

**A CONSTITUTIONALLY APPOINTED  
ADMINISTRATIVE LAW JUDGE – YOU “KNOW IT  
WHEN YOU SEE IT”**

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**Synopsis:** This article explores the impact of conflicting decisions of the U.S. Courts of Appeals for the Fifth, Tenth and District of Columbia Circuits regarding the validity of Administrative Law Judge appointments under the Appointments Clause of the Constitution. It inquires into the logical underpinnings of the issue to show that the decisions follow mistaken paths and pursue “red-herring” arguments. The history of the formation of the ALJ corps in the 1940s shows that the creators of the position envisioned ALJs to be impartial, apolitical agency fact-finders who render “initial decisions” toward fulfillment of their agencies’ statutory administrative duties. Congress’ power under the Necessary and Proper Clause, not the Appointments Clause, is the lodestar of the Administrative Procedure Act’s conceptualization of ALJs. The article offers a view of a proper outcome in this line of cases: that ALJs are constitutional under the Appointments Clause.

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I. ORIGINS AND COURSE OF THE COLLATERAL ATTACK ON ALJ APPOINTMENTS

I can’t prove you are a Communist. But when I see a bird that quacks like a duck, walks like a duck, has feathers and webbed feet and associates with ducks – I’m certainly going to assume that he is a duck.<sup>1</sup>

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1. Attributed to Emil Mazey, secretary-treasurer of the United Auto Workers, at a labor meeting in 1946; Sentinel, John, “Communists Expose the Case of the Duck,” *Milwaukee Sentinel* (Sept. 29, 1946).

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of “hard-core pornography”]; and perhaps I could never succeed in intelligibly doing so.<sup>2</sup> But I know it when I see it, and the motion picture involved in this case is not that.<sup>2</sup>

Would only that it were so easy to spot a Constitutionally-appointed federal Administrative Law Judge. The 1,931 “ALJs” (a convenient shorthand that some Administrative Law Judges dislike but I will use here) work at solving complex cases in 31 different federal agencies.<sup>3</sup> Some of their “Initial Decisions” are hundreds of pages long, find thousands of facts, and make scores of conclusions of law regarding such matters as patents, electric rates, collective bargaining agreements, Medicare claims, Social Security disability claims, ship licenses, securities fraud, and many other things. Their decisions are reviewed, affirmed, reversed, modified, and supplemented by several federal commissions and boards, then cogitated upon by U.S. courts of appeals and the U.S. Supreme Court. ALJ opinions are pored over by law school professors, students, and public- and private-sector lawyers in specialized federal agency bars.

Despite the critical role of ALJs in resolving such a heavy workload of thorny issues, courts have lately questioned whether ALJs fit within the framework of Article II, section 2, clause 2 of the U.S. Constitution. Known as the “Appointments Clause,” it provides that the President:

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . 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.<sup>4</sup>

Some litigants now try to neutralize an administrative agency proceeding by jumping over its final decision-making step. Rather than confining their appeals to the ALJs’ rulings on questions of evidence or points of substantive law, some litigants now let the ALJs reach decisions in their courtrooms but attempt to nullify them before the reviewing commissions and courts of appeals. The challenge that they put forth is that the proceeding was invalid in the first place because the ALJ was an “inferior Officer” whose appointment was not made by “the President alone,” a “Court of Law,” or a “Head of a Department,” as the Appointments Clause requires.

The U.S. Supreme Court has heard several cases weighing the constitutionality of particular federal jobs under the Appointments Clause, but has never decided a case involving the constitutionality of a federal ALJ. In 1953, the Supreme Court in *Ramspeck v. Federal Trial Examiners Conference* examined the Civil Service Commission’s regulations concerning the then-named “hearing examiners” under the newly-fashioned Administrative Procedure Act (APA) but did not go into the constitutionality of the ALJ position.<sup>5</sup> The Court, in looking at Con-

2. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

3. U.S. OFFICE OF PERSONNEL MGMT.: ALJS BY AGENCY, <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> (last visited Sept. 24, 2017).

4. U.S. CONST. art. II, § 2, cl. 2.

5. *Ramspeck v. Fed. Trial Exam’rs Conference*, 345 U.S. 128 (1953).

gressional intent behind the creation of the position, nevertheless noted that “Congress intended to make hearing examiners ‘a special class of semi-independent subordinate hearing officers’ by vesting control of their compensation, promotion and tenure in the Civil Service Commission to a much greater extent than in the case of other federal employees.”<sup>6</sup> The closest that the Supreme Court has come on the constitutionality of the administrative judiciary has been in *Freytag v. Commissioner of Internal Revenue*, in which it held special trial judges (STJs) of the U.S. Tax Court, who are appointed by the Chief Judge of that court, to be “inferior Officers” who are appointed by a “Court of Law,” and are therefore constitutionally appointed.<sup>7</sup>

Since *Freytag*, the U.S. Court of Appeals for the District of Columbia Circuit has heard two cases on the application of the Appointments Clause to ALJs: *Landry v. Federal Deposit Insurance Corp.*, in 2000, which was not further appealed; and *Raymond J. Lucia Cos., Inc. v. Securities and Exchange Commission*, in 2016.<sup>8</sup> The U.S. Court of Appeals for the Tenth Circuit also decided a case in 2016, *Bandimere v. Securities and Exchange Commission*.<sup>9</sup> The U.S. Court of Appeals for the Fifth Circuit decided yet another case in 2017, *Burgess v. Federal Deposit Insurance Corp.*, supporting the Tenth Circuit’s ruling in *Bandimere*.<sup>10</sup> On this issue, the D.C. Circuit has reached a diametrically opposing outcome from the Fifth and Tenth Circuits.<sup>11</sup> The Tenth Circuit denied rehearing *en banc* (with a published dissent by two judges) on its three-judge panel opinion declaring ALJs unconstitutional under the Appointments Clause.<sup>12</sup> The D.C. Circuit denied *per curiam* by an equally divided court rehearing *en banc* of its three-judge panel opinion in *Lucia* declaring ALJs constitutional.<sup>13</sup> *Lucia* and *Bandimere* are the subjects of petitions for certiorari to the Supreme Court that may resolve the split in the circuits.<sup>14</sup>

The Tenth Circuit, in considering *Bandimere*, pointed out that normally, “[f]ederal courts avoid unnecessary adjudication of constitutional issues.”<sup>15</sup> Here, however, the Court felt compelled to address the petitioner’s Appointments Clause issue.<sup>16</sup> The court reasoned that unlike the usual non-constitutional challenges to the Securities and Exchange Commission’s (SEC) findings of securities fraud liability as being “arbitrary and capricious,” the petitioner “attacks the SEC’s opinion as a whole . . . including both his securities fraud and registration liability, based

6. *Id.* at 132.

7. *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868 (1991).

8. *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000); *Raymond J. Lucia Cos., Inc. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *petition for cert. filed* (U.S. July 21, 2017) (No. 17-130).

9. *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016) [hereinafter *Bandimere*], *reh’g denied*, 855 F.3d 1128 (10th Cir. 2017).

10. *Burgess v. FDIC*, 871 F.3d 297 (5th Cir. 2017).

11. Compare *Landry* and *Lucia* with *Bandimere* and *Burgess*.

12. *Bandimere*, 855 F.3d at 1128-33 (Lucero and Moritz, JJ., dissenting).

13. *Raymond J. Lucia Cos., Inc. v. SEC*, No. 15-1345, 2017 WL 2727019 (D.C. Cir. June 26, 2017).

14. *Petition for Writ of Certiorari, Lucia v. SEC* (U.S. July 21, 2017) (No. 17-130); *Petition for Writ of Certiorari, SEC v. Bandimere* (U.S. Sept. 29, 2017) (No. 17-475).

15. *Bandimere*, 844 F.3d at 1171.

16. *Id.*

on the Appointments Clause.”<sup>17</sup> According to the court, this argument, if successful, would “relieve[] Mr. Bandimere of all liability.”<sup>18</sup> So, rather than hearing the merits of the SEC’s securities fraud allegations against the petitioner, the Court chose to address the constitutionality of the presiding ALJ’s appointment.<sup>19</sup>

In *Burgess*, the Fifth Circuit stayed a final order of the Federal Deposit Insurance Corporation (FDIC) “assessing a civil penalty against Burgess [a bank officer and director] and requiring his withdrawal from the banking industry.”<sup>20</sup> The Court found that Burgess was likely to succeed on the merits of his argument that the FDIC ALJ who conducted the administrative hearing and issued recommended findings of fact and conclusions of law had been appointed unconstitutionally.<sup>21</sup> “The duties of FDIC ALJs are therefore sufficiently ‘important,’ and their discretion sufficiently ‘significant,’ to render them Officers under *Freytag*,” the court held.<sup>22</sup>

Over at the SEC, a party challenged an ALJ’s authority under this litigation approach and has brought that proceeding to a halt as well.<sup>23</sup> The SEC issued an Order Instituting Administrative and Cease-and-Desist Proceedings against Plaintiff Alexander Kon on November 14, 2016.<sup>24</sup> The SEC ALJ Cameron Elliot was appointed by the Commission to preside over the administrative proceedings.<sup>25</sup> Kon filed in the U.S. District Court for the District of Kansas for injunctive and declaratory relief against the ALJ proceeding, citing the ALJ’s unconstitutionality under the Appointments Clause and, once it issued, the *Bandimere* decision.<sup>26</sup> While the District Court action was pending (which was ultimately dismissed for lack of jurisdiction), Kon made a motion to the ALJ asking him to withdraw from the case.<sup>27</sup> The ALJ “declined to withdraw citing [the] split in authority between the Tenth and D.C. Circuit[s] on the issue and a 2015 SEC Order stating that ALJs were not subject to the Appointments Clause.”<sup>28</sup> Kon then sought interlocutory review by the SEC of the ALJ’s decision not to withdraw, which was denied by the ALJ.<sup>29</sup> After the Tenth Circuit denied rehearing *en banc* in *Bandimere*, however, the SEC stayed “all administrative proceedings assigned to an [ALJ] in which a respondent has the option to seek review in the Tenth Circuit of a final

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17. *Id.* at 1171-72.

18. *Id.* at 1172.

19. *Id.*

20. *Burgess*, 871 F.3d at 299.

21. *Id.* at 301.

22. *Id.* at 303.

23. *Kon v. SEC*, No. 17-CV-2105-JAR-GLR, 2017 WL 1153228 (D. Kan. Mar. 28, 2017).

24. Alexander Kon, Securities Release No. 33-10252, 2016 WL 7041389 (Nov. 14, 2016) (Kon).

25. *Kon*, 2017 WL 1153228, at \*1. It is perhaps not coincidental that ALJ in the *Kon* proceeding is the same one who presided in *Bandimere*. See generally David F. Bandimere, Securities Act Release No. 507, 2013 WL 5553898 (Oct. 8, 2013).

26. *Kon*, 2017 WL 1153228, at \*1.

27. *Id.* at \*1, \*12.

28. *Id.* at \*1.

29. *Id.*

order of the Commission.”<sup>30</sup> This stay includes the case of *Kon*, a resident of Kansas, which is in the Tenth Circuit.<sup>31</sup>

Undoubtedly this controversy will arise again in other administrative fora. As an ALJ myself, I have no insight whatsoever as to how any agency or court would decide the issue, nor would I presume to prejudice such a decision. But inasmuch as ALJs under the APA exist in 31 federal agencies, I fear that this matter will cast a cloud over every administrative case until the Supreme Court rules on it, leading to a multitude of conflicting agency rulings. In the meantime, such rulings may disrupt the proper functioning of administrative proceedings with significant impacts on stakeholders of subject agencies. The potential impact of this development on the smooth functioning of government is palpable and potentially disastrous, prompting me to offer my view in the hope of setting things right.

This article, after reviewing the dichotomy between the conflicting circuits on the applicability of the Appointments Clause to ALJs, will probe the logical underpinnings of the issue to show that the decisions follow mistaken paths and pursue “red-herring” arguments. The article examines the history of the formation of the ALJ corps for insight into how the creators of the position envisioned ALJs as being an embodiment of agency factfinders rendering “initial decisions” in fulfillment of the agencies’ statutory duties in line with the Constitution’s Necessary and Proper Clause. This constitutional foundation, not the Appointments Clause, is the lodestar of the Administrative Procedure Act’s conceptualization of ALJs that should guide a decision on the issue. The article will then offer a view of a proper outcome in such a case; namely, that ALJs are constitutional under the Appointments Clause.

## II. THE DICHOTOMY IN THE CIRCUITS ON ALJ APPOINTMENTS

The D.C. Circuit in *Landry* and *Lucia* decided that ALJs of the FDIC (in *Landry*) and the SEC (in *Lucia*) are not “inferior Officers” pursuant to the Appointments Clause, but rather are “employees” that fall outside of the scope of that Clause because they do not exercise the “significant authority” to issue a “final decision” of the agency.<sup>32</sup> Instead, in accordance with the provisions of the APA, ALJs issue only “initial decisions” or “recommended decisions” that must be passed upon *de novo* by the agency in order to become final.<sup>33</sup> Thus, SEC and FDIC ALJs, as employees and not “inferior Officers,” need not be appointed in accordance with the Appointments Clause, exclusively by the President alone, a Court of Law, or the Head of a Department.<sup>34</sup>

In *Bandimere*, the Tenth Circuit decided that an SEC ALJ is an “inferior Officer” under the Appointments Clause and therefore *must* be appointed by one of the three Constitutionally-authorized entities.<sup>35</sup> That Court deemed significant a dissenting opinion of Justice Breyer in *Free Enterprise Fund v. Public Co. Ac-*

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30. In re Pending Admin. Proc., Sec. Release No. 10365, 2017 WL 2224348 (May 22, 2017).

31. Notice of Stay, *Kon*, Sec. Release No. 4821 (May 23, 2017).

32. *Landry*, 204 F.3d at 1134; *Lucia*, 832 F.3d at 289.

33. 5 U.S.C. § 557 (2016).

34. *Lucia*, 832 F.3d at 289; *Landry*, 204 F.3d at 1134.

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

*counting Oversight Board* (PCAOB), a Supreme Court decision in which the majority found that the appointment of members of the PCAOB by the SEC did not violate the Appointments Clause, explaining that “[e]fforts to define [‘inferior Officers’] inevitably conclude that the term’s sweep is unusually broad.”<sup>36</sup> Applying that broad sweep to SEC ALJs in its own case, the Tenth Circuit opined that “the creation and duties of SEC ALJs” show that they are also “inferior Officers,” not just “employees,” because they were created by statute (viz., the APA) and have many significant duties that require the “exercise [of] significant discretion in carrying out important functions.”<sup>37</sup>

The Tenth Circuit dismissed the D.C. Circuit’s distinction in the earlier *Landry* and *Lucia* cases that ALJs do not render “final decisions” of their agencies. It found that the D.C. Circuit placed “undue weight on final decision-making authority.”<sup>38</sup> Instead, the Tenth Circuit placed more emphasis on ALJ’s “great deal of discretion” and on the “important functions” that ALJs perform, albeit without having final decision-making capability.<sup>39</sup> The Tenth Circuit, in short, did not find “final decision-making authority to [be] the crux of inferior officer status.”<sup>40</sup>

The Fifth Circuit in *Burgess* followed the Tenth Circuit’s line of reasoning in ordering a stay of the FDIC penalty proceeding.<sup>41</sup> Like the Tenth Circuit, the Fifth Circuit found that “[a] government worker is therefore an ‘inferior Officer’ subject to the Appointments Clause if his office entails ‘significant . . . duties and discretion.’”<sup>42</sup> The FDIC ALJs, the Fifth Circuit reasoned, “exercise significant discretion” in carrying out such functions as taking testimony, conducting trials, ruling on the admissibility of evidence, and enforcing compliance with discovery orders.<sup>43</sup> Hence, they are “Officers.”<sup>44</sup>

### III. THE UNDERLYING CIRCUIT ANALYSES

Regardless of whether one follows the logic of the D.C. Circuit in *Lucia* or the Fifth and Tenth Circuits in *Burgess* and *Bandimere*, the functional analysis that the courts have adopted to examine Appointment Clause cases involving ALJs yields uneven results. A critical look at the relevant decisions of these circuits illustrates this point.

The Tenth Circuit in *Bandimere* listed several federal jobs that have been found by the Supreme Court over 150 years to be “inferior Officer” positions, in order to illustrate the broad sweep of the Appointments Clause.<sup>45</sup> The Court noted that these jobs have included (among others) “a district court clerk,” “an assistant-surgeon,” “a federal marshal,” a Navy “cadet engineer,” “a postmaster first class,”

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36. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 539 (2010).

37. *Bandimere*, 844 F.3d at 1176-82.

38. *Id.* at 1182.

39. *Id.*

40. *Id.* at 1183.

41. *Burgess*, 871 F.3d at 303.

42. *Id.* at \*3.

43. *Id.*

44. *Id.*

45. *Bandimere*, 844 F.3d at 1173-74.

and “military judges.”<sup>46</sup> To then demonstrate that SEC ALJs warrant being considered “inferior Officers” as well, the Tenth Circuit in *Bandimere* pointed out a host of “significant duties” that ALJs have at that agency, including administering oaths and affirmations, consolidating proceedings having common questions of law and fact, entering default judgments, examining witnesses, granting extensions of time and stays, issuing protective orders, and ruling on motions.<sup>47</sup> The Fifth Circuit in *Burgess* did likewise, listing taking testimony, conducting trials, ruling on the admissibility of evidence, and enforcing compliance with discovery orders.<sup>48</sup>

Both courts in *Bandimere* and *Burgess* compared ALJs’ powers to those of STJs of the Tax Court that the Supreme Court found in *Freytag* to be of “inferior Officer” status.<sup>49</sup> Those powers, the Supreme Court said in *Freytag*, manifest a “degree of authority” possessed by STJs that is “so ‘significant’ that it was inconsistent with the classifications of ‘lesser functionaries’ or employees.”<sup>50</sup> Both Circuits also pointed to the Supreme Court’s comment in *Freytag* that downplayed the significance of STJs’ inability to render final decisions in certain classes of cases.<sup>51</sup> This inability, according to *Freytag*, “ignore[s] the significance of the duties and discretion that special trial judges possess.”<sup>52</sup> STJs, the Supreme Court stated, “perform more than ministerial tasks,” and “[i]n the course of carrying out these important functions, the [STJs] exercise significant discretion.”<sup>53</sup> Because ALJs also possess such powers and duties, the Tenth Circuit in *Bandimere* and the Fifth Circuit in *Burgess* both found that ALJs likewise should be considered “inferior Officers” for purposes of the Appointments Clause.<sup>54</sup>

Not so, said the D.C. Circuit in *Lucia*.<sup>55</sup> Also quoting *Freytag*, the D.C. Circuit stated in *Lucia* that the Appointments Clause “addresses concerns about diffusion of the appointment power and ensures ‘that those who wielded it were accountable to political force and the will of the people.’”<sup>56</sup> Generally, said the D.C. Circuit, “an appointee is an Officer, and not an employee who falls beyond the reach of the Clause, if the appointee exercises ‘significant authority pursuant to the laws of the United States.’”<sup>57</sup>

The D.C. Circuit’s test for “significant authority,” which it set forth in *Landry*, was repeated in *Lucia* as follows:

Once the appointee meets the threshold requirement that the relevant position was “established by Law” and the position’s “duties, salary, and means of appointment”

46. *Id.*

47. *Id.* at 1178.

48. *Burgess*, 871 F.3d at 302.

49. *Bandimere*, 844 F.3d at 1181; *Burgess*, 871 F.3d at 302-03.

50. *Bandimere*, 844 F.3d at 1175 (quoting *Freytag*, 501 U.S. at 881).

51. *Id.* at 1175-76; *Burgess*, 871 F.3d at 301.

52. *Bandimere*, 844 F.3d at 1175 (quoting *Freytag*, 501 U.S. at 881); *Burgess*, 871 F.3d at 303 (“[T]he absence of final decision-making authority does not sufficiently undermine FDIC ALJs’ ‘significant authority’ such that they are employees, rather than Officers”).

53. *Bandimere*, 844 F.3d at 1175-76 (quoting *Freytag*, 501 U.S. at 881-82).

54. *Id.* at 1179; *Burgess*, 871 F.3d at 303.

55. *See generally Lucia*, 832 F.3d 277.

56. *Id.* at 284 (quoting *Freytag*, 501 U.S. at 883-84).

57. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

are specified by statute . . . “the main criteria for drawing the line between inferior Officers and employees not covered by the Clause are (1) the significance of the matters resolved by the officials, (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions. . . .”<sup>58</sup>

To the D.C. Circuit, the distinguishing characteristic that separated “employee” ALJs of the SEC from the “inferior Officer” Tax Court STJs examined in *Freytag* was that the APA precludes ALJs from issuing final decisions.<sup>59</sup> Their authority is limited to issuing “initial” or “recommended” decisions that require final action by the SEC.<sup>60</sup> The STJs, by contrast, have authority to issue final decisions in at least some cases, a distinction that the D.C. Circuit found was “critical” to the Supreme Court’s ruling in *Freytag*.<sup>61</sup> “[D]ue to the lack of final decision power or discretion,” the D.C. Circuit found, ALJs “could not be said to have been delegated sovereign authority or to have the power to bind third parties, or the government itself, for the public benefit,” and therefore were “employees,” not “inferior Officers.”<sup>62</sup> In view of the inability of SEC ALJs to issue final decisions of the SEC, the D.C. Circuit ruled in *Lucia*, “[o]ur analysis begins, and ends, there.”<sup>63</sup>

Finality of decision-making has become a primary judicial focus under the Appointments Clause not only in the case of ALJs, but also in the case of administrative judicial officers that are *not* subject to the APA, and instead decide cases under other governing statutes. There are thousands of such non-ALJ judicial officers in the federal government.<sup>64</sup>

Recently, the U.S. Court of Appeals for the Federal Circuit heard *Helman v. Department of Veterans Affairs*, involving the constitutionality under the Appointments Clause of an “Administrative Judge” for the Merit Systems Protection Board (MSPB), an agency charged with deciding cases about federal employee discipline and removal.<sup>65</sup> Under section 713 of the 2014 Veterans Access, Choice, and Accountability Act, senior executives in the Department of Veterans Affairs (DVA) can be removed from their jobs under an expedited procedure that includes a final, unreviewable decision by an MSPB Administrative Judge.<sup>66</sup>

The Federal Circuit on appeal held the Administrative Judge’s position in this scheme to be unconstitutional in accordance with *Freytag*, because in the case of a fired DVA senior employee, the Judge was capable of issuing a final MSPB ruling, and therefore had to be appointed as an “officer” in accordance with the

58. *Id.*

59. 5 U.S.C. § 557 (2016).

60. *Lucia*, 832 F.3d at 284-85.

61. *Id.* at 285.

62. *Id.*

63. *Id.*

64. Steven A. Glazer, *Administrative Law Judges – Giving Process its Due*, THE PUBLIC MANAGER (2008) <https://www.thefreelibrary.com/Administrative+law+judges—giving+process+its+due.-a0187908929> (“There are thousands of other types of agency adjudicators”).

65. *Helman v. Dep’t of Veterans Affairs*, 856 F.3d 920 (Fed. Cir. 2017).

66. 38 U.S.C. § 713 (2015).



Appointments Clause rather than as a mere “employee” of the MSPB.<sup>67</sup> Underlining the element of finality of decision-making that the statute had granted MSPB Administrative Judges, the Federal Circuit held:

Indeed, granting such final decision-making authority and giving the administrative judge the last word on affirming or overturning a cabinet-level official directly conflicts with the definition of employee: a lesser functionary who is *subordinate* to officers of the United States. *Freytag*, 501 U.S. at 881, 111 S.Ct. 2631. An administrative judge with this authority is no longer subordinate to any officer. Further, when we compare the § 713 authority to render a decision to implement or overturn the Secretary’s decision to the functions found to be important in *Freytag*, it is clear that this § 713 decision making authority is also an “important function,” and surely “more than a ministerial task.”<sup>68</sup>

When it comes to ALJs under the APA, the D.C. Circuit, on one hand, and the Fifth and Tenth Circuits, on the other, focused on the finality (or lack thereof) of ALJ decisions but reached diametrically opposite conclusions.<sup>69</sup> The Tenth Circuit in *Bandimere* made a point of listing earlier cases purporting to show how many seemingly “lesser” federal jobs achieved “Officer” status, thereby proving *a fortiori* that ALJs must be “Officers” as well.<sup>70</sup> But the Tenth Circuit’s list sheds little light on this issue. Those cases focus primarily on whether a particular official has the appointment power, or whether a particular official has the power to remove a duly-appointed officer.<sup>71</sup> They do not focus on the Appointments Clause as a prerequisite to an appointed officer’s job in the first place.

#### IV. THE APA DUTY OF IMPARTIALITY MAKES ALJs “EMPLOYEES,” NOT “OFFICERS”

It is remarkable that some courts have embarked upon this constitutional challenge to ALJs, when a far more simple and direct interpretation of the APA would suffice to uphold them. In so doing, courts violate their own principle of

67. *Helman*, 856 F.3d at 929.

68. *Id.*

69. *See generally Landry*, 204 F.3d 1125; *Burgess*, 871 F.3d 297; *Bandimere*, 844 F.3d 1168.

70. *Bandimere*, 844 F.3d at 1173-74.

71. *See, e.g., In re Hennen*, 38 U.S. 230, 258 (1839) (district court clerk appointed by district courts in accordance with Judiciary Act of 1789 can be removed by the district court judge; “that a clerk is one of the inferior officers contemplated by this provision in the Constitution cannot be questioned”); *U.S. v. Germaine*, 99 U.S. 508, 511 (1878) (surgeon appointed by Commissioner of Pensions is not an “inferior Officer” because he was not appointed by a “Head of a Department,” “[t]he association of the words ‘heads of departments’ with the President and the courts of law strongly implies that something different is meant from the inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of the departments. . . .” Also, the term “officer” “embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary”); *Buckley*, 424 U.S. at 124-39 (Federal Elections Commissioners, chosen partly by President and partly by heads of both houses of Congress, are not “Officers”; Congressionally-appointed officials properly perform duties only in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not ‘Officers of the United States.’); *Myers v. United States*, 272 U.S. 52, 127 (1926) (postmaster, first class, appointed by President and confirmed by Senate, cannot be removed by the President without Congressional approval. The phrase, “But Congress may by law vest,” is equivalent to “excepting that Congress may by law vest.” By the plainest implication it excludes congressional dealing with appointments or removals of executive officers not falling within the exception and leaves unaffected the executive power of the President to appoint and remove them).

constitutional avoidance.<sup>72</sup> “[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”<sup>73</sup>

To assess the reach of the Appointments Clause over ALJs, a more predominant characteristic about ALJs to consider than functions or finality is the statutory requirement of impartiality that ALJs are required to observe in deciding cases.<sup>74</sup> The history of the ALJ corps shows that the element of impartiality that is built into the job by the APA should preclude them from being considered “inferior Officers” subject to being chosen exclusively by the three political authorities named by the Appointments Clause.

In *Freytag*, the Supreme Court pointed out that “[t]he Framers [of the Constitution] understood . . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people.”<sup>75</sup> Vesting the appointment of “inferior Officers” in Heads of Departments, the Supreme Court observed, made sure that such officials “are subject to the exercise of political oversight and share the President’s accountability to the people.”<sup>76</sup>

Political accountability, however, is not the *sine qua non* of all government jobs, and not of ALJs. The ALJs are *not* supposed to be motivated by partisanship or bias.<sup>77</sup> As one Court of Appeals observed in reviewing a Social Security disability case:

Because the ALJ’s decision will typically be the final word given our standard of review, the ALJ’s impartiality is “integral to the integrity of the system.” The ALJ thus must “not conduct a hearing if he or she is prejudiced or partial with respect to any party or has any interest in the matter pending for decision.”<sup>78</sup>

The impartiality of federal ALJs was crucial to their formation after World War II. Before the War, the 1941 report of a committee chaired by the Attorney General envisioned “a corps of highly responsible hearing officers” to replace the agency hearing examiners of the New Deal era, who had earned a dubious reputation for political favoritism.<sup>79</sup> The creation of the APA and the ALJ corps was subjected to vigorous lobbying efforts by the American Bar Association Journal (ABAJ) and Senator Alexander Wiley, Republican from Wisconsin and chairman of the Senate Judiciary Committee, who pressed the Civil Service Commission and the Attorney General for the adoption of politically neutral ALJs.<sup>80</sup>

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72. *Bandimere*, 844 F.3d at 1171.

73. *Pub. Citizen v. Dep’t of Just.*, 491 U.S. 440, 466 (1989).

74. 5 U.S.C. § 556 (2016).

75. *Freytag*, 501 U.S. at 884.

76. *Id.* at 886.

77. *Jarrett v. Comm’r of Soc. Sec.*, 422 Fed. App’x 869, 874 (11th Cir. 2011).

78. *Id.* (internal citations omitted).

79. Ralph F. Fuchs, *The Hearing Examiner Fiasco under the Administrative Procedure Act*, 63 HARV. L. REV. 737, 739 (1950).

80. *Id.* at 742.

There was an “insistence on impartiality” of the ALJs.<sup>81</sup> This was “a paramount issue” that the ABAJ and Senator Wiley colorfully warned was needed to avoid the “‘Soviet concept of judicial bodies’ [that rendered them] ‘government organs of vengeance’ for carrying out ‘the predeterminations of the government policy makers, irrespective of the facts as to the individuals involved.’”<sup>82</sup> According to Senator Wiley, decision-making in federal agencies of the New Deal was threatened by

an entrenched palace guard of former [i.e., incumbent] Examiners and/or individuals having an approach inimical to the welfare of private enterprise. . . . [E]xaminers should not be appointed on a narrow partisan and ideological basis, with the selection largely limited to present examiners and agency staffs, who might be men of bias, of ideological pre-conceptions, of partisan fealty, of subservience to pressure groups, of habits of unfairness, of disregard of the true values and weight of evidence – men of leftist thinking, men who don’t have complete loyalty to our constitutional system of checks and balances.<sup>83</sup>

The Supreme Court in *Ramspeck* reiterated this non-partisanship objective in its review of the relevant Civil Service Commission regulations in 1953.<sup>84</sup> “Congress intended to provide tenure for the examiners in the tradition of the Civil Service Commission,” the Supreme Court said.<sup>85</sup> “They were not to be paid, promoted, or discharged at the whim or caprice of the agency or for political reasons.”<sup>86</sup>

The ALJs, at bottom, are assigned to serve in non-partisan and impartial capacities as agency adjudicators and are imbued with non-partisanship and impartial decision-making as a key characteristic. This should not be anathema to the political considerations of the Appointments Clause because even though administrative agencies are creatures of politics in reality, the political positions that they take must nevertheless be grounded in accurate, truthful fact-finding by neutral examiners.<sup>87</sup> If these characteristics of administrative agencies are not strictly observed and guarded, it would not be long before the American people would lose faith in the integrity of the administrative law system.

These concerns were aptly expressed by Circuit Judge Lucero, who together with Circuit Judge Moritz vigorously dissented with the Tenth Circuit’s order denying re-hearing in *Bandimere*:

The majority opinion undermines this well-established structure of ALJ independence, and places the legitimacy of our administrative agencies in serious doubt. Whether SEC ALJs exercise the “significant authority” necessary to constitute inferior officers should be informed not just by their daily duties, but by the independent guardrails of our constitutional structure, to wit, the separation of functions within administrative agencies. The majority opinion notes that the Appointments Clause reflects “both separation of powers and checks and balances” concerns, and “promotes public accountability.” But my respected colleagues in the majority fail to

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81. *Id.*

82. *Id.* at 742-43.

83. *Id.* at 743 (internal punctuation omitted).

84. *See generally Ramspeck*, 345 U.S. 128.

85. *Id.* at 142.

86. *Id.*

87. *See generally Bandimere*, 855 F.3d 1128 (Lucero and Moritz, JJ., dissenting).

appreciate that these are the very principles embodied in the current structure and process governing selection of ALJs.<sup>88</sup>

The APA, as finally enacted in 1946, was worded in a way that embodies these concerns. Importantly, the role of the ALJ is described in the Act as that of a “presiding *employee*” or a “participating *employee*.”<sup>89</sup> The Tenth Circuit in *Bandimere* takes note of this statutory language, but says nothing about its implication that Congress thereby intended to place ALJs beyond the scope of the Appointments Clause.<sup>90</sup> It should have, though, because courts “readily presume that Congress knows the settled legal definition of the words it uses, and uses them in the settled sense.”<sup>91</sup>

By telling contrast, in *Freytag*, on which the Tenth Circuit relies, the Tax Court STJs that the Supreme Court deemed to be “inferior Officers” subject to the Appointments Clause are identified in the Tax Reform Act of 1969 that created them as “judicial *officers*.”<sup>92</sup> Congress thus rendered obvious the reach of the Appointments Clause to these positions and their appointment by a “Court of Law” – the Tax Court – constitutionally appropriate.<sup>93</sup>

The APA specifically states that “[t]he functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner.”<sup>94</sup> ALJ impartiality, then, is a statutory requirement of the position, and since they are “*subordinate* to officers of the United States,” they nevertheless can stand as removed from the “political . . . accountability to the people” that the Appointments Clause envisions for “inferior Officers” such as Tax Court STJs.<sup>95</sup>

#### V. CONGRESS CAN CREATE NON-“OFFICER” ALJ POSITIONS

Congress enacted the APA not so much in light of the Appointments Clause of the Constitution, but more with a view toward the Necessary and Proper

88. *Id.* at 1130 (internal citations omitted).

89. 5 U.S.C. §§ 556(b), (c), 557(b) (2016) (emphasis added).

90. *Bandimere*, 844 F.3d at 1185. *See, e.g.*, *Morrisette v. United States*, 342 U.S. 246, 263 (1952) (“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed”). *Accord Ibarra v. Holder*, 736 F.3d 903, 914 (10th Cir. 2013). *See CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1223 (11th Cir. 2001) (quoting *Harris v. Garner*, 216 F.3d 970, 974) (“[W]e readily presume that Congress knows the settled legal definition of the words it uses, and uses them in the settled sense”).

91. *Arcia v. Fla. Sec’y of State*, 772 F.3d 1335, 1344 (11th Cir. 2014) (quoting *Harris*, 216 F.3d at 974). *Accord State of Ala. ex rel. Graddick v. Tenn. Valley Auth.*, 636 F.2d 1061, 1065 (5th Cir. 1981) (“When a word has a judicially settled meaning, it is presumed that Congress, by using that word in a statute, used it in that accepted sense”).

92. *Freytag*, 501 U.S. at 870; 26 U.S.C. § 7448 (a)(5) (definition of “special trial judge”) (emphasis added).

93. *Freytag*, 501 U.S. at 888-92 (Congress’ consistent interpretation of the Appointments Clause evinces a clear congressional understanding that Article I courts could be given the power to appoint).

94. 5 U.S.C. § 556(b) (2016).

95. *Helman*, 856 F.3d at 929; *Freytag*, 501 U.S. at 886.

Clause.<sup>96</sup> The courts have long recognized the broad and powerful reach of this Clause.<sup>97</sup>

In *Buckley v. Valeo*, the Supreme Court recognized that “Congress may undoubtedly under the Necessary and Proper Clause create ‘offices’ in the generic sense and provide such method of appointment to those ‘offices’ as it chooses.”<sup>98</sup> The Court in *Buckley* cautioned, however, that the Appointments Clause limits the scope of Congress’ creativity and it may not create “Officers” subject to the Appointments Clause without complying with its specific requirements.<sup>99</sup>

*Buckley* says that if Congress decides to create a set of “employees” that are not subject to the Appointments Clause, those employees may “perform duties only in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not ‘Officers of the United States.’”<sup>100</sup> Thus, *Buckley* rejected the manner in which Commissioners of the Federal Election Commission (FEC) were appointed.<sup>101</sup> Of the six voting members of the FEC, two were appointed by the President Pro Tempore of the Senate, two were appointed by the Speaker of the House, and two were appointed by the President.<sup>102</sup> All six voting members had to be confirmed by both Houses of Congress.<sup>103</sup> As their appointments did not conform to the Appointments Clause, the six voting FEC Commissioners could exercise “legislative” powers possessed by Congress itself, such as “powers . . . of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees.”<sup>104</sup> But they could not exercise the enforcement authority that Congress had also granted to the FEC, such as the power to seek judicial relief that is normally reserved to the President as an executive function, in the absence of their appointments complying with the Appointments Clause.<sup>105</sup>

By the same token, ALJs are “sufficiently removed from the administration and enforcement of the public law” such that their non-partisan, impartial fact-finding and initial decision writing powers do not fall under *Buckley*’s requirement that their appointments comply with “inferior Officer” prerequisites of the Appointments Clause.<sup>106</sup> Tenth Circuit Judge Monroe G. McKay, in his dissent in *Bandimere*, effectively made this point by relying on the U.S. Supreme Court’s 2010 decision in *Free Enter. Fund*.<sup>107</sup> “[The] SEC ALJs,” Judge McKay said, “possess only a ‘purely recommendatory power’ . . . which separates them from

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96. U.S. CONST., art. I, § 8, cl. 18 (“The Congress shall have Power . . . 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”).

97. *Buckley* at 138; *Myers* at 128.

98. *Buckley* at 138.

99. *Id.* at 138-39.

100. *Id.* at 139.

101. *Id.* at 140.

102. *Id.* at 113.

103. *Buckley*, 424 U.S. at 113.

104. *Id.* at 137.

105. *Id.* at 138.

106. *Id.* at 139.

107. *Bandimere*, 844 F.3d at 1194-1201 (McKay, J., dissenting).

constitutional officers.”<sup>108</sup> He pointed out in his dissent that in *Free Enter. Fund*, the Supreme Court majority dismissed fears raised by dissenting Justice Breyer on the decision’s impact on ALJ independence by explaining,

[I]ts holding ‘does not address that subset of independent agency employees who serve as administrative law judges’ and that ‘unlike members of the [Public Company Accounting Oversight] Board,’ who *were* officers, ‘many administrative law judges . . . perform adjudicative rather than enforcement or policymaking functions, or possess purely recommendatory powers.’<sup>109</sup>

The Supreme Court, in other words, has already recognized in *Free Enter. Fund* the distinction that the Fifth and Tenth Circuits in *Burgess* and *Bandimere* reject.

#### VI. THE ROLE OF “POLITICAL POWER” IN DISTINGUISHING “OFFICERS” FROM “EMPLOYEES”

The late Supreme Court Justice Antonin Scalia, in his early career as a law professor at the University of Chicago, criticized the Office of Personnel Management (OPM) evaluation system for selecting ALJs in an article darkly entitled *The ALJ Fiasco – A Reprise*.<sup>110</sup> Upon leveling his critique in 1979, Professor Scalia made a useful distinction between the apolitical nature of ALJs as compared to the political power of Article III judges:

[O]ur system for selecting article III judges makes no pretense (or at least no convincing pretense) of being based primarily upon merit or performance. *It is justifiable as a political system for selecting individuals who wield a considerable degree of political power – authority to overrule the actions of the two elected branches. No such power inheres in the presiding officers at administrative hearings, even if Congress chooses to call them judges.* They are entirely subject to the agency on matters of law; they can be reversed by the agency on matters of fact, even where demeanor evidence is an important factor; and they can always be displaced, if the agency wishes, by providing for hearing before the agency itself or one of its members.<sup>111</sup>

The highlighted language of then-Professor Scalia underscores the basic reason why Article III judges and “inferior Officers” are appointed in the manner laid out by the Appointments Clause, but not ALJs. Article III judges are selected for lifetime appointments in a manner that insures their political accountability to the people, and therefore are appointed in a partisan way by officials who are elected by the people or appointed directly by their elected representatives. In order to be powerful enough to award damages from a federal agency, or enjoin the enforcement of a law, or override an executive order, Article III judges must be connected by reason of their appointments to the will of the people, just as the officers whom they may have to overrule are. This is constitutional “checks and balances” at work.

108. *Id.* at 1197 (citation omitted).

109. *Free Enter. Fund*, 561 U.S. at 542-43 (Breyer, J., dissenting); *Bandimere*, 844 F.3d at 1197-98 (quoting *Free Enter. Fund*, 561 U.S. at 507 n.10).

110. Antonin Scalia, *The ALJ Fiasco – A Reprise*, 47 U. CHI. L. REV. 57 (1979).

111. *Id.* at 62 (emphasis added).

This is not the case with an ALJ. As Professor Scalia accurately pointed out, ALJs are circumscribed by their agencies in every respect. The ALJs offer an agency only an administrative record and a neutral “first cut” at the resolution of a matter for agency decision. The agency may use means other than an ALJ to resolve a matter. Although an ALJ may resolve disputes in discovery or in the assembly of a record, no ALJ has the power to enforce a subpoena, or enjoin an action, or declare a law unconstitutional. The ALJs rule on the basis of the record that they assemble, not on the basis of politics or policies that change at executive or legislative levels above them.

It is in this respect that ALJs fit the role of agency employees under the APA, not of “inferior Officers” subject to the Appointments Clause. It is not necessary, therefore, to parse an ALJ’s functions and duties to see if they render “final agency decisions” or not, or if one or the other power constitutes an exercise of “significant authority” or not, or if those powers are “more than ministerial tasks” or not. The courts freely admit that there are examples of ALJ functions and duties across the entire spectrum of tasks that are performed by “inferior Officers” at one end and “employees” at the other.<sup>112</sup> It is nowhere questioned that federal agencies can hire employees outside the Appointments Clause, and that authority extends to the hiring of ALJs as Congress intended.<sup>113</sup> That longstanding authority was recognized by Supreme Court Justice Samuel Freeman Miller in the 1878 decision of *United States v. Germaine*, who held that a government employee “may be an agent or employ[ee] 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.”<sup>114</sup>

The view of Justice Miller is in line with the original concept of the federal Civil Service system, which was created around the same time as the *Germaine* case and constitutes the structure of the government’s non-political employment classifications.<sup>115</sup> According to section 3101 of that civil service law,

[e]ach Executive agency, military department, and the government of the District of Columbia may employ such number of employees of the various classes recognized by chapter 51 of this title [referring to civil service employees paid according to the General Schedule] as Congress may appropriate for from year to year.<sup>116</sup>

Section 3105 of that law further provides that “[e]ach agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of [the APA].”<sup>117</sup> Other than

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112. *Freytag*, 501 U.S. at 882 (“Special trial judges are not inferior officers for purposes of some of their duties under § 7443A, but mere employees with respect to other responsibilities. The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution”).

113. *See generally Germaine*, 99 U.S. 508.

114. *Id.* at 509.

115. *See generally* 5 U.S.C. §§ 3101-3161 (2016).

116. *Id.* § 3101.

117. *Id.* § 3105.

the low-level authorization of section 3105, Congress has made no other law specifically authorizing the “Head” of any “Department” to appoint ALJs *as officers* in the Constitutional sense of the Appointments Clause. Hence, ALJs have been authorized by Congress to exist only as civil service “employees,” not as “inferior Officers” subject to the prerequisites of the Appointments Clause.

#### VII. CONCLUSION

The current strategy for using the Appointments Clause to attack the structure of federal administrative law by invalidating the role of the ALJ instead of arguing the merits of a case is wasting valuable appellate court time. The structure of the APA was designed by Congress to fit seamlessly around the contours of the Appointments Clause by introducing an apolitical, neutral decision-making mechanism within the administrative agency process. Independent and impartial ALJs are agency employees engaged in the governmental function of assembling records and initially deciding individual cases that arise under the powers delegated to agencies by Congress and the Constitution. The roles of ALJs arise out of the Necessary and Proper Clause of the Constitution, empowering Congress “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”<sup>118</sup> Congress, by enacting the APA, created ALJs as a “necessary and proper” vehicle within the civil service system for carrying out agency powers.<sup>119</sup> This constitutional foundation should be viewed by the courts as the paramount source of authority for ALJs; the Appointments Clause does not stand in the way of the performance of their official duties.

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118. U.S. CONST., art. I, § 8, cl. 18.

119. 5 U.S.C. § 3105 (2016).