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SUMMARY

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The Appointments Clause: Responses to Frequently Asked Questions

The Appointments Clause is a provision in Article II, Section 2, Clause 2 of the Constitution that provides the "exclusive means" of appointing "Officers of the United States," as distinct from "mere employees" or "lesser functionaries" of the federal government. *Lucia v. SEC*, 585 U.S. 237, 241, 244–45 (2018). According to the Supreme Court, an officer subject to the Clause is a person who "occup[ies] a 'continuing' position established by law" and "exercis[es] significant authority pursuant to the laws of the United States." *Id.* at 245. A position is usually considered to be "continuing" for purposes of this standard where its duties are ongoing rather than temporary or intermittent, even if the occupants change due to a fixed term of office. The Court has identified rulemaking authority, enforcement authority, and certain adjudicatory functions to be forms of significant authority, though this list is not exclusive.

There are two classes of federal officers: principal officers and inferior officers. Principal officers must be appointed by the President with the advice and consent of the Senate, and generally include positions such as Cabinet-level department heads or the heads of independent agencies. An inferior officer is someone whose "work is directed and supervised at some level" by one or more principal officers within the executive branch. *Edmond v. United States*, 520 U.S. 651, 663 (1997). While advice and consent is the default method of appointment for inferior officers, the Appointments Clause permits Congress to "vest" the appointment of inferior officers "by Law" in "the President alone," in "the Courts of Law," or in "the Heads of Departments." U.S. CONST. art. II, § 2, cl. 2. In other words, Congress, by statute, can authorize one of these three to appoint inferior officers.

An Appointments Clause violation occurs if an officer is not appointed according to any of the constitutionally prescribed methods, or if there is a mismatch between the way the officer was appointed and the officer's status as a principal or inferior officer. If a court finds that an Appointments Clause violation occurs, it may order a new administrative proceeding (in the case of a discrete agency enforcement action) or determine whether it can "sever" a portion of the statute governing that position to align the appointment method with the person's status as a principal or inferior officer. In one case, the Supreme Court accorded "de facto validity" to a federal commission's work rather than vacating its past decisions, providing Congress an opportunity to correct the constitutional problem. *Buckley v. Valeo*, 424 U.S. 1, 142 (1976) (per curiam).

Congress has several options to address potential Appointments Clause concerns. Congress could, for example, amend a statute to specify an appointment method consistent with an officer's status as a principal or inferior officer; amend a statute to remove certain duties and discretion from an office so that the occupant no longer exercises significant federal authority; or retain the existing statutory language with the option of observing whether the issue arises in litigation and how courts resolve the question.

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What Is the Appointments Clause?

The Appointments Clause is a provision in Article II of the Constitution that reads:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[1]

The Clause provides the "exclusive means" of appointing "Officers of the United States" (officers) as distinct from "mere employees" or "lesser functionaries" of the government.[2] As interpreted by the Supreme Court, the Clause divides officers[3] into "two classes": principal officers and inferior officers.[4] The distinction between the two classes is discussed in a later section of this report.[5] Whether a position is a principal or an inferior office dictates what method or methods of appointment are available to the government under the Appointments Clause.[6]

While the Clause does not apply to nonofficer federal employees, all officers—whether principal or inferior—must be appointed according to its strictures.[7] "No class or type of officer is excluded because of its special functions."[8] Neither the title of the position nor its location in an agency's organizational chart conclusively determines whether the Appointments Clause applies.[9]

The Supreme Court has called the Appointments Clause one of the "significant structural safeguards of the constitutional scheme," because the Clause helps to preserve the separation of powers.[10] The Clause "prevents congressional encroachment upon the Executive and Judicial Branches," by empowering the President to "select the principal (noninferior) officers of the United States."[11] At the same time, the Clause requires Senate confirmation of the President's choice of nominee "to curb Executive abuses of the appointment power," to encourage "judicious" selection of officers, and to "ensure public accountability for both the making of a bad appointment and the rejection of a good one."[12]

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[1] U.S. CONST. art. II, § 2, cl. 2. *See Overview of Appointments Clause*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artII-S2-C2-3-1/ALDE_00013092/ (last visited Apr. 1, 2025).

[2] Lucia v. SEC, 585 U.S. 237, 241, 244–45 (2018).

[3] The remainder of this report uses the term "officers" to refer to "all other Officers of the United States"—principal and inferior—whose appointments are not "otherwise provided for" in the Clause, thus excepting "Ambassadors, other public Ministers and Consuls, [and] Judges of the supreme Court." U.S. CONST. art. II, § 2, cl. 2.

[4] United States v. Germaine, 99 U.S. 508, 509 (1879).

[5] *See infra* "What Distinguishes a Principal Officer from an Inferior Officer?".

[6] *See infra* "What Are the Permissible Methods of Appointing Officers?".

[7] Buckley v. Valeo, 424 U.S. 1, 132 (1976) (per curiam). *See also Lucia*, 585 U.S. at 245 (remarking that "the Appointments Clause cares not a whit about who named" nonofficer employees).

[8] *Buckley*, 424 U.S. at 132.

[9] *See* Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC, 590 U.S. 448, 465 (2020) (explaining that a statute providing that a particular board was not a department or agency of the federal government showed at most "that Congress did not intend to make the Board members 'Officers of the United States,'" not whether "insofar as the Constitution is concerned, they succeeded").

[10] Edmond v. United States, 520 U.S. 651, 659 (1997).

[11] *Id.*

[12] *Id.* at 659–60.

According to the Supreme Court, the Constitution's Framers recognized that appointment of every officer by the President with the Senate's advice and consent might prove "inconvenient" as the number of offices in the federal government grew.[13] The Appointments Clause thus provides 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."[14] This "Excepting Clause" allows Congress to dispense with Senate confirmation for certain officers,[15] while "prevent[ing] Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint."[16]

Why Is the Appointments Clause Relevant for Congress?

Under the U.S. constitutional structure, Congress has the power to establish federal offices through lawmaking.[17] Unless the Constitution provides otherwise for a particular office, such as the presidency, Congress's power includes "the determination of [an office's] functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed and their compensation."[18]

The Appointments Clause may constrain how Congress structures positions within the federal government. As a threshold matter, the Clause applies only if Congress assigns a "continuing" position "significant" federal authority.[19] If so, the "default" method of appointment is appointment by the President with the Senate's advice and consent.[20] Congress can change that method "by Law," but only for "inferior Officers" and only by choosing the President, the courts, or a department head to appoint such inferior officers.[21] Case law interpreting the Appointments Clause can serve as a guide to Congress when it is considering legislation to create a new position within a federal agency or on a statutorily created board or commission. Such legal standards may also be relevant if Congress is amending the duties of an existing position or designating an existing official to perform functions outside of their typical duties.[22]

Congress could require Senate confirmation of more types of officers if it so chooses, to play a greater role in the appointment process. By default, the Appointments Clause divides the power to

[13] United States v. Germaine, 99 U.S. 508, 510 (1879).

[14] U.S. CONST. art. II, § 2, cl. 2.

[15] *Edmond*, 520 U.S. at 660.

[16] Freytag v. Comm'r, 501 U.S. 868, 885 (1991).

[17] Myers v. United States, 272 U.S. 52, 129 (1926).

[18] *Id.*

[19] *See infra* "Who Are "Officers of the United States"?".

[20] *Edmond*, 520 U.S. at 660.

[21] U.S. CONST. art. II, § 2, cl. 2.

[22] In *Weiss v. United States*, the Supreme Court held that "the Appointments Clause by its own force does not require a second appointment before military officers," who are already appointed through advice and consent, could "discharge the duties of [a military] judge." 510 U.S. 163, 176 (1994). The Court reasoned that there was little evidence that Congress sought to "circumvent[] the Appointments Clause" by effectively creating a new office and selecting the officer holder, because the statute "authorized an indefinite number of military judges, who could be designated from among hundreds or perhaps thousands of qualified commissioned officers." *Id.* at 174. Additionally, the new duties were germane to military service, the Court reasoned, because "all military officers, consistent with a long tradition, play a role in the operation of the military justice system." *Id.* at 174–75.

select individuals to serve in federal offices between the President (through appointment) and the Senate (through advice and consent).[23] Thus, unless Congress prescribes a different method of appointing a particular inferior officer, the Senate retains a role in appointing officers through the confirmation process.[24] The confirmation process is also a form of congressional oversight.[25] Confirmation hearings "can be used to provide policy direction to nominees, inform nominees of congressional interests, and seek commitments on future behavior."[26]

Once a nominee is confirmed, both chambers of Congress can exercise oversight over the appointee's performance. Congress can use its oversight authority to determine whether Senate-confirmed appointees are adhering to the commitments made during their confirmation hearings.[27] Acting through its committees, Congress can also, if it so chooses, conduct hearings or investigations to determine whether other persons exercising significant federal authority are appointed consistent with the Appointments Clause.

Who Are "Officers of the United States"?

The Supreme Court has interpreted the term "Officers of the United States" as used in the Appointments Clause as having two components. First, an officer is someone who "occup[ies] a 'continuing' position established by law."[28] Second, an officer "exercis[es] significant authority pursuant to the laws of the United States."[29] These features distinguish officers from "lesser functionaries" or "mere employees" of the federal government.[30]

What Does It Mean to Occupy a Continuing Position Established by Law?

The Supreme Court described the concept of a federal "office" in its 1867 decision in *United States v. Hartwell*.[31] The Court explained that an "office is a public station, or employment, conferred by the appointment of government" and "embraces the ideas of tenure, duration, emolument, and duties."[32] The Court held that the defendant, who was indicted under federal law for embezzlement, was an officer within the meaning of the statute because he was employed "in the public services of the United States," "appointed pursuant to law" and "by the head of a department" within the meaning of the Appointments Clause, "his compensation was fixed by

[23] *Edmond*, 520 U.S. at 660. *See* Freytag v. Comm'r, 501 U.S. 868, 884 (1991) ("[T]he Clause bespeaks a principle of limitation by dividing the power to appoint the principal federal officers—ambassadors, ministers, heads of departments, and judges—between the Executive and Legislative Branches.").

[24] *Edmond*, 520 U.S. at 660.

[25] *See* CRS Report RL30240, *Congressional Oversight Manual*, coordinated by Ben Wilhelm, Todd Garvey, and Christopher M. Davis (2022).

[26] *Id.* at 25.

[27] *Id.*

[28] Lucia v. SEC, 585 U.S. 237, 245 (2018) (quoting United States v. Germaine, 99 U.S. 508, 511 (1879)).

[29] *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam)).

[30] *Id.*

[31] 73 U.S. 385, 393 (1867).

[32] *Id.*

law," and his "duties were continuing and permanent, not occasional or temporary."[33] Subsequent decisions reiterated these elements of an office in the context of Appointments Clause disputes.[34]

Continuing Position

In 1879, in *United States v. Germaine*, the Supreme Court held that a civil surgeon appointed by the Commissioner of Pensions to "make the periodical examination of pensioners which are or may be required by law" was not an officer of the United States.[35] The duties of a civil surgeon, the Court explained, "are *not* continuing and permanent, and they *are* occasional and intermittent."[36] "The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination."[37] Other characteristics of the surgeon's employment also factored into the Court's analysis, including that the surgeon was "required to keep no place of business for the public use" and apparently took "no oath."[38] Additionally, while the surgeon was paid from federal funds for each examination, "[n]o regular appropriation [was] made to pay his compensation."[39]

The Supreme Court reached a similar conclusion in *Auffmordt v. Hedden*, an 1890 case concerning a customs dispute over the valuation of imported goods.[40] A federal statute authorized reappraisals of a collector's initial valuation by a general appraiser and a "merchant appraiser" selected by the collector.[41] The Court rejected the importers' claim that the merchant appraiser who performed its reappraisal was an officer within the meaning of the Appointments Clause.[42] The Court described a merchant appraiser as "an expert" who is "selected for his special knowledge in regard to the character and value of the particular goods in question" for a specific reappraisal.[43] The Court observed that the position had "no general functions" and did not "fall within the provisions of the civil service law."[44] In sum, the merchant appraiser's position was "without tenure, duration, continuing emolument, or continuous duties, and he act[ed] only occasionally and temporarily."[45]

An individual does not have to serve indefinitely to be an officer. A position with a set term of office can be "continuing" if its next occupant would assume the duties assigned to the position.[46]

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[33] *Id.*

[34] *E.g.*, United States v. Germaine, 99 U.S. 508, 511 (1879).

[35] *Id.* at 508, 512.

[36] *Id.* at 512 (emphasis added).

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] 137 U.S. 310, 327 (1890).

[41] *Id.* at 312–13.

[42] *Id.* at 326.

[43] *Id.* at 326–27. The Court further observed that the statute used the word "select" rather than "appoint." *Id.* at 327.

[44] *Id.* at 326.

[45] *Id.* at 327.

[46] United States v. Donziger, 38 F.4th 290, 297 (2d Cir. 2022) (stating that "to qualify as an office, the position must not depend on the identity of the person occupying it, and the duties should 'continue, though the person be changed'" (quoting United States v. Maurice, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823)). *See also* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd. (PCAOB), 561 U.S. 477, 501 (2010) (ruling implicitly that members of the PCAOB, who served five-year terms, were officers for constitutional purposes); Humphrey's Ex'r v. United States, 295 U.S. 602, 620, 631–32 (1935) (upholding Congress's authority to fix a seven-year term of office for Commissioners of the FTC, subject to removal by the President only for certain enumerated causes).

Still, the line between a "continuing" and a "temporary" position is not always clear, and the Court has found positions with temporary features to be offices in some cases. In *United States v. Eaton*, the Court held that a vice consul—a subordinate officer "charged with the duty of temporarily performing the functions of the consular office" under "special and temporary conditions"—remained an inferior officer.[47] In *Morrison v. Olson*, the Court found it "clear" that an independent counsel appointed to investigate a particular matter was an officer of the United States, focusing instead on the question of whether he was an inferior or a principal officer.[48] In the course of that analysis, the Court described the independent counsel's duties as temporary in nature.

> [A]ppellant's office is limited in tenure. There is concededly no time limit on the appointment of a particular counsel. Nonetheless, the office of independent counsel is "temporary" in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated, either by the counsel herself or by action of the Special Division. Unlike other prosecutors, appellant has no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for and authorized by the Special Division to undertake. In our view, these factors relating to the "ideas of tenure, duration . . . and duties" of the independent counsel are sufficient to establish that appellant is an "inferior" officer in the constitutional sense.[49]

In a 2022 decision, the U.S. Court of Appeals for the Second Circuit[50] applied "three factors" derived from *Germaine* and *Auffmordt* to determine "whether a temporary position is an office: (1) the position is not personal to a particular individual; (2) the position is not transient or fleeting; and (3) the duties of the position are more than incidental."[51] Based on these factors, the court concluded that certain court-appointed special prosecutors occupied a continuing position.[52]

In a January 16, 2025, opinion,[53] the Department of Justice's Office of Legal Counsel (OLC) offered an additional consideration for "determining whether a newly created, temporary position is 'continuing.'"[54] OLC stated that a temporary position might nevertheless be continuing for Appointments Clause purposes "if the position's bundle of duties has historically been performed by an officer" and those duties, "although vested in a new temporary position, would continue to be exercised by a single position in the government in a largely unbroken chain across time."[55]

[47] 169 U.S. 331, 343 (1898). In particular, the vice consul was performing the duties of the consular office during the illness of the consul-general. *Id.*

[48] 487 U.S. 654, 670 n.12 (1988).

[49] *Id.* at 672 (citations omitted).

[50] Subsequent references to a particular circuit in this report refer to the U.S. Court of Appeals for that circuit (e.g., D.C. Circuit).

[51] *Donziger*, 38 F.4th at 297.

[52] *Id.* at 295–99.

[53] Within the executive branch, OLC opinions may be authoritative or controlling on questions of law, but they are not binding on the legislative or judicial branches. *See* 28 U.S.C. §§ 511–513 (directing the Attorney General to advise the President, the heads of executive departments, and the Secretaries of military departments on "questions of law" upon request); Citizens for Resp. & Ethics in Washington v. DOJ, 922 F.3d 480, 484 (D.C. Cir. 2019) (discussing OLC's position that its "formal written opinions" are binding on the executive branch).

[54] The Test for Determining "Officer" Status Under the Appointments Clause, 49 Op. O.L.C. slip op. at 6 (Jan. 16, 2025).

[55] *Id.*

Established by Law

The requirement that an office be "established by Law" comes from the text of the Appointments Clause.[56] As with other concepts in Appointments Clause cases, however, its meaning is not precisely defined. The standard is usually met where "the duties, salary, and means of appointment for that office are specified by statute."[57] OLC and some courts have cautioned that the absence of one or more of these statutory elements does not necessarily render an official a nonofficer.[58] For example, OLC reasoned in a 2007 opinion that individuals who receive no federal compensation may nevertheless occupy a position established by law due to the nature of their statutorily prescribed duties.[59]

Questions can arise as to whether a position was "established by Law" when it was created by executive order or regulation rather than by statute. Similar questions can arise when statutory duties are assigned to a position "extant in the bureaucratic hierarchy."[60] Several lower courts have held that a position created by regulation was established by law, where the regulation was based on a statute authorizing the agency head to appoint or designate "officers or employees" or promulgate "necessary and appropriate regulations" to carry out certain functions.[61] Other lower court decisions suggest that a position must be specifically named or described in statute to be established by law.[62]

Another open question concerns the constitutional ramifications of a government employee exercising significant authority while in a position that is not "established by Law."[63] The

[56] *See* U.S. CONST. art. II, § 2, cl. 2 (stating that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law").

[57] Freytag v. Comm'r, 501 U.S. 868, 881 (1991). *See also Lucia v. SEC*, 585 U.S. 237, 248 (2018) (holding that SEC ALJs occupied a position established by law because their "appointment is to a position created by statute, down to its 'duties, salary, and means of appointment'" (citing *Freytag*, 501 U.S. at 878)).

[58] *See, e.g.*, Confederated Tribes of Siletz Indians v. United States, 110 F.3d 688, 697 (9th Cir. 1997) (analyzing whether state governors, who formally held no federal position, nonetheless "perform[ed] duties reserved for officers of the United States" under a specific statute).

[59] *See* Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 119, 121 (2007) (opining that "an emolument" is "not essential" for an official to qualify as an officer within the meaning of the Appointments Clause).

[60] Tucker v. Comm'r, 676 F.3d 1129, 1130–31 (D.C. Cir. 2012).

[61] Manis v. U.S. Dep't of Agric., 731 F. Supp. 3d 685, 694 (M.D.N.C. 2024) (reasoning that although "Congress itself did not explicitly create the office of Judicial Officer, it did explicitly grant the Secretary authority to do so"), *appeal filed*, No. 24-1367 (4th Cir. 2024) (oral argument held Dec. 10, 2024); United States v. Alaska, No. 1:22-CV-00054-SLG, 2024 WL 1348632, at *9 (D. Alaska Mar. 29, 2024) (holding that a board created by regulation was established by law because a statute authorized the relevant agency heads to "prescribe such regulations as are necessary and appropriate to carry out" certain statutory duties and "properly enacted regulations have the force of law"), *appeal filed*, No. 24-2251 (9th Cir. 2024); McConnell v. U.S. Dep't of Agric., No. 4:23-CV-24, 2023 WL 6960365, at *2 (E.D. Tenn. Oct. 20, 2023) (having "no issue concluding that the Judicial Officer holds an office established by law" because the position was "established by regulation, pursuant to the statutory authorization of Congress"). *Cf.* SEC v. Musk, No. 3:23-MC-80253-JSC, 2024 WL 2875096, at *4 (N.D. Cal. May 14, 2024) (concluding that a Senior Counsel at SEC held "a continuing office stablished by law," citing 5 U.S.C. § 4802(b), which authorizes the SEC to "appoint and fix the compensation of such officers, attorneys, . . . and other employees as may be necessary for carrying out its functions under the securities laws").

[62] *See* Navarro v. U.S. Ctr. for SafeSport, No. 3:24-CV-00030, 2025 WL 209166, at *16 (W.D. Va. Jan. 15, 2025) (concluding that the position of director on the board of directors of the U.S. Center for SafeSport is not "established by law" because the "Amateur Sports Act says nothing about SafeSport's board of directors"), *appeal filed*, No. 25-1150 (4th Cir. 2025).

[63] U.S. CONST. art. II, § 2, cl. 2. While the same concerns might arise if a private person (i.e., not a federal employee) (continued...)

Supreme Court's most recent cases elaborating on the distinctions between officers and nonofficers have not reached this question, because the positions at issue were expressly set out in statute.[64] Nevertheless, the Court's framing and application of the legal standards in those cases may be instructive. In both its 1991 decision in *Freytag v. Commissioner* concerning special trial judges of the U.S. Tax Court and its 2018 decision in *Lucia v. SEC* concerning an administrative law judge (ALJ) at the Securities and Exchange Commission (SEC), the Court observed that the positions in question were "established by Law" before analyzing whether their holders exercised significant authority.[65] The *Lucia* Court reasoned, for example, that

> [f]ar from serving temporarily or episodically, SEC ALJs 'receive[ ] a career appointment.' And that appointment is to a position created by statute, down to its 'duties, salary, and means of appointment.'[66]

On one reading, the *Lucia* Court's reasoning is simply an explanation of why ALJs mirrored the special trial judges in *Freytag*.[67] The case could also be read, however, as stating a prerequisite for officer status, suggesting that an individual must occupy a position established by law (and a continuing one at that) to be an officer subject to the Appointments Clause.[68] On this reading, a lower court might conclude that an Appointments Clause challenge to an official's actions would necessarily fail if the official had no such established position,[69] because nonofficer employees "need not be selected in compliance with the strict requirements of Article II."[70] That conclusion could lead to results inconsistent with the design—and some might argue, the text—of the Appointments Clause. In a 2012 decision, the D.C. Circuit remarked that "it would seem anomalous if the Appointments Clause were inapplicable to positions extant in the bureaucratic hierarchy, and to which Congress assigned 'significant authority,' merely because neither Congress nor the executive branch had formally created the positions."[71] In that case, the court "ultimately bypass[ed]" the question of whether certain positions within the Internal Revenue Service's Office of Appeals were established by law, but its reasoning reflects a skepticism on the

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were to exercise significant federal authority, that scenario might implicate the private nondelegation doctrine, another facet of separation-of-powers jurisprudence. In a constitutional challenge to a federal statute, a plaintiff argued that an entity's private status for constitutional purposes cannot defeat an Appointments Clause claim because otherwise "the federal government can simply vest all executive power in a private corporation and avoid the Appointments Clause." Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415, 440 (5th Cir. 2024), *stay granted sub nom.* Horseracing Integrity & Safety Auth. v. Nat'l Horsemen's Benevolent & Protective Ass'n, 145 S. Ct. 8 (Mem.) (2024) (granting stay of mandate pending disposition of petition for certiorari in No. 24-433), *pets. for cert. filed*, Nos. 24-429, 24-433, 24-465, 24-472, 24-489 (U.S. 2024). The Fifth Circuit responded that the plaintiff's "argument ignores the role of the private nondelegation doctrine," which provides that the "government cannot delegate core governmental powers to unsupervised private parties." *Id.*

[64] Freytag v. Comm'r, 501 U.S. 868, 881 (1991); Lucia v. SEC, 585 U.S. 237, 247–48 (2018).

[65] *Freytag*, 501 U.S. at 881 ("The office of special trial judge is 'established by Law,' and the duties, salary, and means of appointment for that office are specified by statute. These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute." (internal citations omitted)); *Lucia*, 585 U.S. at 247–48 ("To begin, the Commission's ALJs, like the Tax Court's [special trial judges], hold a continuing office established by law. Indeed, everyone here—Lucia, the Government, and the amicus—agrees on that point." (internal citations omitted)).

[66] *See Lucia*, 585 U.S. at 247–48 (internal citations omitted).

[67] *See id.* at 247 ("*Freytag* says everything necessary to decide this case.").

[68] *See id.* at 245 (synthesizing the "basic framework for distinguishing between officers and employees," and observing that the Court in 1879 "made clear that an individual must occupy a 'continuing' position established by law to qualify as an officer").

[69] *E.g.*, *Navarro*, No. 3:24-CV-00030, 2025 WL 209166, at *16.

[70] *Freytag*, 501 U.S. at 880.

[71] Tucker v. Comm'r, 676 F.3d 1129, 1130–31 (D.C. Cir. 2012).

part of some judges that Congress or the executive branch could avoid the Constitution's appointment requirements by declining to establish a specific position by law.[72]

In the past, the executive branch has argued that the absence of a formal office within the federal government does not necessarily make the Appointments Clause inapplicable. In a 2007 opinion, OLC posited that "Congress could not evade the Appointments Clause by, for example, the artifice of authorizing a contract for the supervision of the Justice Department, on the ground that no 'office' of Attorney General would be created by law—even where the statutory authorization for the contract were to delegate sovereign authority and establish the continuance of the contractual position."[73] Although OLC issued a more recent opinion on the meaning of "officer" on January 16, 2025, it referred readers to its "prior writings" on the phrase "established by Law," stating that "the Supreme Court has not focused on [this language] in the ensuing years."[74]

At least one sitting Supreme Court Justice has argued that the exercise of significant federal authority outside of a congressionally created or authorized office constitutes a violation of the Appointments Clause and general separation-of-powers principles.[75] Separately concurring in *Trump v. United States*, Justice Clarence Thomas wrote that by "requiring that Congress create federal offices 'by Law,' the Constitution imposes an important check against the President—he cannot create offices at his pleasure."[76] Justice Thomas explained as follows:

> The limitation on the President's power to create offices grew out of the Founders' experience with the English monarchy. The King could wield significant power by both creating and filling offices as he saw fit. . . . In fact, one of the grievances raised by the American colonists in declaring their independence was that the King "ha[d] erected a multitude of New Offices, and sent hither swarms of Officers to harass our people and eat out their substance." Declaration of Independence ¶12. . . .
>
> The Founders broke from the monarchial model by giving the President the power to *fill* offices (with the Senate's approval), but not the power to *create* offices.[77]

In sum, while the Supreme Court has described an office, for Appointments Clause purposes, as a "continuing position established by law,"[78] it has not squarely decided whether the absence of a statute creating or authorizing a contested position would defeat an Appointments Clause claim, nor has the Court decided whether it would violate the separation of powers for such an individual to exercise significant authority.

What Does It Mean to Exercise Significant Authority Pursuant to the Laws of the United States?

While the Supreme Court has not delineated the precise bounds of "significant authority," the Court has identified rulemaking authority, enforcement authority, and adjudicatory functions in

[72] *Id.* at 1132.

[73] *See* Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 117–118 (2007).

[74] The Test for Determining "Officer" Status Under the Appointments Clause, 49 Op. O.L.C. slip op. at 3 n.2 (Jan. 16, 2025) (stating that the Court has not focused on these concepts "beyond the passing statement from *Lucia*" that an officer occupies "a 'continuing' position established by law").

[75] Trump v. United States, 603 U.S. 593, 643–50 (2024) (Thomas, J., concurring in part) (arguing with respect to the prosecutor in the case that the position of "Special Counsel" may not have been "established by law").

[76] *Id.* at 643.

[77] *Id.* at 645–46.

[78] Lucia v. SEC, 585 U.S. 237, 245 (2018) (internal quotation marks omitted).

presiding over adversarial proceedings to be forms of significant authority.[79] Final decisionmaking authority on matters related to these functions can be an indicator of officer status, though it is not required for someone to qualify as an officer.[80] The Supreme Court has suggested that the power to decide "eligibility for funds" may also be a form of significant authority but has not ruled on whether or in what circumstances federal grantmaking or contracting authority qualifies.[81]

Recognized Forms of Significant Authority

The Supreme Court's 1976 decision in *Buckley v. Valeo* was the first to expound on the significant authority standard.[82] The *Buckley* Court examined the authority of Federal Election Commission (FEC) members, several of whom were appointed by Members of Congress, to take various actions to implement the Federal Election Campaign Act (FECA).[83] The Court first observed that Article II of the Constitution gives the President both the responsibility to ensure that federal laws are "faithfully executed" and the power of "administrative control" over those executing the laws.[84] The Court then considered which of the FEC's functions were "merely in aid of congressional authority to legislate" or "sufficiently removed from the administration and enforcement of public law" such that nonofficers could perform them.[85]

The Court upheld a delegation to the FEC to receive, disseminate, and investigate information about elections. The Court concluded that these investigative and informational powers could be exercised by nonofficers because these functions are legislative in nature and "fall[] in the same general category as those powers which Congress might delegate to one of its own committees."[86]

In contrast, the Court held that only a constitutionally appointed officer could exercise the FEC's "broad administrative powers" and its authority to enforce FECA through administrative determinations and civil actions.[87] With respect to administrative powers, the Court observed that FECA empowered the Commission to make rules, render advisory opinions, and determine candidates' eligibility for funds—all "free from day-to-day supervision of either Congress or the Executive Branch."[88] Explaining that such functions were "usually performed by independent regulatory agencies" or executive branch departments implementing a federal statute, the Court described the functions as "more legislative and judicial in nature than" the FEC's enforcement powers.[89] Nevertheless, the Court reasoned that "each" administrative function reflected "the performance of a significant governmental duty exercised pursuant to a public law."[90] The Court also concluded that the FEC's "primary responsibility" for instituting civil actions for certain

[79] *Lucia*, 585 U.S. at 248; Buckley v. Valeo, 424 U.S. 1, 138–41 (1976) (per curiam).

[80] *See* Freytag v. Comm'r, 501 U.S. 868, 882 (1991) (reasoning that special trial judges would be officers even if they did not have important adjudicatory duties in some contexts because they could "render the decisions of the Tax Court" in certain other contexts which resulted in them acting "as inferior officers who exercise independent authority"); *Lucia*, 585 U.S. at 247 n.4 (stating that final decisionmaking authority is not "a *sine qua non* of officer status").

[81] Buckley v. Valeo, 424 U.S. 1, 140 (1976) (per curiam).

[82] *Id.*

[83] *Id.* at 109, 113.

[84] *Id.* at 135–36 (quoting Myers v. United States, 272 U.S. 52, 117, 163–64 (1926)).

[85] *Id.* at 141.

[86] *Id.* at 137.

[87] *Id.* at 138–41.

[88] *Id.* at 140.

[89] *Id.* at 140–41.

[90] *Id.* at 141.

violations of federal election law "cannot possibly be regarded as merely in aid of the legislative function of Congress."[91] For the Court, such enforcement authority fell squarely within the executive branch's "responsibility to 'take Care that the Laws be faithfully executed.'"[92] Because the FEC exercised "significant authority" and because some of its members were selected by Congress alone—that is, outside the parameters of the Appointments Clause—the *Buckley* Court held that the FEC could not exercise most of its powers "as presently constituted."[93]

In 2018, in *Lucia v. SEC*, the Supreme Court held that administrative law judges at the SEC were officers of the United States because they performed a range of "important" adjudicatory functions.[94] In particular, ALJs "take testimony," "receive evidence," "examine witnesses," "conduct trials," "administer oaths," "rule on motions," "generally 'regulat[e] the course of' a hearing, as well as the conduct of parties and counsel," "rule on the admissibility of evidence," and "have the power to enforce compliance with discovery orders."[95] They also issue initial "decisions containing factual findings, legal conclusions, and appropriate remedies," which become the agency's final decisions if the Commission declines to review them.[96] In sum, in the *Lucia* Court's view, SEC ALJs possessed "nearly all the tools of federal trial judges" and thus exercised significant federal authority.[97]

Final Decisionmaking Authority

The authority to render a final decision on behalf of a federal agency may qualify as significant authority under some circumstances. Prior to the Supreme Court's decision in *Lucia*, lower courts had split on whether the authority to issue final decisions was a necessary characteristic for officer status.[98] Some courts equated officer status with the ability to take actions that "bind third parties, or the government itself, for the public benefit."[99] In *Lucia*, the Court clarified that final decisionmaking authority is not a prerequisite for officer status.[100] In other words, even if an individual lacks final decisionmaking authority, they may be an officer based on their other "important functions" and "significant discretion."[101] The *Lucia* Court suggested, however, that the power to render a decision that might have "independent effect" without agency approval—for example, where agency review of the decision is not automatic—may be "significant" enough, standing alone, to trigger the Appointments Clause.[102]

The kinds of decisions at issue in *Lucia* involved factual findings and legal conclusions made by ALJs presiding over adversarial proceedings in administrative enforcement actions against regulated entities.[103] It is not clear whether authority to make other types of decisions on an

[91] *Id.* at 138, 140.

[92] *Id.* at 138 (quoting U.S. CONST. art. II, § 3).

[93] *Id.* at 143.

[94] 585 U.S. 237, 248 (2018).

[95] *Id.*

[96] *Id.* at 249.

[97] *Id.* at 248.

[98] *See generally* CRS Legal Sidebar LSB10061, *UPDATED: Supreme Court Agrees to Hear Constitutional Challenge to SEC Administrative Law Judges*, by Victoria L. Killion (2018).

[99] Raymond J. Lucia Cos. v. SEC, 832 F.3d 277, 286 (D.C. Cir. 2016), *rev'd*, *Lucia*, 585 U.S. 237.

[100] *See Lucia*, 585 U.S. at 247 n.4 (stating that *Freytag*'s "primary analysis explicitly reject[ed]" the view that "final decisionmaking authority is a *sine qua non* [an essential element] of officer status").

[101] *Id.* at 238.

[102] *Id.* at 248–49.

[103] *Id.*

agency's behalf would qualify as significant authority, such as when a decision involves a "ministerial" task performed according to specific statutory criteria.[104]

An agency official may have final decisionmaking authority for Appointments Clause purposes even if the governing statute allows for review by another branch of government, such as a time frame to appeal an administrative decision to a court.[105] What matters appears to be whether the individual in question has the "last[] word" when it comes to the executive branch.[106]

Federal Grantmaking or Contracting Authority

It is unsettled whether the authority to make grants or enter into contracts on the federal government's behalf qualifies as "significant authority" within the meaning of the Appointments Clause. There are some aspects of managing and spending federal funds that, standing alone, may not rise to the level of significant federal authority. For example, federal funding is often disbursed to states and private entities through programs authorized by statute.[107] Many of these funding recipients are not appointed federal officials, yet they are sometimes authorized to decide how to spend allocated funds or what entities will receive funding as subrecipients. The degree of discretion varies according to parameters specified by Congress in the program statute or relevant appropriations or by the disbursing agency in regulations or grant agreements.[108]

Other aspects of grantmaking and federal contracting could implicate significant authority—though, again, the question is unsettled. An agency entering into a grant or contract has the potential to bind the government and an instrument to enforce against the private party that entered into the agreement. In a 2007 opinion, OLC concluded that the authority to enter into contracts on the government's behalf is significant federal authority.[109] Additionally, an agency's allocation of federal funds may involve policy judgments that Congress has delegated to the head of the agency.[110]

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[104] *See* Freytag v. Comm'r, 501 U.S. 868, 881 (1991) (explaining that special trial judges, whom the Court determined to be officers, "perform more than ministerial tasks"). *Cf.* Morrison v. Olson, 487 U.S. 654, 681 (1988) (holding that it did not violate the separation of powers for a court, rather than an appointee in the executive branch, to "exercise some judgment and discretion" with respect to powers that were "themselves essentially ministerial").

[105] *Cf.* United States v. Arthrex, Inc., 594 U.S. 1, 17 (2021) (reasoning that "[r]eview outside Article II—here, an appeal to the Federal Circuit—cannot provide the necessary supervision" to show that administrative patent judges acted as inferior, rather than principal, officers in deciding certain proceedings).

[106] *Lucia*, 585 U.S. at 249 (stating that "when the SEC declines review (and issues an order saying so), the ALJ's decision itself 'becomes final' and is 'deemed the action of the Commission'").

[107] *See, e.g.*, 20 U.S.C. § 1070a (establishing Federal Pell Grants for low-income students).

[108] *E.g.*, 34 U.S.C. § 10152 (authorizing the Attorney General to "make grants to States and units of local government" according to a statutory formula, "for use by the State or unit of local government to provide additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice or civil proceedings"); 42 U.S.C. § 604(a) (generally authorizing states to use grants for Temporary Assistance for Needy Families "in any manner that is reasonably calculated to accomplish the purpose" of the statute).

[109] Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73 (2007). OLC distinguished the authority to "receive" and "disburse[]" public funds on the government's behalf from other "functions simply involving the management of governmental property," which it reasoned an unappointed employee can take in a "proprietary" capacity. *Id.* at 89.

[110] *See* City of Los Angeles v. Barr, 929 F.3d 1163, 1169, 1171 (9th Cir. 2019) (explaining that a certain grant program for public safety and community policing "gives broad discretion to DOJ to allocate grants and administer the grant program for the purposes set forth" in the statute and that DOJ's "scoring process" for applications "is designed to allocate federal assistance to programs, focuses, or conduct that DOJ deems to best further statutory purposes and federal goals").

Can State, Local, or Territorial Officials Be Officers of the United States?

The Appointments Clause "governs the appointments of all officers of the United States" regardless of where they are located geographically.[111] At the same time, the phrase "officers of the United States" refers only to officials exercising significant *federal* authority.[112] Individuals "whose powers and duties are primarily local in nature" are not considered officers of the United States, even if their duties derive from an act of Congress and amount to "considerable power."[113]

In 2020, the Supreme Court considered whether members of the Financial Oversight and Management Board for Puerto Rico were officers of the United States.[114] Congress created the Board through a federal statute, using its authority with respect to U.S. territories under Article IV of the Constitution.[115] The statute authorized the President to appoint seven of the Board's eight members and specified the Board's duties.[116] The Board could "hold hearings," "issue subpoenas," "develop its own budget," "control[] the issuance of new debt for Puerto Rico, and" "initiate bankruptcy proceedings for Puerto Rico."[117] Its "broad investigatory powers" were "backed by Puerto Rican, not federal law," however.[118] Additionally, the Board exercised its budgetary and bankruptcy authority on behalf of the Commonwealth of Puerto Rico, not the United States.[119] Based on the "local nature of the legislation's expressed purposes, the representation of local interests in bankruptcy proceedings, the focus of the Board's powers upon local expenditures, the local logistical support, the reliance on local laws in aid of the Board's procedural powers," and the history of Puerto Rico and the U.S. territories, the Supreme Court concluded that the Board members had "primarily local duties."[120] Accordingly, the Court held that the Board members were not officers of the United States and need not be appointed in conformity with the Appointments Clause.[121]

What Are the Permissible Methods of Appointing Officers?

The "default" method of appointment for any officer of the United States is appointment by the President with the advice and consent of the Senate.[122] This process is also the required method of

[111] Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC, 590 U.S. 448, 453 (2020).

[112] *Id.* at 468.

[113] *Id.* at 453, 467.

[114] *Id.* at 453.

[115] U.S. CONST. art. IV, § 3, cl. 2. *See Power of Congress over Territories*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIV-S3-C2-3/ALDE_00013511/ (last visited Apr. 1, 2025).

[116] *Aurelius*, 590 U.S. at 454–55 (explaining that the Governor of Puerto Rico serves as an ex officio member and the President must select six of the members from lists prepared by congressional leaders).

[117] *Id.* at 466–67.

[118] *Id.* at 466.

[119] *Id.*

[120] *Id.* at 467.

[121] *Id.* at 471–72.

[122] Edmond v. United States, 520 U.S. 651, 660 (1997). The Appointments Clause also specifies certain officers—"Ambassadors, other public Ministers and Consuls, [and] Judges of the supreme Court"—who must be appointed through the advice and consent process. U.S. CONST. art. II, § 2, cl. 2.

appointment for principal officers.[123] In what is sometimes called the "Excepting Clause,"[124] the Appointments Clause permits Congress to "vest" the appointment of inferior officers "by Law" in "the President alone," in "the Courts of Law," or in "the Heads of Departments."[125] In other words, Congress, by statute, can authorize one of these three to appoint inferior officers.

The language "the President alone" is generally understood to mean the President appointing an inferior officer without Senate confirmation.[126] The "Courts of Law" include courts established under Article III of the Constitution, such as the federal district courts.[127] The phrase also captures "non-Article III tribunals" (i.e., "legislative courts") that "exercise judicial power and perform exclusively judicial functions," such as the U.S. Tax Court.[128] A department head, for Appointments Clause purposes, means a cabinet-level Secretary (e.g., the Secretary of Labor) or the leader of a "freestanding component of the Executive Branch," which can be a multimember body (e.g., the Securities and Exchange Commission).[129] "Inferior commissioners and bureau officers" are not usually considered department heads.[130]

What Distinguishes a Principal Officer from an Inferior Officer?

The Supreme Court has not adopted "an exclusive criterion for distinguishing between principal and inferior officers."[131] Both types of officers exercise "significant authority pursuant to the laws of the United States."[132] The main difference between the two is that the work of inferior officers is "directed and supervised at some level" by one or more principal officers within the executive branch.[133] In *United States v. Edmond*, a 1997 decision, the Supreme Court concluded that certain military judges had the requisite supervision to qualify as inferior officers.[134] A Senate-confirmed official could remove the judges from their judicial assignments "without cause," which the Court considered a "powerful tool for control."[135] Additionally, the military judges had "no power to

[123] *Edmond*, 520 U.S. at 660.

[124] *Id.*

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

[126] *See* Myers v. United States, 272 U.S. 52, 161 (1926) (describing "the action of Congress in removing the necessity for the advice and consent of the Senate and putting the power of appointment in the President alone").

[127] Freytag v. Comm'r, 501 U.S. 868, 891 (1991); *Overview of Establishment of Article III Courts*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-8-1/ALDE_00013557/ (last visited Apr. 1, 2025).

[128] *Freytag*, 501 U.S. at 889, 892.

[129] *Id.* at 878; Free Enter. Fund v. PCAOB, 561 U.S. 477, 511 (2010).

[130] *Freytag*, 501 U.S. at 886 (quoting United States v. Germaine, 99 U.S. 508, 511 (1878)).

[131] Edmond v. United States, 520 U.S. 651, 661 (1997).

[132] *Id.* at 662. *See supra* "Who Are "Officers of the United States"?".

[133] *Id.* at 666 (reasoning that the military judges were inferior officers "by reason of the supervision over their work exercised by the General Counsel of the Department of Transportation in his capacity as Judge Advocate General and the Court of Appeals for the Armed Forces"). *See also* United States v. Arthrex, Inc., 594 U.S. 1, 14 (2021) (reasoning that administrative patent judges acted as principal officers in proceedings where "no principal officer at any level within the Executive Branch" directed and supervised their work).

[134] *Edmond*, 520 U.S. at 653 (holding that the appointment of civilian members of the Coast Guard Court of Criminal Appeals by the Secretary of Transportation, the head of a department, complied with the Appointments Clause).

[135] *Id.* at 664.

render a final decision" on the federal government's behalf "unless permitted to do so by other Executive officers."[136]

By comparison, in its 2021 decision in *United States v. Arthrex*, the Court ruled that administrative patent judges (APJs) acted as principal officers when they issued decisions after presiding over certain proceedings to challenge a patent.[137] The statutory framework lacked the "review by a superior executive officer" that was present in *Edmond*, rendering APJs' "unreviewable authority" during these proceedings "incompatible with their appointment by the Secretary to an inferior office."[138] The Court resolved the issue by "severing" (i.e., declaring unenforceable) a statutory provision that effectively barred rehearing of APJ decisions stemming from these proceedings by the Director of the Patent and Trademark Office, thus allowing a principal officer within the executive branch to review APJ decisions.[139] The Court explained that "the Director need not review every decision," stating that "[w]hat matters is that the Director have the discretion to review decisions rendered by APJs."[140] "In this way," the Court reasoned, "the President remains responsible for the exercise of executive power—and through him, the exercise of executive power remains accountable to the people."[141]

Does the Designation of an Acting Officer Need to Comply with the Appointments Clause?

The duties of a Senate-confirmed officer "may go unperformed if a vacancy arises and the President and Senate cannot promptly agree on a replacement."[142] According to the Supreme Court, "Congress has long accounted for this reality by authorizing the President to direct certain officials to temporarily carry out the duties of a vacant [advice-and-consent] office in an acting capacity, without Senate confirmation."[143] A federal statute, the Federal Vacancies Reform Act of 1998 (FVRA), currently prescribes the rules for many such temporary designations.[144] In addition, agency-specific statutes may authorize acting service in specific offices.[145]

An official's temporary service as an acting officer can prompt questions about whether that official must be appointed in accordance with the Appointments Clause, and if so, whether the governing statutes prescribe the correct method of appointment. Some lower courts have upheld specific appointments made under the FVRA against constitutional challenges. Many of these courts cited *United States v. Eaton*, the 1898 Supreme Court case mentioned above, in which the

[136] *Id.* at 665.

[137] 594 U.S. at 23.

[138] *Id*.

[139] *Id.* at 24–27 (plurality opinion).

[140] *Id.* at 27.

[141] *Id.*

[142] NLRB v. SW Gen., Inc., 580 U.S. 288, 292 (2017).

[143] *Id.* at 293.

[144] *Id. See* CRS Report R44997, *The Vacancies Act: A Legal Overview*, by Valerie C. Brannon (2025). This 1998 law is the most recent iteration of a statute generally governing acting service in the executive branch; Congress first enacted a law called "the Vacancies Act" in 1868, and has provided for acting service in specific positions since 1792. *SW Gen.*, 580 U.S. at 294.

[145] *See, e.g.*, 29 U.S.C. § 552 (providing that the Deputy Secretary of Labor "shall (1) in case of the death, resignation, or removal from office of the Secretary, perform the duties of the Secretary until a successor is appointed, and (2) in case of the absence or sickness of the Secretary, perform the duties of the Secretary until such absence or sickness shall terminate").

Court rejected an Appointments Clause challenge to the acting service of a vice consul.[146] For example, the Fourth Circuit held that the President's selection of a particular individual to serve as the Acting Attorney General under the FVRA satisfied the Appointments Clause, because one "who temporarily performs the duties of a principal officer is an inferior officer for constitutional purposes, and accordingly may occupy that post without having been confirmed with the advice and consent of the Senate."[147] The parties to the appeal had agreed that the FVRA authorized the President to designate that individual—the former Attorney General's chief of staff—as the Acting Attorney General.[148] The Fourth Circuit concluded that, for constitutional purposes, the FVRA served as the statute that "vest[ed]" the appointment of an Acting Attorney General, an inferior officer, "in the President alone."[149]

While current case law suggests acting service is constitutional in at least some circumstances, courts have not always been consistent in their reasoning. Thus, whether a particular individual's acting service complies with the Appointments Clause likely depends on the circumstances. The Fourth Circuit's reasoning may not apply in all situations, such as when an individual "automatically serve[s] pursuant to the operation of the Vacancies Act or an agency-specific statute rather than through presidential designation," and there may be other grounds to uphold certain forms of temporary service.[150]

What Remedies Might a Court Order for an Appointments Clause Violation?

An Appointments Clause violation occurs if an officer is not appointed according to any of the constitutionally prescribed methods, or if there is a mismatch between the way the officer was appointed and the officer's status as a principal or inferior officer.[151] For example, a principal officer's appointment by a department head would violate the Appointments Clause. Congress and the executive branch can take steps to correct an Appointments Clause issue.[152] If, in a legal challenge, a court holds that an Appointments Clause violation occurred, the court may order a specific remedy.

The Supreme Court has taken different approaches to redressing Appointments Clause violations over the years. In *Buckley v. Valeo*, a 1976 case, the petitioners sought a declaration and order from the Court that selection of members of the Federal Election Commission (FEC) violated the Appointments Clause.[153] Ultimately, the Supreme Court agreed, holding that the FEC's composition violated the Appointments Clause because (1) its commissioners were "officers of

[146] 169 U.S. 331, 343 (1898). *See supra* "Continuing Position."

[147] United States v. Smith, 962 F.3d 755, 764 (4th Cir. 2020).

[148] *Id.* at 762–63; United States v. Smith, No. 1:18-cr-00115-MR-WCM, 2018 WL 6834712, at *2 (W.D.N.C. Dec. 28, 2018).

[149] *Id.* at *1 (quoting U.S. CONST. art. II, § 2, cl. 2).

[150] CRS Report R44997, *The Vacancies Act: A Legal Overview*, supra note 144, at 33. In a March 2025 opinion, OLC posited that the President has "inherent" authority to designate acting officials "when necessary to fulfill his constitutional duties, at least where no statute precludes it." Temporary Presidential Designation of Acting Board Members of the Inter-American Foundation and the United States African Development Foundation, 49 Op. O.L.C. slip op. at 4–5 (Mar. 14, 2025).

[151] United States v. Arthrex, Inc., 594 U.S. 1, 23 (2021).

[152] *See infra* "What Are Congress's Options if It Identifies a Potential Appointments Clause Concern?".

[153] 424 U.S. 1, 8–9, 113, 118 (1976) (per curiam).

the United States" and (2) Members of Congress appointed several of the FEC commissioners.[154] Nevertheless, the Court "accorded de facto validity" to the past acts of the Commission, analogizing to cases in which the Court upheld the acts of legislators who had been elected under an unconstitutional apportionment plan.[155] As the Court explained in a later case, the "*de facto* officer doctrine" from which its remedy stemmed "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient."[156] The doctrine "springs from the fear of the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government despite technical defects in title to office."[157] By deeming the FEC's past actions to be valid, the *Buckley* Court signaled that it would not vacate or set aside the FEC's previous "administrative actions and determinations."[158] At the same time, the Court ruled that the Appointments Clause violation meant that the FEC as structured at that time could not exercise "most of [its] powers" going forward.[159] The Court stayed its judgment for thirty days to allow Congress to "reconstitute the Commission by law or to adopt other valid enforcement mechanisms."[160]

Approximately twenty years later, in *Ryder v. United States*, the Supreme Court considered whether to similarly grant de facto validity to a decision of the Coast Guard Court of Military Review (Coast Guard Court), which the United States Court of Military Appeals (Court of Military Appeals) had upheld despite finding an Appointments Clause violation.[161] Specifically, the Court of Military Appeals held that two of the three judges sitting on the petitioner's Coast Guard Court panel were not properly appointed pursuant to the Appointments Clause, but nevertheless affirmed the petitioner's conviction, reasoning, based on *Buckley*, that the panel's actions were de facto valid.[162] Considering what the proper remedy should be for the Appointments Clause violation, the Supreme Court acknowledged its decision to uphold the FEC's past acts in *Buckley*.[163] Nonetheless, the Court limited *Buckley* to its facts, noting that the *Buckley* petitioners were awarded the precise relief they had sought (i.e., declaratory and injunctive relief)[164]—whereas the *Ryder* petitioner sought reversal of the decisions affirming his conviction and a new hearing due to the alleged constitutional defect.[165] The Court reasoned that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred."[166] The Court then held that the petitioner was

[154] *Id.* at 126–27, 140–43.

[155] *Id.* at 142.

[156] Ryder v. United States, 515 U.S. 177, 180 (1995).

[157] *Id.* (quoting 63A AM. JUR. 2D, PUBLIC OFFICERS AND EMPLOYEES § 578, at 1080–81 (1984)).

[158] *Buckley*, 424 U.S. at 142.

[159] *Id.* at 143.

[160] *Id.* at 142–43.

[161] 515 U.S. at 179–80.

[162] *Id.* at 180.

[163] *Id.* at 182–83.

[164] *Id.* at 183–84.

[165] *Id.* at 179. *See also* Brief for Petitioner at *23, Ryder v. United States, 515 U.S. 177 (1995) (No. 94-431).

[166] *Ryder*, 515 U.S. at 182–83.

"entitled to a hearing before a properly appointed panel" of the Coast Guard Court and remanded the case for further proceedings.[167]

The Court reaffirmed its approach from *Ryder* in its 2018 decision in *Lucia v. SEC*. There, an improperly appointed ALJ had ruled against the petitioners, an investment advisor and his company, in an agency proceeding alleging violations of the federal securities laws.[168] The Court reasoned that, as in *Ryder*, the petitioners brought a "timely challenge" to the validity of the presiding official's appointment because the petitioners raised the issue before the agency and on appeal.[169] The Court concluded once again that "the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official."[170] The Court added that the official presiding over the new hearing could not be the same ALJ that issued the original decision "even if he has by now received (or receives sometime in the future) a constitutional appointment."[171] The Court reasoned that having already heard and decided the claims against the petitioners, the original ALJ "cannot be expected to consider the matter as though he had not adjudicated it before."[172] "To cure the constitutional error," the Court ruled, "another ALJ (or the Commission itself) must hold the new hearing."[173] The Court suggested in a footnote that consideration by a different officer may not be "required for every Appointments Clause violation," such as when the violation affects an entire commission and "there is no substitute decisionmaker," suggesting that in those circumstances, a court may order a rehearing by the same multimember body that initially issued the decision.[174]

Although the remedy in *Lucia* was limited to the case before the Court, the Court's holding regarding the officer status of SEC ALJs and its judgment ordering a new hearing before a properly appointed ALJ had sweeping effects throughout the federal government. The Department of Justice reportedly advised department heads to ratify the appointments of existing ALJs and reassign administrative cases involving timely Appointments Clause challenges,[175] which many agencies proceeded to do.[176] A month after the *Lucia* decision, the President issued an executive order placing ALJs in the excepted service, where positions are not subject to competitive examination.[177] The Office of Personnel Management (OPM) interpreted the order to

[167] *Id.* at 188.

[168] Lucia v. SEC, 585 U.S. 237, 242, 251 (2018).

[169] *Id.* at 251.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.* at 251–52.

[174] *Id.* at 251 n.5.

[175] Alison Frankel, *In Confidential Memo to Agency GCs, DOJ Signals 'Aggressive' Stand on Firing ALJs*, REUTERS (July 23, 2018), https://www.reuters.com/article/us-otc-dojmemo/in-confidential-memo-to-agency-gcs-doj-signals-aggressive-stand-on-firing-aljs-idUSKBN1KD2BB/; Debra Cassens Weiss, *Justice Department Memo Gives More Power to Agency Chiefs to Remove Administrative Law Judges*, ABA J. (July 25, 2018), https://www.abajournal.com/news/article/justice_department_memo_gives_more_power_to_agency_chiefs_to_remove_adminis.

[176] *See, e.g.*, SSR 19-1p, 84 Fed. Reg. 9582 (Mar. 15, 2019) (announcing procedures for new hearings before ALJs at the Social Security Administration); Morris & Dickson Co., LLC; Decision & Order, 88 Fed. Reg. 34523, 34532 (Drug Enf't Admin. May 30, 2023) (stating that the Attorney General "ratified the prior appointment" of ALJs at the Drug Enforcement Administration on Oct. 25, 2018); FDIC Rules of Practice and Procedure; Technical Revisions, 86 Fed. Reg. 2246 (Jan. 21, 2021) (to be codified at 12 C.F.R. pt. 308) (stating that "[a]lthough the *Lucia* decision did not directly affect the FDIC [Federal Deposit Insurance Corporation] or the ALJs for the FDIC, the Board nevertheless elected to formally appoint the ALJs that preside over FDIC enforcement proceedings").

[177] Excepting Administrative Law Judges from the Competitive Service, Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (continued...)

reduce OPM's role in evaluating and ranking ALJ candidates, giving agency heads greater flexibility to hire candidates of their choice.[178] As a result of the *Lucia* decision and the executive order, many agencies changed how they hired and appointed ALJs.[179]

In federal court, litigation ensued against ALJs in other agencies, including the Social Security Administration (SSA), the largest employer of ALJs at the time.[180] If the SSA denies a claim for benefits, the claimant can seek review of the decision by an ALJ, and potentially appeal the ALJ's decision to the Appeals Council at SSA.[181] Decisions of the Appeals Council can then be appealed to a federal court in certain circumstances.[182] In 2021, the Supreme Court ruled that claimants in SSA benefits proceedings need not raise an Appointments Clause challenge during their first appearance before an ALJ to state a "timely" Appointments Clause claim in their appeal to a federal court.[183]

After *Lucia*, litigants also challenged the appointment of other types of adjudicators, such as immigration judges, based on the reasoning in that decision.[184] The holding in *Lucia* that SEC ALJs are officers also revived a latent constitutional challenge to the statutory requirements for removing ALJs based on a 2010 Supreme Court ruling.[185]

In separation-of-powers cases decided after *Lucia*, the Court did not automatically order the remedy of a new trial or hearing before a properly appointed officer or properly constituted agency. In *Arthrex*, discussed above, the Court resolved the incompatibility of administrative patent judges' appointment as inferior officers while having attributes of principal officers by severing a statutory provision barring review of certain APJ decisions by the agency's Director.[186]

(July 10, 2018) (codified at 5 C.F.R. §§ 6.3, 6.8 (2025)). *See also* CRS Report R45635, *Categories of Federal Civil Service Employment: A Snapshot*, by Jon O. Shimabukuro and Jennifer A. Staman (2019).

[178] *See* Administrative Law Judges, 85 Fed. Reg. 59207, 59208 (proposed Sept. 21, 2020) (to be codified at 5 C.F.R. pts. 212, 213, 303, 930) ("In light of the Executive Order, OPM terminated the ALJ competitive service register, its centralized list of eligible ALJ applicants, as the Executive Order ended the need for competitive examination, rating and ranking, and selection from competitive certificates of eligibles issued by OPM.").

[179] Jack M. Beermann & Jennifer L. Mascott, *Research Report on Federal Agency ALJ Hiring after Lucia and Executive Order 13843* (Admin. Conf. of the United States, May 31, 2019), https://www.acus.gov/sites/default/files/documents/Submitted%20final%20draft%20JB.pdf.

[180] *ALJs by Agency*, OFF. OF PERS. MGMT., https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency (last visited Mar. 18, 2025). *See also id.* (June 4, 2018 archived site) [https://web.archive.org/web/20180604052359/https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency].

[181] *Appeal a Decision We Made*, SSA, https://www.ssa.gov/apply/appeal-decision-we-made (last visited Mar. 14, 2025).

[182] *Id.*

[183] *See* Carr v. Saul, 593 U.S. 83, 92–96 (2021) (holding that unlike in *Ryder* and *Lucia*, an Appointments Clause claim cannot be adequately developed, debated, and decided in the context of a benefits hearing before an ALJ).

[184] *See* Duenas v. Garland, 78 F.4th 1069, 1073 (9th Cir. 2023) (holding that immigration judges and members of the Board of Immigration Appeals are officers based on the reasoning in *Lucia*); McIntosh v. Dep't of Def., 53 F.4th 630, 641 (Fed. Cir. 2022) (holding that plaintiff forfeited her argument that administrative judges on the Merit Systems Protection Board, who decided her case in 2019, were improperly appointed inferior officers, but observing that "any issues with their appointment have since been remedied" because a "quorum of the reconstituted Board . . . issued a Ratification Order on March 4, 2022 that ratified the prior appointments of administrative judges").

[185] *See* Free Enter. Fund v. PCAOB, 561 U.S. 477, 492 (2010) (holding that "the dual for-cause limitations on the removal of [Public Company Accounting Oversight] Board members contravene[d] the Constitution's separation of powers"). *E.g.*, Express Scripts, Inc. v. FTC, No. 4:24-CV-01549-MTS, 2025 WL 521812, at *4 (E.D. Mo. Feb. 18, 2025), *appeal filed*, No. 25-1383 (8th Cir. 2025).

[186] United States v. Arthrex, Inc., 594 U.S. 1, 23–26 (2021). *See supra* "What Distinguishes a Principal Officer from an Inferior Officer?"

The Court did not, however, order a new hearing before a different panel of APJs.[187] Instead, it remanded the case to the Acting Director "for him to decide whether to rehear the petition" challenging the patent in question.[188] The Court explained that "[b]ecause the source of the constitutional violation is the restraint on the review authority of the Director, rather than the appointment of APJs by the Secretary," the petitioner was not entitled to the remedy of a new proceeding under *Lucia*.[189]

The Court took a similar approach in cases involving allegations that a statute unconstitutionally insulated a particular officer from removal at will by the President. In *Seila Law v. CFPB*, the Court held that "the CFPB's leadership by a single independent Director violate[d] the separation of powers."[190] To remedy this violation, the Court severed a statutory provision that barred the President from removing the CFPB Director at will.[191] The Court declined to order petitioner's preferred remedy of denying the government's pending petition to enforce a civil investigative demand and dismissing the case.[192] Instead, the Court remanded the decision so that the lower courts could decide whether an Acting CFPB Director removable at will by the President had validly ratified the civil investigative demand issued by the former CFPB Director.[193] On remand, the appellate court held that the CFPB Director's ratification of the contested agency action was proper and "remedie[d] any constitutional injury that Seila Law may have suffered due to the manner in which the CFPB was originally structured."[194] In *Collins v. Yellen*, the Court held that the Director of the Federal Housing Finance Agency (FHFA) was unconstitutionally insulated from removal. As in *Seila Law*, the Court declined to set aside the contested agency actions, because the officials who took them, including the Director, were properly appointed.[195] The Court reasoned that the petitioners might be entitled to "retrospective relief," but only if they showed "compensable harm."[196]

Whether post-*Lucia* cases reflect an emerging trend away from unwinding agency decisions in response to separation-of-powers violations remains to be seen, especially because two of the three cases involved constitutional challenges to statutory removal protections rather than appointment defects. At the time of this writing, the Supreme Court is considering a case involving an Appointments Clause challenge to the U.S. Preventive Services Task Force.[197] The Task Force issues recommendations on certain preventive services that, by operation of a statute, become binding coverage requirements for certain health insurers.[198] The district court set aside all agency actions taken to implement or enforce the affected coverage requirements and enjoined

[187] *Arthrex*, 594 U.S. at 27.

[188] *Id.* at 26.

[189] *Id.* at 27.

[190] 591 U.S. 197, 232 (2020).

[191] *Id.* at 238.

[192] *Id.* at 232.

[193] *Id.* at 232, 238.

[194] CFPB v. Seila L. LLC, 997 F.3d 837, 846 (9th Cir. 2021).

[195] 594 U.S. 220, 257 (2021).

[196] *Id.* at 259–60 (offering, as an example, a hypothetical scenario in which "the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way").

[197] Kennedy v. Braidwood Mgmt., Inc., No. 24-316 (U.S. filed Feb. 24, 2025) (oral argument scheduled for April 21, 2025).

[198] 42 U.S.C. § 300gg-13(a)(1).

future enforcement of such requirements on a nationwide basis.[199] The appellate court modified the decision to enjoin enforcement only against the plaintiffs in the case.[200] Before the Supreme Court, the federal government argues that the Task Force members are properly appointed but asks the Court to "apply its traditional severability principles" (as it did in *Arthrex*) if it finds a constitutional defect in the statutory scheme.[201]

What Are Congress's Options if It Identifies a Potential Appointments Clause Concern?

Congress has several options to address a potential Appointments Clause problem, depending on the nature of the concern. An Appointments Clause question may arise if a statute provides for appointing an officer using a method not permitted by the Appointments Clause, such as authorizing a deputy or manager subordinate to the department head to appoint the person who will serve in that office without approval from the department head. Another scenario might involve appointment by the President alone or a department head of a principal officer.[202] In these situations, Congress may have the option to:

- Amend the statute to specify an appointment method consistent with the officer's status:
    - For a principal officer, require presidential appointment and Senate confirmation;
    - For an inferior officer, either require presidential appointment and Senate confirmation or vest appointment authority in the President, the courts, or a department head;
- Amend the statute to remove certain duties and discretion from the office so that the occupant no longer exercises significant federal authority and the Appointments Clause no longer applies to the position;
- If the position in question appears to involve a principal officer who is appointed under current law as an inferior officer, amend the statute such that another principal officer within the executive branch would supervise and direct the officer's work on matters involving the exercise of significant authority; or
- Retain the existing statutory language and potentially observe whether the issue arises in litigation and how courts resolve the question.

[199] Braidwood Mgmt. Inc. v. Becerra, 666 F. Supp. 3d 613, 633 (N.D. Tex. 2023), *aff'd in part, rev'd in part*, 104 F.4th 930 (5th Cir. 2024), *cert. granted*, No. 24-316, 2025 WL 65913 (U.S. Jan. 10, 2025), *and cert. denied sub nom.* Braidwood MGMT. Inc v. Becerra, No. 24-475, 2025 WL 76462 (U.S. Jan. 13, 2025).

[200] *Braidwood Mgmt.*, 104 F.4th at 957.

[201] Brief for Petitioners at 3–4, *Braidwood Mgmt.*, No. 24-316 (U.S. filed Feb. 18, 2025).

[202] *E.g.*, United States v. Arthrex, Inc., 594 U.S. 1, 23 (2021) (holding that "the unreviewable authority wielded by" administrative patent judges during certain proceedings was "incompatible with their appointment by the Secretary to an inferior office").

In the event a court finds an Appointments Clause violation, Members of Congress have the options of monitoring any appeals from the decision,[203] evaluating how a court-ordered remedy plays out in the affected agency and the courts, or responding to the ruling through legislation, as discussed above. These options are not necessarily mutually exclusive, and alternative approaches may be available depending on the circumstances.

If a particular officer was not appointed according to the constitutionally prescribed method, but a statute provides for the correct method of appointment, then Congress could take steps to direct or incentivize the correct appointing authority to appoint the officer anew or "ratify" the officer's appointment. Such steps might take the form of a bill or resolution stating the Sense of Congress that, for example, the President should nominate or appoint an individual to serve in a particular position,[204] or legislation directing a department head to implement recordkeeping or reporting requirements related to the appointment of officers at that agency.[205]

Ratification of an appointment, which typically takes the form of an affidavit or agency notice or order, is a way for the correct appointing official to approve the prior, improper selection of an individual to serve in that office.[206] Ratification of an appointment does not necessarily foreclose claims based on decisions made while the officer in question was not properly appointed, but courts have generally considered ratification documents to effectuate a valid appointment for purposes of future actions or decisions by the officer in question.[207]

[203] Depending on the court and stage of the appeal, a Member of Congress or group of Members may seek the court's permission to file an amicus brief stating their views on the legal questions presented. *E.g.*, Brief of Amici Curiae Members of Congress in Support of Petitioners, FCC v. Consumers' Rsch., Nos. 24-354, 24-422 (U.S. filed Jan. 16, 2025); Brief of Current and Former Members of Congress as Amici Curiae in Support of Affirmance, Seila L. LLC v. CFPB, 591 U.S. 197 (2020) (No. 19-7).

[204] *Cf.* National Aeronautics and Space Administration Authorization Act of 2008, S. 3270, 110th Cong. § 18 (stating "the sense of Congress that the President should appoint members to the National Space Council in accordance with section 501 of the National Aeronautics and Space Administration Authorization Act, Fiscal Year 1989").

[205] *Cf.* 18 U.S.C. § 3602 (directing federal district courts to appoint probation officers and stating that the "order of appointment shall be entered on the records of the court, a copy of the order shall be delivered to the officer appointed, and a copy shall be sent to the Director of the Administrative Office of the United States Courts").

[206] *See* Carr v. Saul, 593 U.S. 83, 86–87 (2021) (stating that "a few weeks after *Lucia* was decided, the SSA's Acting Commissioner pre-emptively 'address[ed] any Appointments Clause questions involving Social Security claims' by 'ratif[ying] the appointments' of all SSA ALJs and 'approv[ing] those appointments as her own.'" (quoting 84 Fed. Reg. 9583 (2019)). *E.g.*, Ratification and Reconsideration Order, C.F.T.C. (2018) (ratifying the appointment of a Judgment Officer), https://www.cftc.gov/sites/default/files/2018-04/ogcorder040918.pdf.

[207] *See*, *e.g.*, K&R Contractors, LLC v. Keene, 86 F.4th 135, 144 (4th Cir. 2023) (concluding that "the Secretary's express ratification of [the ALJ's] appointment cured any constitutional defect in his original hiring by [the agency]" such that the ALJ "had been constitutionally appointed by the time [he] took any action in this case"); McIntosh v. Dep't of Def., 53 F.4th 630, 641 (Fed. Cir. 2022) (reasoning that any appointment defect with administrative judges at the Merit Systems Protection Board had "since been remedied" because a "quorum of the reconstituted Board, who qualify as 'heads of departments' under the Appointments Clause, issued a Ratification Order . . . that ratified the prior appointments of administrative judges").

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