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Note

Late for an Appointment: Balancing Impartiality and Accountability in the IRS Office of Appeals

David Hahn*

And some tax collectors also came to be baptized, and they said to him, “Teacher, what shall we do?”¹

INTRODUCTION

Larry Tucker didn’t pay his taxes for three years.² The Internal Revenue Service (IRS) filed a lien on his property. Tucker objected, offering instead to pay off his liabilities in a compromise settlement, but the IRS representative refused.³ Frustrated with the adverse result, Tucker attacked the system that brought it about, claiming that the method of choosing that representative was unconstitutional.⁴ The implications of his claim reach far beyond IRS human resources policy: Can an adjudicator in any agency be both “impartial”⁵ and “politically accountable”?⁶ And what role does the agency’s structure play in answering that question?

Taxpayers in Tucker’s situation can challenge an IRS collection action by requesting a collection due process (CDP) hearing

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1. *Luke* 3:12–13.
2. *Tucker v. Comm’r*, 135 T.C. 114, 117–18 (2010), *aff’d*, 676 F.3d 1129 (D.C. Cir. 2012).
3. *Id.*
4. *Id.* at 116–17.
5. *See infra* note 14 and accompanying text.
6. *See infra* note 135 and accompanying text.

before an “impartial officer” or employee of the IRS Office of Appeals.⁷ The purpose of the hearing is to resolve tax disputes before litigation and to balance efficient tax collection with the rights of the taxpayer.⁸ Taxpayers may appeal an adverse CDP determination to the U.S. Tax Court.⁹ For the last twenty years, CDP hearings have played a central role in the tax collection process.¹⁰

CDP officers wield substantial government power. They have wide discretion in determining the appropriateness of collection actions, and they have the power to bind the government.¹¹ And these hearings are not rare; the IRS Office of Appeals received 43,749 CDP cases in Fiscal Year 2016 and resolved 41,380 in the same period.¹² When a taxpayer submits an offer-in-compromise, the CDP officer is the face of the agency, and when that offer is successful, the hearing is the whole of the taxpayer’s adversarial interaction with the IRS.¹³

CDP officers are not meant to be political agents of the IRS. On the contrary, they have a statutory duty to be “impartial.”¹⁴ They are not writing regulations or creating policy; they merely apply existing policy to decide the appropriateness of an individual collection action.¹⁵ Like other members of the federal civil service, CDP officers enjoy protection against political retaliation and can contest adverse employment actions before the Merit Systems Protection Board, meaning—effectively—that they are only removable for good cause.¹⁶

This combination of power and protection places CDP officers in a constitutional conundrum. The Appointments Clause of the Constitution imposes procedural constraints on the appointment of all “Officers of the United States.”¹⁷ The President, with the advice and consent of the Senate, must appoint all “principal

7. I.R.C. § 6330(b)(3) (2017).

8. *Id.* § 6330(c)(3)(C).

9. *Id.* § 6330(d)(1).

10. INTERNAL REVENUE SERV., THE IRS COLLECTION PROCESS: PUBLICATION 594, at 4 (2018), <https://www.irs.gov/pub/irs-pdf/p594.pdf> [hereinafter IRS COLLECTION PROCESS] (describing the role of the CDP hearing).

11. *See infra* note 65 and accompanying text.

12. INTERNAL REVENUE SERV., 2016 DATA BOOK 50 (2017), <https://www.irs.gov/pub/irs-soi/16datbk.pdf>.

13. *See infra* note 64.

14. I.R.C. § 6330(b)(3).

15. *See infra* note 61 and accompanying text.

16. *See infra* notes 68–72 and accompanying text.

17. U.S. CONST. art. II, § 2, cl. 2.

officers,” but Congress may vest the appointment of “inferior officers” in “the President alone, in the Courts of Law, or the Heads of Departments.”¹⁸ By giving Congress the power to create offices, but the executive and judicial branches the power to fill them, the Clause promotes the separation of powers.¹⁹ It adds transparency to the appointment process, ensuring that government officers are accountable to the politicians that appoint them and, by extension, to the public.²⁰ Courts and commentators have struggled to define an “Officer of the United States” and what differentiates “inferior officers” from “principal officers,” but there is consensus that these terms have a broad sweep.²¹ A recent surge of separation-of-powers litigation has seen many litigants arguing that government officials are unconstitutionally appointed.²²

But appointments are only half of the equation. The Supreme Court has struck down restrictions on officer removal when those restrictions severely limit the President’s ability to oversee the execution of the laws.²³ If the Appointments Clause is meant to provide political accountability, the Court reasoned, then there must be a way to hold officers accountable, and the most obvious way is removal.²⁴ If CDP officers are Officers of the United States, then they must be appointed consistent with the Appointments Clause.²⁵ But if the limitations on their removal

18. *Id.*

19. THE FEDERALIST NO. 51 (James Madison).

20. *Edmond v. United States*, 520 U.S. 651, 660 (1997).

21. *See* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 539 (2010) (Breyer, J., dissenting) (describing the definition of “inferior officer” as “unusually broad”); Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 74 (2007) (describing an “inferior officer” as anyone who holds a position that is “continuing” and “invested by legal authority with a portion of the sovereign powers of the federal government”); James Heilpern, *Ode to the Assistant Doorkeeper of the House of Representatives*, YALE J. REG.: NOTICE & COMMENT BLOG (Apr. 2, 2018), <http://yalejreg.com/nc/ode-to-the-assistant-doorkeeper-of-the-house-of-representatives-by-james-heilpern> (noting that an eighteenth-century assistant doorkeeper to the House of Representatives was called an officer).

22. *See, e.g., Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Burgess v. FDIC*, 871 F.3d 297 (5th Cir. 2017); *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), *cert. denied*, 138 S. Ct. 2706 (2018) (challenging the appointment of SEC administrative law judges); *Tucker v. Comm’r*, 135 T.C. 114 (2010), *aff’d*, 676 F.3d 1129 (D.C. Cir. 2012).

23. *See Free Enter. Fund*, 561 U.S. at 492 (holding that two layers of “good cause” removal protection for Board members is unconstitutional).

24. *See Edmond*, 520 U.S. at 664 (“The power to remove . . . is a powerful tool for control.”).

25. *See supra* note 17 and accompanying text.

improperly insulate them from political accountability, they may no longer be able to enjoy civil service protections.

Litigants have argued that CDP officers are unconstitutionally appointed. The U.S. Tax Court rejected such a challenge in 2010, and the D.C. Circuit affirmed.²⁶ Both opinions rested on reasoning that has since been called into question, and neither addressed CDP officers' civil service protections. Several cases currently pending before the U.S. Tax Court could allow more circuits to consider the issue soon.²⁷

There is reason to believe that new cases will yield different results. There is growing scholarly and judicial support for a formalistic and wide-ranging definition of "Officer of the United States"²⁸—one that could encompass both administrative law judges (ALJs)²⁹ and informal agency adjudicators.³⁰ The Supreme Court has been open to examining these questions.³¹ Even so, if current appointments are unconstitutional, there is considerable disagreement over the appropriate solution.³²

26. See *Tucker*, 135 T.C. at 114.

27. See Respondent's Response to Motion to Remand at 1, *Thompson v. Comm'r*, No. 7038-15L (T.C. Jan. 5, 2018) (arguing that CDP officers are not subject to the Appointments Clause); Petitioner's Motion to Remand at 1, *Elmes v. Comm'r*, No. 24872-14L (T.C. Sept. 30, 2017) (arguing that CDP officers are subject to the appointments clause); Order at 1, *Fonticiella v. Comm'r*, No. 23776-15L (T.C. Aug. 9, 2017) (denying petitioner's motion for recusal on grounds that the President's authority to remove Tax Court judges does not violate separation of powers principles).

28. See generally John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, 2007 PATENTLY O-PAT. L.J. 21, 21 (2007); Jennifer Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 454 (2018) (arguing that the original public meaning of "Officer of the United States" is "one whom the government entrusts to perform a statutory duty of any level of importance").

29. See *Lucia v. SEC*, 138 S. Ct. 2044, 2053–54 (2018) (holding that ALJs in the SEC are officers); see also *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 679 (6th Cir. 2018).

30. See, e.g., Stacy M. Lindstedt, *Developing the Duffy Defect: Identifying Which Government Workers Are Constitutionally Required to Be Appointed*, 76 MO. L. REV. 1143 (2011) (arguing that CDP officers must be constitutionally appointed).

31. See *Lucia*, 138 S. Ct. at 2053–54 (considering whether ALJs are officers).

32. See *id.* at 2055 (remanding case for a new hearing before a different ALJ); *id.* at 2064 (Breyer, J., concurring in the judgment) (arguing that remanding for a new hearing before the same ALJ poses no Appointments Clause or Due Process violation). Compare Thomas C. Rossidis, *Article II Complications Surrounding SEC-Employed Administrative Law Judges*, 90 ST. JOHN'S L. REV. 773, 777–78 (2016) (advocating reappointment of ALJs by SEC Commissioners, protection of past rulings under a "de facto officer" doctrine, and continued dual-

The combination of a broad officer definition and close scrutiny of removal restrictions could leave any government agency that employs career civil servants vulnerable to constitutional challenge. This trend could undermine both formal and informal agency adjudication, affecting the way agencies structure their adjudicatory procedures, who is chosen for adjudicative roles, and to whom those adjudicators are accountable. This dilemma highlights a tension between formalist and functionalist constitutional interpretation: How should the strict construction of constitutional text interact with pragmatic historical practice when deciding these questions?³³

This Note straddles the line between formalism and functionalism. It first observes that—for better or worse—CDP officers are likely Officers of the United States and therefore require constitutional appointment. CDP officers exercise substantial discretion while carrying out statutorily-mandated duties that play a crucial role in the tax collection process.³⁴ Because of the supervision they face from the Agency, they are likely inferior—rather than principal—officers. The previous cases that addressed the issue were wrongly decided, and even if they were correct at the time, recent Appointments Clause litigation calls their reasoning into question.³⁵

This Note also addresses an issue previous courts and commentators have not considered: whether CDP officers' civil service protections are unconstitutional restrictions on their removal. It concludes that those protections are not only constitutional under current Supreme Court precedent but are also a normative good, preserving the impartiality that Congress contemplated.³⁶ While this Note focuses on CDP officers, it rec-

layer good-cause removal protections), *with* Memorandum from Professor Steven G. Calabresi & Shams Hirji to the Senate & the House of Representatives 1 (Nov. 7, 2017) (advocating the abolition of 158 ALJ positions and the addition by legislation of circuit court judgeships).

33. *Compare* NLRB v. Noel Canning, 134 S. Ct. 2550, 2560 (2014) (Breyer, J.) (“[T]he longstanding ‘practice of government’ . . . can inform our determination of ‘what the law is.’” (first quoting *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819); and then quoting *Marbury v. Madison*, 5 U.S. 137, 176 (1803))), *with id.* at 2594 (Scalia, J., concurring in the judgment) (“[P]ast practice does not, by itself, create power.” (quoting *Medellin v. Texas*, 552 U.S. 491, 532 (2008))).

34. *See infra* notes 58–64 and accompanying text.

35. *See infra* note 198 and accompanying text.

36. *See* I.R.C. § 6330(b)(3) (2017) (requiring that officers conducting CDP hearings be impartial).

ognizes the implications these questions have for informal adjudicators throughout the administrative state.³⁷

Part I discusses the statutory and regulatory scheme underlying CDP hearings and traces the history and purposes of the Appointments Clause, highlighting key doctrinal developments in the last ten years. Part II analyzes how courts disposed of earlier Appointments Clause challenges to the CDP process, explains how recent litigation casts those decisions into doubt, and concludes that CDP officers are likely inferior officers. Part III recommends that Congress provide for the appointment of CDP officers by the Secretary of the Treasury to promote prospective accountability for the quality of CDP decisions but concludes that CDP officers' civil service protections are constitutional because of their adjudicative role.

I. THE APPOINTMENTS CLAUSE AND CDP HEARINGS

The IRS Office of Appeals has, for years, provided taxpayers a venue to appeal adverse decisions internally before taking disputes to court.³⁸ For most of the twentieth century, the IRS enjoyed considerable discretion in how to structure those appeals.³⁹ In response to rising concerns for taxpayer due process rights,⁴⁰ Congress passed the IRS Restructuring and Reform Act of 1998 (RRA), establishing the CDP process and requiring the Agency to follow certain procedures in its execution.⁴¹ Section A discusses the power and prominence of CDP officers under that legislation.

Whether those statutory changes transformed CDP officers from mere IRS employees to Officers of the United States requires a precise understanding of both the power they exercise

37. *Cf.* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 549–88 (Breyer, J., dissenting) (compiling an appendix of twenty-four departments and 573 career-appointed positions arguably occupied by Officers of the United States who are subject to two layers of for-cause removal protections).

38. *See* INTERNAL REVENUE SERV., HISTORY OF APPEALS, 60TH ANNIVERSARY EDITION 3–6 (1987).

39. Andrew Strelka & Sean Morrison, *The IRS and America's Longest Running ADR Program*, 63 FED. LAW. 28, 28 (2016) (citing INTERNAL REVENUE SERV., HISTORY OF APPEALS, 60TH ANNIVERSARY EDITION (1987)) (describing the series of appeals schemes the IRS created by regulation before procedures were mandated by statute).

40. *See* S. REP. NO. 105-174, at 67 (1998) (“The Committee believes that following procedures designed to afford taxpayers due process in collections will increase fairness to taxpayers.”).

41. *See* I.R.C. § 6330.

and how courts have applied the Appointments Clause to date. To lay this foundation, Section B discusses the history of the Appointments Clause, articulations of its broad sweep, and how recent courts have applied it to administrative adjudicators.

A. THE IRS OFFICE OF APPEALS AND COLLECTION DUE PROCESS HEARINGS

CDP hearings have become a fixture of the tax collection process.⁴² A brief summary of that process helps illustrate their significance.

1. Tax Collection Generally

Uncontested tax collection follows a fairly simple process. First, the IRS makes an assessment to establish the amount owed, commonly through the filing of a federal tax return.⁴³ When the amount already paid exceeds the amount owed, the IRS issues a refund. When the taxpayer owes additional taxes, the IRS issues a bill for the unpaid amount.⁴⁴

Complexities arise if the taxpayer does not pay. If the tax remains unpaid ten days after the taxpayer receives notice of an assessment and a demand for payment, a federal tax lien attaches to the taxpayer's property.⁴⁵ The IRS provides a Notice of Federal Tax Lien (NFTL) to the taxpayer and the taxpayer's other creditors, establishing the priority of the IRS's claim.⁴⁶ The NFTL may negatively impact the taxpayer's credit score.⁴⁷

If a taxpayer still does not pay after a lien attaches, the IRS may levy the taxpayer's property.⁴⁸ A federal tax lien establishes a legal claim to the taxpayer's property, but a levy involves an actual seizure of the property. This can involve a physical seizure

42. See *Tucker v. Comm'r*, 135 T.C. 114, 137–39 (2010), *aff'd*, 676 F.3d 1129 (D.C. Cir. 2012) (describing the role of the CDP hearing).

43. IRS COLLECTION PROCESS, *supra* note 10, at 2.

44. *Id.*

45. Danshera Cords, *How Much Process Is Due? I.R.C. Sections 6320 and 6330 Collection Due Process Hearings*, 29 VT. L. REV. 51, 55 (2004). The tax lien arises automatically after nonpayment of the first tax bill and applies to all of the taxpayer's current and future property, including "a house or car, and rights to property, such as wages and bank accounts." IRS COLLECTION PROCESS, *supra* note 10, at 4–5.

46. IRS COLLECTION PROCESS, *supra* note 10, at 5.

47. *Id.*

48. Cords, *supra* note 45.

(e.g., of a house or a car) or a seizure of rights to property (e.g., garnishment of wages or Social Security payments).⁴⁹

2. The Collection Due Process Hearing

The tools of tax collection give the IRS substantial power.⁵⁰ Over the years, both Congress and the Agency have created procedures to protect taxpayers from the arbitrary exercise of that power. The RRA created the CDP hearing to balance efficient tax collection with the “legitimate concern of the taxpayer that the collection action be no more intrusive than necessary.”⁵¹

Within five days after a federal tax lien arises, the IRS must send the taxpayer a notice of: (1) the amount of unpaid tax; (2) the right to request a CDP hearing within 30 days; and (3) the proposed collection action.⁵² A taxpayer that returns a written request⁵³ is entitled to a CDP hearing before an “impartial officer,” which the statute defines as an “officer or employee who has had no prior involvement with respect to the unpaid tax.”⁵⁴ No statutory provision expressly creates either the Office of Appeals or CDP officers. Regulations allow the hearings to be conducted by (1) Appeals Team Managers; (2) Settlement Officers; or (3) Appeals Account Resolution Specialists.⁵⁵ For simplicity’s sake and because the statutory duties are the same, this Note refers to these positions collectively as “CDP officers.” In the absence of an organic provision specifically creating CDP officers, the IRS staffs the Office of Appeals through its generic hiring

49. IRS COLLECTION PROCESS, *supra* note 10, at 5. If a taxpayer remains “seriously delinquent” on his or her debt, there may be additional consequences, including a legal summons to meet with the IRS or passport revocation. *Id.*

50. Commentators have noted that these tools give the IRS substantially more power to collect than a private creditor enjoys. *See, e.g.,* Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?*, 41 HOUS. L. REV. 1145, 1148 (2004).

51. S. REP. NO. 105-174, at 68 (1998).

52. I.R.C. § 6330(a)(3) (2017). The notice typically must precede the collection action, but the IRS has promulgated regulations allowing for post-levy notice where the tax collection is in jeopardy or involves a state tax refund. *Id.* § 6330(a)(1)–(2); *see* Treas. Reg. §§ 301.6330-1(a)(2)(i)–(ii) (2018).

53. Treas. Reg. § 301.6330-1(c)(2).

54. I.R.C. § 6330(b)(3). Elsewhere in the RRA, Congress required that the IRS implement a reorganization plan that includes a prohibition on ex parte communications between Appeals Officers and other IRS staff “to the extent that such communications appear to compromise the independence of the appeals officers.” Pub. L. No. 105-206, § 1001(a)(4) (1998).

55. IRM 8.22.4.5 (Aug. 9, 2017).

provision.⁵⁶ The Tax Court noted in dicta that if the Appointments Clause does apply to CDP officers, the current hiring procedures do not amount to a constitutional appointment.⁵⁷

At the hearing, the CDP officer must first verify that the IRS has abided by applicable law and administrative procedures.⁵⁸ The taxpayer may then raise “any relevant issue relating to the unpaid tax . . . including (i) appropriate spousal defenses; (ii) challenges to the appropriateness of collection actions; and (iii) offers of collection alternatives.”⁵⁹ The taxpayer can challenge the underlying liability if not previously afforded an opportunity to do so.⁶⁰ After considering the IRS’s compliance with procedural requirements, the issues raised by the taxpayer, and “whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary,” the officer issues a determination.⁶¹

CDP officers’ decision-making is subject to several forms of supervision, but they retain significant discretion. For example, the Internal Revenue Manual instructs CDP officers to request legal advice from the Associate Chief Counsel on “novel or significant” legal issues.⁶² When the CDP officer determines that there is a “lack of uniformity . . . on the disposition of [an] issue,” she must obtain a Technical Advice Memorandum from the Office of the Chief Counsel.⁶³ When the technical advice is favorable to the taxpayer, the CDP officer must follow it, but the officer retains the discretion to settle cases notwithstanding non-favorable technical advice.⁶⁴

56. See I.R.C. § 7804(a) (authorizing the Commissioner “to employ such number of persons as the Commissioner deems proper for the administration and enforcement of the internal revenue laws”).

57. See *Tucker v. Comm’r*, 135 T.C. 114, 126 (2010), *aff’d*, 676 F.3d 1129 (D.C. Cir. 2012) (noting that the IRS’s hiring procedures do not conform to the Appointments Clause).

58. I.R.C. § 6330(c)(1).

59. *Id.* § 6330(c)(2).

60. *Hoffman v. Comm’r*, 119 T.C. 140, 145 (2002).

61. I.R.C. § 6330(c)(3).

62. IRM 8.6.3.4 (Oct. 6, 2016).

63. The Internal Revenue Manual leaves the determination of the appropriateness of seeking such a memorandum to the discretion of the CDP officer. IRM 8.6.3.2.3 (Oct. 6, 2016) (“Appeals determines whether to request a TAM . . .”).

64. Treas. Reg. § 601.106(f)(9)(viii)(c) (2018); *see also* IRM 8.6.3.3.2 (Oct. 6, 2016). IRS regulations also impose guidelines concerning when officers may accept an offer from a taxpayer. Treas. Reg. § 601.106(f)(2). CDP officers refer a taxpayer’s offer-in-compromise to the “centralized offer-in-compromise” (COIC)

The taxpayer (but not the IRS) may appeal the CDP officer's determination to the Tax Court.⁶⁵ The Tax Court reviews the CDP determination for abuse of discretion unless the underlying tax liability is at issue, in which case the Tax Court reviews the determination de novo.⁶⁶ The Office of Appeals retains jurisdiction to conduct future hearings with respect to its determinations.⁶⁷

As federal employees, CDP officers enjoy significant civil service protections. The purpose of the civil service is to ensure that hiring and promotion decisions are based on merit and to protect career federal workers from political pressure and retaliation.⁶⁸ As non-senior employees in a cabinet-level agency, CDP officers are part of the competitive service.⁶⁹ Competitive service employees may appeal certain adverse employment actions—including removal—to the Merit Systems Protections Board (MSPB) for a determination of whether good cause existed.⁷⁰ The members of the MSPB are appointed by the President and are themselves removable only for cause.⁷¹ The result is that CDP

unit for processing. If the COIC unit rejects the offer, the CDP officer still makes a final determination. IRM 8.22.7.10.4.5 (Aug. 9, 2017). When the amount of compromised, unpaid tax exceeds \$50,000, the officer must obtain a favorable opinion from the IRS General Counsel. I.R.C. § 7122(b). When relieving a taxpayer of liability through a closing agreement, the officer must obtain the Secretary's approval. *Id.* § 7121(b).

65. *Id.* § 6330(d)(1).

66. *Sego v. Comm'r*, 114 T.C. 604, 609–10 (2000).

67. I.R.C. § 6330(d)(3). A taxpayer who does not timely request a CDP hearing may still request an equivalent hearing. Equivalent hearings are prescribed entirely by regulation rather than by statute, but their procedures closely mirror CDP hearings, and taxpayers may raise all the same issues. *See* Treas. Reg. § 6330-1(i)(1); LAURENCE F. CASEY, FEDERAL TAX PRACTICE § 13C:11 n.70–74 and accompanying text (4th ed. 2018). But unlike in CDP hearings, equivalent hearings do not require the IRS to halt collection actions, and decisions resulting from equivalent hearings are not appealable to the Tax Court. Treas. Reg. § 6330-1(i)(2), A-16.

68. *See* 5 U.S.C. § 2301(b)(8) (2017) (“Employees should be . . . protected against arbitrary action, personal favoritism, or coercion for partisan political purposes.”).

69. *See id.* § 2102(a) (defining competitive service to include all positions not specifically excepted, requiring Senate confirmation, or in the Senior Executive Service).

70. 5 C.F.R. § 1201.3(a)(1) (2018). Employees in “excepted” positions do not have these rights. *See* Excepting Administrative Law Judges from Competitive Service, Exec. Order No. 13,843, 88 Fed. Reg. 32,755 (July 10, 2018), <https://www.whitehouse.gov/presidential-actions/executive-order-excepting-administrative-law-judges-competitive-service> (purporting to except administrative law judges, thereby depriving them of civil service protections).

71. 5 U.S.C. § 1202(d).

officers, in effect, enjoy two layers of good-cause protection from removal: their own civil service protections combined with those of the MSPB. These protections constitute a multi-layered statutory and regulatory framework, a contrast to the discrete for-cause removal provisions of other statutes.⁷²

B. THE EVOLUTION OF THE APPOINTMENTS CLAUSE

The Appointments Clause requires that all “officers of the United States” be appointed by the President with the advice and consent of the Senate, but it allows Congress to vest the appointment of “inferior officers” in the President alone, the “Courts of Law,” or the “Heads of Departments.”⁷³ The Clause does not define “officer” or “inferior officer,” and disputes over its applicability center around these terms.

Traditionally, the removal power is incident to the executive’s appointment power.⁷⁴ Statutory schemes that go too far in inhibiting that power unconstitutionally intrude on the President’s obligation to execute the laws.⁷⁵ A complete picture of an officer’s appointment, therefore, requires accounting for removal from office.

This Section provides a brief history of the Appointments Clause and the removal power. It outlines the Clause’s intended purpose, describes its contemporary interpretations, and explores the difficulty courts have had in applying it to formal and informal administrative adjudicators.

1. Origins and Purpose

The Appointments Clause has its roots in complaints about pre-Revolutionary British colonial administration.⁷⁶ The king would create offices in the colonies and hand-pick the people to fill them; colonists saw many of these offices as simply a waste

72. See, e.g., 12 U.S.C. § 5491(c)(3) (2017) (“The President may remove the Director [of the Consumer Financial Protection Bureau] for inefficiency, neglect of duty, or malfeasance in office.”); see also *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (severing for-cause removal provisions).

73. U.S. CONST. art. II, § 2, cl. 2.

74. *Free Enter. Fund*, 561 U.S. at 509.

75. See *id.* at 492 (holding that two layers of for-cause removal protection for members of the Public Company Accounting Oversight Board violated the separation of powers); see also U.S. CONST. art. II.

76. Lindstedt, *supra* note 30, at 1147.

of their resources.⁷⁷ To alleviate this problem, the Founders imposed limitations on the installation of individuals that wield government power.⁷⁸ The Clause separates the legislative power to create offices from the executive power to fill them.⁷⁹

Cabining the appointment and removal powers in a limited and identifiable group of individuals promotes transparency and political accountability. Citizens unhappy with the performance of government workers know who to blame and can remedy those grievances through the democratic process.⁸⁰ The appointing official will—at least in theory—anticipate this accountability and ensure that the individual being appointed is qualified and capable of doing the job.⁸¹ Citizens unhappy with an officer can exert political pressure on the appointer to remove the appointee from office.

2. Who Is an “Officer of the United States”?

Most disputes involving the Appointments Clause involve the distinction between officers and mere employees of the federal government.⁸² Typically, an “officer” for purposes of the Appointments Clause is a means through which the President executes the law.⁸³ An officer therefore wields some form of federal power, often executive.⁸⁴

Early cases addressing the distinction offer little clarity. In 1867, for example, the Supreme Court held that “tenure, duration, emolument, and duties” characterize an office.⁸⁵ In another

77. *Id.* at 1147–48.

78. *See* *Edmond v. United States*, 520 U.S. 651, 659, 663 (1997); *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 75 (2007).

79. *Edmond*, 520 U.S. at 659; *see also* *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 75 (2007); Lindstedt, *supra* note 30, at 1147.

80. *Edmond*, 520 U.S. at 660 (citing THE FEDERALIST NO. 77 (Alexander Hamilton)).

81. *Id.*

82. *See, e.g.*, *Freytag v. Comm’r*, 501 U.S. 868 (1991); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), *cert. denied*, 138 S. Ct. 2706 (2018); *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000).

83. *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 79 (2007) (quoting *Printz v. United States*, 521 U.S. 898, 922 (1997)) (relating the Appointments Clause to the requirement that the President “take Care that the Laws be faithfully executed” (quoting U.S. CONST. art. II, § 3)).

84. *Id.* at 76–79 (describing the delegation of a portion of the sovereign powers of the federal government as an essential element of an office).

85. *United States v. Hartwell*, 73 U.S. 385, 393 (1867).

case, the Court held that any individual “who can be said to hold an office” must be constitutionally appointed.⁸⁶ These decisions offer no clear standard, but they suggest the term officer covers a wide range of government workers. Following these early cases, the Appointments Clause received relatively little attention until 1976.

The Supreme Court articulated the modern officer standard in *Buckley v. Valeo*: “[A]ny appointee exercising *significant authority* pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed by [the Appointments Clause].”⁸⁷ Applying this test to the Federal Election Commission, the Court identified three categories in the Commission’s duties: informative, rulemaking, and adjudicative/enforcement.⁸⁸ The Court held that, while the Commission’s informative duties—i.e., investigative and reporting tasks—were not significant, its rulemaking and adjudicatory functions were.⁸⁹ *Buckley*’s standard has been the basis of Appointments Clause analyses ever since, but a clear definition of significant authority has proved elusive.⁹⁰

In *Freytag v. Commissioner*, the Court applied the Appointments Clause to special trial judges (STJs) in the U.S. Tax Court.⁹¹ The Internal Revenue Code allows the Chief Tax Judge to assign STJs to hear enumerated categories of cases as well as “any other proceeding which the chief judge may designate.”⁹² STJs can enter final judgments in the enumerated categories, but can only offer recommended resolutions in the other cases assigned by the Chief Judge.⁹³ The Court noted that the office of STJ is “‘established by Law’ . . . and the duties, salary, and means of appointment . . . are specified by statute.”⁹⁴ STJs “take testimony, conduct trials, rule on the admissibility of evidence,

86. *United States v. Germaine*, 99 U.S. 508, 510 (1878).

87. *Buckley*, 424 U.S. at 126 (emphasis added).

88. *Id.* at 137.

89. *Id.* at 126.

90. See *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991); *Bandimere v. SEC*, 844 F.3d 1168, 1173 (10th Cir. 2016), *cert. denied*, 138 S. Ct. 2706 (2018); *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 284 (D.C. Cir. 2016); *Tucker v. Comm’r*, 676 F.3d 1129, 1132 (D.C. Cir. 2012).

91. *Freytag*, 501 U.S. at 870.

92. I.R.C. § 7443A(a)–(b) (2017).

93. *Freytag*, 501 U.S. at 876–77 (quoting U.S. CONST. art. II).

94. *Id.* at 881.

and have the power to enforce compliance with discovery orders.”⁹⁵ All of this added up to the significant authority required for officer status.⁹⁶ Moreover, the fact that STJs perform some less significant tasks was beside the point: just because “an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution.”⁹⁷ Nearly identical characteristics led the Court to hold in *Lucia v. SEC* that ALJs in the Securities and Exchange Commission are officers.⁹⁸

The Supreme Court sidestepped an opportunity to clarify its significant authority standard in *Lucia*.⁹⁹ And while lower courts and commentators have proposed a range of frameworks,¹⁰⁰ officer status seems ultimately to depend on a collection of factors, including but not necessarily limited to: (1) whether the office at issue is “established by law;”¹⁰¹ (2) whether its “duties, salary, and means of appointment . . . are specified by statute;”¹⁰² (3) whether the alleged officer’s decisions are final;¹⁰³ (4) whether the office is subject to formal procedures in its proceedings;¹⁰⁴ (5) whether the alleged officer exercises “significant discretion;”¹⁰⁵ (6) whether the position is “continuing;”¹⁰⁶ and (7) whether the

95. *Id.* at 881–82.

96. *Id.*

97. *Id.* at 882.

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

99. *Id.*

100. *See also* Lindstedt, *supra* note 30; Mascott, *supra* note 28. *Compare* Burgess v. FDIC, 871 F.3d 297, 301 (5th Cir. 2017) (concluding “that final decision-making authority is not a necessary condition for Officer status” and highlighting other relevant criteria), *and* Bandimere v. SEC, 844 F.3d 1168, 1179 (10th Cir. 2016), *cert. denied*, 138 S. Ct. 2706 (2018) (concluding that the three characteristics from *Freytag* were the proper framework), *with Lucia*, 138 S. Ct. at 2065 (Sotomayor, J., dissenting) (suggesting that “the ability to make final, binding decisions on behalf of the Government” is a requisite component), *and* Landry v. FDIC, 204 F.3d 1125, 1133 (D.C. Cir. 2000) (highlighting both “the authority to render the *final* decision” and the ability to make one’s own factual findings as important tests).

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

102. *Id.* (quoting *Freytag*, 501 U.S. at 881).

103. *Landry*, 204 F.3d at 1133; *see also Lucia*, 138 S. Ct. at 2065 (Sotomayor, J., dissenting).

104. *Freytag*, 501 U.S. at 881–82.

105. *Id.* at 882.

106. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 539–40 (2010) (Breyer, J., dissenting) (citing Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 74 (2007)).

office is “invested by legal authority with a portion of the sovereign powers of the federal government.”¹⁰⁷ There is considerable disagreement over what these factors mean, how to properly weigh them, and which of them are required for officer status.¹⁰⁸

The result is a notion of officer that is both vague and exceedingly broad, potentially reaching roles in nearly all corners of the federal government.¹⁰⁹ One court illustrated the breadth of the term by simply listing some of the roles held to fall in the category:

- a district court clerk;
- an “assistant-surgeon;”
- “thousands of clerks in the Departments of the Treasury, Interior, and the othe[r]” departments;
- an election supervisor;
- a federal marshal;
- a “cadet engineer” appointed by the Secretary of the Navy;
- a “commissioner of the circuit court;”
- a vice consul temporarily exercising the duties of a consul;
- extradition commissioners;
- a U.S. commissioner in district court proceedings;
- a postmaster first class;
- Federal Election Commission (FEC) commissioners;
- an independent counsel;
- Tax Court special trial judges; and
- military judges.¹¹⁰

For this reason, and because of the lack of clear guidance from the Supreme Court, deciding whether an individual is an officer frequently comes down to comparing the duties of the office at issue with those previously designated officers.¹¹¹

107. *Id.*

108. *See also* Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 74 (2007) (describing an “inferior officer” as anyone who holds a position that is “continuing” and “invested by legal authority with a portion of the sovereign powers of the federal government”). *Compare* *Landry*, 204 F.3d at 1125 (holding that the FDIC’s ALJs are not inferior officers because they lack final decision-making authority), *with* *Burgess v. FDIC*, 871 F.3d 297, 302 (5th Cir. 2017) (holding that an inferior officer must exercise “signifi- can[t] . . . duties and discretion” and that final decision-making authority is not dispositive of the question).

109. *Free Enter. Fund*, 561 U.S. at 540–41 (Breyer, J., dissenting). *But see* *Lucia v. SEC*, 138 S. Ct. 2044, 2065 (2018) (Sotomayor, J., dissenting) (“[T]he vast majority of those who work for the Federal Government are not ‘Officers of the United States.’”).

110. *Bandimere v. SEC*, 844 F.3d 1168, 1173–74 (10th Cir. 2016), *cert. de- nied*, 138 S. Ct. 2706 (2018).

111. *See, e.g., Lucia*, 138 S. Ct. at 2047–48 (noting the many characteristics

3. Principal Versus Inferior Officers

The Appointments Clause applies to all “Officers of the United States,” but it prescribes different requirements depending on whether the officer is “principal” or “inferior.”¹¹² Whereas the test for defining an officer focuses on the individual’s duties and authority, principal or inferior status depends on the officer’s relationship to other government officials.

Edmond v. United States is the leading modern case on the principal-inferior distinction.¹¹³ In that case, the Court held that military judges on the Coast Guard Court of Criminal Appeals are inferior officers.¹¹⁴ An inferior officer, according to the Court, is one “whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”¹¹⁵ The word inferior, then, does not indicate that the officer’s authority is necessarily less significant than a principal officer’s; it just means that that authority is subject to supervision.

The Coast Guard judges in *Edmond* faced substantial supervision from both the Judge Advocate General and the Court of Appeals for the Armed Forces.¹¹⁶ They were required to comply with procedural rules made by other Executive Branch officials and faced automatic review by the Court of Appeals for the Armed Forces in certain categories of cases.¹¹⁷ The upshot, according to the Court, is that the judges “ha[d] no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.”¹¹⁸ Courts have relied on the *Edmond* subordination test ever since.¹¹⁹

ALJs share with the STJs in *Freytag*).

112. U.S. CONST. art. II, § 2, cl. 2.

113. 520 U.S. 651 (1997).

114. *Id.* at 665.

115. *Id.* at 663; *see also id.* at 662 (“Whether one is an ‘inferior’ officer depends on whether he has a superior.”).

116. *Id.* at 664.

117. *Id.* at 664–65.

118. *Id.* at 665.

119. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510 (2010); *Ass’n of Am. R.R.s v. U.S. Dep’t of Transp.*, 821 F.3d 19, 36 (D.C. Cir. 2016); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1337 (D.C. Cir. 2012).

4. Who Can Appoint?

The Appointments Clause provides a default rule: the President must appoint “Officers of the United States” with the advice and consent of the Senate.¹²⁰ Even if an officer is inferior, that default rule applies unless Congress provides for appointment by the President alone, a “Head of Department,” or a “Court of Law.” Both terms have inspired judicial debate, and while a full exploration of that debate is beyond the scope of this Note, a brief summary is necessary.

The meaning of “Court of Law” for Appointments Clause purposes is far from certain. The *Freytag* Court, while unanimous as to the inferior officer status of STJs and even as to the constitutionality of their appointment, split five to four on the reasoning.¹²¹ The majority concluded that the U.S. Tax Court is a Court of Law.¹²² It reasoned that, even though the Tax Court was not created under Article III, it exercises the “judicial power of the United States” and performs “exclusively judicial functions.”¹²³ Justice Scalia, concurring in the judgment, disagreed sharply; in his view, only Article III courts could exercise the judicial power of the United States.¹²⁴ Because the Founders would not have conceived of courts outside the context of Article III, he reasoned, only Article III courts could be Courts of Law for purposes of the Appointments Clause.¹²⁵ The D.C. Circuit later held that the Tax Court is a Court of Law for the Appointments Clause but does not exercise “the judicial power of the United States.”¹²⁶ Because the Court endorsed Justice Scalia’s *Freytag* concurrence on other grounds in a later case, there is a real possibility that Courts of Law are limited to Article III.¹²⁷

Justice Scalia would have held that the Tax Court is a “department,” with the Chief Tax Judge as its “head.”¹²⁸ While the

120. U.S. CONST. art. II, § 2, cl. 2.

121. *Freytag v. Comm’r*, 501 U.S. 868 (1991).

122. *Id.* at 891–92.

123. *Id.*

124. *Id.* at 908–09 (Scalia, J., concurring in part and concurring in the judgment).

125. *Id.* at 903.

126. *Kuretski v. Comm’r*, 755 F.3d 929, 940–42 (D.C. Cir. 2014).

127. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510–11 (2010).

128. *Freytag*, 501 U.S. at 914 (Scalia, J., concurring in part and concurring in the judgment).

majority had concluded that a Department must be “like a Cabinet-level department,”¹²⁹ Justice Scalia concluded that a department must merely be a “separate organization” within the Executive Branch with independent organization.¹³⁰ A Head of Department must be appointed by the President with the advice and consent of the Senate.¹³¹

Under either approach in *Freytag*, the Commissioner of Internal Revenue is likely not a Head of Department. If a Department must be a cabinet-level agency, this is clear; despite its size and significance, the IRS is not a cabinet department. And under Justice Scalia’s independent organization approach, the result is the same; because the IRS is a subordinate agency in the Department of the Treasury, it is likely not a separate organization or allotment. The Tax Court has assumed this result in dicta.¹³² The Head of Department for IRS workers, therefore, is likely the Secretary of the Treasury.

5. The Removal Power

In *Myers v. United States*, the Supreme Court announced, as a general rule, that the President has an unrestricted power to remove executive officers.¹³³ That removal power flows from the right to appoint the officer.¹³⁴ Because a purpose of the Appointments Clause is to ensure political accountability for an officer’s performance, it follows that the appointer must have some degree of control over the appointee; removal is the most basic and powerful mechanism of exercising that control.¹³⁵

But in some cases, an officer’s role justifies a greater degree of independence from the President. In such cases, the Court has upheld removal restrictions. In *Humphrey’s Executor v. United States*, the Court held that Congress could restrict the removal of principal officers in the Federal Trade Commission to cases of

129. *Id.* at 915.

130. *Id.* at 920 (citing 1 N. Webster, AMERICAN DICTIONARY 58 (1828)); see also *Free Enter. Fund*, 561 U.S. at 511 (describing a “Department” as a “free-standing component of the Executive Branch, not subordinate to or contained within any other such component”).

131. *Freytag*, 501 U.S. at 919.

132. See *Tucker v. Comm’r*, 135 T.C. 114, 125–26 (2010), *aff’d*, 676 F.3d 1129 (D.C. Cir. 2012).

133. 272 U.S. 52, 176 (1926).

134. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010) (The Constitution does not enumerate a removal power).

135. *Id.* at 539 (Breyer, J., dissenting).

“inefficiency, neglect of duty, or malfeasance in office.”¹³⁶ The Court justified its holding by noting that, while the function of the officer in *Myers* was “purely executive,” Federal Trade Commissioners played a “quasi[-]legislative” and “quasi[-]judicial” role, which made a degree of independence desirable.¹³⁷

While the Federal Trade Commissioner in *Humphrey’s Executor* was a principal officer, the Court has also upheld restrictions on the removal of inferior officers.¹³⁸ In *Morrison v. Olson*, the Court held that the Ethics and Government Act did not violate the separation of powers by imposing a “good cause” removal protection designed to ensure the impartiality of independent counsels.¹³⁹ Although the President lacked the power to remove the independent counsel and the Attorney General could only do so for good cause, the Court upheld the statute.¹⁴⁰

Congress’s power to impose restrictions on removal is not boundless, however. Before 2010, the Sarbanes-Oxley Act provided that members of the Public Company Accounting Oversight Board (PCAOB), an independent agency, could only be removed by the Securities and Exchange Commission (SEC) for good cause.¹⁴¹ The statute defined good cause and gave PCAOB members the right to “notice and opportunity for a hearing” before removal.¹⁴² A removal order was subject to judicial review.¹⁴³ In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Court struck down these provisions.¹⁴⁴ The Court assumed, without deciding, that members of the SEC are

136. 295 U.S. 602, 620 (1935).

137. *Id.* at 627–29.

138. *See* *United States v. Perkins*, 116 U.S. 483 (1886) (upholding restrictions on the removal of a naval cadet-engineer).

139. 487 U.S. 654, 692 (1988).

140. *Id.* Many have speculated that *Morrison’s* viability is in doubt in light of changes to the Court’s composition. *See* Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court’s New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103 (1998); Adrian Vermeule, *Morrison v. Olson Is Bad Law*, LAWFARE (June 9, 2017, 8:14 PM), <https://www.lawfareblog.com/morrison-v-olson-bad-law>. As of publication, *Morrison* has not been overruled, and the Court cited it in *Free Enterprise Fund* as precedent for placing restrictions on the removal of inferior officers. *Free Enter. Fund*, 561 U.S. at 494–95.

141. 15 U.S.C. § 7211(e)(6) (2009).

142. *Id.* § 7217(d)(3).

143. *See* 5 U.S.C. §§ 554(a), 556(a), 557(a), 557(c)(B) (2009); 15 U.S.C. § 78y(a)(1).

144. 561 U.S. 477, 492 (2010).

subject to the for-cause removal protections outlined in *Humphrey's Executor*,¹⁴⁵ which gave PCAOB members two levels of good-cause protection. The Court held these restrictions unconstitutional, and it severed the good-cause provisions from the Sarbanes-Oxley Act.¹⁴⁶ The Court then used this holding to uphold the constitutionality of the appointment of PCAOB members more generally; without providing much explanation, the Court noted that, because PCAOB members were now subject to at-will removal by the SEC, they were inferior—rather than principal—officers.¹⁴⁷

The *Free Enterprise Fund* opinion created a great deal of uncertainty. While the majority emphasized the unusual nature of PCAOB's appointment and removal scheme, there is reason to believe that hundreds or thousands of other federal officials could be characterized as having two layers of good-cause removal protection.¹⁴⁸ Perhaps most significantly, the broadest reading of *Free Enterprise Fund* casts doubt on the constitutionality of any officer who is a member of the civil service.¹⁴⁹ And in contrast to the neatly severable provisions of the Sarbanes-Oxley Act at issue in *Free Enterprise Fund*, civil service protections come from a complex statutory and regulatory framework, rendering the majority's severance remedy unworkable.

The majority in *Free Enterprise Fund* explicitly noted that the opinion does not address the status of ALJs.¹⁵⁰ It justified its holding on the grounds that PCAOB members exercised enforcement and policymaking—rather than adjudicative—functions.¹⁵¹ Adjudicators are thus impliedly permitted to enjoy greater restrictions on their removal. Reading between these lines suggests that *Free Enterprise Fund* merely requires courts

145. *Id.* at 487 (“The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of ‘inefficiency, neglect of duty, or malfeasance in office.’” (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 620 (1935))).

146. *Id.* at 508.

147. *Id.* at 510 (“Given that the Commission is properly viewed . . . as possessing the power to remove Board members at will, . . . the Board members are inferior officers . . .”).

148. *Id.* at 540–41 (Breyer, J., dissenting) (arguing, as a “conservative estimate,” that the majority's opinion could jeopardize the job security of 573 high-ranking civil service officials).

149. *Id.* at 538. The Court suggests, but does not definitively decide, that the opinion does not apply broadly to members of the civil service. *Id.* at 506 (majority opinion).

150. *Id.* at 507 n.10.

151. *Id.*

to consider the specifics of an agency's design and an officer's functions to decide whether particular removal restrictions are constitutional. It does not render two levels of for-cause removal protection per se unconstitutional.¹⁵²

6. Administrative Adjudication and the Appointments Clause

Administrative adjudicators present a special challenge in applying appointment and removal precedents. Many likely possess sufficient authority to be officers, but at-will removal by political superiors could threaten their decisional independence.

ALJs have been the subject of several circuit splits in the last two decades. ALJs hold a statutorily-created position with a statutorily-defined set of duties.¹⁵³ They preside over trial-like proceedings at the agency level and issue recommended dispositions for review by the Agency.¹⁵⁴ Statutes typically empower agencies to appoint their own ALJs.¹⁵⁵ Some courts held that ALJs are mere employees because they lack the authority to render final decisions.¹⁵⁶ Others rejected the "final decision-making authority" requirement and held that ALJs are officers because their office is "established by law;" their "duties, salaries, and means of appointment" are set out in a statute; and they "exercise significant discretion."¹⁵⁷ After the en banc D.C. Circuit divided evenly on the question, the Supreme Court granted certiorari.¹⁵⁸

In *Lucia v. SEC*, the Court held that the SEC's ALJs are officers.¹⁵⁹ The Court relied primarily on *Freytag*: because the

152. See Kevin M. Stack, *Agency Independence After PCAOB*, 32 CARDOZO L. REV. 2391, 2392 (2011) (arguing that the Court decided *Free Enterprise Fund* based on the specific combination of officer functions at issue). *But see* Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 FORDHAM L. REV. 2541, 2541 (2011) (arguing that *Free Enterprise Fund* "creates a framework for challenging the constitutionality of agency independence").

153. See 5 U.S.C. § 5372 (2017).

154. See *id.* § 556.

155. See, e.g., *id.* § 3105.

156. See, e.g., *Landry v. FDIC*, 204 F.3d 1125, 1134 (D.C. Cir. 2000).

157. See *Bandimere v. SEC*, 844 F.3d 1168, 1179 (10th Cir. 2016), *cert. denied*, 138 S. Ct. 2706 (2018).

158. *Raymond J. Lucia Cos. v. SEC*, 868 F.3d 1021 (D.C. Cir. 2017), *vacated*, 138 S. Ct. 2044 (2018).

159. *Lucia v. SEC*, 138 S. Ct. 2044, 2047 (2018). The SEC, acting collectively, is a head of department in which Congress has vested the appointment of ALJs. The SEC had impermissibly delegated that authority to other staff members. *Id.* at 2051 n.3.

ALJs at issue had almost all the material characteristics of STJs, they are officers.¹⁶⁰ ALJs “hold a continuing office established by law.”¹⁶¹ They “take testimony,” “conduct trials,” “rule on the admissibility of evidence,” and “have the power to enforce compliance with discovery orders.”¹⁶² The Court found especially telling that the SEC could choose not to review an ALJ’s proposed order, in which case that order becomes final.¹⁶³ This all added up to significant authority, and because the SEC staff had not constitutionally appointed the ALJ that decided Lucia’s case, the Court remanded the case for a new hearing before a constitutionally-appointed—and different—ALJ.¹⁶⁴

Lucia is most notable for the questions it left unanswered. Because the Court resolved the case almost solely by analogy to *Freytag*, it offered no clarification on the meaning of the significant authority standard.¹⁶⁵ And notably, ALJs enjoy two¹⁶⁶—and possibly even three¹⁶⁷—layers of good-cause protection against their removal. At the certiorari stage, the Solicitor General asked the Court to address the constitutionality of these provisions,¹⁶⁸ and at the merits stage he urged the Court to “construe the statutory provision that addresses tenure protections for ALJs . . . to permit the removal of an ALJ for misconduct or failure to follow lawful agency directives or to perform his duties adequately.”¹⁶⁹ This construction would seem, in effect, to allow termination for policy disagreements, which contradicts the traditional purpose of removal protections.¹⁷⁰ The Court declined to

160. *Id.* at 2053–54.

161. *Id.* at 2052 (citing *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991)).

162. *Id.* at 2053 (citing *Freytag*, 501 U.S. at 881–82).

163. *Id.* at 2053–54.

164. *Id.* at 2052, 2055. By the time of the decision, the SEC had already taken unilateral action to cure the potential constitutional defect by ratifying the appointment of all ALJs and remanding pending cases for additional proceedings. See In re: Pending Admin. Proceedings, Securities Act Release No. 10440, Exchange Act Release No. 82,178, Investment Advisers Act No. 4816, Investment Company Act Release No. 32,929, 34 SEC Docket 82,178 (Nov. 30, 2017).

165. See *Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring); *id.* at 2064–65 (Sotomayor, J., dissenting).

166. Brief for the Respondent at 20, *Raymond J. Lucia Cos. v. SEC*, No. 17-130 (U.S. Nov. 29, 2017).

167. *Id.*

168. *Id.* at 20–21.

169. Brief for the Respondent at 39, *Raymond J. Lucia Cos. v. SEC*, No. 17-130 (U.S. Feb. 21, 2018).

170. See *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935) (holding that for-cause removal protection did not allow the President to fire a Federal Trade

address the issue.¹⁷¹ Justice Breyer, concurring in the judgment, would have resolved the case on statutory grounds: because the SEC had not appointed Lucia's ALJ—as required by statute—remand was appropriate.¹⁷² Deciding the constitutional question of ALJs' officer status without deciding the “different, embedded constitutional question” posed by their removal protections risked undermining the independence of a whole class of career federal employees.¹⁷³

Lucia could have significant implications not just for the ALJs within the SEC or the approximately 1,500 other ALJs, but also for the approximately 3,300 administrative judges (AJs) that conduct informal adjudications in other agencies.¹⁷⁴ AJs wield substantially similar power to ALJs and are even more common.¹⁷⁵ Agencies frequently choose AJs over ALJs for greater flexibility and fewer procedural constraints, giving the agency greater control over the adjudicative process.¹⁷⁶ CDP officers, as informal adjudicators, fall into the AJ category. And if CDP officers are inferior officers, their tenure protections may be subject to constitutional limitations. *Lucia* therefore could have major implications for the future independence of the IRS Office of Appeals.

II. CDP OFFICERS ARE LIKELY INFERIOR OFFICERS.

In 2010 and 2012, respectively, the U.S. Tax Court and the D.C. Circuit held that CDP officers are not “Officers of the United States.”¹⁷⁷ Those cases likely were wrongly decided. This Part recognizes that, because CDP officers “exercis[e] significant

Commissioner for policy disagreements). *But see* PHH Corp. v. CFPB, 881 F.3d 75, 124 (2018) (Griffith, J., concurring in the judgment) (concluding that a for-cause removal provision would allow the President to fire the official for ineffective policy choices).

171. *See Lucia v. SEC*, 138 S. Ct. 2044, 2050 n.1 (2018).

172. *Id.* at 2058–59 (Breyer, J., concurring in the judgment in part and dissenting in part).

173. *Id.* at 2057.

174. *See* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1652 (2016).

175. *Id.* at 1647.

176. *Id.* at 1649. Kent Barnett criticizes this tendency, suggesting that it undermines impartiality and risks abuse in agency adjudications, which account for a greater and greater proportion of dispute resolutions each year. *Id.* at 1650–51.

177. *Tucker v. Comm'r*, 135 T.C. 114, 125 (2010), *aff'd*, 676 F.3d 1129 (D.C. Cir. 2012).

authority pursuant to the laws of the United States,”¹⁷⁸ they must be constitutional officers. But because of the degree of supervision they face, they are inferior—rather than principal—officers.¹⁷⁹ This legal conclusion carries normative pros and cons: constitutional appointment could lend greater accountability to the hiring process and improve the quality of decisions, but it also jeopardizes CDP officer independence by placing their civil service protections under constitutional scrutiny. Part III explores those consequences in greater detail.

A. *TUCKER V. COMMISSIONER*

The first reported Appointments Clause challenge to CDP officers came in the U.S. Tax Court in 2010. In *Tucker v. Commissioner (Tucker I)*, the Tax Court rejected that challenge.¹⁸⁰ The court traced the historical development of tax collection in the United States, noting a distinction between external revenue personnel—historically appointed by the President or by the Secretary of the Treasury—and internal revenue personnel, who could be employed without an appointment.¹⁸¹ Because no specific statute governs the hiring or appointment of CDP officers, they are hired pursuant to the Commissioner’s general hiring authority.¹⁸² The court’s conclusion therefore depends on its implicit assumption that the Commissioner is not a Head of Department for Appointments Clause purposes.¹⁸³

The Tax Court held that CDP officers are not inferior officers but noted in dicta that, if they were officers, their appointment would be unconstitutional.¹⁸⁴ Its conclusion was two-fold. First, the CDP officer position is not “established by law,” a threshold requirement for inferior officer status.¹⁸⁵ The lack of any statute or regulation providing something like: “There shall be, within the Office of Appeals, officers designated as hearing officers, who shall conduct CDP hearings,” convinced the court that the law does not establish a CDP officer position.¹⁸⁶

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

179. *See Edmond v. United States*, 520 U.S. 651, 662–63 (1997) (holding that inferior officers’ work must be “directed and supervised at some level”).

180. *Tucker*, 135 T.C. at 125.

181. *Id.* at 132–33.

182. *Id.* at 135 (citing I.R.C. § 7804(a) (2006)).

183. *See id.* at 126; *see also supra* notes 128–32 and accompanying text.

184. *Id.* at 134, 165.

185. *Id.* at 152.

186. *Id.* at 153.

Even if the position were established by law, the court held, CDP officers do not exercise the type of significant authority that warrants constitutional appointment.¹⁸⁷ Relying heavily on the D.C. Circuit's decision in *Landry*, the court held that CDP officers are not constitutional officers because their decisions "are *not* 'final' in the sense that is relevant to the Appointments Clause."¹⁸⁸ The court also noted in dicta that CDP hearings lack the procedural formalities exercised under the Administrative Procedure Act by the ALJs in *Landry*.¹⁸⁹

In *Tucker II*, the D.C. Circuit affirmed *Tucker I*, but on different reasoning.¹⁹⁰ The court first noted that, while no statute or regulation established a CDP officer position "in any formal sense," such a requirement "would seem anomalous" and could be inconsistent with the substance of the Appointments Clause.¹⁹¹ After casting doubt on this portion of the Tax Court's opinion, the D.C. Circuit bypassed the issue.

The D.C. Circuit rejected the Tax Court's analysis of the significant authority requirement. In contrast, it held that CDP officers' decisions are effectively final, but that the supervision, guidelines, and consultation requirements to which CDP officers are subject left their discretion sufficiently constrained to preclude officer status.¹⁹² It was this lack of discretion—not a lack of finality in decisions—that caused the Appointments Clause claim to fail.¹⁹³ And while the court agreed with the Tax Court that the procedural informality of CDP hearings could be "a signal from Congress of the weightiness of the substantive powers granted," it was not, in itself, a reason to deny officer status.¹⁹⁴

Tucker received limited scholarly attention. After the Tax Court's decision and before the D.C. Circuit's affirmance, Stacy M. Lindstedt published an article arguing that CDP officers are inferior officers under a newly-proposed Appointments Clause framework, based on principles of administrative finality.¹⁹⁵ John T. Plecnik disagreed in a 2014 article, arguing that the D.C.

187. *Id.* at 165.

188. *See id.* at 163–64.

189. *Id.* at 164–65.

190. *Tucker v. Comm'r*, 676 F.3d 1129 (D.C. Cir. 2012).

191. *Id.* at 1133.

192. *Id.* at 1134.

193. *Id.*

194. *Id.* at 1135.

195. Lindstedt, *supra* note 30.

Circuit's *Tucker* decision showed that the officer-employee distinction was "close to fully developed."¹⁹⁶ Neither article had the benefit of doctrinal developments in the last several years, and neither addressed the potential constitutional problem posed by CDP officers' civil service protections.

There is reason to believe that courts will reconsider the CDP issue at the circuit level soon. Litigants have brought Appointments Clause challenges in several cases pending before the Tax Court.¹⁹⁷ New circuit decisions could create a split and lead to resolution by the Supreme Court.

B. CURRENT LAW SHOWS *TUCKER I* AND *TUCKER II* WERE WRONGLY DECIDED.

Lucia v. SEC calls into question the holdings in *Tucker I* and *Tucker II*. The Court in that case held that ALJs are "Officers of the United States" and not employees because: (1) they occupy "continuing" positions that are "established by law;" and (2) their statutory duties constitute "significant discretion."¹⁹⁸ Because CDP officers meet both prongs of the *Lucia* test, they are officers rather than employees. But because of the supervision they face from the IRS, they are inferior officers.

1. CDP Officers Occupy Continuing Positions that Are Established by Law.

CDP officers are full-time government workers. Both statutes and regulations describe their duties and assume the position already exists.¹⁹⁹ But because no statute or regulation expressly creates the position of CDP officer, some might argue the position is not established by law and therefore need not comport

196. John T. Plecnik, *Officers Under the Appointments Clause*, 11 PITT. TAX REV. 201, 204 (2014).

197. See Respondent's Response to Motion to Remand at 1, *Thompson v. Comm'r*, No. 7038-15L (T.C. Jan. 5, 2018) (arguing that CDP officers are not subject to the Appointments Clause); Petitioner Motion to Remand at 1, *Elmes v. Comm'r*, No. 24872-14L (T.C. Sept. 30, 2017) (arguing that CDP officers are subject to the Appointments Clause); Order at 1, *Fonticiella v. Comm'r*, No. 23776-15L (T.C. Aug. 9, 2017) (denying petitioner's motion for recusal on grounds that the President's authority to remove Tax Court judges does not violate separation of powers principles).

198. *Lucia v. SEC*, 138 S. Ct. 2044, 2052-54 (2018) (quoting *Freytag v. Comm'r*, 501 U.S. 868, 882 (1991)).

199. See, e.g., I.R.C. §§ 6320, 6330 (2017); Treas. Reg. § 6330-1 (2018).

with the Appointments Clause.²⁰⁰ While the Court in *Lucia* acknowledged that an officer's position must be established by law, it has not equated "established by law" with "created by statute or regulation."²⁰¹ Doing so would create a doctrinal gap; Congress could evade the Appointments Clause by conferring duties—no matter how significant—collectively on the employees of a particular department.²⁰² The Court has consistently focused on the continuing nature of the office and the significance of the office's duties rather than the superficial aspects of its creation.²⁰³ An individual exercising the duties of an officer is an officer. Moreover, requiring that a statute prescribe an officer's means of appointment comes close to the tautological reasoning of early Supreme Court cases on the issue (i.e., government workers are officers that must be appointed if they are, in fact, appointed).²⁰⁴ A more appropriate question to ask is whether the purported officer holds a continuing position and carries out significant duties that the law requires someone to carry out.²⁰⁵ That is clearly the case with CDP officers.

2. CDP Officers Exercise Significant Authority.

The Court in *Lucia* offered several factors that make the authority ALJs exercise significant: ALJs "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce discovery orders."²⁰⁶ In the course of these duties, they

200. See *Tucker v. Comm'r*, 135 T.C. 114, 152–59 (2010), *aff'd*, 676 F.3d 1129 (D.C. Cir. 2012) (holding that CDP officers do not hold a position "established by law").

201. See *Lucia*, 138 S. Ct. at 2053 (holding that the ALJ position is established by law because it is created by statute, but not deciding whether statutory creation is the exclusive means of establishing an office).

202. See *Tucker*, 676 F.3d at 1133 ("[I]t would seem anomalous if the Appointments Clause were inapplicable to positions extant in the bureaucratic hierarchy . . . merely because neither Congress nor the executive branch had formally created the positions."); see also Lindstedt, *supra* note 30, at 1172–73 (arguing that a formal requirement of statutory or regulatory creation is "subject to congressional manipulation").

203. See *Lucia*, 138 S. Ct. at 2053 (comparing the duties of ALJs to the duties of STJs).

204. See *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 115–17 (2007).

205. Lindstedt, *supra* note 30, at 1177 (citing *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73 (2007)).

206. See *Lucia*, 138 S. Ct. at 2053.

“exercise significant discretion.”²⁰⁷ In at least some cases, they render final decisions.²⁰⁸

To be sure, CDP officers’ duties do not line up “point for point” with those of the ALJs in *Lucia* or the STJs in *Freytag*,²⁰⁹ but the similarities are nonetheless striking. CDP officers have significant discretion over how to conduct their proceedings, including whether to allow the taxpayer to present witnesses.²¹⁰ They must consider all relevant information that the taxpayer presents on spousal defenses, the “appropriateness” of IRS collection actions, and offers of collection alternatives.²¹¹ When the taxpayer has not previously had an opportunity to challenge the underlying tax liability, the officer may consider that as well.²¹² It is difficult to see how this does not qualify as taking testimony in some sense. CDP officers issue a decision that is final if the taxpayer does not appeal to the Tax Court. If the taxpayer does appeal, the court reviews the determination under an abuse of discretion standard.²¹³

Moreover, the Court’s pre-*Lucia* Appointments Clause jurisprudence remains intact, and the language it has used to describe officers in the past only reinforces the conclusion here. CDP officers almost certainly are “charged with ‘the administration and enforcement of the public law;’”²¹⁴ they ensure that taxpayers can exercise a statutorily created right within the tax collection system. Early commentators recognized that those “connected with the administration of justice [and] the collection

207. *Id.* (quoting *Freytag v. Comm’r*, 501 U.S. 868, 882 (1991)).

208. *See, e.g., id.* at 2048 (“In a major Tax Court case, a regular Tax Court judge must always review an STJ’s opinion, and that opinion comes to nothing unless the regular judge adopts it. By contrast, the SEC can decide against reviewing an ALJ’s decision, and when it does so the ALJ’s decision itself ‘becomes final’ and is ‘deemed the action of the Commission.’” (quoting 17 C.F.R. § 201.360(d)(2) (2015); 15 U.S.C. § 78d-1(c) (2015))).

209. *See id.* (comparing ALJs and STJs).

210. *See Lindstedt, supra* note 30, at 1162.

211. Brief for Harvard Federal Tax Clinic as Amicus Curiae in Support of the Appellant at 6–7, *Byers v. Comm’r*, No. 17-2652 (8th Cir. Oct. 26, 2017) [hereinafter *Harvard Brief*] (quoting I.R.C. § 6330(c)(2)(A)(ii) (2017)).

212. I.R.C. § 6330(c)(2)(B) (2017).

213. *Sego v. Comm’r*, 114 T.C. 604, 610 (2000).

214. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 539 (2010) (Breyer, J., dissenting) (quoting *Buckley v. Valeo*, 424 U.S. 1, 139 (1976)).

of the revenue” were some of the “most important civil officers.”²¹⁵ When CDP officers issue a decision in the taxpayer’s favor, the decision is final.²¹⁶ As full-time government employees carrying out statutorily defined duties, they can almost certainly, in some sense, “be said to hold an office.”²¹⁷ Even superficially comparing CDP officers with others held to be officers in the past compels the conclusion that CDP officers fall within the term’s “unusually broad” sweep.²¹⁸ It is difficult to see, for example, how a district court clerk,²¹⁹ a cadet engineer,²²⁰ and a “vice consul temporarily exercising the duties of a consul,”²²¹ would exercise significant authority while a CDP officer would not.

There are two principal counterarguments. First, critics may point to the differences between the statutorily-defined duties of ALJs and the more limited grant of authority to CDP officers. Congress provided a precise list of duties and powers for ALJs to exercise, while leaving much of CDP officers’ duties undefined.²²² But a lack of statutory detail does not lessen the significance of a CDP officers’ duties. Even when required to seek guidance or permission from elsewhere in the IRS, CDP officers have the power to make significant—and, at least occasionally, final—decisions about a taxpayer’s rights.²²³ Neither *Freytag* nor *Lucia* held that formal, adversarial procedures were a necessary or exclusive precondition of significant authority.²²⁴

215. Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 89 (2007) (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1530, at 387 (1833)).

216. Harvard Brief, *supra* note 211, at 25–26 (observing that only the taxpayer, not the IRS, can appeal CDP determinations to the Tax Court).

217. See *Free Enter. Fund*, 561 U.S. at 539 (Breyer, J., dissenting) (citing *United States v. Germaine*, 99 U.S. 508, 510 (1878)).

218. *Id.*; see also *Bandimere v. SEC*, 844 F.3d 1168, 1173–74 (10th Cir. 2016), *cert. denied*, 138 S. Ct. 2706 (2018) (listing government workers previously held to be inferior officers).

219. See *In re Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839).

220. See *United States v. Perkins*, 116 U.S. 483, 484–85 (1886).

221. See *United States v. Eaton*, 169 U.S. 331, 343 (1898).

222. Compare 5 U.S.C. § 556(c) (2017) (empowering ALJs as employees to exercise enumerated powers over formal, adversarial administrative proceedings), with I.R.C. § 6330(c) (2017) (empowering CDP officers to preside at CDP hearings and issue a determination).

223. See *supra* Part I.A.2.

224. See *Tucker v. Comm’r*, 676 F.3d 1129, 1135 (D.C. Cir. 2012) (“[W]e do not understand *Freytag* to suggest that mere informality of proceedings, or the absence of adversarial procedures, could justify denying ‘Officer’ status to one whose powers would otherwise demand that classification.” (citations omitted)); *cf. Lucia v. SEC*, 138 S. Ct. 2044, 2051–52 (2018) (stating that the similarity

Second, critics may argue that CDP officers do not exercise significant discretion. The D.C. Circuit reached this conclusion in *Tucker II*,²²⁵ and the IRS continues to advance this argument in ongoing litigation.²²⁶ It is true that CDP officers must follow Agency guidance and must seek legal advice on novel questions.²²⁷ But while courts have generally accepted that officers must exercise some degree of discretion, institutional constraints on discretion are a form of supervision that is more relevant to the principal/inferior distinction than to the officer/employee distinction.²²⁸ CDP officers have the discretion either to determine that a given collection action is appropriate or to accept a taxpayer's offer-in-compromise, binding the IRS in the process.²²⁹ That discretion is surely sufficient to make them officers.

3. CDP Officers Are Inferior—Rather than Principal—Officers.

The institutional constraints that the IRS places on CDP officers likely makes them inferior officers. An inferior officer is one “whose work is directed or supervised at some level by others who were appointed by the presidential nomination with the advice and consent of the Senate.”²³⁰ In *Edmond*, judges on the Coast Guard Court of Criminal Appeals were subject to the administrative oversight of the Judge Advocate General (JAG), who was in turn subordinate to the Secretary of Transportation.²³¹ The JAG would “prescribe uniform rules of procedure” and meet with other Judge Advocates General to “formulate policies and procedure.”²³² Even so, the JAG could not reverse the judges' decisions or use the threat of removal to influence those decisions.²³³

between ALJs and STJs made it unnecessary to elaborate on the significant authority standard).

225. *Tucker*, 676 F.3d at 1134.

226. See Respondent's Response to Motion to Remand at 38–40, *Thompson v. Comm'r*, No. 7038-15 (T.C. Jan. 5, 2018) (arguing that CDP officers are not officers because they lack sufficient discretion).

227. See *supra* Part I.A.2 (describing ways in which agency guidance constrains CDP officer discretion).

228. See *Burgess v. FDIC*, 871 F.3d 297, 303 (5th Cir. 2017).

229. See *supra* Part I.A.2.

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

231. *Id.* at 664–65.

232. *Id.* at 664.

233. *Id.* at 665.

Like the judges in *Edmond*, CDP officers must follow the policies and procedures in the Internal Revenue Manual and must often abide by the technical advice they receive from the IRS General Counsel on novel or complex questions.²³⁴ They occasionally must seek permission to accept an offer-in-compromise.²³⁵ Still, the IRS may not reverse or appeal a CDP officer's decision.²³⁶ So while CDP officers' discretion in decision-making is constrained, their relationship to their superiors fits squarely within *Edmond*'s subordination test. Subject to agency guidance and deferential review by the Tax Court, CDP officers exercise substantial discretion over the fate of the taxpayers that appear before them.

While lower courts have attempted to impose more restrictive tests on the Appointments Clause, that approach is inconsistent with the vague and "unusually broad" definition of inferior officer that characterizes Supreme Court jurisprudence.²³⁷ It seems difficult to deny that CDP officers are inferior officers. The more interesting questions are what to do about it and what it means for their civil service protections. Does the chance that those protections violate the Constitution jeopardize the adjudicatory independence of CDP officers? This constitutional headache might lead some to pause before concluding that CDP officers are inferior officers. But that is inconsistent with the formalism that characterizes the Supreme Court's inferior officer precedent.²³⁸ By contrast, its removal precedent, discussed above, requires an examination of an agency's design and an officer's functions—and the relationship of removal protections to those functions—to make a constitutional determination.²³⁹

III. CDP OFFICERS SHOULD BE APPOINTED BY THE SECRETARY OF THE TREASURY BUT SHOULD KEEP THEIR CIVIL SERVICE PROTECTIONS.

The conclusion that CDP officers are inferior officers creates a potential constitutional mess. Who should appoint them? What happens with previously decided cases and those that are still

234. See *supra* notes 62–64 and accompanying text.

235. See *supra* note 64.

236. See *supra* note 64.

237. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 539 (2010) (Breyer, J., dissenting).

238. *Id.* (describing the broad sweep of the definition of officer).

239. See *supra* notes 151–52 and accompanying text.

pending? And perhaps most consequential: are CDP officers' civil service protections constitutional?

Section A recommends that Congress vest the appointment of CDP officers in the Secretary of the Treasury. Section B briefly outlines remedies the Court can use to give the Agency a manageable logistical burden for constitutional compliance. Sections C and D conclude that CDP officers should keep their civil service protections because their adjudicative role justifies the independence those protections promote.

A. CDP OFFICERS SHOULD BE APPOINTED BY THE SECRETARY OF THE TREASURY.

First and foremost, as inferior officers, CDP officers must be appointed. Congress can vest their appointment in the President, the Head of a Department, or the Courts of Law.²⁴⁰ The best option is the Secretary of the Treasury.

The Commissioner of Internal Revenue likely cannot continue simply to hire CDP officers because the Commissioner is not a constitutional Head of Department. What exactly constitutes a Department for purposes of the Appointments Clause is not entirely clear; while it may not need to be a cabinet-level department,²⁴¹ it does not encompass "every organ in the Executive Branch."²⁴² Because the IRS falls under the umbrella of the Treasury Department, it is likely not a Department, so the Commissioner is not a constitutional Head of Department.²⁴³ And even if the Commissioner could be construed as a Head of Department, vesting the selection of CDP officers in the Commissioner may not be consistent with the impartial, detached relationship those officers are meant to hold with the collection process of the Agency.²⁴⁴ If CDP officers are chosen by the individual that oversees the IRS—rather than by the IRS itself—they may feel less pressure to side with their direct superiors.

240. U.S. CONST. art. 2, § 2, cl. 2. This Note concludes that presidential appointment of CDP officers, with or without Senate confirmation, is both impracticable and unnecessary.

241. *But see* Freytag v. Comm'r, 501 U.S. 868, 886 (1991) (confining the term Departments "to executive divisions like the Cabinet-level departments").

242. *Id.* at 885.

243. *Id.* Justice Scalia, writing for four Justices, would have held that "all independent executive establishments [are Departments]." *Id.* at 919 (Scalia, J., concurring in the judgment).

244. *See* I.R.C. § 6330(b)(3) (2017) (requiring that CDP officers be impartial); IRM § 8.1.10 (Sept. 28, 2017) (restricting ex parte communications between CDP officers and other IRS functions).

Allowing the appointment of CDP officers by the Secretary of the Treasury addresses both issues. The Secretary is undoubtedly a Head of Department for purposes of the Appointments Clause.²⁴⁵ The Secretary is a presidentially-appointed and Senate-confirmed officer²⁴⁶ who is removable at will by the President, making him or her accountable for the quality of appointments. Vesting appointment in the Secretary can minimize the procedural burden of presidential appointment and Senate confirmation²⁴⁷ while capitalizing on the Secretary's likely expertise concerning the proper qualifications for revenue officers. This would certainly represent an increase in the number of appointees each year, but it would be a comparative drop in the bucket.²⁴⁸ Indeed, granting the Secretary this appointment power would likely be the quickest and least disruptive route to constitutional compliance. Moreover, placing the responsibility for appointments with the Head of Treasury may lessen the risk—whether actual or perceived—that CDP officers hired by the IRS will be biased in favor of the Agency.

Appointment by a court of law might seem an appropriate choice, given CDP officers' adjudicative role and the requirement that they be impartial,²⁴⁹ but that option creates its own constitutional complications. While the Court has upheld interbranch appointments in the past,²⁵⁰ the extent to which they are permitted is unclear.²⁵¹ Some commentators have argued that the text of the Appointments Clause only allows Courts of Law to appoint their own inferior officers—clerks, for example.²⁵² Moreover, judges cannot be removed at will or voted out of office; even if, as

245. See *Freytag*, 501 U.S. at 886 (differentiating between a secretary and an inferior officer).

246. See 31 U.S.C. § 301(b) (2017).

247. See Lindstedt, *supra* note 30, at 1186–87 (describing the logistical and political advantages of appointment by heads of departments).

248. See *id.* (noting that the government had been able to manage “the annual appointment of roughly 240,000 military officers in the past”).

249. I.R.C. § 6330(b)(3) (2017).

250. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 673–76 (1988) (upholding the appointment of an independent counsel by a special Article III court).

251. Compare *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (holding that Congress could not retain the power to remove the Comptroller General), with *Mistretta v. United States*, 488 U.S. 361, 411 n.35 (1989) (“Nothing in *Bowsher*, however, suggests that one Branch may *never* exercise removal power, however limited, over members of another Branch.”) (emphasis added).

252. Jennifer L. Mascott, *Constitutionally Conforming Agency Adjudication*, 2 LOY. J. REG. COMPLIANCE 22, 30 (2017).

discussed below, adjudicatory independence justifies some insulation from removal once a CDP officer is in office, appointment by an executive branch official can ensure some level of *prospective* accountability for the quality of appointments. Appointment by a court would be inconsistent with this purpose of the Clause.

Appointment by the President, with or without confirmation by the Senate, is both unnecessary and impractical. The large number of CDP officers²⁵³ would further clog an already hampered presidential nomination process.²⁵⁴ Moreover, inferior officers are typically appointed by principal officers that supervise them.²⁵⁵ Here, it makes sense for the Secretary, who theoretically possesses more specific expertise than the President in the needs of the tax system, to choose the people that carry out the Agency's rules and directives.

Congress and the IRS need not wade into these constitutional and logistical complexities to solve the problem at hand. Providing for appointment by the Secretary of the Treasury is the quickest and cleanest—albeit a slightly formalistic—way to resolve the constitutional issue, and as discussed in Section D below, it strikes the best balance between independence and accountability.

B. A HOLDING THAT CDP OFFICERS ARE INFERIOR OFFICERS NEED NOT INVALIDATE PREVIOUSLY DECIDED CASES.

If CDP officers have not been constitutionally appointed to date, what happens to the many thousands of decisions they have already issued or to currently pending cases? This concern has come up in the ALJ cases that led to *Lucia*.²⁵⁶ There is reason to believe the Court would fashion a remedy to minimize the bureaucratic chaos.

253. At the end of FY2017 there were 857 CDP officers. *Table 30: Personnel Summary, by Employment Status, Budget Activity, and Selected Personnel Type, Fiscal Years 2016 and 2017*, INTERNAL REVENUE SERV., <https://www.irs.gov/statistics/irs-budget-and-workforce> (last visited Oct. 4, 2018).

254. Cf. Sheldon Goldman, *Tracking Obstruction and Delay in U.S. Senate Confirmations of Judges to the Federal Courts*, SCHOLARS STRATEGY NETWORK (July 1, 2013), <http://www.scholarsstrategynetwork.org/brief/tracking-obstruction-and-delay-us-senate-confirmations-judges-federal-courts> (discussing how the nomination process is known for its logistical and political delays).

255. See *Edmond v. United States*, 520 U.S. 651, 663 (1997) (“[T]here shall be in the said department, an inferior officer, to be appointed by the said principal officer . . .” (quoting Act of 27 July 1789, ch. 4, § 2, 1 Stat. 28 (1789))).

256. See *Bandimere v. SEC*, 844 F.3d 1168, 1201 (10th Cir. 2016) (McKay, J., dissenting), *cert. denied*, 138 S. Ct. 2706 (2018) (“Today’s holding risks throwing much into disarray.”).

In the past, the Court has applied remedial-mitigation doctrines to retroactively validate actions taken by “entire administrative or legislative bodies.”²⁵⁷ After the Supreme Court found in *Buckley v. Valeo* that the FEC’s structure violated the Appointments Clause, it granted all of the agency’s past acts “de facto validity.”²⁵⁸ It also issued a thirty-day stay on its judgment in order to give Congress time to reconstitute the Agency.²⁵⁹ As authority for this remedy, the Court cited precedent according “de facto validity” to the acts of legislators elected pursuant to unconstitutional apportionment plans.²⁶⁰ In a later case, the Court limited the de facto validity doctrine to cases involving election law or challenges to an entire agency design.²⁶¹ But the Court applied a similar retroactive remedy when it found that bankruptcy courts violated Article III in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*²⁶² The Court noted that retroactive application would “not further the operation of [the] holding, and would surely visit substantial injustice upon those litigants who relied upon . . . the jurisdiction of the bankruptcy courts.”²⁶³ Whether or not the Court refers to the remedy in a potential future CDP case as “de facto validity,” it is likely to opt for a remedy it considers minimal and pragmatic.²⁶⁴

Mitigation is appropriate in the CDP case. Given the sheer number of CDP cases resolved each year,²⁶⁵ reopening previously closed cases would be entirely impracticable. Reexamining these cases would delay implementation of a constitutional CDP process and could “visit substantial injustice” on taxpayers that relied on the past actions of the Office of Appeals. Just as it did in *Buckley*, a temporary stay could allow Congress to address the situation.

Professor Kent Barnett argues that these remedial-mitigation doctrines do not provide adequate redress for violations of

257. Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481, 528 & n.257 (2014) (citing *Ryder v. United States*, 515 U.S. 177, 183–84 (1995)).

258. 424 U.S. 1, 142 (1976) (per curiam).

259. *Id.* at 143.

260. *Id.*

261. *Ryder*, 515 U.S. at 183–84.

262. 458 U.S. 50, 87–88 (1982); Kent Barnett, *Standing for (and up to) Separation of Powers*, 91 IND. L.J. 665, 682 (2016).

263. *N. Pipeline*, 458 U.S. at 88.

264. See Kent Barnett, *The Consequences of Missing Appointments*, YALE J. REG.: NOTICE & COMMENT (Apr. 2, 2018), <http://yalejreg.com/nc/the-consequences-of-missing-appointments-by-kent-barnett>.

265. See *supra* note 12 and accompanying text.

challenging parties' constitutional rights.²⁶⁶ He has a point; if the Court has granted an unconstitutional agency action de facto validity, the challenging party is left out in the cold with only a pyrrhic victory.²⁶⁷ The Court could address this concern by granting validity only to closed cases while requiring a new CDP hearing before a properly appointed officer—and perhaps a different officer than before—in still-pending cases.²⁶⁸ The SEC tried to do this unilaterally by ratifying ALJ appointments and ordering new proceedings in light of the uncertainty created by *Lucia*.²⁶⁹ In any case, a full assessment of the appropriate remedy is beyond the scope of this Note. For present purposes, it is enough to note the precedent for remedies that fix constitutional violations without creating an insurmountable logistical burden for agencies.

C. CDP OFFICERS SHOULD BE ABLE TO KEEP THEIR CIVIL SERVICE PROTECTIONS.

Holding that CDP officers are inferior officers and prescribing appointment by the Secretary does not end the discussion. Restrictions on an inferior officer's removal that improperly interfere with the President's power to control the execution of the laws are unconstitutional.²⁷⁰ But the removal protections that CDP officers enjoy do not—and should not—run afoul of *Free Enterprise Fund*.

In *Free Enterprise Fund*, the Court noted that the two levels of protection PCAOB members enjoyed were an unconstitutional limitation on the President's power to take care that the laws are faithfully executed.²⁷¹ The Court noted, however, that the executive nature of the PCAOB's functions supported its decision.²⁷²

266. Barnett, *supra* note 262, at 683; *see also* Kristin E. Hickman, *Symbolism and Separation of Powers in Agency Design*, 93 NOTRE DAME L. REV. 1475, 1487–99 (2018) (arguing that severing unconstitutional provisions may not adequately protect the rights of challenging parties).

267. Barnett, *supra* note 262, at 681–83.

268. *See Lucia v. SEC*, 138 S. Ct. 2044, 2055–56 (2018) (remanding for a new hearing before a different ALJ than before).

269. *See supra* note 164 and accompanying text. The Department of Labor recently took similar steps. *See Office of Administrative Law Judges*, DEP'T LAB., <https://www.oalj.dol.gov> (last visited Oct. 4, 2018) (describing the Secretary of Labor's ratification of a chief judge and all other ALJ appointments in light of *Lucia*).

270. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010).

271. *Id.*

272. *Id.* at 504.

It contrasted PCAOB members with ALJs, who “perform adjudicative rather than enforcement or policymaking functions.”²⁷³ It is thus a fair reading of the case that the nature of an officer’s functions help determine the constitutionality of a given removal scheme.²⁷⁴ Dual-layer good-cause removal protections are not per se unconstitutional; rather, it is a nuanced question of officer functions and agency design.²⁷⁵

The Court did not clarify the scope of *Free Enterprise Fund* in *Lucia*, and it is unclear where the decisions will lead. The SEC may remove an ALJ only for good cause as determined by the MSPB. Members of the MSPB themselves are only removable by the President for good cause shown. If, as the majority in *Free Enterprise Fund* assumed, members of the SEC are removable by the President only for good cause, then the SEC’s ALJs enjoy three layers of removal protections. After the Court declined the opportunity to weigh in on these protections in *Lucia*, the White House took matters into its own hands, purporting by executive order to strip ALJs of their good-cause protection.²⁷⁶

ALJs’ removal protections are distinguishable from those at issue in *Free Enterprise Fund*. ALJs carry out primarily adjudicative, rather than policymaking, functions. While an agency’s decision to bring proceedings before an ALJ could certainly be characterized as policymaking,²⁷⁷ the ALJ is meant to play an impartial, adjudicative role in those proceedings.²⁷⁸ The Court left itself an out in *Free Enterprise Fund*; it can, and should, hold that the removal protections enjoyed by ALJs are both constitutional and consistent with precedent.²⁷⁹

But no matter what the Court may do in a future ALJ case, CDP officers should be able to keep their civil service protections

273. *Id.* at 507 n.10.

274. *See* PHH Corp. v. CFPB, 881 F.3d 75, 113–14 (D.C. Cir. 2018) (Wilkins, J., concurring).

275. *See supra* notes 150–52 and accompanying text.

276. *See* Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018); Kent Barnett, *Raiding the OPM Den: The New Method of ALJ Hiring*, YALE J. REG.: NOTICE & COMMENT (July 11, 2018), <http://yalejreg.com/nc/raiding-the-opm-den-the-new-method-of-alj-hiring-by-kent-barnett>.

277. *Cf.* SEC v. Chenery Corp., 332 U.S. 194, 203, 209 (1947) (recognizing an agency’s ability to choose whether to make policy through rulemaking or adjudication).

278. *See Free Enter. Fund*, 561 U.S. at 507 n.10.

279. *But see* Jennifer Mascott, *Revisiting the Record on Removal*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 5, 2018) (arguing that the Solicitor General’s requested reevaluation of ALJ removal restrictions is relatively modest).

notwithstanding their officer status. CDP officers play an important role in the tax collection process, but that role is adjudicative. The CDP program was enacted out of concern for the due process rights of taxpayers,²⁸⁰ and the statute contemplates impartiality on the part of the appeals officer conducting a hearing.²⁸¹ As described above, CDP officers exercise discretion and judgment when deciding the appropriateness of collection actions.²⁸² They receive factual information both from the IRS and from the taxpayer and apply the law to those facts.

Even if ALJs' removal protections are unconstitutional, CDP officers are distinguishable. Because the Secretary of the Treasury is removable by the President at will, there is no argument that CDP officers would enjoy three layers of removal protection. The majority in *Free Enterprise Fund* clearly implied that two levels of good-cause protection could be permissible for adjudicative officers. CDP officers are constitutionally secure.²⁸³

D. A PROPER APPOINTMENT, COMBINED WITH EXISTING CIVIL SERVICE PROTECTIONS, STRIKES THE APPROPRIATE NORMATIVE BALANCE BETWEEN INDEPENDENCE AND ACCOUNTABILITY.

Providing for appointment by the Secretary of the Treasury while maintaining civil service protections is constitutionally permissible, and it also makes normative sense. The majority in *Free Enterprise Fund* was correct to note the meaningful difference between policymaking and adjudicative functions. Adjudication warrants more independence.

The present CDP scheme has normative flaws in addition to its constitutional violation. Civil service insulation without the accountability of a constitutional appointment reduces the incentive to make careful and high-quality decisions.²⁸⁴ The Secre-

280. S. REP. NO. 105-174, at 67 (1998) ("The Committee believes that following procedures designed to afford taxpayers due process in collections will increase fairness to taxpayers.").

281. I.R.C. § 6330(b)(3) (2017).

282. See *supra* Part I.A.2.

283. Even if a court were to find these two layers of good-cause protection unconstitutional, courts could craft a remedy that does not cause the civil service to implode. See *Bandimere v. SEC*, 844 F.3d 1168, 1190 (10th Cir. 2016) (Briscoe, J., concurring), *cert. denied*, 138 S. Ct. 2706 (2018). Just as the Court in *Free Enterprise Fund* simply severed the PCAOB's good-cause removal provision and made PCAOB members removable by the SEC at will, courts could hold that members of the MSPB are removable at will by the President. *Id.* at 1190–91.

284. See *generally* TREASURY INSPECTOR GEN. FOR TAX ADMIN., REVIEW OF

tary, and the President that appoints the Secretary, must be prospectively accountable for the smooth and effective operation of the CDP program. Delegating the hiring of CDP officers to the Commissioner, the head of Appeals, or a human resources office dilutes that accountability and deprives the public of a clear target for its dissatisfaction.²⁸⁵

Invalidating the civil service protections as applied to CDP officers would present its own problems. Giving a presidential political appointee an absolute right of removal would strip CDP officers of any semblance of the impartiality their governing statute requires.²⁸⁶ At-will removal would invite bias in favor of the agency and reduced public faith in the tax system.²⁸⁷ In the context of an adjudication, such a scenario could even rise to the level of a due process violation.²⁸⁸

This Note's solution recognizes that all government actors fall on a spectrum between total political accountability and total independence.²⁸⁹ Ideally, elected officials will fall close to the politically accountable end, while Article III judges, with their lifetime salaries and tenure, will come as close as possible to total independence. Agency actors fall somewhere in between, depending on a variety of factors, including: whether the agency is independent or a part of the executive branch; the extent to which the officer engages in policymaking; and whether the officer engages in rulemaking or adjudication. Appointment mechanisms and removal restrictions help calibrate where a particular officer or agency falls on the spectrum.

Naturally, policymakers and neutral adjudicators will fall at different points. Of course, not all agency adjudications are the same. Different forms of adjudication involve different degrees of policymaking, and agencies typically may choose to set policy

THE OFFICE OF APPEALS COLLECTION DUE PROCESS PROGRAM 4–6 (2017) (finding both systemic defects and human errors in the operation of the CDP program).

285. Barnett, *supra* note 276.

286. I.R.C. § 6330(b)(3) (2017).

287. See *Ramspeck v. Fed. Trial Exam'rs Conference*, 345 U.S. 128, 131 (1953) (describing complaints, prior to the APA, that adjudicators who were dependent on their agencies were subservient to the agency heads); Barnett, *supra* note 276.

288. See Kent Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 MO. L. REV. 1023, 1024 (2016).

289. See Hickman, *supra* note 266, at 1497.

through either rulemaking or adjudication.²⁹⁰ But some positions fall clearly in the neutral adjudication category; a CDP officer—whose job is to evaluate the appropriateness of a specific collection action in a specific case according to established rules—is one of them. While both adjudicators and policymakers can be inferior officers that require constitutional appointment, the Constitution does not require a one-size-fits-all approach to their removal. It tolerates more independence for adjudicators.²⁹¹

Appointing CDP officers while allowing them to maintain civil service protections strikes the right constitutional and normative balance. It acknowledges that the significant authority they exercise warrants their designation as officers of the United States, but it recognizes that the Internal Revenue Code, due process, and common sense require from them a certain degree of independence.

CONCLUSION

The Appointments Clause contemplates a balance between political accountability, independence, and effective administration of the laws. There is perhaps no area in which it is more important to strike that balance than in tax administration.

This Note explores how the Appointments Clause developed and how it has evolved (or failed to evolve) to accommodate a government that is much bigger and more complex than the Founders likely ever contemplated. Despite efforts by lower courts to cabin the Clause's applicability, Supreme Court precedent suggests that the provision casts a wide net that captures the IRS's CDP officers. CDP officers need to be appointed, and the Secretary of the Treasury is the one to do it. Congress should codify this change to achieve constitutional compliance while minimizing the disruption that such procedural changes can cause.

But the constitutional problem ends there. CDP officers' role as adjudicators justifies civil service protections to prevent arbitrary removal and to protect their statutorily-mandated impartiality. These restrictions do not improperly interfere with the President's control over the administration of the laws, and there is room for them within the contours of the Constitution.

290. *SEC v. Chenery Corp.*, 332 U.S. 194, 203, 209 (1947).

291. *See PHH Corp. v. CFPB*, 881 F.3d 75, 115 (D.C. Cir. 2018) (Wilkins, J., concurring).