

“LIBERTY REQUIRES ACCOUNTABILITY”: THE APPOINTMENTS CLAUSE, *LUCIA V. SEC*, AND THE NEXT CONSTITUTIONAL CONTROVERSY

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ABSTRACT

“Liberty requires accountability” is the essential precept which animates the Appointments Clause of Article II. This constitutional safeguard assures that those who exercise the sovereign power of the United States remain accountable both to the Chief Executive who appointed them and to the People who elected that President. The proviso was most recently tested in Lucia v. SEC, and, most assuredly, shall be in controversy again. After first expositing the high Court’s extensive Appointments Clause jurisprudence presaging Lucia, this Article thoroughly explores this newest Article II landmark, before concluding with commentary upon future Appointments Clause challenges expected to soon arrive before the Supreme Court.

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INTRODUCTION

For over eight decades now, the Securities and Exchange Commission (SEC or “the Commission”) has been the primary watchdog over Wall Street.¹ Since its inception in 1934,² the SEC has been tasked with regulating the securities industry in its varied and sundry forms. The Commission’s oversight ranges broadly from superintending the issuance of securities,³ to policing the marketplace for securities fraud.⁴ We are therefore accustomed to witnessing the agency exert its regulatory powers over corporations, broker-dealers, and other industry participants.

What is rare—indeed, almost novel—is the SEC occupying the eye of a constitutional storm. One does not normally associate the Commission with a controversy implicating the precise meaning of Article II of the Constitution, and its ramifications for the wielding of presidential authority.

Yet that is exactly the scenario which brought the SEC before the United States Supreme Court in *Raymond J. Lucia, et al. v. SEC*.⁵ In a challenge to the lawful authority of the in-house jurists the Commission employs to adjudicate alleged violations of the federal securities laws, the very power of the Chief Executive to appoint, and remove, Executive Branch officials was put to the test.⁶

We write this Article, not merely to exposit the immediacy of the Court’s newest landmark decision with respect to securities law enforcement, but with even greater awareness as to how this decision, conceived in a securities industry dispute, holds grave and long-lasting ramifications for constitutional law. For *Lucia* is far more than a high Court precedent regarding the federal securities laws; it is destined to enter the pantheon of constitutional landmark decisions which determine the very meaning of the Constitution, particularly with respect to assuring that the Executive Branch remains accountable to the People. Keeping that overriding significance in mind, we proceed to the task at hand.

¹ 15 U.S.C. § 78d (2012).

² *Id.*

³ *See generally id.* § 77.

⁴ *Id.* § 78j-1(b); 17 C.F.R. § 240.10b-5 (2006).

⁵ *Lucia v. SEC*, 138 S. Ct. 2044, 2044 (2018).

⁶ *Id.* at 2061.

To that end, this Article shall first set forth the essentials of the Commission's enforcement power, and the adjudicative structure empowering its administrative law judges ("ALJs"). It is imperative that we follow by setting forth the constitutional landmarks that regulate the manner in which officials of this type attain office, so we can better comprehend the roots of the Article II controversy addressed by *Lucia*. We shall then proceed to a brief recapitulation of the controversy in its nascent stage before the federal district courts.

Thereafter, we shall explore how different circuit courts of appeals took varying approaches in the main endeavor to avoid the constitutional controversy. This will naturally bring us to the point of unavoidable conflict between two tribunals, one of them the birthplace of the *Lucia* case, which then finally percolated to the highest level of the American judiciary.

The final element of this essential prelude shall include notation of the government's sharp course reversal with respect to defending the decision below. All that accomplished, we shall then embark upon a detailed examination of *Lucia* in all its noteworthy aspects.

To be sure, our final analysis shall not be confined to the ramifications *Lucia* holds for the SEC's enforcement of the securities laws. It is our intention to delve deeply into the broader, constitutional implications of the instant case, and its more lasting meaning for Article II, the Executive Branch, and all administrative agencies.

I. GAINING PERSPECTIVE: SECURITIES LAW, THE SEC, AND ITS ALJS

To have the fullest appreciation possible of *Lucia*, one must first understand the securities law which provides the backdrop for this latest pronouncement. Certainly, in *Lucia*, the Supreme Court ruled upon a constitutional challenge rooted in the Appointments Clause of Article II.⁷ Yet, since the office-holders thereby challenged were part of the imposing construct that is federal securities regulation, the appropriate point of view is taken from the New Deal-era laws which have assured the nation of open and honest capital markets since the 1930s.⁸

⁷ See *id.* at 2063.

⁸ 15 U.S.C. § 78d (2012).

The edifice that is modern federal securities law is firmly based on two cornerstones. The first is the Securities Act of 1933.⁹ The other noble cornerstone is the Securities Exchange Act of 1934.¹⁰

The 1934 Act established the Securities and Exchange Commission as the paramount federal regulator of the Nation's securities markets.¹¹ The SEC is authorized by statute to commence administrative enforcement proceedings against those believed to have violated the various securities acts.¹²

Heading the agency are five Commissioners, each appointed by the President with the advice and consent of the Senate.¹³ Unquestionably, the five appointees that comprise the SEC's ruling council are not only officers of the United States, but qualify as principal officers of the United States residing within the Executive Branch.¹⁴

Obviously, five mere mortals could never undertake the herculean task of overseeing the securities exchanges and its denizens without the assistance of a sizable bureaucracy. The Depression-era Congress wisely gave the Commission "the authority to delegate, by published order or rule, any of its functions" to, among others, "an administrative law judge."¹⁵ The powers which may be delegated to such a jurist include, and are not limited to, "hearing, determining, ordering ... or otherwise acting" with respect to any SEC function.¹⁶

In-house agency adjudicators, once called "hearing examiners," were given the title "Administrative Law Judges" in 1978, and the number of such positions was increased.¹⁷ Thus, the

⁹ *Id.* § 77a. Commonly referred to as "the '33 Act," its focus upon regulating the initial issuance of securities places it well outside the scope of the instant Article, notwithstanding that enactment's own fascinating and noteworthy aspects.

¹⁰ *Id.* § 78a. The promulgation goes by more than one *nom de guerre*. It is frequently shorthanded as the "Exchange Act," "the 1934 Act," or, lastly, "the '34 Act." Accordingly, we shall use these referents interchangeably herein.

¹¹ *Id.* § 78d(a).

¹² The Securities Act of 1933, 15 U.S.C. § 77h-1; The Securities Exchange Act of 1934, 15 U.S.C. § 78u-3; The Investment Company Act of 1940, 15 U.S.C. § 80a-9(b); The Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(e).

¹³ 15 U.S.C. § 78(d)(a).

¹⁴ See U.S. CONST. art. II, § 2, cl. 2.

¹⁵ § 78d-1(a).

¹⁶ *Id.*

¹⁷ See Act of Mar. 27, 1978, Pub. L. No. 95-251, 92 Stat. 183, 183-84 (1978).

controversy which this Article concerns itself with grew from that tiny seed.

Indeed, with the benefit of hindsight, it might be said that this innocuous name change helped precipitate the Appointments Clause challenge under discussion here. Forty years ago, the lawmakers casually observed that administrative law judges “hold a position with tenure very similar to that provided for Federal judges under the Constitution.”¹⁸ The imprecision of that comparison was fraught with peril and portended the constitutional crisis this Article now addresses.

To be sure, these newly minted ALJs were not granted autonomy. Undoubtedly to preserve accountability to the Chief Executive and the People, it was declared that “the Commission shall retain a *discretionary* right to review the action of any ... administrative law judge.”¹⁹

This oversight prerogative can be initiated by the Commission *sua sponte* “or upon petition of a party.”²⁰ Only a single Commissioner need vote in favor of review in order to bring any ALJ action before the full body.²¹

Significantly, should the SEC decline to exercise its power of oversight or if review is not requested in a timely manner, then the action decreed by an administrative law judge “*shall* ... be deemed the action of the Commission.”²² Note well the legislative choice of the imperative “shall,” and not the permissive “may,” in this particular proviso.

Of course, who guards the guardians? After all, the SEC is an administrative body.²³ Its awesome powers to regulate the stock markets must be kept in check, lest we descend into a totalitarian regime.

To protect against such calamities, any person aggrieved “by a final order of the Commission” may seek judicial review of

¹⁸ S. REP. NO. 95-697, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 496, 497; *see Butz v. Economou*, 438 U.S. 478, 513–15 (1978) (administrative law judges enjoy absolute immunity from damages lawsuits because they are “functionally comparable” to judges).

¹⁹ § 78d-1(b) (emphasis added).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* § 78d-1(c) (emphasis added).

²³ *See id.* § 78d.

the relevant judgment either “in the United States Court of Appeals for the circuit in which he resides or has his principal place of business” or, alternatively, “the District of Columbia Circuit.”²⁴ Not only does this assure Article III oversight, thereby preserving accountability, and, hence, liberty, the various options for the situs of the reviewing court often plays a role in the evolution of these proceedings, including the matter now under discussion.

And while the appellate tribunal is empowered to affirm, modify or overturn “in whole or in part” any final order of the Commission,²⁵ the regulators’ factual findings are conclusive, provided they are supported by substantial evidence.²⁶

The essentials of this regulatory infrastructure, that being the Commission, its lawful delegation of authority to administrative law judges, and so forth, remained fundamentally the same well into the Twenty First Century.²⁷ It took the cataclysm of the Great Recession to statutorily modify the SEC’s enforcement powers in such a way as to provoke a constitutional challenge to its in-house adjudicators.²⁸

This enabling legislation, made law during the heat of the financial meltdown in the late 2000s, is correctly known by the turgid moniker of the Dodd-Frank Wall Street Reform and Consumer Protection Act.²⁹ Better known by the far less cumbersome appellation of Dodd-Frank, this is a body of remedial statutes epic in proportion, and physically the size of an old-fashioned telephone directory.³⁰ Thankfully, the Appointments Clause issue extant here permits us to take a laser-like focus upon the sole proviso germane to the instant controversy.

The revamped law expanded the role of the Commission’s administrative law judges in the following manner. Prior to the new enactment, if the SEC sought a monetary penalty against a

²⁴ § 78y(a)(1).

²⁵ § 78y(a)(3).

²⁶ § 78y(a)(4).

²⁷ See generally *id.* § 78a.

²⁸ Hill v. SEC, 114 F. Supp. 3d 1297, 1315 (N.D. Ga. 2015), *vacated and remanded*, 825 F.3d 1236 (11th Cir. 2016).

²⁹ Pub. L. No. 111-203, § 1(a), 124 Stat. 1376 (2010), *reprinted in* 2010 U.S.C.C.A.N. 1; see also *Jarkesy v. SEC*, 803 F.3d 9, 12 (D.C. Cir. 2015).

³⁰ See generally Pub. L. No. 111-203, § 1, 124 Stat. 1376 (2010), *reprinted in* 2010 U.S.C.C.A.N. 1.

nonregulated individual or entity, the agency was required to file suit in an appropriate federal district court.³¹

Dodd-Frank changed all that by giving the regulators the choice of bringing such an action in the district court or by commencing an administrative enforcement proceeding before its in-house adjudicators.³² To be sure, the choice of the forum to proceed in lies solely within the agency's discretion.³³

At least one appellate court declared that Dodd-Frank "dramatically expanded" the Commission's power to institute enforcement proceedings before its own ALJs, reputedly "with a rate of success notably higher than it has achieved in federal district courts."³⁴ Thus, at the commencement of the second decade of the Twenty First Century, we find the SEC possessed a newfound power.³⁵ No longer was it required to bring supposed miscreants before a federal trial court for adjudication; now, the Commission could try alleged wrongdoers before its own, in-house tribunal.³⁶

To summarize, the duties and powers of the SEC's present-day adjudicators, particularly in light of the Dodd-Frank enforcement regime, predict the controversy under review here. By virtue of their traditional prerogatives, as enhanced by the Dodd-Frank reforms, ALJs now play an even more critical role in upholding the federal securities acts.³⁷

The Commission's in-house jurists hear cases and create records of those proceedings.³⁸ These adjudicators find facts, draw conclusions of law, and decide the validity of charges brought by the SEC against private persons.³⁹ Notwithstanding subsequent review by the Commission—if any—ALJs most certainly do *not* merely advise, recommend, or investigate.⁴⁰ In every sense of

³¹ *Bebo v. SEC*, 799 F.3d 765, 768 (7th Cir. 2015).

³² *Id.*; see also Pub. L. No. 111-203, § 929P(a)(2), 124 Stat. 1376 (2010), reprinted in 2010 U.S.C.A.N.

³³ *Tilton v. SEC*, 824 F.3d 276, 278 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2187 (2017).

³⁴ *Id.* at 279 (citation omitted).

³⁵ *Id.* at 278.

³⁶ *Id.* at 279.

³⁷ See *id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See 17 C.F.R. § 201.111 (2006).

the phrase, the agency's internal jurists exercise, by any yardstick, significant sovereign authority.⁴¹

This concludes our primer upon the fundamental notions of federal securities regulation that set the stage for *Lucia*. As indicated, many of these statutory norms have existed since the Securities and Exchange Commission was created via the 1934 Act.⁴² Nevertheless, it was the enactment of the Dodd-Frank legislation, conceived in the crisis atmosphere of the Great Recession, which sparked the constitutional conflagration over the authority of the Commission's ALJs.⁴³

Yet *Lucia* was a constitutional crisis, not merely a dispute under the laws regulating the securities markets.⁴⁴ For that reason, it is imperative that we next turn to the fundamental principles of constitutional law which formed the basis for the high Court's newest landmark.

II. THE APPOINTMENTS CLAUSE: TEXTUAL FUNDAMENTALS AND SUPREME COURT LANDMARKS

From the very inception of the Republic, one of the paramount motivations of the Founders was a justifiable concern for power concentrated in the hands of the one or the few, and worse yet, such authority lacking accountability to the political will of the citizenry.⁴⁵ It was this "fear that prompted the Framers to build checks and balances into our constitutional structure."⁴⁶

Specifically, to preserve our ordered system of liberty from the excesses of executive power, the Framers acted upon a fundamental and inarguable precept. "Liberty requires accountability."⁴⁷ In recognition of that basic truth, the Framers incorporated several "accountability checkpoints" into the Constitution,⁴⁸ each one securing separation of powers and checks and balances.

⁴¹ See *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

⁴² See generally 15 U.S.C. § 78(a) (2012).

⁴³ See *Buckley*, 424 U.S. at 126–27; *Tilton*, 824 F.3d at 276, 279–80.

⁴⁴ See *Lucia v. SEC*, 138 S. Ct. 2044, 2047 (2018).

⁴⁵ *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1244 (2015) (Thomas, J., concurring).

⁴⁶ *Id.*

⁴⁷ *Id.* at 1234 (Alito, J., concurring).

⁴⁸ *Id.* at 1237 (Alito, J., concurring).

Several of these guardians of our precious liberty are found within Article II.⁴⁹ Concurrent with establishing the duties and responsibilities of the Executive Branch, and empowering the office of the Chief Executive, the Article equally restrains presidential ambitions, by assuring the chief magistrate stays responsive to the popular will.⁵⁰ Both courts and commentators have lauded Article II as one of the Constitution's most noble provisions, guaranteeing accountability to the People.⁵¹

Prominent among Article II's critical subcomponents is the Appointments Clause, a "structural safeguard" that tethers federal officers to the "sovereign power of the United States, and thus to the people."⁵² Above all else, the Appointments Clause insists that those who wield executive authority remain "accountable to political force and the will of the people."⁵³

The requirements of the Appointments Clause are "among the significant structural safeguards of the constitutional scheme" and are "designed to preserve political accountability relative to important Government assignments."⁵⁴ In regulating the manner of taking office, the proviso assures that appointees are "accountable to the President, who himself is accountable to the people."⁵⁵

⁴⁹ See U.S. CONST. art. II.

⁵⁰ See *id.* § 2.

⁵¹ See *PHH Corp. v. CFPB (PHH II)*, 881 F.3d 75, 164 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting) (quoting Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 705 (2003) (quotations and brackets omitted)).

⁵² *Bandimere v. SEC*, 844 F.3d 1168, 1188 (10th Cir. 2016) (Briscoe, J., concurring).

⁵³ *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 884 (1991). The Founders indicated that dependence upon the People is a primary means of controlling the federal government from excess. See *THE FEDERALIST NO. 51*, at 356 (James Madison) (Wright ed., 1961); see also ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 136 (Arthur Goldhammer trans., 2004). In his majestic paean to American freedom, de Tocqueville eloquently posits the following: "In order to maintain the republican form of government, it was essential that the [President] ... be subject to the national will." To that end, de Tocqueville observes that the Senate oversees the Chief Executive "in the distribution of appointments, so that he can neither corrupt nor be corrupted." *Id.* And, finally, this erudite witness to America's early years adds the following gem, quite apropos to the instant controversy: The President "ought to be left as free as possible to choose his own agents and to dismiss them at will." *Id.* at 146.

⁵⁴ *Edmond v. United States*, 520 U.S. 651, 659, 663 (1997).

⁵⁵ *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1238 (2015) (Alito, J., concurring).

Accountability is maintained by the Appointments Clause in the following manner: officers of the United States are appointed by the President, who answers to the People.⁵⁶ When the electorate takes exception to the action of an executive officer, they protest to the Chief Executive who they elected, and she must then inquire of the appointee.⁵⁷ This is how the chain of responsibility operates, and the unitary and uniform execution of the law secured.⁵⁸

With regard to the relevant text of the Appointments Clause, its most visible segment is well known to most Americans. The President is empowered, with the advice and consent of the Senate, to nominate and appoint ambassadors, “ministers” (cabinet level department heads in more modern terms), “Judges of the [S]upreme Court, and all other Officers of the United States.”⁵⁹ It is unassailable that all officers of the United States must be appointed in accordance with the Appointments Clause.⁶⁰

Not as high profile, but nevertheless at the eye of the constitutional tempest which is the subject of this Article, the Appointments Clause makes further provision that 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.”⁶¹

Distilled to its essence, and highly germane to the instant discussion, Article II posits the foregoing as an alternative to the more cumbersome (and, dare we say, more politically contentious) process of presidential nomination subject to senatorial oversight.⁶² Presuming a statutory grant, the Chief Executive, as well as department heads and the courts, enjoy the inherent authority to emplace lesser office-holders.⁶³

⁵⁶ See U.S. CONST. art. II, § 2, cl. 1–2.

⁵⁷ See *id.*

⁵⁸ See *PHH Corp. v. CFPB (PHH II)*, 881 F.3d 75, 142 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting).

⁵⁹ U.S. CONST. art. II, § 2, cl. 2.

⁶⁰ See *Buckley v. Valeo*, 424 U.S. 1, 140–41 (1976) (holding Federal Election Commissioners performing significant governmental duties pursuant to public law were properly classified as “officers of the United States” but had failed to attain office in conformity with the Appointments Clause).

⁶¹ U.S. CONST. art. II, § 2, cl. 2.

⁶² See *id.*

⁶³ See *id.*

At the end of the day, the Appointments Clause provides meaningful assurance that officers of the United States do not elude the reach of the Chief Executive, and, thereby, the People.⁶⁴ That is, the Appointments Clause, textually speaking. How it has been interpreted and applied is our next topic.

A. Free Enterprise Fund

In the main, the epicenter of the high Court's Appointments Clause jurisprudence is occupied by two fairly modern landmarks. Given such, we shall posit these cornerstones first, as the foundation of our analysis.

In contemporary Article II case law, it is beyond argument that *Free Enterprise Fund v. Public Company Accounting Oversight Board*⁶⁵ stands preeminent in guaranteeing separation of powers and checks and balances.

For nearly a decade, *Free Enterprise Fund* has been the pivot upon which Appointments Clause controversies have turned.⁶⁶ Its precepts constitute a significant portion of "the best guidance we have about the original and enduring meaning of Article II."⁶⁷

Appropriately enough for this writing, this first crucial landmark is itself rooted in yet another financial crisis of recent vintage. The holding of *Free Enterprise Fund* can be directly traced to the accounting industry reforms made in the early 2000s, subsequent to the scandalous doings of Enron, WorldCom, and similar nefarious corporations being revealed to an outraged investor class.⁶⁸ To counteract the blatant financial reporting trickery found in those ignominious cases, Congress promulgated the Sarbanes-Oxley Act (SOX).⁶⁹ For all intents and purposes,

⁶⁴ *See id.*

⁶⁵ *See generally* *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 513–14 (2010).

⁶⁶ *See* *PHH Corp. v. CFPB (PHH II)*, 881 F.3d 75, 155 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting); *see also, e.g., PHH Corp. v. CFPB (PHH I)*, 839 F.3d 1, 7 (D.C. Cir. 2016), *vacated and remanded en banc*, 881 F.3d 155 (D.C. Cir. 2018).

⁶⁷ *PHH II*, 881 F.3d at 155 n.13 (Henderson, J., dissenting); *see, e.g., PHH I*, 839 F.3d at 7, *vacated and remanded en banc*, 881 F.3d 75 (D.C. Cir. 2018).

⁶⁸ *See Free Enter. Fund*, 561 U.S. at 484.

⁶⁹ *See id.*

the legislation was a massive auditing reform law calling for stricter oversight of the accounting profession.⁷⁰

The legislation also created the respondent above named, the Public Company Accounting Oversight Board, the “PCAOB” (colloquially pronounced “Peek-A-Boo”), to administer SOX’s new regime of registering all public accounting firms that audit publicly traded companies, regimenting their standards of practice, and imposing rigorous oversight to assure their compliance.⁷¹

The PCAOB was not without its challengers, however, and these opponents set out to stop the Board in its tracks.⁷² The chosen form of attack was to invoke the Appointments Clause of Article II of the Constitution.⁷³

As Chief Justice Roberts explains in *Free Enterprise Fund*, the Appointments Clause authorizes the President to appoint two classes of officers within the Executive Branch to assist in executing the laws of the United States.⁷⁴ The first grouping of appointees is familiar, consisting of ambassadors, cabinet members, and the like (such as Article III jurists), usually called “principal officers,” whom the President appoints *with* the advice and consent of the Senate.⁷⁵

The second set of Executive Branch adjuncts is comprised of so-called “inferior officers,” whose defining attributes are that they exercise significant authority in executing the laws of the land, yet nonetheless remain accountable to the Oval Office—in plain English, the President can fire them at will.⁷⁶ The latter point cannot be underestimated, for placing these persons beyond the Chief Executive’s power of recall is an irredeemable constitutional error.⁷⁷

Finally, there is an added nuance of the Appointments Clause, specifically that department heads (essentially, cabinet members and agency chiefs) and the federal courts enjoy a similar

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *See id.* at 487.

⁷³ *See id.*

⁷⁴ *See id.*

⁷⁵ *See* U.S. CONST. art. II, § 2, cl. 2.

⁷⁶ *Free Enter. Fund*, 561 U.S. at 493.

⁷⁷ *Id.*

power to invest their own “inferior officers” with authority to assist the former in executing the laws of the land.⁷⁸

And here is where *Free Enterprise Fund* found the fatal flaw in constituting the PCAOB’s membership. Chief Justice Roberts observed how the five Board members were selected by the SEC, not appointed by the President.⁷⁹ Once in place, a Board member could only be removed “for good cause.”⁸⁰ Another key link in the chain of *Free Enterprise Fund*’s Appointments Clause analysis was that the Commissioners of the SEC itself, the ones who appoint the PCAOB members, likewise cannot be terminated, except “for good cause.”⁸¹ Chief Justice Roberts characterized this as, not just one, but two levels of “tenure” shielding PCAOB members from dismissal by the Chief Executive.⁸²

This attribute of the PCAOB led to its downfall.⁸³ The Appointments Clause is predicated upon the notion (as articulated by Founder James Madison while serving in the First Congress) that only the Chief Executive holds the executive power accorded by the Constitution, and part and parcel of her accountability to the People in exercising that power is the unrestricted ability to dismiss appointees who are inadequate to the task of executing the Nation’s laws.⁸⁴

In other words, the Appointments Clause does not merely regulate the manner of appointments; it assures that officeholders shall be accountable to the President who commissioned them, and *ergo*, the citizens who elected the Chief Executive.⁸⁵

Accordingly, the *Free Enterprise Fund* Court found the SOX methodology for constituting the PCAOB antithetical to the rigors of the Appointments Clause.⁸⁶ Moreover, the liberty interest protected by the Article II proviso was further confounded by the two levels of insulation the board members enjoyed.⁸⁷

⁷⁸ U.S. CONST. art. II, § 2, cl. 2.

⁷⁹ *Free Enter. Fund*, 561 U.S. at 484–85.

⁸⁰ *Id.* at 478.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 492.

⁸⁴ *Id.*

⁸⁵ *Id.* at 493.

⁸⁶ *Id.* at 503.

⁸⁷ *Id.* at 492.

This tenure protection made the PCAOB fundamentally untethered to the President's will, given the clear inability of the President to exercise her prerogative of recall.⁸⁸ The resultant lack of accountability to the President only exacerbated the constitutional infirmity.⁸⁹

While the high Court left the vast bulk of SOX undisturbed,⁹⁰ this assertion of the Appointments Clause's requirements vis-à-vis the PCAOB set in place a vital imperative for the constitutional delegation of administrative authority, cutting across a wide swath of regulatory agencies, and not just the ones tasked to administer the securities laws.⁹¹ Indeed, *Free Enterprise Fund* continues to emerge as a touchstone in cases questioning the apportionment of governmental power within the Executive and other Branches.⁹²

We will soon see that the disavowed parameters for appointments to the PCAOB at issue in *Free Enterprise Fund* bore a striking similarity to the appointive process for the Commission's ALJs.⁹³ That justifies our care in expositing *Free Enterprise Fund* as a linchpin in the imbroglio that challenged the authority of the SEC's adjudicators, for those similarities were exploited to no end by those opposing the agency's jurisdiction.⁹⁴

B. Freytag

Our second high Court precedent was one that somewhat presaged the coming of *Free Enterprise Fund*, albeit nearly two decades earlier.⁹⁵ In *Freytag v. Commissioner of Internal Revenue*,

⁸⁸ *Id.* at 495.

⁸⁹ *Id.*

⁹⁰ *Id.* at 509.

⁹¹ See *Stern v. Marshall*, 564 U.S. 462, 503 (2011) (bankruptcy judges do not enjoy the full judicial power of the United States because, *inter alia*, they are appointees of the Article III courts); *Morrison v. Olson*, 487 U.S. 654, 696–97 (1988) (as one of the seminal cases in the never-ending tug of war over empowering “inferior officers” within the three competing branches, including ongoing divisiveness over the role of judges within the Article III branch).

⁹² See *Stern*, 564 U.S. at 503; *Morrison*, 487 U.S. at 696–97.

⁹³ See *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 868 (1991).

⁹⁴ See *id.*

⁹⁵ One might even venture it provided the rule for decision. See *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238 (2013) (Scalia, J.) (“Truth

the plaintiff was a taxpayer aggrieved by the IRS's assessment of additional tax due.⁹⁶ More importantly, this plaintiff went so far as to challenge the very constitutionality of the judicial process whereby his tax was determined.⁹⁷ Freytag's argument was one we are already familiar with: his main contention was that the judicial officer hearing his controversy exercised significant authority under federal law, yet the mode the judicial officer's appointment, and that of his fellows, did not comport with the requisites of the Appointments Clause.⁹⁸

Taking center stage here were the officials entitled Special Trial Judges (STJs), effectively adjuncts to the United States Tax Court, a body itself long deemed to be an Article I "legislative court."⁹⁹ Indeed, in its arguments for confirming the validity of the existing system, the government emphasized the supposedly subordinate role of the STJs, calling them merely assistants to the actual Tax Court jurists in such matters as taking evidence, drafting proposed findings of fact and opinions, and other purely ministerial tasks.¹⁰⁰ In sum, and despite the taxpayer's protestations to the contrary, the government held fast to its claim that the STJs were little more than glorified clerks.¹⁰¹

The Supreme Court ruled otherwise, and, in taking the taxpayer's side, carefully parsed the exact duties of these judicial officers.¹⁰² STJs, noted the high Court, take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders, among other things.¹⁰³ In addition, the very office in which they serve is a creation of statute, and the precise tasks, salary, and means of appointment for STJs are likewise specified by law.¹⁰⁴

Combining the foregoing powers of the STJs with the means by which they attain and keep office, it was no surprise that the

to tell, our decision in *AT&T Mobility* all but resolves this case." (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)).

⁹⁶ See *Freytag*, 501 U.S. at 868.

⁹⁷ *Id.* at 872.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 880–81.

¹⁰¹ *Id.*

¹⁰² *Id.* at 881–82.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 881.

Court concluded that these judicial helpmates “exercise significant discretion” in their everyday duties.¹⁰⁵ Thus, the Supreme Court had no hesitancy in categorizing the STJs as “inferior officers” for Article II purposes.¹⁰⁶

But leaving nothing to chance, *Freytag* did not end there. It contrasted the STJs to “special masters,” yet another variety of judicial appointee found across the landscape of the federal court system.¹⁰⁷ The role of special master is, to be sure, not established by statute, nor does the law clearly delineate the duties and obligations of the office.¹⁰⁸ Special masters serve the Article III bench on a temporary and *ad hoc* basis or, as the Justices put it so well, are “episodic” in the frequency of their service to the Judicial Branch.¹⁰⁹ This effectively forecloses any characterization of special masters as “inferior officers,” whereas, in sharp contradistinction, it underscores the conclusion that STJs are even more deserving of that title, with all of its constitutional implications.¹¹⁰

Having thus set forth the appreciable powers of the STJs, and having further placed them in exquisite counterpoise to special masters and the latter’s comparatively limited purview, the Supreme Court readily concluded that the former exercised “significant discretion” under the law, as that term is understood for Article II purposes.¹¹¹ That established, the Court declared that the STJs were, in fact, “inferior officers,” as Article II jurisprudence classifies that title.¹¹² Therefore, such persons “must be properly appointed” pursuant to the strictures of the Appointments Clause.¹¹³ And since this helpmate to the Tax Court had not attained office in a manner consonant with Article II, his adjudication of the plaintiff’s tax liability was invalidated.¹¹⁴

In sum, *Freytag* was the trailblazer towards the primacy of *Free Enterprise Fund* in resolving contemporary disputes over

¹⁰⁵ *Id.* at 882.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 881.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 882.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 892.

the scope and application of the Appointments Clause. Given the role it was to eventually play in resolving the instant controversy over SEC ALJs, we urge mindfulness of *Freytag's* carefully drawn distinctions amongst different classifications of adjudicators, and the sharp implications for the matter at hand.

C. Germaine

Before departing entirely from the realm of modern Appointments Clause jurisprudence, we are required to briefly explore a Reconstruction era holding that presaged some of the current Article II controversy. Why reach back some one hundred and forty years to a ruling that could not have possibly conceived of today's Administrative State? The direct answer is because the high Court itself called upon this venerable edict to help resolve the controversy most recently at the bar.

United States v. Germaine presents the sordid tale of a civilian surgeon accused of extorting monies from the pension applicants he was charged with examining.¹¹⁵ One aspect of his appeal was that the avaricious medico had been prosecuted under a law calling for the fine or imprisonment of any officer of the United States found guilty of committing extortion under color of his office.¹¹⁶ The obvious prerequisite to a successful prosecution thereunder was that the defendant actually qualify as a *bona fide* officer of the United States.¹¹⁷ Seeking to avoid that penalty, the defendant contended he enjoyed no such status.¹¹⁸ To the contrary, Germaine alleged his appointment by the Commissioner of Pensions was not compliant with the procedures mandated by Article II.¹¹⁹

Writing for a unanimous Court, Justice Miller made short shrift of the entire affair.¹²⁰ Obviously, the defendant had not been appointed by the President or the courts of law.¹²¹ Adhering strictly to the plain text of Article II, the sole question remaining

¹¹⁵ *United States v. Germaine*, 99 U.S. 508, 508–09 (1878).

¹¹⁶ *Id.* at 509.

¹¹⁷ *Id.* at 512.

¹¹⁸ *Id.* at 509.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 508–09.

¹²¹ *Id.* at 510.

was whether the Commissioner of Pensions was the head of a department.¹²² As he was not, it was clear to the Justices that neither this defendant nor anyone holding office by virtue of the Commissioner's order could be deemed an officer of the United States.¹²³ Since Germaine did not qualify as an officer of the United States, he could not be prosecuted under a statute prohibiting malfeasance by such appointees.¹²⁴

Relevant to today's Appointments Clause challenge to the power of SEC ALJs, we may draw the following lessons from *Germaine*. First, “[t]he Constitution ... very clearly divides all its officers into two classes.”¹²⁵ Principal officers must be nominated by the President and confirmed by the Senate.¹²⁶ All others, denoted as inferior officers, may attain office as appointees of the President, the courts of law, or the heads of departments, if Congress so provides by statute.¹²⁷

Notably, the *Germaine* Court justified this more convenient mode of appointment as the Constitution foreseeing the day “when officers became numerous, and sudden removals necessary.”¹²⁸ One can only applaud the prescience of the *Germaine* Court, not to mention the Founders, for predicting the present-day Administrative State.

Be that as it may, the Justices of that bygone era were unequivocal in one other key finding. “[T]here can be but little doubt” that the foregoing two methodologies are the exclusive means by which one attains the vaunted status of Officer of the United States.¹²⁹

¹²² *Id.*

¹²³ *Id.* at 511.

¹²⁴ *Id.* at 512.

¹²⁵ *Id.* at 509 (“[t]he Constitution ... very clearly divides all its officers into two classes.”).

¹²⁶ *Id.* at 509–10.

¹²⁷ *Id.* at 510.

¹²⁸ *Id.* (explaining that the Court justified their decision of adopting a more convenient mode of appointment as they foresaw a time “when officers became numerous, and sudden removals necessary ...”).

¹²⁹ *Id.* In an expansive discussion of Executive bureaus, Justice Miller classified other government functionaries as “mere aids and subordinates of the heads of the departments,” citing as an example “the thousands of clerks in the Department of the Treasury” and elsewhere. *Id.* at 511. Obviously, it was the purpose of the *Germaine* Court to expound upon these mere employees of the government, so as to place them in contradistinction to true officers of the

Hereinabove, we have not only illuminated the Article II precedents instrumental in deciding *Lucia*, we now have a greater appreciation for the high Court's fidelity to the Appointments Clause as a guarantor of accountability, and, thereby, liberty. While all this is a necessary precursor to the review which is soon to follow, we must remember that the latest addition to the Court's Article II jurisprudence traveled a complex and arduous trail of litigation, which we are duty bound to explore.

For while the ultimate focus of this Article shall be the Supreme Court's decision in *Lucia*, that new landmark cannot be rightly contemplated in isolation. Our analysis is informed by the many conflicting lower court opinions that preceded the high Court's final ruling here.

Cases similar to *Lucia* were first the subject of vastly different approaches taken by trial judges, and then the decisions of various appellate tribunals took vectors in a direction totally contrary to that of the Supreme Court's eventual ruling.¹³⁰ This newest high Court pronouncement can only be considered in light of its jurisprudential roots. It could be said that the saga which is *Lucia* is a play in four acts. Accordingly, we expound upon it in that fashion.

III. ACT ONE: THE TRIAL COURTS

The road to a Supreme Court landmark is typically predictable and linear. It commences when a substantial number of federal district courts issue dissimilar rulings with regard to the same controversy. The discord is heightened when a significant number of circuit courts, sitting in review, declare their own views, presumably contrary to each other. Warring factions soon take shape, until the highest court in the land steps in, and ends the internecine controversy by promulgating its own edict.

United States. Yet if the Supreme Court of 1878 could make such notable distinctions as to the infrastructure of the then-nascent federal bureaucracy, can we do any less than apply that wisdom to our current Article II controversy? Even then, in post-Civil War America, the Supreme Court found "nine-tenths of the persons rendering service to the government undoubtedly are" mere hirelings, not officers holding their rank pursuant to the Appointments Clause. *Id.* at 509.

¹³⁰ See *Bandimere v. SEC*, 844 F.3d 1168, 1171 n.2 (10th Cir. 2016).

Notably, *Lucia* did not precisely follow that familiar pattern.¹³¹ Its contours first took shape with a remarkably small number of trial court decisions, most of which coalesced around a common point of argument.¹³² In time, said argument became the focal point of the high Court's attention, and therefore the gravamen of its ultimate holding.¹³³

Yet, at the appellate court level, a near majority of circuit panels rejected the postulations of the lower courts, and moved in an entirely different direction.¹³⁴ In truth, two—and only two—federal tribunals embarked upon paths which placed them in the requisite counterpoise.¹³⁵ Thus, the conflict finally resolved by the Supreme Court entailed contentiousness between a mere fraction of the more than one dozen circuit courts of appeals.¹³⁶ That, in and of itself, is unusual.

Given that *Lucia* did not track in a manner customary to the evolution of a high Court landmark, we are compelled to first sample, ever so briefly, the decisions of selective district courts that set the nascent controversy on the path to its final adjudication by the Justices.

Lucia's early roots were embodied in district court rulings addressing challenges to the SEC's newly expanded prerogative to have enforcement cases presided over by the agency's in-house adjudicators.¹³⁷ Respondents named in such proceedings actively resisted having administrative law judges hear the Commission's charges against them.¹³⁸

One of the first such cases, *Hill v. SEC*, presented a plaintiff of a different sort.¹³⁹ Hill described himself as a real estate

¹³¹ See *Lucia v. SEC*, 138 S. Ct. 2044, 2049–50 (2018).

¹³² See *In the Matter of Raymond J. Lucia Co.*, 106 SEC 4611 (2013) (initial decision).

¹³³ *Lucia*, 138 S. Ct. at 2055–56.

¹³⁴ See *Bandimere*, 844 F.3d at 1171 n.2.

¹³⁵ Compare *Hill v. SEC*, 114 F. Supp. 3d 1297, 1301 (N.D. Ga. 2015) *vacated and remanded*, 825 F.3d 1236 (11th Cir. 2016), with *Tilton v. SEC (Tilton I)*, No. 15-CV-2472, 2015 WL 4006165, at *1, *2 (S.D.N.Y. June 30, 2015).

¹³⁶ See *Bandimere*, 844 F.3d at 1171 n.2.

¹³⁷ *Lucia Cos., Inc. v. SEC (Lucia Cos. II)*, 832 F.3d 277, 280–81 (D.C. Cir. 2016).

¹³⁸ See generally Michael A. Sabino & Anthony Michael Sabino, *Challenging the Power of SEC ALJs: A Constitutional Challenge or a More Nuanced Approach?*, 43 SEC. REG. L.J. 369 (2015) [hereinafter *Challenging SEC ALJs*] (analyzing the then-extant cases).

¹³⁹ *Hill*, 114 F. Supp. 3d at 1301.

developer.¹⁴⁰ Thus, he was not a securities industry professional, normally subject to SEC jurisdiction.¹⁴¹ After he made nearly three-quarters of a million dollars transacting in the stock of a takeover target, the Commission accused Hill of indulging in the wrongful act of insider trading.¹⁴²

The plaintiff disputed the authority of the SEC ALJ overseeing his proceeding.¹⁴³ Arguing before Judge Leigh Martin May, Mr. Hill contended that the Commission's administrative law judges were officers of the United States, yet had attained office in contravention of the Appointments Clause.¹⁴⁴ "Not so," countered the agency; "the SEC's ALJs are mere employees."¹⁴⁵

District Judge May sided with the plaintiff.¹⁴⁶ Her touchstone was *Freytag's* postulation that the exercise of "significant authority" was the litmus test for deciding if an Executive Branch functionary is an officer of the United States, subject to the rigors of the Appointments Clause.¹⁴⁷

For all these reasons, *Hill* was among the first of the lower courts to hold that the Commission's in-house adjudicators held office in violation of the Appointments Clause.¹⁴⁸

Notably, *Hill* offered a means to end the evolving controversy before it erupted into a full-blown constitutional crisis. District Judge May suggested that the full Commission, collectively a head of a department as contemplated by Article II, nominate and appoint each and every SEC ALJ.¹⁴⁹ But, lacking any such

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 1304–05.

¹⁴⁴ *Id.* at 1316.

¹⁴⁵ *Id.* at 1317. *Hill* elaborated upon how ALJs assume office, thusly. The Commission's administrative law judges are hired internally by the agency's Office of Administrative Law Judges, with input from the SEC's Chief ALJ, its Office of Personnel Management, and the agency's human resources department. Significantly, an ALJ enjoys a "career appointment," with a salary set by statute. *Id.* at 1303.

¹⁴⁶ *Id.* at 1317.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1319 (explaining that the district judge declined to address the plaintiff's further contention that "the ALJ's two-layer tenure protections also violate Article II's removal" provisos, but in *dicta* expressed "serious doubts that it does" constitute a constitutional infirmity). *Id.* at 1319 n.12.

¹⁴⁹ *Id.* at 1320.

initiative from the agency, *Hill* forbade the agency's adjudicator from conducting further proceedings involving this plaintiff.¹⁵⁰

Whilst *Hill* emanated from southerly climes, it provided a template for resolution adopted by certain federal trial courts within walking distance of Wall Street itself.¹⁵¹ The case in point—*Duka v. SEC*¹⁵²—in actuality comprised an interconnected set of rulings, which willingly joined *Hill*'s assessment of the burgeoning controversy as a matter of constitutional import.¹⁵³

Duka presented an industry professional accused by the SEC of wrongdoing in disseminating inaccurate and misleading credit ratings, to the detriment of investors who relied upon such reports when transacting in the ranked securities.¹⁵⁴ This respondent sought to enjoin the Commission from further pursuit.¹⁵⁵ *Duka*'s claim—like the one interposed in *Hill*—was an allegation that the Appointments Clause had been violated in empowering the agency's in-house adjudicators.¹⁵⁶

The end result was markedly the same.¹⁵⁷ In a sequence of interlocked opinions, District Judge Berman eventually concluded that SEC ALJs do, in fact, exercise "significant authority," as that term is utilized in the lexicon of the Appointments Clause.¹⁵⁸ Key to the trial court's determination was its recognition that the Commission's administrative law judges do much of what ordinary judges do on an everyday basis.¹⁵⁹

Accordingly, *Duka II* easily resolved the Article II question by finding that the agency's adjudicators were, indeed, officers of the United States, and therefore required a nomination compliant with the strictures of the Appointments Clause.¹⁶⁰ These rulings compelled the *Duka II* court to halt the SEC's

¹⁵⁰ *Id.* at 1320–21.

¹⁵¹ *Duka v. SEC (Duka I)*, 103 F. Supp. 3d 382 (S.D.N.Y. 2015).

¹⁵² *Id.*, abrogated by *Tilton v. SEC (Tilton II)*, 824 F.3d 276 (2d Cir. 2016), cert. denied, 137 S. Ct. 2187 (2017); see also *Duka v. SEC (Duka II)*, 124 F. Supp. 3d 287 (S.D.N.Y. 2015), vacated and remanded No.15-2732 (2d Cir.) (June 13, 2016).

¹⁵³ *Duka II*, 124 F. Supp. 3d at 289.

¹⁵⁴ *Duka I*, 103 F. Supp. 3d at 387.

¹⁵⁵ *Id.* at 385–86.

¹⁵⁶ *Id.* at 385.

¹⁵⁷ *Id.* at 395–96.

¹⁵⁸ *Duka II*, 124 F. Supp. 3d at 289.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

enforcement proceeding, given the constitutional defect in how the presiding ALJ attained office.¹⁶¹

Notably, this New York district jurist took up the suggestion of his colleague from the Northern District of Georgia, to wit, that the Commission remedy the entire matter by having the “[h]eads of [d]epartments,” that being the Commissioners themselves, appoint the SEC ALJs anew, thereby correcting the nettlesome Article II violation.¹⁶² Regrettably, as in *Hill*, the agency failed to act upon the court’s prompting.¹⁶³

At this juncture, it must be remembered that federal trial judges are not bound by the decisions of their peers, even those from within the same judicial district.¹⁶⁴ That fundamental truth was exemplified in the instant controversy’s early stages.¹⁶⁵ Specifically, yet another district jurist, also hailing from the same vicinage as *Duka II*, issued a holding inapposite to both the aforementioned and *Hill*.¹⁶⁶

This contrary decision was the first iteration of *Tilton v. SEC*¹⁶⁷ Replicating the now familiar pattern, a financial professional and her affiliated companies were subjected to Commission action, based upon the SEC’s allegation that they had, jointly and severally, violated the federal securities law.¹⁶⁸ This plaintiff counterattacked, alleging that the agency’s administrative law judge took office in violation of Article II; therefore, the Commission’s enforcement case should be enjoined from continuing before the in-house adjudicator.¹⁶⁹

Taking a different tack from her brethren, District Judge Ronnie Abrams disagreed with both the plaintiff before her, and with the rulings issued in *Hill* and *Duka II*.¹⁷⁰ To be sure, this

¹⁶¹ *Id.* at 290.

¹⁶² *Id.* at 289.

¹⁶³ *Id.* at 288.

¹⁶⁴ *See* *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2530 (2011).

¹⁶⁵ *Id.* at 2532–33.

¹⁶⁶ *Id.* at 2531.

¹⁶⁷ *Tilton v. SEC (Tilton I)*, No. 15-CV-2472, 2015 WL 4006165, at *1, *2 (S.D.N.Y. June 30, 2015), *aff’d*, *Tilton v. SEC (Tilton II)*, 824 F.3d 276, 276 (2d Cir. 2016).

¹⁶⁸ *Id.* at *1–3.

¹⁶⁹ *Id.* at *2.

¹⁷⁰ *Id.* at *5.

New York jurist, presiding in a forum within a stone's throw of Wall Street, was not unmindful of the plea of a constitutional defect.¹⁷¹

Notwithstanding the assertion of an Appointments Clause violation, the court in *Tilton I* looked to the fact that the plaintiff retained a statutory right to have an appellate court review any sanction decreed by the SEC.¹⁷² Given the undisputed availability of a subsequent hearing before a circuit tribunal, *Tilton I* refused to prevent the Commission from proceeding with the enforcement action.¹⁷³ To be sure, the highlight of *Tilton I* is its staunch refusal to embrace the Appointments Clause challenge proffered by similarly situated plaintiffs in *Hill* and *Duka II*.

We pause here for a moment of contemplation. The controversy, which was to percolate through the federal courts, and conclude with the new landmark of *Lucia*, commenced with a relatively small cross-section of trial courts at odds with each other on the ostensible constitutional crisis.

Some halted Commission enforcement proceedings, out of recognition of the alleged Appointments Clause violation.¹⁷⁴ Others set to the side the purported constitutional infirmity.¹⁷⁵

At that time, we commented that the internecine struggle would not go away soon, nor would it depart neatly.¹⁷⁶ We accurately predicted that only Supreme Court intervention could restore order.¹⁷⁷ While grateful for that small bit of prescience, no one could have foretold the various directions the instant controversy would take.¹⁷⁸

Having submitted the above for your edification, we are now able to turn to the circuit conflict, in its variegated form, which ultimately led to the fresh landmark we now know as *Lucia*.

¹⁷¹ *Id.* at *1.

¹⁷² *Id.* at *5–6.

¹⁷³ *Id.* at *12–14.

¹⁷⁴ *Challenging SEC ALJs*, *supra* note 138, at 378–79.

¹⁷⁵ *Id.* at 378–80.

¹⁷⁶ *Id.* at 369, 386.

¹⁷⁷ *Id.* at 386.

¹⁷⁸ To be sure, the preliminary schism that gripped the district courts encompassed additional points of view which, in the interest of conciseness, we need not address here. See *id.* at 373–76 (analyzing SEC v. Gupta, 796 F. Supp. 2d 503 (S.D.N.Y. 2011) (Rakoff, J.)); *id.* at 380–84 (analyzing Chau v. SEC, 72 F. Supp. 3d 417 (S.D.N.Y. 2014) (Kaplan, J.)).

IV. ACT TWO: THE CIRCUIT COURTS AVOIDING THE APPOINTMENTS CLAUSE QUESTION

As already postulated herein above, the essence of this controversy is the constitutional question as to whether administrative law judges of the SEC are officers of the United States and attain office in a manner compliant with the Appointments Clause of Article II. The conventional wisdom has long been that, for questions of constitutional magnitude, the Supreme Court typically refrains from asserting its prerogative of review until a substantial number of the circuit courts of appeals have weighed in on the issue at hand.

That is not precisely what happened with respect to the instant controversy.¹⁷⁹ To be sure, in a following section, we shall exposit the two diametrically opposed circuit decisions that led to the ultimate resolution of *Lucia*. However, we duly note that a substantial number of circuit tribunals, when asked to resolve the very Appointments Clause challenge at the heart of *Lucia*, declined to do so.¹⁸⁰ These appellate courts essentially ignored the Article II claim, and resolved the litigation before them on more prosaic grounds.¹⁸¹

In order to fully comprehend *Lucia*, we must provide some discussion of those circuit decisions, since it cannot be denied they made their own contribution to the abovementioned landmark, albeit by indirect means. However, because of their contrarian approach, and the further reason that we do not wish to detract from *Lucia*'s true underpinnings, we can be brief in expositing these cases.

Moreover, these circuits, which chose to resolve their respective cases by means other than resorting to the text of the Appointments Clause, comprise a fair cross-section of the federal judiciary.¹⁸²

¹⁷⁹ *Id.* at 373, 380, 383.

¹⁸⁰ See *Bennett v. SEC*, 844 F.3d 174, 176 (4th Cir. 2016); *Hill v. SEC*, 825 F.3d 1236, 1241 (11th Cir. 2016); *Tilton v. SEC (Tilton II)*, 824 F.3d 276, 291 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2187 (2017); *Bebo v. SEC*, 799 F.3d 765, 767 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016).

¹⁸¹ See *Bennett*, 844 F.3d at 176; *Hill*, 825 F.3d at 1241; *Tilton II*, 824 F.3d at 291; *Bebo*, 799 F.3d at 767.

¹⁸² See *Bandimere v. SEC*, 844 F.3d 1168, 1171 n.2 (10th Cir. 2016).

Chronologically speaking, the first tribunal to be heard from was the venerable Seventh Circuit.¹⁸³ In *Bebo v. SEC*, that court deflected the plaintiff's constitutional challenge to the authority of a SEC ALJ to hear the proceeding brought against her by the Commission.¹⁸⁴

Writing for the panel, Circuit Judge Hamilton found that jurisdiction was lacking, as the plaintiff had not yet exhausted her options.¹⁸⁵ "Bebo will be able to raise her constitutional claims in this circuit or in the D.C. Circuit" pursuant to the statutory review scheme provided by Congress.¹⁸⁶ Per force, this would include the assertion that the administrative law judge then hearing her case held office in violation of the Appointments Clause.¹⁸⁷ Put another way, said the Seventh Circuit, Bebo's Article II challenge was preserved until she sought out review by a federal appeals court.¹⁸⁸

Not long after *Bebo* was decided, the August Second Circuit added to the dialogue with its holding in *Tilton v. SEC*¹⁸⁹ There is no need to regurgitate the court's reasoning here, comprehensive as it might have been.

Suffice to say, the New York-based tribunal ruled consistently with its brethren in Chicago, finding the plaintiff's Appointments Clause claim was premature.¹⁹⁰ Circuit Judge Sack opined on behalf of the panel that Tilton, a securities industry professional, was required to raise her constitutional challenge

¹⁸³ See *id.* at 1171 n.2; see also *Bebo*, 799 F.3d at 765.

¹⁸⁴ *Bebo*, 799 F.3d at 765, 767. In that administrative enforcement case, the SEC charged Bebo, a former CEO, of manipulating her company's books and records, and making false representations to auditors and the Commission itself. Notably, the ALJ had yet to rule on the case at the time Bebo filed her lawsuit. *Id.* at 767.

¹⁸⁵ *Id.* at 767, 775.

¹⁸⁶ *Id.* at 767–68.

¹⁸⁷ *Id.* at 768.

¹⁸⁸ *Id.* at 774. For the sake of explicitness, the original—and only—panel decision in *Bebo* was issued on August 24, 2015. The Seventh Circuit denied rehearing and rehearing *en banc* on November 5th of that same year. *Id.* at 765. We deem that later ruling as immaterial in fixing a chronology. Accordingly, *Bebo* rightfully holds first position, as compared to *Jarkesy v. SEC*, which was decided on September 29, 2015. *Jarkesy v. SEC*, 803 F.3d 9, 9 (D.C. Cir. 2015).

¹⁸⁹ *Tilton v. SEC (Tilton II)*, 824 F.3d 276 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2187 (2017).

¹⁹⁰ *Id.* at 291.

within the “exclusive” review infrastructure created by Congress.¹⁹¹ In so doing, the Second Circuit likewise did not approach the Article II issue that was to become the focus of *Lucia*.¹⁹²

Consistency was maintained amongst the federal tribunals with *Hill v. SEC*,¹⁹³ a ruling issued only days after *Tilton II* appeared.¹⁹⁴ There, the Eleventh Circuit joined its sister circuits in declining jurisdiction,¹⁹⁵ and directed the subjects of an enforcement proceeding to first exhaust their rights of review, as provided by Congress in the statutory scheme of the Exchange Act.¹⁹⁶

As the author of the opinion, Circuit Judge Pryor distinguished the case at bar from the “precarious position the Supreme Court found unacceptable” in *Free Enterprise Fund*.¹⁹⁷ In this fashion, the Eleventh Circuit avoided the constitutional challenge brought by Hill pursuant to the Appointments Clause.¹⁹⁸

The circle of appellate courts declining to entertain the constitutional arguments of respondents challenging the power of SEC ALJs was completed by the Fourth Circuit in *Bennett v. SEC*.¹⁹⁹ By this late date,²⁰⁰ the cohesion of these geographically diverse tribunals was such that the unanimous panel commenced the opinion with a declaration that the Fourth Circuit was now conjoined with its kin.²⁰¹ Further discussion exemplifying this union of the courts of appeals was relegated to a parenthetical.²⁰²

As a point of additional interest, *Bennett* likewise observed that the plaintiff’s theory of unconstitutionality in the appointment of the Commission’s adjudicators “reads too much into the *Free Enterprise* Court’s conclusion,” which this tribunal found was

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ 825 F.3d 1236 (11th Cir. 2016).

¹⁹⁴ *Tilton II* was decided June 1, 2016. 824 F.3d at 276. *Hill* was rendered on June 17, 2016. 825 F.3d at 1236.

¹⁹⁵ *Hill*, 825 F.3d at 1241.

¹⁹⁶ *Id.* at 1237. As to the underlying case brought by the SEC before the ALJ, Hill, a real estate developer, was accused of profiting on inside information pertaining to a corporate merger. *Id.* at 1239.

¹⁹⁷ *Id.* at 1247 (citations omitted).

¹⁹⁸ *See id.* at 1247–48.

¹⁹⁹ *See generally* *Bennett v. SEC*, 844 F.3d 174 (4th Cir. 2016).

²⁰⁰ *Bennett* was issued on December 16, 2016. *Id.* at 174.

²⁰¹ *Id.* at 176.

²⁰² *Id.* at 183 n.7.

factually distinguishable.²⁰³ Explicating the last comment, Circuit Judge Duncan pointed out that “Bennett is already embroiled in an enforcement proceeding.”²⁰⁴ The plaintiff did not incur any additional risks by having her constitutional challenge heard as part and parcel of the nominal statutory review process.²⁰⁵

Thus, as 2016 drew to a close, there was apparent unanimity amongst the circuit courts of appeals on the matter of Appointments Clause challenges to Commission ALJs holding office, and presiding over the agency’s enforcement actions.²⁰⁶ After all, the D.C., Seventh, Second, Eleventh, and Fourth Circuits had held the line, refusing to hear the constitutional complaints made by the subjects of SEC proceedings.²⁰⁷

By the straightforward expedient of directing such persons to return to the agency’s adjudicators, and counseling that their Article II claims were preserved there and in the subsequent review process, nearly half of the Nation’s appellate courts had successfully—and, one could venture, appropriately—avoided resolving a question of constitutional magnitude.²⁰⁸

²⁰³ *Id.* at 182, 186.

²⁰⁴ *Id.* at 186. The plaintiff, the founder of an investment firm, was charged by the Commission with materially misstating assets under management, falsifying performance results, and related securities law violations. *Id.* at 177.

²⁰⁵ *Id.* at 186.

²⁰⁶ See *supra* text accompanying note 204.

²⁰⁷ We relegate to a parenthetical what might otherwise be deemed the pioneering decision of the D.C. Circuit on the controversy at hand, the case captioned *Jarkesy v. SEC*. Decided on September 29, 2014, *Jarkesy* presents a pattern to be oft-repeated before the federal tribunals in the next year and one half. *Jarkesy v. SEC*, 803 F.3d 9, 9 (D.C. Cir. 2015). The plaintiff there managed the general partner of two hedge funds and was accused of securities fraud in a Commission enforcement proceeding. *Id.* at 13. Seeking to derail the administrative action by ousting the SEC of jurisdiction, he asserted, *inter alia*, Due Process and Equal Protection claims. *Id.* at 14. Significant to our central purpose here, *Jarkesy* did not interpose an Appointments Clause challenge to the ALJ’s power. Therefore, while several tribunals claimed fellowship with the D.C. Circuit when issuing their own subsequent rulings on the power of SEC ALJs, in truth *Jarkesy* never addressed the Article II aspects of the instant controversy. While the D.C. Circuit is often credited by its brethren as a constituent member of the then-emerging majority, the fact is *Jarkesy* is distinguishable, and thus cannot be more than mentioned in passing when discussing the Appointments Clause challenge that defined the heart of the matter at hand.

²⁰⁸ *But see* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 375 (Roberts, C.J., concurring) (when constitutional questions are unavoidable, the Court must decide them) (quotations and citations omitted).

Yet all that was to change mere days later, as the waning days of 2016 brought forth the first opposing pole of a controversy, once thought to be dormant, but now entering the full flower of contentiousness.²⁰⁹ We now come to the limited, but irreconcilable, rift between the circuits which set the stage for *Lucia*.

V. ACT THREE: TWO CIRCUITS DO BATTLE OVER THE APPOINTMENTS CLAUSE

As already stipulated, a near majority of circuit courts of appeals had successfully avoided divisiveness by deftly sidestepping the Appointments Clause questions put before them. Then, two tribunals clashed head on, giving rise to what would eventually become the Supreme Court's Article II landmark in *Lucia*.²¹⁰

We now examine the two—and only two—appellate decisions that gave rise to the internecine conflict, now concluded, at least for the time being.

A. *Lucia* Companies I and II

For reason that the Supreme Court's decision in *Lucia* occupies the apex of this Article, it would be wasteful to expend much effort in discussing the appellate court decision that was reversed and remanded by the Justices. Therefore, while reserving the bulk of our dissertation for the high Court's reasoning, we note, but briefly, the holding which preceded the new landmark.

In *Raymond J. Lucia Cos., Inc. v. SEC*, a panel of the D.C. Circuit Court of Appeals was asked to overturn a Commission final order imposing sanctions upon an investment adviser.²¹¹ The petitioning entities raised the now-familiar Appointments Clause challenge to the power of the SEC ALJ who initially heard and decided the underlying enforcement proceeding.²¹²

First, the panel devoted many pages to a detailed analysis of the statutory predicate for the Commission's enforcement power,

²⁰⁹ See generally *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016); *Raymond J. Lucia Cos., Inc. v. SEC (Lucia Cos. I)*, 832 F.3d 277 (D.C. Cir. 2016), *petition for review denied*, 868 F.3d 1021 (D.C. Cir. 2017).

²¹⁰ See *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

²¹¹ *Lucia Cos. I*, 832 F.3d at 277.

²¹² *Id.* at 280.

its ability to delegate, and the role of its in-house adjudicators.²¹³ Then, turning to the petitioners' contentions that the ALJ presiding over their case did not hold office in conformity with Article II,²¹⁴ the August tribunal began—and ended—with a singular observation.

The decisive point here, wrote Circuit Judge Rogers, is whether the SEC's administrative law judge had the power to issue final decisions.²¹⁵ Since he did not, the panel ruled the agency's in-house jurist was not an officer of the United States, and thus there was no constitutional infirmity in the manner in which the ALJ took office.²¹⁶

The tribunal found it conclusive that the full Commission "retained full decision-making powers," and that body "alone issues final orders."²¹⁷ As simple as that, the D.C. Circuit handily refuted the Appointments Clause claim.²¹⁸

Nearly an entire year passed before the D.C. Circuit issued the penultimate decree which primed the matter for final

²¹³ *Id.* at 281–83.

²¹⁴ *Id.* at 283–85.

²¹⁵ *See id.* at 285.

²¹⁶ *See id. Contra Burgess v. FDIC*, 871 F.3d 297, 299, 304 (5th Cir. 2017), where the Fifth Circuit stayed the order of a Federal Deposit Insurance Corporation ALJ on the grounds that the adjudicator attained office in violation of the Appointments Clause. *Id.* at 299, 304. Duly noting *Lucia Cos. I and II*, the tribunal took cognizance of the intercircuit rift. *Id.* at 300–01. Holding that the ALJ employed by the banking regulator exercised all the attributes of an officer of the United States, albeit as an inferior office-holder, the southerly circuit had no difficulty in finding the lack of compliance with the Appointments Clause nullified the adjudicator's directive. *Id.* at 302–03. Writing for the panel, Circuit Judge Owen, as joined by Judges Jones and Clement of that prestigious bench, opined the fact that ALJs are often directed and supervised by a superior is "more relevant to the distinction between principal and inferior officers." It does not, however, diminish one bit the appointee's Article II status as an officer of some stripe. *Id.* at 303 (quotation and footnote omitted). It can be stated that *Burgess* is firmly grounded in the notion that the ability of an appointee to render final decisions on behalf of the United States has relevance to distinguishing principal officers from inferior officers but has no bearing on differentiating officers of either classification from mere employees. *See Edmond v. United States*, 520 U.S. 651, 665–66 (1997).

²¹⁷ *Lucia Cos. I*, 823 F.3d at 286.

²¹⁸ The remainder of *Lucia Cos. I* likewise rejected the petitioners' challenges to the finding of liability and choice of sanctions decreed by the SEC's ALJ. *Id.* at 289–96.

adjudication by the Supreme Court.²¹⁹ In a *per curiam* judgment, “an equally divided court” denied further review at the circuit level.²²⁰ The case at bar was now ready to be placed before the Nation’s highest tribunal.²²¹

But first, it needed a conflicting ruling to be set in opposition. A panel of a circuit court nearly fifteen hundred miles distant from the Nation’s capital soon provided the necessary counterpoint, and it is that contrarian view that we exposit next.²²²

B. Bandimere

Bandimere v. SEC came before the courts much like the cases which preceded it.²²³ The SEC alleged that David F. Bandimere, a Colorado businessman, had breached various federal securities laws.²²⁴ An administrative law judge assigned by the Commission presided over the enforcement proceeding, ruled Bandimere was liable as charged, and assessed various punishments against the respondent, including a lifetime ban from securities industry.²²⁵

The full Commission essentially confirmed the decision of its ALJ, while simultaneously rejecting Bandimere’s Appointments

²¹⁹ Raymond J. Lucia Cos., Inc. v. SEC (*Lucia Cos II*), 868 F.3d 1021, 1021 (D.C. Cir. 2017).

²²⁰ *Id.* at 1021.

²²¹ The denial of further review by the *en banc* court exemplified the conventional wisdom “that the D.C. Circuit is a ‘AAA baseball team for the Supreme Court’s major league.’” Fred Lucas, *Here’s What Happened the Last Time Democrats Tried to Deny Brett Kavanaugh a Court Seat*, THE DAILY SIGNAL (July 10, 2018), <https://www.dailysignal.com/2018/07/10/heres-what-happened-the-last-time-democrats-tried-to-deny-kavanaugh-a-court-seat> [<https://perma.cc/FTY6-5BHT>] (quoting Professor Anthony Michael Sabino). *Lucia Cos. II* was adjudged by, among others, then–Circuit Judge Brett M. Kavanaugh, and Circuit Judge Sri Srinivasan, mentioned as a possible high Court nominee. Not participating in the denial of review was D.C. Circuit Chief Judge Merrick B. Garland, nominated to the Supreme Court in the waning days of the Obama Administration. *Lucia Cos. II*, 868 F.3d at 1021.

²²² See generally *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016).

²²³ *Id.* *Bandimere* was decided on December 27, 2016. *Id.* at 1168. Even including intervening holidays, the Tenth Circuit issued its ruling less than two weeks after the Fourth Circuit issued *Bennett*. *Bennett v. SEC*, 844 F.3d 174, 174 (4th Cir. 2016).

²²⁴ *Bandimere*, 844 F.3d at 1171.

²²⁵ *Id.*

Clause challenge.²²⁶ Upon the respondent's petition for review,²²⁷ the controversy was submitted to the Tenth Circuit for further adjudication.²²⁸

The Tenth Circuit pronounced its judgment without equivocation.²²⁹ In only the second paragraph of its opinion, and citing solely to *Freytag*, this western tribunal firmly declared that the ALJ who heard *Bandimere's* case "was not constitutionally appointed, [and] held his office in violation of the Appointments Clause."²³⁰

Circuit Judge Matheson commenced the analysis with an overview of the Appointments Clause.²³¹ The proviso, he noted, "embodies both separation of powers and checks and balances."²³² In addition, the Appointments Clause assures accountability, by establishing the vital chain between those appointed and the elected officials who bestowed the office.²³³ Relying upon the very words of *Freytag*, the *Bandimere* court emphasized these constraints upon the appointment power were the best guarantee that the machinery of government would be accountable to the will of the People.²³⁴

²²⁶ *Id.*

²²⁷ See 15 U.S.C. § 78(y)(a)(1).

²²⁸ *Bandimere*, 844 F.3d. at 1171. As explained previously herein, it was *Bandimere's* option to seek review before the D.C. Circuit or the Tenth, the latter sitting in Denver. Being a Coloradan, the respondent made the obvious choice of the tribunal closest to his home. But he chose wisely, since he thereby avoided the tribunal from which *Jarkesy* and *Lucia Cos. I* emanated, rulings far less favorable to his position.

²²⁹ *Id.* at 1170.

²³⁰ *Id.* *Bandimere* opens with these cogent historical observations. It postulated that the Framers could not have foreseen the creature of the administrative law judge, and, better still, such an appointee presiding at securities law enforcement hearings. Nor could the Founders have imagined an Executive Branch comprised of more than four million people, most of them employees, but some of that bureaucratic army standing apart as officers of the United States, be they principal or inferior office-holders "who must be appointed under the Appointments Clause." *Id.* at 1170 (citation omitted).

²³¹ *Id.* at 1172–73.

²³² *Id.* at 1172; see also *Ryder v. United States*, 515 U.S. 177, 182 (1985) ("The Clause is a bulwark against one branch aggrandizing its power at the expense of another.").

²³³ *Bandimere*, 844 F.3d at 1172. In various parentheticals, Judge Matheson looked to the Federalist documents for supplementary discussion of separation of powers, accountability, and checking the President's authority to populate the Executive Branch. *Id.* at 1172 nn.5–6.

²³⁴ *Id.* at 1173 (quotation and citation omitted).

There followed an in-depth discussion of the Supreme Court's jurisprudence regarding those persons found to constitute inferior officers of the United States, and an extensive cataloging of those positions.²³⁵ This was set in counterpoise to *Freytag*,²³⁶ then punctuated by a notation that SEC ALJs are permitted to take office via the Administrative Procedure Act,²³⁷ and are the proper delegates of the Commission's lawful functions, pursuant to the 1934 Exchange Act.²³⁸ Possibly most telling in this discourse was the concession by the agency that "its ALJs are not appointed by the President, a court of law, or the head of a department."²³⁹

All this inexorably led to the Tenth Circuit's conclusion that, as decreed in *Freytag*, SEC administrative law judges are inferior officers of the United States, and they must therefore attain their rank via a process congruent with the Appointments Clause.²⁴⁰ Since the adjudicator in *Bandimere*'s case had not, the respondent possessed a valid Article II claim.²⁴¹ But the Tenth Circuit had one more critical piece of business to attend to. The tribunal was required to address the contrary outcome reached by the D.C. Circuit in *Lucia Cos. I*.²⁴²

Writing for this western appeals court, Circuit Judge Matheson promptly disposed of the matter.²⁴³ He opined that the appellate bench residing in the Nation's capital had concluded

²³⁵ *Id.* at 1173–74.

²³⁶ *Id.* at 1174–76.

²³⁷ *Id.* at 1174.

²³⁸ *Id.* at 1177.

²³⁹ *Id.* at 1176.

²⁴⁰ *Id.* at 1179, 1181.

²⁴¹ *Id.* at 1179. Circuit Judge Matheson then summarized the characteristics of the Commission's in-house judges which compelled categorizing them as officers pursuant to the *Freytag* inquiry. First, the office of SEC ALJ is established by statute. *Id.* Second, those same provisos set forth the duties, salaries, and means of appointment of those adjudicators. *Id.* Third, and most decisive as to the issue of proper classification, "SEC ALJs exercise significant discretion" in presiding over enforcement proceedings brought by the agency. *Id.* Among other things, these appointees supervise discovery, hear testimony, rule on motions, preside over hearings, and then issue initial decisions that might well transform into final action sanctioned by the Commission. *Id.* at 1179–80. "In sum," concluded Circuit Judge Matheson, "SEC ALJs closely resemble the STJs described in *Freytag*," in the main because they exercise important adjudicative functions, not mere ministerial tasks. *Id.* at 1181.

²⁴² *Id.* at 1182.

²⁴³ *Id.*

SEC ALJs are employees, not officers of the United States, primarily because the agency's administrative law judges cannot render final decisions.²⁴⁴

"We disagree," stated the Tenth Circuit, indicating that the finality (or purportedly lack thereof) of an ALJ's ruling is not dispositive.²⁴⁵ Once more, and again invoking the teachings of *Freytag*, the *Bandimere* panel deemed the totality of circumstances surrounding the SEC's ALJs, how they took office, the authority they possessed, and, again most especially, the significant discretion they exercised in adjudicating securities law cases, decreed that these persons were indeed officers of the United States.²⁴⁶ In this thoughtful manner, the Tenth Circuit brought forth the essence of the disagreement amongst the two warring circuits that would soon occupy the Supreme Court.

So *Bandimere* concluded finding that SEC ALJs were, in truth, officers of the United States, yet they attained office unconstitutionally, for reason that the rigors of the Appointments Clause had not been satisfied.²⁴⁷ Accordingly, the Commission's final rendering against this respondent was overturned due to that constitutional defect.²⁴⁸ Now the die was cast, and a final showdown before the Nation's highest Court appeared to be a foregone conclusion.²⁴⁹

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 1182; *accord* Burgess v. FDIC, 871 F.3d 297, 300–01 (5th Cir. 2017) (appointee still qualifies as an officer even if she lacks final decision-making authority).

²⁴⁶ *Bandimere*, 844 F.3d at 1179–81 (10th Cir. 2016).

²⁴⁷ *Id.* at 1181–82.

²⁴⁸ *Id.* at 1188.

²⁴⁹ A few brief notes regarding the supplemental opinions in *Bandimere* are helpful to our continued understanding of the magnitude of the constitutional issue revealed herein. In a concurring opinion, Circuit Judge Briscoe emphasized the structural significance of the Appointments Clause, as it "tether[s] key personnel ... to the sovereign power of the United States, and thus to the people." *Id.* at 1188 (Briscoe, J., concurring). Concomitantly, he stressed that the tribunal's opinion today does not place every ALJ in every federal agency in jeopardy, primarily because *Freytag*, the keystone to the panel's reasoning, made no such sweeping pronouncements. *Id.* at 1188–89 (Briscoe, J., concurring). In sharp contrast, the dissent penned by Circuit Judge McKay warned of repercussions from the majority's holding, describing it as endangering the status of nearly two thousand ALJs at sundry federal agencies, and potentially invalidating hundreds of thousands of decisions made annually. *Id.* at 1194, 1199 (McKay, J., dissenting).

C. Petitioning for Supreme Court Review

In ordinary circumstances, commentators have little or no need to discuss the petition for *certiorari* stage of a case which subsequently evolves into a Supreme Court landmark. But *Lucia*'s path to the high bench was somewhat exceptional, and therefore deserving of a few words of explanation.

Very briefly, Mr. Lucia's plea for high Court review assumed the shape one would expect, given his losses in the court below.²⁵⁰ He posited the salient question rather straightforwardly: "Whether administrative law judges of the Securities and Exchange Commission are Officers of the United States within the meaning of the Appointments Clause."²⁵¹

Far more remarkable was his advocacy contending the matter was ripe for review. Mr. Lucia characterized the division between *Bandimere* and his own case as an "intractable" circuit split.²⁵² Arguably correct, vis-à-vis the two tribunals in question; yet it failed to take cognizance of the many other circuits that were not so diametrically opposed.²⁵³

Nor did this petitioner brook any intermediate outcomes. Mr. Lucia foresaw only one resolution.²⁵⁴ "The question presented is binary; one of those two decisions *must* be wrong."²⁵⁵ Certainly, nothing unusual in a petitioner's strident advocacy, but remarkable nonetheless for its unwillingness to admit to any alternative holding.

Finally, Mr. Lucia, as the petitioner, boldly proclaimed his case was the ideal vehicle to resolve the extant Appointments Clause controversy.²⁵⁶ Among other things, he asserted the SEC had "dramatically increased" by both "number and proportion" the enforcement proceedings it placed before its in-house adjudicators, while simultaneously diminishing its resort to the district courts,²⁵⁷ that, notwithstanding over a dozen similar cases, only

²⁵⁰ Petition for Writ of Certiorari at i, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130) [hereinafter *Lucia* Petition for Certiorari].

²⁵¹ *Id.*

²⁵² *Id.* at 2.

²⁵³ *See id.* at 8–9.

²⁵⁴ *See id.* at 19.

²⁵⁵ *Id.* at 19 (emphasis in the original).

²⁵⁶ *Id.* at 32.

²⁵⁷ *Id.* at 33.

Lucia and *Bandimere* collided head-on over the constitutional question at the appellate level.²⁵⁸ And lastly, striking a note of impending disaster, Mr. Lucia pleaded that this disarray amongst the trial adjudicators, be they judicial or administrative actors, could only increase until the high Court restored harmony.²⁵⁹

And how did the respondent SEC react to all this? With pardons for stating the obvious, the litigant which prevailed in the court below typically resists *certiorari*, and vigorously opposes any modification of the outcome obtained from the lower tribunal.²⁶⁰

Not so in *Lucia*. The sea change brought about by the immediately prior presidential election caused both the Solicitor General, Noel J. Francisco, and the SEC, his nominal client, to abandon the D.C. Circuit's rulings favorable to the agency in *Lucia Cos. I* and *II*.²⁶¹ The government now urged the high Court to reverse the rulings below, on the grounds that the Commission's ALJs were, in truth, officers of the United States.²⁶² Therefore, petitioner and respondent agreed that the agency's in-house adjudicators had attained office in contravention of the Appointments Clause.²⁶³

But there was more to come from the government. Not only did the United States ask the Supreme Court to renounce its victory before the D.C. Circuit, it appended a further request to this 180 degree change in direction.²⁶⁴ The government now requested that the high Court "address whether the restrictions imposed by statute on [the] removal [of the Commission's ALJs] are consistent with the constitutionality prescribed separation of powers."²⁶⁵

In short, the respondent not only joined Mr. Lucia's argument as to the unconstitutional appointment of the SEC's in-house

²⁵⁸ *Id.* at 34.

²⁵⁹ *Id.* at 35.

²⁶⁰ See UNITED STATES COURTS (Aug. 31, 2019, 1:58 PM), <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> [<https://perma.cc/E4GV-5X6M>].

²⁶¹ See Cristian Farias, *Noel Francisco, Trump's Tenth Justice*, THE NEW YORK REPORT OF BOOKS: NYR DAILY (Aug. 29, 2019, 9:04 PM), <https://www.nybooks.com/daily/2018/08/09/noel-francisco-trumps-tenth-justice/> [<https://perma.cc/R4ZV-MGMV>].

²⁶² Brief for the Respondent at 9–10, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130) (November 2017) [hereinafter SEC *Certiorari* Brief].

²⁶³ *Id.* at 14, 18.

²⁶⁴ *Id.* at 21.

²⁶⁵ *Id.*

adjudicators, it added a separate challenge to the laws that immunized these jurists from at-will removal by the Chief Executive.²⁶⁶

Finally, for reason of the government's refutation of the D.C. Circuit's holdings below, the Solicitor General urged the Justices to appoint an *amicus curiae* to defend the now orphaned decision of the lower tribunal.²⁶⁷

Once the government reversed its position, it stayed the new course. Subsequent to the grant of review, the United States continued to concur with the petitioner that the Commission's ALJs are officers of the United States within the meaning of the Appointments Clause.²⁶⁸ Implicitly then, the government continued to espouse the opinion that the agency's in-house adjudicators attained office in derogation of Article II's mandates.

The additional challenge respecting removal was refined in further briefing, as follows: "whether the statutory restraints on removing [the ALJs] from office unconstitutionally impair the President's ability to faithfully execute the laws."²⁶⁹ In other words, if the appointment of the SEC's administrative law judges was constitutionally defective, *a fortiori* any encumbrance upon the Chief Executive's prerogative to remove those adjudicators at will was likewise constitutionally flawed.²⁷⁰

²⁶⁶ See also *id.* at 18.

²⁶⁷ *Id.* at 10. The government's about-face also engendered financial repercussions, which have yet to be resolved. The prestigious law firm of Gibson, Dunn & Crutcher, which represented Mr. Lucia *pro bono*, has asked the United States to pay more than \$800,000 for legal fees incurred in securing the petitioner's victory. Filing a fee application with the D.C. Circuit, the law firm cites the provisions of the Equal Access to Justice Act, a statute which entitles a prevailing party to fees and other expenses unless the government's position is substantially justified. Undoubtedly, this petition for the reimbursement of Mr. Lucia's fees "will place new scrutiny [on] the government's changed position" before the Supreme Court. See Coyle, *Gibson Dunn Fee Petition Puts New Focus on DOJ Switched Position in SCOTUS*, 206 N.Y. L.J. at p. 2, cl. 4 (Dec. 18, 2018). See generally Anthony Michael Sabino, *And Unequal Justice for All—Bankruptcy Court Jurisdiction under the Equal Access to Justice Act*, 22 MEM. ST. U. L. REV. 453, 458–62 (1992) (analyzing the Equal Access to Justice Act, its purpose, history, and statutory provisions).

²⁶⁸ Reply Brief for Respondent Supporting Petitioners at 1, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)) [hereinafter SEC Reply Brief].

²⁶⁹ *Id.* at 2.

²⁷⁰ One can only admire the government's commitment to its newfound position. Yet, we are left to ponder, given the confluence of events, if the government's urging of this separate question upon the Justices was influenced by *PHH I*,

Mr. Lucia and the United States were in accord on an additional matter of some significance. As the preceding discussion informs us, while the discord between the D.C. and Tenth Circuits on the Appointments Clause issue was quite obvious, a near-majority of other tribunals had avoided the constitutional question entirely.²⁷¹

Therefore, a question remained: was this limited conflict sufficiently ripe to merit high Court review? Notably, on that point the government again agreed with Mr. Lucia.²⁷² The Solicitor General concurred that the petitioner's case was the superior medium for resolution of the Appointments Clause challenge; accordingly, it asked that *Bandimere* be held in abeyance.²⁷³

One last wrinkle was added to the mix prior to the Supreme Court consenting to contemplate the internecine conflict. While the petition for *certiorari* was pending, the Commission ratified the appointment of all its ALJs, including the agency adjudicator who initially heard the enforcement proceeding against Mr. Lucia.²⁷⁴

It is a fair supposition that the SEC undertook this remedial step for reasons other than influencing the eventual outcome in *Lucia*. Far more practical, the Commission most likely promulgated this blanket ratification in order to preserve the authority of its in-house adjudicators in pending and future cases, and steel the results reached by their current deliberations against further constitutional challenges.

and the controversy raised in that proceeding over the Chief Executive's authority to remove a key official in a kindred regulatory body. *PHH Corp. v. CFPB (PHH I)*, 839 F.3d 1, 6 (D.C. Cir. 2016), *vacated and remanded en banc*, 881 F.3d 75 (D.C. Cir. 2018).

²⁷¹ Brief for Anthony Michael Sabino as Amici Curiae Supporting Respondents at 11–12, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130) (arguing for denying review given that the majority of circuits had yet to rule on the Appointments Clause question).

²⁷² SEC Certiorari Brief, *supra* note 262, at 24.

²⁷³ *Id.*; see also Petition for a Writ of Certiorari at 9, *SEC v. Bandimere* 844 F.3d 1168 (10th Cir. 2016) (No. 17-475). One week after the Court decided *Lucia*, it tied off loose ends by formally declining review of *Bandimere*. *SEC v. Bandimere*, 844 F.3d 1168, 1182 (10th Cir. 2016), *cert. denied*, 138 S. Ct. 2706 (2018). Moreover, Justice Gorsuch took no part in that decision, as he once called the Tenth Circuit home. See *id.*

²⁷⁴ See SECURITIES AND EXCHANGE COMMISSION, Order (Aug. 26, 2019, 8:00 PM), <https://www.sec.gov/litigation/opinions/2017/33-10440.pdf> [<https://perma.cc/PDQ5-TCRD>].

Certainly, it would be excessive to classify as unprecedented the events immediately preceding the high Court's grant of review in *Lucia*. Rather, let us categorize them as unusual, insofar as the government, the victor in the proceedings below, now effectively wished the ruling in its favor to be reversed.

Adding to the intrigue was the United States posing an additional question for the Justices to review.²⁷⁵ Clearly, the respondent recognized the utility of *Lucia*, not only to scrutinize the constitutional validity of the *appointment* of the SEC's ALJs, but to examine the companionable question of whether the present barriers to the Chief Executive's *removal* of the agency's adjudicators would survive an Appointments Clause test.²⁷⁶ Against this somewhat unusual backdrop, *Lucia* was at last ready for disposition by the high Court.

VI. ACT FOUR: THE SUPREME COURT DECIDES *LUCIA*

The particulars having now been set forth herein above, it is time to review the actual decision of the Supreme Court in *Lucia*. To be sure, the Court ably resolved the constitutional challenge to the power of SEC ALJs, while adding to its stock of Appointments Clause jurisprudence. Yet, as shall be discussed later on, the high Court's holding, while resolving the controversy at hand, might well have presaged future Article II challenges to the vast federal bureaucracy.

The Court's summary of the facts was brief; in fact, surprisingly so.²⁷⁷ It quickly noted the Commission's allegations that Mr. Lucia misled investors with his "Buckets of Money" strategy, administrative proceedings were presided over by an ALJ, and the adjudicator ruled against the respondent.²⁷⁸

With similar alacrity, that Court took cognizance of the petitioner's claim that the ALJ held office in violation of the Appointments Clause, the full Commission rejected his assertion, and thereafter a panel of the D.C. Circuit sided with the SEC.²⁷⁹

²⁷⁵ SEC Reply Brief, *supra* note 268, at 20–21.

²⁷⁶ *See id.*

²⁷⁷ *See Lucia v. SEC*, 138 S. Ct. 2044, 2049–50 (2018).

²⁷⁸ *Id.* at 2049–50.

²⁷⁹ *Id.* at 2050.

Few words were spared to note the *en banc* split of the entire D.C. tribunal.²⁸⁰

Shockingly terse was the notation that the D.C. Circuit's affirmance in *Lucia* conflicted with the Tenth Circuit's holding in *Bandimere*.²⁸¹ No discussion of *Bandimere* followed.²⁸² Nor did the *Lucia* Court even mention the differing approaches of the many other circuits wherein the power of SEC ALJs was challenged.²⁸³

Instead, the high bench was content to characterize the internecine conflict as a split between those two circuit courts alone, effectively adopting Mr. Lucia's posture as to the question to be resolved.²⁸⁴ Indeed, the Court did spare a few words to note the government's about-face on the controversy, and, more importantly, to praise the *amicus curiae* appointed by the high Court to defend the judgment below.²⁸⁵ The preliminaries thus disposed of in summary fashion, the high bench moved on to the substance of the controversy.

Justice Kagan minced no words in pronouncing the issue to be resolved.²⁸⁶ "The sole question here," she declared, is whether the administrative law judges of the SEC are "Officers of the United States' or simply employees of the Federal Government."²⁸⁷ After positing the essence of the Appointments Clause, the learned jurist acknowledged the undisputed fact that the ALJ who decided the petitioner's case was assigned to the task by the SEC staff, and not the Commission itself.²⁸⁸

This led to a crucial observation by Justice Kagan. If it was decided that the ALJs were, in fact, "officers" of the United States, Mr. Lucia's claim of a constitutional violation was indeed valid.²⁸⁹

²⁸⁰ *See id.*

²⁸¹ *See id.* (citing *Bandimere v. SEC*, 844 F.3d 1168, 1179 (2016)).

²⁸² *Id.*

²⁸³ *Id.* at 2050.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 2050–51. The *amicus curiae* appointed to defend the D.C. Circuit's decision was Anton Metlitsky, a former law clerk to Chief Justice John G. Roberts. *Id.* at 2051 n.2; *see also* Anton Metlitsky, O'MELVENY, <https://www.omm.com/professionals/anton-metlitsky/> [<https://perma.cc/JVL6-23DZ>].

²⁸⁶ *Id.* at 2051.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

Then “[t]he only way to defeat his position” was to hold the Commission’s adjudicators were “non-officer employees” or, put another way, “lesser functionaries’ in the Government’s workforce.”²⁹⁰

In order to resolve this weighty constitutional question, the Court first established a framework for decision, that structure anchored by two fundamental landmarks.²⁹¹ The first such cornerstone reached back nearly one hundred and forty years ago, to Reconstruction Era America. In *United States v. Germaine*,²⁹² the high bench classified doctors hired by the federal government to administer physical examinations as “mere employees” because the work they performed was but occasional or temporary, not continuing or permanent.²⁹³ *Germaine* was thus emplaced to occupy one end of the spectrum.

The other anchorage was occupied by *Buckley v. Valeo*, well-known as one of the Court’s more illustrious exercises in constitutional jurisprudence in the latter half of the twentieth century.²⁹⁴ Justice Kagan stressed the importance of *Buckley* to the matter at hand, as the former “set out another requirement, central to [*Lucia*].”²⁹⁵

Buckley held that members of a federal commission qualified as “officers” for reason that they “exercis[ed] significant authority pursuant to the laws of the United States.”²⁹⁶ As summarized by the *Lucia* court, the appropriate inquiry here must focus upon “the extent of power an individual wields in carrying out his assigned functions.”²⁹⁷

²⁹⁰ *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976)).

²⁹¹ *Id.*

²⁹² *United States v. Germaine*, 99 U.S. 508, 511–12 (1879).

²⁹³ *Lucia*, 138 S. Ct. at 2051 (citing *Germaine*, 99 U.S. at 511–12) (quotations omitted).

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

²⁹⁷ *Lucia*, 138 S. Ct. at 2051. As the Court relegated it to a footnote, likewise we shall treat the following in a mere parenthetical. Not at issue in the instant case was the distinction between “principal” and “inferior” officers. *Id.* at n.3 (citing *Edmond v. United States*, 520 U.S. 651, 659–60 (1997)). Pursuant to the Appointments Clause, the former can only be appointed by the President, with the advice and consent of the Senate; the latter may be appointed by the President, the courts or the heads of departments, if Congress so provides for the alternate procedure. U.S. CONST., art. II, § 2, cl. 2.

The Court was clearly motivated to establish these foundation stones because the government, among others, sought an elaboration upon *Buckley's* articulation of the “significant authority” test.²⁹⁸ Yet the Justices refuted the request, declaring “that project unnecessary.”²⁹⁹

Rather, the Court looked to another decision along the spectrum established by *Germaine* and *Buckley*, the case entitled *Freytag v. Commissioner*.³⁰⁰ The Justices found *Freytag* instructive here, for reasons that it applied the “significant authority” test of *Buckley*, without adornment, to adjudicators “who are near-carbon copies” to the ALJs in the SEC’s service.³⁰¹ Indeed, the *Lucia* Court pronounced that the *Freytag* theorem “necessarily decides” the case at bar.³⁰²

As recapitulated by Justice Kagan, *Freytag* concerned the constitutional status (or lack thereof) of the “special trial judges” of the United States Tax Court.³⁰³ Referred to by the Court as STJs for sake of brevity, the authority of these adjudicators varied from controversy to controversy.³⁰⁴ They could conclusively decide relatively minor matters on behalf of the Tax Court.³⁰⁵ Yet in more significant cases, a STJ was delimited to submitting proposed findings and rulings to a Tax Court judge for further review, and, presumably, a final judgment.³⁰⁶

Specific to *Freytag*, the disputed tax deficiency was a billion and a half dollars, a major proceeding indeed.³⁰⁷ Understandably, the STJ conducted in excess of three months of hearings.³⁰⁸ When the Tax Court jurist adopted the specialist’s draft decision as his own, the aggrieved taxpayer challenged the ruling on the

²⁹⁸ See *Lucia*, 138 S. Ct. at 2051.

²⁹⁹ *Id.* The Court pointedly added that “maybe one day” the need to refine *Buckley* shall arise, but “that day is not this one.” *Id.* Admittedly, a neat rebuff by Justice Kagan.

³⁰⁰ *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868 (1991).

³⁰¹ *Lucia*, 138 S. Ct. at 2052.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* (citing *Freytag*, 501 U.S. at 873).

³⁰⁶ *Id.* (citing *Freytag*, 501 U.S. at 873).

³⁰⁷ *Id.*

³⁰⁸ *Id.*

constitutional ground that the STJ did not hold office in conformity with the Appointments Clause.³⁰⁹

In relating *Freytag* to the matter at hand, Justice Kagan emphasized that the Court in the former case emphasized the significance of the duties of office exercised by the STJs.³¹⁰ Now writing for the high bench in *Lucia*, the Court's third newest Justice stressed *Freytag*'s reliance upon the fact that these tax specialists took testimony, ruled on evidentiary matters, and conducted proceedings.³¹¹ In doing so, these adjudicators exercised broad discretion.³¹² "That fact meant they were officers, even when their decisions were not final," *Lucia* declared.³¹³

That summary of *Freytag* given, the *Lucia* majority reiterated that it now possessed everything necessary to decide the instant case.³¹⁴ It found that, similar to the Tax Court's specialist judges, the Commission's ALJs "hold a continuing office established by law," a fact undisputed by any party, most probably because an administrative law judge's appointment, salary, and duties are clearly defined by statute.³¹⁵

Moreover, the SEC's in-house jurists exercise significant discretion and perform important functions.³¹⁶ Justice Kagan pronounced they hold "all the authority needed to ensure fair and orderly adversarial hearings," much like Article III judges.³¹⁷

Once more, *Lucia* catalogued these essential attributes of judicial power as the ability to administer oaths, take testimony, examine witnesses, rule on motions, conduct trials, and enforce compliance with their directives.³¹⁸ "So point for point," in drawing

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* (citing *Freytag v. Comm'r*, 501 U.S. 868, 882 (1991)).

³¹³ *Id.* In a footnote, *Lucia* makes brief mention that the *Freytag* Court also proffered the view that, since it was conceded by the government that STJs could enter final judgment in smaller cases, "it made no sense" for the Justices then to categorize these jurists as officers in some proceedings, but not in others. *Id.* at n.4. The majority was no doubt compelled to address this facet in a parenthetical in order to deflect a related point made in Justice Sotomayor's dissent. *Id.* at 2065 (Sotomayor, J., dissenting).

³¹⁴ *Id.* at 2053.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.* at 2053.

³¹⁸ *Id.*

comparisons between STJs and the SEC's ALJs, Justice Kagan found both sets of adjudicators held "equivalent duties and powers" in the course of completing their assigned tasks.³¹⁹

Lastly, the Commission's administrative law judges, much like their fellows in *Freytag*, issue decisions—"except with potentially more independent effect."³²⁰ The *Lucia* majority noted that in a major case a Tax Court judge must always review a STJ's proposed findings.³²¹ In contradistinction, if the full Commission declines to review the conclusion of one of its own ALJs, then the jurist's decision becomes final and is backed by the full weight of the SEC.³²² In other words, declared Justice Kagan, "the [Commission] ALJ can play the more autonomous role."³²³

Characterizing that attribute as a "last-word capacity," the majority deemed it inescapable that the case at bar must fall into alignment with *Freytag*.³²⁴ "If the Tax Court STJs are officers, as *Freytag* held, then the Commission's ALJs must be too."³²⁵

To reinforce that holding, *Lucia* turned to various assertions made in support of viewing the agency's adjudicators as ordinary employees.³²⁶ One was that the SEC's ALJs seemingly lack the power to punish contempt; the second, that the Commission's rules require no deference by the ruling body to an administrative law judge's findings.³²⁷

The Court would have none of it.³²⁸ Even lacking in the formal authority to punish contempt of court, a SEC jurist is nevertheless empowered to shape proceedings in such a manner as to assure compliance with the adjudicator's edicts, said the high bench.³²⁹

Not the least of these "conventional weapons," as so poetically described by Justice Kagan, is the ALJ's ultimate power to issue an opinion, which the full Commission can very well adopt

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.* at 2053–54.

³²² *Id.* at 2053.

³²³ *Id.*

³²⁴ *Id.* at 2054.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

in toto.³³⁰ That capability constitutes sufficient and “substantial informal power to ensure the parties stay in line.”³³¹

The second argument, pertaining to the standard of oversight applied to an administrative law judge’s decision, fared no better.³³² The standard of subsequent review was of no moment to *Freytag*’s Appointments Clause analysis, found Justice Kagan, and so it should not be conclusive in *Lucia*.³³³ In any event, held the Court, the SEC often accords deference to its adjudicators, particularly with regard to matters of fact-finding and credibility.³³⁴

Apparently accepting as true the counter-assertion that the Commission employs a generally deferential standard when sitting in review of its ALJs, Justice Kagan deemed it nearly automatic that the full SEC would rarely upset the holdings of its adjudicatory staff.³³⁵ In all, the Court found the distinction drawn to “make no difference for officer status” in an Article II inquiry.³³⁶ And so, the majority disposed of the last obstacle to its ultimate declaration.

Combining its own reasoning in the case at bar with the rationale previously espoused in *Freytag*, the *Lucia* Court declared that the Commission’s administrative law judges are “officers of the United States,” subject to the strictures of the Appointments Clause of Article II.³³⁷ And since the prerequisites of that constitutional proviso had not been complied with, the SEC’s ALJs held office in an unconstitutional manner.³³⁸

The substance of its holding thus delivered, the high bench then turned to the best remedy for the constitutional defect that now lay exposed. Justice Kagan commenced with the precept that a party who timely challenges the constitutional validity of the appointment of the adjudicator hearing his case is entitled to relief.³³⁹ The Court speedily moved to answer the obvious question of what relief accordingly flows from said principle. Justice Kagan

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.* at 2054–55.

³³³ *Id.* at 2054.

³³⁴ *Id.* at 2054–55.

³³⁵ *Id.* at 2055.

³³⁶ *Id.* at 2054.

³³⁷ *Id.* at 2055.

³³⁸ *Id.*

³³⁹ *Id.* (citing *Ryder v. United States*, 515 U.S. 177, 182–83 (1995)).

readily replied that the most appropriate remedy is a new hearing before a constitutionally appointed official.³⁴⁰ But here the Court imposed an additional requirement to remediate Mr. Lucia's constitutional injury.³⁴¹

The Court decreed that the administrative law judge who originally heard the petitioner's case was prohibited from presiding at any renewed enforcement proceedings.³⁴² The Court ordered that a new ALJ properly appointed pursuant to the Appointments Clause oversee all subsequent hearings.³⁴³ Justice Kagan postulated that the first adjudicator "cannot be expected to consider the matter as though he had not adjudicated it before."³⁴⁴ To be sure, the majority found that, even if the first jurist was subsequently appointed in a manner compliant with Article II, that remediation would nonetheless be insufficient to expunge the taint of the prior constitutional infirmity.³⁴⁵

The sanctity of the Appointments Clause having been upheld, and the appropriate remedy accorded to the petitioner, the Supreme Court brought *Lucia* to a close. Standing above all else was the Court's unequivocal declarations that the administrative law judges of the Securities and Exchange Commission were officers of the United States, and they could constitutionally hold office if they were appointed in a manner compliant with the Appointments Clause of Article II.³⁴⁶ Since the ALJ presiding over Mr. Lucia's proceeding had not, the decision adverse to the petitioner was reversed and the enforcement proceeding against him was remanded.³⁴⁷

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* The majority's edict in this regard balanced principled decision-making with pragmatism. As to the first, the Court noted that barring the first adjudicator from rehearings fostered timely Appointments Clause challenges, thereby better serving the objectives of that constitutional mandate. *Id.* at 2055 n.5. As to the second, the availability of other SEC ALJs, and, indeed, the full Commission itself, rendered the Court's mandate for a new adjudicator a simple instruction, one easily obeyed. *Id.* at 2055 n.5.

³⁴⁶ *Id.* at 2055.

³⁴⁷ *Id.* at 2056. The Court wisely refrained from addressing Lucia's further claim that the Commission's recent order ratifying the appointment of all its ALJs did nothing to solve the constitutional defect. Aside from the implicit

Before departing *Lucia* entirely, note must be taken of the concurring opinion therein of Justice Thomas.³⁴⁸ Justice Thomas's approach to the case at bar was most intriguing. He readily agreed that *Lucia* was "indistinguishable" from *Freytag*.³⁴⁹ Yet that was not enough, he declared.³⁵⁰ Looking to the next test of Article II and beyond, Justice Thomas postulated that "this Court will not be able to decide every Appointments Clause case by comparing it to *Freytag*."³⁵¹ The learned Justice's concern was rooted in his perception that "our precedents in this area do not provide much guidance."³⁵²

Justice Thomas characterized *Freytag* as instructing what suffices to qualify someone as an officer of the United States, but *Freytag* and its fellows "have never clearly defined what is *necessary*" to declare that an office-holder has attained the vaunted constitutional status of an "officer[] of the United States."³⁵³

To end this deficiency, Justice Thomas proposed an examination of the Appointments Clause grounded upon original meaning.³⁵⁴ To that end, the concurring opinion commenced with the obligation of an ongoing statutory duty as the foremost defining attribute of an officer of the United States.³⁵⁵

Turning to the constitutional text, Justice Thomas affirms that the Appointments Clause provides the "exclusive process" for appointing officers of the United States.³⁵⁶ A subroutine of the mandatory procedure is the alternative methodology for appointing

point that the question was not yet ripe for the high Court's review (and it might never be), the majority parenthetically pointed out the several possibilities: the full Commission might hear *Lucia*'s case on the remand; a new ALJ might be the beneficiary of a constitutional appointment; or, in a truth left unspoken by the Court, another method of achieving compliance with Article II might be employed. *Id.* at 2055 n.6. At the end of the day, there was no good reason to reach that sub-issue, and the Court rightly left it alone.

³⁴⁸ *Id.* at 2056–57 (Thomas, J., concurring). Justice Gorsuch joined in Justice Thomas's concurrence.

³⁴⁹ *Id.* at 2056 (Thomas, J., concurring).

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.*

“inferior” officers of the United States.³⁵⁷ Here, noted Justice Thomas, Article II “strikes a balance between efficiency and accountability.”³⁵⁸

In contradistinction to principal officers, who must endure the arduous process of presidential nomination and Senate ratification, a strictly limited number of governmental actors are empowered to appoint junior officers without the rigors of senatorial hearings and oversight.³⁵⁹ While accommodating of “the sheer number of inferior officers” in service to the Nation, this alternative process nonetheless “maintains clear lines of accountability” to the People.³⁶⁰ Those are the procedures, and the more practical reasons behind them, according to Justice Thomas.³⁶¹

Turning to the original meaning of the pivotal terminology, Justice Thomas hypothesized that the Founders most likely perceived officers of the United States to be those “who perform an ongoing, statutory duty—no matter how important or significant the duty.”³⁶² Furthermore, Founding Era documentation reflects a generally held belief that the obligations of these federal officers were duties established and defined by statute.³⁶³

His journey to the original meaning of the terms in question now complete, Justice Thomas applied them to the case at bar. He opined that the SEC’s administrative law judges “easily qualify” as officers of the United States.³⁶⁴ Setting aside the relative importance or significance of their duties, Judge Thomas declared “[a]ll that matters is that the [ALJs] are continuously responsible for performing them.”³⁶⁵ That was conclusive, in the estimation of the veteran Justice.

For these reasons, Justice Thomas joined the majority in its opinion, firmly convinced “the original meaning of the Appointments Clause” inevitably points to the determination that

³⁵⁷ *Id.* (citing U.S. CONST. art. II, § 2, cl. 2).

³⁵⁸ *Id.*

³⁵⁹ U.S. CONST. art. II, § 2, cl. 2.

³⁶⁰ *Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring); THE FEDERALIST NO. 76, at 483 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

³⁶¹ *Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring).

³⁶² *Id.*

³⁶³ *Id.* at 2057 (citations omitted); see also U.S. CONST. art. II, § 2, cl. 2.

³⁶⁴ *Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring).

³⁶⁵ *Id.* at 2057.

the Commission's adjudicators are officers of the United States, precisely because they are charged with fulfilling ongoing statutory duties.³⁶⁶ And, since the agency's ALJs lacked a proper Appointments Clause pedigree, their holding of office amounted to an irremediable constitutional violation.³⁶⁷

Our analysis of *Lucia* does not end here. Equally worthy of contemplation is the opinion of Justice Breyer, concurring in the judgment in part, and dissenting in part.³⁶⁸ We posit this for reason of Justice Breyer's differing methodology, and his focus upon certain aspects of this Appointments Clause controversy which the majority did not address directly.

Foremost in Justice Breyer's approach was his stated inclination to resolve the instant case upon statutory, and not constitutional, grounds.³⁶⁹ This preference was rooted in his grave concern that the case at bar necessarily involved the resolution of "a different, embedded constitutional question," that companion issue being "the constitutionality of the statutory 'for cause' removal protections Congress afforded administrative law judges."³⁷⁰

It is a "well approved principle of constitutional and statutory construction that the power of removal of executive officers [is] incidental to the power of appointment."³⁷¹ No doubt, the Justice's caution arose from the fact of the Solicitor General's change in position on the basic Appointments Clause question initially raised by the petitioner, which compelled the United States to urge the high Court to resolve this secondary constitutional controversy.³⁷²

To be sure, Justice Breyer was in concert with the majority's holding that the Commission's ALJs attain office in contravention of the Appointments Clause.³⁷³ Yet, as aforesaid, his path to

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 2057 (Breyer, J., concurring in the judgment in part and dissenting in part). Justices Ginsburg and Sotomayor joined Justice Breyer, but solely insofar as they agreed with him that Lucia's case could be remanded to the same administrative law judge, and naming a new adjudicator was unnecessary. *Id.* at 2057, 2067.

³⁶⁹ *Id.* at 2057.

³⁷⁰ *Id.*

³⁷¹ *Myers v. United States*, 272 U.S. 52, 119 (1926).

³⁷² *Lucia*, 138 S. Ct. at 2050.

³⁷³ *Id.* at 2057 (Breyer, J., concurring).

that same conclusion commenced with statutory law, precisely, the Administrative Procedure Act (APA).³⁷⁴ Justice Breyer found it critical that the administrative law judge designated in *Lucia* (and his peers elsewhere) was appointed by the SEC staff, not the Commission itself.³⁷⁵

Justice Breyer contended that the APA, correctly read, bestows the appointive power in the Commission, itself a collective head of a department, a status in harmony with the explicit text of the Appointments Clause.³⁷⁶ By virtue of investing that prerogative in the full body, the statute concomitantly forbids its delegation to the agency's staff.³⁷⁷ Such an interpretation of the relevant statute, opined the Justice, avoids the more troublesome constitutional question.³⁷⁸

Intriguingly, Justice Breyer posited that this analysis “may differ for other agencies that employ administrative law judges.”³⁷⁹ He specifically mentioned the statute governing the Social Security Administration and inferred that the abundance of dissimilar statutory regimes which govern the plethora of federal agencies other than the SEC might well lead to disparate outcomes on the same question.³⁸⁰

“The upshot, in my view,” emoted Justice Breyer, is that the Court should resolve nothing today beyond finding that the Commission's ALJs were not lawfully appointed.³⁸¹ But the learned Justice urged that this outcome should be reached on statutory grounds alone.³⁸² Proceeding to the constitutional question would, by necessity, implicate the Court's decision in *Free Enterprise Fund*.³⁸³ To invoke that stalwart precedent in the case at bar might provoke “dramatic” results, he warned.³⁸⁴

³⁷⁴ *Id.* See generally 5 U.S.C. § 500 (1999).

³⁷⁵ *Lucia*, 138 S. Ct. at 2058 (Breyer, J., concurring).

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.* This portion of the concurrence is consistent with Justice Breyer's concern for the continuance in office of the ALJs serving the Social Security Administration, as he voiced nearly a decade ago in *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010). *Lucia*, 138 S. Ct. at 2059.

³⁸¹ *Id.* at 2058–59.

³⁸² *Id.* at 2057.

³⁸³ *Id.* at 2059.

³⁸⁴ *Id.*

Couching his trepidation in a sequence of hypotheticals, Justice Breyer cautioned that making a full-fledged application of *Free Enterprise Fund* to the validity of the appointments in question here might then require applying the same rubric of constitutional analysis to the concomitant statutory removal procedures safeguarding ALJs.³⁸⁵ “This would risk transforming administrative law judges from independent adjudicators into *dependent* decision makers,” beholden to the Commission which installed them in office.³⁸⁶ Justice Breyer did not sugarcoat his reasons for hesitating to act precipitously here. He envisioned any continuation of the constitutional inquiry as a threat to the merit-based civil service system that has held sway for over a century.³⁸⁷

Viewed from a certain perspective, it would seem Justice Breyer’s key concern was that indulging in an Article II examination would inevitably lead to the dismantling of the “for cause” removal restrictions protecting the continuance of ALJs in office.³⁸⁸ Given that danger, he advocated for the Court binding itself to a statutory analysis only, thereby avoiding the invocation of *Free Enterprise Fund*, and its unavoidable imposition of the strictures mandated by the Appointments Clause.³⁸⁹

Justice Breyer then elucidated why he believed that making a ruling upon constitutional grounds in the instant case could be upsetting to legislative intent.³⁹⁰ Properly understood, the Appointments Clause grants Congress “a degree of leeway as to whether particular Government workers are officers or instead mere employees.”³⁹¹

Justice Breyer grounded his belief upon the text of Article II, which plainly states that “Congress may by Law” vest the appointment of inferior officers in department heads and others.³⁹² This suggested to Justice Breyer that “Congress, not the Judicial Branch alone, must play a major role” in determining

³⁸⁵ *Id.* at 2060.

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.* at 2061–62.

³⁸⁹ *Id.* at 2058–59.

³⁹⁰ *Id.* at 2062–63.

³⁹¹ *Id.* at 2062.

³⁹² *Id.* at 2060 (emphasis in the original) (quoting U.S. CONST. art. II, § 2, cl. 2).

an individual's classification as an officer of the United States.³⁹³ Accordingly, in these matters legislative intent "is often highly relevant."³⁹⁴

Continuing in this vein of circumspection, Justice Breyer argued against the imposition of bright-line rules.³⁹⁵ In light of the diversity of civil service positions, an examination of their statutory underpinnings, "while highly relevant, need not always prove determinative."³⁹⁶ The Justice cited these realities as further support for his contention that Congressional intent and formulations have value in classifying persons as officers or employees within the vast federal bureaucracy.³⁹⁷

Progressing towards his conclusion, Justice Breyer turned to the distinct matter of the remedy ordered by the majority in the case at bar. And just as separately, he disagreed with the edict that a fresh magistrate had to preside over the remand of Mr. Lucia's proceedings.³⁹⁸ Making short shrift of this final issue, Justice Breyer deemed it sufficient that the SEC had, as the head of department, bestowed a commission of office (albeit subsequently) upon the original adjudicator.³⁹⁹ The instant situation is no different from the customary remand by a tribunal to the initial hearing officer, and Justice Breyer found the matter at hand to be indistinguishable from the nominal case.⁴⁰⁰

Justice Breyer concluded the duality of his concurrence and dissent with a stern warning. The Court's methodology this day in resolving *Lucia* was "problematic" at best.⁴⁰¹ The bifurcation of the appointments controversy from the removal provisions

³⁹³ *Id.*

³⁹⁴ *Id.* at 2062–63. Justice Breyer was careful to note that Congress does not have a free hand in these matters. The lawmakers may not arbitrarily recategorize true officers of the United States as ordinary employees. No doubt the Justice was fearful of legislative fiat reshaping the government at the whim of Congress. *Id.* at 2063.

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.* at 2064.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* Among other things, Justice Breyer noted the change in adjudicators was never addressed below, and, more to his point, Justice Breyer could not explain "why the Constitution would require" a new ALJ. *Id.*

⁴⁰¹ *Id.*

question threatened to unravel the entire federal construct of administrative adjudication one agency at a time.⁴⁰²

Lucia ends there, and now assumes its rightful place in the pantheon of constitutional jurisprudence. And while we have described in detail the wisdom of the high Court in resolving this important Article II controversy, we have one vital mission remaining.

VII. ANALYSIS AND COMMENTARY

We come now to the important task of analyzing *Lucia*. From the outset, it must be made clear that we eschew the traditional mode of review, that is, merely dissecting this new landmark in isolation, with nothing more. That methodology is woefully insufficient in the instant case.

To be certain, there is a good deal more to be said with regard to this latest proclamation of the Supreme Court. *Lucia* is a landmark first notable for how it arrived at the high Court, for reason that its route to the Justices varied from the customary path.⁴⁰³ Nor is it even enough to make a more fulsome examination of this precedent's lineage.

What *Lucia* bodes for the future, the questions left unanswered, and the significant controversies that may yet ensue, is equally worthy of our contemplation, possibly more so. We now address these points *seriatim*.

⁴⁰² *Id.* Justice Sotomayor, as joined by Justice Ginsburg, filed a dissent, wherein she contended that "Commission ALJs are not officers because they lack final decision making authority." *Id.* at 2066 (Sotomayor, J., dissenting). By virtue of this conclusion, she posited "it is not necessary to reach the constitutionality of their removal protections." *Id.* at 2067. Lastly, the dissent joined Justice Breyer's contention that the same ALJ who heard *Lucia*'s enforcement proceeding in the first instance could preside on the remand. Interesting on two fronts, Justice Sotomayor's dissent did not find *Freytag* as essential to finding a resolution here as did the majority. *Id.* Second, the dissent found *Free Enterprise Fund* distinguishable from the case at bar. *Id.* For reasons we shall soon elaborate upon in the subsequent discussion, we cannot help but think that the learned dissent garnered the wrong conclusion from certain facts, most especially the relative power of the Commission's ALJs. Justice Sotomayor made much of the power of the full body to review, and even reject, the holdings of its adjudicators. Yet the dissent gave short shrift to the SEC's inherent power to adopt the findings of its delegates as the agency's own, let alone the possibility, if not the fact, that many proceedings are never carried beyond the ALJ level, thereby making the determinations of these administrative law judges final and binding.

⁴⁰³ *Id.* at 2049–51.

A. Lucia and Its Appointments Clause Teachings

It is only fitting that the first portion of our analysis be devoted to the wisdom *Lucia* imparts with respect to the Appointments Clause, and our understanding thereof. Again, this is what makes this new landmark one of the constitutional variety and not merely a resolution of securities law issues.

Hereinabove, we have explicated the precise language of *Lucia*; therefore, we have no need at this point to regurgitate same. Rather, our analysis shall be of the essentials of this newest landmark, for reason that part of *Lucia*'s elegance is its simplicity.

First, consider the initial layer of the Court's decision. It brings together a pair Article II precedents separated in time by nearly a century yet bound by their clear expressions of the meaning of the Appointments Clause.⁴⁰⁴

Anchoring one corner of this foundation is *Germaine*, the post-Civil War case that distinguished officers of the United States from mere employees, based, in part, upon the permanency of their endeavors.⁴⁰⁵

Standing opposite is the companionable case of *Buckley v. Valeo*, and its wisdom that it is the exertion of significant authority by an office-holder which largely determines if that person should be classified as an officer of the United States.⁴⁰⁶ Yet these counterparts, important as they might be, provided only the first level of the necessary Appointments Clause critique.⁴⁰⁷

Far more crucial is the role the high Court assigned to *Freytag* in resolving the current controversy regarding the appointment of the SEC's ALJs. The first and most telling point is the kinship between the adjudicators challenged in *Lucia* and the special trial judges under scrutiny in *Freytag*. Without putting too fine a point on it, both sets of jurists toiled internally at

⁴⁰⁴ *Id.* at 2051.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ As indicated hereinabove, we concur with the Court's choice not to embellish upon the teachings of *Buckley*. We agree it would simply have been unwise to do so, for any expansion of *Buckley* would have been superfluous to deciding *Lucia*. Rather, the Justices shall await a justifiable need to clarify *Buckley*, assuming it ever arises, and the proper context in which to expound upon that vaunted landmark.

important government agencies, deliberated upon complex factual matters and even more complicated disputes of law, and then issued decisions with significant repercussions for private citizens embroiled in litigation with the sovereign.⁴⁰⁸

Most compelling, it was the means by which these in-house judges adjudicated the matters put before them by their respective agencies. Both the SEC's administrative law judges and the Tax Court's STJs heard testimony, weighted credibility, and held considerable sway over the course of these contested proceedings.⁴⁰⁹ An exercise of "significant authority," indeed, as defined by the Supreme Court consistently throughout *Germaine*, *Buckley*, and *Freytag*.⁴¹⁰ In a very real sense, *Lucia* did not break new ground with respect to officer status being derived from the exercise of significant authority. Rather, it can fairly be said that *Lucia* was the logical and sensible outcome of its antecedents.

Lastly, by placing the probability of the finality of the decisions rendered by the SEC's in-house judges in contradistinction with the potential for conclusiveness enjoyed by the specialist tax adjudicators, the *Lucia* case wisely and pragmatically recognized the true extent of the "significant authority" routinely exercised by jurists who have much in common in the discharge of their duties.⁴¹¹ Little wonder the Supreme Court declared the SEC ALJs of *Lucia* are almost complete duplicates of the STJs, and therefore subject to the exact same Appointments Clause precepts enunciated in *Freytag*.⁴¹²

It is beyond peradventure that *Freytag* comprehensively listed the elements which classify an office-holder as an officer of the United States subject to the requirements of the Appointments Clause.⁴¹³ *Lucia* shares that same worthwhile characteristic.

In this newest Article II landmark, Justice Kagan parsed these attributes into two distinct categories: the nature of the office and the powers exercised by the appointee.⁴¹⁴

⁴⁰⁸ *Id.* at 2053.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 2051–53.

⁴¹¹ *Id.* at 2052.

⁴¹² *Id.* at 2053.

⁴¹³ *Id.*

⁴¹⁴ *Id.* at 2052–53.

As to the first, *Lucia* bestows officer of the United States status where the position in question is established by statute, continuously operates (and, conversely, is therefore not intermittent), pays a salary, and imposes duties set out in the law.⁴¹⁵ One might categorize these as the structural components establishing an appointee as an officer of the United States subject to the Appointments Clause.

The second body of elements which lead to classification as an officer of the United States bound to the rigors of Article II are the actual tasks to be performed by the office-holder.⁴¹⁶ The greater the discretion exercised by the appointee, the more significant the functions she performs, then the more certain the individual is an officer of the United States.⁴¹⁷

Quite telling is how the *Lucia* majority compared the means by which the SEC's ALJs conduct proceedings with the customary duties of full-fledged Article III jurists.⁴¹⁸ There is an undeniable symmetry here.

Federal judges attain their lofty posts by an appointive process clearly set out in Article II.⁴¹⁹ *Lucia* has now decreed that agency adjudicators must undergo the same rigors of the Appointments Clause because they exercise a portion of the sovereign power of the United States, again something that only true officers of the United States are capable of doing.⁴²⁰ While leagues away from parity with the Article III judiciary, this shared characteristic compels the imposition of the same constitutional process for appointment.⁴²¹

This was a bold step by the *Lucia* Court, to so unequivocally catalogue these trappings of judicial authority routinely exercised by the Commission's administrative law judges. To be sure, Justice Kagan's point-by-point comparison was between

⁴¹⁵ *Id.*

⁴¹⁶ *Id.* at 2053.

⁴¹⁷ *Id.* at 2052–54.

⁴¹⁸ *Id.* at 2053.

⁴¹⁹ See U.S. CONST. art. II, § 2, cl. 2.

⁴²⁰ *Lucia*, 138 S. Ct. at 2055.

⁴²¹ Recall the earlier observation herein that Congress provided the catalyst for such comparisons when it renamed these adjudicators administrative law judges, and explicitly declared that the ALJs shared the characteristics of Article III jurists. See *supra* notes 17–18 and accompanying text.

the Tax Court's STJs and the SEC's in-house jurists.⁴²² Yet implicit therein was the unmistakable similarity between the nominal powers of the latter agency's adjudicator with the true exercise of the judicial power of the United States by those holding the office of Article III judge.⁴²³

In this respect, the eventual outcome of *Lucia* was obvious. Once the high Court decided to employ the same methodology found in *Freytag*, the *Lucia* Court was compelled to reach the same outcome. Anything else would have usurped the wisdom of the former case.

Put another way, if the *Freytag* Court deemed the specialist tax jurists to be officers of the United States because of the judicial power they wielded, then regard for precedent—not to mention plain sense—required *Lucia* to make the same declaration for the Commission's ALJs, who functioned in a nearly identical manner.⁴²⁴

Also worthy of our respect is *Lucia*'s close scrutiny of the finality of decisions reached by the SEC ALJs, particularly when compared to the powers of the STJs in *Freytag*, and as a component of determining status as officers of the United States. The *Lucia* Court took pains to note that the adjunct tax jurists were subject to far more oversight of their rulings than the Commission's administrative law judges.⁴²⁵

Moreover, greater opportunities existed for the ruling of an SEC ALJ to avoid further review and become, without alteration, final agency action.⁴²⁶ Justice Kagan's pithy comment that the Commission's in-house adjudicators enjoy far more autonomy and independence in rendering their decisions justifies *Lucia*'s holding that these ALJs are truly officers of the United States.⁴²⁷ Therefore, such persons must attain office in a manner consistent with the Appointments Clause.⁴²⁸

⁴²² *Lucia*, 138 S. Ct. at 2052–54.

⁴²³ *See id.*

⁴²⁴ *See id.*

⁴²⁵ *Id.* at 2047, 2053–54.

⁴²⁶ *Id.* at 2053–54.

⁴²⁷ *Id.* at 2054 (“That last-word capacity makes this an *a fortiori* case: If the Tax Court's STJs are officers, as *Freytag* held, then the Commission's ALJs must be too.”).

⁴²⁸ *Id.* at 2055.

Another astute conclusion reached in *Lucia* is its refusal to equate the absence of a formal power of contempt with a lack of authority.⁴²⁹ The high Court deftly notes that a jurist does not require the contempt power in order to exercise significant authority.⁴³⁰

The SEC's ALJs were clearly at liberty to shape the proceeding before them by, *inter alia*, regulating discovery, testimony, and the admission of evidence.⁴³¹ The Supreme Court fairly noted that an adjudicator armed with such a panoply of powers could easily control a case, even without a formalistic power to punish contempt.⁴³² The mere availability of such options to the Commission's in-house adjudicators was, by itself, an exercise of the significant authority imperative to declaring these ALJs to be officers of the United States, and therefore subject to the prerequisites of the Appointments Clause.⁴³³

And the culmination of the judicial powers vested in the agency's ALJs might be the most decisive of all: the ultimate power to rule. *Lucia* recognized that, in a very real sense, the power of an administrative law judge to issue a decision is all the exercise of significant authority she needs in order to be classified as an officer of the United States, and one that must withstand the rigors of the Appointments Clause vis-à-vis her attainment of office.⁴³⁴

Lastly, there is the admittedly ancillary, yet no less necessary, component of *Lucia*'s ultimate adjudication: the degree of finality typically bestowed upon the deliberations of the SEC's ALJs. Justice Kagan concisely marshaled the salient points: the Commission generally accords deference to the findings of its in-house adjudicators; it is the exception, not the rule, for the SEC to reverse the final determinations of the agency's jurists.⁴³⁵ In those few words, *Lucia* recognized the truth of the matter; for the most part, the rulings of the Commission's administrative law judges wore the imprimatur of conclusive agency actions.⁴³⁶

⁴²⁹ *Id.* at 2054.

⁴³⁰ *Id.*

⁴³¹ *Id.* at 2049.

⁴³² *Id.* at 2054.

⁴³³ *Id.* at 2055.

⁴³⁴ *Id.* at 2053–55.

⁴³⁵ *Id.* at 2054–55.

⁴³⁶ *Id.*

This small, but nonetheless important, determination underscored the broader holding that SEC ALJs are officers of the United States, for reason that they irrefutably exercise significant authority, and operate with a fair degree of discretion in doing so. Since the high Court had decided years ago in *Freytag* that individuals possessed of that prerogative must attain office pursuant to the strictures of the Appointments Clause,⁴³⁷ the *Lucia* Court of the present was simply being consistent with established precedent in reaching the same outcome.⁴³⁸

Now to summarize *Lucia* for its own sake. This newest Article II landmark decision is built upon the firmest of foundations, specifically *Freytag* and its kin. In a real sense, *Freytag* supplied the rule of decision here, and rightly so.

First, there are the factual similarities which are so striking here. True, the Tax Court's STJs in the Court's earlier pronouncement were adjuncts to a duly constituted court.⁴³⁹ Nonetheless, the Tax Court, and its subsidiary tax adjudicators, are more accurately described as administrators of that other bureaucratic behemoth, the Internal Revenue Code. Exalting, as we must, substance over mere labels, *Freytag's* STJs are best classified as the administrative law judges of federal tax law. Since it is beyond peradventure that the SEC administers a sister monolith of national law, to wit, the federal securities acts, the Commission's in-house jurists have a great deal in common with the Tax Court's subalterns. Thus, the grounds for *Lucia* were no different from the basis for *Freytag*, and therefore the outcome of the former flowed from the rule established in the latter.

Second, let us address the legal principles espoused here. The *Lucia* Court upheld the precepts of law established in *Freytag*, paramount among them that an officer of the United States is recognized by her exercise of significant authority.⁴⁴⁰ In *Freytag*, Special Tax Judges did so by enjoying a fair degree of authority in presiding over significant tax controversies, having the power to shape proceedings, and were subject to review (and even reversed) in certain circumstances.⁴⁴¹ Such was the rule of law announced in *Freytag*: the establishment of a multifaceted test for

⁴³⁷ *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 881–82 (1991).

⁴³⁸ *Lucia*, 138 S. Ct. at 2055.

⁴³⁹ *Freytag*, 501 U.S. at 870–71.

⁴⁴⁰ *Lucia*, 138 S. Ct. at 2051–52.

⁴⁴¹ *Freytag*, 501 U.S. at 873–74, 881–82.

what is significant authority, the fact that who exercises the same is an officer of the United States, and, most of all, that such an office-holder must be appointed by a method comporting with Article II.⁴⁴²

At the end of the day, *Lucia* made a straightforward application of *Freytag* to the case at bar. The Court of today concluded the Commission's ALJs exercised as much significant authority as their tax law counterparts, possibly even more because the deference and general lack of review of the former's determinations emphasized the significance of the authority they exercised, and the discretion granted them.⁴⁴³

Again, precedent ruled the day, as well it should. With the cognizable difference between the Tax Court's STJs and the SEC's ALJs ranging from slim to none, *Lucia* saw no need to depart from the cogent analysis of *Freytag*.⁴⁴⁴ Deference to the rule of law would not allow such a detour, nor did the situation merit such a diversion from the high Court's established precepts.

As a brief aside, we make the following notes for the future of *Freytag*, *Lucia*, and their progeny. One, we agree with Justice Kagan's common sense in setting aside the government's request to clarify *Freytag*, in fairness a call, for whatever reason, seeking a whole revisitation of that proclamation.⁴⁴⁵ *Lucia* rightly found such a venture wholly unnecessary to the matter at hand. Moreover, the instant case was most likely not the proper vehicle for an overhaul of *Freytag*'s well-known axioms. Nevertheless, we candidly admit that day might come, and soon. As a nation, we must always be foremost concerned with portentous constitutional matters, such as checking the exercise of government power, especially by unelected office-holders. For that reason, the reexamination of *Freytag* postponed by *Lucia* may yet come before the Court, and sooner, as opposed to later.

Next, we respect Justice Thomas' erudite concurrence in *Lucia*, where he makes the discriminating point, *inter alia*, that *Freytag* (and, by extension now, *Lucia*) does not resolve every Appointments Clause challenge.⁴⁴⁶ We applaud the veteran Justice

⁴⁴² *Id.* at 881–82.

⁴⁴³ *Lucia*, 138 S. Ct. at 2053–54.

⁴⁴⁴ *Id.* at 2053–55.

⁴⁴⁵ *Id.* at 2051.

⁴⁴⁶ *Id.* at 2056 (Thomas, J., concurring).

for his dual adherence and mild amplification of *Freytag* to the matter then at hand. And we tend to agree with his prediction for the future of the appointive proviso of Article II before the high bench. We concur; it is most likely that future constitutional controversies predicated upon the Appointments Clause will require the amplification, clarification, or extension (possibly all three) of the maxims now embodied in the conjoined holdings of *Freytag* and *Lucia*. In this context, we rely upon these sage pronouncements of Justice Thomas: “We have been willing to check the improper allocation of executive power” on occasion.⁴⁴⁷ Even more predictive is Justice Thomas’s wry comment that the Supreme Court has answered the call “probably not as often as we should.”⁴⁴⁸ We assert that Justice Thomas has the right of it. Yes, the Supreme Court has acted to check unbridled executive power; *Lucia* is proof of the high Court’s watchfulness.

Yet it is debatable if the high bench needs to do more, in the proper context of course. The next Appointments Clause controversy might not only prove to be the catalyst for a further examination of the axioms found in *Freytag*, and now *Lucia*. More importantly, it may yield yet another opportunity to apply Article II and reinforce, as a check upon executive power, the invaluable accountability that safeguards our precious liberty.

Lucia is now concluded. By its teachings, we know that the SEC’s administrative law judges previously attained office unconstitutionally, for reason that the mode of their appointment did not satisfy the rigors of Article II.⁴⁴⁹

Nevertheless, the Commission’s global order, issued while *Lucia* was *sub judice*, appears to have written the penultimate chapter here. With the agency’s ruling council, as the “head of a department,” having bestowed its benediction of approval upon the present office-holders, it would seem that the ultimate command of *Lucia* has now been complied with. This should conclude the matter of the constitutionality of SEC ALJs attaining office, at least for the present time.

But now, as a newly minted Appointments Clause precedent, *Lucia* may yet prove to be the pivot upon which the next

⁴⁴⁷ *Dep’t of Transp. v. Ass’n of Am. R.R.*, 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring in the judgment) (citing *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010)).

⁴⁴⁸ *Id.* (citing *Morrison v. Olson*, 487 U.S. 654 (1988)).

⁴⁴⁹ *See Lucia*, 138 S. Ct. at 2055.

constitutional challenge shall turn. In truth, *Lucia* presages, some might even say preordains, the next challenge to be brought pursuant to Article II.

B. Avoiding the Doctrine of Constitutional Avoidance

Our second point of analysis is not what *Lucia* decided. Rather, we respectfully ask: was it necessary for the Supreme Court to even decide *Lucia* in the first place?

Yes, *Lucia* is the law of the land, and worthy of its place in the pantheon of constitutional jurisprudence, particularly with respect to the proper interpretation of the Appointments Clause. But it is far too easy to merely deal with *Lucia* as a *fait accompli*.

Notwithstanding the high Court's willingness in embracing the constitutional question, there are countervailing principles of constitutional interpretation that militate against the Supreme Court's willingness to enter the fray.

The *Lucia* Court demonstrated fortitude in resolving the constitutional question posed to it. But one must still ask, was that strictly necessary? Consider the high Court's cardinal rules with regard to the proper approach to be taken to claims of constitutional infirmities.

It is axiomatic that the courts should avoid resolving constitutional questions whenever possible: "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [the Court] ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable."⁴⁵⁰ This "fundamental rule of judicial restraint" enjoys the sanction of "time and experience."⁴⁵¹ It serves an essential need to protect both "the law and the adjudicatory process."⁴⁵² In sum, the courts do not decide constitutional questions "needlessly."⁴⁵³

That "fundamental rule of judicial restraint" was respected in full by a significant number of the appellate courts cited herein above. Prior to the D.C. Circuit issuing the decision that was to come before the high Court, and certainly well before the Justices even deigned to grant review of *Lucia*, the Seventh, Second,

⁴⁵⁰ *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 14 (1993) (Blackmun, J., dissenting) (quotation and citation omitted).

⁴⁵¹ *Id.* (Blackmun, J., dissenting) (quotation and citation omitted).

⁴⁵² *Id.* at 16 (Blackmun, J., dissenting).

⁴⁵³ *Id.*

Eleventh, and Fourth Circuits had successfully resolved the essential controversy on grounds other than the Appointments Clause.⁴⁵⁴ The relevant tribunals avoided a potential constitutional quagmire, not by adroitness, but via adherence to the principle of restraint articulated in *Zobrest* and elsewhere.⁴⁵⁵

In truth, the number of tribunals which fell into this category did not aggregate into a strict numerical majority of all the circuits.⁴⁵⁶ Yet they constituted a growing consensus, that, had it been given time, might have eventually coalesced into a true and undeniable majority of circuit court reasoning.

But as to that reasoning, we make an even more telling point. Those four august Courts of Appeals made declarations eminently rational, and eminently reasonable, in light of the constitutional precept noted above. Each of these panels was faithful to the overarching imperative of avoiding a constitutional question wherever possible.

Interestingly, the tribunals concluding it was better to avoid the Article II question comprised less than half of the federal circuits by number.⁴⁵⁷ That tally is intriguing, when one considers that the relevant Exchange Act bestows upon any person aggrieved by SEC action the prerogative to seek review before the appellate court of their choice.⁴⁵⁸

Put another way, it could once be said there was ample opportunity for the remainder of the circuit benches to add their own wisdom to the then nascent conflict, a contentiousness that might be fairly deemed at the time as falling short of a genuine internecine controversy. Yet the Court's instant decision in *Lucia* arrested the development of further arguments which might have brought the matter at hand to a higher state of evolution.

Certainly, it is beyond peradventure that *Lucia* and *Bandimere* were diametrically opposed. As point in fact, the Tenth

⁴⁵⁴ See generally *Bennett v. SEC*, 844 F.3d 174 (4th Cir. 2016); *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016); *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015); *Tilton v. SEC (Tilton II)*, 824 F.3d 276 (2d Cir. 2016).

⁴⁵⁵ See generally *Bennett*, 844 F.3d; *Hill*, 825 F.3d; *Bebo*, 799 F.3d; *Tilton II*, 824 F.3d.

⁴⁵⁶ See generally *Bennett*, 844 F.3d; *Hill*, 825 F.3d; *Bebo*, 799 F.3d; *Tilton II*, 824 F.3d. Four out of the thirteen circuits have followed this approach.

⁴⁵⁷ See generally *Bennett*, 844 F.3d; *Hill*, 825 F.3d; *Bebo*, 799 F.3d; *Tilton II*, 824 F.3d.

⁴⁵⁸ 15 U.S.C. § 78y (2012).

Circuit embraced the irreconcilable conflict.⁴⁵⁹ But is Supreme Court review justified when discord, even pertaining to a subject as meaningful as the Appointments Clause, is cabined to only two tribunals out of the more than dozen federal appellate courts?

Let it be repeated that *Lucia* is a most worthy and notable addition to the Court's Article II jurisprudence. Yet we are troubled, first by the fact that it might be a proclamation made before its time, and even more so, that this new landmark came at a cost to even more august principles governing when constitutional arguments should be addressed.

Now, take the foregoing axioms favoring the avoidance of constitutional questions unless they are unavoidable, and contrast them, not only to the situation in *Lucia*, but how this newest Supreme Court landmark may be the harbinger of more Appointments Clause controversies.

C. *Lucia* as the Template for Challenging ALJs

An undeniable aspect of modern America is its behemoth administrative state. As so well put by Chief Justice Roberts, Americans have been forced to tolerate bureaucrats "poking into every nook and cranny of daily life."⁴⁶⁰ For decades now, regulatory agencies and those that toil therein constitute "a veritable fourth branch of the Government," essentially rearranging our notions of a tripartite system of governance.⁴⁶¹ This extraconstitutional body wields great power, in large part by means of what commentators have labeled a "hidden judiciary."⁴⁶²

It is beyond refute that the drafters of the Founding Documents could not have foreseen contemporary SEC ALJs,⁴⁶³ nor, in all likelihood, the latter's numerous peers presently at work within the far-flung bureaucracy extant today. It is equally unlikely

⁴⁵⁹ *Bandimere v. SEC*, 844 F.3d 1168, 1182 (10th Cir. 2016), *cert. denied*, 138 S. Ct. 2706 (2018) (expressly disagreeing with the D.C. Circuit's holding in *Lucia*); *see also* *Lucia* Petition for Certiorari, *supra* note 250, at 19 ("The question presented is binary; one of these two decisions *must* be wrong.").

⁴⁶⁰ *See City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

⁴⁶¹ *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

⁴⁶² *See* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1645 (2016) (quotations omitted).

⁴⁶³ *Bandimere*, 844 F.3d at 1170.

the Framers envisioned these administrative adjudicators would outnumber the constitutionally authorized Article III bench by a ratio of two to one.⁴⁶⁴

Such matters are well illustrated by *Lucia* and its antecedents. Therefore, we can only rightfully contemplate this newest Supreme Court pronouncement in light of its impact upon the opaque administrative branch and its in-house adjudicators.

As revealed in the instant controversy, there are reportedly a total of 1,792 administrative law judges in service to federal agencies today.⁴⁶⁵ The number of Social Security Administration adjudicators provide but one pungent example of the pervasive influence of appointed ALJs over the daily lives of many Americans. 1,537 Social Security Administration ALJs alone “collectively handle hundreds of thousands of hearings a year.”⁴⁶⁶

Such facts were well known to the Court over a decade before *Lucia* appeared on the docket.⁴⁶⁷

This lends credence to the statement that “[t]oo many important decisions of the Federal Government are made nowadays by unelected agency officials.”⁴⁶⁸ It is common knowledge that these agencies and their in-house adjudicators act upon matters of grave importance to ordinary citizens.⁴⁶⁹

Equally so, administrative agencies today are rightly said to exert significant power over the economic and social life of the Nation.⁴⁷⁰

Agencies and their nonjudicial arbiters therefore represent one side of a conflict between “executive power and individual liberty.”⁴⁷¹ If administrative law judges are left unrestrained,

⁴⁶⁴ See AUTHORIZED JUDGESHIPS—FROM 1789 TO PRESENT, <https://www.uscourts.gov/judges-judgeships/authorized-judgeships> [<https://perma.cc/2X5X-HSFC>] (860 authorized judgeships for 2016).

⁴⁶⁵ *Bandimere*, 844 F.3d at 1199 n.5.

⁴⁶⁶ *Id.* at 1199 nn.5–6 (McKay, J., dissenting) (citations omitted).

⁴⁶⁷ See *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 542–43 (2010) (Breyer, J., dissenting) (noting in excess of 1,500 ALJs in the employ of the federal government at the time).

⁴⁶⁸ *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1610 (2014) (Scalia, J., dissenting).

⁴⁶⁹ See *Bandimere*, 844 F.3d at 1201 (McKay, J., dissenting).

⁴⁷⁰ *PHH Corp. v. CFPB (PHH I)*, 839 F.3d 1, 6 (D.C. Cir. 2016), *vacated and remanded en banc*, 881 F.3d 75 (D.C. Cir. 2018).

⁴⁷¹ *Id.* at 5.

they can pose a “significant threat” to bedrock principles of separation of powers and checks and balances.⁴⁷²

Notwithstanding the pervasiveness of the modern federal bureaucracy, *Lucia* has made it clear that present-day administrative law judges are susceptible to an Appointments Clause challenge. By extending the precepts of *Freytag*, reflecting the theoretical basis of *Free Enterprise Fund*, and even reaching back nearly a century and a half to invoke the teachings of *Germaine*, the Supreme Court’s latest pronouncement has illuminated a path towards challenging *all* in-house adjudicators on the claim that they were not appointed consonant with the mandates of Article II.

Could *Lucia* eventually lead to chaos? Certainly, one hopes not. Yet Justice Sotomayor alluded to such a possibility in her dissent.⁴⁷³

To be quite clear, we proclaim that *Lucia* was inestimably correct in its core holding; one upholding the guarantee of liberty safeguarded by the Appointments Clause. We applaud *Lucia* for its forthrightness in preserving accountability to the People, precisely as the Framers envisioned in the context of Article II and executive appointments.

Yet we have genuine concerns for the systemic risk it might engender. It is virtually assured that *Lucia* shall unleash an untold number of fresh challenges against ALJs across a broad spectrum of agencies, and endanger the everyday administrative adjudications alluded to above. It is not beyond the realm of possibility that “all federal ALJs are at risk” in the constitutional wake of *Lucia*.⁴⁷⁴ We pause at the thought of the further possibility that this new landmark, no matter how necessary and correct it might be, “effectively render[s] invalid thousands of administrative actions.”⁴⁷⁵

As stipulated at the outset of this Article, it would be folly to view *Lucia* in isolation. This new Supreme Court landmark could well be the harbinger of many cases yet to come, each one challenging the authority of administrative law judges at work at a myriad of federal agencies. Indeed, we have little doubt that *Lucia* shall be a wellspring of litigation concerning this constitutional issue.

⁴⁷² *Id.* at 6.

⁴⁷³ See *Lucia v. SEC*, 138 S. Ct. 2044, 2064 (2018) (Sotomayor, J., dissenting).

⁴⁷⁴ *Bandimere*, 844 F.3d at 1199 (McKay, J., dissenting).

⁴⁷⁵ *Id.*

To be sure, this assessment is not wholly our own. A decade ago, the high Court itself identified this very possibility. Writing in *Free Enterprise Fund*, Justice Breyer voiced concern over the fate of the [then] fifteen hundred plus ALJs then holding office.⁴⁷⁶ The in-house adjudicators employed by the SEC are but a minuscule fraction of that adjudicative work force.⁴⁷⁷ Parties aggrieved at being called to task before these jurists are compelled, if not mandated, to raise an Appointments Clause challenge similar to that undergirding *Lucia*.⁴⁷⁸

Certainly, we have not undertaken an exhaustive study of the statutes and procedures governing the appointment of ALJs by federal agencies other than the overseer of the securities markets; to do so would unnecessarily detract from the focus of this Article.

Yet the point is irrefutable. It is more likely than not that such adjudicators, for reason of their sheer numbers alone, attain office via a methodology far more like an internal, bureaucratic process, and quite different and removed from the methodology demanded by Article II.

Even further beyond peradventure is the undeniable fact that the Commission's ALJs and their peers at sister agencies have a commonality of adjudicative power. At the risk of oversimplification, most, if not all, of these administrative judges operate in an identical manner: they preside over contested matters; hear testimony, review evidence, and decide the probity and weight of same; and eventually these ALJs issue rulings which carry the force of their parent agency.⁴⁷⁹

With respect to the latter, as a matter of practicality, such determinations might be final indeed, as the mere availability of an appeal (either higher in the subject agency or by an Article III court) by no means guarantees that the option of subsequent review will actually be exercised.⁴⁸⁰

⁴⁷⁶ *Free Enter. Fund v. PCOAB*, 561 U.S. 477, 542–43 (Breyer, J., dissenting).

⁴⁷⁷ *See Lucia*, 138 S. Ct. at 2049 (noting that the SEC currently has only five ALJs).

⁴⁷⁸ *Free Enter. Fund*, 561 U.S. at 543–44.

⁴⁷⁹ *See Lucia*, 138 S. Ct. at 2049.

⁴⁸⁰ *See PHH Corp. v. CFPB (PHH II)*, 881 F.3d 75, 158 (D.C. Cir. 2018) (Henderson, K., dissenting). In her erudite dissent, Judge Karen LeCraft Henderson cautioned the mere fact that there exists a statutory right of appeal to a circuit court (the typical avenue offered to those disadvantaged by an ALJ's decision) does not absolve any constitutional infirmities in the appointive process for particular administrative law judges.

The salient point of *Lucia* is that it identified the key attributes which determine if an adjudicator holds the rank of officer of the United States.⁴⁸¹ This latest promulgation of the high Court confirmed the parameters previously set forth in *Freytag*, and then refined them, for the purpose of establishing a fairly comprehensive test for the application of Article II to questions of executive appointments.⁴⁸²

Lucia is a powerful edict, for it first catalogues these adjudicative prerogatives, and then finds that SEC administrative law judges fall squarely within its ambit.⁴⁸³ From there, it is a small—and unavoidable—step to classifying these in-house adjudicators as officers of the United States who can attain their office solely by means of compliance with the strictures of the Appointments Clause.

Lucia has the truth of it, then: agency adjudicators exercising significant authority are officers of the United States.⁴⁸⁴

Therefore, they are susceptible to a constitutional challenge unless they attained office in a manner compliant with the Appointments Clause.⁴⁸⁵ Without such conformity, they fail to meet the demands of Article II. In postulating these axioms, the Supreme Court's newest Appointments Clause landmark not only establishes the template for future litigation, it invites it.

D. Lucia's Unanswered Question and the Next Constitutional Crisis for the Appointments Clause

Many have predicted that the next constitutional crisis shall arise from the question deliberately left unanswered by the high Court in *Lucia*: do statutory restrictions upon the President's power to remove administrative law judges violate the Appointments Clause?⁴⁸⁶ Recall the respondent SEC urged the Justices to resolve this query, but the high bench declined.⁴⁸⁷

⁴⁸¹ *Lucia*, 138 S. Ct. at 2053–54.

⁴⁸² *Id.* at 2053.

⁴⁸³ *Id.* at 2053–54.

⁴⁸⁴ *See id.* at 2053–55.

⁴⁸⁵ *See id.* at 2055.

⁴⁸⁶ *Id.* at 2059–60 (Breyer, J., dissenting); see Steven D. Schwinn, *Lucia v. SEC and the Attack on the Administrative State*, AM. CONST. SOC'Y SUP. CT. REV. 1, 256 (2017–18).

⁴⁸⁷ *See* Brief for Respondent at 21, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130).

Certainly, we acknowledged the existence of the question of an earlier point in this Article but did so in a deliberately understated manner. Our rationale was since the Supreme Court did not formally embrace the issue, it would be unwise for us to elevate it from subtext.

After all, it must be recalled that the government was most insistent that the Justices openly adopt this additional query and resolve it as an essential part of *Lucia*.⁴⁸⁸ Yet since the high Court effectively ignored the sovereign's plea, we were not at liberty to differ.⁴⁸⁹

Until now. To be quite sure, we concur that *Lucia* was not the appropriate vehicle to decide if Article II is violated when the President's power to remove an administrative law judge is constrained by statute. All the government's protestations to the contrary, the Court was indisputably correct to avoid that constitutional question on the day it accorded Mr. Lucia victory. But there is another reason, one far more just and powerful.

The *Lucia* Court was right not to decide the removal question because, in all likelihood, it shall soon find its own way to the high bench. However, the vehicle for that next constitutional adjudication has yet to be determined. At least one prime contender did not answer the bell, but other possibilities now loom in the lower courts.

With respect to the former, a most worthy candidate would have been *PHH II*, a D.C. Circuit decision we alluded to previously herein.⁴⁹⁰ That bifurcated controversy touched upon many of the Article II points raised in *Lucia*, most especially the constitutionality under an Appointments Clause analysis of a statutory bar to the President removing an agency official from office.⁴⁹¹

So as not to detract from this Article's proper focus upon *Lucia*, we summarize *PHH II* ever so briefly. At an earlier stage, a three-judge panel of the D.C. Circuit declared that the Director of the Consumer Financial Protection Bureau (the CFPB) held office unconstitutionally because he could not be removed by the

⁴⁸⁸ *Id.*

⁴⁸⁹ *Lucia*, 138 S. Ct. at 2060–61 (Breyer, S., dissenting).

⁴⁹⁰ See *supra* notes 51–68 and accompanying text.

⁴⁹¹ *PHH Corp. v. CFPB (PHH II)*, 881 F.3d 75, 101 (D.C. Cir. 2018); *id.* at 156–57 (Henderson, J., dissenting); *id.* at 166 (Kavanaugh, J., dissenting).

President.⁴⁹² In a forceful opinion rendered by then–Circuit Judge Kavanaugh, the tribunal found the statutory provisos insulating the CFPB’s Director from removal by the Chief Executive were an irreparable violation of the Appointments Clause.⁴⁹³

Subsequently, a sharply divided D.C. Circuit, sitting *en banc*, reversed the panel, and declared that the sanctity of the Appointments Clause was unmolested by the ability of the agency’s chief to retain office without fear of removal by the Chief Executive.⁴⁹⁴

PHH II, most especially its dissent, deals with many of the same issues addressed in *Lucia*, among them, the Appointments Clause, the accountability of Executive Branch functionaries to the President and, therefore, the People, and the liberty interest preserved by that same accountability.⁴⁹⁵ Indeed, as so ably argued in the erudite dissents found in *PHH II*, the President’s inability to remove an administrative agency official is doubly sinful.

Its first transgression is that it renders the office-holder unaccountable to the People.⁴⁹⁶ Its second affront, equally offensive to the Constitution, is that it exonerates the President from accounting to the People for the actions of a member of officialdom.⁴⁹⁷

In hindsight, one might speculate that the *Lucia* Court deliberately left the removal question for another day because there was some supposition that *PHH II* would eventually find its way to the high Court’s docket. Yet such musings are futile. As fate would have it, neither side petitioned for Supreme Court review of the D.C. Circuit’s fractious opinion.⁴⁹⁸

As made clear in our references to *PHH II*, and its predecessor *PHH I*, at various points within this Article, that proceeding was driven by the maxim of liberty requires accountability, but with its Appointments Clause connotations viewed via the

⁴⁹² *PHH Corp. v. CFPB (PHH I)*, 839 F.3d 1, 31, 36 (D.C. Cir. 2016), *vacated and remanded en banc, PHH II*, 881 F.3d 75 (D.C. Cir. 2018).

⁴⁹³ Indeed, then–Circuit Judge Kavanaugh described this offense against Article II in the most egregious of terms. *Id.* at 7–9.

⁴⁹⁴ *PHH Corp. II*, 881 F.3d at 137.

⁴⁹⁵ *Id.* at 164, 183 (Kavanaugh, J., dissenting).

⁴⁹⁶ *Id.* at 164–66.

⁴⁹⁷ *Id.* at 164, 166, 168.

⁴⁹⁸ See, e.g., Barbara S. Mishkin, *No U.S. Supreme Court review sought in PHH*, BALLARD SPAHR LLP: CONSUMER FINANCE MONITOR (May 4, 2018), <https://www.consumerfinancemonitor.com/2018/05/04/no-u-s-supreme-court-review-sought-in-phh/> [<https://perma.cc/Y8LD-39M2>].

prism of the correlative power to remove, as opposed to appoint. Nonetheless, given the congruency of the two under any Article II scrutiny, it is a given that *Lucia* would have powerfully influenced, if not outright provided the rule of decision, had *PHH II* been granted high Court review.⁴⁹⁹

Yet there is no need for disappointment; rather, anticipation, albeit measured, is in order. For while *PHH II* never proved to be the vehicle for the Supreme Court to resolve *Lucia*'s unanswered question, other controversies are looming on the horizon, and may yet arrive before the Justices in due course.

Indeed, it would seem the same administrative agency at the eye of the storm in *PHH II* abounds with such possibilities for further testing of the demands of the Appointments Clause. One such instance involving the embattled Consumer Financial Protection Bureau is *C.F.P.B. v. RD Legal Funding, LLC*.⁵⁰⁰ There, Senior District Judge Loretta J. Preska, former Chief Judge of New York's illustrious Southern District, dismissed an agency enforcement action "because [the CFPB's] composition violates the Constitution's separation of powers."⁵⁰¹ The learned district judge openly rejected the majority holding of *PHH II*, choosing to explicitly adopt then-Circuit Judge Kavanaugh's dissent in that fractious D.C. Circuit holding.⁵⁰²

Embedded in Judge Preska's pithy constitutional analysis was the Article II violation inherent in the CFPB's infrastructure, to wit, the inability to remove the agency's head at the will of the Chief Executive.⁵⁰³ While the gravamen of the *RD Funding*

⁴⁹⁹ See *State Nat'l Bank of Big Spring v. Mnuchin*, No. 18-5062, 2018 U.S. App. LEXIS 16266, at *1, *4 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 916 (2019). According to the petitioner, the unpublished decision of the D.C. tribunal was "wholly based" upon *PHH II*. Petition for Writ of Certiorari at 1, *Mnuchin*, 139 S. Ct. 916 (2019) (No. 18-307); see also Marcia Coyle, *Justices, With Kavanaugh Sidelined, Rebuff Challenge to Consumer Bureau*, ALM MEDIA (Jan. 16, 2019) (LEXIS) (detailing, *inter alia*, the substance of the constitutional challenge to the authority of the CFPB's solitary director, and Justice Kavanaugh's recusal from the controversy, for reason of the depth of his participation in *PHH I* and *II*). As point in fact, we concur with the reported view of the Solicitor General that the Supreme Court should await a vehicle wherein the entire high bench may participate without restraint. *Id.*

⁵⁰⁰ *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 745–46 (S.D.N.Y. 2018).

⁵⁰¹ *Id.* at 785 (quotations and citations omitted).

⁵⁰² *Id.* at 784.

⁵⁰³ *Id.* at 784–85.

decision rests upon separation of powers, the interrelationship of those maxims to the operation of and justification behind the Appointments Clause cannot be minimized. Judge Preska's clear adoption of the notions espoused in *PHH II*'s dissent verifies the kinship and shared rationales of both opinions.⁵⁰⁴

Presuming *RD Funding* remains controversial, the Supreme Court may eventually find this case to be the proper vehicle to respond to the removal question so ardently posited by the SEC in *Lucia*, and thereby extend Appointments Clause analysis set forth in that new landmark.⁵⁰⁵

In sum, and no matter if the chosen vehicle for resolution is *RD Funding* or another controversy, we respectfully submit *Lucia* shall be the touchstone for the high Court's eventual decision regarding the Appointments Clause and the removal power. Moreover, *Lucia*'s safeguarding of liberty by imposing accountability will, we steadfastly believe, dictate the very pattern and outcome of the Supreme Court's next addition to the Article II pantheon.

What we are most assured of is the following. *Lucia*, in its brevity, in its forthrightness, in its certitude, made it absolutely clear that inhabitants of administrative agencies who hold a certain degree of power are officers of the United States.⁵⁰⁶ Thus, they must attain office in manner strictly compliant with the Appointments Clause.⁵⁰⁷ Only in this way can the precept "[l]iberty requires accountability" be met.⁵⁰⁸

Given that the new landmark known as *Lucia* has memorialized the foregoing as a constitutional truth, can the congruent removal question be decided any differently? Respectfully, we think not.

⁵⁰⁴ *Id.*

⁵⁰⁵ Ever so briefly, we note that the existence of a case pending before the Court of Appeals for the Fifth Circuit, *CFPB v. All Am. Check Cashing, Inc.*, No. 3:16-CV-356 (WHB) (JCG), 2018 U.S. Dist. LEXIS 131595, at *2 (S.D. Miss. Mar. 21, 2018), *argued* No. 18-60302 (5th Cir. Mar. 12, 2019), where the agency's constitutionality is challenged. As aforementioned, there is no lack of candidates for bringing *Lucia*'s unanswered question regarding the Appointments Clause and the President's power to remove administrative agency officials before the Justices again, and this time in full flower.

⁵⁰⁶ *Lucia v. SEC*, 138 S. Ct. 2044, 2053–54 (2018).

⁵⁰⁷ *Id.* at 2055.

⁵⁰⁸ *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring).

Rather, we are of the firm opinion that impediments to the President's power to remove a bureaucrat exercising significant decision-making power are just as violative of the Appointments Clause as deficiencies in the Chief Executive's authority to appoint such office-holders in the first instance. And given the parallels therein, our expectation is that *Lucia* will unequivocally shape the next permutation of the Supreme Court's Appointments Clause jurisprudence.

E. Liberty, Accountability, and Lucia

From the outset of this Article, we have maintained that *Lucia* is not a mundane instance of challenging administrative agency power via questioning the authority of administrative law judges. Rather, it encompasses a true test of the very bedrock principles of our ordered system of liberty, specifically the preservation of that liberty by maintaining the accountability of government to the People.

Let us commence this section of our commentary with the fundamentals. From the founding to the present day, the American people can boast of a government which functions by the consent of the governed.⁵⁰⁹ This is so because the national government so constructed derives all of its sovereign power from the People.⁵¹⁰

The Appointments Clause of Article II contributes mightily to preserving the consent of the governed. The proviso is elegant in the simplicity of its operation, as follows: the President is accountable to the People, and officers of the United States are accountable to the Chief Executive.⁵¹¹ A citizen aggrieved by the actions of a member of officialdom brings her complaint to the President, who then requires the appointee to justify his actions.⁵¹²

Not only does this assure the continued sovereignty of the People, it also comports neatly with the President's sworn duty to "take Care that the Laws be faithfully executed."⁵¹³ To fulfill her own oath of office, the Chief Executive shall be compelled to

⁵⁰⁹ See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

⁵¹⁰ U.S. CONST. pmbl.

⁵¹¹ *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 513–14 (2010).

⁵¹² *Id.* at 497–98.

⁵¹³ U.S. CONST. art. II, § 3; see also *Free Enter. Fund*, 561 U.S. at 484 ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them.").

commission competent and trustworthy individuals as the sworn officers of the United States.⁵¹⁴

Thereafter, and for as long as she holds office, the President is free to call upon her appointees for an accounting.⁵¹⁵ Conversely, all true officers of the United States are keenly aware that they are answerable to the Chief Executive, and, thereby, the People, the ultimate holders of the sovereign power.⁵¹⁶ In sum, this accountability guarantees liberty.

Lucia is further premised upon the fact that “[t]hose who exercise the power of Government are set apart from ordinary citizens.”⁵¹⁷ Precisely to forestall this tiny fraction of the population from standing apart and aloof from the general citizenry, the Supreme Court has declared it essential that “[t]here should never be a question whether someone is an officer of the United States.”⁵¹⁸

By its robust and fair application of the Appointments Clause to the matter set before it, the *Lucia* Court assured that those who hold office, and are entrusted with sovereign authority by the President, are easily classified.⁵¹⁹ Once properly categorized, the Appointments Clause assures their accountability to the Chief

⁵¹⁴ See U.S. CONST. art. II, § 3, cl. 6 (the President commissions all officers of the United States); U.S. CONST. art. VI, cl. 3 (all executive and judicial officers must take an oath or affirmation to support the Constitution).

⁵¹⁵ See *PHH Corp. v. CFPB (PHH II)*, 881 F.3d 75, 142 (D.C. Cir. 2018) (Henderson, K., dissenting); *id.* at 164 (Kavanaugh, J., dissenting); *Dep’t of Transp. v. Ass’n of Am. R.R.*, 135 S. Ct. 1225, 1238 (2015) (Alito, J., concurring).

⁵¹⁶ See *PHH II*, 881 F.3d at 142 (Henderson, J., dissenting); *Dep’t of Transp.*, 135 S. Ct. at 1238 (Alito, S., concurring).

As this Article went to press, several newly filed petitions for *certiorari* confirmed that the CFPB continues to be a flashpoint for Appointments Clause challenges. Each petition, in relevant part, invokes the Article II maxims postulated by *Lucia*. See *Seila Law LLC v. CFPB*, ___ U.S. ___, No. 19-7 (petition pending) (alleging that, *inter alia*, the President’s inability to remove the agency’s director at will is antithetical to the principles espoused by the Court in *Lucia*); *All Am. Check Cashing, Inc. v. CFPB*, ___ U.S. ___, No. 19-432 (petition pending for a writ of *certiorari* before judgment) (contending that, *inter alia*, the petitioner’s challenge to agency authority is precisely the kind of Appointments Clause challenge contemplated by *Lucia*); see also *Collins v. Mnuchin*, ___ U.S. ___, No. 19-422 (petition pending) (similar Article II challenge to the constitutionality of the Federal Housing Finance Agency).

⁵¹⁷ *Dep’t of Transp.*, 135 S. Ct. at 1235 (Alito, J., concurring).

⁵¹⁸ *Id.* (discussing Oath and Commission Clauses as vital prerequisites to the exercise of sovereign power).

⁵¹⁹ *Lucia v. SEC*, 138 S. Ct. 2044, 2053–55 (2018).

Executive who appointed them, and, thereby, to the People who elected that same chief magistrate.

Lucia is a sterling example of these vaunted precepts in action. The petitioner therein was aggrieved by the actions of the SEC and its in-house adjudicator, each an ostensible part of the Executive Branch.⁵²⁰ Under normal circumstances, as envisioned by the Appointments Clause, a citizen such as Mr. Lucia would have brought his complaint to the President, who is accountable to the People, and the Chief Executive would have called to account the agency and its jurist.

Yet that was a pointless exercise here, because the ALJ had never been appointed by the President.⁵²¹ Lacking appointment by the Chief Executive meant a corresponding lack of accountability, an affront to the very *raison d'être* of the Appointments Clause. Thus, could the Supreme Court's finding that the Clause had been violated come as a surprise to anyone familiar with the essence of the Article II proviso?

Moreover, if *Lucia* had been decided differently, it would have fostered, not only a lack of accountability by the SEC's ALJs, but an evasion of accountability by the President. Notwithstanding that the President is accountable to the People, how can she answer for the actions of those who have no cause to account to her?⁵²² Of the two unsavory possibilities set forth above, we deem the latter to be far more dangerous to our ordered system of liberty.

It must be said that the erosion of the accountability of the President to the People is no less dangerous than the accretion of power to the Chief Executive. Nor does it matter if that reapportionment comes swiftly or at glacial pace.⁵²³ Strange but nevertheless true, diminishing the need for the President to account increases the power of the Chief Executive. Either outcome is antithetical to the People's liberty interest.

⁵²⁰ *Id.* at 2049–50.

⁵²¹ *Id.* at 2050.

⁵²² *See* *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 498 (2010) (“Without a clear and effective chain of command, the public cannot determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.”) (citation and quotations omitted).

⁵²³ *See* *PHH Corp. v. CFPB (PHH II)*, 881 F.3d 75, 157 (D.C. Cir. 2018) (Henderson, J., dissenting).

Another truism is that any dispersion of responsibility within government only engenders more of the same.⁵²⁴ That is why the accountability mandated by the Appointments Clause is so vital to our ordered system of liberty. Implicit in *Lucia* is a stern warning regarding the danger to freedom offered by non-chalance towards accountability, and the even greater danger of severing the chain of accountability in its entirety.⁵²⁵

By means of its unswerving enforcement of the process for appointment mandated by the Appointments Clause, *Lucia* keeps faith with the long line of high Court precedent which has staunchly defended the prerogative of the elected President to oversee the unelected bureaucracy and prevent the latter from retreating into a limbo of unaccountability.⁵²⁶

Lucia is invigorated from the Supreme Court's prior declarations that we cannot permit the contemporary Administrative State to "slip from the Executive's control, and thus from that of the people."⁵²⁷ This latest Supreme Court landmark fully acknowledges that the consent of the governed degenerates into mere theory unless those appointed to execute the laws are compelled to account to the Chief Executive in a meaningful way.⁵²⁸ *Lucia* marks the next evolution in that line of constitutional maxims, and it simultaneously draws strength from and strengthens its antecedents interpreting and enforcing the mandates of the Appointments Clause.

For our *coda*, we repeat that *Lucia* did not merely adjudicate a dispute centered upon federal securities law. This new landmark is so much more. It is truly a reaffirmation of the core precept that liberty requires accountability, and that the Appointments Clause is one of the most important tools in assuring the reality of that accountability to the People.

It is an unfortunate fact that since the 1930s, much of the sovereign power has been delegated to a plethora of administrative

⁵²⁴ See *Free Enter. Fund*, 561 U.S. at 497.

⁵²⁵ *Id.* at 495–96 (decrying the situation where an executive organ is not accountable to the President, and where the Chief Executive can deny responsibility for the actions of the bureaucrats ensconced within that agency).

⁵²⁶ *Id.* at 498–99.

⁵²⁷ *Id.* at 499.

⁵²⁸ See *PHH II*, 881 F.3d at 137 (Henderson, J., dissenting).

agencies (including their administrative law judges), “making accountability more elusive and more important than ever.”⁵²⁹

That is why *Lucia* represents such an important contribution to the Supreme Court’s Appointments Clause jurisprudence. Since the founding of the nation, the Constitution, in all its aspects, has been the solemn mechanism by which the People govern themselves, through their duly elected leaders.⁵³⁰

And even as difficult as it might be in the vast ocean of the Administrative State, the People remain firmly on the course of self-government by keeping the bureaucracy accountable, via bulwarks of liberty such as the Appointments Clause. Liberty *does* require accountability, and *Lucia* shall henceforth play a role in that vital exercise, by first clearly defining who stands as officers of the United States and utilizing the strictures of the Appointments Clause to assure their accountability, thereby preserving liberty.

CONCLUSION

When all is said and done, we are confident that *Lucia* is the beginning, not the end, of a fresh epoch of constitutional challenges to executive power. *Lucia* is the next forthright postulation of the plain meaning of Article II, and the procedures it mandates, all purposed to assure accountability to the People.

Moreover, while *Lucia* is forceful in its own right, it garners further strength from its classification of *Freytag’s* leading principles, and, to a slightly lesser extent, reinforces landmarks of an older vintage, such as *Germaine*. To be sure, even while *Lucia* does not overtly reference *Free Enterprise Fund*, implicitly the former incorporates the latter’s fundamental holdings as to Article II’s basic protection of our ordered system of liberty.

In the preceding pages, we have candidly predicted that *Lucia* shall be the progenitor of a new generation of Appointments Clause challenges to agency power. Utilizing the new landmark as a template and guided by its axioms as to the process for the constitutional appointment of officers of the United States, parties subject to in-house adjudications can assure that the

⁵²⁹ *Id.*

⁵³⁰ *Free Enter. Fund*, 561 U.S. at 499.

presiding jurist holds her office in conformity with the constitutional mandates decreed by Article II.

Far more important, citizens can be confident there exists an accountability of government which, in turn, safeguards their liberty.

Are more Appointments Clause cases for the good? Unequivocally yes. The proviso, along with the rest of Article II, cabins executive power, simultaneous with establishing the prerogatives of the Executive Branch. It assures a process by which the nondescript functionaries of the Fourth Branch of government must answer to the People, through the person of the Chief Executive.

We conclude this Article with the concise, yet eloquent, words of Justice Alito. “Liberty requires accountability.”⁵³¹ *Lucia* now stands at the apex of the Appointments Clause jurisprudence which guarantees that vital precept shall continue to safeguard our precious liberties.

⁵³¹ *Dep’t of Transp. v. Ass’n of Am. R.R.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring).