to *Freitag*.”).

¹³⁵ *Id.* at 2055–56 (internal quotations omitted).

¹³⁶ See *id.* at 2057–58 (Breyer, J., concurring in the judgment in part and dissenting in part). See also Jennifer Nou, The SEC’s Improper Subdelegation (Statutory, not Constitutional), 36 *Yale J. on Reg.: Notice & Comment*, Apr. 11, 2018, <http://yalejreg.com/nc/the-secs-improper-subdelegation-statutory-not-constitutional>.

¹³⁷ *Lucia*, 138 S. Ct. at 2064–67 (Sotomayor, J., dissenting).

a prerequisite to officer status” and that any official who merely “investigates, advises, or recommends” is not an Article II “officer.”

IV. Conclusion: The Road Ahead

Despite *Lucia*'s narrowness, it took only a few weeks for tremors to be felt within the agency adjudication system. On July 10, the president issued an executive order to implement *Lucia*.¹³⁸ But the order, as is the president's prerogative in oversight of the executive branch, extends beyond the technical four corners of the *Lucia* ruling.

The parties in *Lucia* challenged only the role of SEC staff in making the final appointment of ALJs; they had not challenged the initial evaluation of ALJ candidates through statutory and regulatory competitive service, merit-based procedures.¹³⁹ Nonetheless, the executive order notes “doubt regarding the constitutionality” of using “competitive examination and competitive service selection procedures” to limit the discretion of agency heads who must appoint ALJs under Article II in light of *Lucia*.¹⁴⁰ Therefore, the order places “the position of ALJ in the excepted service” to “mitigate concerns about undue limitations on the selection of ALJs, reduce the likelihood of successful Appointments Clause challenges, and forestall litigation in which such concerns have been or might be raised.” The executive order preserves merit-based consideration of ALJ candidates in that it calls on agencies to assess “critical qualities” and

¹³⁸ See generally Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 10, 2018), <https://bit.ly/2AV9CHX>.

¹³⁹ See *Lucia*, 138 S. Ct. at 2051 (addressing only the constitutionality of the final ALJ selection by staff). As background, ALJs at agencies like the SEC typically have undergone competitive service selection to enter the ALJ system and then received an initial appointment at the Social Security Administration (SSA), which has hundreds of ALJs and is often the starting point for newly hired ALJs. Often ALJs at agencies like the SEC have been transferred to their current agency from this initial SSA assignment. Cf. Emily Bremer, A Shared Power to Appoint ALJs?, 36 Yale J. on Reg.: Notice & Comment, (Apr. 4, 2018), <http://yalejreg.com/nc/a-shared-power-to-appoint-aljs/>.

¹⁴⁰ See Exec. Order, *supra* note 138, at 32,755 (“Regardless of whether [competitive service selection] procedures would violate the Appointments Clause as applied to certain ALJs, there are sound policy reasons to take steps to eliminate doubt regarding the constitutionality of th[is] method of appointing officials who discharge such significant duties and exercise such significant discretion.”). See also Mascott, *supra* note 110, at 33-34 (questioning the extent to which “competitive-based selection of ALJs may remain permissible”).

hire ALJs based on considerations “such as work ethic, judgment, and ability to meet the particular needs of the agency” but leaves evaluation of those criteria more within the discretion of the agencies themselves.¹⁴¹

In addition, the executive order touches on tenure protections for ALJs. Action by Congress is necessary to comprehensively address ALJ removal issues as ALJ tenure protections are statutory. But, outside of what is “required by statute,” the executive order provides that “Civil Service Rules and Regulations shall not apply” to ALJ removals, to Schedule A, C, or D positions, or to “positions excepted from the competitive service by statute.”¹⁴²

Litigants and lower courts have already begun incorporating lessons from *Lucia* as well. For example, on July 31, 2018, the U.S. Court of Appeals for the Sixth Circuit vacated penalties imposed by the Federal Mine Safety and Health Review Commission that had initially been imposed by an ALJ not appointed as an “inferior officer.”¹⁴³ Because the commission’s ALJs have responsibilities “commensurate with their SEC counterparts,” the court concluded that they are “inferior officers” who had been improperly hired by the commission’s chief ALJ.¹⁴⁴ And then in litigation with a more attenuated connection to *Lucia*, a military detainee challenged the structural constitutionality of his military commission proceeding on Appointments Clause grounds, contending that the “convening authority who purported to refer Appellee’s case for trial . . . was never appointed in the manner required by the Appointments Clause.”¹⁴⁵

Over the next few months it will be intriguing to watch for the potential torrent of litigation filed to address the numerous questions the Court left open in *Lucia*. By answering only the precise question

¹⁴¹ Exec. Order, *supra* note 138, at 32,755.

¹⁴² See *id.* at 32,756 (establishing ALJs as Schedule E positions); *id.* at 32,757.

¹⁴³ *Jones Brothers, Inc. v. Secretary of Labor*, No. 17-3483, 2018 WL 3629059, at *2 (6th Cir. July 31, 2018).

¹⁴⁴ See *id.* at *5, *7.

¹⁴⁵ See Appellee’s Combined Motion for Leave to File and Motion to Dismiss Because the Military Commission Lacked Subject-Matter Jurisdiction at 2–3, *United States v. Al-Rahim Hussein Al-Nashiri*, No. 18-002 (U.S. Ct. of Military Comm’n Rev. July 13, 2018), <https://www.justsecurity.org/wp-content/uploads/2018/07/Appellees-Corrected-MTD-Lack-of-SMJ.pdf> (citing *Lucia*).

needed to resolve the specific Appointments Clause issue in *Lucia*, the Court in a sense moved itself out of the central role in the interpretation and application of Appointments Clause restraints. The executive branch has already stepped in to play its role in guiding practice within administrative agencies and in adapting regulations to the executive's understanding of the contours of the clause. Perhaps Congress will follow suit and take up the mantle of more comprehensive civil-service reform.

