Constitutionally Conforming Agency Adjudication

Jennifer L. Mascott*
August 22, 2017, **DRAFT**
(*forthcoming Fall 2017*, Loyola Journal of Regulatory Compliance)

In May 2017 the U.S. Court of Appeals for the D.C. Circuit reconsidered en banc[1] a panel holding that administrative law judges ("ALJs") for the Securities and Exchange Commission ("SEC") are just employees—not "Officers of the United States."[2] As mere employees the ALJs would fall outside the Constitution's Appointments Clause requirements in Article II.[3] The original D.C. Circuit panel's opinion directly conflicts with a recent Tenth Circuit decision finding the SEC ALJs *are* "officers" within the scope of the Article II Clause.[4] In June 2017 the D.C. Circuit issued a judgment indicating the en banc court was equally divided in the ALJ case.[5] Under circuit rules, this evenly divided judgment will result in the reaffirmance of the D.C. Circuit's earlier panel decision[6]—continuing the split with the Tenth Circuit and making this issue subject to likely consideration by the Supreme Court.

* Assistant Professor of Law, Antonin Scalia Law School at George Mason University. Earlier drafts of this article were written as an Olin/Searle Fellow in Law affiliated with Georgetown University Law Center and the George Washington University Law School. Thanks to Kent Barnett, Jason Iuliano, Michelle Layser, Alex Lemann, Brian Lipshutz, Aaron Nielson, and Christopher Walker for helpful comments and conversations.

[1] Raymond J. Lucia Cos., Inc. v. S.E.C., No. 15-1345, 2017 U.S. App. LEXIS 2732 (D.C. Cir. Feb. 16, 2017), *en banc pet'n denied by* 2017 U.S. App. LEXIS 11298 (D.C. Cir. June 26, 2017).

[2] Raymond J. Lucia Cos., Inc. v. S.E.C., 832 F.3d 277, 280, 283–84 (D.C. Cir. 2016), *vacated and reh'g en banc granted*, 2017 U.S. App. LEXIS 2732, at *2 (D.C. Cir. Feb. 16, 2007).

[3] U.S. CONST. art. II, § 2, cl. 2 ("The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint 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.").

[4] Bandimere v. S.E.C., 844 F.3d 1168, 1170 (10th Cir. 2016).

[5] Raymond J. Lucia Cos., Inc. v. S.E.C., No. 15-1345, 2017 U.S. App. LEXIS 11298 (D.C. Cir. June 26, 2017).

[6] *See id.* (denying the en banc petition for review pursuant to D.C. Cir. Rule 35(d), which provides that when "the en banc court divides evenly, a new judgment affirming the decision under review will be issued").

The final determination of whether the ALJs are "officers" with "significant authority"[7] has far-reaching consequences.[8] The Appointments Clause expressly limits the permissible methods for selecting "officers" to appointment by (i) the President with Senate advice and consent, (ii) the Head of a Department, (iii) a court of law, or (iv) the President alone.[9] (Principal officers with no superior other than the President[10] may be appointed only by the President with Senate advice and consent,[11] but the SEC ALJs are being challenged as "inferior officers"—not principal officers.[12]) If courts determine the SEC ALJs are "officers," the process for selecting those ALJs must change. The SEC concedes its ALJs currently are not appointed by a department head or any other Article II-approved entity.[13]

That said, a widely cited article by Professor Kent Barnett suggests that one potential significant problem with agency adjudicators coming within Article II's scope is that agency adjudicators hear cases in which the agencies themselves are parties.[14] Perhaps, Barnett suggests, executive branch appointment, supervision, and involvement with the removal of ALJs creates impermissible bias, as the adjudicator would be subject to hiring and possible firing by one of the entities whose case she is deciding.[15] Professor Barnett believes that under Supreme

---

[7] *See* Buckley v. Valeo, 424 U.S. 1, 125–26 (1976).

[8] *See generally* Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. (forthcoming 2018) (Mar. 2017 manuscript, at 3, online at https://ssrn.com/abstract=2918952) (addressing the import of the Appointments Clause).

[9] U.S. CONST. art. II, § 2, cl. 2; Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 800 (2013).

[10] *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 510 (2010) (describing Supreme Court precedent finding that "inferior officers are officers whose work is directed and supervised at some level by other officers appointed by the President with the Senate's consent" (internal quotation omitted)).

[11] *See* U.S. CONST. art. II, § 2, cl. 2.

[12] *See, e.g.*, *Bandimere*, 844 F.3d at 1170; *Raymond J. Lucia Cos.*, 832 F.3d at 289.

[13] *See Raymond J. Lucia Cos.*, 832 F.3d at 283; *see also* Barnett, *supra* note 9, at 800 ("ALJs, however, are selected by heads of agencies, only some of whom qualify as heads of departments.").

[14] *See* Barnett, *supra* note 9, at 799–802; *see also* Kent Barnett, *Resolve the "ALJ Quandary": Let the D.C. Circuit Appoint and Remove ALJs*, YALE J. ON REG.: NOTICE & COMMENT (Jan. 2, 2017), http://yalejreg.com/nc/resolve-the-alj-quandary-let-the-d-c-circuit-appoint-and-remove-aljs-by-kent-barnett/.

[15] *See generally* Barnett, *supra* note 9, at 799–802.

Court precedent such an arrangement may raise due process concerns.[16] This is in addition to the often-acknowledged potential Article III concerns with non-lifetime-tenured adjudicators hearing disputes that appear similar to judicial cases and controversies.[17] To address potential partiality and due process concerns, Professor Barnett recommends that Congress authorize the D.C. Circuit—not the President or a department head—to "appoint, discipline, and remove ALJs upon request from administrative agencies."[18]

This essay relies on scholarship by Professors Gary Lawson,[19] Caleb Nelson,[20] Philip Hamburger,[21] Nathan Chapman and Michael McConnell[22] to observe that as a matter of first principles, executive branch appointment of ALJs raises no partiality or due process concerns if adjudicators act only within the proper confines of executive adjudicative power.[23] In particular, Part I of the essay highlights several points from judicial precedent, legal scholarship,[24] and early

[16] *See id.* at 801.

[17] *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 482–95 (2011); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58–76, 87 (1982) (plurality opinion) (addressing non-Article III bankruptcy courts); *cf.* Barnett, *supra* note 9, at 798 (contending that "the function of ALJs closely parallels that of Article III judges").

[18] Barnett, *supra* note 9, at 802.

[19] *See generally* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, (1994) [hereinafter Lawson, *Rise and Rise*]; Gary Lawson, *Take the Fifth . . . Please!: The Original Insignificance of the Due Process of Law Clause*, forthcoming BYU L. REV. 2017 (July 7, 2017 manuscript, online at https://ssrn.com/abstract=2998733) [hereinafter Lawson, *Take the Fifth*].

[20] *See generally* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007).

[21] *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (chapters 12–13) (demonstrating problems with agencies exercising the judicial power as opposed to engaging in only "[l]awful [e]xecutive [a]cts [a]djacent to [a]djudication").

[22] *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1697 (2012) ("Fundamentally, 'due process' meant that the government may not interfere with established rights without legal authorization and according to law, with 'law' meaning the common law as customarily applied by courts and retrospectively declared by Parliament, or as modified prospectively by general acts of Parliament.").

[23] *See, e.g.*, Lawson, *Rise and Rise*, *supra* note 19, at 1246–47 ("Much adjudicative activity by executive officials . . . is *execution* of the laws by any rational standard . . . ."); Nelson, *supra* note 20, at 559 ("[I]n the nineteenth century, whether adjudication required 'judicial' power was thought to depend on the nature of the legal interests that the adjudication would bind. Governmental officials needed 'judicial' power to dispose conclusively of an individual's legal claim to private rights that fit the template of life, physical liberty, or traditional forms of property. But 'judicial' power was not considered necessary for governmental adjudicators to make authoritative determinations adverse to other legal interests, including legal interests held by the public as a whole and legal interests that jurists classified as mere 'privileges' rather than core private 'rights.'").

[24] *See* Akhil Amar, *Intratextualism*, 112 HARV. L. REV. 747, 804–12 (1999) (concluding that lower-level executive officers must be appointed by executive branch actors—not by courts of law).

federal practice suggesting that agency adjudicators may—and must—be subject to Appointments Clause strictures. And their appointing entity must be one of the executive branch actors authorized to make appointments under Article II.[25] ALJs should be appointed by a department head or the President (with or without Senate consent)—not the interbranch Appointments Clause entity, a court of law.[26] Part II then briefly sketches some of the potential implications of legal scholarship analyzing separation of powers issues related to agency adjudication. Based on that scholarship, this part of the essay suggests: When limited to adjudicating issues properly before the Executive Branch pursuant to law,[27] adjudication by executive-appointed agency officers raises neither due process of law[28] nor Article III concerns.[29] But when agency adjudicators stray outside the proper limits of executive adjudication such as by depriving individuals of vested property rights,[30] they must not serve even as factfinders subject to judicial deference.[31] All cases and controversies subject to the

[25] *See infra* Part I.B (relying heavily on several points from Professor Amar's article "Intratextualism" as well as on analysis of the Vesting Clause and the drafting history of the Appointments Clause).

[26] *See* Amar, *supra* note 24, at 804–12 (1999) (concluding that "[w]hen Congress chooses to allow unilateral appointment of an 'inferior' officer, without the special check and safeguard of Senate confirmation, it must vest the power to appoint the 'inferior in his or her superior. The superior appointing authority must have broad power to direct or to countermand the decisions of the subordinate.").

[27] *See infra* notes 182–205.

[28] U.S. CONST. amend. V; *see also* Lawson, *Take the Fifth*, *supra* note 19, at 4 (contending that "the Fifth Amendment's Due Process of Law Clause" would not present a separate constitutional hurdle for agency adjudication in any event, because "the clause itself is irrelevant to the Constitution's original interpretative meaning" as it "adds virtually nothing to, and subtracts nothing from, the meaning of the Constitution of 1788").

[29] *See* Lawson, *Rise and Rise*, *supra* note 19, at 1246 ("Agency adjudication is therefore constitutionally permissible under Article III as long as the activity in question can fairly fit the definition of executive power . . . .").

[30] *See* Chapman & McConnell, *supra* note 22, at 1726–27 (observing that "depriv[ing] specific persons of liberty or vested property rights" required the protections of a common law court).

[31] *See* Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, forthcoming GEO. J. OF L. & PUB. POL'Y (May 2017 manuscript, at 2–3, online at https://ssrn.com/abstract=2967320); Lawson, *Rise and Rise*, *supra* note 19, at 1247–48 (positing that judicial deference to agency fact-finding "arguably fails to satisfy Article III" and thus Article III likely "requires de novo review, of both fact and law, of all agency adjudication that is properly classified as 'judicial' activity"); Nelson, *supra* note 20, at 590–92 (describing "'adjudicative facts'" regarding "core private rights" that courts historically had to resolve). *Cf. N. Pipeline Constr. Co.*, 458 U.S. at 77–78 (plurality opinion) (identifying Crowell v. Benson, 285 U.S. 22 (1932), as the first Supreme Court case to uphold "[t]he use of administrative agencies as adjuncts" engaged in factfinding, similar to the function played by "a jury or a special master" (internal quotation omitted)).

federal judicial power[32]—or parts of those cases and controversies—must be evaluated and determined by Article III judges with salary and lifetime tenure protection.[33] The Constitution's Vesting Clauses[34] and carefully delineated power structures demand it.[35]

I. Necessary Appointment by Executive Branch Actors

This part of the essay briefly will explain why courts should conclude that the SEC's ALJs are Article II "officers." It then will contend that if courts so conclude, the executive branch actors listed in Article II—not courts of law[36]—should appoint the ALJs.

A. Administrative Law Judges Are "Officers of the United States."

The Supreme Court has held that government officials with "significant authority" are "Officers of the United States" subject to the Appointments Clause.[37] According to the Court, several factors indicating "significant authority" include whether the relevant position, its duties, and salary, are created and specified by statute and thus, "'established by Law'"; whether the duties are important; and whether the official exercises discretion in carrying out those duties.[38]

Both circuit courts recently ruling on the "officer" status of ALJs seem to agree that the SEC's ALJs have duties "established by Law" that involve some measure of discretion and importance.[39] The core disagreement arises from the D.C. Circuit's view that the Supreme Court's opinion in *Freytag v. Commissioner* added the power to issue final decisions to the list of

---

[32] U.S. CONST. art. III, § 2.

[33] *Id.* § 1 (giving lifetime tenure protection to Judges "during good Behaviour" and establishing that Judges' Compensation "shall not be diminished during their Continuance in Office").

[34] *See* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *see also* U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . . .").

[35] *See generally* Lawson, *Rise and Rise*, *supra* note 19.

[36] *See infra* note 66 (Justice Scalia interpreting "Courts of Law" to mean just Article III courts—not Article I courts or any other kind of adjudicative tribunal).

[37] *Buckley*, 424 U.S. at 125–26.

[38] Freytag v. Comm'r, 501 U.S. 868, 881–82 (1991).

[39] *Bandimere*, 844 F.3d at 1179–80; *Raymond J. Lucia Cos.*, 832 F.3d at 284–85.

elements required for Article II "officer" status.[40] Because the original D.C. Circuit panel considering the *Lucia* case determined that the SEC ALJs lack final decision-making power, the panel concluded they were employees.[41] The Tenth Circuit disagreed, finding that the Supreme Court in *Freytag* did not require final decision-making authority for "officer" status[42] and the SEC ALJs thus fall within the scope of Article II.[43]

The D.C. Circuit precedent applying *Freytag* is mistaken based on a fairly straightforward reading of that case.[44] In *Freytag*, the Court rejected the government's argument that a lack of authority to enter final decisions would have made special trial judges mere employees. The Court believed such an "argument ignore[d] the significance of the duties and discretion that special trial judges possess."[45] The Court mentioned finality simply as a possible alternative basis for its holding, clarifying that even if the special trial judges' duties had been less significant, the judges nonetheless still would have been "officers" because they had final decision-making authority in some cases.[46]

The D.C. Circuit's conclusion that ALJs are non-officers also is incorrect as a matter of first principles. Evidence suggests the original public meaning of "officer" in Article II never embodied a final decision-making element—or discretion, for that matter.[47] In contrast, the most likely original public meaning of "officer" encompassed any federal official with ongoing

[40] *See Raymond J. Lucia Cos.*, 832 F.3d at 284–85 (indicating its decision hinged on the determination that the ALJs do not issue final decisions—a required element for "officer" status under precedential D.C. Circuit decisions interpreting *Freytag*); Landry v. F.D.I.C., 204 F.3d 1125, 1134 (2000).

[41] *See Raymond J. Lucia Cos.*, 832 F.3d at 285–87.

[42] *Bandimere*, 844 F.3d at 1182–84.

[43] *Id.* at 1188.

[44] *See generally Freytag*, 501 U.S. 868.

[45] *Id.* at 881; *see also Bandimere*, 844 F.3d at 1182–84.

[46] *Freytag*, 501 U.S. 881–82; *see also Landry*, 204 F.3d at 1142 (Randolph, J., concurring opinion) (explaining "that the Court clearly designated this as an alternative holding").

[47] *See* Mascott, *supra* note 8, at 4.

responsibility for carrying out a governmental duty "of any level of importance."[48] If a statute, for example, "authorizes the federal government to complete a particular task or exercise a particular power, the individual who maintains ongoing responsibility for the task is an 'officer.'"[49]

ALJs in general qualify under such a standard as they carry out adjudicative functions that Congress has assigned via the Administrative Procedure Act[50] (APA). Section 556(b)(3) of Title V of the U.S. Code, within the APA, authorizes ALJs to, among other things, preside over agency hearings, administer oaths, issue subpoenas, take depositions, and rule on evidence.[51] In particular for the SEC, Section 78d-1(a) of Title 15 provides specific authority for the Commission to delegate any of its functions to its ALJs.[52] The SEC, through regulation, has carried out this statutory authority by authorizing its ALJs to conduct hearings and issue initial decisions on its behalf.[53]

B. Executive Adjudicative "Officers" Must Be Appointed by the President or a Department Head—Not a Court of Law.

If the Supreme Court steps in to address the circuit split and determines that the SEC's ALJs are officers, either the SEC itself or the President would need to appoint the ALJs—at least under first principles as set forth in Article II's Appointments Clause. The multimember SEC—an Article II Department Head under Supreme Court precedent[54]—already has the statutory authority to appoint its ALJs.[55] The Commission just has chosen instead to rely on its Chief ALJ

[48] *Id.* at 4, 6.
[49] *Id.* at 6.
[50] Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).
[51] 5 U.S.C. § 556(b)(3).
[52] 15 U.S.C. § 78d-1(a); *see also Bandimere*, 844 F.3d at 1176–78 (describing statutory authorization for various ALJ tasks).
[53] 17 C.F.R. § 200.14(a).
[54] *Free Enter. Fund*, 561 U.S. at 510–13.
[55] 15 U.S.C. § 78d(b)(1).

to make the ALJ selections.[56] The Commission would need to correct this practice if the ALJs are found to be Article II officers.

By the plain text of Article II, "inferior Officers"—the category that encompasses ALJs—may be appointed by the President alone (or with Senate consent), department heads, or courts of law.[57] No particular portion of the text expressly purports to restrict Congress on which of these options it may choose for the offices it establishes.[58] Rather, the text seems to empower Congress with a great deal of choice in the matter of how, and even whether, to establish officer positions. This is by design.

The Constitution explicitly requires officer positions to be "established by Law." The British King's abuse of power by sending "hither Swarms of Officers to harrass" the colonies was an abuse the Framers wanted to avoid,[59] by cleanly separating the power to *appoint* officers from the power to *create* the offices those officers would fill.[60]

Further, in addition to the Article II provision authorizing Congress to establish offices "by Law," Article II, Section 2 also gives Congress the choice either to require presidential appointment with Senate consent or "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] By its terms, Section 2 gives Congress the discretion to choose between subjecting inferior officers to the principal appointment procedure requiring Senate consent or utilizing an alternative

---

[56] *Bandimere*, 844 F.3d at 1177.

[57] U.S. CONST. art. II, § 2, cl. 2.

[58] *Id.* ("[B]ut 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." (emphasis added)); *see also* Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 760–62 (2008) (relying on the qualifier, "as they think proper," as support for the constitutionality of "statutory qualifications" on who may fill inferior officer slots).

[59] THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776).

[60] *See* Mascott, *supra* note 8, at 28; Volokh, *supra* note 58, at 766–69.

[61] U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

appointment method.[62] But does it also give Congress the unrestrained discretion to choose from among the three alternative methods whichever alternative it prefers for each office it establishes?[63] There are several significant reasons—some set forth in Professor Akhil Amar's article "Intratextualism," as well as additional arguments based on the Appointments Clause drafting history and the Vesting Clause—to conclude the Constitution's text and structure indicate the answer is "no."[64]

1. *Interbranch Appointment of ALJs by Courts Likely Is Inconsistent with the Constitutional Structure and Text.*

Professor Barnett in contrast says "yes," to a degree at least, Congress has discretion to choose its preferred alternative appointment mode for inferior officers.[65] Barnett contends Congress should use this discretion to address potential concerns about impartiality in agency adjudication by giving the power to appoint ALJs to an Article III "Court[] of Law"[66] like the

[62] *See id.* ("The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, . . . *but the Congress may by Law vest* the Appointment of such inferior Officers, *as they think proper* . . . ." (apparently giving Congress a choice between sticking with the default "Advice and Consent" procedure or choosing to vest appointment power in an alternative authority) (emphasis added)); Volokh, *supra* note 58, at 760 (explaining that one possible way to read the phrase "as they think proper" is as a modification of "the verb 'vest,' meaning that Congress has the power, whenever and however it thinks proper, to vest appointment of an inferior officer in the President").

[63] As a textual matter, one might answer "yes" if one were to read the phrase "as they think proper" to modify the immediately following list of three alternative inferior appointments modes, rather than the immediately preceding vesting phrase authorizing Congress to create inferior offices free from Senate advice and consent. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 673 (1988) (relying on this view). But this is not the best reading of the "inferior Officers" provision, for reasons explained below. *See infra* Parts I.B.1.a–c.

[64] *See infra* notes 69–142.

[65] *See* Barnett, *supra* note 9, at 801–02.

[66] Justice Scalia, in his concurring opinion in *Freytag*, provided strong arguments that the "Courts of Law" referenced in Article II include only Article III courts vested with "[t]he Judicial Power of the United States." 501 U.S. at 901–14. That said, the majority of the Supreme Court at the time disagreed. Therefore, governing Supreme Court precedent still defines "Courts of Law" to include any court "exercis[ing] the judicial power of the United States"—which in the *Freytag* Court's view encompasses "non-Article III tribunals" such as Article I courts. *See id.* at 888–90. The Supreme Court has since disavowed one facet of the *Freytag* opinion—the dictum suggesting the phrase "Heads of Departments" might include only Cabinet secretaries, *see Free Enter. Fund*, 561 U.S. at 510–11, but the *Freytag* Court's expansive interpretation of "Courts of Law" remains on the books.

D.C. Circuit.[67] That way, ALJs will not be biased toward ruling in favor of the agency whose head has appointed them to power and holds at least part of the power to remove them.[68]

But there are reasons to think, based on the text in conjunction with the structure of Article II, that the Framers would have intended Article III courts of law to appoint only their own subordinate officers such as court clerks—not inferior officers within the Executive Branch. As background, appointment of inferior officers by an entity in a separate branch of government is referred to as an "interbranch" appointment.[69] Governing precedent imposes little to no restriction on Congress selecting an interbranch appointment mechanism for inferior officers.[70] The Supreme Court in *Morrison v. Olson* approved the interbranch appointment of the independent counsel by "a specially created federal court."[71] And the Court in 1880 suggested interbranch appointments by courts were permissible as long as there was no "'incongruity' between the functions normally performed by the courts and the performance of their duty to appoint."[72]

a. *Early Practice*

[67] Barnett, *supra* note 9, at 801–02.

[68] *Cf. id.* at 825–26 (expressing concerns about bias if the President or principal officers may remove ALJs without tenure protections); *see also id.* at 807 (explaining how under current law agencies hold at least "a circumscribed ability to discipline and remove ALJs").

[69] *See, e.g.*, *Morrison*, 487 U.S. at 673.

[70] *See, e.g.*, *id.* at 674–76 (opining that nothing in the recorded debates of the Constitutional Convention indicated the Framers meant to bar Congress from interbranch appointments, but such appointments might be "improper if there was some 'incongruity' between the functions normally performed by the courts and the performance of their duty to appoint"); *see also* Barnett, *supra* note 9, at 837–38 (noting that in *Ex parte Hennen*, 38 U.S. 230 (1839), the Court "appeared to condemn interbranch appointments" but subsequently has limited the dictum in that case and imposed merely "an ambiguous incongruity" limitation on interbranch appointments).

[71] *See Morrison*, 487 U.S. at 676.

[72] *See id.* at 675–76 (describing *Ex parte Siebold*, 100 U.S. 371 (1879)). *See also* Barnett, *supra* note 9, at 837–40 (noting the Court has affirmatively supported such appointments in the past). *But see* Amar, *supra* note 24, at 810 n.242 (observing that *Siebold* "treated the Appointments clause only in passing and laid down no general doctrinal test" and that the actual facts in *Siebold* are consistent with an intrabranch appointments limitation as the case involved judicial appointments of "special election supervisors whose duties were somewhat akin to marshals and ministerial clerks").

In contrast, however, as a matter of first principles, Professor Akhil Amar has contended that only *intra*-branch appointments are constitutional. In his article "Intratextualism," Professor Amar observes that both an "intratextual" and a "standard clause-bound" interpretation of the Constitution suggest that "inferior Officer" appointing authorities may select only "their own respective subordinates."[73]

Professor Amar first makes the intratextual move[74] of comparing the "inferior Officer" provision with the Constitution's two other uses of the term "inferior."[75] The term appears in both the Article III Vesting Clause[76] and Article I, Section 8,[77] each of which indicate that any inferior courts established by Congress are "'inferior to' their superior—the Supreme Court."[78] Professor Amar notes that these provisions are symmetrical to the Appointments Clause's reference to "inferior Officers," which "likewise means 'inferior to' their superior—the relevant unilateral appointing authority."[79]

Professor Amar then turns to explain that reading the Clause to permit only intrabranch appointments is confirmed by three early historical points.[80] First, early congressional statutes authorized department heads to select and supervise their subordinates.[81] Second, Justice Story's 1833 treatise reported that appointing officials selected only their own subordinates. One example was the courts who had only "the narrow prerogative of appointing their own clerk, and

---

[73] Amar, *supra* note 24, at 805–08.

[74] *See id.* at 759 (characterizing as an "intratextual move" the practice of using one provision of the Constitution to help interpret another similarly phrased, but not necessarily adjoining, constitutional provision).

[75] *See id.* at 806–07.

[76] U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .").

[77] *Id.* art. I, § 8, cl. 9 ("The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court.").

[78] *See* Amar, *supra* note 24, at 806.

[79] *Id.* at 806–07.

[80] *Id.* at 808–09.

[81] *Id.* at 808.

reporter."[82] Third, the early 19th-century Supreme Court opinion, *Ex Parte Hennen*, concluded that the inferior officer appointing power "was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged."[83]

b. *Appointments Clause Drafting History*

The drafting history of the Appointments Clause further supports the notion that executive branch appointments should be left up to the President and department heads. Article II, Section 1, begins with a bang[84]—providing, "*The* executive Power shall be vested in a President of the United States of America."[85] The Framers apparently understood authority to appoint executive officers to inhere in this "executive Power."

Specifically, the Virginia Plan that the Framers used as their initial working draft of the Constitution provided only very generally that an executive magistrate should "enjoy the Executive rights vested in Congress by the Confederation."[86] That working draft explicitly provided for "the National Legislature" to select judges,[87] but it made no direct reference to the

[82] *Id.* In the very first Congress, "Courts of Law" were authorized only to appoint their own clerks. *See* Judiciary Act of 1789, ch. 20, § 7, 1 Stat. 73, 76 (1789). The First Federal Congress also authorized courts to appoint persons to perform tasks such as executing writs and precepts in "causes wherein the marshal or his deputy shall be a party." 1 Stat. at 87, § 28. But performance of those discrete tasks did not qualify the appointees as Article II "officers," *see* Mascott, *supra* note 8, at Part III.E, and their tasks were closely related to Article III business in any event. *See also, e.g.*, An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 4, 1 Stat. 112, 113 (1790) (authorizing courts to hire surgeons to dissect and take away the bodies of executed federal criminals).

[83] Amar, *supra* note 24, at 808–09 (internal quotation omitted).

[84] *Cf.* Lawson, *Rise and Rise*, *supra* note 19, at 1251 (using "the Big Bang" as an analogy to critique one interpretive theory of the Constitution).

[85] U.S. CONST. art. II, § 1 (emphasis added).

[86] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1937) [hereinafter FARRAND'S RECORDS] (Resolution 7) (May 29).

[87] *Id.* at 21–22 (Resolution 9) (May 29).

appointment of executive branch officers.[88] The Framers apparently assumed such authority was encompassed within "the Executive rights."[89]

Fairly early in the drafting process the Committee of the Whole amended the draft Constitution to explicitly assign some appointment authority to the Executive, clarifying that he should receive, among other responsibilities, the power "to appoint to offices in cases not otherwise provided for."[90] The author of the amendment, James Madison, questioned whether it was absolutely necessary to explicitly delineate that "appoint[ing]" authority.[91] He thought the power to appoint executive officers likely already was encompassed within the amendment's reference to the Executive having the "power to carry into effect the national laws."[92] Madison "did not however see any inconvenience in retaining [the words]."[93] Subsequently an appointments clause was added to the explicit list of the Executive's responsibilities.[94]

c. *Article II Vesting Clause*

Also, the Vesting Clause's "grant of executive power to the President,"[95] along with the duty to "take Care that the Laws be faithfully executed,"[96] suggests that executive branch actors

[88] *See id.* at 20–23 (May 29).

[89] *See* ARTICLES OF CONFEDERATION of 1781, art. IX (assigning the Confederation Congress appointment authority); *see also* 1 FARRAND'S RECORDS, *supra* note 86, at 65–66 (June 1) (characterizing James Wilson's statements: "The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not appertaining to and appointed by the Legislature.").

[90] 1 FARRAND'S RECORDS, *supra* note 86, at 62–63 (June 1) (internal quotation omitted).

[91] *Id.* at 63, 66–67 (June 1).

[92] *Id.* at 67 (June 1).

[93] *Id.*

[94] *Id.* at 67. Professor Amar's article highlights an additional distinct aspect of the Appointments Clause drafting history that supports the conclusion that the "inferior Officers" provision permits only intrabranch appointments. In particular, Professor Amar notes there was such little debate over the provision that it must have been "viewed as a minor housekeeping measure"—not one that would make the dramatic change of permitting judges to appoint executive branch actors such as diplomats or prosecutors. *See* Amar, *supra* note 24, at 808; *see also infra* notes 113–15 and accompanying text (noting that the record of the debate on the "inferior Officers" provision was limited to just one-half of one page in *Farrand's Records*).

[95] *See* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1281 (1996) (describing the Article II Vesting Clause).

[96] U.S. CONST. art. II, § 3; *see also* Lawson & Moore, *supra* note 95, at 1280 (describing the "take Care" "duty").

must appoint executive branch adjudicators.[97] Whether one adheres to a "unitary executive" interpretation of the Article II structure[98] or believes the Executive has a more general "duty to supervise,"[99] the Chief Executive necessarily has some measure of responsibility and accountability for the authority exercised by executive actors.[100] The President's ability to make good on this "take Care" duty likely hinges in no small part on his ability to direct, at least on some level, decisions made by executive actors—even by adjudicators.[101]

That does not mean that a President should be permitted to order adjudicators to make crass judgments biased unfairly toward the government or arbitrarily apply the law against parties.[102] Ever. By any means. All executive actors must uphold the Constitution,[103] which most fundamentally preserves and defends "Justice" and "Liberty."[104] But at bottom, accountability for the proper use of federal power by agency adjudicators must reach back to the President.[105] Our system needs to be able to hold an elected President accountable for decisions

---

[97] *Cf.* Barnett, *supra* note 9, at 815 (suggesting that the President must have oversight of executive branch actors because of his "take Care" duty). *But see* Amar, *supra* note 24, at 802–04 (characterizing Justice Scalia's position in Morrison as the view that "the Vesting Clause command" is satisfied "as long as the President retains the basic power to remove an executive officer at will, or otherwise countermand that officer's orders").

[98] *See, e.g.*, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–68 (1992); Lawson, *Rise and Rise*, *supra* note 19, at 1242.

[99] *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1842 (2015).

[100] *Cf.* Amar, *supra* note 24, at 805 (contending that the Appointments Clause's use of the word "inferior" means "[t]he superior appointing authority must have broad power to direct or to countermand the decisions of the subordinate").

[101] *See* Lawson, *Rise and Rise*, *supra* note 19, at 1242–43 (explaining that "the Article II Vesting Clause seems to require that [agency officials'] discretionary authority be subject to the President's control").

[102] *See infra* notes 221–31 (describing the First Federal Congress's statutory efforts to ensure legality and impartiality in executive action); *see also* Lawson, *Take the Fifth*, *supra* note 19, at 24–25, n.90 (explaining that statutory procedures or executive discretion typically are the only appropriate source of constraints on "non-rights-depriving" actions but "extreme cases" may also implicate constitutional fiduciary principles: "Executive agents, as with all federal governmental actors, have a fiduciary duty of care, and that duty limits the extent to which wholly arbitrary or inappropriate procedures can be employed in any tasks.").

[103] U.S. CONST. art. VI, cl. 3.

[104] U.S. CONST. pmbl.

[105] *See generally* Lawson, *Rise and Rise*, *supra* note 19, at 1241–46 (describing how the Article II Vesting Clause gives the President authority to control the exercise of executive power by lower-level officials); *see also* Dina Mishra, *An Executive-Power Non-Delegation Doctrine for the Private Administration of Federal Law*, 68 VAND. L. REV. 1509, 1523–24 (2015) (suggesting the President must have sufficient control over subordinates that he is not divested of his "executive Power"—even under Ms. Mishra's "less rigid" theory of executive supervision,

by executive agencies. Otherwise, "We the People"[106] have no political recourse against abuse. Article II helps ensure liberty by giving the People a say in the selection of the President, who must be held responsible—to at least some degree—for any and every exercise of federal executive power.[107] We cannot vote out of office agency adjudicators—only the President. To ensure there is some direct chain of accountability between adjudicators and the President,[108] no matter how long the chain, an executive actor should have a say in the adjudicators' appointment.[109]

i. Appointment

Statements made during the Founding Era debates suggest, as an initial matter, that one key purpose of the Appointments Clause was to ensure "officers" were selected on the basis of their excellence and qualifications—not due to patronage or favoritism.[110] The Framers concluded that leaving appointments responsibility with one actor, rather than an appointments council, would ensure transparency and accountability.[111] If the appointing authority picked an unqualified officer based on patronage, it would be very clear whom to blame if the appointee later messed up.[112]

---

which incorporates the idea of "non-delegation of executive power" as an alternative to the unitary executive model).

[106] U.S. CONST. pmbl.

[107] *Cf.* Mishra, *supra* note 105, at 1587 (noting that "the popularly elected President['s]" control over exercises of executive power "provides a mechanism to align the decision-maker's interest more generally with that of the public").

[108] *Cf. id.* at 1514–15 (referring to the need for "a chain of accountability to the American people via the President" but contending implementation of the chain might be flexible and potentially "could employ one of a variety of combinations of oversight or control mechanisms—including through appointment, removal, or supervision or review of decision-making—of varying types, strengths, and directness").

[109] *See generally* Mascott, *supra* note 8, at Part IV.B.

[110] *See* Amar, *supra* note 24, at 809 n.240; Mascott, *supra* note 8, at Part IV.B.1.

[111] *See* Mascott, *supra* note 8, at Part IV.B.1.

[112] *See id.*; *cf.* Amar, *supra* note 24, at 809 (asking, when "independent" officers "mess up, whom can we blame? Who is accountable? . . . How can there be an inferior without a superior?").

To be sure, the Framers' debate over councils versus individual actors occurred during the recorded discussion of just the principal Appointments Clause mechanism—presidential nomination with Senate advice and consent.[113] (Farrand's *Records of the Constitutional Convention* includes only one-half page of information about consideration of the "inferior Officer[]" appointments clause, which was inserted into the Constitution during the final stages of the Convention.)[114] But it seems the Framer's desire to ensure highly qualified officers were selected also would have caused the Framers to want the President or a department head to pick high-quality officers to serve under them, carrying out aspects of the executive power. Would a court of law, within this accountability framework, have as much incentive to pick highly qualified executive "officers" who are not in any way subject to that court's direction or responsible for helping the judicial branch carry out its duties?[115]

ii. Removal and Supervision

Further, the Supreme Court and numerous scholars have observed that one key mechanism for ensuring executive control over agency action is the preservation of some ability for the chief executive to effectuate the removal of insubordinate actors.[116] Under longstanding Supreme Court precedent, "the power to remove is incident to the power to appoint, unless

[113] *See, e.g.*, 1 FARRAND'S RECORDS, *supra* note 86, at 119 (June 5) (Wilson: opposing judicial appointments by the legislature because of the intrigue and partiality associated with "numerous bodies"); *id.* (Madison: also expressing disapproval for the appointment of judges by a "numerous body"); *see also Free Enter. Fund*, 561 U.S. at 513 (observing that the litigants in the case had introduced evidence showing the Framers' distaste for collective appointments only with respect to the principal appointments process involving advice and consent—not with respect to the inferior officer nominating process).

[114] 2 FARRAND'S RECORDS, *supra* note 86, at 627–28 (Sept. 15).

[115] *See* Amar, *supra* note 24, at 809 ("[W]hen an appointing authority is picking its own assistant, it obviously has strong incentives to pick well. If the subordinate does a bad job, other government officials and ordinary citizens will and should blame the boss.").

[116] *Free Enter. Fund*, 561 U.S. at 483–84; Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 599 (1994) (listing removal as one of the mechanisms that the President needs to maintain adequate control over executive officers); *cf.* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1207–08 (2014) (noting the importance of removal at will for principal officers).

Congress has placed the removal power elsewhere."[117] Professor Barnett has observed that, under this doctrine, assigning ALJ appointment power to the D.C. Circuit presumably would transfer the default removal power to the D.C. Circuit as well.[118]

To preserve the "chain of accountability"[119] for executive adjudicators within the Executive Branch, Congress should decline to submit ALJs to the appointment authority, and concomitant removal authority, of the D.C. Circuit, in the event the courts determine that ALJs are Article II officers. Agency adjudicators should be appointed by either the President or a department head.

Perhaps some may contend that keeping ALJ appointment and removal authority within the Executive Branch would subject adjudicators to improperly unrestrained presidential power, particularly since the Supreme Court's decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board* might be read to subject adjudicators to at-will employment in the event they are officers.[120] Under the apparent bright-line *Free Enterprise Fund* principle,[121] the removal chain from Article II officers to the President may include at most one layer of tenure protection.[122] Therefore, if the Court were to conclude ALJs are "officers" and extend *Free Enterprise Fund* to them, ALJs might lose all tenure protection as a constitutional matter:[123] ALJs appointed by the heads of independent agencies (themselves arguably removable just for

---

[117] *See* Barnett, *supra* note 9, at 844, n. 278; *see also* U.S. v. Perkins, 116 U.S 483, 484–85 (1886) (making the related point that Congress's power to choose the appointment method for inferior officers carries, incident to it, the power to impose limitations on the removal of those officers).

[118] *See* Barnett, *supra* note 9, at 844–45 (contending that if the D.C. Circuit acquires the power to appoint ALJs, "the President loses any constitutional power he may have had to remove ALJs").

[119] *See* Mishra, *supra* note 105, at 1514.

[120] *See* Barnett, *supra* note 9, at 801, 814–15; *see also Free Enter. Fund*, 561 U.S. at 542–44 (Breyer, J., dissenting) (expressing concern about ALJs being subject to the majority's holding). *But see id.* at 507 n.10 (majority opinion) (expressly declining to decide to extend the scope of the holding to agency adjudicators).

[121] *Cf.* Mishra, *supra* note 105, at 1569 (observing the possibility that *Free Enterprise Fund* either "adopted no bright-line rule for other cases" or adopted a rule for a subset of executive officers based on a functionalist assessment of Article II).

[122] *See Free Enter. Fund*, 561 U.S. at 483–84, 514.

[123] *See* Barnett, *supra* note 9, at 800–01.

cause)[124] could not receive tenure protection.[125] And even ALJs appointed by heads of executive departments subject to at-will removal would see their tenure protections decreased.[126] Under current law the Merit Systems Protection Board (MSPB)—its own members ensconced with tenure protection—has a say in disciplinary action impacting ALJs.[127] Within this current framework, ALJs in executive departments are subject to two layers of removal protection.[128] ALJs in independent agencies arguably are subject to three.[129] Consequently, the application of *Free Enterprise Fund* to agency adjudicators would suggest the tenure-protected MSPB could no longer be in charge of supervising tenure-protected ALJs.[130]

That said, the Court in *Free Enterprise Fund* indicated its prohibition on double for-cause tenure protection hinged in large measure on the specific facts before the Court, in particular the type of authority exercised by the relevant powerful officers at issue in the case.[131] The Court in fact affirmatively suggested that its holding did not address adjudicative officials like ALJs.[132] Members of the Court seem to have become more focused on structural accountability for the administrative state in recent years,[133] so perhaps the Court would extend the *Free Enterprise*

---

[124] *See Free Enter. Fund*, 561 U.S. at 493 (describing Supreme Court precedent that characterized independent agencies as "quasi-legislative and quasi-judicial" entities that may be subject to good-cause tenure protections (internal quotation omitted)); *id.* at 542–44 (Breyer, J., dissenting) (describing the consequences for ALJ removals if the majority opinion's holding were to be extended to them).

[125] *See* Barnett, *supra* note 9, at 814–15.

[126] *See id.*

[127] *See id.* at 800.

[128] *See id.* at 814–15.

[129] *See id.* at 815.

[130] *See id.* at 800–01.

[131] *See Free Enter. Fund*, 561 U.S. at 506–08 (referring to the "size and variety of the Federal Government," which "discourage[s] general pronouncements" on particular positions not before the Court).

[132] *See id.* at 507 n.10.

[133] *See, e.g.*, Mich. v. E.P.A., 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring) (questioning the allocation of judicial interpretive authority to agencies in the form of *Chevron* deference); Dep't. of Transp. v. Amer. Ass'n of R.R., 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring) (noting that "[l]iberty requires accountability" and the public should take notice when the government tries to pass off regulatory authority to a supposedly private entity); City of Arlington v. F.C.C., 133 S. Ct. 1863, 1877–78 (2013) (Roberts, C.J., dissenting) (noting the potential for tyranny posed by administrative agencies' accumulation of undifferentiated executive, legislative, and judicial power).

Fund principle to ALJs if such a case came before it today.[134] But the language in *Free Enterprise Fund* expressly reserved for another day the issue of precisely which governmental positions might come within the general scope of the Court's double for-cause removal ban.[135] The Supreme Court's multi-factor approach to evaluating Article II appointment and removal in *Morrison v. Olson*[136] apparently continues to govern all removal restrictions except any that specifically fall within the scope of *Free Enterprise Fund*'s carve-out for certain double for-cause removal bans.[137]

Moreover, the balancing test in *Morrison v. Olson* counterintuitively may suggest that subjecting ALJs to Article II appointments requirements justifies subjecting ALJs to more removal restrictions, not fewer. Language near the conclusion of the *Morrison* opinion intimates that the extent of the Executive Branch's involvement in appointing an officer may have a bearing on the extent to which Congress may limit the Executive Branch's ability to remove that officer.[138] Specifically, the opinion can to be read to suggest that the more influence the Executive has over inferior officer appointments, the more severely Congress can restrict removal without unconstitutionally encumbering executive supervision—at least under

---

[134] *See, e.g.*, *Free Enter. Fund*, 561 U.S. at 483–84 (implying that the Court was not revisiting its approval of removal restrictions in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), *Morrison*, and *Perkins* in part because the parties had not asked the Court to do so); *id.* at 513–14 (closing the opinion with strong, broad-based language stating that the President must have the power "to remove those who assist him" and the restriction of "two levels of protection from removal" generally is inappropriate for those who "exercise significant executive power").

[135] *See id.* at 506. *But see* Barnett, *supra* note 9, at 815–16 (contending that the majority opinion's explanation for why its holding may not extend to ALJs is "unsound as stated").

[136] *See Morrison*, 487 U.S. at 685–96 (analyzing numerous factors to determine the constitutionality of the independent counsel removal restrictions as the Court believed there are no "rigid categories of . . . officials who may or may not be removed at will by the President").

[137] *See Free Enter. Fund*, 561 U.S. at 494–95 (stating that the issue in *Free Enterprise Fund* was one "of first impression" and thus, *Morrison* was not dispositive to the question before the Court in this case (internal quotation omitted)); *see also* Mishra, *supra* note 105, at 1569 (noting that *Free Enterprise Fund* seems to have left in place the *Morrison* removal analysis for all government officials other than the "set of inferior executive officers" before the Court in *Free Enterprise Fund*).

[138] *See* Mishra, *supra* note 105, at 1578 (noting that the strength of one executive accountability mechanism might decrease, or increase, the requisite level of intensity of a separate mechanism: "For example, in *Morrison* v. *Olson*, the Court concluded that the independent counsel could be appointed as an inferior, rather than principal, officer in part because he was statutorily removable by a superior officer.").

Morrison's hazy analysis.[139] Neither the President nor the Attorney General had the power to appoint the independent counsel under review in *Morrison*.[140] Nonetheless, the Court cited the Attorney General's role in determining whether an independent counsel must be hired in the first place as one source of executive power that counterbalanced the limits on Executive Branch removal of the counsel.[141]

So even if the Supreme Court eventually weighs in and explicitly holds ALJs are "officers" and Congress thus requires department heads to appoint them, perhaps the Court would rely on *Morrison* to conclude the direct accountability link between the chief executive and ALJs reduces the need for executive influence during the removal process. To be clear, this is not the best reading of *Morrison* in light of *Free Enterprise Fund*, which indicates the Court has moved to a much stricter view of the need for executive responsibility over administrative actors than the Court provided in *Morrison*. Nonetheless, the dissenting Justices in *Free Enterprise Fund* expressed concern about the eventuality that ALJs might one day be labeled "officers." The above analysis simply points out that whatever view the Court holds on removal of adjudicators within "independent" agencies—an oxymoron under first principles, incidentally[142]—the Court should not let its removal jurisprudence distort its holdings in Appointments Clause cases. Even if the Court is reticent to apply its double for-cause removal ban to "independent" agency adjudicators, the Court should clean up its Appointments Clause

---

[139] *See Morrison*, 487 U.S. at 695–96 (suggesting that the Attorney General's influence in the decision of whether an independent counsel was needed and the Attorney General's control over the submission of facts helping to define the counsel's jurisdiction helped "give the Executive Branch sufficient control over the independent counsel" despite the Executive Branch's limited power to remove him).

[140] *See id.*at 695.

[141] *See id.* at 695–96; *cf.* Mishra, *supra* note 105, at 1568–69 (observing that the Court upheld the for-cause restriction on independent counsel removals "in part because the President could still control that office somewhat via the Attorney General, a principal officer he could remove at will").

[142] *Cf.* Amar, *supra* note 24, at 810 n.241 (noting the disconnect between the concepts of independence and inferior officer status: "A truly inferior independent calls to mind a truly square circle."); Calabresi & Rhodes, *supra* note 98, at 1165–66.

jurisprudence and clearly make a greater swath of officials wielding federal power subject to "officer" appointments. This would ensure more federal "officers" are properly subject to democratic accountability, at least on the front end.

Lastly, Professor Gary Lawson has contended that the real measure of agency accountability is not whether the President or his subordinates can effectively remove officers, but whether the President can direct the actions of executive branch actors.[143] In other words, if an officer disregards the law, may a department head remove that officer but not undo his action?[144] If so, the President really is not in charge and cannot properly take care that laws are followed.[145]

Even under this theory of accountability, it makes more sense for Congress to assign the President or department heads to appoint agency adjudicators rather than giving the appointing authority to a court of law. Presumably an agency adjudicator is more likely to comply with the law in his executive branch duties if he is subject to the direction of the entity who may appoint or remove him. Moreover, any theoretical benefit of impartiality gained by having the D.C. Circuit rather than a department head appoint an ALJ is lost if Article II's grant of "executive Power" nonetheless permits the President or his department heads to correct an unlawful executive adjudicative action.

2. *Presidential or Departmental Head Appointment of ALJs Might Still Permissibly Be Subject to a Merit-Based System, Consistent with First Principles.*

[143] Lawson, *Rise and Rise*, *supra* note 19, at 1243–45 (concluding that the removal debate has "relatively little constitutional significance" and removal is "either constitutionally superfluous or constitutionally inadequate").

[144] *See id.* at 1244.

[145] *Id.* (contending that if an official is removed for "exercis[ing] power contrary to the President's directives" but the insubordinate act nonetheless remains "legally valid," the "ex-official will have effectively exercised executive power contrary to the President's wishes, which contravenes the vesting of that power in the President").

Under current law ALJs are selected utilizing a merit-based system.[146] Similar to the competitive service system in general, a panel scores ALJ candidates.[147] Several top-ranked candidates then are presented to the relevant agency who selects from among them to make the appointment.[148] As Professor Barnett has observed, the primary reason this process may be unconstitutional if ALJs in fact are "officers" is because some agency heads currently selecting ALJs are not department heads[149]—at least not under the Supreme Court's interpretation of that phrase.[150] But the main gist of the merit-based ALJ selection process might be permissible.

Based on examination of "the text, history, and structure of the Constitution," Professor Hanah Metchis Volokh has presented arguments suggesting that "statutory qualifications are consistent with the Constitution's process for vested [or, "inferior Officer"] appointments."[151] The earliest evidence of congressional practice suggests such qualifications in fact were quite modest, such as the requirement that an Attorney General be "learned in the law."[152] That said, merit-based evaluation of at least some executive branch officials has been occurring since as early as the mid-19th century.[153] And Congress's Article II power to "establish[] by Law" executive offices may include textual authority to place conditions on who may fill those offices.[154] If so, merit-based selection requirements may be just another permissible condition of

---

[146] *See* Barnett, *supra* note 9, at 804–05; *see also* VANESSA K. BURROWS, CONG. RESEARCH SERV., RL34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW 2–3 (2010) (explaining that the Office of Personnel Management scores ALJ applicants and places those receiving a passing score on a register listing eligible hires; agencies then select from among the top three candidates).

[147] *See* Barnett, *supra* note 9, at 804–05.

[148] *See id.*

[149] *Id.* at 800.

[150] *See Free Enter. Fund*, 561 U.S. at 511 (defining a department as "a freestanding component of the Executive Branch, not subordinate to or contained within any other such component").

[151] Volokh, *supra* note 58, at 745.

[152] *Id.* at 769 (internal quotation omitted); *see also* Mascott, *supra* note 8, at 66–67 n.486 (collecting references to the minimalist statutory qualifications that the First Federal Congress imposed on various governmental positions).

[153] *See* Mascott, *supra* note 8, at 67, n.490.

[154] *Id.* at 66, n.485; Volokh, *supra* note 58, at 759–60 *cf. id.* at 760–62 (finding additional support for the idea that Congress may impose qualifications on inferior officers in the distinct Appointments Clause phrase, "as

office-holding that Congress imposes on the offices it creates.[155] As long as (i) the final entity selecting from among the meritorious candidates is the President or a department head and (ii) the panelists scoring candidates are themselves properly appointed,[156] merit-based selection of ALJs may very well comport with Article II.

3. *Does a Change in the ALJ Appointment Structure Impact the Fairness of Agency Adjudicative Proceedings?*

Perhaps some may object that raising fairness concerns about the alteration of the ALJ appointment structure really is much ado about nothing. After all, the agency heads already are subject to Appointments Clause requirements.[157] And the APA requires agencies to give such little deference to ALJ decisions[158] that an ALJ's determination has minimal impact on the fairness of the outcome in any given case. How can subjecting ALJs to Article II procedures make agency adjudication any more biased than it already is in light of the potentially non-deferential review of ALJ decisions by politically appointed agency heads?

On one level, this is a very good point. Agency heads often play a significant role in agency adjudicative determinations. Acknowledgement of this significant role may perhaps underscore the need to reexamine whether agency adjudication, through and through, is subject to so much executive influence that certain private rights matters simply are inappropriate for

---

they think proper" (U.S. CONST. art. II, § 2, cl. 2: "but the Congress may by Law vest the Appointment of such inferior officers, as they think proper . . .").

[155] *See* Mascott, *supra* note 8, at 66–68; *see also* CIV. SERV. COMM'N, 13 OP. ATT'Y GEN. 516, 518–20, 524–25 (1871) (concluding that it would be unconstitutional for merit-based requirements to limit the President to one specific officer candidate but merit-based requirements limiting the President to choosing from a class of candidates may be okay).

[156] *See* Mascott, *supra* note 8, at Part IV.A.2.b.ii.

[157] *See, e.g.*, 15 U.S.C. § 78d(a) (subjecting SEC Commissioners to appointment by the President with Senate advice and consent).

[158] *See* 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); Barnett, *supra* note 9, at 799 (observing that agencies "can reverse ALJs' decisions in toto").

executive adjudicative resolution altogether and should be transferred instead to the jurisdiction of constitutionally impartial Article III courts.[159]

On the other hand, first-level agency decision-makers like ALJs enjoy their own substantial federal authority. For example, if an ALJ's decision is not challenged, by default under the APA it may "become[] the decision of the agency without further proceedings."[160] Even if the agency reviews the ALJ's initial decision, the ALJ's earlier determination is part of the record that the agency must consider during its reevaluation of the case.[161] The initial decision also is part of the record for purposes of potential eventual judicial review.[162]

As administrative law expert Professor Michael Asimow has observed, the United States' administrative adjudicative system relies most heavily on the individual adjudicator's initial decision.[163] Comparatively "[f]ew[] resources are invested in reconsideration or judicial review" because "it is improbable that the decision will be overturned on the basis of a factual or discretionary error."[164]

Moreover, simply during an ALJ's initial consideration of a case, she exercises substantial governmental power over the regulated party. For example, an ALJ has the power to issue subpoenas, take depositions, and require parties or their representatives to attend

---

[159] *See infra* Part II.

[160] 5 U.S.C. § 557(b). That said, the practice of certain agencies may be to require further agency action before an ALJ's decision becomes final agency action, at least for purposes of judicial review. For example, in the D.C. Circuit's *Lucia* case, the SEC's regulations require the Commission to "enter an order of finality as to each party." *See* 17 C.F.R. § 201.399(b)(1), (d)(1)–(2).

[161] *See* 5 U.S.C. § 557(c); *see also Bandimere*, 844 F.3d at 1179–80 (describing numerous ways in which initial consideration by SEC ALJs shapes the outcome of a case even when it is reviewed by the commission on appeal).

[162] *Compare* 5 U.S.C. § 706 (providing for judicial review of the records from agency action), *with* 5 U.S.C. § 557(c) ("All decisions, including initial, recommended, and tentative decisions, are a part of the record . . . .").

[163] Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. COMP. L. 3, 13 (2015).

[164] *Id.* at 13–14.

conferences.[165] It is important for the democratic accountability and transparency of Article II procedures to apply to these exercises of governmental power.[166]

The stakes are high. In the D.C. Circuit's *Lucia* case, for example, agency adjudication resulted in Mr. Lucia's lifetime bar from his profession.[167]

II. Proper Limits on Matters Subject to Agency Adjudication

As legal scholarship about agency adjudication lays bare, the preservation of true impartiality of the kind we expect in *judicial* determinations directly conflicts with the value of maintaining presidential supervision over executive action.[168] Giving the Chief Executive or a department head any role in appointing, or removing, or even directing the general policies of agencies involved in judicial resolution of contested issues opens up the danger of abuse of power. Regulated parties whose private liberty and property rights are subject to adjudicative deprivation by the political branches are at risk.[169]

So, how are we to resolve the tension between the need for executive supervision over executive adjudication and the potential partiality of executive-appointed officers in resolving private property and liberty deprivations?[170] Happily, there's an Article for that.

---

[165] 5 U.S.C. § 556(c)(2), (4), (8); *see also Bandimere*, 844 F.3d at 1178–81 (describing the numerous duties and substantial influence of the SEC's ALJs).

[166] *See supra* notes 105–109 and accompanying text (discussing the democratic accountability and transparency of Article II procedures).

[167] *Raymond J. Lucia Cos.*, 832 F.3d at 283.

[168] *See, e.g.*, Barnett, *supra* note 9, at 825 (arguing that the elimination of tenure protections for purposes of improving presidential supervision would increase the potential for bias); *id.* at 826 (describing independence as the "flipside" to supervision and contending that increasing removal power will have an "inverse impact on independence and impartiality").

[169] *See* HAMBURGER, *supra* note 21, at 227–28 ("[W]hen government once again relies on extrajudicial adjudications to bind subjects, it clearly violates these constitutional provisions. Indeed, it systematically returns to the extralegal adjudication that constitutional law developed largely in order to prevent. The result is a massive evasion of fundamental constitutional limitations.").

[170] *See* Barnett, *supra* note 9, at 800–01*; cf.* William Funk, *Slip Slidin' Away—The Erosion of APA Adjudication* (draft manuscript, at 2, online at https://sls.gmu.edu/csas/wp-content/uploads/sites/29/2017/04/Slip-Slidin-Away.pdf) (last accessed June 18, 2017) (attributing ALJs' independence in large part to the extensive "good cause" removal protections that they enjoy (internal quotation omitted)).

Article III entrusts judicial resolution of cases and controversies to judges with lifetime tenure and salary protection.[171] The reason that resolution of tension between executive supervision of agency adjudication and impartial due process seems so intractable is because the Constitution was not intended to permit executive agencies to resolve a number of the matters before them today.[172]

This tension raises the obvious question, however: what matters *should* executive agency adjudicators resolve? They clearly have the constitutional authority to resolve certain disputes.[173] From the time of the very first Congress, agency adjudicators have been engaged in "the application of legal standards to particular facts"[174] to resolve contested issues. But what is the proper line between adjudicative issues that truly are executive matters subject to resolution by the political Article II branch versus judicial matters that, at the federal level, may be resolved only by Article III judges?[175]

Providing an adequate answer to that question requires reliance on extensive historical research and analysis—research that several scholars have undertaken in significant measure.[176]

---

[171] U.S. CONST. art. III, §§ 1–2.

[172] *See* Lawson, *Rise and Rise*, *supra* note 19, at 1248 ("I do not make this claim with full confidence . . . , but it seems to me that Article III requires de novo review, of both fact and law, of all agency adjudication that is properly classified as 'judicial' activity. Much of the modern administrative state passes this test, but much of it fails as well."). *See generally* HAMBURGER, *supra* note 21, at 227–76 (Chapter Thirteen: "Return to Extralegal Adjudication").

[173] *See, e.g.*, HAMBURGER, *supra* note 21, at 191 ("[T]he early federal executive could do much that came close to judicial power. For example, the executive could hold judicial-like hearings and could issue orders directing its own officers. But it could do these things that might seem like judicial power only as long as it did not thereby bind subjects in the manner of actual judicial power."); Lawson, *Rise and Rise*, *supra* note 19, at 1246.

[174] *See* Lawson, *Rise and Rise*, *supra* note 19, at 1246; *see also Freytag*, 501 U.S. at 909 (Scalia, J., concurring) (describing the role of the 18th-century Comptroller of the United States and defining adjudication as "determin[ing] facts, apply[ing] a rule of law to those facts, and thus arriv[ing] at a decision").

[175] *See* Lawson, *Rise and Rise*, *supra* note 19, at 1246–47 (noting it can be "difficult to identify those activities that are strictly judicial in the constitutional sense"); *see also* HAMBURGER, *supra* note 21, at 191–225 (distinguishing between judicial acts and "[l]awful [e]xecutive [a]cts [a]djacent to [a]djudication"—describing executive adjudication involving non-subjects and executive adjudication regarding not-yet-vested "benefits or other privileges" as examples of permissible executive actions).

[176] *See generally, e.g.*, Chapman & McConnell, *supra* note 22; Lawson, *Take the Fifth*, *supra* note 19; Nelson, *supra* note 20.

Part II of this essay will not revisit this analysis in detail. But Part II will provide a brief sketch of some of the principles set forth in this literature (i) that help to uncover the proper dividing line between executive adjudication and the exercise of judicial power and (ii) that demonstrate how properly limited executive adjudication might assuage many of the partiality concerns raised by contemporary scholars like Professor Barnett.

In particular, a starting point for this analysis might be found in the history of the original meaning of the due process protections in the Constitution. Professors Michael McConnell and Nathan Chapman provide a compelling account of the original meaning of "due process of law."[177] They explain that "due process" protections historically applied against all federal government action taken by any of the three branches—including the legislature and the executive.[178] They contend that in contrast to modern doctrine,[179] due process "[f]undamentally . . . was about securing the rule of law" and "only secondarily about notice and the opportunity to be heard."[180] (Professor Gary Lawson recently has drafted an article suggesting the due process of law protections in the Fifth Amendment actually were even narrower, in the sense that they provide no restraints on federal power beyond those "already contained in the text and structure of the Constitution of 1788."[181])

With respect to executive action, Professors Chapman and McConnell's research indicates that due process simply "ensured that the executive would not be able unilaterally to

---

[177] *See* Chapman & McConnell, *supra* note 22, at 1675 (internal quotation omitted).

[178] *Id.* at 1679, 1807.

[179] *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 333–35 (1975) (analyzing the type of notice and hearing that must be provided in a given case through a multi-factor lens).

[180] Chapman & McConnell, *supra* note 22, at 1807.

[181] Lawson, *Take the Fifth*, *supra* note 19, at 1. Professor Lawson agrees that notice is a constitutional requirement prior to any federal deprivation of life, liberty, and property. But Lawson concludes "the bedrock requirement" of notice is such a "basic part of American law" that "it pre-dated the Fifth Amendment's Due Process of Law Clause, is part and parcel of what it means to exercise 'judicial Power,' and did not need articulation in the Fifth Amendment to be effective." *Id.* at 17–18.

deprive persons within the nation of their rights of life, liberty, or property except as provided by common law or statute and as adjudicated by independent judicial bodies."[182] Professors Chapman and McConnell continue on to explain in detail the kinds of individualized acts that legislatures, for example, could take apart from the due process requirement of an independent judicial determination—and those they could not, absent a historical, lawful practice to the contrary.[183]

This line between permissible legislative acts versus acts requiring independent judicial resolution is a useful analogue for evaluating which types of issues are appropriate for agency adjudicative resolution and which are not. For example, as a historical matter, Professors McConnell and Chapman explain that Congress could enact "private statutes" not "depriv[ing] anyone of life, liberty, or property."[184] In contrast, "quasi-judicial" acts that generally were impermissible unless subject to judicial resolution included: (i) taking private property from one party and giving it to someone else; (ii) taking land for a public use without proper compensation, (iii) revising land charters or revoking land grants, and (iv) reducing "procedural protections for a small class of citizens."[185]

Cases involving such deprivations or transfers of life, liberty, or property constitute a "core" of cases that, when considered at the federal level, must be resolved by Article III courts—not executive adjudicators "dressed up as courts."[186] Matters, on the other hand, that

[182] Chapman & McConnell, *supra* note 22, at 1807.
[183] *See id.* at 1734–35, 1774–75.
[184] *Id.* at 1734 (internal quotation omitted).
[185] *Id.* at 1755–68.
[186] *See id.* at 1802–04, 1807. Professor Lawson also has articulated a similar standard based on Professor Philip Hamburger's landmark book—*Is Administrative Law Unlawful?* In a review of the book, Lawson praises Hamburger's observation of "the crucial distinction between executive acts that purport to bind subjects and executive acts that purport merely to instruct executive agents or exercise coercion against non-subjects." Gary Lawson, *The Return of the King: The Unsavory Origins of Administrative Law*, 93 TEX. L. REV. 1521, 1524 (2015). Specifically, Professor Lawson notes, "[I]t is only the former kind of executive actions—attempts by the executive,

may in fact be appropriate for resolution by agency adjudicators include governmental grants of privileges or benefits[187] or issues historically adjudicated without the use of traditional common law judicial procedures.[188] Professors McConnell and Chapman highlight, for example, the case of *Murray's Lessee v. Hoboken Land & Improvement Co.*,[189] in which the Supreme Court held that established practice showed the validity of Congress in certain instances "authoriz[ing] executive officials to seize private property without judicial warrant or a jury trial."[190] In that particular case, U.S. Treasury officials had tried to secure a lien on property owned by a customs officer.[191] The officials were attempting to acquire repayment of a debt the officer owed for customs duties that he had collected but failed to hand over to the government.[192] Because English history indicated "there had always been a summary method for the recovery of debts due to the crown," the Court held that this executive deprivation of property was permissible without judicial proceedings.[193]

As Professor Lawson has pointed out, applying this historical understanding of "due process" to ALJs and contemporary agency adjudication may counsel for the following arrangement at the federal level: (i) If an issue involves the "deprivation of rights," only an

---

with or without statutory authorization, to constrain subjects—that raises constitutional problems of adjudication outside of Article III . . . ." *Id.*

[187] *See* HAMBURGER, *supra* note 21, at 191 (observing that "the core of judicial power" historically was reserved "exclusively to the courts" but "did not include decisions about government benefits or privileges, unless they had 'vested' and become rights").

[188] *See* Chapman & McConnell, *supra* note 22, at 1803–04 (finding that it is permissible for the executive to adjudicate matters outside the traditional common law judicial process if it is rooted in longstanding British practice that the Constitution and early American practice had not changed); *id.* at 1804 ("An Article III judge is required in all federal adjudications, unless the text and historical practice of the Constitution expressly or implicitly give Congress the power to authorize them.").

[189] 59 U.S. 272 (1856). *See also* Lawson, *Take the Fifth*, *supra* note 19, at 32–38 (addressing this case extensively); Nelson, *supra* note 20, at 586–90 (same).

[190] Chapman & McConnell, *supra* note 22, at 1774.

[191] *Id.*

[192] *Id.*

[193] *Id.* at 1774–75 (internal quotation omitted).

Article III court may resolve it.[194] Agency adjudicators should not act even as adjuncts, or assistants, to the courts in such matters.[195] This category of matters that are inappropriate for executive adjudication undisputedly includes criminal judgments, according to multiple scholars.[196] Professor Lawson has suggested this category likely also includes within it "the imposition of a civil penalty or fine," which "is very hard to distinguish from the imposition of a criminal sentence."[197] Perhaps one more obvious extension of the principle would be to conclude that executive adjudication is an improper forum for imposing sanctions like suspension or a lifetime bar from a professional practice area.[198] (ii) In contrast, executive adjudication may be permissible for matters historically resolved by executive actors like

[194] *See* Lawson, *Rise and Rise*, *supra* note 19, at 1247 (observing that "the Article III inquiry" might "merge[] with questions of due process: if the government is depriving a citizen of 'life, liberty, or property,' it generally must do so by *judicial* process, which in the federal system requires an Article III court; but if it is denying a citizen . . . a mere privilege, it can do so by purely executive action").

[195] *See id.* at 1247–48 ("Article III certainly would not be satisfied if Congress provided for judicial review but ordered the courts to affirm the agency no matter what. . . . There is no reason to think that it is any different if Congress instead simply orders courts to put a thumb (or perhaps two forearms) on the agency's side of the scale."). In his book examining the first century of U.S. administrative practice, Professor Jerry Mashaw presents several cooperative efforts between the Executive Branch and courts as an early analogue to the role today of administrative law judges. *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 74–75 (2012) ("The use of courts as administrative tribunals to make initial or recommended decisions seems analogous to the modern role of the administrative law judge."). For example, Professor Mashaw describes a statute permitting individuals to petition a district judge for remittance of a tax penalty; the judge created a factual record and then forwarded it to the Treasury Secretary for the Secretary's determination whether the penalty had been warranted. *Id.* at 74. But this and similar examples do not do the work Professor Mashaw requires of them. As an initial matter, as Professor Lawson has observed, the most egregious problems today with agency consolidation of power occur because agencies often *both* develop the factual record and decide the case, along with the agencies' additional prosecutorial and policymaking roles. Lawson, *Rise and Rise*, *supra* note 19, at 1248–49. But even more fundamentally, Professor Mashaw's examples involve the adjudication of government-related debts and benefits—not the distinct deprivations of private property and liberty that evoke constitutional separation-of-powers concerns. *See* HAMBURGER, *supra* note 21, at 191–92.

[196] *See, e.g.*, Lawson, *Rise and Rise*, *supra* note 19, at 1246–47; Nelson, *supra* note 20, at 610, n.212. Professor Hamburger goes somewhat further and contends that any binding administrative order or warrant is unauthorized by the Constitution—whether it is of a criminal nature or not. *See* HAMBURGER, *supra* note 21, at 265–67. In his view, such inappropriate administrative orders include not just the imposition of penalties or fines but even orders requiring parties to "testify under oath" or "produce their business papers and records" for an administrative inquiry. *See id.* at 228, 266.

[197] Lawson, *Rise and Rise*, *supra* note 19, at 1247.

[198] *See supra* note 167 and accompanying text.

disputes over funds owed to the government[199] or the grant or denial of entitlement benefits[200]—resources to which, as a historical matter, citizens had no pre-existing vested private property right.[201] Additional examples of matters listed by Professor Lawson as appropriate for executive adjudicatory resolution include (i) notice-giving, (ii) acts involving "internal executive administration," and (iii) acts of coercion pursuant to duties imposed by a constitutionally legitimate statute where those acts do not "purport[]to add any independent binding authority to the statute."[202]

Under this construct distinguishing between lawful and unlawful executive adjudication, one would need to analyze whether a particular type of dispute is analogous to cases that historically were subject to resolution by independent judicial bodies.[203] If so, agency adjudicators should not be authorized today to determine the matter.[204] Although this might sound like a radical claim, Professor Lawson has observed that the matters constitutionally

---

[199] *See supra* notes 187–93 and accompanying text. To some, the existence of this historical practice may seem like a dubious exception to a general principle that the government may not take private property like one's income without judicial process. But one key distinction in the public revenue cases is that it was not the government singling out one property owner for some type of taking, punishment, or fine. Rather, the government had already by law authorized the receipt of certain government funds—a principle generally applicable to the public. *See* Lawson, *Take the Fifth*, *supra* note 19, at 35–36. And the elected branches bore the political accountability of the public knowing they had passed the generally applicable revenue law and therefore could be voted out of office for it. Also, as Professor Lawson has observed, even executive adjudication pursuant to public revenue laws is legal only if Congress acted properly, pursuant to one of its enumerated powers, in enacting the revenue statute—another potential check against the unrestrained exercise of federal power. *See id.* at 36–38 (analyzing whether the public revenue collection statute at issue in *Murray's Lessee* was a proper exercise of congressional power under the Necessary and Proper Clause); Lawson, *Rise and Rise*, *supra* note 19, at 1234–35 (noting that the Necessary and Proper Clause authorizes only "laws that 'carry[] into Execution' other granted powers").

[200] *See* Lawson, *Rise and Rise*, *supra* note 19, at 1246 ("[G]ranting or denying benefits under entitlement statutes – is *execution* of the laws by any rational standard . . . .").

[201] *See supra* notes 182–86 and accompanying text.

[202] Lawson, *Take the Fifth*, *supra* note 19, at 24–25.

[203] *See generally, e.g.*, Nelson, *supra* note 20 (conducting significant historical research to define and explicate the constitutional distinction between "core private rights" versus "'privileges' or 'franchises'").

[204] *See* Chapman & McConnell, *supra* note 22, at 1774–75 (observing that due process of law encompasses "the settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country" (internal quotation omitted)).

inappropriate for agency adjudications under this construct are "a relatively modest subset" of present-day executive action.[205]

Examples from early practice seem to bear out these principles.[206] For example, the First Federal Congress established the position of Auditor responsible for, among other things, receiving public accounts, examining them, and certifying their balance.[207] If any person with an audited account was dissatisfied with the Auditor's examination, that person could "appeal to the Comptroller against such settlement."[208] According to Justice Scalia in his concurring opinion in *Freytag*, the Comptroller's adjudication was not subject to further review by the Treasury Secretary.[209] Both the Auditor and the Comptroller who reviewed the Auditor's adjudicative determinations[210] on appeal were appointed by the President with Senate advice and consent.[211] The First Congress did not specify any particular tenure protections for those officials;[212] nonetheless they resolved important issues related to resources owed to the government.[213]

In his book analyzing administrative practice during the first 100 years after the ratification of the Constitution, Professor Jerry Mashaw discusses a number of additional

---

[205] Lawson, *Take the Fifth*, *supra* note 19, at 25.

[206] *See, e.g.*, *Freytag*, 501 U.S. at 909–10 (Scalia, J., concurring) (discussing an early example of executive adjudication within the Treasury Department where the First Federal Congress authorized the Comptroller to give final review to challenges brought against an Auditor's examination and certification of public accounts).

[207] MASHAW, *supra* note 190, at 40 (discussing An Act to Establish the Treasury Department, ch. 12, § 5, 1 Stat. 65, 66–67 (1789)).

[208] 1 Stat. at 66–67, § 5; MASHAW, *supra* note 195, at 40.

[209] *Freytag*, 501 U.S. at 909 (Scalia, J., concurring) (observing that the Comptroller was engaged in an exercise of "executive power" in reaching his determination, which was not subject to "further review by the [Treasury] Secretary").

[210] *See supra* note 169 and accompanying text (observing that adjudication simply amounts to the application of a legal standard to facts).

[211] MASHAW, *supra* note 195, at 40; *see also, e.g.*, 1 S. EXEC. J. 1ST CONG., 1ST SESS. 25 (1789).

[212] *See* 1 Stat. at 66–67, §§ 1, 3, 5; *see also* MASHAW, *supra* note 195, at 42 (noting that "presidential appointment and removal were common to all the departments"); *cf. id.* at 40 and 327 n. 49 (observing that James Madison had supported a term limit for the Comptroller because of his appellate authority but Congress ultimately rejected that proposal).

[213] *See* MASHAW, *supra* note 195, at 327 n.49 (noting that Congress provided by statute that the Comptroller's decisions "would be final and conclusive to all concerned" (internal quotation omitted)).

examples of early executive branch adjudication.[214] They include a private act by Congress authorizing the President to determine how to best distribute relief funds to U.S. residents who had fled Saint Domingo during an insurrection.[215] In another early private act, Congress authorized the President to determine the most appropriate distribution of funds to individuals suffering property damage as a result of defending the government during the Whiskey Rebellion.[216] From early on, lower-level officials appointed by the President also engaged in adjudicative determinations. Revenue officers collecting duties on distilled whiskey had the authority to determine how large of a bond was required as security for the future payment of duties owed on that whiskey.[217] And when customs collectors suspected importers of fraudulent reporting about the goods on their ships, Congress directed the collectors, "in the presence of two or more reputable merchants," to open and examine the suspected packages.[218] Any packages found to have been fraudulently recorded were forfeited based on this examination.[219] In all of these instances, however, the adjudication involved the distribution of government benefits or the recovery of resources owed to the government—not a matter involving the deprivation of liberty or private property.[220]

---

[214] *See id.* at 48.

[215] *See id.* (discussing An Act Providing for the Relief of Such of the Inhabitants of Saint Domingo, Resident within the United States, as May Be Found in Want of Support, ch. 2, 6 Stat. 13 (1794) (authorizing the President to distribute money from the U.S. Treasury to affected persons in the manner that in his opinion is "most conducive to the humane purposes of this act" (internal quotation omitted)).

[216] *Id.* at 48, 331 n.90; (describing 4 ANNALS OF CONGRESS 1000–02 (1794)).

[217] *See* An Act Repealing, After the Last Day of June Next, the Duties Heretofore Laid Upon Distilled Spirits Imported from Abroad and Laying Others in Their Stead; and Also Upon Spirits Distilled Within the United States, and for Appropriating the Same, ch. 15, §§ 3–5, 1 Stat. 199, 199–200 (1791).

[218] An Act to Provide More Effectually for the Collection of the Duties Imposed by Law on Goods, Wares and Merchandise Imported into the United States, and on the Tonnage of Ships or Vessels, ch. 35, § 47, 1 Stat. 145, 169–70 (1790); MASHAW, *supra* note 195, at 36.

[219] *See* MASHAW, *supra* note 195, at 36.

[220] *See supra* notes 194–205 and accompanying text; *see also* HAMBURGER, *supra* note 21, at 191–92 (observing that early administrative precedents discussed by Professor Mashaw "concerned executive actions that did not bind subjects" and thus are not authoritative "precedents for contemporary administrative adjudication").

Despite the constitutionality of executive adjudicative resolution of these types of issues without independent judicial consideration, Congress nonetheless may determine that resolution of such matters merits *statutory* protections to encourage impartiality.[221] As Professor Mashaw has extensively uncovered, from the time of the very First Congress, Congress established numerous far-reaching mechanisms to ensure accountability in executive action.[222] For example, federal officers could face common law suits in state court for wrongdoing in office.[223] And many federal officials had to "give bond, with sufficient sureties" prior to entering office, "with condition for the faithful performance of the duties of [their] office[s]."[224] Official wrongdoing could cause officers to face criminal prosecution,[225] stiff monetary penalties,[226] and removal from office accompanied by a prohibition on holding any future federal office.[227] Certain officials also faced conflict-of-interest prohibitions.[228] Treasury officials, for example, could

[221] *Cf.* Lawson, *Take the Fifth*, *supra* note 19, at 23–25 (observing that under the Constitution standing alone, executive procedures are not "even relevant to, the lawfulness of an executive deprivation of life, liberty, or property"; such procedures become relevant to an action's legality only if "valid statutes prescribe necessary procedures that must be followed").

[222] *See* MASHAW, *supra* note 195 (Chapter 3); *see, e.g.*, *id.* at 63 (referring to the techniques of "oaths, bonds, forfeitures, criminal penalties, and qui tam actions" that were imposed by congressional statute as well as "internal control" efforts via "instructions, audits, and inspections"); *id.* (noting also that the Federalists preserved accountability by "leaving all officers subject to removal").

[223] *Id.* at 36–37; *see also, e.g.*, An Act to Establish the Judicial Courts of the United States, ch. 20, §§ 27–28, 1 Stat. 73, 87–88 (1789) (describing misfeasance in office as a breach of the bond a marshal was required to pay prior to assuming office).

[224] *See, e.g.*, 1 Stat. at 66, § 4 (describing the Treasurer's bond requirement); An Act to Provide More Effectually for the Collection of the Duties Imposed by Law on Goods, Wares and Merchandise Imported Into the United States and on the Tonnage of Ships or Vessels, ch. 35, § 52, 1 Stat. 145, 171 (1790) (requiring collectors, naval officers, and surveyors involved in collecting customs duties to give a bond with sureties "with condition for the true and faithful discharge of the duties of his office according to law"); MASHAW, *supra* note 195, at 58, 62.

[225] *See* MASHAW, *supra* note 195, at 67; *see also, e.g.*, 1 Stat. at 66, § 3 (providing for "prosecutions for all delinquencies of officers of the revenue").

[226] *See* MASHAW, *supra* note 195, at 62.

[227] *Id.*; *see also, e.g.*, 1 Stat. at 67, § 8.

[228] MASHAW, *supra* note 195, at 58.

not be "directly or indirectly" involved[229] in the "business of trade or commerce"[230] or "be concerned in the purchase or disposal of any public securities."[231]

Congress today similarly could provide for many mechanisms to help ensure the fair and lawful execution of federal power by agency adjudicators and other executive branch officials. For example, in a recent paper arguing for constrained use of informal agency adjudication procedures, Professor William Funk highlighted the beneficial requirement in formal adjudication of stringent separation between agency investigators and prosecutors and agency adjudicators[232]—a statutory procedural safeguard currently present in the APA.[233] Professor Asimow also has praised statutory safeguards encouraging impartiality in agency adjudication. He has recommended that protections such as separation of functions and restrictions on ex parte contact be extended beyond just formal adjudication to govern less formal proceedings.[234]

All such statutory protections for impartiality nonetheless must remain compatible with the Chief Executive's constitutionally required supervision over agency matters including adjudication. Disputes at the federal level impacting vested private rights[235] should be resolved by Article III courts. In contrast, genuinely executive matters should be resolved by adjudicators subject to the ultimate appointment by, and supervision of, a democratically accountable Chief

[229] 1 Stat. at 67, § 8.

[230] *See* MASHAW, *supra* note 195, at 58 (describing 1 Stat. at 67, § 8 (internal quotation omitted)).

[231] 1 Stat. at 67, § 8.

[232] *See* Funk, *supra* note 170, at 13–14 (analyzing a recent Administrative Conference of the United States recommendation to encourage certain "best practices" for non-APA adjudications (internal quotation omitted)).

[233] *See* 5 U.S.C. § 554(d).

[234] Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1004, 1013–16 (2004).

[235] *See, e.g.*, Nelson, *supra* note 20, at 577–78 (explaining the historical example of the distribution of public lands and observing that executive determinations were adequate "to transfer the public's interest in land to a private person" but judicial proceedings would have been required to subsequently retract that newly vested private interest).

Executive. These constitutional protections will help ensure democratic liberty and transparency.[236]

Conclusion

When evaluating ALJs under the Appointments Clause, courts should conclude both under modern doctrine and as a matter of first principles that ALJs are "inferior Officers"—not employees. In changing the selection mechanisms for ALJs to comply with Article II, Congress should subject ALJs to the appointment of either a department head or the President.

In many cases where agencies just allocate various governmental benefits or adjudicate governmental debt collection,[237] there likely is no due process or Article III problem with a properly appointed Article II officer following whichever procedural requirements Congress has imposed.[238] But where historical liberty and vested private property interests are at stake, even the impartiality protections available through formal APA adjudication just are not enough.[239]

The recent Article II cases involving the SEC thus reveal yet another constitutional ground for reconsidering whether agency adjudication is the proper forum to evaluate deprivations of liberty and property interests. If Congress feels restricting agency adjudication would burden Article III courts with untenably broad jurisdiction, perhaps that is an indication that the breadth of issues subject to federal jurisdiction—and indeed, federal power of any kind—is too broad today.[240]

---

[236] *See, e.g.*, Amar, *supra* note 24, at 809 (referring to "the general liberty-enhancing architecture of separation of powers"); Lawson, *Rise and Rise*, *supra* note 19, at 1248 ("The constitutional separation of powers is a means to safeguard the liberty of the people.").

[237] *See* Chapman & McConnell, *supra* note 22, at 1774.

[238] *See supra* notes 221–34 and accompanying text.

[239] *See* Chapman & McConnell, *supra* note 22, at 1804 ("An Article III judge is required in all federal adjudications, unless the text and historical practice of the Constitution expressly or implicitly give Congress the power to authorize them." (internal quotation omitted)).

[240] *See* Lawson, *Rise and Rise*, *supra* note 19, at 1236–37, 1253.