AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers/Appointment and Removal Powers

**Lucia v. Securities and Exchange Commission, \_\_\_ U.S. \_\_\_** (2018)

*The Securities and Exchange Commission instituted an administrative proceeding against Raymond Lucia, who the SEC claimed used misleading information in violation of the Investment Advisors Act. The commission assigned an administrative law judge (ALJ), Cameron Elliott to hear the case. Elliott concluded that a violation had occurred at imposed a fine of $300,000 and banned Lucia from the investment business. Lucia appealed that decision to the SEC, claiming that Elliott could not adjudicate the case because he had been appointed by SEC staff members and not, as the appointments clause requires, by either the president, a court of law, or a head of a department. The commission rejected that appeal on the ground that Elliott was an employee rather than an officer of the United States, and that decision was sustained by the Court of Appeals for the District of Columbia. Lucia appealed to the Supreme Court of the United States.*

 *The Supreme Court of the United States reversed the decision by a 7-2 vote. Justice Elana Kagan’s majority opinion held that Elliott was an officer of the United States because he had permanent employment and exercised significant authority. How does Kagan understand “significant authority?” How does Justice Sotomayor understand significant authority? Who has the better of the argument? Do good reasons exist for forbidding Elliott from hearing the case on remand, even if he now has a valid appointment or is Justice Stephen Breyer correct in analogizing this to the common practice of remanding a case to the judge who made the initial decision? What are the stakes in this decision? Is the case really about the conditions under which government workers may be fired, as Breyer suggests, or is this simply a straightforward, relatively apolitical dispute over who are officers of the United States.*

JUSTICE KAGAN delivered the opinion of the Court

The sole question here is whether the Commission's ALJs are “Officers of the United States” or simply employees of the Federal Government. The Appointments Clause prescribes the exclusive means of appointing “Officers.” Only the President, a court of law, or a head of department can do so. And as all parties agree, none of those actors appointed Judge Elliot before he heard Lucia's case; instead, SEC staff members gave him an ALJ slot. So if the Commission's ALJs are constitutional officers, Lucia raises a valid Appointments Clause claim. The only way to defeat his position is to show that those ALJs are not officers at all, but instead non-officer employees—part of the broad swath of “lesser functionaries” in the Government's workforce. For if that is true, the Appointments Clause cares not a whit about who named them.

Two decisions set out this Court's basic framework for distinguishing between officers and employees. *United States v. Germaine* (1879) held that “civil surgeons” (doctors hired to perform various physical exams) were mere employees because their duties were “occasional or temporary” rather than “continuing and permanent.” Stressing “ideas of tenure [and] duration,” the Court there made clear that an individual must occupy a “continuing” position established by law to qualify as an officer. *Buckley v. Valeo* (1976) . . . . determined that members of a federal commission were officers only after finding that they “exercis[ed] significant authority pursuant to the laws of the United States The inquiry thus focused on the extent of power an individual wields in carrying out his assigned functions.

. . . . (I)n *Freytag v. Commissioner* (1991), we applied the unadorned “significant authority” test to adjudicative officials who are near-carbon copies of the Commission's ALJs. . . . The officials at issue in *Freytag* were the “special trial judges” (STJs) of the United States Tax Court. . . . In “comparatively narrow and minor matters,” they could both hear and definitively resolve a case for the Tax Court. In more major matters, they could preside over the hearing, but could not issue the final decision; instead, they were to “prepare proposed findings and an opinion” for a regular Tax Court judge to consider. . . . This Court held that the Tax Court's STJs are officers, not mere employees. [T]he Court first found that STJs hold a continuing office established by law. . . . The Court then considered . . . the “significance” of the “authority” STJs wield. . . . Describing the responsibilities involved in presiding over adversarial hearings, the Court said: STJs “take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders.” And the Court observed that “[i]n the course of carrying out these important functions, the [STJs] exercise significant discretion.” That fact meant they were officers, even when their decisions were not final.

*Freytag* says everything necessary to decide this case. To begin, the Commission's ALJs, like the Tax Court's STJs, hold a continuing office established by law. . . . Still more, the Commission's ALJs exercise the same “significant discretion” when carrying out the same “important functions” as STJs do. Both sets of officials have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges. . . . And at the close of those proceedings, ALJs issue decisions much like that in *Freytag*—except with potentially more independent effect. . . . [T]he Commission's ALJs issue decisions containing factual findings, legal conclusions, and appropriate remedies. . . . In a major case like *Freytag*, a regular Tax Court judge must always review an STJ's opinion. And that opinion counts for nothing unless the regular judge adopts it as his own. By contrast, the SEC can decide against reviewing an ALJ decision at all. And when the SEC declines review (and issues an order saying so), the ALJ's decision itself “becomes final” and is “deemed the action of the Commission.” . . .

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. . . . *Freytag* referenced only the general “power to enforce compliance with discovery orders,” not any particular method of doing so. True enough, the power to toss malefactors in jail is an especially muscular means of enforcement—the nuclear option of compliance tools. But just as armies can often enforce their will through conventional weapons, so too can administrative judges. As noted earlier, the Commission's ALJs can respond to discovery violations and other contemptuous conduct by excluding the wrongdoer (whether party or lawyer) from the proceedings—a powerful disincentive to resist a court order. Similarly, if the offender is an attorney, the ALJ can “[s]ummarily suspend” him from representing his client—not something the typical lawyer wants to invite. And finally, a judge who will, in the end, issue an opinion complete with factual findings, legal conclusions, and sanctions has substantial informal power to ensure the parties stay in line. . . .

The *Freytag* Court never suggested that the deference given to STJs' factual findings mattered to its Appointments Clause analysis. . . . And anyway, the Commission often accords a similar deference to its ALJs, even if not by regulation. . . .

. . . . This Court has also held that the “appropriate” remedy for an adjudication tainted with an appointments violation is a new “hearing before a properly appointed” official. And we add today one thing more. That official cannot be Judge Elliot, even if he has by now received (or receives sometime in the future) a constitutional appointment. Judge Elliot has already both heard Lucia's case and issued an initial decision on the merits. He cannot be expected to consider the matter as though he had not adjudicated it before. To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled.

JUSTICE [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I6f5f52c8755811e8bc5b825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom JUSTICE [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I6f5f52c8755811e8bc5b825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins, concurring.

I agree with the Court that this case is indistinguishable from *Freytag v. Commissioner* (1991). . . . While precedents like *Freytag* discuss what is sufficient to make someone an officer of the United States, our precedents have never clearly defined what is necessary. I would resolve that question based on the original public meaning of “Officers of the United States.” To the Founders, this term encompassed all federal civil officials “‘with responsibility for an ongoing statutory duty.’ ”

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The Founders likely understood the term “Officers of the United States” to encompass all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty. . . . Based on how the Founders used it and similar terms, the phrase “of the United States” was merely a synonym for “federal,” and the word “Office[r]” carried its ordinary meaning. The ordinary meaning of “officer” was anyone who performed a continuous public duty. The Founders considered individuals to be officers even if they performed only ministerial statutory duties—including recordkeepers, clerks, and tidewaiters (individuals who watched goods land at a customhouse). . . .

Applying the original meaning here, the administrative law judges of the Securities and Exchange Commission easily qualify as “Officers of the United States.” These judges exercise many of the agency's statutory duties, including issuing initial decisions in adversarial proceedings. As explained, the importance or significance of these statutory duties is irrelevant. All that matters is that the judges are continuously responsible for performing them.

JUSTICE [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I6f5f52c8755811e8bc5b825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) concurring in the judgment in part and dissenting in part.

I agree with the Court that the Securities and Exchange Commission did not properly appoint the Administrative Law Judge who presided over petitioner Lucia's hearing. But I disagree with the majority in respect to two matters. First, I would rest our conclusion upon statutory, not constitutional, grounds. I believe it important to do so because I cannot answer the constitutional question that the majority answers without knowing the answer to a different, embedded constitutional question, which the Solicitor General urged us to answer in this case: the constitutionality of the statutory “for cause” removal protections that Congress provided for administrative law judges. Second, I disagree with the Court in respect to the proper remedy.

 [*Justice Breyer then explained when the appointment violated federal law*]

The same statute, the Administrative Procedure Act, that provides that the “agency” will appoint its administrative law judges also protects the administrative law judges from removal without cause. . . . The Administrative Procedure Act . . . allows administrative law judges to be removed only “for good cause” found by the Merit Systems Protection Board. And the President may, in turn, remove members of the Merit Systems Protection Board only for “inefficiency, neglect of duty, or malfeasance in office.” Thus, Congress seems to have provided administrative law judges with two levels of protection from removal without cause—just what Free Enterprise Fund interpreted the Constitution to forbid in the case of the Board members.

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If the *Free Enterprise Fund* *v. Public Company Accounting Oversight Bd* (2010) Court's holding applies equally to the administrative law judges—and I stress the “if”—then to hold that the administrative law judges are “Officers of the United States” is, perhaps, to hold that their removal protections are unconstitutional. This would risk transforming administrative law judges from independent adjudicators into dependent decisionmakers, serving at the pleasure of the Commission. Similarly, to apply *Free Enterprise Fund* 's holding to high-level civil servants threatens to change the nature of our merit-based civil service as it has existed from the time of President Chester Alan Arthur. . . .

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And now it should be clear why the application of Free Enterprise Fund to administrative law judges is important. If that decision does not limit or forbid Congress' statutory “for cause” protections, then a holding that the administrative law judges are “inferior Officers” does not conflict with Congress' intent as revealed in the statute. But, if the holding is to the contrary, and more particularly if a holding that administrative law judges are “inferior Officers” brings with it application of *Free Enterprise Fund* 's limitation on “for cause” protections from removal, then a determination that administrative law judges are, constitutionally speaking, “inferior Officers” would directly conflict with Congress' intent, as revealed in the statute. In that case, it would be clear to me that Congress did not intend that consequence, and that it therefore did not intend to make administrative law judges “inferior Officers” at all.

Congress' intent on the question matters, in my view, because the Appointments Clause is properly understood to grant Congress a degree of leeway as to whether particular Government workers are officers or instead mere employees not subject to the Appointments Clause. . . . The use of the words “by Law” to describe the establishment and means of appointment of “Officers of the United States,” together with the fact that Article I of the Constitution vests the legislative power in Congress, suggests that (other than the officers the Constitution specifically lists) Congress, not the Judicial Branch alone, must play a major role in determining who is an “Office[r] of the United States.” And Congress' intent in this specific respect is often highly relevant. Congress' leeway is not, of course, absolute—it may not, for example, say that positions the Constitution itself describes as “Officers” are not “Officers.” But given the constitutional language, the Court, when deciding whether other positions are “Officers of the United States” under the Appointments Clause, should give substantial weight to Congress' decision.

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. . . . I would not answer the question whether the Securities and Exchange Commission's administrative law judges are constitutional “Officers” without first deciding the pre-existing *Free Enterprise Fund* question—namely, what effect that holding would have on the statutory “for cause” removal protections that Congress provided for administrative law judges. If, for example, *Free Enterprise Fund* means that saying administrative law judges are “inferior Officers” will cause them to lose their “for cause” removal protections, then I would likely hold that the administrative law judges are not “Officers,” for to say otherwise would be to contradict Congress' enactment of those protections in the Administrative Procedure Act. In contrast, if *Free Enterprise Fund* does not mean that an administrative law judge (if an “Office[r] of the United States”) would lose “for cause” protections, then it is more likely that interpreting the Administrative Procedure Act as conferring such status would not run contrary to Congress' intent. In such a case, I would more likely hold that, given the other features of the Administrative Procedure Act, Congress did intend to make administrative law judges inferior “Officers of the United States.”

Separately, I also disagree with the majority's conclusion that the proper remedy in this case requires a hearing before a different administrative law judge. The Securities and Exchange Commission has now itself appointed the Administrative Law Judge in question, and I see no reason why he could not rehear the case. After all, when a judge is reversed on appeal and a new trial ordered, typically the judge who rehears the case is the same judge who heard it the first time. . . .

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JUSTICE [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I6f5f52c8755811e8bc5b825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom JUSTICE [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I6f5f52c8755811e8bc5b825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins, dissenting.

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As the majority notes, this Court's decisions currently set forth at least two prerequisites to officer status: (1) an individual must hold a “continuing” office established by law, and (2) an individual must wield “significant authority.” The first requirement is relatively easy to grasp; the second, less so. To be sure, to exercise “significant authority,” the person must wield considerable powers in comparison to the average person who works for the Federal Government. . . . But this Court's decisions have yet to articulate the types of powers that will be deemed significant enough to constitute “significant authority.”

To provide guidance to Congress and the Executive Branch, I would hold that one requisite component of “significant authority” is the ability to make final, binding decisions on behalf of the Government. Accordingly, a person who merely advises and provides recommendations to an officer would not herself qualify as an officer.

There is some historical support for such a requirement. For example, in 1822, the Supreme Judicial Court of Maine opined in the “fullest early explication” of the meaning of an “‘office,’” that “‘the term “office” implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office,’” that “‘in its effects[,] ... will bind the rights of others.’: Those who merely assist others in exercising sovereign functions but who do not have the authority to exercise sovereign powers themselves do not wield significant authority. Consequently, a person who possesses the “mere power to investigate some particular subject and report thereon” or to engage in negotiations “without [the] power to make binding” commitments on behalf of the Government is not an officer.

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Turning to the question presented here, it is true that the administrative law judges (ALJs) of the Securities and Exchange Commission wield “extensive powers.” . . . Nevertheless, I would hold that Commission ALJs are not officers because they lack final decisionmaking authority. As the Commission explained below, the Commission retains “‘plenary authority over the course of [its] administrative proceedings and the rulings of [its] law judges.’” The Commission can review any initial decision upon petition or on its own initiative. The Commission's review of an ALJ's initial decision is de novo. It can “make any findings or conclusions that in its judgment are proper and on the basis of the record.” The Commission is also in no way confined by the record initially developed by an ALJ. . . . Even where the Commission does not review an ALJ's initial decision, as in cases in which no party petitions for review and the Commission does not act *sua sponte*, the initial decision still only becomes final when the Commission enters a finality order. . . . In other words, Commission ALJs do not exercise significant authority because they do not, and cannot, enter final, binding decisions against the Government or third parties.

. . . . In *Freytag*, . . . the Court noted that STJs could enter final decisions in certain types of cases, and that the Government had conceded that the STJs acted as officers with respect to those proceedings. Because STJs could not be “officers for purposes of some of their duties ..., but mere employees with respect to other[s],” the Court held they were officers in all respects. *Freytag* is, therefore, consistent with a rule that a prerequisite to officer status is the authority, in at least some instances, to issue final decisions that bind the Government or third parties.

. . . . [A]lthough I would conclude that Commission ALJs are not officers, I share Justice Breyer's concerns regarding the Court's choice of remedy. . . .