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# THE ATTORNEY GENERAL AND EARLY APPOINTMENTS CLAUSE PRACTICE

*Aditya Bamzai\**

## INTRODUCTION

Among the structural provisions of the Constitution are a series of rules specifying the method by which the federal government will be staffed. One of those rules, contained in what is known as the Appointments Clause, establishes the procedures for appointing “all . . . Officers of the United States, whose Appointments are not . . . otherwise provided for” in the Constitution—requiring one mechanism (presidential appointment and senate confirmation) for “principal” officers and permitting a set of alternatives (appointment by the “President alone,” the “Courts of Law,” or the “Heads of Departments”) for “officers” who are considered “inferior.”<sup>1</sup> The Clause has traditionally been understood to require these appointment procedures for a subset of federal government employees who meet some constitutional threshold that establishes their status as “officers,” rather than for all federal employees.<sup>2</sup> In light of that understanding, the Clause naturally raises a question about the precise boundary between constitutional “officers” and other federal “employees”—a question that has recently been the subject of substantial litigation and extensive treatment within the executive branch and the scholarly literature.<sup>3</sup>

The caselaw and the scholarly debate, however, have overlooked a significant source of early interpretations of the Clause: opinions construing the Clause written by the Attorneys General of the United States during the nation’s first century. Ever since the Judiciary Act of 1789, the Attorney General has been authorized “to prosecute and conduct all suits in the Supreme

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1 U.S. CONST. art. II, § 2, cl. 2.

2 See *infra* Section I.A.

3 See *id.*; see, e.g., GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 190 (7th ed. 2016) (noting that “[t]he last few decades have produced, by historical standards, a veritable torrent of litigation on the Appointments Clause”).

Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States.”<sup>4</sup> Using this authority, several Attorneys General opined on the Clause’s meaning. This Article examines their heretofore-neglected opinions, specifically addressing the opinions’ treatment of the constitutional status of the “deputies” of “officers.”

There are two reasons to review these sources. First, the opinions of the Attorneys General provide evidence of the appointments and separation-of-powers practices of the United States in its early years. From establishment Virginians, to Jacksonians, Whigs, and Republicans, the Attorneys General created a body of precedent on which each subsequent holder of the office relied and built. In an area of law—namely, interpretation of the Appointments Clause—where early court opinions are hard to come by, executive branch practice furnishes a significant trove of material by which to understand the constitutional text.

Second, the First Congress enacted statutes that envisioned the appointment of certain “deputies” to “officers” in a manner that would be inconsistent with the requirements of the Appointments Clause if those “deputies” were themselves considered “officers.” For example, among other statutory provisions, Congress enacted a statute that permitted United States Marshals—who were likely neither “Heads of Departments,” nor (needless to say) the “President” or a “Court of Law”—to appoint their own deputies.<sup>5</sup> That statutory provision, and other comparable ones, raise the question whether the deputy marshals, who in certain respects exercised authority similar to the marshals themselves, were constitutional “officers” or “employees.” If the “deputies” were “officers,” their appointments had to comply with the requirements of the Appointments Clause—which they did not. If the “deputies” were “employees,” as opposed to “officers,” their appointments would not need to comply with the Appointments Clause’s requirements. But classifying the “deputies” as “employees” outside the scope of the Appointments Clause would require some theory to explain why their roles, as opposed to the roles of their superiors, did not qualify for “officer” status under the Constitution.

That question has recently been the subject of discussion at the Supreme Court and within the scholarly literature. In *Lucia v. Securities and Exchange Commission*, which concerns whether Administrative Law Judges (“ALJs”) are “officers” or “employees,” the Court may well confront these early practices of the First Congress and address whether a federal official who otherwise meets the threshold for “officer” status should not be treated as an “officer” if

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4 Judiciary Act of 1789, § 35, 1 Stat. 73, 93. The Act also authorized the Attorney General to provide advice on legal questions “when requested by the heads of any of the departments, touching any matters that may concern their departments.” *Id.* Under the Department of Justice’s present configuration, the Office of Legal Counsel performs this advice-giving function. See 28 C.F.R. § 0.25 (2017) (setting out the functions of the Office of Legal Counsel).

5 See *infra* Section I.B.

she can be classified as a “deputy” to a superior officer.<sup>6</sup> In one of the few articles to address the First Congress’s practice, Professor Jennifer Mascott contends that the “deputies” whose appointments were authorized by the First Congress were not “officers” because their principals were required to assume personal financial liability for the deputy’s actions.<sup>7</sup> With the exception of Mascott’s article, however, there is little scholarship on the status of “deputy” officers in the constitutional scheme.

The cases and scholarship, thus far, have not reviewed the opinions of the Attorneys General. In their opinions, the Attorneys General confronted and explained this practice, thus providing critical evidence on how interpreters of the Constitution understood the position of “deputies” (and the Appointments Clause more broadly) in the nation’s early years. Taken together, their opinions establish that an official was a constitutional “deputy” when he exercised his “office in right of another” or was the “shadow” of a principal, in the sense that the “deputy” had no statutory authority distinct from the principal; the principal was financially liable for the deputy’s actions; or the deputy held office at the pleasure of the principal—and would even, absent express congressional provision, lose his position when the principal departed. Such a “deputy” did not need to be appointed pursuant to the requirements of the Appointments Clause. But the exception did not

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6 As of the time of this writing, the Court had yet to decide *Lucia*. At the oral argument, the question of “deputies” or “agents” was discussed on multiple occasions. See Transcript of Oral Argument at 23, *Lucia v. SEC*, No. 17-130 (U.S. Apr. 23, 2018), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2017/17-130\\_41p3.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-130_41p3.pdf) (question from Sotomayor, J.) (“You know, a U.S. marshal was – deputy wasn’t an officer by a – and customs inspectors weren’t officers, but shipmasters were.”); *id.* at 53 (question from Sotomayor, J.) (“So what’s the line that makes somebody an agent or not? Can we speak about ALJs in this context being agents of the SEC commissioners when the SEC commissioners didn’t pick them, don’t supervise them, essentially don’t have anything to do with their work other than reviewing it?”). The argument was raised in a brief to the Court by the Court-Appointed Amicus Curiae. See Brief for Court-Appointed Amicus Curiae in Support of the Judgment Below at 22, *Lucia v. SEC*, No. 17-130 (U.S. Mar. 26, 2018), 2018 WL 1531942 (contending that, even if a federal official exercises “significant authority,” thereby meeting the test for “officer” status under Supreme Court caselaw, the official is not a constitutional “officer” unless she acts “in her own name rather than in the name of a superior officer”); see also *id.* at 32 (“Although the authority to bind the government or private parties is a necessary precondition of constitutional officer status . . . it is not sufficient.”); *id.* at 48 (contending that SEC ALJs are “akin to [these] non-officer deputies” because “Congress did not delegate [them] any power to issue decisions in their own name”).

7 Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 517 (2018) [hereinafter Mascott, *Who Are Officers*] (speculating that deputies were not thought to be officers because “the primary officers represented by deputy marshals and deputy customs officials could be held personally liable for their deputies’ misdeeds”). See generally JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 36–38, 73–78 (2012) (discussing suits against officers); see also Jennifer Mascott, *Missing History in the Court-Appointed Amicus Brief in Lucia v. SEC*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 28, 2018), <http://yalejreg.com/nc/missing-history-in-the-court-appointed-amicus-brief-in-lucia-v-sec/>.

swallow the rule: Officials that lacked these attributes, and the resulting close link to a principal, were deemed not to be “deputies,” but rather “officers” who had to be appointed pursuant to the Clause.

This Article proceeds as follows. In Part I, I provide an overview of the Appointments Clause and the officer-employee line as it currently stands in caselaw and in executive branch practice. I also summarize the Appointments Clause practices of the First Congress. In Part II, I address the opinions of the Attorneys General, and their attempt to rationalize and to explain the statutes enacted by the First Congress and the appointments practices of the nation. In Part III, I derive some implications and conclusions, generally for the Appointments Clause and specifically for the Administrative Law Judge controversy that is currently the subject of a Supreme Court case in *Lucia*.

## I. THE APPOINTMENTS CLAUSE AND EARLY APPOINTMENTS PRACTICES

### A. *The Constitution and the Leading Cases*

The Constitution establishes specific measures for staffing particular federal offices and, then, in the Appointments Clause a catch-all provision for all other “officers.” Article I of the Constitution contains provisions establishing a selection process (as well as qualifications) for the President and Vice President,<sup>8</sup> members of the House of Representatives,<sup>9</sup> and the Senate.<sup>10</sup> With the exception of those offices and the Supreme Court, the creation of offices is generally in the hands of Congress, which may supplement the few positions created by the Constitution with additional “offices” using its authority to enact laws “necessary and proper” for executing the federal government’s powers.<sup>11</sup> Once Congress creates those offices, however, the Appointments Clause specifies the mechanism for filling them. It provides that:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>12</sup>

The Clause, the Supreme Court has said, is “designed to preserve political accountability relative to important Government assignments,”<sup>13</sup> by

8 See U.S. CONST. art. I, § 2, cl. 2–6; see also *id.* amend. XII, XX, XXII–XXIII, XXV.

9 See *id.* art. I, § 2, cl. 2–4; *id.* art. I, § 4, cl. 1; *id.* art. I, § 5, cl. 1; *id.* art. I, § 6, cl. 2.

10 See *id.* art. I, § 3, cl. 1–3; *id.* art. I, § 4, cl. 1; *id.* art. I, § 5, cl. 1; *id.* art. I, § 6, cl. 2; *id.* amend. XVII.

11 See *id.* art. I, § 8, cl. 18; see also SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 172–75* (2015) (discussing office creation by Congress and, in the case of diplomatic posts, by the President).

12 U.S. CONST. art. II, § 2, cl. 2.

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

“preventing the diffusion of the appointment power.”<sup>14</sup> On its face, the Clause distinguishes between two sets of “officers”—“principals” and “inferiors”—specifying a single person (the President, with Senate consent) who may appoint the former and three bodies (the President, Courts of Law, and Heads of Departments) who may appoint the latter. Though not readily apparent from the Clause’s text, a second distinction—between “officers” who must be appointed pursuant to the Clause’s procedures and “employees” who need not be so appointed—is embedded in its terms. As a result, not all workers of the federal government qualify as “officers” and, hence, not all government employees must be appointed according to the process set forth in the Appointments Clause.

This latter distinction, in turn, raises a question about where to draw the line between constitutional “officers” and “employees.” In a series of cases, the Court has said that the way to distinguish “officers” from “employees” is by focusing on the degree of authority that a government official wields. Under modern caselaw, where an official exercises “significant authority pursuant to the laws of the United States,” that person is an “Officer of the United States” and “must, therefore, be appointed in the manner prescribed by” the Appointments Clause.<sup>15</sup> Earlier cases, such as Chief Justice Marshall’s opinion while riding circuit in *United States v. Maurice*, defined an officer using a slightly different verbal formulation as anyone performing a “duty” that is 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.”<sup>16</sup>

The executive branch, in a 2007 opinion by the Office of Legal Counsel, has adopted yet another formulation. OLC reasoned that the term “officer” encompassed any “position to which is delegated by legal authority a portion of the sovereign powers of the federal government and that is ‘continuing.’”<sup>17</sup> That test, according to the opinion, typically excluded an official

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14 *Ryder v. United States*, 515 U.S. 177, 182 (1995) (internal quotation marks omitted) (quoting *Freytag v. Comm’r*, 501 U.S. 868, 878 (1991)).

15 *Buckley v. Valeo*, 424 U.S. 1, 125–26, 143 (1976) (per curiam) (holding that the members of the Federal Election Commission were “Officers” who had to be appointed pursuant to the Appointments Clause); *see id.* at 267 (White, J., concurring in part and dissenting in part) (agreeing with the per curiam opinion on this issue); *see also Edmond*, 520 U.S. at 662 (holding that members of the Coast Guard Court of Criminal Appeals are “inferior Officers”); *Freytag*, 501 U.S. at 880–82 (holding that special trial judges are “inferior Officer[s]” rather than the “lesser functionaries” known as employees).

16 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747). Other important Supreme Court cases include *Auffmordt v. Hedden*, 137 U.S. 310 (1890) (holding that a merchant appraiser was not an officer because he was “selected for the special case” and had “no general functions, nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case”), and *United States v. Germaine*, 99 U.S. 508, 512 (1878).

17 Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 73 (2007); *id.* at 83 (“[T]he term ‘office’ implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office.” (quoting Opinion of the Justices, 3 Greenl. (Me.) 481, 482 (1822))); *see also* FLOYD R. MECHEM, A

who “occupies a purely advisory position . . ., who is a typical contractor . . ., or who possess his authority from a state.”<sup>18</sup> The test also excluded a position that is “personal, transient, or incidental.”<sup>19</sup> But it included officials who “bind[ ] the government or third parties for the benefit of the public, such as by administering, executing, or authoritatively interpreting the laws,” as well as functions that “have long been understood to be sovereign functions, particularly the authority to represent the United States to foreign nations or to command military force on behalf of the government.”<sup>20</sup> It also included, among many other officials, those who have “the public authority to arrest criminals, impose penalties, enter judgments, and seize persons or property.”<sup>21</sup>

### B. *Appointments Clause Practices of the First Congress*

The Supreme Court often tests the validity of present-day constitutional doctrine and practice by referring to the actions of the First Congress.<sup>22</sup> In the case of practice under the Appointments Clause, legislation enacted by the First Congress may be thought particularly relevant, given the extensive attention that Congress gave to matters of public administration.<sup>23</sup>

More specifically, the practices of the First Congress are particularly notable because they demonstrate broad consistency with modern Appoint-

TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 1, at 1–2 (1890) (“A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercise by him for the benefit of the public.”).

18 31 Op. O.L.C. at 77.

19 *Id.* (internal quotation marks omitted) (giving as examples diplomatic agents, short-term contractors, *qui tam* relators, and other ad hoc or temporary officials); *see, e.g.*, Alexander Hamilton, *The Defence No. 37*, reprinted in 20 THE PAPERS OF ALEXANDER HAMILTON 13, 20 (Harold C. Syrett ed., 1974) (arguing that commissioners on a tribunal established by the Jay Treaty were “not in a strict sense officers,” but rather “arbitrators between the two Countries” (emphasis omitted)).

20 31 Op. O.L.C. at 77.

21 *Id.* at 88. A recent article by Professor Jennifer Mascott has advocated a broader understanding of the term “officer.” In her article, Professor Mascott argues that the term “officer” encompasses “any government official with responsibility for an ongoing governmental duty.” Mascott, *Who Are Officers*, *supra* note 7, at 443. For other relevant scholarship on the constitutional status of “officers,” see John F. Duffy, *Essay, Are Administrative Patent Judges Unconstitutional?*, 77 GEO. WASH. L. REV. 904, 904–06 (2009); E. Garrett West, *Clarifying the Employee-Officer Distinction in Appointments Clause Jurisprudence*, 127 YALE L.J. FORUM 42 (2017).

22 *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186 (2003); *see also* *Stuart v. Laird*, 5 U.S. 299, 309 (1803).

23 *See* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1072 (2006); *see also* 8 Annals of Cong. 2294, 2304 (1799) (statement of Rep. Harper) (describing the term “office” as deriving “from the Latin word *officium*, which signifies duty, charge, or employment” and claiming that an “office” is “a post, place, or employment, which requires the performance of some duty of a public nature”).

ments Clause jurisprudence—with one important exception. As an initial matter, during the First Congress, a number of statutes created offices to which officers were appointed pursuant to Article II procedures.<sup>24</sup> Those offices included clerks who maintained statutorily required records.<sup>25</sup> At the same time, Congress appeared to treat some employees—specifically, copyists, messengers, and office-keepers—as nonofficers by failing to require that they be appointed under Article II.<sup>26</sup> That distinction—between certain “officers” with sufficiently “significant” tasks and nonofficers who served in less important roles—maps onto current doctrine, which requires a federal official to exercise “significant authority” to qualify for “officer” status.

In a significant set of statutes, however, Congress vested appointment authority in officials who were not the President, a Court of Law, or a Head of a Department. In these statutes, Congress authorized various officers—who were likely inferior officers themselves<sup>27</sup>—to appoint their own “deputies.”<sup>28</sup> Specifically, Congress enacted statutes authorizing marshals, collectors, naval officers, and surveyors to appoint their own deputies. In some instances, Congress allowed appointments “in cases of occasional and necessary absence, or of sickness,”<sup>29</sup> which may be consistent with modern Appointments Clause understandings that requires the exercise of some

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24 For an exhaustive study of the First Congress (on which I have relied and to which I am indebted), see Mascott, *Who Are Officers*, *supra* note 7, at 507–45.

25 See Act of Aug. 7, 1789, § 2, 1 Stat. at 50 (clerks for Department of War); Act of July 27, 1789, § 2, 1 Stat. at 29 (Foreign Affairs); *cf.* Act of Sept. 2, 1789, §§ 1, 7, 1 Stat. at 65, 67 (“Assistant” to the Secretary); Act of Sept. 11, 1789, § 2, 1 Stat. at 68 (authorizing the “heads of the three departments” to “appoint” such additional clerks “as they shall find necessary”). See generally Mascott, *Who Are Officers*, *supra* note 7, at 510–15.

26 See Mascott, *Who Are Officers*, *supra* note 7, at 512 & n.391; see also *id.* at 528–30 (discussing the status of lower-ranked military officials such as “sergeants” and “corporals”). For a survey of other officials, see *id.* at 531–37.

27 See, e.g., Act of Aug. 4, 1790, ch. 35, § 6, 1 Stat. 145, 155 (requiring collectors to keep records in such “form as may be directed by the proper department, or officer having the superintendence of the collection of the revenue” and, thereby, suggesting that collectors were subordinate to the Secretary of the Treasury); Judiciary Act of 1789, § 27, 1 Stat. at 87 (authorizing the appointment of marshals without suggesting that they were part of any executive department); see also Mascott, *Who Are Officers*, *supra* note 7, at 515–16 & n.424, 526–27. Under modern conceptions of the Appointments Clause, the “Heads of Departments” authorized to appoint “inferior Officers” include “the heads of all agencies immediately below the President in the organizational structure of the Executive Branch.” *Freytag v. Comm’r*, 501 U.S. 868, 917–22 (Scalia, J., concurring in part and concurring in the judgment); see also *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510–11 (2010) (appearing to embrace Justice Scalia’s test from *Freytag*).

28 Mascott, *Who Are Officers*, *supra* note 7, at 515–22.

29 Act of Aug. 4, 1790, ch. 35, § 7, 1 Stat. 145, 155 (repealed 1799) (permitting collectors, naval officers, and surveyors, in those situations, to appoint deputies to “exercise and perform their several powers, functions and duties”); see *id.* (providing that deputies acted “under the[ ] hands and seals” of officers who were “answerable” of the deputies’ execution of the officers’ trust); see also Act of Mar. 3, 1791, ch. 26, § 1, 1 Stat. 219, 219 (amended 1799) (authorizing inspectors to “depute” someone for a discrete task); Act of Mar. 3, 1791, ch. 15, § 50, 1 Stat. 199, 210 (amended 1792) (authorizing internal revenue

“continuing” government functions before finding “officer” status. In other instances, such as in the case of marshals, Congress authorized the appointment of deputies in the assistance of the marshal’s duties with no suggestion that the appointments would be temporary.<sup>30</sup> On the one hand, the deputy marshal’s status seemed closely tied to the marshal. The statute allowed the deputy marshal to continue to execute writs when a marshal died, but in the name of the deceased marshal rather than the deputy’s name.<sup>31</sup> The statute further required the marshal to post a bond that would cover the actions of his deputies.<sup>32</sup> On the other hand, the deputy marshal was required by law to take an oath to faithfully perform the duties of “the office of . . . marshal’s deputy,”<sup>33</sup> and was removable by district court judges, rather than the marshal.<sup>34</sup>

Not all “deputies” were treated as nonofficers. For example, when Congress created the Post Office, it authorized the Postmaster General to appoint deputies and an assistant.<sup>35</sup> In addition, later Congresses treated “deputy quartermasters” as commissioned military officers,<sup>36</sup> and provided for the appointment of an “apothecary-general, and one or more deputies” and “officers of the United States.”<sup>37</sup> These examples suggest that the term “deputy,” by itself, did not convert an officer into a nonofficer.

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supervisors to assign deputies to administer oaths); *id.* § 52, 1 Stat. at 211 (authorizing internal revenue officers to carry out inspections through deputies).

30 See Judiciary Act of 1789, § 27, 1 Stat. 73, 87 (“[A] marshal shall be appointed . . . to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty, and to appoint as there shall be occasion, one or more deputies.”); see also *id.* § 28, 1 Stat. at 87–88.

31 *Id.* § 28, 1 Stat. at 87.

32 *Id.* §§ 27–28, 1 Stat. at 87; see also *Suits Against Marshals*, 1 Op. Att’y Gen. 92, 92 (1800) (“If the marshal or his deputy commit a misfeasance in office to the injury of the United States, compensation may be obtained for the United States by an action of debt upon the bond given by the marshal in pursuance of the 27th section of the judicial act, which sought may be brought against the marshal and his sureties jointly, or either of them.”); Mascott, *Who Are Officers*, *supra* note 7, at 519 & nn.441–43.

33 Judiciary Act of 1789, § 27, 1 Stat. at 87; see also Act of May 2, 1792, ch. 28, § 9, 1 Stat. 264, 265 (repealed 1795) (“[T]he marshals of the several districts and their deputies, shall have the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states.”).

34 Judiciary Act of 1789, § 27, 1 Stat. at 87; see also Act of May 8, 1792, ch. 36, § 7, 1 Stat. 275, 278 (amended 1821) (imposing potential criminal penalties on deputies).

35 See Act of Sept. 22, 1789, § 1, 1 Stat. 70, 70 (amended 1790); see, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510–11 (2010) (suggesting that assistant and deputy postmasters were inferior officers); Mascott, *Who Are Officers*, *supra* note 7, at 521 (addressing deputy postmasters).

36 Act of Mar. 3, 1795, ch. 44, § 11, 1 Stat. 430, 431 (amended 1796).

37 Act of Mar. 2, 1799, ch. 27, §§ 1, 3, 1 Stat. 721, 721 (amended 1802).

## II. THE OPINIONS OF THE ATTORNEYS GENERAL

What to make of these First Congress practices? It seems undoubtedly true that the term “deputy” is not dispositive. Like the word “employee,” the word “deputy” cannot be found in the Appointments Clause or, for that matter, the Constitution. The background principle in administrative law is that functions, not labels, determine the constitutional status of a federal administrative body—and thus the fact that a particular officer is labeled a deputy, or not a deputy, should be irrelevant to their constitutional status under the Appointments Clause.<sup>38</sup> Thus, it seems clear that the mere label “deputy” ought not to matter in drawing the line between “inferior officer” and “employee” status. But if not labels, what explains the treatment of “deputy” officers by the First Congress?

Five Attorneys General opined on the question of the constitutional status of “deputies” to “officers” during the course of the Nation’s first century. One other Attorney General presented the executive branch position to the Supreme Court, which accepted it while interpreting a statute in *United States v. Hartwell*.<sup>39</sup> In this Part, I distill their reasoning and demonstrate the test that they adopted.

### A. *William Wirt*

In 1821, William Wirt, who served as Attorney General under both James Monroe and John Quincy Adams, considered the meaning of a statute authorizing a collector of customs “with the approbation of the principal officer of the Treasury Department, to employ proper persons as weighers, gaugers, measurers, and *inspectors*, at the several ports within his district.”<sup>40</sup> Wirt understood that the provision was “susceptible of two constructions.”<sup>41</sup> Under one construction, the Treasury Secretary’s “approbation” was required only “generally” as to whether the officials could “be employed at

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38 See, e.g., *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 392–93 (1995). For the same reason, it seems equally clear that the test for “officer” status (as opposed to nonofficer “deputy” status) ought not to turn on whether Congress has labeled an official’s acts as occurring “in her own name rather than in the name of a superior officer.” As with a focus on the label “deputy,” the “in her own name” test would seem to elevate labeling over functions.

39 73 U.S. (6 Wall.) 385 (1867).

40 *Tenure of Office of Inspectors of Customs*, 1 Op. Att’y Gen. 459, 459 (1821) (emphasis added by Wirt) (quoting Act of Mar. 3, 1815, § 3, 3 Stat. 155). Initially, Congress authorized collectors to “employ proper persons as weighers, gaugers, measurers and inspectors.” Act of Aug. 4, 1790, ch. 35, § 6, 1 Stat. 145, 154 (repealed 1799); Act of July 31, 1789, ch. 5, §§ 1, 5, 1 Stat. 29, 29, 36–37 (repealed 1790). Congress later changed the statute to require the “approbation of the principal officer of the Treasury Department.” Act of Mar. 2, 1799, ch. 22, § 21, 1 Stat. 627, 642; see also Jerry L. Mashaw & Avi Perry, *Administrative Statutory Interpretation in the Antebellum Republic*, 2009 MICH. ST. L. REV. 7, 19–20 (observing that “[t]he first Attorney General whose opinions were treated as authoritative guidance to the interpretation of federal law was probably Attorney General William Wirt, who was also the first Attorney General to maintain copies of his opinions”).

41 1 Op. Att’y Gen. at 459.

such and such ports, leaving the selection of the individuals to the collectors alone.”<sup>42</sup> Alternatively, the provision could be interpreted to mean that “no one shall be appointed who shall not be approved” by the Treasury Secretary.<sup>43</sup> Wirt held that the Treasury Secretary had to approve each individual selection, reasoning that the customs laws established “inspectors” as “permanent officers of the customs” with “important duties,” who did “not hold their appointments at the mere pleasure of the collector” but rather could not “be put out of [office] without the . . . approbation” of the Secretary of the Treasury.<sup>44</sup>

### B. John Berrien

A decade later, in 1831, John Berrien, who served as Attorney General under President Andrew Jackson, addressed the question whether an inspector of customs continued in office after the death, resignation, or removal of the collector by whom he was appointed.<sup>45</sup> The question was no small matter because Justice Story, riding circuit in *United States v. Wood*, had held that an inspector of customs ceased to be an officeholder on the collector’s departure given that he held his office during the pleasure of the collector.<sup>46</sup> Contrary to *Wood*, Berrien concluded that inspectors continued in office. As he explained, “When an office is held during the pleasure of any designated officer, it is at the pleasure of the *officer*, and not of the *individual*.”<sup>47</sup>

In reaching that conclusion, Berrien observed that there was a provision in the “revenue law for the continuance of the functions of the *deputy* collector after the death or disability of the collector.”<sup>48</sup> According to Berrien, Congress’s decision to enact a specific provision allowing for a continuance of the deputy collector did not mean (under the *expressio unius maximi*) that Congress’s failure to enact a like provision for continuance of the inspector of customs made continuance in office unlawful. As Berrien explained:

[T]o maintain this argument, it is necessary to show that the analogy between these subordinate officers is complete. And herein, as I respectfully conceive, the error lies. The *deputy* (as his *name* imports, and as it is expressly laid down by law writers) *exercises his office in right of another*. He is, as they express it, the *shadow* of his principal—having no authority distinct from him, nor to act otherwise than in his name, nor to perform any other duties but such as the collector himself may perform. These things cannot be affirmed of the other subordinates. The duties of the *inspector*, for exam-

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42 *Id.*

43 *Id.*

44 *Id.*; see *Hartwell*, 73 U.S. at 393–94 (holding that a clerk appointed by the Assistant Treasurer, with the approbation of the Secretary of the Treasury, was “appointed by the head of the Department” under the Appointments Clause).

45 Tenure of Office of Inspectors of Customs, 2 Op. Att’y Gen. 410 (1831); see also Mashaw & Perry, *supra* note 40, at 20, 36, 40 (discussing Berrien’s interpretive approach).

46 28 F. Cas. 752 (C.C.D. Mass. 1815) (No. 16,754).

47 2 Op. Att’y Gen. at 412.

48 *Id.* at 413.

ple, are prescribed by law, and to be performed by him alone. They are not the duties of another, which he performs in right of, and by deputation from, that other. But though he holds his office at the pleasure of the collector so long as he continues in office, the duties which he performs are emphatically his own, specified by law, performed by him in his own right, under the authority of the law, and incapable of being performed by another. There is, then, an entire want of analogy between these offices for all the purposes of this inquiry; and they are not, therefore, necessarily liable to the application of the same rule.<sup>49</sup>

The notion that a “deputy” would lose his position on the departure of an “officer” may sound peculiar to us today. But Berrien’s argument was an accepted understanding of the officer-deputy relationship. In the argument in the *Hartwell* case (which was decided in 1867), for example, Attorney General Henry Stanbery, who served under Andrew Johnson, repeated Berrien’s logic, contending that the defendant in the case was an “officer” because he did “not stand in the relation of a deputy with a tenure of office depending on the principal who appointed him; but he remains in office notwithstanding his principal may retire.”<sup>50</sup> The Court accepted this argument, holding that the defendant was an officer in part because “[v]acating the office of his superior would not have affected the tenure of his place.”<sup>51</sup>

### C. *Hugh Legaré*

A dozen years after Berrien’s opinion, in 1843, Hugh Legaré, who served as Attorney General under President John Tyler, addressed the validity of the procedures for the appointment and removal of customs inspectors.<sup>52</sup> In the course of his opinion—and relying on Wirt’s and Berrien’s precedents—Legaré observed that “all permanent inspectors, are, to all intents and purposes, officers of the government of the United States, not mere occasional *deputies*, employés, or agents of the collectors.”<sup>53</sup> Legaré understood an earlier act as authorizing the appointment by collectors of the customs of “occasional inspectors whose services were demanded by extraordinary exigencies in the service.”<sup>54</sup> He distinguished between these “occasional inspectors” and the “permanent inspectors expressly recognised as public officers.”<sup>55</sup> And he reasoned that Congress had “no power to vest [the power to appoint

49 *Id.* at 413–14.

50 *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 389–90 (1867) (argument of the United States); see also CYNTHIA NICOLETTI, *SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS* 149–52 (2017) (recounting Stanbery’s replacement of James Speed as Attorney General during the presidency of Andrew Johnson).

51 *Hartwell*, 73 U.S. at 393 (opinion of the Court).

52 *Appointment and Removal of Inspectors of Customs*, 4 Op. Att’y Gen. 162 (1843); see also Mashaw & Perry, *supra* note 40, at 35–36 (discussing Legaré’s interpretive approach).

53 4 Op. Att’y Gen. at 163 (emphasis added).

54 *Id.*

55 *Id.*

inspectors] in collectors” and, indeed, the appointment must be by “the Secretary, or it is null and void under the constitution.”<sup>56</sup>

#### D. *James Speed*

In 1865, Abraham Lincoln’s Attorney General and good friend James Speed (who also served briefly under Andrew Johnson) concluded that an act vesting in assessors the appointment of assistant assessors of the internal revenue was unconstitutional.<sup>57</sup> (Speed’s opinion is dated April 25, 1865, eleven days after Lincoln was shot.) Because the assessors were not “heads of departments,” Speed observed that “[m]anifestly, the statute is in violation of the constitutional provision, if the assistant assessors are, within the meaning of the Constitution, ‘officers’ of the United States.”<sup>58</sup> As for the assistant assessors, Speed argued that their duties were not “the duties of another, which he performs in right of, and by *deputation* from that other.”<sup>59</sup> That was because “[t]he statute carefully prescribes the sphere of the [assistant assessor’s] authority, but within that sphere he performs the duties and exercises the powers devolving upon him in subordination and under responsibility only to the law, whose agent, in truth, he is.”<sup>60</sup> In this regard, “[t]he assessor may re-examine and rectify [the assistant assessor’s] assessments, but only as a court of error may revise and correct the decisions of inferior tribunals on appeal.”<sup>61</sup> As a result, Speed concluded that he had “no difficulty . . .

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56 *Id.* at 164. In reaching that conclusion, Legaré reasoned that the collectors were not “heads of departments.” *Id.* (“Congress has power to vest the appointment of these inferior officers in the heads of departments. It has no power to vest it in collectors.”); *see id.* (“Congress has no power whatever to vest the appointment of any employé, coming fairly within the definition of an inferior officer of the government, in any other public authority but the President, the heads of departments, or the judicial tribunals.”); *see also* Power of the Secretary of the Treasury to Remove Inspectors of Hulls and Boilers, 10 Op. Att’y Gen. 204, 206, 208–09 (1862) (Attorney General Bates) (relying on Wirt’s and Legaré’s opinions to interpret a comparable statute and holding that “any act of Congress which attempted to vest [the appointing] power elsewhere would be in direct violation of the Constitution”).

57 Appointment of Assistant Assessors of Internal Revenue, 11 Op. Att’y Gen. 209 (1865); *see* Act of Mar. 3, 1865, § 1, 13 Stat. 469 (providing that the “assessor, whenever there shall be a vacancy, shall appoint, with the approval of said Commissioner, one or more assistant assessors”). For a discussion of Speed’s role in the aftermath of Lincoln’s assassination, *see* NICOLETTI, *supra* note 50, at 6, 137–52; Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 550–51 (2012).

58 11 Op. Att’y Gen. at 210; *see id.* at 210–11 (observing that “Congress is not competent to confer the power of appointing officers of the United States on any public authority, save the President, the courts, or the heads of departments” and relying on Chief Justice Marshall’s opinion in *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747), which defined an officer as anyone performing a “duty” that is 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”).

59 11 Op. Att’y Gen. at 211 (emphasis added).

60 *Id.*

61 *Id.*

in determining that an assistant assessor is an ‘officer,’ in the meaning of the Constitution.”<sup>62</sup> That determination, according to Speed, meant that the 1865 statute “vesting the power of appointing assistant assessors in the respective assessors, is clearly unconstitutional.”<sup>63</sup>

The very next year, Congress authorized the Secretary of the Treasury, who was undeniably the head of a department, “to appoint any assistant assessors of internal revenue now provided by law,”<sup>64</sup> thereby acquiescing in Speed’s constitutional determination.

#### *E. Amos Akerman*

Finally, in 1871, Amos Akerman, who served as Attorney General under Ulysses Grant, addressed the question whether Congress could constitutionally require “that a vacant civil office must be given to the person who is found to stand foremost in a competitive examination,” thus effectively making “the judges in that examination the appointing power to that office.”<sup>65</sup> Akerman concluded that, “[i]f the President in appointing a marshal . . . must take the individual whom a civil-service board adjudge to have proved himself the fittest by the test of a competitive examination, the will and judgment which determine that appointment are not the will and judgment of the President . . . but are the will and judgment of the civil-service board, and that board is virtually the appointing power.”<sup>66</sup> Akerman observed that Congress had “at various times, authorized appointments . . . in the customs service, in the internal-revenue service, in the land-offices, and in some other branches of the civil service.”<sup>67</sup> With respect to these pieces of legislation, Akerman contended:

First, that in some of these cases, such as those of deputy marshals and deputy clerks, the persons appointed are representatives of the officers who appoint them, and who, in some particulars, are responsible for their conduct, and, perhaps, it was considered by Congress that the office was substantially in the principal. Second, that it was, no doubt, considered by Congress

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62 *Id.* at 211–12; *see id.* at 212 (relying on the test applied by Speed’s “predecessors, Mr. Wirt, Mr. Berrien, and Mr. Legare”).

63 *Id.* at 212.

64 An Act Authorizing the Secretary of the Treasury to Appoint Assistant Assessors of Internal Revenue, 14 Stat. 2, 2 (1866). Remarkably, there exists an 1868 letter in Walt Whitman’s hand conveying Speed’s opinion to Attorney General Stanbery, who had at that time recently argued *Hartwell*. *See* Letter from John M. Binkley, Assistant Att’y Gen., to Henry Stanbery, Att’y Gen. (Mar. 30, 1868), <https://whitmanarchive.org/manuscripts/scribal/tei/nar.00496.html>.

65 Civil-Service Commission, 13 Op. Att’y Gen. 516, 517 (1871). For a discussion of Akerman, *see* Jed H. Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 163 (2014).

66 13 Op. Att’y Gen. at 518–19; *see id.* at 520 (“A legal obligation to follow the judgment of [an examining] board is inconsistent with the constitutional independence of the appointing power.”).

67 *Id.* at 521.

that some of the persons whose appointments were thus provided for were not officers in the constitutional sense of the term.<sup>68</sup>

### III. IMPLICATIONS FOR THE APPOINTMENTS CLAUSE DEBATE

These five opinions lead to two fundamental conclusions about the constitutional status of “deputy” officers. First, through the course of the nineteenth century—in opinions by establishment Virginians like Wirt, Jacksonians like Berrien, Whigs like Legaré, and Republicans like Speed and Akerman—the Attorney General consistently understood the Appointments Clause. Indeed, each Attorney General referred to and built on the opinions of his predecessors, thus indicating that, well before the modern Supreme Court constructed a test for constitutional “officer” status, there was a settled understanding in the executive branch on its meaning.

Second, the Attorneys General understood the “deputy”-“officer” relationship in a technical sense as requiring a particular sort of close link between the two officials. For example, the Attorneys General relied on whether the deputy exercised his “office in right of another” or was the “shadow” of a principal, in the sense that the “deputy” had no statutory authority distinct from the principal; the principal was financially liable for the deputy’s actions; and the deputy held office at the pleasure of the principal—and would even, absent express congressional provision, lose his position when the principal departed. As Attorney General Speed made clear, an official did not become a “deputy” simply because some officer might “re-examine and rectify” the official’s decisions.

That understanding was mirrored by at least one early treatise on the subject. As Professor Floyd Mechem explained “deputy” status:

Where [a deputy’s] appointment is provided for by law, and *a fortiori* where it is required by law, which fixes the powers and duties of such deputies, and where such deputies are required to take the oath of office and to give bonds for the performance of their duties, the deputies are usually regarded as public officers. . . . But where the deputy is appointed merely at the will and pleasure of his principal to serve some purpose of the latter, he is not a public officer but a mere servant or agent.<sup>69</sup>

And it was reiterated in opinions of the Supreme Court, like *Hartwell*, which found officer status in part because “[v]acating the office of [a] superior would not have affected the [officer’s] tenure.”<sup>70</sup>

Not only does this approach make sense of the Clause’s text, structure, and historical understanding, it also makes good sense of the functional justifications for the Appointments Clause. A government official who meets the

68 *Id.* (relying on Legaré’s and Speed’s opinions).

69 MECHEM, *supra* note 17, § 38, at 16–17.

70 *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1867); *cf.* *United States v. Germaine*, 99 U.S. 508, 512 (1878) (“He is but an agent of the commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties.”).

constitutional line for “inferior officer” status (say, for the sake of argument, “significant authority”) would either herself have to be appointed pursuant to the rules of the Appointments Clause or be sufficiently closely connected to and monitored by officers who were properly appointed. A government official who did not meet that standard, because she did not exercise “sufficient authority,” would not have to be appointed pursuant to the Clause. In this fashion, the Appointments Clause would ensure political accountability by requiring officers exercising the federal government’s sovereign authority to be constitutionally appointed under the Clause or to be closely tied (in historic “deputy” fashion) to properly appointed officers.

That analysis brings us back to the Court’s consideration of the status of Administrative Law Judges in *Lucia v. Securities and Exchange Commission*. In that case, the Court is considering whether those ALJs are “officers” or “employees” for purposes of the Appointments Clause and, specifically, whether the ALJs may be deemed “deputies” or “agents” of the Commission itself.<sup>71</sup> Those ALJs, to be sure, are “subordinate employees” of their agencies,<sup>72</sup> and the agency retains on “appeal from or review of the [ALJ’s] decision . . . all the powers which it would have in making the initial decision” itself.<sup>73</sup> But that review authority is not, in itself, enough to make those ALJs “deputies.” For one thing, it is readily apparent that ALJs hold an office created by statute,<sup>74</sup> and perform statutorily conferred duties.<sup>75</sup> For another, unlike the “deputies” considered above, ALJs do not have the links with the Commission to be considered mere “agents” under the Appointments Clause. The Commissioners do not bear personal liability for the ALJs’ actions and, equally importantly, cannot remove ALJs except “for good cause established and determined by the Merit Systems Protection Board.”<sup>76</sup> The ALJs thus lack the attributes that would make them “deputies” within the meaning of the precedents that the First Congress established.

This implication from the opinions of the Attorneys General does not answer whether the ALJs exercise “significant authority” under federal law—or even whether the “significant authority” test is the appropriate one. Both of those questions are outside the scope of this Article. Instead, the early Attorney General opinions explain a practice of the First Congress that might otherwise seem inconsistent with background conceptions of the Appointments Clause. The better view—the view of the Attorneys General—is that those First Congress practices were consistent with the remainder of Appointments Clause jurisprudence. The alternative to that view would risk converting the Appointments Clause into a labelling requirement under which the status of “deputy” could be conferred or taken away by statute in a manner that makes little sense of the Clause’s text, structure, and purpose.

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71 *See supra* note 6.

72 5 U.S.C. § 557(c) (2012).

73 *Id.* § 557(b).

74 *Id.* § 3105.

75 *Id.* §§ 556(b)–(c), 557(b).

76 *Id.* § 7521(a).

## CONCLUSION

In a series of early opinions, the Attorneys General of the United States interpreted the Appointments Clause, specifically addressing whether certain “officers” were “deputies” who did not need to be appointed pursuant to Article II’s procedures. That analysis is relevant to us today because the Supreme Court routinely relies on longstanding practice within the political branches to understand the meaning of constitutional provisions.<sup>77</sup> It is also relevant because it demonstrates how early interpreters grappled with the practices of the First Congress in an effort to make the Constitution’s text and structure consistent with practice. Ultimately, the test that the Attorneys General articulated required a close link between constitutional “officers” and constitutional “deputies,” thus preserving the functional justifications underlying the adoption of the Appointments Clause.

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<sup>77</sup> See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2562–63, 2568–73 (2014) (relying on opinions by Wirt, among other Attorneys General, to understand the meaning of the Recess Appointments Clause).