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## Can a "Mere Employee" Stop You from Vaping? The Appointments Clause Applied to Rulemakers

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CAN A “MERE EMPLOYEE” STOP YOU FROM  
VAPING?: THE APPOINTMENTS CLAUSE  
APPLIED TO RULEMAKERS

*Melinda Holmes\**

INTRODUCTION

Agencies wield immense power today that the Framers of the Constitution could not have imagined when contemplating the existence of departments within the executive branch. The receding tide of public opinion regarding the trustworthiness of agencies brought with it an increased focus on methods available to check agency action, including hiring requirements for officers under the Appointments Clause. The constitutional methods of appointing officers—presidential appointment with Senate advice and consent, and sole appointment by the President, heads of departments, or courts of the United States—enable the public to hold the political branches accountable for those officers, who are able to exercise authority in governance, and protect the separation of powers among the branches.

The question that follows is: Who is an officer requiring one of these constitutionally designated modes of appointment? It is a question that has been placed before the Supreme Court time and again. *Lucia v. SEC*, the most recent Supreme Court case on the subject, held that the SEC’s administrative law judges (ALJs) are officers but left open important questions about how the Appointments Clause and the *Lucia* holding might apply in other contexts.<sup>1</sup> Among those are agency decisionmakers who are not ALJs, such as those who sign their names to rulemaking documents.

A group of cases percolating in the lower courts and consolidated in the U.S. District Court for the District of Columbia present the issue of officer status in the rulemaking context. They offer an opportunity to clarify who is an “officer” without the striking similarity to facts that a precedent case like *Lucia* had to *Freytag v. Commissioner*, which held that special trial judges (STJs) appointed by the Chief Judge of the United States Tax Court are

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1 *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018).

officers.<sup>2</sup> *Hoban v. FDA*, *Moose Jooce v. FDA*, and *Rave Salon v. FDA* challenge the Deeming Rule, which was issued by the Food and Drug Administration (FDA) under the signature of an individual who was not appointed by one of the constitutionally required methods for officers.<sup>3</sup> These cases present a novel question and an opportunity to further develop the law defining who is an “officer.”

This Note analyzes whether actors discharging the rulemaking function of an agency are officers and discusses whether persons not appointed pursuant to the Appointments Clause can constitutionally exercise such power. Part I examines the development of the doctrine over time leading to *Lucia*. Part II presents possible frameworks for challenges following *Lucia*. Part III traces delegation of authority from Congress to the agency and from senior agency officials to the individual who actually exercises the delegated authority. In doing so, it explores how the framework should apply in the rulemaking context, focusing on the example presented by litigation challenging the promulgation of the FDA Deeming Rule.

Formally adhering to the demands of the Constitution, which ensures that the lines of accountability within the executive branch remain clear and unobscured, has value in itself. In practice, the FDA Deeming Rule can satisfy the demands of the Appointments Clause merely by having an officer who was appointed in one of the manners prescribed by that Clause formally promulgate the rule. However, the import of that action is the strengthening of political accountability of agencies to the President, particularly in an agency that does not enjoy independence and instead is directly under the control of the President. Thus, formal adherence to the Appointments Clause is essential for the proper balance in our separation of powers, even if, in reality, the solution is merely a different person’s signature on the rule.

When regulating the safety of e-cigarettes and vaping,<sup>4</sup> it is important that these regulations are promulgated under the proper authority within the FDA.

## I. THE APPOINTMENTS CLAUSE HISTORY AND PRECEDENT—“OFFICER” VERSUS “MERE EMPLOYEE”

The Appointments Clause fulfills important purposes in maintaining the balance of power among the branches of government and promoting good

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2 Freytag v. Comm’r, 501 U.S. 868, 870, 882 (1991).

3 Complaint at 1, *Hoban v. FDA*, No. 18-cv-00269 (D. Minn. Jan. 30, 2018) [hereinafter Complaint, *Hoban*]; Complaint at 1, *Moose Jooce v. FDA*, No. 1:18-cv-00203 (D.D.C. Jan. 30, 2018) [hereinafter Complaint, *Moose Jooce*]; Complaint at 1, *Rave Salon v. FDA*, No. 3:18-cv-00237 (N.D. Tex. Jan. 30, 2018) [hereinafter Complaint, *Rave Salon*]. These cases have been consolidated in *Moose Jooce*.

4 See, e.g., *Lung Illnesses Associated with Use of Vaping Products*, FDA (Oct. 4, 2019), <https://www.fda.gov/news-events/public-health-focus/lung-illnesses-associated-use-vaping-products>; see also Sheila Kaplan & Matt Richtel, *The Mysterious Vaping Illness That’s ‘Becoming an Epidemic,’* N.Y. TIMES (Sept. 11, 2019), <https://www.nytimes.com/2019/08/31/health/vaping-marijuana-ecigarettes-sickness.html>.

governance by increasing transparency and accountability. It blends the power of appointing officers between the President and Congress and limits congressional delegation of authority to the executive branch. The text of the Constitution divides this power, stating 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, . . . 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>5</sup>

Two key distinctions exist within the Appointments Clause doctrine. The first distinction, between officers and nonofficer employees, is at issue in this Note and is expanded on below. Whether the official in question is an officer or a nonofficer employee determines whether the Appointments Clause applies at all to the hiring of that particular individual. When the individual’s position is that of a “mere employee,” there is no constitutional significance to how he or she got the job.<sup>6</sup>

The second distinction, between principal officers and inferior officers, sprung from the two different modes of appointment set out by the Appointments Clause itself. For principal officers, only one mode of appointment is available: presidential appointment subject to advice and consent by the Senate. This can be considered the default for all officers, as inferior officers may also be appointed in this manner, though it is not mandatory.<sup>7</sup> The other mode of appointment needs no Senate participation—only the President, the courts, or a department head is required to appoint these officers. This mode is only available to inferior officers, though they may be appointed using either mode.<sup>8</sup> In either case, the appointment must be by law, and Congress decides the mode.

These differences in mode of appointment—particularly the blending and checking of powers involved in the first and not the second—balance the conflicting values of efficiency and accountability.<sup>9</sup> Over time, the Supreme Court has developed the doctrine that distinguishes principal and inferior officers.<sup>10</sup> In *Morrison v. Olson*, the Court held the independent counsel was an inferior officer,<sup>11</sup> though at the same time recognizing that the line between inferior and principal officer was “far from clear” and even stating that the Court “need not attempt here to decide exactly where the line falls

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5 U.S. CONST. art. II, § 2, cl. 2.

6 John T. Plecnik, *Officers Under the Appointments Clause*, 11 PITT. TAX REV. 201, 203 (2014) (“[E]mployees may be hired by any arm of government.”).

7 See GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 189–90, 205–16 (7th ed. 2018).

8 *Id.*

9 *Lucia v. SEC*, 138 S. Ct. 2044, 2056 (2018) (Thomas, J., concurring) (“This alternative process for appointing inferior officers strikes a balance between efficiency and accountability.”).

10 See *Morrison v. Olson*, 487 U.S. 654 (1988).

11 *Id.* at 659–60, 671.

between the two types of officers,” given that the independent counsel was clearly an inferior officer.<sup>12</sup> Instead of providing a definitive test, *Morrison* identified several factors that set out the position of independent counsel as inferior rather than principal: it was “subject to removal by a higher Executive Branch official,” authorized to exercise “certain, limited duties,” and “limited in jurisdiction.”<sup>13</sup> This opened the door for the Court to later define the line more clearly.<sup>14</sup> Justice Scalia dissented in *Morrison*, arguing that separation of powers principles should be the first consideration and, when properly considered, required the opposite decision to “preserve the equilibrium the Constitution sought to establish.”<sup>15</sup> Nearly a decade later, in *Edmond v. United States*, Justice Scalia wrote for the Court,<sup>16</sup> filling in the gap left by *Morrison* when it had declined to prescribe a definitive test for the line between inferior and principal officers under the Appointments Clause.<sup>17</sup> In *Edmond*, the Court pointed to the level of supervision of an officer as a relevant consideration: “Whether one is an ‘inferior’ officer depends on whether he has a superior.”<sup>18</sup> Under this test, an inferior officer is one “whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”<sup>19</sup> Following *Edmond*, the test applied by courts to determine the proper mode of appointment under the Appointments Clause has been relatively clear and steady. But the same cannot be said for the test for officers and nonofficer employees.

The test distinguishing officers from nonofficer employees remains largely unsettled. Challenges in this area arise when a government official is claimed to be a nonofficer employee and is “accused of unconstitutionally

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12 *Id.* at 671.

13 *Id.* at 671–72.

14 *See* *Edmond v. United States*, 520 U.S. 651 (1997).

15 *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting). The statuses of both the independent and special counsels have received significant attention over the years. *See, e.g.*, Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2135–36 (1998) (arguing that the independent counsel is a principal officer and appointment by advice and consent would provide “greater public credibility and moral authority”). Recently, Robert Mueller’s position as special counsel has been questioned as to whether or not he is a principal officer who only could have been constitutionally appointed with advice and consent. *See* VICTORIA NOURSE, AM. CONSTITUTION SOC’Y, THE SPECIAL COUNSEL, *MORRISON V. OLSON*, AND THE DANGEROUS IMPLICATIONS OF THE UNITARY EXECUTIVE THEORY 1, 7 (2018), <https://www.acslaw.org/wp-content/uploads/2018/07/UnitaryExecutiveTheory.pdf>; Steven G. Calabresi, *Mueller’s Investigation Crosses the Legal Line*, WALL ST. J. (May 13, 2018), <https://www.wsj.com/articles/muellers-investigation-crosses-the-legal-line-1526233750>; George Conway, *The Terrible Arguments Against the Constitutionality of the Mueller Investigation*, LAWFARE (June 11, 2018), <https://www.lawfareblog.com/terrible-arguments-against-constitutionality-mueller-investigation>.

16 *Edmond*, 520 U.S. 651.

17 *Id.* at 661 (“*Morrison* did not purport to set forth a definitive test for whether an office is ‘inferior’ under the Appointments Clause.”).

18 *Id.* at 662.

19 *Id.* at 663.

wielding the more significant authority of an Officer.”<sup>20</sup> In the most recent Supreme Court case on the question, *Lucia v. SEC*, the Court laid out a two-step framework for determining whether the administrative law judges at issue were officers.<sup>21</sup> First, were the positions continuing?<sup>22</sup> Second, did they exercise significant authority under the law?<sup>23</sup> It is within this second part of the test that the law remains unclear and leaves lingering questions as to who exactly is an officer of the United States.

### A. *Development of the Doctrine*

The history of the Supreme Court’s Appointments Clause doctrine illuminates the background on which *Lucia* was decided. Chief Justice Marshall, riding the circuit, described an officer as one in “‘a public charge or employment’ . . . on the part of the United States” performing a “continuing” duty.<sup>24</sup> Later, in *United States v. Hartwell*, the Court also referred to an office as being a “public station, or employment, conferred by the appointment of government” and “embrac[ing] the ideas of tenure, duration, emolument, and duties.”<sup>25</sup> Harkening back to *Hartwell*, the Court in *United States v. Germaine* concluded that the individual in question was not an officer within the meaning of the Appointments Clause based on his “tenure, duration, emolument, and duties.”<sup>26</sup> Of particular import to the Court was that the individual’s duties were not “continuing and permanent,” but rather were “occasional and intermittent.”<sup>27</sup>

In *Buckley v. Valeo*, the Supreme Court specified, for the first time, the requirement that an officer exercise significant authority.<sup>28</sup> The Court specified that “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States.’”<sup>29</sup> Elaborating on the facts of the case at hand, the Court noted that the administrative powers bestowed on the Federal Election Commission by Congress included “rulemaking, advisory opinions, and determinations of eligibility for funds and . . . for federal elective office itself” without supervision by Congress or the executive branch and that “each of these functions also represents the

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20 Plecnik, *supra* note 6, at 203.

21 *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018).

22 *Id.*

23 *Id.*

24 *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747); see E. Garrett West, *Clarifying the Employee-Officer Distinction in Appointments Clause Jurisprudence*, 127 *YALE L.J.F.* 42, 46–47 (2017).

25 *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868).

26 *United States v. Germaine*, 99 U.S. 508, 511–12 (1879) (citing *Hartwell*, 73 U.S. (6 Wall.) at 393).

27 *Id.* at 512.

28 *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam) (“We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article.”).

29 *Id.*

performance of a significant governmental duty exercised pursuant to a public law.”<sup>30</sup>

### B. *The Doctrine Today*

*Freytag v. Commissioner* involved the organization of the U.S. Tax Court, an adjudicatory Article I court. The questions before the Supreme Court were whether special trial judges were officers and whether their appointment by the Chief Judge of the Tax Court violated the Appointments Clause.<sup>31</sup>

The Court held that the STJs were officers and identified several factors leading to that conclusion. The office was established by law, and “the duties, salary, and means of appointment for that office are specified by statute.”<sup>32</sup> It did not matter that they could not enter a final decision. STJs performed “more than ministerial tasks” and “exercise[d] significant discretion.”<sup>33</sup> Even if some of the tasks performed could be performed by an employee, that does not change the status of an inferior officer, according to the Court.<sup>34</sup> Thus, the STJs were inferior officers. The Court further held that the statute granting the Chief Judge the authority to hire the STJs did not violate the Appointments Clause because the Chief Judge was one of the “Courts of Law” under Article II.<sup>35</sup>

Two terms back, the Court heard another Appointments Clause case. The issue in *Lucia v. SEC* was whether the SEC administrative law judges were officers. *Lucia* laid out a two-step framework to determine who are officers.<sup>36</sup> The first question is whether the position is “continuing.”<sup>37</sup> Citing *United States v. Germaine*, the Court retained the distinction between a position that is “occasional or temporary” and one that is “continuing and permanent.”<sup>38</sup> If a position is “occasional or temporary,” the individual who holds it is a mere employee, not an officer.<sup>39</sup> Second, drawing language from *Buckley v. Valeo*, the individual must “exercis[e] significant authority pursuant to the laws of the United States.”<sup>40</sup>

While the Court acknowledged that there is a need for further elaboration of the significant authority test to serve as guidance in the future, articulating that “maybe one day [it] will see a need to refine or enhance the test,” it declined to address that topic, instead finding that *Freytag* made any further

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30 *Id.* at 140–41.

31 *Freytag v. Comm’r*, 501 U.S. 868, 878 (1991).

32 *Id.* at 881.

33 *Id.* at 881–82.

34 *Id.* at 882.

35 *Id.* at 888–92.

36 *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018).

37 *United States v. Germaine*, 99 U.S. 508, 511–12 (1879).

38 *Lucia*, 138 S. Ct. at 2051 (quoting *Germaine*, 99 U.S. at 511–12).

39 *Id.*

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

elaboration unnecessary.<sup>41</sup> The Court found the ALJs at issue in *Lucia* were “near-carbon copies” of the STJs in *Freytag*, whom that Court found to be officers.<sup>42</sup> Viewing *Freytag* through the framework laid out above, it gave an overview of the decision, pointing out that the Court there first found the STJs to be a continuing office established by law and, second, that the STJs wielded significant authority.<sup>43</sup>

Following that was a fact-by-fact comparison of the ALJs to the STJs according to the factors considered by the *Freytag* Court. As the Court acknowledged, “*Freytag* says everything necessary to decide this case.”<sup>44</sup> First, the position of an ALJ is also a continuing office established by law.<sup>45</sup> There was no dispute on this point, so the Court turned its attention to the question of significant authority. It found that the “ALJs exercise the same ‘significant discretion’ when carrying out the same ‘important functions’ as STJs do.”<sup>46</sup> It pointed to four powers *Freytag* mentioned with respect to the authority in ensuring “fair and orderly adversarial hearings.”<sup>47</sup> They take testimony, conduct trials, rule on the admissibility of evidence, and have power to enforce compliance with discovery orders.<sup>48</sup> The Court found a difference between the positions in terms of the independence of the decisions issued. While a major decision by the STJs always requires review by a Tax Court judge, major decisions by ALJs do not have the same mandatory review by the SEC. The SEC may choose not to review, in which case the ALJ’s decision is final.<sup>49</sup> As the Court did not find any suggestions of relevant distinctions convincing, it held that ALJs are officers.<sup>50</sup>

Justice Thomas wrote a concurring opinion, which Justice Gorsuch joined, agreeing with the outcome of the case but arguing that further guidance can be found in the original public meaning regarding what makes someone an officer.<sup>51</sup> In support of his position, he cited extensively to Jennifer Mascott’s article *Who Are “Officers of the United States”?*, which provides a detailed originalist account in answering that question.<sup>52</sup> Justice Thomas—in alignment with Professor Mascott’s thesis—stated that “[t]he Founders likely understood the term ‘Officers of the United States’ to encompass all

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41 *Id.* at 2052.

42 *Id.*

43 *Id.*

44 *Id.* at 2053.

45 *Id.*

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

47 *Id.*

48 *Id.*

49 *Id.* at 2054.

50 *Id.* at 2055.

51 *Id.* at 2056 (Thomas, J., concurring).

52 Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 *STAN. L. REV.* 443 (2018).

federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty.”<sup>53</sup>

Justice Breyer wrote an opinion concurring in part and dissenting in part.<sup>54</sup> While he agreed that the ALJs were improperly appointed, he found a violation under the Administrative Procedure Act (APA) rather than the Constitution.<sup>55</sup> The APA provides that “[e]ach agency shall appoint as many administrative law judges as are necessary for” hearings under the APA.<sup>56</sup> Justice Breyer argued that the APA gives the Commission the authority to appoint ALJs, not the Commission’s staff.<sup>57</sup> Because the APA does not give the Commission the authority to delegate its power of appointment, the appointment of ALJs in this case violated the APA.<sup>58</sup> With statutory grounds on which to find this unlawful, Justice Breyer would have the Court exercise judicial restraint and “decide no more than that.”<sup>59</sup>

He further explained his reasons for not expanding the Court’s definition of officer. The Court found in *Free Enterprise Fund v. PCAOB* that for Congress to provide more than one level of protection to officers from removal, it would violate the separation of powers by impermissibly limiting the President’s authority.<sup>60</sup> If *Free Enterprise Fund* applies to ALJs, it implicates their independence in decisionmaking, a feature that has been long protected through such removal restrictions.<sup>61</sup> While there has been criticism generally of an ALJ’s ability to truly operate independently pre-*Lucia*, the *Lucia* holding, combined with *Free Enterprise Fund*, suggests that either the current ALJ structure is unconstitutional or that ALJs must enjoy much less independence than they currently have. Justice Breyer provided some comfort in this by referring to the *Free Enterprise Fund* Court’s discussion of how ALJs can be distinguished from the board members at issue in that case.<sup>62</sup>

*Lucia* went no further than *Freitag* and thus obviated the need for the Court to elaborate on the relevant standard. Professor Mascott has suggested that *Lucia* shut down an interpretive approach followed in *Freitag* and *Tucker*.<sup>63</sup> Those cases suggested that the exercise of discretionary authority

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53 *Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring). This understanding would potentially eliminate one of the two prongs of the Court’s analysis in *Lucia* or provide the basis for the significant authority definition.

54 *Id.* at 2057 (Breyer, J., concurring in part and dissenting in part).

55 *Id.* at 2057.

56 5 U.S.C. § 3105 (2012).

57 *Lucia*, 138 S. Ct. at 2058 (Breyer, J., concurring in part and dissenting in part).

58 *Id.* 2058–59

59 *Id.* at 2059.

60 *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 514 (2010).

61 *Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring in part and dissenting in part) (“[T]o hold that the administrative law judges are ‘Officers of the United States’ is, *perhaps*, to hold that their removal protections are unconstitutional.”).

62 *Id.* at 2060–61.

63 Jennifer Mascott, *Symposium: The Appointments Clause—A Modest Take*, SCOTUSBLOG (June 22, 2018, 3:35 PM), <http://www.scotusblog.com/2018/06/symposium-the-appointments-clause-a-modest-take/>.

and final decisionmaking power were mandatory in order to find that the individual is an officer. *Lucia* did not appear to make the presence of those factors mandatory, though they may still be relevant considerations. Justice Thomas’s concurrence interpreted the Court’s move in that way, stating those factors could be sufficient but not necessary for an officer. Following *Lucia*, courts attempting to apply the proper standard can be confident that the office must be continuing, but what is required by the second prong—exercising significant authority—remains unsettled.<sup>64</sup>

## II. WHO IS AN OFFICER AFTER *LUCIA*?

*Lucia* laid out a two-step framework for a court to determine who are officers.<sup>65</sup> The first requirement is that the position is “continuing.”<sup>66</sup> Second, the individual must “exercis[e] significant authority pursuant to the laws of the United States.”<sup>67</sup> Despite the apparent clarity of a two-prong analysis, this configuration leaves substantial room for interpretation, since the Court has not yet applied it in a case without precedent directly on point. As Justice Thomas pointed out in his concurring opinion in *Lucia*, “this Court will not be able to decide every Appointments Clause case by comparing it to *Freytag*.”<sup>68</sup> Indeed, the Court itself acknowledged that “maybe one day [the Court] will see a need to refine or enhance the test.”<sup>69</sup> There are three ways in which the Court may resolve the uncertainty arising from the “significant authority” prong in the future: defining “significant authority” narrowly, defining it broadly, or overturning *Lucia*’s two-prong analysis entirely in favor of the officer test suggested by the original public meaning—a “continuing, statutory duty.” Section II.A briefly addresses the first prong of the *Lucia* framework. Next, Section II.B discusses the narrow interpretation of significant authority. Section II.C then considers both a broad construction of significant authority and the alternative definition of officer status according to the original public meaning, noting that the two approaches may lead to a similar result on the issue of officer status.

### A. *Continuing and Permanent*

The “continuing” prong of the officer analysis of *Lucia* is straightforward. Citing *United States v. Germaine*, the Court retained the distinction between a position that is “occasional or temporary” and one that is “continu-

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64 This discussion does not attempt to resolve the next natural question: Are they principal or inferior officers? For discussion of a case regarding whether ALJs are principal officers, see *Constitutionality of PTAB Judge Appointments Challenged in Polaris IPR Appeal*, FOLEY & LARDNER LLP (Aug. 3, 2018), <https://www.foley.com/constitutionality-of-ptab-judge-appointments-challenged-in-polaris-ipr-appeal-08-03-2018/>.

65 *Lucia*, 138 S. Ct. at 2051.

66 *Id.* (citing *United States v. Germaine*, 99 U.S. 508, 511–12 (1879)).

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

68 *Id.* at 2056 (Thomas, J., concurring).

69 *Id.* at 2052 (majority opinion).

ing and permanent.”<sup>70</sup> If a position is “occasional or temporary,” the individual who holds it is a mere employee, not an officer.<sup>71</sup>

### B. *Narrow Interpretation of Significant Authority*

The first interpretation of “significant authority” is a narrow one, of which Justice Sotomayor and Justice Ginsburg are proponents. Justice Sotomayor, joined by Justice Ginsburg, dissented in *Lucia*, addressing the fact that the Court has not yet articulated what it means to be an officer of the United States.<sup>72</sup> Following the Court’s two-prong framework, Justice Sotomayor elaborated on the meaning of the significant authority requirement from *Buckley*. Under her interpretation, to be considered an officer under the Appointments Clause, that individual must have “the ability to make final, binding decisions on behalf of the Government.”<sup>73</sup> One who “merely advises and provides recommendations to an officer would not herself qualify as an officer.”<sup>74</sup> She called upon *Free Enterprise Fund* in support of this position.<sup>75</sup> There, the Court stated in dicta that at least ninety percent of individuals who “render services to the Federal Government and are paid by it are not constitutional officers.”<sup>76</sup> Some historical documents were also cited for support.<sup>77</sup> Given this structure requiring officers to exercise final decisionmaking authority, the ALJs at issue in *Lucia* were not officers, Justice Sotomayor concluded.<sup>78</sup> This would be consistent with *Freytag* because, in that case, the STJs “in at least some instances [could] issue final decisions that bind the Government or third parties.”<sup>79</sup>

In his *Lucia* opinion, Justice Breyer also called for a narrow interpretation, describing the consequences of a broad conception of “officer” as acute and far reaching.<sup>80</sup> If the Court were to accept the original public meaning

70 *Id.* at 2051 (citing *Germaine*, 99 U.S. at 511–12).

71 *Id.*

72 *See id.* 2065 (Sotomayor, J., dissenting).

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.* (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 506 n.9 (2010)).

77 *Id.* (referring to the Supreme Judicial Court of Maine in 1822, which stated the meaning of “office” implied delegation of sovereign power which binds the rights of others, and a House Judiciary Committee Report in 1899 that discussed creation of an office that involves delegation of sovereign functions).

78 *Id.* at 2067.

79 *Id.* It should be noted that the distinction between “office” and “officer” was left explicitly unanswered by the Court in *Lucia*. *See* *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868) (discussing employment in an “office” in terms of “continuing and permanent” duties, not significant authority). *But see* *United States v. Germaine*, 99 U.S. 508, 510 (1879) (“That all persons who can be said to hold an office . . . under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt.”).

80 *Lucia*, 138 S. Ct. at 2064.

as the definition of “officer” in the Appointments Clause, it would implicate more than administrative law judges.

A narrow definition without the finality requirement featured in Justice Sotomayor’s opinion could be one “vested with the authority to alter legal rights and obligations on behalf of the United States.”<sup>81</sup> Either way, under a narrow definition of “significant authority,” an officer’s status depends on a factual analysis of her job responsibilities.

### C. *Comparing a Broad Interpretation to the Original Public Meaning*

A broad conception of “significant authority” would find this prong satisfied where the officer performs a statutory duty. Performing a “statutory duty” clarifies the “significant authority” requirement to mean any duty established by statute. It draws from the original meaning, which, if fully embraced, would abrogate the two prongs from *Lucia* entirely.

There has been a call by some scholars to return to the original public meaning of “officer.” Professor Mascott suggests the original public meaning is significantly broader than any definition up to this point.<sup>82</sup> An officer is “one whom the government entrusts with ongoing responsibility to perform a statutory duty of any level of importance.”<sup>83</sup> This means that any individual who carries out a task Congress assigned to the agency is an officer. In the massive administrative state today, with the high levels of subdelegation within an agency discussed above, the adoption of this broad definition of officer would send shockwaves throughout the current system. Professor Mascott’s proposition could be viewed as an abrogation of the current significant authority requirement in favor of a new “duty-related standard,” which would look to whether the officer had continuing duties (in line with the modern doctrine’s first prong) and whether those duties were imposed by statute.<sup>84</sup>

However, Professor Mascott acknowledges that it is possible to “return to the eighteenth century statutory duty standard” while remaining “consistent with Supreme Court case law, in substance even if not in form.”<sup>85</sup> In this way, the Court may remain loyal to precedent without compromising the protection the Constitution mandates here by framing the original public meaning definition—a continuing, statutory duty—in terms of the modern framework that focuses on continuing position and exercising significant authority. When the Court clarifies the standard by which courts determine whether

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81 West, *supra* note 24, at 44 (emphasis omitted).

82 Mascott, *supra* note 52, at 453–54. This Note accepts Professor Mascott’s account for this comparison among the significant authority definitions.

83 *Id.*

84 *Id.* at 463–64; Brief Amicus Curiae of Pac. Legal Found. in Support of Petitioners at 18, *Lucia*, 138 S. Ct. 2044 (No. 17-130) [hereinafter Brief for Pac. Legal Found.] (“But the duties need *not* be significant.”).

85 Mascott, *supra* note 52, at 465; *cf.* Brief for Pac. Legal Found., *supra* note 84, at 23 (“[I]t is possible to read *Buckley* as saying that ‘significant authority’ means ‘sovereign authority.’”).

individuals are officers (as it inevitably must), it may adhere to its doctrinal development of a two-prong approach and simply clarify that the “significant authority” the *Buckley* Court presented is aligned with the longstanding requirement that officers exercise a statutory duty. This is not far-fetched when one considers that the government, in its ordinary functioning, already exercises immense power over others.<sup>86</sup> *Buckley* itself concluded that the Framers understood the term “‘Officers of the United States’ . . . to embrace all appointed officials exercising responsibility under the public laws of the Nation.”<sup>87</sup> It may be understood to alter the formula without “intention to break with the longstanding understanding of a public office or fashion a new term of art.”<sup>88</sup>

This raises the question of the most recent discussion and application of the “significant authority” requirement in *Freytag* and *Lucia*. Acknowledging that *Freytag*’s application of the *Buckley* standard may diverge from the original meaning of “officer,” Professor Mascott suggests that it may not be “irreconcilably inconsistent with the historic officer standard,” as one can interpret that opinion as expressing merely sufficient factors for finding an officer rather than requirements.<sup>89</sup> This logic can be carried over to the Court’s treatment of the *Buckley* standard in *Lucia* through the lens of *Freytag*.

Professor Mascott is not alone in her call to the original public meaning. She and other scholars have pointed to early Supreme Court cases on the subject supporting this broader definition of officer as the original understanding of the role.<sup>90</sup> Citing *United States v. Hartwell*, a case decided in 1868, the Court in *United States v. Germaine* in 1879 stated that the term officer “embraces the ideas of tenure, duration, emolument, and duties.”<sup>91</sup> It found dispositive the defendant’s lack of continuing and permanent duties in concluding that he was not an officer.<sup>92</sup>

Joining these scholars in support of this original public meaning of officers were Justice Thomas and Justice Gorsuch, as Professor Mascott’s work was cited repeatedly in Justice Thomas’s concurring opinion in *Lucia*.<sup>93</sup> Acknowledging the lack of clarity for what criteria are necessary to consider someone an officer under the Appointments Clause, Justice Thomas argued that this determination should be based on the original public meaning—“all

86 Mascott, *supra* note 52, at 464 (“The federal government, in exercising authority over private parties, inherently wields so much power that, arguably, anyone carrying out a statutory duty necessarily exercises ‘significant authority’ in some sense.”).

87 *Buckley v. Valeo*, 424 U.S. 1, 128–31 (1976) (per curiam).

88 Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 86 (2007).

89 Mascott, *supra* note 52, at 465.

90 See Brief for Pac. Legal. Found., *supra* note 84 at 15–29; Mascott, *supra* note 52, at 463–64; West, *supra* note 24, at 46–49.

91 *United States v. Germaine*, 99 U.S. 508, 511 (1879).

92 *Id.* at 512.

93 See *Lucia v. SEC*, 138 S. Ct. 2044, 2056–57 (2018) (Thomas, J., concurring).

federal civil officials ‘with responsibility for an ongoing statutory duty.’<sup>94</sup> Within the original public meaning, the “significant authority” requirement of *Buckley v. Valeo* would mean something slightly different from how it sounds because it would include those who “perform an ongoing, statutory duty—no matter how important or significant the duty.”<sup>95</sup> Justice Thomas did not discuss what this means for the *Freytag* and *Lucia* framework. He framed precedent as showing “what is *sufficient* . . . [but not] what is *necessary*.”<sup>96</sup> Perhaps significant authority is obviously sufficient because such authority would clearly meet the low threshold under the original public meaning. Alternatively, Justice Thomas can be read as intending to overthrow the entire framework set forth thus far, now requiring courts to answer this one question: Does this individual perform an ongoing, statutory duty? Without a clear answer from the Court, this could very well be the definition of the future. However, recognizing that the Court does not always follow Justice Thomas’s lead in support of original public meaning, other definitions have the potential to emerge in clarifying the “significant authority” requirement of an officer under the Appointments Clause.

If the Constitution requires one of the two permissible modes of appointment under the Appointments Clause for individuals who in any capacity perform a continuous, statutory duty, the implications could be far reaching, as noted by Justice Breyer in *Lucia*. It would include actors, at all levels, performing an agency’s adjudication and rulemaking functions, as both are triggered by statute. As discussed in Part III below, it would impact individuals far down on an agency’s organization chart who are empowered through subdelegations, flowing from the statute to the agency and from department head to other individuals. Each individual position in an agency would need to be categorized—principal officers, inferior officers, and non-officer employees—at the outset, before hiring, in order to ensure the proper constitutional procedure is followed. The problems may include exacerbation of bureaucratic sluggishness, tightening the funnel for hiring the majority of individuals because it would require the department head to formally hire each one. It would in turn promote the values the Appointments Clause generally protects. It would clarify the line of accountability for every agency action, no matter how far down the chain. The politically accountable department head—and formally, the President—would be incentivized to choose (or put into place a system that selects) the most qualified candidates and to exercise greater control over the agency’s actions at every level. An increase in inconvenience does not alter the constitutional

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94 *Id.* (quoting *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring)).

95 *Id.* at 2056.

96 *Id.*

analysis.<sup>97</sup> In the Appointments Clause context, the Framers contemplated difficulties and accounted for them in the Clause itself.<sup>98</sup>

### III. APPOINTMENTS CLAUSE DOCTRINE APPLIED TO RULEMAKING OFFICIALS: FDA DEEMING RULE

After *Lucia*, it remains the case that the further the individual at question is from an analogous officer, the more uncertain the current Appointments Clause analysis becomes. Significant work has been done regarding the appointment of ALJs<sup>99</sup> and the appointment of independent or special counsel,<sup>100</sup> and the Supreme Court's jurisprudence has developed primarily in those contexts. Less has been said about the appointment of officers in other contexts, namely those involved in rulemaking. The unique aspects of a rulemaking official's role must affect the determination of whether such an official is an officer. These are explored below through the application of the current doctrine and its possible conceptions to the real example of the FDA Deeming Rule, which has been challenged on Appointments Clause grounds.

#### A. FDA Deeming Rule

The Food and Drug Administration has not always had the power to regulate tobacco, as surprising as it may seem, given the extent of its anti-smoking—and now, antivaping—campaign. The Food, Drug, and Cosmetic Act (FDCA), passed in 1938 and amended in 1996, gives the FDA the authority to regulate “drugs” and “devices.”<sup>101</sup> It defines “drug” as “articles (other than food) intended to affect the structure or any function of the body.”<sup>102</sup> The FDA interpreted “drug” to include nicotine, which served as its basis for regulating tobacco products in order to reduce use by minors.<sup>103</sup> These reg-

97 See *INS v. Chadha*, 462 U.S. 919, 944 (1983).

98 See *United States v. Germaine*, 99 U.S. 508, 510 (1879) (“[F]oreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments.”).

99 See, e.g., Kent Barnett, *Resolving the ALJ Quandry*, 66 VAND. L. REV. 797 (2013); Jennifer L. Mascott, *Constitutionally Conforming Agency Adjudication*, 2 LOY. U. CHI. J. REG. COMPLIANCE 22 (2017); Jackson C. Blais, Note, *Mischief Managed? The Unconstitutionality of SEC ALJs Under the Appointments Clause*, 93 NOTRE DAME L. REV. 2115 (2018).

100 See, e.g., Steven G. Calabresi & Gary Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, 95 NOTRE DAME L. REV. 87 (2019); Kavanaugh, *supra* note 15, at 2135–36 (arguing that the independent counsel is a principal officer and appointment by advice and consent would provide “greater public credibility and moral authority”); Nourse, *supra* note 15, at 1, 7.

101 21 U.S.C. §§ 321(g)–(h), 393 (1994). The FDA's general authority goes back much further than this, though. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

102 21 U.S.C. § 321(g)(1).

103 *Brown & Williamson*, 529 U.S. at 131.

ulations were challenged in *FDA v. Brown & Williamson Tobacco Corp.*, where the issue was whether the FDA had the authority to regulate tobacco products.<sup>104</sup> Justice O’Connor wrote the majority opinion, holding FDA lacked the authority to regulate tobacco products under the FDCA because it found that Congress “clearly precluded the FDA from asserting jurisdiction to regulate tobacco products.”<sup>105</sup>

Nine years later, Congress empowered the FDA to regulate the tobacco industry through the Family Smoking Prevention and Tobacco Control Act (TCA).<sup>106</sup> Under this Act, the FDA has authority to regulate to promote public health, for example, prohibiting sales to minors, sales in publicly available vending machines, tobacco-brand sponsorships of social or cultural events like sports, and free giveaways of tobacco products and promotional items.<sup>107</sup> The FDA’s power to regulate the tobacco industry is undisputed under this law.

Disputes have arisen under a particular administrative action—the Deeming Rule. In 2016, the FDA issued a rule to regulate all tobacco products.<sup>108</sup> The Deeming Rule extends the FDA’s regulations to cover all tobacco products within the statutory definition, including e-cigarettes and vaporizers.<sup>109</sup> According to the FDA, this rule regulates all tobacco products, requires health warnings on certain new products, bans free samples, requires that new products meet the applicable public health standard and receive marketing authorization from the FDA, prohibits sales to minors, requires photo ID verification, and prohibits tobacco products sold in vending machines that are generally available.<sup>110</sup> This is the foundation for FDA tobacco-related actions.

The Deeming Rule has been challenged on various grounds in district courts.<sup>111</sup> A round of cases, transferred and consolidated in the D.C. district

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104 *Id.* at 125.

105 *Id.* at 126.

106 Family Smoking Prevention and Tobacco Control Act, Pub. L. 111-31, 123 Stat. 1776 (2009); see *Family Smoking Prevention and Tobacco Control Act—An Overview*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/tobaccoproducts/labeling/rulesregulationsguidance/ucm246129.htm> (last Jan. 17, 2018) [hereinafter *TCA Overview*].

107 *TCA Overview*, *supra* note 106.

108 Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products, 81 Fed. Reg. 28,973, 28,976 (May 10, 2016) (codified at 21 C.F.R. pt. 1100) [hereinafter *Deeming Rule*]; see *FDA’s Deeming Regulations for E-Cigarettes, Cigars, and All Other Tobacco Products*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/tobaccoproducts/labeling/rulesregulationsguidance/ucm394909.htm#rule> (last updated Nov. 25, 2019).

109 *Deeming Rule*, *supra* note 108.

110 *The Facts on the FDA’s New Tobacco Rule*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/ForConsumers/ConsumerUpdates/ucm506676.htm> (last updated June 16, 2016).

111 See, e.g., *Nicopure Labs, LLC v. FDA*, 266 F. Supp. 3d 360, 366, 368 (D.D.C. 2017) (holding that the FDA’s Deeming Rule did not exceed its statutory authority nor did it

court, challenge the Deeming Rule as violating the Appointments Clause: *Hoban v. FDA*,<sup>112</sup> *Moose Jooce v. FDA*,<sup>113</sup> and *Rave Salon Inc. v. FDA*.<sup>114</sup> The plaintiffs, primarily manufacturers and retailers in the vaping industry, claim that signing the Deeming Rule requires an officer and that the signatory here was neither a principal nor inferior officer, thus violating the Appointments Clause.<sup>115</sup> They claim that the Deeming Rule is invalid because the FDA employee who issued it was not lawfully vested with the authority to do so.<sup>116</sup>

Specifically at issue in this case is the status of the individual within the FDA who issued the rule: Leslie Kux, the Associate Commissioner for Policy (ACP) and Director of the Office of Policy in the Office of the Commissioner at the FDA.<sup>117</sup> According to the FDA's website, at the time the rule was issued, Ms. Kux "overs[aw], direct[ed], and coordinate[d] the agency's rulemaking activities and regulations development system, including processing documents for publication in the Federal Register and initiating new systems and procedures to make the agency's process more efficient."<sup>118</sup> Ms. Kux was a career appointment to a senior executive service (SES) position.<sup>119</sup> The FDA Commissioner and Deputy Commissioner appoint individuals to SES positions subject to the Department of Health and Human Services (HHS) Secretary's concurrence.<sup>120</sup> Accordingly, Ms. Kux was not hired pursuant to either of the modes of appointment sufficient for an inferior officer

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violate the First Amendment); *Commercial Tobacco Control Litigation—Case Summaries*, PUB. HEALTH L. CTR., <https://www.publichealthlawcenter.org/content/tobacco-control-cases> (last visited Jan. 28, 2020) (providing summaries of numerous lawsuits relating to the Deeming Rule).

112 Complaint, *Hoban*, *supra* note 3.

113 Complaint, *Moose Jooce*, *supra* note 3.

114 Complaint, *Rave Salon Inc.*, *supra* note 3.

115 Plaintiffs' Memorandum of Points and Authorities in Support of Their Motion for Partial Summary Judgment at 2, *Moose Jooce v. FDA*, No. 1:18-CV-00203 (D.D.C. May 2, 2019) [hereinafter Plaintiffs' Memorandum of Points].

116 See Ilya Shapiro, *A Lawsuit to Make Rulemakers Follow the Rules*, WASH. EXAMINER (Feb. 5, 2018), <https://www.washingtonexaminer.com/a-lawsuit-to-make-rulemakers-follow-the-rules>.

117 *Meet Leslie Kux, Associate Commissioner for Policy*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/aboutfda/centersoffices/ucm304642.htm> (last updated Mar. 27, 2018) [hereinafter *Meet Leslie Kux*]; Deeming Rule, *supra* note 108, at 29,106. Ms. Kux is no longer the ACP, and, as of this publication, Lauren Roth is serving as the acting Associate Commissioner for Policy. See *Lauren Roth JD*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/about-fda/fda-organization/lauren-roth> (last updated Apr. 22, 2019). Changes in personnel following the Deeming Rule's promulgation do not affect the analysis.

118 *Meet Leslie Kux*, *supra* note 117.

119 See COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, 114TH CONG., POLICY AND SUPPORTING POSITIONS 70 (Comm. Print 2016), [https://www.govinfo.gov/collection/plum-book?path=/Gpo/United%20States%20Government%20Policy%20and%20Supporting%20Positions%20\(Plum%20Book\)/2016](https://www.govinfo.gov/collection/plum-book?path=/Gpo/United%20States%20Government%20Policy%20and%20Supporting%20Positions%20(Plum%20Book)/2016) (providing the appointment of the Associate Commissioner for Policy as a career appointment); 2 FDA STAFF MANUAL GUIDES § 1431.23 (2005), <https://www.fda.gov/AboutFDA/ReportsManualsForms/StaffManualGuides/ucm136380.htm>.

120 *Id.*

under the Appointments Clause: presidential appointment with Senate confirmation or appointment by a department head, court of law, or the President alone at Congress’s direction.<sup>121</sup> The complaints characterize Ms. Kux as exercising “the power to issue a final rule on one’s own authority” without any procedure for a superior to review it.<sup>122</sup> The FDA does not provide readily available details about its internal rulemaking procedures.<sup>123</sup> Reading the final rule also sheds little light on the process of its promulgation.<sup>124</sup> The FDA Staff Manual Guide details the delegation and subdelegation of authority from Congress to the HHS Secretary, from the Secretary to the Commissioner of the FDA, and from the Commissioner to individuals within the agency, including the Associate Commissioner of Policy.<sup>125</sup> Section 1410.21 states that the Associate Commissioner for Policy, among other individuals, is authorized to issue final regulations of the Food and Drug Administration.<sup>126</sup> The guide also provides an overview of the functions of the Office of Policy, including “[o]versee[ing], direct[ing], and coordinat[ing] the agency’s rulemaking and guidance development activities.”<sup>127</sup>

The ACP’s constitutional status remains an open question, as *Lucia* only addressed the officer standard as applied to SEC ALJs.<sup>128</sup>

### B. Delegation and Subdelegation (and Sub-subdelegation) of Authority

It is a practical reality that, in the modern administrative state, Congress cannot legislate in a manner that could account for all the details required in the current expansive regulatory environment. The solution to this is the

121 See 2 FDA STAFF MANUAL GUIDE § 1431.23, *supra* note 119.

122 Complaint, *Hoban*, *supra* note 3, at 6, 12 (“[R]ather than exercising significant authority under the laws of the United States pursuant to a valid officer’s commission, Ms. Kux exercises this power pursuant to an unconstitutional delegation.”); Complaint, *Rave Salon*, *supra* note 3, at 6, 12; Complaint, *Moose Jooce*, *supra* note 3, at 7, 12.

123 See *FDA Rules and Regulations*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/regulatoryinformation/rulesregulations/default.htm> (last updated May 7, 2019) (providing only a general, textbook account of the rulemaking process); cf. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-205, FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS 7 (2009) (finding FDA is not forthcoming with information about internal rulemaking processes).

124 See Deeming Rule, *supra* note 108.

125 2 FDA STAFF MANUAL GUIDES §§ 1410.10, 1410.21 (2016), <https://www.fda.gov/AboutFDA/ReportsManualsForms/StaffManualGuides/ucml36380.htm>.

126 *Id.* § 1410.21(1)(G) (“[T]he Associate Commissioner for Policy . . . [is] authorized . . . [t]o perform any of the functions of the Commissioner with respect to the issuance of FR notices and proposed and final regulations of the Food and Drug Administration.”).

127 1 *id.* § 1118.6(1)(F) (2014).

128 See Seth Barrett Tillman & Josh Blackman, *Is Robert Mueller an ‘Officer of the United States’ or an ‘Employee of the United States’?*, LAWFARE (July 23, 2018), <https://www.lawfareblog.com/robert-mueller-officer-united-states-or-employee-united-states> (discussing how “*Lucia* has unsettled what was previously settled case law”). Consider the effect of doctrines like the de facto officer doctrine. See Gordon Stoner, *Recovery of Salary by a De Facto Officer*, 10 MICH. L. REV. 178 (1912).

delegation of some of its power to expert agencies to make those calls within the guidelines Congress provides.

For the same reasons Congress delegates—to promote efficiency, effectiveness, and expertise that would be impossible for the highest tier of governance to achieve—agency heads must delegate authority to individuals within their agencies.<sup>129</sup> While the organic statute Congress passes may delegate authority to an agency—or an agency head or board or commission—as a practical matter, other actors not mentioned in the law exercise the delegated authority. Agency subdelegation is beyond the scope of the Appointments Clause cases up to this point, as those cases involved questions about the status of officials operating in offices specified by Congress. The process of subdelegation, through which the heads of agencies pass on the authority granted by Congress to their subordinates,<sup>130</sup> adds complexity to the officer question.

In this increasingly complex administrative world, with more delegation of authority and commands to agencies to regulate from Congress, the system would be unable to function effectively without the ability of agency heads to delegate responsibilities within their respective bodies.<sup>131</sup> The Constitution contemplated the President would need heads of departments (and thus departments) to execute the laws passed by Congress, and practical considerations, such as the limited time and resources available to agency leaders, show that those responsibilities must be further diffused throughout those departments to actors other than those specifically granted the authority.<sup>132</sup> The implications of subdelegation depend on how the agency head chooses to pass down authority. She may choose to delegate final authority to the subordinate, allowing the subordinate to sign off on a rule, for example. These have been called “final subdelegations.”<sup>133</sup> Or she could keep for herself the final authority by reviewing the subordinate’s work before signing off on it—a “reviewable subdelegation.”<sup>134</sup> There is also a difference between formally subdelegated authority, as through a rule, and that which is subdelegated simply in practice without any announcement by the agency or process in conveying that authority.<sup>135</sup> All this is to say that the question of who is an officer—who exercises significant authority in a continuing office, under *Lucia*—becomes more difficult when an agency official is lower in the organizational chart.

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129 Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 441 (2015).

130 See Jennifer Nou, Essay, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 475 (2017).

131 *Id.* (“Delegation in some form, of course, is a necessity in large organizations like bureaucracies.”).

132 See U.S. CONST. art. II, § 2, cl. 1 (“The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments . . .”).

133 Nou, *supra* note 130, at 485. Note that *Lucia* recently focused on the *Freytag* Court’s rejection of finality as dispositive for significant authority, though it may still be considered as a factor. *Lucia v. SEC*, 138 S. Ct. 2044, 2052 (2018) (citing *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991)).

134 Nou, *supra* note 130, at 485.

135 See Nou, *supra* note 129, at 468.

Subdelegation raises constitutional concerns when subordinate actors in an agency exercise significant authority without being hired pursuant to one of the constitutionally permissible modes for officers.<sup>136</sup> Courts have held that the Constitution constrains the ability of government actors to exercise authority without sufficient political accountability, reading in requirements regarding appointments and restrictions on removal.<sup>137</sup> The response to this concern is to focus on the internal control over the subordinate actor, as more control allows broader delegated authority without compromising political accountability.<sup>138</sup> Mode of appointment is one method of control.

*C. Applying Appointments Clause Frameworks to Rulemaking Officials  
and the FDA Deeming Rule*

When the actor at issue is involved in rulemaking rather than adjudication—the issue presented in the current Deeming Rule litigation—the lawfulness of the rule turns on that actor’s constitutional status. Is the employee who issued the final rule really that—an employee? Or is she an officer because she exercised this final rulemaking authority? Turning that premise around, can it be said instead that, because she is not an officer, the rule she issued was not valid because only an officer can exercise that significant authority? *Freitag* suggested something along these lines, finding that an officer who also performs tasks that a nonofficer employee could perform does not change her status as an officer. Accordingly, a mere employee cannot exercise the authority of an officer without her status changing to that of an officer.

As the Court’s Appointments Clause cases make clear, whether an individual is an officer is a highly fact-specific inquiry. For an individual issuing a rule, such as Ms. Kux in the FDA, courts must inquire into the details of that individual’s authority, tracing it from Congress to the agency, and from the agency to this individual.<sup>139</sup> They should also look at the modes through which the individual exercises that authority and any checks on her power.<sup>140</sup>

Under the *Lucia* framework, the second prong of the analysis turns on whether this individual exercised significant authority under the law. Based

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136 Nou, *supra* note 130, at 512 (“Subdelegation raises constitutional worries since agency heads may entrust significant duties to subordinates with attenuated relationships to the President.”).

137 *Id.* at 514. See generally *Edmond v. United States*, 520 U.S. 651 (1997); *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986).

138 Nou, *supra* note 130, at 514.

139 See Jennifer Nou, *The SEC’s Improper Subdelegation (Statutory, Not Constitutional)*, YALE J. ON REG. BLOG (Apr. 11, 2018), <http://yalejreg.com/nc/the-secs-improper-subdelegation-statutory-not-constitutional/>.

140 See, e.g., Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking, 60 Fed. Reg. 43,110, 42,112 (Aug. 18, 1995); Philip A. Wallach & Nicholas W. Zeppos, *Contestation of Direct Final Rules During the Trump Administration*, BROOKINGS (Oct. 9, 2018), <https://www.brookings.edu/research/contestation-of-direct-final-rules-during-the-trump-administration/>.

on the precedent cases requiring a fact-based inquiry and the realities of agency action, this Note proposes a factor-based approach to the question of significant authority. Relevant to the inquiry are the mode of subdelegation to this individual (final or reviewable, formal or in practice); whether another actor exercises control over this individual; and the nature of the action itself. *Freytag* considered factors relevant to this analysis regarding STJs.<sup>141</sup> The Court has not yet had an opportunity to examine factors particular to the rulemaking context.

Applying the two-prong officer analysis from *Lucia* to the rulemaking official who promulgated the FDA Deeming Rule, the first question is whether the Associate Commissioner for Policy is a continuing position established by law. An apparently clear answer comes from the FDA Staff Manual Guide, showing this is a continuing position, not temporary under *United States v. Germaine*.<sup>142</sup>

The next prong under *Lucia* is whether the ACP exercises significant authority. As discussed in Part II, “significant authority” has more than one possible definition, and it has not yet been settled by the Supreme Court.<sup>143</sup> Under a broad definition of significant authority—exercising a statutory duty—the ACP likely satisfies this prong. The FDA Staff Manual Guide shows that the delegation of statutory authority to issue rules flows from Congress to the Secretary of HHS under the Federal Food, Drug, and Cosmetic Act. That authority is then delegated to the Commissioner of the FDA and further delegated to the ACP.<sup>144</sup>

Under a narrower definition of significant authority, this Note suggests a fact-specific inquiry including consideration of three factors: subdelegation of authority; control over the individual by any other individual (including review authority); and the nature of the action.

According to *Buckley v. Valeo*, “rulemaking . . . exercised free from day-to-day supervision of either Congress or the Executive Branch . . . represents the performance of a significant governmental duty exercised pursuant to a public law,” and “may therefore be exercised only by persons who are ‘Officers of the United States.’”<sup>145</sup> The level of supervision, then, is important in this analysis of officer status in rulemaking.<sup>146</sup>

In the case of the Deeming Rule, the Secretary of HHS from the beginning reserves the right to review. However, the ability to review does not diminish the ability of the ACP to issue a final rule in several instances, whenever the Secretary does not choose to review. The final authority of the FDA

141 *Freytag v. Comm’r*, 501 U.S. 868, 881–82 (1991) (finding STJs exercise significant authority in part because they perform “important functions” with “significant discretion”).

142 See 2 FDA STAFF MANUAL GUIDES § 1410.21, *supra* note 125; *United States v. Germaine*, 99 U.S. 508, 512 (1879); Plaintiffs’ Memorandum of Points, *supra* note 115, at 15.

143 See *supra* Part II.

144 2 FDA STAFF MANUAL GUIDES §§ 1410.10, 1410.21, *supra* note 125.

145 *Buckley v. Valeo*, 424 U.S. 1, 140–41 (1976) (per curiam) (footnotes omitted).

146 Cf. *Edmond v. United States*, 520 U.S. 651, 664 (1997) (describing supervision in deciding the principal versus inferior officer issue).

Commissioner has been subdelegated to the ACP, with only the restriction that it may not be further delegated beyond her.<sup>147</sup> As stated earlier, the particulars of the FDA’s internal rulemaking process are not readily available to discern possible functional restrictions and control exercised over this individual that could affect the analysis. Finally, the nature of the action is issuing a final rule. Issuing a rule alters the legal rights and obligations of the public and the government. *Buckley v. Valeo* listed rulemaking as an example of an exercise of significant authority. Under this analysis, the FDA ACP likely exercised significant authority.

Under the broad and narrow definitions of statutory authority considered here, the ACP, by issuing a final rule, performed the role of an officer of the United States. Under the original meaning definition of officer offered by Professor Mascott,<sup>148</sup> the significant authority language drops out completely, and the question becomes whether the ACP exercises a continuing, statutory duty. Similar to the broad definition of significant authority, under this test, the role of ACP is a continuing position under statute. Therefore, the ACP is an officer under the original meaning definition and must be hired pursuant to the Appointments Clause.

As discussed above, the FDA Commissioner and Deputy Commissioner appoint the ACP. The FDA is an agency within the Department of HHS. It is not a department itself. The Supreme Court has found that “the term ‘Heads of Departments’ does not embrace ‘inferior commissioners and bureau officers.’”<sup>149</sup> The “concurrence of the Secretary” language<sup>150</sup> could complicate the question. As it stands, it seems likely that the ACP was not appointed by a head of department. If the above is true, it would follow that Ms. Kux was not appointed pursuant to one of the constitutionally required modes, so a court might find that the Deeming Rule was issued in violation of the Constitution.

#### D. Implications

When an agency loses on a procedural step and not a substantive one, it can simply issue the rule again following the proper process. Although a plaintiff may win the battle, the agency will win the war. However, there are functional stakes to be considered. A court challenge and invalidation of an agency’s rule takes precious time from an administration working to issue rules—to make and execute policies that the President was elected to do—during a brief four years (sometimes eight). A loss after a long court challenge may result in the frustration of real policy gains that rules are meant to

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147 2 FDA STAFF MANUAL GUIDES § 1410.21, *supra* note 125.

148 See *supra* notes 82–85 and accompanying text.

149 *Freytag v. Comm’r*, 501 U.S. 868, 886 (1991) (quoting *United States v. Germaine*, 99 U.S. 508, 511 (1879)).

150 2 FDA STAFF MANUAL GUIDE § 1431.23, *supra* note 119, at 1.

affect. Consequences will also follow a finding that a vast number of rules were promulgated by unconstitutionally appointed officers.<sup>151</sup>

The other area that has consequences on the functioning of agencies is the *Free Enterprise Fund* holding that having multiple levels of removal protection is unconstitutional. In his *Lucia* dissent, Justice Breyer explained the potential difficulties presented in the ALJ context, where independence is important to the legitimacy and fairness of proceedings, and in practice, this would evoke a potentially disastrous upheaval of the current structure of agencies. The same concerns may apply in the rulemaking context. A broader definition of officer will encompass far more individuals further down the chain of command within agencies. Less rides on the independence of agency rulemaking officials than for ALJs, but there may be even more concern about the structural disruption.

Despite these concerns, there are countervailing purposes that support strict adherence to the text and doctrine of the Appointments Clause—stakes in following the formalities of the Constitution in protection of the proper balance of powers. The formality of the clearly defined modes of appointment acts as a structural safeguard. This fills several purposes. It protects against one branch unilaterally taking on more power by creating and filling an office by itself. It keeps the power of appointment in the current balance—it will not let too much power move from the President and to Congress. It also requires that the executive branch remain accountable for its officers, which can lead to more qualified officers being nominated.<sup>152</sup> The originalist view that Justice Thomas supported in his *Lucia* concurrence stands for the promotion of increased accountability because specifying the few people who can appoint officers makes even clearer the lines of accountability and encourages those people to make good appointments.<sup>153</sup> It guards against encroachment of one branch into another's power by preventing diffusion of the appointment power.<sup>154</sup> It can be argued that mere employees could also cause problems for private citizens with the power they exercise, so why does a more robust appointments doctrine protect those citizens?<sup>155</sup> A broader conception of "officer" means that more individuals acting with the authority to bind the government and the public will be subject to the check provided by the Appointments Clause. The formality of the Appointments Clause requires more careful consideration by Congress before creating officer positions and greater accountability of the President over the conduct of all officers.

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151 See ANGELA C. ERICKSON & THOMAS BERRY, PACIFIC LEGAL FOUND., BUT WHO RULES THE RULEMAKERS?: A STUDY OF ILLEGALLY ISSUED REGULATIONS AT HHS 25 tbl.1 (2019) (finding that Ms. Kux, as ACP, was the sole signer of 385 rules during the study period).

152 Plecnik, *supra* note 6, at 210.

153 *Lucia v. SEC*, 138 S. Ct. 2044, 2056 (2018) (Thomas, J., concurring).

154 See Brief for Pac. Legal Found., *supra* note 84, at 25 (quoting *Freytag*, 501 U.S. at 878).

155 As the Pacific Legal Fund put it: "Cannot 'swarms' of 'mere' employees harass the people and eat out their substance with less than *significant* authority?" *Id.* at 25.

## CONCLUSION

When it comes to the exercise of agency rulemaking authority, the appointment of the individual issuing the final rule matters. Formal adherence to the mandates of the Appointments Clause—properly applied to the rulemaking context—protects the separation of powers among the branches and enables the public to keep policymakers accountable for their actions.

*Lucia* provided a two-prong analysis but left the definition of “significant authority” unsettled. If the Court follows Justice Thomas and the original meaning definition, it could mean a reformulation of the Appointments Clause doctrine entirely, defining “officer” as one exercising a continuous, statutory duty. If it springs off of the two prongs from *Lucia*, the definition of “significant authority” may be broad or narrow. Under the broad definition, an officer performs a statutory duty in accordance with the original public meaning. Under the narrow definition, the standard for significant authority requires a more searching factual inquiry into the individual’s role.

Regardless of which definition prevails, the analysis should promote the values safeguarded by the Appointments Clause—accountability of the political bodies for the actions of those working within them and formal distinctions among the powers of the branches of government. These can be accomplished by considering factors that account for the complexity of agency action in the rulemaking context. The factors include how authority was subdelegated to the individual in question, the degree of control exercised over the individual, and the nature of the action. Applying these factors to the officer who promulgated the final FDA Deeming Rule, one can determine whether the individual who signed off on the rule was a “mere employee,” making her actions unconstitutional under the Appointments Clause.

Following *Lucia*, the question remains as to how the Appointments Clause applies to agency decisionmakers who are not ALJs. Whether through the Deeming Rule litigation or another court challenge to an individual wielding the agency’s authority, the Court will be confronted again with the question of who is an officer of the United States.

