

## Clarifying the Employee-Officer Distinction in Appointments Clause Jurisprudence

*E. Garrett West*

**ABSTRACT.** On May 24, the D.C. Circuit sitting en banc will hear oral argument on whether Securities and Exchange Commission (SEC) administrative law judges (ALJs) count as inferior officers rather than employees for purposes of the Appointments Clause. This Essay attempts to articulate a coherent employee-officer distinction that suits the Constitution's text and structure, that remains consistent with the Court's precedent, and that provides a clear legal rule for judges and for Congress. Part I traces the evolution of the doctrine from an early opinion of Justice Marshall through the nineteenth century to the modern cases of *Buckley* and *Freytag*. From this often-confused line of cases, the Essay explains the central normative and constitutional considerations that animate the Court's doctrine. Part II draws on this doctrine and on related administrative law jurisprudence to present a legal rule that defines who must be an officer under the Appointments Clause: any person who is vested with the authority to *alter legal rights and obligations on behalf of the United States*. Part III applies this analysis to a recent circuit split between the Tenth Circuit and the D.C. Circuit, and it sides with the Tenth: SEC ALJs are officers of the United States who must be appointed according to the strictures of the Appointments Clause.

### INTRODUCTION

On May 24, the D.C. Circuit sitting en banc will hear oral argument on whether SEC ALJs count as inferior officers rather than employees for purposes of the Appointments Clause of Article II of the Constitution.<sup>1</sup> The panel deci-

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1. See *Oral Argument Calendar*, U.S. CT. APPEALS D.C. CIR. (Apr. 17, 2017, 5:30 AM), <http://www.cadc.uscourts.gov/internet/sixtyday.nsf/fullcalendar?OpenView&term=current&count=1000&date=2017-04-12> [<http://perma.cc/TJ59-T5S2>]; see also U.S. CONST. art. 2, § 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President

sion in *Raymond J. Lucia*, issued last August, had concluded that these ALJs were mere employees and thus exempt from the strictures of the Appointments Clause.<sup>2</sup> But last December, the Tenth Circuit openly disagreed with the D.C. Circuit panel, holding in *Bandimere v. SEC* that the ALJs *are* inferior officers and therefore within the scope of the Appointments Clause.<sup>3</sup> The D.C. Circuit's further consideration will either resolve the split or buttress its reasoning for Supreme Court review.

As the *Bandimere* dissent points out, the majority decision threatens to “throw out of balance the teeter-totter approach to determining which of all the federal officials are subject to the Appointments Clause.”<sup>4</sup> It also casts doubt on many of the for-cause removal protections that ALJs currently enjoy.<sup>5</sup> Justice Breyer, dissenting in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, has already argued that the Court's decision threatens the independence of ALJ adjudications.<sup>6</sup>

Putting aside the ramifications for the broader administrative state,<sup>7</sup> this Essay argues that the Court should use this opportunity to clarify its interpretation of the Appointments Clause. Its jurisprudence, so far, has been far from clear. The touchstone of the modern officer-employee distinction rests on a careless articulation in *Buckley v. Valeo*.<sup>8</sup> In a slapdash footnote, the Court drew a dubious distinction: “‘Officers of the United States’ does not include all employees of the United States . . . . Employees are lesser functionaries subordinate to officers . . . .”<sup>9</sup> The category of officers, on the other hand, includes “any appointee exercising *significant authority*.”<sup>10</sup> Since *Buckley*, the Court has never clearly defined the boundary between officers and employees, or between those

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alone, in the Courts of Law, or in the Heads of Departments.”); Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. (forthcoming 2018), <http://ssrn.com/abstract=2918952> [<http://perma.cc/R2E2-U769>] (discussing the original meaning of “Officers of the United States”).

2. See *Raymond J. Lucia Cos., Inc. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *vacated and reh'g en banc granted*, 2017 U.S. App. LEXIS 2732, at \*2 (D.C. Cir. Feb. 16, 2017).
3. *Bandimere v. SEC*, 844 F.3d 1168, 1181-82 (10th Cir. 2016).
4. *Id.* at 1194 (McKay, J., dissenting).
5. See 5 U.S.C. § 7521 (2012).
6. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 542-43 (2010) (Breyer, J., dissenting).
7. *But see generally* Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 FORDHAM L. REV. 2541 (2011) (discussing the implications of *Free Enterprise* for agency independence).
8. 424 U.S. 1 (1976) (per curiam).
9. *Id.* at 126 n.162.
10. *Id.* at 126 (emphasis added).

with “significant authority” and “lesser functionaries.” And *Buckley*’s roots in the Court’s doctrine seem uncertain as well. The early decisions—at times—focus on whether the position at issue came with “tenure” or “duration,” not on the position’s significance.<sup>11</sup>

The confusing case law ultimately drove this split. In the Tenth and D.C. Circuits’ respective panel opinions, the courts offered competing readings of the Supreme Court’s last Appointments Clause case, *Freytag v. Commissioner*.<sup>12</sup> The *Freytag* Court held that special trial judges (STJs) in the United States Tax Court constituted “inferior officers” under the Appointments Clause.<sup>13</sup> Disagreement about the long-term impact of *Freytag* has festered since the D.C. Circuit applied the case to ALJs at the Federal Deposit Insurance Corporation and determined that they were employees.<sup>14</sup> Unlike the STJs, the court reasoned, these ALJs had “no such power[]” to enter “final decision in certain classes of cases.”<sup>15</sup> Judge Randolph, writing alone and concurring only in the judgment, disagreed. He argued vigorously that *Freytag* compelled the conclusion that “the ALJ in this case is an inferior officer.”<sup>16</sup> Though the *Freytag* Court doubtless spoke of the STJ’s capacity to render “final decisions,” it “clearly designated this as an alternative holding.”<sup>17</sup> The Tenth Circuit’s decision in *Bandimere v. SEC* revives Judge Randolph’s approach: “SEC ALJs are inferior officers who must be appointed in conformity with the Appointments Clause.”<sup>18</sup>

This Essay attempts to rationalize the Court’s Appointments Clause jurisprudence.<sup>19</sup> It argues that the Court should define an officer as any person who is vested with the authority to *alter legal rights and obligations on behalf of the United States*. This articulation partially tracks<sup>20</sup> that of a thoughtful Office of Legal Counsel (OLC) opinion, which argued that officers were those “delegated by legal authority with a portion of the sovereign powers of the federal gov-

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11. See *infra* Part I.

12. 501 U.S. 868 (1991).

13. *Id.* at 880-82.

14. *Landry v. FDIC*, 204 F.3d 1125, 1132-34 (D.C. Cir. 2000).

15. *Id.* at 1134.

16. *Id.* at 1143 (Randolph, J., concurring).

17. *Id.* at 1142.

18. *Bandimere v. SEC*, 844 F.3d 1168, 1179 (10th Cir. 2016).

19. Few other pieces have addressed the issue. See generally Stacy M. Lindstedt, *Developing the Duffy Defect: Identifying Which Government Workers Are Constitutionally Required To Be Appointed*, 76 MO. L. REV. 1143 (2011); Mascott, *supra* note 1; John T. Plecnik, *Officers Under the Appointments Clause*, 11 PITT. TAX REV. 201 (2014).

20. *But see infra* text accompanying notes 64-70 (rejecting part of the analysis of the OLC opinion).

ernment.”<sup>21</sup> The OLC opinion states the concept well enough, but this Essay instead incorporates a useful doctrine from administrative law: finality.

The doctrine of finality can inform the meaning of “officer” under the Appointments Clause because it determines whether a person has “suffered [a] legally cognizable injury” at the hand of the state.<sup>22</sup> This doctrine helps define the irreducible constitutional minimum for the protections that the Appointments Clause provides to the citizenry. When an agency determines legal “rights or obligations” or acts such that “legal consequences will flow,”<sup>23</sup> it wields the Constitution’s Article II power against the public. The Appointments Clause ensures that any person who wields this executive power must be appointed according to Article II’s strictures.

This Essay’s articulation of the employee-officer distinction has several virtues. First, it accords with Court precedent. Though it rejects some of the errant emphasis on “tenure” and “duration,” it captures the central concerns of the doctrine and balances the two normative considerations—efficiency and accountability—addressed by the Court’s jurisprudence. Second, it accords with the constitutional principles inherent in the notion of a limited government and inferable from the exclusive authority grants of the Vesting Clauses. Third, it provides a clear rule of decision. The Court’s “teeter-totter approach”<sup>24</sup> to the employee-officer distinction fails to provide a clear rule for lower courts or Congress.

Part I of this Essay canvasses the historical evolution of the case law. It contrasts the pre-*Buckley* Court with the current one, and it highlights the disparate strands of reasoning. Part II first presents the employee-officer distinction articulated above, then defends the doctrinal, constitutional, and normative appeal of the test. Part III applies this test to the reasoning in *Bandimere* and *Raymond J. Lucia*. I suggest that neither court’s inquiry perfectly captures the inquiry that the Appointments Clause requires, but that ALJs should be considered inferior officers in line with the Tenth Circuit’s determination. I then conclude with some considerations about this question’s implications for the broader administrative state.

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21. Steven G. Bradbury, *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 73 (2007) [hereinafter *OLC Opinion*].

22. See JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 1230 (7th ed. 2014).

23. See *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

24. *Bandimere v. SEC*, 844 F.3d 1168, 1194 (10th Cir. 2016) (McKay, J., dissenting).

## I. EVOLVING CONCEPTIONS OF THE EMPLOYEE-OFFICER DISTINCTION

Appointments Clause jurisprudence has been inconsistent from the start. While riding circuit, Justice Marshall offered the first comprehensive and influential definition of “officer of the United States.” *United States v. Maurice* concerned a statute that “empower[ed] the president to erect fortifications, and appropriate[ed] large sums of money to enable him to carry these acts into execution.”<sup>25</sup> Given this grant of authority, Congress left the means of execution “subject to the discretion of the executive,” provided he “employ those means only which are constitutional.”<sup>26</sup> The Secretary of War chose to appoint an “agent of fortifications” by promulgating regulations.<sup>27</sup> This agent would “provide the materials and workmen,” “pay the labourers,” and otherwise ensure that the fortifications were built.<sup>28</sup>

Yet, Marshall argued, the Constitution’s Appointments Clause imposed a limitation on the Secretary’s power to appoint these agents. The Constitution requires that *all* offices be “established by law,”<sup>29</sup> but the statute itself could not easily “be construed to comprehend an agent of fortifications.”<sup>30</sup> Justice Marshall argued, therefore, that *if* “the agent of fortifications [were] an officer of the United States,” then “his office ought to [have been] established by law.”<sup>31</sup>

This logic raised a possible constitutional issue within the statutory scheme. Should the duties of the defendant—James Maurice—have been the duties of an officer, the failure to establish the office by law and appoint him according to the Appointments Clause would have rendered his appointment unconstitutional.<sup>32</sup> To avoid the constitutional problem, Justice Marshall presented the first employee-officer distinction in case law:

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25. *United States v. Maurice*, 26 F. Cas. 1211, 1213 (C.C.D. Va. 1823) (No. 15,747).

26. *Id.* at 1214.

27. *Id.*

28. *Id.*

29. *Id.* at 1214.

30. *Id.* at 1215.

31. *Id.* at 1214.

32. *See id.* Justice Marshall almost certainly did not have to reach the constitutional question, however. James Maurice—the defendant—executed a bond with the United States in which he agreed to pay a penalty of \$20,000 unless he “truly and faithfully execute[d] and discharge[d] all the duties appertaining to the said office of agent [of fortifications].” *Id.* at 1212. He then received sums of money that he “failed to disburse to the use of the United States.” *Id.* As a defense, he and the sureties asserted that “the declaration cannot be sustained, because the bond is void in law, it being taken for the performance of duties of an office, which office has no legal existence, and consequently, no legal duties.” *Id.* In response to this de-

An office is defined to be “a public charge or employment,” and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States. Although an office is “an employment,” it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed; it seems very difficult to distinguish such a charge or employment from an office . . . .<sup>33</sup>

This description is rich but not entirely unambiguous. He does not state directly when or how an “employment” becomes an “office.” The considerations Justice Marshall cites, though, seem to require that the employment be (1) “on the part of the United States” and be (2) a “continuing [duty]” or be “continu[ous], though the person be changed.”<sup>34</sup>

These two conditions, though, must be read in context. Writing in an era before bureaucratic administration, Justice Marshall attempted here to defend *contractors* or *agents* as outside the scope of the Appointments Clause. Thus, he contrasts duties “prescribed by the government” with those defined “by contract.” In distinguishing these two, the continuity of the duty might be a help-

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fense, the opinion presents a comprehensive account of the Appointments Clause and the requirements it places on Congress’s ability to structure the administrative state.

But Justice Marshall did not need to reach the constitutional question at all. He ultimately reasoned that—even though the appointment of Maurice *was* irregular—the United States could recover:

Admitting the appointment to be irregular, to be contrary to the law and its policy, what is to be the consequence of this irregularity? Does it absolve the person appointed from the legal and moral obligation of accounting for public money which has been placed in his hands in consequence of such appointment? Does it authorize him to apply money so received to his own use? . . . Far from it . . . . If, then, this appointment be contrary to the policy of the law, the repayment of the money under it is not, and a suit may, I think, be sustained, to coerce such repayment on the bond given for that purpose.

*Id.* at 1219. Under Justice Marshall’s reasoning, regardless of the regularity of Maurice’s appointment under the Appointments Clause, the United States could recover the money from him or his sureties.

33. *Id.* at 1214.

34. *Id.*

ful heuristic. But continuity alone does not distinguish the two roles. Congress might create a temporary office, or a contract might extend indefinitely.<sup>35</sup> Continuity fails to capture the constitutional difference.

And the disposition of the case did not rely on the continuity of the duties. Justice Marshall noted the agent's "important duties": to "disburse[] of the money placed in [his] hands," to "provide the materials and workmen deemed necessary," and to "pay the labourers employed."<sup>36</sup> These duties raised the agent to the position of officer. Because the agent of fortifications could enter into contracts on behalf of the United States, he could alter the legal relations between private citizens and the U.S. government. Continuity was beside the point.

Later precedents, though, reduced the Appointments Clause inquiry into one about continuity—focusing on whether the position came with "tenure" or "duration." In three post-Civil War cases, the Court narrowed the reasoning in *Maurice*. In *United States v. Hartwell*, the Court stated:

An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law.<sup>37</sup>

The Court narrowed *Maurice* further in *United States v. Germaine*, where the Court stated simply that "the term ['officer'] embraces the ideas of tenure, duration, emolument, and duties."<sup>38</sup> And finally, in *Auffmordt v. Hedden*, the Court held: "His position is without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily. Therefore, he is

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35. See Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1143-44 (1981).

36. *Maurice*, 26 F. Cas. at 1214.

37. *United States v. Hartwell*, 73 U.S. 385, 393 (1867) (finding a "clerk in the office of the assistant treasurer of the United States" to be an officer of the United States, *id.* at 392). *Hartwell* technically concerns the construction of a criminal statute that imposed penalties on "officer[s] or agent[s] of the United States." *Id.* at 387. The Court did not explicitly claim to interpret the Appointments Clause, but it does suggest that the defendant would be considered an officer under the Constitution, too. See *id.* at 393-94 ("The defendant was appointed by the head of a department within the meaning of the constitutional provision upon the subject of the appointing power." (citing U.S. CONST. art. II, § 2)). Regardless, later cases treat *Hartwell* as also relevant to the broader constitutional issue. *United States v. Germaine*, for example, does reach the constitutional question and treats *Hartwell* as relevant. 99 U.S. 508, 511 (1878).

38. 99 U.S. at 511 (finding that a surgeon who assisted the Commissioner of Pensions was not an officer of the United States).

not an ‘officer’ within the meaning of the [Appointments] clause of the Constitution.”<sup>39</sup> These three post-Civil War cases seized on the language of “continuity” in *Maurice*. But this tenure-and-duration approach to the Appointments Clause departs from *Maurice*’s dispositive emphasis on the officer’s “important duties.”<sup>40</sup>

*Buckley v. Valeo*, on the other hand, returns more closely to the decision in *Maurice*: “[A]ny appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States.’”<sup>41</sup> Instead of following the tenure-and-duration reasoning of cases like *Germaine*, *Auffmordt*, and *Hartwell*, the *Buckley* Court stated that the touchstone of the analysis is the “significance” of the authority. This more closely tracks *Maurice*, which ultimately turned on the “importan[ce]” of the duties.<sup>42</sup> Yet even as the *Buckley* Court tacked away from the reasoning of the post-Civil War cases and back towards that of *Maurice*, it continued to cite the post-Civil War cases without explanation.

The *Freytag* Court nominally applied the language from the *Buckley* test, but the discussion was equally conclusory. The Court simply stated that the STJ’s authority was “significant” and “inconsistent with the classifications of ‘lesser functionaries’ or employees.”<sup>43</sup> Then it returned to the language of tenure and duration. Responding to the claim that judges “lack[ed] authority to enter a final decision,” the Court noted that the “office” of the trial judge was “established by Law” and that the “duties, salary, and means of appointment . . . [were] specified by statute.”<sup>44</sup> The establishment by law distinguished them from “special masters” under Article III courts, who the courts hire “on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute.”<sup>45</sup> Further separating these STJs from employees, they also “take testimony, conduct trials, rule on the admissibility of evidence, . . . have the power to enforce compliance with discovery orders,” and render final judgment in “limited-amount tax cases.”<sup>46</sup>

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39. 137 U.S. 310, 327 (1890) (finding that a merchant appraiser was not an officer of the United States).

40. *Maurice*, 26 F. Cas. at 1214.

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

42. *Maurice*, 26 F. Cas. at 1214.

43. *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991).

44. *Id.*

45. *Id.*

46. *Id.* at 881-82.

None of these decisions clearly articulates the employee-officer distinction. *Maurice*'s ambiguity gave way to the tenure-and-duration reasoning of the post-Civil War cases. Though *Buckley* shifted the touchstone towards "significant authority," the *Freytag* Court confused the test by relying on a hodgepodge of considerations—including those from the post-Civil War case law. Today, Court precedent remains decidedly confused. It tacks between notions of continuity and significance. As Justice Breyer, dissenting in *Free Enterprise* argues, "the term 'inferior officer' is indefinite," and "efforts to define it inevitably conclude that the term's sweep is unusually broad."<sup>47</sup>

## II. CLARIFYING THE APPOINTMENTS CLAUSE

### A. Articulating the Test for "Officers of the United States"

An officer is one who *alters legal rights or obligations on behalf of the United States*.<sup>48</sup> This definition tracks just *one* of the conditions of the influential OLC opinion on the Appointments Clause. The OLC opinion claimed that a position is a federal office if it meets two essential conditions: "(1) it is invested by legal authority with a portion of the sovereign powers of the federal government, and (2) it is 'continuing.'"<sup>49</sup> The OLC opinion glossed this first open-textured requirement to include power to "bind third parties, or the government itself, for the public benefit,"<sup>50</sup> including the authority to "arrest criminals, impose penalties, enter judgments, and seize persons or property."<sup>51</sup> Unlike the OLC

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

48. This test departs from the one given in a recent Article by Jennifer Mascott. See Mascott, *supra* note 1. Mascott presents a compelling historical argument that the original public meaning of "Officers of the United States" is much broader than modern doctrine and this Essay suggest. See *id.* at 1. If Mascott is correct, then my suggested legal rule is seriously under-inclusive with respect to the original public meaning of the Clause. Nonetheless, the alters-legal-rights test that I articulate better suits the Court's historical approach to Appointments Clause jurisprudence. So this Essay remains relevant even to some original-public-meaning originalists—in particular, those who find Mascott's evidence persuasive but too inconclusive to depart from precedent. Of course, the role of precedent in originalist jurisprudence is hotly contested. Compare, e.g., Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005), with Thomas Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271 (2005). This Essay makes the narrow claim that the alters-legal-rights test is *at least* consistent with the Constitution's text and structure and that it suits Court precedent.

49. *OLC Opinion*, *supra* note 21, at 74.

50. *Id.* at 87.

51. *Id.* at 88.

opinion, this Essay dispenses with the second condition—“continuity”—as an extra-constitutional appendage passed down from errant language in *Maurice* and reinforced in the post-Civil War cases.

This Essay’s articulation, however, incorporates preexisting administrative law doctrine and thereby concretizes the test. In particular, the employee-officer distinction should incorporate the second prong of the *Bennett v. Spear* finality test: whether the officer makes a decision that alters “rights or obligations” or “from which ‘legal consequences will flow.’”<sup>52</sup> In the administrative law context, this prong of the finality inquiry separates those who have suffered a legally cognizable injury because of the government’s action from those who have not. The Appointments Clause, similarly, ought to capture any person whose activity, if it causes a cognizable harm, can be legally attributable to the U.S. government. Those vested with the capacity to alter legal rights on behalf of the U.S. government wield the state’s power. This definition, following *Bennett*, also captures those with statutory authority to “alter the legal regime” for other officers.<sup>53</sup> In *Bennett*, because the relevant action by the Fish and Wildlife Service carried “direct and appreciable legal consequences” for the Bureau of Reclamation’s responsibilities under the statutory scheme, the Court considered the Service’s activity to be final agency action.<sup>54</sup>

Incorporation of the finality doctrine helps articulate the irreducible constitutional minimum of the Appointments Clause. Basic principles of constitutional limited government constrain the legitimate exercise of government power in two ways. First, the Constitution itself must vest the power in the U.S. government. Second, the Constitution must provide that this authority be vested in a particular *person*; the Constitution itself creates the office of the President<sup>55</sup> and gives Congress the responsibility to create all other offices by statute. Any person who exercises a portion of the government’s power—besides the President—*must* satisfy the strictures of the Appointments Clause. The *Bennett* test helps determine when a person has exercised the power of the government. *Bennett* asks the Court to determine when an agency action has

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52. See *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

53. See *id.*

54. *Id.* Drawing the line between officers and employees will be most difficult in these inter-agency situations. Yet this need not detract from the argument here for two reasons. First, these inter-agency disputes will rarely lead to direct, justiciable private injuries that could support litigation. Second, though the inter-agency officers do present hard cases, my articulation still clarifies the employee-officer distinction in the central cases: when agents of the state alter the legal rights of private parties.

55. See U.S. CONST. art. II, § 1, cl. 1 (“The executive power shall be vested in a President of the United States of America.”); *id.* cl. 7 (referring to the duties of the President as the “Execution of his Office”).

altered the relationship between the state and the litigant such that a legally cognizable injury results. In the Appointments Clause context, a cognizable injury should also trigger the procedural and structural protections of the Appointments Clause.

This alters-legal-rights test would exclude, however, those who merely assist officers in the execution of their duties. A counterexample from the finality jurisprudence illustrates this distinction. In *Dalton v. Specter*,<sup>56</sup> respondents sought to enjoin the closing of the Philadelphia Naval Shipyard. The statute at issue required the Secretary of Defense to prepare and submit a report to the President with “recommendations for base closures and realignments,”<sup>57</sup> but the President had complete discretion to accept or reject those recommendations.<sup>58</sup> Because the President’s determinations were not challengeable under the APA, respondents attempted to challenge the formulation of the report itself.<sup>59</sup> Rejecting this challenge, the Court ruled that the formulation and presentation of the report by the Secretary was not “final agency action.”<sup>60</sup> The Court reasoned that the report carried “no direct consequences,” that it was “more like a tentative recommendation than a final and binding determination,” and that the reports were “like the ruling of a subordinate” and therefore “not subject to review.”<sup>61</sup> Most importantly, the Court argued that “the core question” was “whether the result of th[e] process will *directly affect the parties*.”<sup>62</sup>

This definition, as cabined by *Dalton*, sweeps broadly but not irrationally. Even those lesser functionaries who alter seemingly insignificant legal rights fall within its scope. Were the DMV a federal agency, for example, any person with *final* authority to grant or deny a license should be an officer. Similarly, parties like FBI agents with the authority to “make arrests” would be.<sup>63</sup> But mere assistants—even those with significant authority—remain exempt. The President’s Chief of Staff, for example, would not be an officer. Neither would law clerks for federal judges. Each of these positions assists an officer with his or her work, but neither the clerk nor the chief of staff has any power by virtue of the position. This means that Congress has the capacity to insulate positions

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56. 511 U.S. 462 (1994).

57. *Id.* at 465.

58. *See id.*

59. *See id.* at 469.

60. *See id.* (quoting 5 U.S.C. § 704 (1988)).

61. *See id.* at 469-70 (citing *Franklin v. Massachusetts*, 505 U.S. 788 (1992)).

62. *See id.* at 470 (emphasis added) (quoting *Franklin*, 505 U.S. at 797).

63. *See* 18 U.S.C. § 3052 (2012). Congress did provide for their appointment by the Attorney General in a general statute. *See* 28 U.S.C. § 533 (2012).

from the Appointments Clause simply by withholding formal, legal authority. Those without independent authority to alter legal rights escape the rigors of the Appointments Clause.

Contrary to the OLC opinion, this definition also rejects the importance of tenure, duration, or continuity.<sup>64</sup> The post-Civil War cases took hold of errant language from *Maurice*: “If those duties continue, though the person be changed[,] it seems very difficult to distinguish such a charge or employment from an office.”<sup>65</sup> *Maurice* did not turn on this notion of continuity, but on the importance or significance of the duties.<sup>66</sup> Yet *Maurice*’s language introduces the notion of continuity that the post-Civil War cases (and the OLC opinion) follow. But the importance of the language of continuity should not be overstated. The *Maurice* decision attempts to preserve the executive’s efficiency and flexibility. Throughout, Justice Marshall maintains that the President should be “at liberty” to employ the necessary means to “carry the[] acts into execution.”<sup>67</sup> In an era before bureaucratized administration, agents and contractors were essential tools of governance.<sup>68</sup> Justice Marshall therefore faced a subtle imperative to distinguish these contractors and agents from full-blown officers. This imperative appears again in the post-Civil War cases. *Germaine* concerned a surgeon periodically hired by the Commissioner of Pensions to examine pensioners.<sup>69</sup> *Auffmordt* concerned a merchant appraiser retained from time to time by the Secretary of the Treasury to determine tariffs.<sup>70</sup>

Continuity, duration, and tenure present an intuitive but faulty distinction. Some continuous positions (say, administrative assistants at the EPA) might not be officers, and some short-term positions might be. The early emphasis on continuity can be construed as errant language that illustrates the functional difference between officers and contractors. The alters-legal-rights test, on the other hand, captures a central distinction between officers and non-officers. It explains *both* the early distinction between officers and contractors and the modern distinction between officers and employees.

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64. See generally *OLC Opinion*, *supra* note 21 (arguing that tenure, continuity, and duration are relevant factors).

65. *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747).

66. See *id.*; see also *supra* text accompanying notes 35-36.

67. *Maurice*, 26 F. Cas. at 1214.

68. See generally NICHOLAS PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940* (2013) (describing the rise of bureaucratic governance in American history).

69. See *United States v. Germaine*, 99 U.S. 508 (1878).

70. See *Auffmordt v. Hedden*, 137 U.S. 310 (1890).

*B. Defending the Alters-Legal-Rights Test*

The alters-legal-rights test also suits two distinct constitutional and normative values. First, it accords with constitutional principles inherent in the notion of a limited government and inferable from the exclusive authority grants of the Vesting Clauses. Second, it balances the two normative concerns that I argue drive the Court's historical Appointments Clause jurisprudence.

First, constitutional limited government entails that all governmental authority derives from the Constitution itself. The textual and structural argument that supports this doctrine turns on a reading of the Vesting Clauses. In these three clauses, the Constitution vests all of the power of the U.S. government.<sup>71</sup> These create three, and only three, kinds of governmental power.<sup>72</sup> Yet because this power requires agents to carry it into effect, the Constitution must also provide the means to select its personnel. The Constitution itself creates some offices including the president and federal legislators,<sup>73</sup> but it leaves to Congress the power to structure and define the government with the Necessary and Proper Clause.<sup>74</sup>

Yet Congress does not have *unlimited* power to effectuate governmental power. The private nondelegation doctrine constrains Congress's implementation methods so that it "cannot delegate regulatory authority to a private entity."<sup>75</sup> So Congress may structure the government to exercise constitutional powers, but it must rely on offices that it establishes within branches that the Constitution creates. The Appointments Clause therefore requires that *all* offices be "established by law."<sup>76</sup> As Justice Marshall noted, *if* "the agent of fortifications be an officer of the United States," then "his office ought to be established by law."<sup>77</sup> The Appointments Clause cabins Congress's Necessary and Proper power. It constrains how the powers of the Constitution might be vested in executive offices, and it provides a procedure to elevate private citizens to public

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71. See U.S. CONST. art. I, § 1; art. II, § 1, cl. 1; art. III, § 1.

72. See generally Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 559 (1994) (arguing that the Constitution's text enumerates only three kinds of governmental power).

73. These legislators are not officers within the meaning of the Constitution. See Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995).

74. U.S. CONST. art. I, § 8.

75. See *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1231 (2015) (citing *Ass'n of Am. R.R. v. U.S. Dep't of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013)).

76. U.S. CONST. art. II, § 2.

77. See *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747).

office. “Officer” must be read alongside the Vesting Clause so that no private citizens (even employees) may exercise the power of the United States.

Second, the alters-legal-rights test also balances the competing purposes of Appointments Clause jurisprudence. Despite the doctrinal confusion, the case law reveals two overarching and competing concerns: (1) accountability for significant authority and (2) efficiency in executive implementation. These normative concerns remain salient today,<sup>78</sup> but we find them both voiced and balanced as early as *Maurice*.

On the one hand, Justice Marshall emphasizes that the Appointments Clause ensures an accountable government. All offices, the opinion notes, “shall be established by law.”<sup>79</sup> These officers remain accountable to Congress, to some extent, even when Congress exercises authority under the Inferior Officers Appointments Clause to vest the sole authority to appoint in the President, the courts of law, or the heads of departments.<sup>80</sup> The executive has no authority “to create in all laws of legislative omission, such offices as might be deemed necessary for their execution, and afterwards to fill those offices.”<sup>81</sup> *Germaine* echoes this concern, noting that “all persons who can be said to hold an office . . . were intended to be included within one or the other of these modes of appointment.”<sup>82</sup> The President, then, always depends on Congress to provide for the appointment of his officers, and the public will know that he (or the “Heads of Department” or the “Courts of Law”) is to blame when those officers fail in their duties.

On the other hand, these accountability concerns compete with efficiency concerns. According to Justice Marshall, the executive branch must be given some leeway to implement the laws. Congress charges the President with a task, and Congress “appropriate[s] large sums of money to enable him to carry these acts into execution.”<sup>83</sup> With these funds and this mission, he has the authority to “employ any means which the Constitution and the laws of the United States placed under his control,” including “by contract.”<sup>84</sup> Similarly, *Germaine* notes that the Commissioner of Pensions must have assistance. The

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78. See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (defending the era of “presidential administration” because it serves the often-competing constitutional values of efficiency and accountability).

79. See *Maurice*, 26 F. Cas. at 1214.

80. See U.S. CONST. art. II, § 2.

81. See *Maurice*, 26 F. Cas. at 1213.

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

83. *Maurice*, 26 F. Cas. at 1214.

84. *Id.*

surgeon was “but an agent of the commissioner, appointed . . . to procure information needed to aid in the performance of his own official duties.”<sup>85</sup> Driving home the surgeon’s insignificance under the Appointments Clause, the *Germaine* Court analogized the surgeon to a man charged with “furnish[ing] each agency with [coal for] fuel.”<sup>86</sup> Though hardly rising to the level of officers, the assistance of these “lesser functionaries” remains crucial to effective governance. The Constitution’s Appointments Clause does not so shackle officers of the executive branch that they cannot hire and contract with private citizens to “aid in the performance of [their] own official duties.”<sup>87</sup>

Distinguishing between officers and employees based on their capacity to *alter legal rights or obligations on behalf of the United States* draws a clear and normatively desirable line between these two interests. It gives executive agencies broad latitude to hire employees or contractors to assist with the insignificant activities crucial to a functioning bureaucracy. To modernize the *Germaine* example, it allows the executive to hire HVAC specialists to install air conditioning at the EPA. The example might sound trite, but *Buckley’s* “significant authority” language does not draw a clear line between employees and officers, and the obvious and trite examples soon shade into more difficult questions. Do the administrative assistants at EPA headquarters exercise significant authority? What about the chief of staff to the Commissioner of the SEC? What about a tag-along OSHA inspector without the power to issue citations, but the functional power to spot violations that will be rubber-stamped by a superior? Each of these might do work that seems “significant,” but none has the actual authority to alter the obligations of private parties. Their suggestions go into effect only when the Commissioner or the Secretary issues the order with her signature. This test allows officers to hire helpers to execute their statutory mandates, but it preserves Congress’s Necessary and Proper Clause power to structure the administrative state, and it preserves the chain of accountability from the affected citizen, to the appointed officer, to the appointing official, and then to Congress itself.

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85. *Germaine*, 99 U.S. at 512.

86. *Id.*

87. *Id.*

### III. RESOLVING THE CIRCUIT SPLIT

This alters-legal-rights test resolves the question presented in the D.C. Circuit’s grant of rehearing en banc: whether SEC ALJs count as inferior officers rather than employees for purposes of the Appointments Clause.<sup>88</sup>

Consider the three reasons that the Tenth Circuit gave in *Bandimere* for ruling that the SEC’s ALJs were inferior officers. First, “the office of the SEC ALJ was ‘established by law.’”<sup>89</sup> This does little to establish that the ALJ is an officer. Any office must be “established by law,”<sup>90</sup> but not all things established by law rise to the level of officers. Congress has, for example, provided by law: “Each Executive agency, military department, and the government of the District of Columbia may employ such number of employees . . . as Congress may appropriate for from year to year.”<sup>91</sup> Similarly, the President hires staff members in accordance with federal law, but the brute fact of this statutory authority should not automatically render the hires officers.<sup>92</sup> Second, *Bandimere* argues that “statutes set forth SEC ALJs’ duties, salary, and means of appointment.”<sup>93</sup> This too is insufficient. The specification of duties and salary by statute has some merit in the post-Civil War trilogy of cases, where tenure and duration were touchstones. But under the alters-legal-rights test, the question is what kind of work those duties entail, not whether they have been named in a statute.

The third reason comes closest to the satisfying this test. The court wrote: “SEC ALJs exercise significant discretion in performing ‘important functions’ . . . . This includes authority to shape the administrative record by taking testimony, regulating document production and depositions, ruling on the admissibility of evidence, receiving evidence, ruling on dispositive and procedural motions, issuing subpoenas, and presiding over trial-like hearings.”<sup>94</sup> This laundry list of powers includes one that arguably triggers the requirements of

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88. See *Raymond J. Lucia Cos., Inc. v. SEC*, No. 15-1345, 2017 U.S. App. LEXIS 2732, at \*2 (D.C. Cir. Feb. 16, 2017), *granting reh’g en banc and vacating* 832 F.3d 277 (D.C. Cir. 2016).

89. *Bandimere v. SEC*, 844 F.3d 1168, 1179 (10th Cir. 2016) (quoting *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991)).

90. See, e.g., *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747).

91. 5 U.S.C. § 3101 (2012).

92. See 3 U.S.C. § 105 (2012) (“[T]he President is authorized to appoint and fix the pay of employees in the White House Office without regard to any other provision of law regulating the employment or compensation of persons in the Government service. Employees so appointed shall perform such official duties as the President may prescribe.”).

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

94. *Id.* at 1179-80; see also 5 U.S.C. § 556 (2012) (detailing ALJ powers).

the Appointments Clause: an ALJ has the power to issue subpoenas, which require the parties to appear before it.<sup>95</sup> The rest of the requirements, however, likely do not meet the alter-legal-rights standard. Like the surgeon in *Germaine*, the ALJs simply “procure information needed to aid in the performance of [the agency’s] own official duties.”<sup>96</sup>

The D.C. Circuit’s decision raises the most interesting question under this test. What if Congress gives the ALJs the authority to issue a final decision that alters legal rights, but the agency regulations decline this power? In the SEC’s situation, the statute allowed that “the action of . . . [the] administrative law judge” could “be deemed the action of the Commission.”<sup>97</sup> But the Commission promulgated rules that prevent these ALJ determinations from becoming the final order of the agency. Instead, the Commission “retained full decision-making powers.”<sup>98</sup> The D.C. Circuit concluded, then, that “the Commission’s ALJs neither have been delegated sovereign authority to act independently of the Commission nor, by other means established by Congress, do they have the power to bind third parties . . . .”<sup>99</sup>

This line of reasoning assumes that agency discretion can transform an officer into an employee by withholding the position’s statutorily-granted authority. Viewed as a separation-of-powers matter, though, this seems wrong. The Appointments Clause requires Congress to establish offices by law before those offices can execute laws.<sup>100</sup> The relevant executive-branch actor might decline to exercise his or her full power, or might (as here) be denied this full power by a superior, but the Constitution allows Congress to create offices only

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95. See 5 U.S.C. § 556(c)(2) (2012). Though the ability to rule on dispositive and procedural motions might seem to trigger the alters-legal-right requirement, it only does so if the ALJs have the statutory capacity to make those decisions *with finality*. Otherwise, Congress has created a scheme wherein the ALJ exercises recommendatory power with respect to the agency as a whole. Under my theory and under *Dalton*, these recommendations would not trigger the Appointments Clause because the agency has the final legal authority for the decision. Precedent also likely forecloses the argument that ruling on non-final dispositive motions triggers the Appointments Clause. See *supra* text accompanying notes 85-87 (discussing *Germaine*).

96. *United States v. Germaine*, 99 U.S. 508, 512 (1878).

97. 15 U.S.C. § 78d-1(c) (2012).

98. *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 286 (D.C. Cir. 2016).

99. *Id.*

100. See *Maurice*, 26 F. Cas. 1211, 1213 (C.C.D. Va. 1823) (No. 15, 747) (“[Article II, § 2] makes a general provision, that the president shall nominate, and by and with the consent of the senate, appoint to all offices of the United States, with such exceptions only as are made in the constitution; and that all offices (with the same exceptions) shall be established by law . . . . [This interpretation] accords best with the general spirit of the constitution, which seems to have arranged the creation of office among legislative powers.”).

through bicameralism and presentment.<sup>101</sup> These creatures of statute, then, should not be altered in their nature by agency action. The Appointments Clause should govern whenever the statute creates a position with the power to alter legal rights.

*Maurice* seems to accord with this reasoning. In determining whether the office had been established by law, Justice Marshall rejected the argument that regulations issued by the Secretary of War could create new offices.<sup>102</sup> *Maurice* could be distinguished, perhaps, if we think the Appointments Clause prevents the executive branch from creating *new* offices but still allows it to withhold officer status from certain positions. But the decision's emphasis on the office's statutory nature, along with basic notions of congressional supremacy, suggest that the executive may not transform an officer into an employee.

In short, two factors counsel in favor of the Tenth Circuit's determination that SEC ALJs should be considered inferior officers. First, Congress gives the ALJs authority to issue final orders on behalf of the Commission. These orders alter the legal rights and obligations of the parties before the ALJ. The Commission's decision to withhold this power from the ALJs ought not change the nature of the office. Second, the ALJs in question have the power to issue subpoenas. They may require parties to appear before the agency with the coercive power of the state at their flank. SEC ALJs should be considered inferior officers for purposes of the Appointments Clause.

## CONCLUSION

This Essay argues that the Court should adopt a formalistic definition of "officers of the United States" under the Appointments Clause. Any person who *alters legal rights and obligations on behalf of the United States* should be appointed in accordance with the Constitution's detailed requirements. It argued that this test has roots in early Court doctrine, balances the normative interests that Court precedent evinces, and accords with bedrock notions of limited constitutional government.

Admittedly, this definition might raise some policy concerns. The reader might follow Justice Breyer's *Free Enterprise* dissent and claim that the "term's sweep is unusually broad,"<sup>103</sup> and worry that its breadth might "threaten[]" to

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101. See U.S. CONST. art. I, § 7.

102. *Maurice*, 26 F. Cas. at 1215.

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

disrupt severely the fair and efficient administration of the laws.”<sup>104</sup> As the *Bandimere* dissent points out, this reading arguably puts “all federal ALJs . . . at risk of being declared inferior officers.”<sup>105</sup> Under *Free Enterprise*, this determination could render their for-cause removal provisions unconstitutional.<sup>106</sup> *Free Enterprise* held that dual layers of for-cause removal provisions violate the separation of powers—a condition met in the SEC’s context.<sup>107</sup> In response, though, Congress could simply vest responsibility for ALJ appointments in the “Heads of Departments.”<sup>108</sup> Alternatively, as one scholar has suggested, it might be constitutional to vest their appointment in the D.C. Circuit.<sup>109</sup> The danger to the administrative state’s delicate balancing has been overstated. Further, any danger of disruption arose in the first place because of the Court’s “teeter-totter approach to determining which federal officials are subject to the Appointments Clause.”<sup>110</sup> A clear statement from the Court about the meaning of “inferior officer” would prevent Congress from crafting delicate constitutional schemes atop shaky constitutional foundations.

Perhaps more concerning, though, the loss of for-cause removal protections for ALJs could give policy-oriented agency heads more oversight over the supposedly independent ALJs. Yet statutory constraints remain. The APA would still require that “[t]he functions of [ALJs] . . . be conducted in an impartial manner.”<sup>111</sup> Judicial review under section 706 would also ensure that ALJ determinations remain “supported by substantial evidence” and that the determinations hew reasonably close to the statutory provision.<sup>112</sup> However, even if the ALJs lose some of their supposed impartiality, the harm to the public might be overstated. ALJs have always remained members of the *executive branch*. Their decisions have always been reversible by the same policy-oriented agency heads that might soon have power to remove them. If institutional architects find the notion of politicized adjudications unsettling, the response should not be to torture the meaning of the Appointments Clause. It should be to transfer adjudicative authority from the political branch to a branch with constitutionally granted independence: Article III courts.

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104. *Id.* at 514.

105. *Bandimere v. SEC*, 844 F.3d 1168, 1199 (10th Cir. 2016) (McKay, J., dissenting).

106. *See Free Enter.*, 561 U.S. at 543 (2010) (Breyer, J., dissenting).

107. *See id.* at 477 (majority opinion).

108. *See* U.S. CONST. art. II, § 2.

109. *See, e.g., Kent Barnett, Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 832 (2013).

110. *Bandimere*, 844 F.3d at 1194 (McKay, J., dissenting).

111. 5 U.S.C. § 556(b)(3) (2012).

112. *See* 5 U.S.C. § 706 (2012).

CLARIFYING THE EMPLOYEE-OFFICER DISTINCTION IN APPOINTMENTS CLAUSE  
JURISPRUDENCE

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