If Established by Law, Then an Administrative Judge is an Officer

Jennifer L. Cotton
University of Georgia School of Law, jennifer.cotton@uga.edu

If Established by Law, Then an Administrative Judge is an Officer

Cover Page Footnote

J.D. Candidate, University of Georgia School of Law, 2019; B.A., New York University, 2016. I would like to thank Professor Kent Barnett and the Georgia Law Review Editorial Board for their help in developing and editing this Note.

IF ESTABLISHED BY LAW, THEN AN ADMINISTRATIVE JUDGE IS AN OFFICER

Jennifer L. Cotton[*]

Administrative Judges (AJs) are a large and often overlooked group of federal agency adjudicators. While courts have examined Article II Appointments Clause challenges to Administrative Law Judges (ALJs), courts have yet to encounter a legal challenge to the constitutionality of AJs' appointment procedures. The constitutionality of any federal government actor's appointment is dependent upon whether that actor is an "officer" or an "employee" under the Article II Appointments clause. It is apparent that the current "significant authority" test that the Supreme Court has espoused to distinguish between officers and employees is unworkable. This Note endeavors to set forth a bright-line test to distinguish between officers and employees that better serves the purposes of the Appointments Clause and is more easily applicable. The test is simple: if an AJ is "established by Law," then that AJ is an officer and must be appointed according to the Appointments Clause.

[*] J.D. Candidate, University of Georgia School of Law, 2019; B.A., New York University, 2016. I would like to thank Professor Kent Barnett and the Georgia Law Review Editorial Board for their help in developing and editing this Note.

TABLE OF CONTENTS

I. INTRODUCTION 311

II. APPOINTMENTS CLAUSE BACKGROUND 313
A. THE SUPREME COURT'S PRE-*LUCIA* APPOINTMENTS CLAUSE JURISPRUDENCE 314
B. LOWER COURTS' APPLICATION OF THE SUPREME COURT'S JURISPRUDENCE 319
C. *LUCIA V. SEC* 322

III. ADMINISTRATIVE JUDGES BACKGROUND 323

III. ARGUMENT 326
A. THE COURTS NEED A CLEARER RULE TO DISTINGUISH BETWEEN OFFICERS AND EMPLOYEES. 326
B. THE SUPREME COURT'S JURISPRUDENCE IS LIKELY UNDERINCLUSIVE. 328
C. THE TEST FOR WHETHER AN ADMINISTRATIVE JUDGE IS AN OFFICER SHOULD BE WHETHER HER POSITION IS "ESTABLISHED BY LAW" 330
D. EXAMPLES OF IMPLEMENTATION OF AN "ESTABLISHED BY LAW TEST" FOR ADMINISTRATIVE JUDGES 332

V. CONCLUSION 334

I. INTRODUCTION

It is possible that thousands of federal agency adjudicators in the United States today have been unconstitutionally appointed. The constitutionality of their appointment depends upon whether they are officers or mere employees. While the Article II Appointments Clause of the United States Constitution sets forth black-letter requirements for the appointment of officers, it sets forth none for employees.[1] Despite its apparent importance, the distinction between officers and employees under the Article II Appointments Clause is murky. Several recent cases have concerned challenges to the appointment of the most visible group of agency adjudicators—Administrative Law Judges (ALJs).[2] This Note considers a much larger but often overlooked group, collectively referred to as non-ALJs or Administrative Judges (AJs). This Note will argue for a rule-based approach to determining whether AJs qualify as officers under the Appointments Clause, and will contend that courts should employ a bright-line rule to determine AJs' officer status: if their positions are "established by Law,"[3] then they are officers.

The "hidden judiciary" of federal administrative adjudication is composed of ALJs and their "doppelgängers," AJs.[4] When this Note uses the term "AJs," it refers to all federal administrative adjudicators who oversee evidentiary hearings, excluding ALJs. Non-ALJ adjudicators go by many titles, including Administrative Judges, Hearing Officers, and Immigration Judges,[5] but for

---

[1] 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 . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

[2] *See infra* Part II.

[3] U.S. CONST. art. II, § 2, cl. 2.

[4] Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1645 (2016) (citation omitted); *see also* Thomas C. Mans, *Selecting the 'Hidden Judiciary': How the Merit Process Works in Choosing Administrative Law Judges (Part I)*, 63 JUDICATURE 60, 62 (1979) (coining the phrase "hidden judiciary"). *But see* Ronnie A. Yoder, *The Role of the Administrative Law Judge*, 22 J. NAT'L ASS'N ADMIN. L. JUDGES 321, 323 (2002) ("We [ALJs] used to be referred to as the hidden judiciary; but you do not see that phraseology much any more." (footnote omitted)).

[5] *See* Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection Oversight, and Removal*, 53 Ga. L. Rev. 1, 8 (2019) ("Non-ALJs reported in our survey go by 23 different titles.").

simplicity's sake, this Note will refer to all of these non-ALJ adjudicators as "AJs."

The Supreme Court recently resolved a circuit split regarding whether the Securities and Exchange Commission (SEC) ALJs are employees or officers, holding that the SEC ALJs are officers—not employees.[6] When the SEC ALJ circuit split developed, some expressed concerns about the slippery slope that may result if all ALJs were deemed to be officers.[7] Equally concerning is the prospect of finding that AJs are officers. While courts and scholars have devoted significant attention to ALJs, regarding both their appointment and independence, AJs have received relatively little attention.[8] This disparity in attention is likely due to the fact that AJs are more amorphous than ALJs; data is not as readily available as to their numbers, titles, qualifications, and protections.[9] The most recent study indicates that federal agencies employ at least 10,831 AJs in the United States today.[10] This number towers above the number of reported federal ALJs: 1,931.[11] Some AJs might be appointed in conformity with the Appointments Clause's provisions, but if some AJs are officers—which this Note argues is the case—then likely thousands of AJs have been and are being appointed unconstitutionally.

First, this Note will examine the Appointments Clause, its history, and related jurisprudence that is relevant to the employee-officer distinction. After that, this Note will explain who AJs are, particularly in relation to ALJs. Finally, this Note will argue that a bright-line, "established by Law"[12] test is the best route for determining whether AJs are officers.

---

[6] *See* Lucia v. SEC., 138 S. Ct. 2044, 2049 (2018); *see also infra* Part II.C.

[7] *See, e.g.*, Bandimere v. SEC, 844 F.3d 1168, 1194 (10th Cir. 2016) (McKay, J., dissenting) ("Under the majority's reading of *Freytag*, all federal ALJs are at risk of being declared inferior officers.").

[8] *But see* Helman v. Dep't of Veteran Aff., 856 F.3d 920, 929 (Fed. Cir. 2017) (holding that a Merit Systems Protection Board AJ's appointment as a mere employee was unconstitutional); Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 464 (2018) ("Th[e] historic meaning of 'officer' would likely extend to thousands of officials not currently appointed as Article II officers, such as . . . administrative judges.").

[9] *See* Barnett et al., *supra* note 5, at 13 (noting that the variety of non-ALJ hearings "renders describing and analyzing them a challenge"). Numbers are as of March 2017.

[10] *Id.* at 32.

[11] *Administrative Law Judges by Agency,* U.S. OFFICE OF PERSONNEL MANAGEMENT (Mar. 2017), https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency.

[12] U.S. CONST. art. II, § 2, cl. 2.

II. APPOINTMENTS CLAUSE BACKGROUND

> The United States Constitution delineates the requirements for appointment of "Officers of the United States" in the Article II Appointments Clause:[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all . . . *Officers of the United States*, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[13]

The Clause contains two mechanisms of appointment—a default mechanism for principal officers and an alternative mechanism for inferior officers. The Clause makes clear that the President must appoint principal officers with the Senate's advice and consent;[14] this is the default appointment mechanism. Alternatively, under what is often referred to as the Excepting Clause,[15] Congress may vest the power to appoint inferior officers in the President, courts of law, or heads of departments.[16]

The Clause includes the term "inferior Officers,"[17] but it does not explicitly name the officers who are not inferior. To distinguish between "Officers of the United States" and "inferior Officers," the Supreme Court has dubbed officers who are not inferior as "principal officers."[18] The Clause also does not explicitly name the individuals who do not rise to officer status at all. Courts have dubbed these individuals who work for the federal government—but who are not "officers"—mere "employees."[19]

---

[13] *Id.* (emphasis added).

[14] *Id.*

[15] *See, e.g.*, Myers v. United States, 272 U.S. 52, 127 (1926) ("The phrase 'But Congress may by law vest' is equivalent to 'excepting that Congress may by law vest.'").

[16] U.S. CONST. art. II, § 2, cl. 2.

[17] *Id.*

[18] Stacy M. Lindstedt, *Developing the Duffy Defect: Identifying Which Government Workers Are Constitutionally Required to Be Appointed*, 76 MO. L. REV. 1143, 1148 (2011) (citing Morrison v. Olson, 487 U.S. 654, 668 (1988)).

[19] *See, e.g.*, United States v. Germaine, 99 U.S. 508, 509 (1878) (distinguishing "officers of the United States" from "agent[s] or employ[ees]").

The purposes of the Appointments Clause are manifold, largely stemming from grounds of checks and balances. The Supreme Court has said that the Clause generally protects against "the danger of one branch's aggrandizing its power at the expense of another branch."[20] This purpose reflects a system of checks and balances where neither Congress nor the President alone can create and fill an office.[21] The Clause was also crafted to prevent the "'manipulation of official appointments,' . . . because 'the power of appointment to offices' was deemed 'the most insidious and powerful weapon of eighteenth century despotism.'"[22] The English Crown had used "clever distribution of places and positions" to secure a "great Chain of political Self-Interest" where "[t]he weeds of tyranny flourished."[23] Seeking to evade this utilization of the appointment power as a weapon, the Framers limited it to "ensure that those who wielded it were accountable to political force and the will of the people," and thus divided the power to appoint between the Executive and Legislative Branches.[24]

A. THE SUPREME COURT'S PRE-LUCIA APPOINTMENTS CLAUSE JURISPRUDENCE

The Supreme Court has struggled to draw a clear line to distinguish between principal and inferior officers, and between inferior officers and employees. This Note will not examine the hazy distinction between principal and inferior officers, as it is not relevant to the issue of whether AJs are officers or employees. For now, it will suffice to say that if AJs are officers, then they are almost certainly inferior officers who can be appointed by the alternative mechanism in the Appointments Clause.[25]

---

[20] Freytag v. Comm'r, 501 U.S. 868, 878 (1991).

[21] *See* Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam) ("The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.").

[22] *Freytag*, 501 U.S. at 883 (citing GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 79, 143 (1969)).

[23] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 143 (1998 ed.).

[24] *Freytag*, 501 U.S. at 884 (citing *Buckley*, 424 U.S. at 129–31).

[25] *See* Morrison v. Olson, 487 U.S. 654, 671 (1988) (holding that the individual at issue was an "inferior officer" because, among other reasons, she was "subject to removal by a higher Executive Branch official"). AJs are subordinate in the sense that they have superiors, so under the Court's analysis in *Morrison*, they are likely inferior officers. *See also* Edmond

At the heart of this Note lies the distinction between officers and employees—in other words, the line that divides "Officers of the United States" who must be appointed in accordance with the Appointments Clause, and mere employees whose appointment is not governed by the Clause. To be clear, this Note will *not* ask how to apply the line *as defined by the Court*. Instead, this Note will argue what the line *should* be for AJs. Ultimately, this Note contends that the line between officers and employees needs more clarity, which is a goal that courts can reach by relying upon the "established by Law" provision of the Appointments Clause for AJs.

First, though, it is important to walk through the Supreme Court's employee-officer jurisprudence thus far. The Court has used varying factors for officer status over its history. In 1878, Justice Miller reasoned in *United States v. Germaine* that a civil surgeon appointed by the Commissioner of Pensions was not an officer because he was not appointed by the President, a court of law, or a department head.[26] Courts and scholars have criticized this reasoning as "circular," because it asks how an individual was appointed in order to determine whether the individual should have been appointed that way.[27] The inquiry should be the other way around: one must first ask whether the individual is an officer in order to determine how the individual should be appointed. The *Germaine* court also looked to "the nature of [the civil surgeon]'s employment."[28] It noted that the surgeon's duties "are *not* continuing and permanent, and they *are* occasional and intermittent."[29] Scholars have criticized this tenure and duration language as being both overinclusive and underinclusive.[30] For example, an office might exist temporarily,[31] and an employee's

v. United States, 520 U.S. 651, 622–63 (1997) ("Whether one is an 'inferior' officer depends on whether he has a superior.").

[26] United States v. Germaine, 99 U.S. 508, 510–11 (1878).

[27] *See, e.g.*, Landry v. FDIC, 204 F.3d 1125, 1132–33 (D.C. Cir. 2000) ("[T]he earliest Appointments Clause cases often employed circular logic, granting officer status to an official based in part upon his appointment by the head of a department.").

[28] *Germaine*, 99 U.S. at 511.

[29] *Id.* at 512.

[30] *See, e.g.*, E. Garrett West, *Clarifying the Employee-Officer Distinction in Appointments Clause Jurisprudence*, 127 YALE L.J. F. 42, 48 (2017) ("[C]ontinuity alone does not distinguish the two roles. Congress might create a temporary office, or a contract might extend indefinitely.").

[31] *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 672 (1988) (noting that the independent counsel's position is "limited in tenure," but that she "is an 'inferior' officer in the constitutional sense").

position might be indefinite.[32] Tenure and duration are not reliable indicators of officer status.[33]

In 1920, Justice Brandeis stated in *Burnap v. United States* that "[t]he distinction between officer and employee . . . does not rest upon differences in the qualifications necessary to fill the positions or in the character of the service to be performed," but that the difference is instead "determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto."[34] The *Burnap* court held that a landscape architect appointed by the Office of Public Buildings and Grounds was not an officer, but instead an employee.[35] Justice Brandeis emphasized the "established by Law" provision of the Appointments Clause when he looked to whether Congress established the position, duties, or appointment by law.[36] Of course, Congress's establishing the *appointment* by law is a circular indicator reminiscent of *Germaine*.[37] But Justice Brandeis's looking to Congressional establishment of the *position* by law aligns with this Note's argument: that Congress's statutory creation of AJs' positions should be determinative of their officer status.

Modern employee-officer jurisprudence generally stems from *Buckley v. Valeo*, the 1976 case in which the Court held that Federal Election Commissioners were inferior officers rather than employees.[38] The *Buckley* court established today's prevailing-yet-vague test for officer status: "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States'" and must be appointed according to the Appointments Clause.[39] In a footnote, the Court elaborated upon this distinction by stating that "[e]mployees are lesser functionaries subordinate to officers of the United States . . . , whereas the Commissioners, appointed for a statutory term, are not subject to the control or direction of any other executive, judicial, or legislative

[32] An example might be the thousands of administrative assistants across the federal government.

[33] *But see* Steven G. Bradbury, *Officers of the United States Within the Meaning of the Appointments Clause*, 31 OP. O.L.C. 73, 77 (2007) ("[F]or a position to be a federal office, it also must be 'continuing' . . . .").

[34] Burnap v. United States, 252 U.S. 512, 516 (1920).

[35] *Id.* at 519.

[36] *Id.* at 515.

[37] *See supra* note 28.

[38] Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam).

[39] *Id.*

authority."[40] The Court has since used the "significant authority" test as the touchstone for distinguishing employees from officers.[41] But the "significant authority" test has proven difficult to apply,[42] and it does not help to distinguish inferior officers from either principal officers or employees.

Fifteen years after *Buckley*, the Court again grappled with the employee-officer distinction in *Freytag v. Commissioner*.[43] The Court held that the individuals at issue—Special Trial Judges (STJs) within the Tax Court—were inferior officers, not employees.[44] In doing so, the *Freytag* court fleshed out the significant authority test by incorporating several factors. The Court looked to whether the STJ office was "established by Law," and whether the STJs' duties, salaries, and means of appointment were specified by statute.[45] Unlike *Buckley*, which did not cite *Burnap* at all,[46] the *Freytag* court looked to *Burnap*'s emphasis on the "established by Law" provision to inform its decision.[47] The *Freytag* court also reasoned that although STJs lack authority to render final decisions in all cases they hear, they perform "more than ministerial tasks," and instead "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders."[48] The Court noted that "[i]n the course of carrying out these important functions, the special trial judges exercise significant discretion."[49] This was the first articulation of such factors by the Court. The Court did not make clear how important these factors are, or whether some are more important than others. Finally, the *Freytag* court stated that "[e]ven if the duties of [STJs] . . . were not as significant as we . . . have found them to be, our conclusion would be unchanged" because the chief judge of the Tax Court could assign STJs to render final

---

[40] *Id.* at n.162.

[41] *See, e.g.*, Edmond v. United States, 520 U.S. 651, 662 (1997) (holding significance of authority relevant when determining officer status); Freytag v. Comm'r, 501 U.S. 868, 881 (1991) (citing *Buckley* for "significant authority" test).

[42] *See infra* Part II.B.

[43] *Freytag*, 501 U.S. 868.

[44] *Id.* at 881–82.

[45] *Id.* at 881 (citing Burnap v. United States, 252 U.S. 512, 516–17 (1920); United States v. Germaine, 99 U.S. 508, 511–12 (1878)).

[46] *See* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (never mentioning *Burnap*).

[47] *Freytag*, 501 U.S. at 881.

[48] *Id.* at 881–82.

[49] *Id.* at 882.

decisions in *some* proceedings, and STJs cannot be "inferior officers for purposes of some of their duties . . . but mere employees with respect to other responsibilities."[50] Lower courts have latched onto these finality[51] and discretion[52] factors post-*Freytag*.

Prior to *Lucia*, the most recent Supreme Court case that discussed the employee-officer distinction was *Free Enterprise Fund*.[53] The parties in *Free Enterprise Fund* conceded that the Public Company Accounting Oversight Board (PCAOB) members were officers.[54] The regulated parties argued that the Board members were principal officers, but the Court had "no hesitation in concluding" that the Board members were inferior officers because they were supervised and directed, and thus subordinate.[55] In his dissent, Justice Breyer did not take issue with the majority's distinction between principal and inferior officers, but instead criticized the majority for failing to take this opportunity to clarify the distinction between inferior officers and employees.[56] Justice Breyer listed positions the Court had held to be "officers" in the past, including "a district court clerk, . . . an 'assistant-surgeon[,]' . . . a 'cadet-engineer[,]' . . . [and] election monitors."[57] Justice Breyer contended that "the term's sweep is unusually broad" and recommended that the Court adopt "[a] clearer line."[58] The majority did not accept Justice Breyer's suggestion and steered clear of answering the employee-officer question.[59] In fact, the majority specifically stated that the Court's holding "does not address that subset of independent agency employees who serve as administrative law judges."[60] Therefore, *Free Enterprise Fund* left lower courts with little more than a refusal to establish a clearer employee-officer line.

---

[50] *Id.*

[51] *See, e.g.*, Landry v. FDIC, 204 F.3d 1125, 1134 (D.C. Cir. 2000) ("[T]he [*Freytag*] Court laid exceptional stress on the STJs' final decisionmaking power.").

[52] *See, e.g.*, Tucker v. Comm'r, 676 F.3d 1129, 1135 (D.C. Cir. 2012) ("[T]he . . . discretion involved in the [settlement officer's] decisions seem well below the level necessary to require an 'Officer.'").

[53] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).

[54] *Id.* at 506.

[55] *Id.* at 510 (citing Edmond v. United States, 520 U.S. 651, 662–63 (1997) ("Whether one is an 'inferior' officer depends on whether he has a superior.")).

[56] *Id.* at 539 (Breyer, J., dissenting).

[57] *Id.* at 540 (citations omitted).

[58] *Id.* at 539, 544.

[59] *Id.* at 508.

[60] *Id.* at 507 n.10.

B. LOWER COURTS' APPLICATION OF THE SUPREME COURT'S JURISPRUDENCE

Understandably, lower courts have disagreed as to how the "significant authority" test should be applied. A circuit split developed in 2016 regarding whether the SEC ALJs are officers or mere employees.

Before its 2016 SEC decision, the D.C. Circuit decided in *Landry v. FDIC* that the Federal Deposit Insurance Corporation (FDIC) ALJs are not officers, and are instead employees.[61] The D.C. Circuit went through *Freytag*'s factors, including the "established by Law" provision, which it dubbed the "threshold trigger for the Appointments Clause."[62] The D.C. Circuit also interpreted the *Freytag* opinion as placing "exceptional stress" on the STJs' power to issue final decisions in holding that they were officers.[63] The D.C. Circuit reasoned that because the ALJs at issue do not possess final decision-making powers, they are not inferior officers.[64] Judge Randolph, concurring in the judgment, disagreed with the majority's interpretation of *Freytag*.[65] He criticized the majority's emphasis on the power of final decision-making, explaining that while the *Freytag* court did rely on the finality consideration, "the Court clearly designated this as an alternative holding."[66] Judge Randolph instead found the ALJs to be indistinguishable from the STJs in *Freytag* because both positions were "established by Law," performed similar duties, and "exercise[d] significant discretion."[67]

The D.C. Circuit affirmed this position sixteen years later when it held that ALJs working for the SEC are employees, not officers.[68] The D.C. Circuit vacated its decision and granted a rehearing en banc in early 2017.[69] But after briefings and oral argument, the en banc court was equally divided and thus affirmed its position that

[61] Landry v. FDIC, 204 F.3d 1125, 1134 (D.C. Cir. 2000).

[62] *Id.* at 1133.

[63] *Id.* at 1134.

[64] *Id.*

[65] *Id.* at 1140 (Randolph, J., concurring).

[66] *Id.* at 1142.

[67] *Id.* at 1141.

[68] Raymond J. Lucia Cos. v. SEC, 832 F.3d 277, 289 (D.C. Cir. 2016), *vacated and reh'g en banc granted*, No. 15-1345, slip op. at 1 (D.C. Cir. Feb. 16, 2017), *appeal denied*, 868 F.3d 1021 (D.C. Cir. 2017), *rev'd and remanded*, 138 S. Ct. 2044 (2018).

[69] Raymond J. Lucia Cos. v. SEC, No. 15-1345, slip op. at 1 (D.C. Cir. Feb. 16, 2017), *vacating and granting reh'g en banc*, 832 F.3d 277, 289 (D.C. Cir. 2016), *appeal denied*, 868 F.3d 1021 (D.C. Cir. 2017), *rev'd and remanded*, 138 S. Ct. 2044 (2018).

the SEC ALJs are mere employees.[70] In July 2017, Lucia filed a petition for certiorari in the Supreme Court.[71] In its November 2017 brief to the Supreme Court, the SEC surprisingly changed its position, stating that "the government is now of the view that such ALJs are officers because they exercise 'significant authority pursuant to the laws of the United States.'"[72] The SEC encouraged the Court to review the case because of "pervasive uncertainty over the scope of th[e] Court's holding in *Freytag*" among the courts of appeals.[73] The Supreme Court granted Lucia's petition for certiorari, and decided on June 21, 2018 that SEC ALJs are, indeed, inferior officers who must be appointed according to the Appointments Clause—reversing the D.C. Circuit's en banc decision.[74]

In 2016, the Tenth Circuit openly disagreed with the D.C. Circuit's holding and held in *Bandimere v. SEC* that the SEC ALJs are inferior officers.[75] The Tenth Circuit rejected the D.C. Circuit's reliance on final decision-making power in *Landry* and *Lucia*,[76] and reasoned that the ALJs are officers because, like the STJs in *Freytag*, their positions are "established by Law," their duties, salaries, and appointment are established by statute, and they exercise "significant discretion in performing important functions."[77] The *Bandimere* court laid out a table listing twenty-two of the SEC ALJs' duties, including "[e]nter[ing] default judgment . . . issu[ing] protective orders . . . [r]egulat[ing] the course of the hearing . . . [and] [t]ak[ing] depositions,"[78] and examined these duties in light of *Freytag* to conclude that the SEC ALJs are officers.[79]

---

[70] Raymond J. Lucia Cos. v. SEC, 868 F.3d 1021, 1021 (D.C. Cir. 2017), *denying appeal from* 832 F.3d 277 (D.C. Cir. 2016), *rev'd and remanded*, 138 S. Ct. 2044 (2018).

[71] Petition for Writ of Certiorari at 1, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130).

[72] Brief for Respondent at 10, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130) (citing Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam)).

[73] *Id.*

[74] Lucia v. SEC, 138 S. Ct. 2044, 2055–56 (2018).

[75] Bandimere v. SEC, 844 F.3d 1168, 1179 (10th Cir. 2016), *cert. denied*, 138 S. Ct. 2706 (2018).

[76] *Id.* at 1182.

[77] *Id.* at 1179.

[78] *Id.* at 1178.

[79] *Id.* at 1179–81.

The Fifth Circuit followed the Tenth Circuit's reasoning in its 2017 *Burgess v. FDIC* decision.[80] The Fifth Circuit decided that the regulated party made a "strong showing" that the FDIC ALJs are inferior officers, rather than employees.[81] The Circuit said its reading of *Freytag* dictated that the FDIC ALJs' "lack of final decision-making authority is not dispositive."[82] The Circuit recognized the circuit split regarding the SEC ALJs,[83] and its decision implies that it might find the SEC ALJs to be inferior officers as well.[84]

The United States District Court for the Northern District of Georgia heard two cases in 2015 and decided in both that the SEC ALJs are inferior officers.[85] In both *Gray Financial Group, Inc. v. SEC* and *Hill v. SEC*, the District Court held that "*Freytag* mandates a finding that the SEC ALJs exercise 'significant authority' and are thus inferior officers."[86] The SEC brought a consolidated appeal to the Eleventh Circuit, and in 2016, the Circuit vacated and remanded the cases with instructions to dismiss for lack of jurisdiction.[87]

The Southern District of New York joined the Northern District of Georgia in 2015 when it held that the SEC ALJs are inferior officers in *Duka v. SEC*.[88] The District Court quoted *Hill*

---

[80] Burgess v. FDIC, 871 F.3d 297 (5th Cir. 2017).

[81] *Id.* at 300, 303.

[82] *Id.* at 303.

[83] *Id.* at 301.

[84] *See* Thomas K. Potter, III, *5th Circuit Hints SEC ALJs Unconstitutional*, BURR FORMAN BLOGS (Sept. 13, 2017), http://www.burr.com/blogs/securities-litigation/2017/09/13/5th-circuit-hints-sec-aljs-unconstitutional ("The opinion tips that the Fifth Circuit is likely to align with *Bandimere* and reject the SEC's customary reliance on *Landry*."); *see also* Alison Frankel, *New 5th Circuit decision on ALJ constitutionality adds urgency to SCOTUS bid*, REUTERS (Sept. 12, 2017), https://www.reuters.com/article/us-otc-alj/new-5th-circuit-decision-on-alj-constitutionality-adds-urgency-to-scotus-bid-idUSKCN1BN2P2 ("The new 5th Circuit decision probably increases the odds that the Supreme Court will take up one or both of the SEC ALJ cases.").

[85] Hill v. SEC, 114 F. Supp. 3d 1297, 1319 (N.D. Ga. 2015), *vacated*, Hill v. SEC, 825 F.3d 1236 (11th Cir. 2016); Gray Fin. Grp., Inc. v. SEC, 166 F. Supp. 3d 1335, 1353 (N.D. Ga. 2015), *vacated*, Hill v. SEC, 825 F.3d 1236 (11th Cir. 2016).

[86] *Hill*, 114 F. Supp. 3d at 1319; *Gray Fin. Grp.*, 166 F. Supp. 3d at 1353.

[87] Hill v. SEC, 825 F.3d 1236, 1237, 1252 (11th Cir. 2016), *vacating* Hill v. SEC, 114 F. Supp. 3d 1297 (N.D. Ga. 2015) and Gray Fin. Grp., Inc. v. SEC, 166 F. Supp. 3d 1335 (N.D. Ga. 2015). The Eleventh Circuit reasoned that the parties who filed suit in federal district court against the SEC bypassed the review scheme set up by Congress in 15 U.S.C. § 78y, and that the parties must first resolve their claims in the administrative forum. *Id.* at 1237.

[88] Duka v. SEC, No. 15 Civ. 357(RMB)(SN), 2015 WL 5547463, at *5 (S.D.N.Y. Sept. 17, 2015); *see also* Duka v. SEC, 103 F. Supp. 3d 382, 385 (S.D.N.Y. 2015) (holding that the Court

approvingly, holding that "*Freytag* mandates finding that the SEC ALJs . . . are . . . inferior officers."[89] But like the Eleventh Circuit, the Second Circuit subsequently affirmed the dismissal of a challenge to the SEC ALJs on jurisdictional grounds in *Tilton v. SEC*, holding that the plaintiffs had not exhausted the administrative review process.[90]

C. *LUCIA V. SEC*

In June 2018, the Supreme Court resolved the SEC ALJ circuit split but did almost nothing to provide further guidance to lower courts regarding the employee-officer distinction. The Court reversed the D.C. Circuit's decision in *Lucia v. SEC*, and held that the SEC ALJs are, in fact, officers of the United States.[91] The Court acknowledged outright 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" because the Court's analysis in *Freytag* "necessarily decides this case."[92] Justice Kagan wrote for the majority and reasoned that the SEC ALJs are "near-carbon copies" of *Freytag*'s STJs in that the ALJs and STJs "have equivalent duties and powers . . . in conducting adversarial inquiries" and "issue decisions much like" one another.[93]

Because the Court relied almost completely on *Freytag*'s analysis and added no clarification to the employee-officer test, its resolution of the SEC ALJ circuit split does little to assist lower courts in deciding the officer status of any other ALJs or AJs. Lower courts, however, will inevitably need the guidance that the Supreme Court eschewed in *Lucia*. While courts have yet to encounter challenges to appointment procedures of AJs, *Lucia*'s holding that SEC ALJs are officers is likely to spur such challenges.

---

had subject matter jurisdiction to hear the case), *abrogated by* Tilton v. SEC, 824 F.3d 276 (2d Cir. 2016).

89 *Duka*, 2015 WL 5547463, at *5 (quoting *Hill*, 114 F. Supp. 3d at 1319).

90 824 F.3d at 276. *See also* Bennett v. SEC, 151 F. Supp. 3d 632 (D. Md. 2015), *aff'd*, 844 F.3d 174 (4th Cir. 2016) (dismissing challenge to appointment of SEC ALJs for lack of subject matter jurisdiction).

91 Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018), *rev'g* Raymond J. Lucia Cos. v. SEC, 832 F.3d 277 (D.C. Cir. 2016).

92 *Id.* at 2052.

93 *Id.* at 2052–53.

III. ADMINISTRATIVE JUDGES BACKGROUND

With the Appointments Clause's background and the Supreme Court's jurisprudence in mind, this section aims to explain AJs' role in the administrative sphere and their relationship to ALJs.

Within the federal administrative sphere, there are two general categories of administrative adjudicators. First are ALJs, who preside over formal hearings.[94] When a statute specifies that an agency hearing must occur "on the record," it triggers formal adjudication requirements, which include that an ALJ must preside.[95] As of March 2017, the U.S. Office of Personnel Management (OPM) reported employment of 1,931 ALJs.[96] There is little information regarding ALJs' annual caseloads, but for the fiscal year of October 1, 2016 to September 29, 2017, the U.S. Social Security Administration (SSA) ALJs heard almost 684,000 cases.[97] The SSA hears the vast majority of all ALJ cases across the federal government, so the total number is likely not much larger than this.[98]

Second are AJs, which this Note defines as non-ALJ administrative adjudicators who oversee evidentiary hearings. When a statute does not contain "on the record" language, an agency may use an AJ instead of an ALJ for the hearing.[99] The most recent study on AJs was conducted in 2017, and it found that federal agencies employ at least 10,831 AJs.[100]

---

[94] Administrative Procedure Act, 5 U.S.C. §§ 554, 556–57 (2012).

[95] *See id.* § 554(a) ("This section applies . . . in every case of adjudication required by statute to be determined on the record . . . ."); *id.* § 556(a) ("This section applies . . . to hearings required by section . . . 554 of this title . . . ."); *id.* § 556(b)(3) ("There shall preside at the taking of evidence . . . one or more administrative law judges . . . .").

[96] *Administrative Law Judges by Agency,* U.S. OFFICE OF PERSONNEL MANAGEMENT (Mar. 2017), https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency.

[97] *Hearing Office Workload Data FY 2017*, SOCIAL SECURITY ADMIN. (Sept. 2017), https://www.ssa.gov/appeals/DataSets/archive/02_FY2017/02_September_HO_Workload_Data.html (listing all SSA ALJ dispositions by location, added together equaling 683,735 dispositions).

[98] *See* Paul R. Verkuil, *Reflections upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1343–44 n.7 (1992) (estimating that ALJs heard "300,000 cases per year (with the bulk of them (250,000) in the Social Security Administration)"). If SSA cases continue to constitute 83% of all ALJ cases, then ALJs would have heard almost 824,000 cases total in the October 2016 to 2017 fiscal year. *See supra* note 97 (SSA ALJs heard 683,735 cases in the October 2016 to 2017 fiscal year).

[99] *But see* Verkuil, *supra* note 98, at 1348 (noting that the SSA uses ALJs even though not required to do so).

[100] *See* Barnett et al., *supra* note 5, at 2.

This is a 321% increase in the number of AJ positions from the last reported study in 2002.[101] There is not much recent data on AJs' annual caseloads, but a 2002 study reported that AJs heard 556,000 cases per year.[102] That number is likely much higher today; if the workload per judge remains approximately the same as it was in 1992 and 2002, the number of cases heard annually by AJs would now be between 1,300,000 and 1,700,000.[103] Administrative adjudicators as a whole have been referred to as the "hidden judiciary," but some scholars suggest that AJs "may be the real hidden judiciary."[104] This seems an apt description, given their overshadowing of ALJs in both numbers and caseloads, but general obscurity in scholarly and policymaking decisions.

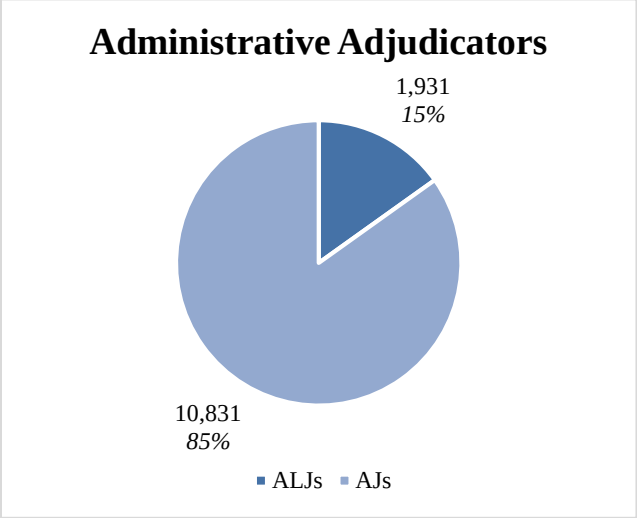
[101] *See* RAYMOND LIMON, OFFICE OF ADMIN. L. JUDGES, THE FEDERAL ADMINISTRATIVE JUDICIARY, THEN AND NOW: A DECADE OF CHANGE, 1992–2002 at 3 (2002) (reporting 3,370 AJs); s*ee also* John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 349 (1992) (reporting 2,692 AJs).

[102] LIMON, *supra* note 101, at 3.

[103] *See* Frye, *supra* note 101, at 264, 349 (reporting 2,692 AJs and 343,200 cases per year); LIMON, *supra* note 101, at 3 (reporting 3,370 AJs and 556,000 cases per year). For 1992, those numbers average to 127 cases per judge per year. For 2002, the numbers average to 165 cases per judge per year. With 10,831 judges today, using those two averages and the same ratio of cases to judge, there would be 1,300,000 to 1,700,00 cases per year. If the ratio of cases to judge has increased over time (127 in 1992 to 165 in 2002; but two data points are not a strong basis for detecting a trend), then there might now be over 1,700,000 cases decided by AJs per year.

[104] Verkuil, *supra* note 98, at 1345 (citations omitted).

Figure 1. Administrative Adjudicators



While ALJs as a class enjoy protections from agency agendas, AJs as a class have fewer protections on several important fronts. First, ALJs are chosen through "an elaborate selection system" run by the OPM.[105] AJs, on the other hand, are selected and appointed by the agencies themselves.[106] Second, once ALJs are appointed, they are statutorily protected from removal unless the agency has good cause.[107] AJs enjoy no such statutory removal protection.[108] Third, Congress and the OPM preserve ALJs' independence by protecting them from performance reviews.[109] However, almost all AJs are subject to performance appraisals and are eligible for bonuses from agencies.[110]

[105] *Id.* at 1344.
[106] *Id.* at 1347.
[107] Administrative Procedure Act, 5 U.S.C. § 7521 (2012).
[108] See Barnett, *supra* note 4, at 1661 ("[U]nlike ALJs, AJs are not entitled to any particular protection from removal from office . . . .").
[109] *Id.* at 1655–56 (noting that ALJ pay is not tied to performance reviews and that agencies cannot give ALJs bonuses).
[110] *See* Barnett et al., *supra* note 5, at 73, 77 (reporting that 99% of AJs are subject to performance appraisals and 90% of AJs are eligible for bonuses).

IV. ARGUMENT

The Supreme Court has failed to create a workable standard for distinguishing between officers and employees. It should use a bright-line test to determine the status of AJs. Lower courts' and scholars' attempts to apply the Court's jurisprudence have resulted in a circuit split.[111] The Court needs a bright-line test, and the current "significant authority" test is likely underinclusive based on the Framers' intent.[112] The test for whether AJs are inferior officers or employees should be whether their positions are "established by Law."

A. THE COURTS NEED A CLEARER RULE TO DISTINGUISH BETWEEN OFFICERS AND EMPLOYEES

The text of Article II itself does little to help courts distinguish between officers and employees. The Supreme Court has struggled to create clear tests distinguishing between principal officers and inferior officers, and between inferior officers and employees.[113] For the latter distinction, the Court has looked to factors ranging from whether the individual was appointed constitutionally,[114] to whether Congress established the position and duties by law,[115] tenure and duration of the position,[116] the exercise of significant authority,[117] discretion,[118] and finality.[119]

---

111 *See supra* Part II.B.

112 *See infra* Part IV.B.

113 *See supra* Part II.A.

114 *See, e.g.*, United States v. Germaine, 99 U.S. 508, 511 (1878) (reasoning that because an individual was appointed by a department head, "he was, therefore, an officer of the United States"); Burnap v. United States, 252 U.S. 512, 516 (1920) ("Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for . . . their . . . appointment . . . .").

115 *See, e.g.*, *Burnap*, 252 U.S. at 516 (stating that whether one is an officer also depends upon whether Congress created the position and duties); Freytag v. Comm'r, 501 U.S. 868, 881 (1991) (finding it significant that "[t]he office of special trial judge is 'established by Law'").

116 *See, e.g.*, *Germaine*, 99 U.S. at 512 (holding an individual not to be an officer because his duties "are *not* continuing and permanent, and they *are* occasional and intermittent").

117 *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam) ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' . . . .").

118 *See, e.g.*, *Freytag*, 501 U.S. at 882 (finding it important that "[i]n the course of carrying out these important functions, the special trial judges exercise significant discretion").

119 *See id.* at 881 (holding STJs are officers despite the fact that they lack authority to enter a final decision).

Although the Supreme Court resolved the SEC ALJ circuit split in *Lucia v. SEC*, it candidly refused to "refine or enhance" the "significant authority" test.[120] Thus, lower courts still lack guidance on the status of AJs.

Recognizing the dissonance in Appointments Clause jurisprudence, the Department of Justice's Office of Legal Counsel (OLC) issued an opinion in April of 2007 that defines "a position, however labeled," as a federal office "if (1) it is invested by legal authority with a portion of the sovereign powers of the federal government, and (2) it is 'continuing.'"[121] The OLC opined that "delegated sovereign authority," the first element, could be defined as "power lawfully conferred by the government to bind third parties, or the government itself, for the public benefit."[122] This power to bind third parties has not been directly articulated by the Court, and it is unclear whether that power is, indeed, important to determine whether an individual is an officer. The OLC seems to have extrapolated this definition of "delegated sovereign authority" from several Supreme Court opinions and historical documents,[123] but requiring officers to have the power to bind third parties would likely be underinclusive, just as the "significant authority" test is.[124]

Scholars, too, have tried to make sense of the Court's jurisprudence by applying it to various positions. Most scholars attempt to work within the Court's articulated "significant authority" test, which generally results in a subjective interpretation of a hodge-podge of factors. For example, Professor John Duffy asked whether administrative patent judges—a kind of AJ—were officers subject to the Appointments Clause.[125] He looked

---

[120] *See* Lucia v. SEC, 138 S. Ct. 2044, 2052 (2018) ("[M]aybe 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 . . . .").

[121] Bradbury, *supra* note 33, at 73–74.

[122] *Id.* at 87.

[123] *Id.*

[124] *See infra* Part IV.B. The OLC's definition also creates some tension with the subordination theory the Court has put forward to distinguish between principal and inferior officers. *See supra* text accompanying note 23.

[125] John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, 77 GEO. WASH. L. REV. 904, 905 (2009); *see also* Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233, 234 (2008) (arguing bankruptcy judges are principal officers, not inferior officers, and are appointed unconstitutionally); Michael W. McConnell, *The Pay Czar Is Unconstitutional*, WALL ST. J. (Oct. 30, 2009), https://www.wsj.com/articles/SB10001424052748703574604574499953992328762 (arguing that Kenneth Feinberg (Special Master for TARP Compensation) is an officer rather than employee and is appointed unconstitutionally).

to whether their offices were "established by Law," whether they had "more than ministerial duties" under the relevant statute, whether they could issue final decisions, whether their decisions received deference, and whether they had "substantial authority" or were "mere 'alter ego[s] or agent[s]'" of their superiors.[126] Professor Stacy Lindstedt expanded upon Duffy's constitutional questioning but criticized the "established by Law" factor because it is "subject to congressional manipulation."[127] This Note refutes that criticism.[128]

B. THE SUPREME COURT'S JURISPRUDENCE IS LIKELY UNDERINCLUSIVE

The Court's "significant authority" test is likely underinclusive based on the Framers' intent. In a recent article, Professor Jennifer Mascott attempts to divine what the Framers intended by "Officers of the United States" in the Appointments Clause.[129] Mascott uses "corpus linguistics-style analysis of Founding-era documents" and "examines appointment practices during the First Congress following constitutional ratification."[130] Based on this analysis, Mascott concludes that the Framers intended for "officers" to include many more positions than are included by case law today.[131] She finds that the "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."[132]

If Mascott's interpretation of the Founders' intent is accurate, there are good reasons to follow what the Framers intended "officers" to mean. A broader inclusion of officers subject to the Appointments Clause preserves a system of checks and balances. By forcing more individuals to be appointed by one of the two

---

[126] Duffy, *supra* note 125, at 907–08.

[127] Lindstedt, *supra* note 18, at 1173 ("Congress could fail to provide for formal appointment although it intends to delegate significant authority. Thus, *Tucker*'s established-by-law analysis gives Congress a blueprint to avoid the Appointments Clause – create what would otherwise be an office by assigning significant authority to a preexisting nonofficer and add the words 'or employee' to destroy any presumption of officer status." (footnote omitted) (referring to Tucker v. Comm'r , 135 T.C. 114 (2010), *aff'd*, 676 F.3d 1129 (D.C. Cir. 2012))).

[128] *See infra* Part IV.C.

[129] Mascott, *supra* note 8, at 443.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 454 (emphasis added).

mechanisms provided by the Appointments Clause, the Clause's purpose of ensuring that those who wield the power to appoint are "accountable to political force and the will of the people"[133] is well served. If the President, courts of law, or heads of departments must appoint more individuals to their positions, it is easier to trace the chains of command and thus hold appointers and the appointed accountable for their actions. In short, the Framers' intended broad definition of officers was well-reasoned because it ensured that "nominators may not act under the cloak of secrecy."[134]

However helpful Mascott's analysis is to gain insight into the Framers' intent, her employee-officer conclusion is problematic. She suggests that even if Congress only establishes *duties* "by law," then Congress has created an office; in other words, the person who performs any statutorily-created duty qualifies as an officer.[135] But this assumption—that an office can exist simply by virtue of Congress's describing duties—contravenes the text of the Appointments Clause itself. The Clause says: "all other Officers of the United States . . . which shall be established by Law."[136] The Clause does not provide that the *duties* of officers are "established by Law," but instead says that the "Officers" are "established by Law."[137] Allowing an office to exist solely by statutory establishment of duties would be overinclusive. It is possible that *no* government actor would be an employee under Mascott's analysis; it is hard to imagine how one could act in furtherance of some governmental mission without at least some statutory basis, no matter how general. Mascott's analysis is instructive as to the Framers' intent, but must be reconciled with the text itself.

C. THE TEST FOR WHETHER AN ADMINISTRATIVE JUDGE IS AN OFFICER SHOULD BE WHETHER HER POSITION IS "ESTABLISHED BY LAW"

If an AJ's position is "established by Law," then the AJ should be considered an officer for the purposes of the Appointments Clause. This is so for two reasons. First, "established by Law" is the most

[133] Freytag v. Comm'r, 501 U.S. 868, 884 (1991) (citing Buckley v. Valeo, 424 U.S. 1, 129–31 (1976)).

[134] Mascott, *supra* note 8, at 107 (citing THE FEDERALIST NO. 77, at 398–99 (Alexander Hamilton) (Jacob Gideon Ed., 2001)).

[135] *Id.* at 59, 95 n.609.

[136] U.S. CONST. art. II, § 2, cl. 2.

[137] *Id.*

important of the articulated indicators of officer status. Second, it provides a workable bright line for courts and agencies to apply.

First, the "established by Law" provision is the most important indicator of officer status. The text of the Appointments Clause says that Congress may vest in the President alone, the courts, or heads of departments the power to appoint inferior officers "whose Appointments are not herein otherwise provided for, and which shall be established by Law."[138] This mechanism for appointment, often referred to as the Excepting Clause,[139] provides a way to appoint inferior officers that does not involve presidential nomination with senatorial advice and consent, as is required for principal officers.[140]

"[E]stablished by Law" is the only factor for officer status the Court has articulated that is derived from the text of the Constitution itself. Courts have recognized that whether a position is "established by Law" is the "threshold" for officer status.[141] If there is a clear threshold for officer status, and there is an advantage to an overinclusive as opposed to underinclusive definition of officers for the purposes of the Appointments Clause,[142] then the "significant authority" test is unnecessary for AJs. The "established by Law" test instead provides a way to distinguish between employees and inferior officers without allowing relatively trivial matters, such as discretion, finality, and continuity, to make the distinction.

Second, the "established by Law" test is a workable, bright-line test that courts and agencies can apply. The current "significant authority" test gave rise to a circuit split regarding officer status of ALJs,[143] which indicates that courts, agencies, and Congress are unable to easily determine whether ALJs or AJs are appointed constitutionally. Implementing the "established by Law" test would be relatively simple compared to implementing the current test. Anyone with basic legal researching skills could look to see if an

---

138 *Id.*

139 *See, e.g.*, Myers v. United States, 272 U.S. 52, 161 (1926) (referring to "[t]he authority of Congress given by the *excepting clause* to vest the appointment of . . . inferior officers in the heads of departments . . . ." (emphasis added)); *see also id.* at 127 ("The phrase 'But Congress may by law vest' is equivalent to 'excepting that Congress may by law vest.'").

140 *See* U.S. CONST. art. II, § 2, cl. 2.

141 *See, e.g.*, Landry v. FDIC, 204 F.3d 1125, 1133 (D.C. Cir. 2000) ("The office of STJ was 'established by Law' (the threshold trigger for the Appointments Clause) . . . .").

142 *See supra* Part IV.B.

143 *See supra* Part II.B.

AJ's position was established via congressional statute and thus determine whether the AJ is an officer. This is good for agencies because it gives them notice as to which AJs need to be appointed according to the Appointments Clause.

The "established by Law" test may work for other similar positions, but this Note focuses on AJs because the AJ category covers numerous agency positions, and all AJs have essentially the same duties. Although this Note is highly skeptical of the "significant authority" inquiry, this argument does not require its outright rejection for all officials. It is enough to say that first, AJs' duties are similar to ALJs' as they both oversee oral evidentiary hearings,[144] and second, that litigation regarding the SEC ALJs has resulted in examination of the minutiae of ALJs' duties.[145] A hard-and-fast rule for AJs provides a more efficient way of handling their officer status.

While possible circumvention of the Appointments Clause's requirements poses a threat under the "established by Law" test, the need for clarity outweighs this concern. The threat here is not that one branch will create and fill an office, but instead that the legislative branch will purposefully fail to establish a position by statute and thus circumvent the Appointments Clause.[146] Although this is a concern, Congress's failure to establish a position by law would not then allow Congress to fill the position; this is not the concern of "encroachment or aggrandizement of one branch at the expense of the other" that motivated the Framers to limit how and who is appointed.[147] Under the "established by Law" test, if Congress wanted to ensure the Executive alone does not create and fill a position, it could establish the position "by Law" and thus

---

[144] *See* Barnett, *supra* note 4, at 1647 ("ALJs and AJs perform the same function: they preside over oral hearings to award benefits and licenses, enforce agency penalties, and adjudicate claims primarily between private parties. Indeed, some agencies use both ALJs and AJs to hear the exact same kinds of cases . . . ."); Michael Asimow, *The Administrative Judiciary: ALJ's in Historical Perspective*, 9 J. NAT'L ASS'N ADMIN. L. JUDGES 25, 25 n.2 (1999) (referring to both ALJs and administrative judges as "lawyers who serve as . . . full-time administrative trial judges").

[145] *See, e.g.*, Bandimere v. SEC, 844 F.3d 1168, 1177–78 (10th Cir. 2016) (laying out a table of twenty-two examples of the SEC ALJs' duties).

[146] *See* Lindstedt, *supra* note 18, at 1173 ("Congress could fail to provide for formal appointment although it intends to delegate significant authority. Thus, [the] established-by-law analysis gives Congress a blueprint to avoid the Appointments Clause . . . ." (footnote omitted)).

[147] Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam); *see supra* Part II.

distribute the power of appointment between the Executive and Legislative Branches. This seems to allow for the kind of balance between the Executive and Legislature that the Appointments Clause was meant to foster.[148]

D. EXAMPLES OF IMPLEMENTATION OF AN "ESTABLISHED BY LAW TEST" FOR ADMINISTRATIVE JUDGES

Under the "established by Law" test, not all AJs will be officers. Those AJs whose positions Congress establishes via statute are "established by Law" and would thus be officers under this test.[149] Those AJs whose positions are not set up by statute or are established only by regulation are not "established by Law" in the relevant sense, and would be mere employees under this test. For example, immigration judges are officers; the Equal Employment Opportunity Commission's (EEOC's) AJs are mere employees; and Internal Revenue Service (IRS) adjudicators are officers. This Note will examine these AJs in turn through the lens of the "established by Law" test.

First, immigration judges are officers under the "established by Law" test. Congress established these positions via statute by providing that "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."[150] Congress further defines an immigration judges as an "attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review."[151] The lack of

---

[148] *See* Freytag v. Comm'r, 501 U.S. 868, 884 (1991) ("[T]he [Appointments] Clause bespeaks a principle of limitation by dividing the power to appoint the principal federal officers—ambassadors, ministers, heads of departments, and judges—between the Executive and Legislative Branches." (citing *Buckley*, 424 U.S. at 129–31)).

[149] Positions "established by Law" should not include those established via regulation because regulations are not promulgated by Congress.

[150] 8 U.S.C. § 1229a(a)(1) (2012).

[151] *Id.* § 1101(b)(4). Congress also establishes the duties of the Immigration Judge, but under the "established by Law" test, only the *position*, not the duties, are established by law. *See id.* § 1229(b)(1) ("The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority . . . to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority . . . ."). These duties seem more than enough to satisfy the "significant authority" test. *See* Freytag v. Comm'r, 501 U.S. 868, 881–82 (1991) (holding STJs exercise significant authority because they perform "more than ministerial tasks," and instead "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders").

"on the record" language and the explicit naming of immigration judges as "administrative judges" together show that they are AJs instead of ALJs. Congress has provided via statute for the office of an immigration judge, and thus under the "established by Law" test, immigration judges are officers of the United States.

In contrast, the EEOC AJs are mere employees under the "established by Law" test. The Civil Rights Act of 1964 provides that "[f]or the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of title 29 shall apply."[152] That section provides that "[t]he Board, or its duly authorized agents or agencies" shall conduct hearings.[153] Neither statute contains "on the record" language,[154] so the proceedings are allowed to be informal. Since neither statute establishes the office of the EEOC AJ, these adjudicators are mere employees under the "established by Law" test.

Finally, IRS hearing officers are officers under the "established by Law" test. Congress provides that IRS hearings shall be conducted "by an officer or employee who has had no prior involvement."[155] By using the phrase "an officer," Congress has established an office "by Law," and thus, the person who conducts IRS hearings is an officer. The statute also includes no "on the record" language to trigger formal adjudication, so the IRS hearings are informal. Because IRS hearing officers are AJs who are "established by Law," they are officers under this Note's proposed test.

V. CONCLUSION

This Note proposes a rule-based approach to determining whether AJs qualify as officers under the Appointments Clause. The test is simple; if an AJ is "established by Law," then that AJ is an officer. This test is preferable to the "significant authority" test the Court has espoused, which has created discord among the lower courts, because it better serves the purposes of the Appointments Clause and is more easily applicable.

---

[152] 42 U.S.C. § 2000e-9 (2012).

[153] 29 U.S.C. § 161(1) (2012).

[154] *See id*. (not containing "on the record" language); 42 U.S.C. § 2000e-9 (2012) (containing no "on the record" language).

[155] 26 U.S.C. § 6320(b)(3) (2012). Under the "established by Law" test, the "or employee" language in this statute is fluff—it has no effect on the creation of an office.

Applying the "established by Law" test to AJs mandates finding that many AJs are officers. This could be a serious problem for agencies given the huge number of AJs in the United States today.[156] For those AJs who have been appointed unconstitutionally, agencies must work to remedy their appointments and determine which actions, if any, should be afforded de facto validity.[157] However, the need for clarity regarding this important clause of the Constitution requires a bright line, and the "established by Law" test is the best line for AJs.

[156] *See supra* Part III.

[157] *See* Buckley v. Valeo, 424 U.S. 1, 142 (1976) (per curiam) (granting de facto validity to the past actions of the unconstitutionally appointed officers).