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I. INTRODUCTION

When a wealthy drug dealer claims you owe her $20,000 what do you do? Maybe you say "no, there's been a mistake, you have the wrong person." But what if the drug dealer remains adamant you owe her the full $20,000? She tells you the only way to convince her to a lesser amount is by taking your claim to her cousin, who is hired *and* employed by the drug dealer to handle all her money disputes. The obvious problem here is in the relationship between the cousin and the drug dealer. Even if the cousin is a neutral arbitrator, his close relationship to the drug dealer reeks of impropriety. After all, the cousin and the drug dealer are family relatives and may even share financial rapport. Therefore, a person would have good reason to doubt the impartiality of any decision made by the cousin to affirm a debt owed to the drug dealer.

It may seem absurd to liken the IRS to a drug dealer, but the above scenario is comparable to the IRS appeals process. A taxpayer who owes money to the IRS may dispute their debt before an IRS Appeals Officer (AO). However, much like the drug dealers' cousin, the AO is both hired *and* employed by the IRS. AOs not only share familial relations with the IRS by being part of the same executive department, the two also share financial and collegial rapport with each other. Thus, regardless if AOs are truly neutral while arbitrating a taxpayer's appeal, their close relationship to the IRS reeks of impropriety; and even appearances of impropriety are

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enough to strip away public confidence[1] in the independence of a decision maker.[2]

This paper begins from a simple premise: requiring IRS AOs to be appointed as inferior Officers under the Appointments Clause will effectively mitigate existing appearances of impropriety currently borne by such Officers.[3] Specifically, subjecting AOs to the Appointments Clause relieves notions of impropriety in two ways. First, because the authority to appoint AOs will be given to an external entity, the IRS can no longer "choose the judge in its own cause."[4] In other words, the IRS cannot be accused of hiring AOs that are sympathetic to agency agendas if AOs are appointed externally. Second, because the power to remove is incident to the power to appoint,[5] the IRS can no longer use the prospect of termination to influence AO decisions if AOs are appointed and removed by an external authority. Thus, this paper argues that IRS AOs meet the necessary requirements to be classified as inferior Officers under the Appointments Clause and therefore should be appointed by a Court of law for reasons of impartiality.

1. Public confidence in the IRS has generally fallen. In 2003, 32% of public respondents reported having little or no confidence in the IRS. In 2013, that number rose to 57% of respondents reporting a lack of confidence in the IRS. Scott Clement, *The IRS' Approval Ratings are Free Fallin*', WASH. POST (May 28, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/05/28/the-irs-approval-ratings-are-free-fallin/?utm_term=.dd383a086a1d.

2. *See* Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 280 (1994) (showing that twenty-six percent of ALJs for the SSA perceive agency pressure to rule differently); *see also* Taxpayer Bill of Rights, Pub. L. No. 114-113, § 401(a)(3)(E), 112 Stat. 2242, 3117 (2015) (codified at I.R.C. § 7803(a)(3)(E)) (stating taxpayers have "the right to appeal a decision of the [IRS] in an *independent forum* …") (emphasis added); *see also* Pub. L. No. 105-206, § 1001(a)(4), 112 Stat. 685 (1998) (codified at I.R.C. § 7801) (requiring the Treasury Secretary to "ensure an independent appeals function within the [IRS]"); *see also* Bernard Schwartz, *Adjudication and the Administrative Procedures*, 32 TUL. L. REV. 203, 207 (1996) (explaining the theory of separation to insulate the person judging for the agency); *see also In Re* Larson, 86 A.2d 430, 435 (N.J. Super. Ct. App. Div. 1952) ("the combination of functions violates the ancient tenet of Anglo-American justice that '[n]o man shall be a judge in his own cause.'").

3. *See* Freytag v. Comm'r, 501 U.S. 868, 912 (1991) (considering the independent exercise of judicial and executive power to be incongruent).

4. Kent H. Barnett, *Resolving the ALJ Quandary*, 66 VAN. L. REV. 797, 848 (2013) [hereinafter *ALJ Quandary*] (citing Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 886 (2009) (internal quotation marks omitted)).

5. *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161 (2010); *see also* Burnap v. United States, 252 U.S. 512, 515 (1920) ("The power to remove is, in the absence of statutory provision to the contrary, an incident of the power to appoint.").

Determining whether a federal actor is an inferior Officer—and thus subject to the Appointment Clause—entails an in-depth examination of the position they hold, the office within which they work, and the scope of authority assigned to them. [6] Therefore, the following section of this paper discusses the Office of IRS Appeals[7] within which AOs perform their central duties to adjudicate and settle tax liabilities before litigation.[8] Understanding the history and structure of IRS Appeals provides a foundation to better understand the duties and scope of authority assigned to AOs, which is necessary to apply the legal framework of the Appointments Clause. That framework is examined in section three of this paper, which looks at two Court opinions holding AOs outside the purview of the Appointment Clause. Those opinions are contradicted by the Supreme Court's recent holding in *Lucia v. SEC*, which builds on prior jurisprudence by clarifying that an Officer, as defined under the Appointments Clause, need only to have final decision making authority "in some instances."[9] The Supreme Court's analysis in *Lucia* is applied to AOs in section four of this paper, and section five provides a series of policy arguments for requiring the application of the Appointments Clause to AOs. Lastly, section six of this paper compares the possible methods to appoint AOs and argues that appointment by the Courts is the most method viable for reasons of impartiality.

II. THE STRUCTURE AND PURPOSE OF IRS APPEALS AND ITS OFFICERS

IRS Appeals has one main purpose: to settle cases before litigation. AOs were created to assist the Office of Appeals in fulfilling that purpose by overseeing all administrative appeals, and ultimately deciding whether or not to compromise the liability in question. To fully understand the role of an IRS Appeals Officer, it is necessary to understand the structure and purpose of IRS Appeals. After all, the authority of an AO is limited to the authority delegated to the Office of Appeals. This section provides an overview of why IRS Appeals was created, its initial authority, and the evolution and scope of its role within the IRS. This examination, in turn, will establish a

6. *See generally* Lucia v. SEC, 138 S. Ct. 2044 (2018) (holding SEC ALJs subject to the Appointment's Clause because they held offices established by law and wielded significant authority).

7. The IRS Office of Appeals is also referred to as "Office of Appeals," "IRS Appeals," or "Appeals Office."

8. IRS, HISTORY OF APPEALS, IRS DOC. 7225, at 1 (1987) [hereinafter *IRS Doc. 7225*].

9. *Lucia*, 138 S. Ct. at 2066.

foundation from which to better understand the role of an AO and the authority they wield under the current structure of the IRS.

A. The Creation of IRS Appeals

IRS Appeals has developed alongside the US Tax Court, which traces back to the Committee on Appeals and Review (the Committee). The Committee was created in 1918 by the IRS Commissioner as means to adjudicate tax controversy within the IRS.[10] The Committee, however, had only limited authority to settle cases. For example, it was "directly responsible to the Commissioner and could act only in an advisory capacity. Thus, the Commissioner was theoretically free to disregard Committee recommendations."[11] The Commissioner's restraint over Committee recommendations was ultimately removed by the Revenue Act of 1921;[12] which made two additional contributions to the appeals process. First, the 1921 Act afforded appeal rights to all taxpayers.[13] Second, the Act granted the Committee final decision making authority over such appeals.[14] The Act effectively increased the number of annual appeals and caused the Committee to significantly expand, nearly quadrupling in size over a two-year period.[15] However, the Committee's expansion was not enough to handle the appeal load, which ultimately lead to the Committee being replaced by the Board of Tax Appeals, in 1924.[16]

Two major issues led to the replacement of the Committee. First, the Committee was not independent of the Bureau of Internal Revenue.[17] The Tax Simplification Board[18] reviewed this issue and found that "it would never be possible to give to the taxpayer the fair and independent review to which [she is rightly entitled] as long as the appellate tribunal is directly

10. The Committee was the first adjudicatory body created by the Commissioner and organized within the IRS. *See* 1920 COMM'R OF INT. REV. REP. 14–15.

11. Harold Dubroff & Brant J. Hellwig, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS, 42–45 (2d ed. 2014) [hereinafter *Historical Analysis*] ("The Solicitor of Internal Revenue reviewed Committee decisions on behalf of the Commissioner and readily exercised authority to amend or reverse them."); *see also* REPORT OF TAX SIMPLIFICATION BOARD, H.R. DOC. NO. 68-103, at 2 (1923).

12. Revenue Act of 1921, Pub. L. No. 67-98, ch. 136, § 250(d), 42 Stat. 227, 265.

13. *Id.* § 1309, 42 Stat. 310.

14. *Id.*

15. *Historical Analysis*, *supra* note 11, at 43.

16. COMM'R OF INT. REV. REP. 11 (1924).

17. *See* A.E. Graupner, *The Operation of the Board of Tax Appeals*, 3 NAT'L INC. TAX MAG. 295 (1925) (describing the issue that Committee recommendations were mere settlements of disputed issues rather than judicial determinations of legal questions).

18. Revenue Act of 1921, Pub. L. No. 67-98, ch. 136, § 1327, 42 Stat. 317 (creating the Tax Simplification Board to investigate the administration of the internal revenue laws).

under, and its recommendations subject to the approval of, the [O]fficer whose duty it is to administer the law and collect the tax."[19] A second flaw was the Committee's lack of procedural due process. The informal and private nature of Committee hearings allowed taxpayers to settle liabilities behind closed doors.[20] These private hearings encouraged inconsistent settlements resulting in large refunds to some taxpayers but not others.[21] This led to public demands for more transparency and "equal applicability of the law" within the appeals process.[22]

Congress addressed public concerns by creating more formal appeal procedures in the 1924 Revenue Act.[23] The Act replaced the Committee with the Board of Tax Appeals (the Board), an "independent executive branch agency that would later evolve into the U.S. Tax Court."[24] The Board was analogous to a judicial forum, with appointments made by the President of United States.[25] However, the Board's decisions were "not final on the question of liability."[26] Thus, the Government could appeal unfavorable decisions to Federal Court.[27] Importantly, the Board had formal procedures. These included public hearings with written findings of fact, and even written opinions.[28] The Board's formal procedures, however, slowed the appeals process.[29]

To expedite the tax appeals process, the IRS Commissioner formed an independent Special Advisory Committee in 1927 that would later evolve into IRS Appeals.[30] The Advisory Committee "functioned essentially as a settlement agency exercising the discretion vested in the Commissioner."[31]

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19. 1924 COMM'R OF INTL. REV. ANN. REP. 12; *see also* 65 CONG. REC. 2614, 2684 (1924) (remarks of Mr. Young).

20. *Historical Analysis*, *supra* note 11, at 47.

21. *See, e.g.*, Sully, *Those Refunded Millions*, SATURDAY EVENING POST, June 21, 1924, at 36.

22. *Historical Analysis, supra* note 11, at 47 ("The creation of the board represented a victory for those forces of righteousness demanding absolute precision and equal applicability of the law without fear or favor.").

23. Revenue Act of 1924, ch. 234, §1100(a), 43 Stat. 253.

24. Andrew Strekla & Sean Morrison, *The IRS and America's Longest Running ADR Program,* FED. L. PUB., Nov. 2016 at 28.

25. *Historical Analysis, supra* note 11, at 63.

26. *Id.* at 122.

27. *Id.* at 56.

28. *Historical Analysis*, *supra* note 11, at 93 (clarifying that written opinions were required for cases involving more than $10,000).

29. National Archives, Record of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1923.* "The board [had] more cases to pass on and less informal practice, and, therefore, greater delay upon each case than [the Committee]."

30. Strekla & Morrison*, supra* note 24, at 28.

31. *Id.*

The Advisory Committee had limited authority,[32] and its procedures were informal, allowing taxpayers to petition without fear of technical objections.[33] In 1933, the Advisory Committee was replaced by a group known as Technical Staff, which was given increased authority to settle cases.[34] Specifically, Technical Staff "had the authority to bind the IRS in matters of $5,000[35] or less for any one tax year."[36] The Technical Staff went through several reorganizations, each increasing in authority throughout time.[37] Finally, in 1978 the IRS Appeals Division was created.[38]

B. The Current Structure of IRS Appeals

The structure of IRS Appeals (hereafter Appeals or Office of Appeals) was first described in Rev. Proc. 78-1,[39] and was further defined by Treasury Regulations in 1987.[40] Throughout its history, the structure of IRS Appeals has emphasized the informal nature of its proceedings.[41] For example, the regulations make clear that testimony is not taken under oath, and matters alleged as facts are taken as such.[42] Importantly, IRS Appeals has exclusive and final authority to determine liability for most taxes at the administrative level.[43] This authority also includes complete settlement

32. *See IRS Doc. 7225*, *supra* note 8, at 1 (clarifying the Special Advisory Committee could review cases only where a notice of deficiency had been issued).

33. Strekla & Morrison, *supra* note 24, at 29.

34. *IRS Doc. 7225, supra* note 8, at 1.

35. *See CPI Inflation Calculator, Bureau of Labor Statics*, for calculation that 5,000 in 1933 is equivalent to $97,377.13 in 2018 U.S. dollars, https://www.bls.gov/data/inflation_calculator.htm (last visited 2/9/2019).

36. Strekla & Morrison, *supra* note 24, at 28.

37. *Id.* ("Technical Staff became 'the Appellate Division' in 1952, and as the jurisdiction of the Appellate Division increased, its employees changed titles from 'technical advisors' to 'appellate conferees,' and finally to the current title of 'appeals officers' in 1978.").

38. *Id.*

39. REV. PROC. 78-1, C.B. 550 (1978).

40. *See* Treas. Reg. § 601.106.

41. *Id.* (clarifying that no testimony is taken under oath).

42. Treas. Reg. § 601.106(c).

43. Treas. Reg. § 601.106(d)(2)(ii). *See also* James E. Merritt, *How to Handle a Tax Controversy at the IRS and in Court*. THE AMERICAN LAW INSTITUTE (October, 1996) *and* I.R.S. PUB. NO. 556 (clarifying that to receive attorney fees, the taxpayer must "apply for administrative costs within 90 days of the date on which the *final decision* of the IRS Office of Appeals … was mailed to you.") (emphasis added).

powers.[44] Under this broad authority, IRS Appeals is able to accomplish its mission to settle tax liabilities before litigation.[45]

Initially, IRS Appeals was not acknowledged by statute.[46] It was instead recognized only by Treasury Regulations, Revenue Procedures, and the IRS Manual.[47] That all changed when Congress passed the Restructuring and Reform Act (RRA), in 1998.[48] The RRA responded to public requests for a more taxpayer-centered appeals process by establishing broad statutory rights of appeal.[49] The Act addressed public concern in two ways. First, the Act directed the Treasury Secretary to "ensure an independent appeals function" within the IRS, including a "prohibition of ex parte communications between AOs and other Internal Revenue Service employees."[50] This effectively echoed the Taxpayer's Bill of Rights, which, under Section 7803, granted taxpayers a "right to appeal a decision of the IRS in an independent forum."[51] IRS Appeals was restructured within the RRA to be that "independent" forum.[52] The impartial and independent nature of IRS Appeals has since been reiterated within numerous IRS publications and statutes.[53]

Second, the RRA granted taxpayers a statutory right of appeal, otherwise referred to as a Collection Due Process (CDP) hearing, "which allow[s] taxpayers to appeal lien, levy, or seizure actions proposed by the IRS."[54] Under the RRA, CDP hearings were to be conducted within IRS Appeals.[55] The RRA further allowed IRS Appeals to "retain jurisdiction with

44. *See* MICHAEL SALTZMAN, IRS PRACTICE AND PROCEDURE, ¶9.01[2] (2nd ed. 2002). *See also* Treas. Reg. § 601.106(a)(1)(i) ("The Appeals office will have exclusive settlement jurisdiction … over cases docketed in the Tax Court.").

45. *IRS Doc. 7225, supra* note 8, at 7.

46. *See* SALTZMAN, *supra* note 44 (clarifying that vague references to an appeal unit could be found in I.R.C. § 7429, which called for review of jeopardy assessments in localized offices. Other references are found in I.R.C. § 7430, which permits taxpayers to recover litigation costs after the taxpayer exhausts all administrative remedies).

47. *Id.*

48. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 [hereinafter RAA].

49. *See* SALTZMAN, *supra* note 44.

50. *RRA, supra* note 48, at §1001.

51. I.R.C. § 7803(a)(3)(E).

52. *RRA, supra* note 48, at § 1001(a)(4).

53. Your Rights as a Taxpayer, IRS Pub. No. 1, 64731W, at 1 (2017) ("Taxpayers are entitled to a *fair and impartial* administrative appeal of most IRS decisions …") (emphasis added). *See also* I.R.C. § 7122(e)(1) (entitling taxpayers to "an *independent* administrative review of any rejection of a proposed offer-in-compromise …") (emphasis added).

54. S. Rep. No. 105-174 at 92, (1998).

55. I.R.C. § 6320(b) (giving IRS Appeals the authority to oversee all taxpayer appeals against notices of intent to file a lien); I.R.C. § 6330(b) (giving IRS Appeals the authority to

respect to any determination made,"[56] and even authorized IRS Appeals to settle matters on docket before the U.S. Tax Court.[57] Importantly, the RRA required all CDP hearings to be conducted by an "[i]mpartial officer … who has had no prior involvement with respect to the [contested matter]."[58] Those "[i]mpartial officer[s]" are referred to as "[A]ppeals [O]fficers."[59]

C. The Scope and Authority of IRS Appeal Officers

All CDP hearings conducted within IRS Appeals are heard by an IRS AO.[60] The AO position has existed in one form or another long before the RRA.[61] However, the RRA codified the authority for Appeals Officers under IRC Sections 6330 and 6320. Those statutes make clear that AOs are to be the aforementioned "impartial officers" tasked with conducting CDP hearings.[62] AOs are also vested with exclusive authority to determine tax liability,[63] issue notices of deficiencies,[64] and even settle cases on behalf of the IRS Commissioner.[65]

Within the broad scope of authority given to AOs there are certain statutorily mandated duties. First, before issuing any final determination as to liability after conducting a CDP hearing, "[t]he [AO] shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met."[66] Second, AOs must consider all relevant issues raised by the taxpayer in the hearing, including spousal defenses,[67] the appropriateness of collection actions,[68] as well as any alternatives to collections.[69] Third, in making a determination, the AO must

oversee all appeals of levy notices); I.R.C. § 7122(e) (giving statutory right to taxpayers to appeal any denied Offer in Compromise).

56. I.R.C. § 6330(d)(3).
57. *See* Treas. Reg. § 601.106(a)(1)(i).
58. I.R.C. §§ 6330(b)(3), 6320(b)(2).
59. I.R.C. §§ 6330(c)(1), 6330(c)(3).
60. *See* I.R.C. §§ 6330(c)(1) *and* 6330(c)(3) (The [AO] shall at the [CDP] hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.").
61. *IRS Doc. 7225*, *supra* note 8, at 5 (explaining that "[i]n 1965, the name of settlement officer was changed from 'Technical Advisor' to 'Appellate Conferee.' It was subsequently changed to 'Appeals Officer' in October of 1978.").
62. *See* I.R.C. §§ 6320(b)(3), 6330(b)(3), 6330(c)(1)-(3).
63. Treas. Reg. § 601.106(d)(2)(ii).
64. *Id.*
65. Treas. Reg. § 601.106(a)(1)(i).
66. I.R.C. § 6330(c)(1).
67. I.R.C. § 6330(c)(2)(A)(i).
68. I.R.C. § 6330(c)(2)(A)(ii).
69. I.R.C. § 6330(c)(2)(A)(iii).

consider "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary."[70]

Although taxpayers may petition Tax Court to review an AO determination, [71] it is often necessary for taxpayers to first bring their case before an AO as a prerequisite to bringing their case before Tax Court. One example is where a taxpayer wants to qualify for an award of attorney fees.[72] To qualify, the taxpayer must first exhaust all administrative remedies, including their right to a CDP hearing before an AO.[73] Another example is where the taxpayer received no deficiency notice, which is required to petition Tax Court for review.[74] Specifically, where no deficiency notice is received,[75] the taxpayer must first request a CDP hearing to receive a formal deficiency notice from an AO.[76] Thus, AOs often act as the "gatekeepers" to Tax Court because they are authorized to determine liability and issue deficiency notices, which are prerequisites for Tax Court jurisdiction.[77] Because of this broad authority, some taxpayers have argued that AOs wield too much power to be considered mere employees, and should instead be considered Officers of the United States, which are subject to appointment under the U.S. Constitution.[78]

III. THE APPOINTMENTS CLAUSE

This section provides an overview of the scope of the Appointments Clause and its prior application to AOs by the Courts. This cursory overview will, in turn, provide a foundation to better understand the recent expansion of Appointment Clause jurisprudence, which is discussed in Part C of this Section, and the effects of that expansion to IRS AOs, which is discussed in section four of this paper.

70. I.R.C. § 6330(c)(3)(C).
71. I.R.C. § 6330(d)(1).
72. *See generally* I.R.C. § 7430.
73. I.R.C. § 7430(c)(4)(A)(ii), and Treas. Reg. § 301.7430-1(b).
74. I.R.C. § 6213(a).
75. *See generally* I.R.C. § 6511(a)-(b) (Taxpayers can sometimes receive no deficiency notice when contesting denials of claims for refund.)
76. Treas. Reg. § 601.106(d)(2)(ii) (stating, in part, that "[AOs] having authority for the administrative determination of tax liabilities … are also authorized to prepare, sign on behalf of the Commissioner, and send to the taxpayer by registered or certified mail any statutory notice of deficiency prescribed …").
77. *See* I.R.C. § 6212 (A statutory notice of deficiency is sometimes referred to informally as a taxpayer's "ticket to Tax Court.").
78. *See, e.g.*, Tucker v. Comm'r, 135 T.C. 114, 166 (2010), *and* Tucker v. Comm'r, 676 F.3d 1129, 1132 (2012) (considering IRS AOs not to be Officers under the U.S. Constitution).

A. The Scope of the Appointments Clause

Simply stated, the Appointments Clause requires Officers of the United States to be appointed.[79] This means such Officers can be hired and fired only as directed by Article II.[80] Under Article II, principal Officers are appointed by the President with advice and consent of the Senate,[81] and inferior Officers[82] are appointed by the President alone, a Court, or a Department Head.[83] In discussing the scope of the Appointments Clause, and how it applies to AOs, this paper focuses only on the scope and definition of inferior Officers.[84] This is because, by definition, inferior Officers answer to other appointed Officers, whereas principal Officers answer only to the President.[85] Thus, if the Appointments Clause were to apply to AOs, they would not be considered principal Officers because AOs answer to other Officers, not to the President. Instead, if AOs were subject to the Appointments Clause, they would fall under the scope and definition of an inferior Officer (hereon referred to simply as "Officer").[86]

79. U.S. CONST. art. II, §2, cl. 2.

80. *See* Myers v. United States, 272 U.S. 52, 126 (1926) ("In the absence of any specific provision to the contrary, the power of appointment to executive office carries with it, as a necessary incident, the power of removal …"), *and* United States v. Perkins, 116 U.S. 483, 285 (1886) (stating that "Congress [has] the power to limit and regulate removal of such inferior officers by heads of departments when it exercises its constitutional power to lodge the power of appointment with them.").

81. Morrison v. Olson, 487 U.S. 654, 716 (1988) (Scalia, J. dissenting) (defining an Officer who answers directly to the President as a principle Officer).

82. *Id.* (defining an Officer who answers to another appointed Officer as an inferior Officer); *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 510 (2010) (stating "inferior [o]fficers are officers whose work is directed and supervised at some level by other [o]fficers …").

83. Buckley v. Valeo, 424 U.S. 1 at 126 (1976), superseded by statue, The Bipartisan Campaign Reform Act of 2002 (BCRA), Pub.L. No. 107–155, 116 Stat. 81 as recognized in McConnell v. Fed. Election Comm'n, 540 U.S. 93, 93 (2003); *see also* Freytag v. Comm'r, 501 U.S. 868, 915 (1991) (defining a department as a "free standing, self-contained entity in the Executive Branch."); *see also* John T. Plecnik, Officers Under the Appointments Clause, 11. PITT. TAX. REV. 201, 203 (2014) (a department head includes the Treasury Secretary but not the IRS Commissioner).

84. *See generally Morrison*, 487 U.S. at 716 (discussing the differences between inferior and principal Officers).

85. *Id.*

86. *See Tucker,* 135 T.C. at 165-66 (supporting the proposition that AOs cannot be considered principal Officers because AOs answer to the Chief Counsel and Assistant Chief Counsel of the IRS) ("[N]o CDP determination is issued until it has been reviewed and approved by a higher-ranking team manager."); *see also* 26 U.S.C. § 6330(c)(1) ("The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.").

Distinguishing Officers from mere employees is an essential first step to applying the Appointment's Clause because employees do not require appointment.[87] Employees are defined as "lesser functionaries subordinate to [O]fficers of the United States."[88] T he Supreme Court has, over the years, defined certain characteristics necessary for an employee to be considered an Officer subject to the Appointments Clause.[89] Those characteristics are conveniently distilled within a two-factor test.[90] In other words, to be subject to the Appointments Clause, an Officer must maintain a "continuing office established by law" and, in addition, must "wield significant authority."[91]

An Officer maintains a "continuing office" when "they serve on an ongoing, rather than a temporary or episodic basis," and their "duties, salary, and means of appointment are all specified [by law]."[92] This first factor was examined by the Supreme Court in *United States v. Germaine.*[93] There, the Supreme Court held that "civil surgeons" were mere employees because their duties were occasional or temporary rather than "continuing and permanent."[94] Importantly, the surgeons in *Germaine* acted only when called on by the Commissioner of Pensions.[95] In addition, the surgeons made no oath for office, nor were any appropriations made to pay their compensation.[96] Thus, the Supreme Court held that civil surgeons did not maintain a "continuing office" because their positions were temporary and they did not receive statutorily defined duties, salary or means of appointment.[97]

As for the second factor within the two-factor test, the Appointments Clause requires Officers to wield "significant authority."[98] The Supreme Court has found "significant authority" where an Officer has the power to issue final decisions,[99] and where an Officer has unfettered use of discretion.[100] Importantly, an Officer will not be removed of their Officer

87. *See* Plecnik, *supra* note 83, at 203 (discussing the application of the Appointments Clause to federal employees).
88. *Buckley*, 424 U.S. at 125-26.
89. *Id.* (clarifying that Officers hold positions that "[do] not include all employees …").
90. *Lucia*, 138 S.Ct. at 2049 (applying most recently the two-factor Officer test to SEC ALJs).
91. *Tucker*, 135 T.C. at 159.
92. *Freytag*, 501 U.S. at 881.
93. United States v. Germaine, 99 U.S. 508, 512 (1878).
94. *Id.* at 510.
95. *Id.* at 512.
96. *Id.*
97. *Id.*
98. *Tucker*, 135 T.C. at 159 (2010).
99. *See* Landry v. FDIC, 204 F.3d 1125, 1133-34 (D.C. Cir. 2000).
100. *Freytag*, 501 U.S. at 882.

status for occasionally performing employee duties.[101] In other words, an Officer will not be considered an "[O]fficer for purposes of some of their duties… but mere employees with respect to other responsibilities."[102] Therefore, in determining whether an employee wields the necessary authority to be considered an Officer subject to appointment, prior Courts look at *all* the duties assigned to the employee in question.[103]

B. Prior Application of the Appointments Clause to Appeals Officers

Because Courts apply the Appointments Clause on a case-by-case basis,[104] it is important to understand how prior Courts have specifically applied the Appointments Clause to AOs. This section provides an analysis of two prior Court opinions that considered AOs "mere employees" who are outside the scope of the Appointments Clause. Those cases are Tucker I and Tucker II.[105]

1. Tucker I

The Tax Court first looked at whether AOs were Officers subject to the Appointments Clause in *Tucker v. CIR* (Tucker I).[106] There, the Court held that AOs were not subject to appointment because, among other reasons, they did not wield significant authority.[107] Tucker I involved a taxpayer who appealed an IRS notice of intent to file a lien to collect unpaid taxes.[108] The taxpayer's appeal was granted and a CDP hearing was held by an AO.[109] The AO sustained the notice of intent to file a lien, from which the taxpayer appealed to Tax Court on constitutional grounds, arguing that the AO who

101. *Id.* (stating that where an "[O]fficer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform [her] status under the Constitution").

102. *Id.*

103. *Tucker*, 676 F.3d at 1132 (2012) ("[W]e look not only to the authority that Appeals employees wielded in [Petitioner's] case but to *all* their duties …"). *See also Free Enterprise Fund*, 561 U.S. at 520 (2010) ("[T]he Court in these circumstances has looked to function and context, and not to bright-line rules.") (Breyer J., dissenting).

104. *Free Enterprise Fund*, 561 U.S. at 539 (stating "I understand the virtues of a common-law case-by-case approach" to applying the Appointments Clause to inferior Officers) (Breyer J., dissenting).

105. *See generally Tucker*, 135 T.C. 114 (2010); *Tucker*, 676 F.3d 1129 (D.C. Cir. 2012).

106. *Tucker*, 135 T.C. 114 (2010).

107. *Id.* at 165.

108. *Id.* at 116.

109. *Id.*

handled his administrative appeal was required to be appointed.[110] The Tax Court heard the appeal, applied the two-part "Officer" test, and held that an AO "has neither a position 'established by [l]aw' nor 'significant authority' that is characteristic of an '[O]fficer of the United States' for purposes of the Appointments Clause."[111]

In examining the first factor of the two-part test, the Tax Court concluded that "no [AO] position [was] established by law."[112] Despite AOs having duties and salary specified by law, the Tax Court considered such specified duties, salary, and means of appointment as non-determinative for purposes of meeting the first factor. Specifically, the Court stated that such specified duties and salary are only "a factor that has proven relevant under the Supreme Court's Appointments Clause jurisprudence."[113] Instead, the Tax Court found that Appeals Officers did not hold offices established by law because the IRS Office of Appeals, within which AOs perform their duties, was created by an Executive order with statutory authority.[114] The Court stated that "[i]f there were a statutory provision to the effect that '[t]here shall be, within the IRS Office of Appeals, officers designated as Appeals Officers, who shall conduct CDP hearings,' etc. . . then that would be some indication that the Appeals Officer Position was [e]stablished by [l]aw."[115] The Tax Court supported their conclusion by looking at the statutory language within I.R.C. Sections 6320 and 6330, which specify duties for the AO position.[116] Those statutes refer specifically to AOs as either an "[O]fficer or employee." The Court concluded that, "[i]f Congress had intended to assign CDP duty to a particular rank of "Appeals Officer," it would not have added the phrase "or employee."[117] Lastly, the Court found that no Appeals Office was established by Treasury Regulations,[118] however the Court did not examine any Treasury Regulations during its analysis.[119]

110. *Id.*
111. *Id.* at 165.
112. *Id.* at 152.
113. *Id.*
114. *Id.* at 153.
115. *Id.* ("It was the Executive Branch that created the IRS Office of Appeals and its personnel structure, pursuant to that authority in [S]ection 7804(a).").
116. *See generally* I.R.C. § 6320 (2019); I.R.C § 6330 (2019).
117. *Tucker*, 135 T.C. at 154 (2010).
118. *Id.* at 159 ("[E]ven under the regulations the CDP responsibility does not inhere in any specific office or position.").
119. *Id.* at 158-59.

Despite finding that the AO "positon in question [was] not an office established by law,"[120] the Court went on to assume that the AO position *was* established by law, stating:

> However, if the phrase "established by [l]aw" were construed to mean that the Appointments Clause can apply only to a position expressly created by a statute, then abuses could arise. For example, Congress could take a pre-existing low-level position (which had been created by the Executive Branch pursuant to a general authorization like section 7804(a), and which was not subject to appointment by the President or a Head of a Department) and could invest it with significant additional power, thus evading the Appointments Clause by seeming to avoid "establishing" the office.[121]

The Court supported their new position by pointing to cases from the Fifth and Sixth Circuits, which found an Administrative Review Board (ARB) employee to be an Officer under the Appointments Clause despite the ARB being created by order of the Secretary of Labor.[122] The Tax Court was hesitant, but went on to "assume arguendo that the CDP function prescribed under [S]ections 6320 and 6330 and the regulations thereunder is committed to a position "established by [l]aw."[123] Considering the first-factor met, the Court then examined the second factor of whether AOs wield "significant authority."[124]

In examining the second factor, the Court held that AOs do not wield significant authority because they do not make final decisions.[125] The Court supported their determination by citing *Landry*.[126] There, the Court stated in dicta that adjudicative positions do not have final decision making power where their "determinations are subject to supervision."[127] In *Landry*, the

120. *Id. at 158*

121. *Tucker*, 135 T.C. at 158.

122. *Id*. at 157 (referring to Willy v. Admin. Rev. Bd., 423 F.3d 483, 491 (5th Cir. 2005)), *and* Varnadore v. Sec. of Labor, 141 F.3d 625, 631 (6th Cir.1998) (finding an Administrative Review Board (ARB) member to be an inferior Officer under the Appointments Clause despite the ARB being created by order of the Secretary of Labor).

123. *Id*. at 158-9 ("Rather, the parties and the [C]ourts seem to have assumed that if the positions existed, then the positions were established by law. If this assumption is correct, then it would seem that any "Office" that actually existed in the Federal Government is arguably established by law.").

124. *Id*. at 160.

125. *Id.* at 161.

126. *Id.* (citing *Landry*, 204 F.3d at 1133-1134).

127. *Id.* at 163 (citing *Landry*, 204 F.3d at 1133-1134).

DC Court of Appeals held the administrative law judges (ALJs) in question[128] did not exercise significant authority because their decisions were subject to agency review and were thus not final.[129] The Tax Court in *Tucker* applied the same analysis to IRS AOs and found they were not vested with "independent authority" because their decisions were subject to approval by the Office of Appeals, which "retains jurisdiction to reconsider and overturn its personnel's determinations with respect to a collection action."[130] Thus, according to the court, because AOs do not have final decision making power, they do not wield significant authority.[131]

2. Tucker II.

The taxpayer in Tucker I appealed the Tax Court decision to the D.C. Circuit Court of Appeals. The Circuit Court upheld the Tax Court decision, finding AOs outside the purview of the Appointments Clause.[132] However, the Circuit Court did not take a decisive position on whether AOs maintain continuing positions under law. Specifically, the court stated "we first consider – and ultimately bypass – whether, in the words of the clause, [AO] positions were established by law."[133] Although, in bypassing the first factor, the Court stated that it would seem "anomalous if the Appointments Clause were inapplicable to positions extant in the bureaucratic hierarchy, and to which Congress assigned 'significant authority,' merely because neither Congress nor the [E]xecutive branch had formally created the positions."[134] The Court quickly added that, "[i]n any event, because we conclude below that [AOs] do not exercise significant authority within the meaning of the Appointments Clause cases, we need not resolve whether their positions were 'established by [l]aw' for purposes of that clause."[135] The Court then examined the "significance" of AO authority.

In holding that AOs do not wield significant authority, the D.C. Circuit Court of Appeals looked at three criteria: the significance of the matters resolved by AOs, the discretion they exercise in reaching their decision, and the finality of those decisions.[136] The Court did not quibble over the first

128. *Landry*, 204 F.3d at 1128 (In *Landry*, the ALJs in question adjudicated on behalf of the Federal Deposited Insurance Corporation (FDIC)).
129. *Id.* at 1133.
130. *Tucker*, 135 T.C. at 164 (referencing 26 U.S.C. § 6330(d)(2)).
131. *Id.*
132. *Tucker*, 676 F.3d at 1133.
133. *Id.* at 1132.
134. *Id.*
135. *Id.*
136. *Id.* at 1133.

criterion. Instead, the Court took as fact "that the issue of a person's tax liability is substantively significant enough to meet [the first factor], in which case degrees of discretion and finality will ultimately be determinative."[137] In examining the second criterion, the court found the discretion exercised by AOs to be constrained because there are limitations on the settlement amounts on which they can agree.[138] For example, "if Appeals estimates that the IRS's chances of prevailing on a disputed point of law are 60%, [an AO] may agree to accept only 60% of the liability that turns on the point."[139] The court also noted that AO discretion is constrained because they are instructed to "[r]equest legal advice from an Associate Chief Counsel office on novel or significant issues."[140] Further, the Court noted that AOs must receive approval from Treasury's General Counsel for any compromise exceeding $50,000,[141] and any closing agreement relieving a taxpayer of a liability is subject to approval by the Treasury Secretary.[142] For these reasons, the *Tucker II* Court found the discretion of an AO to be "highly constrained."[143]

Lastly, the court examined the final decision making authority of AOs. However, the Court avoided an in-depth analysis. Specifically, the Court "conclude[d] that the [AOs] lack of discretion [was] determinative, offsetting the effective finality of [their] decisions …"[144] The Court reasoned that, "if the tasks assigned [to] a position allowed the holder no choice, obviously, it would be pointless to classify [her] as an "Officer" even though the consequences of [her] ministerial decisions were both vital and final."[145] Thus, the Court concluded that "the significance and discretion involved in [AO] decisions seem well below the level necessary to [consider them] an Officer."[146]

137. *Tucker*, 676 F.3d at 1133.
138. *Id.* at 1134 ("[An AO] is subject to consultation requirements, to guidelines, and to supervision.").
139. *Id*. (citing C.F.R. § 601.106(f)(2)).
140. *Id.* (citing I.R.M. pt. 8.6.3.5 (Oct. 26, 2007)).
141. *Id.* (citing U.S.C. § 7122(b)).
142. *Tucker*, 676 F.3d at 1134.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 1135 (internal quotations omitted).

C. Recent Additions to the Appointments Clause Jurisprudence

In 2018, the Supreme Court decided *Lucia v. SEC*,[147] which effectively redefines essential features of the Appointments Clause analysis relied on by both the *Tucker I and Tucker II* Courts. (i.e., Tax Court and D.C. Circuit Court of Appeals, respectively). In *Lucia*, Petitioner marketed a retirement savings strategy called "Buckets of Money."[148] The SEC considered Petitioner's business strategy deceitful and charged Petitioner under the Investment Advisors Act.[149] An ALJ for the SEC concluded that Petitioner had violated the Investment Advisors Act.[150] Petitioner appealed the ALJs decision arguing it was invalid because the SEC's ALJ was not constitutionally appointed under the Appointments Clause.[151] Petitioner's appeal was granted certiorari, and the Supreme Court applied the two-factor test to determine whether SEC ALJs are Officers under the Constitution.[152]

The Supreme Court cited their opinions in *Freytag* and *Germaine*[153] to establish the first-factor, that Officers, as defined under the Appointments Clause, must "hold a continuing office established by law."[154] In *Freytag*, the Supreme Court found that Special Trial Judges (STJs) of the US Tax Court had continuing positions because "they serve on an ongoing, rather than a temporary or episodic basis, and their duties, salary, and means of appointment are all specified in the Tax Code."[155] The Supreme Court compared the duties and statutory authority of SEC ALJs to the STJs in *Freytag* and found that SEC ALJs, like Tax Court STJs, receive career appointments to statutorily created positions, and therefore hold a "continuing office established by law."[156] Thus, the first factor was met.

In examining the second-factor, the Supreme Court cited their holding in *Freytag* to establish that Officers, as defined under the Appointment Clause, must wield significant authority.[157] In *Freytag*, the Supreme Court held that Special Trial Judges (STJs) of the US Tax Court wielded significant

147. *Lucia*, 138 S. Ct. 2044.
148. *Id.*
149. *Id.*
150. *Id.* at 2050.
151. *Id.* at 2051.
152. *Id.* at 2051.
153. *Germaine*, 99 U.S. at 510.
154. *Lucia*, 138 S. Ct. at 2047 (citing *Freytag*, 501 U.S. at 881).
155. *Freytag*, 501 U.S. at 881.
156. *Lucia*, 138 S. Ct. at 2047 ("The Commission's ALJs, like the Tax Court's STJs, hold a continuing office established by law. SEC ALJs receive a career appointment… to a position created by statute . . .") (internal quotation marks omitted).
157. *Id.* at 2053 ("*Freytag* says everything necessary to decide this case.").

authority under law.[158] There, the Government attempted to equate "significant authority" with the authority to issue final decisions.[159] Specifically, the Government argued "that STJs are employees in all cases in which they could not enter a final decision."[160] The Government supported their argument by pointing to specific cases where STJs lacked final decision-making authority.[161] The *Freytag* Court, however, disagreed with the Government's position and pointed to instances where STJs *could* issue final decisions.[162] Importantly, the Court stated:

> [STJs] are not inferior officers for purposes of some of their duties … but mere employees with respect to other responsibilities. The fact that an inferior [O]fficer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform [her] status under the Constitution. If a special trial judge is an inferior [O]fficer for purposes of [some duties, she] is an inferior officer within the meaning of the Appointments Clause and must be properly appointed.[163]

In determining that SEC ALJs wielded "significant authority," the Supreme Court in *Lucia* compared the SEC's ALJs to the STJs in *Freytag*.[164] Similar to the Tax Court's STJs, the ALJs in *Lucia* could only "issue initial decisions containing factual findings, legal conclusions and appropriate remedies."[165] These initial decisions were reviewable and potentially dismissible by the SEC, but if the SEC opted against review, it would issue

158. *Freytag*, 501 U.S. at 882.

159. *Id.* at 881 ("The Commissioner reasons that special trial judges may be deemed employees in subsection (b)(4) cases because they lack authority to enter a final decision.").

160. *Id.* at 881-82; *see also*, *Lucia*, 138 S. Ct. at 2048 (holding SEC ALJs to wield significant authority where the SEC had the power to adopt the ALJs opinion as final or ignore it entirely).

161. *Id.* at 874 ("Petitioners appear not to appreciate the distinction between the [STJ's] authority to hear cases and prepare proposed findings and opinions under subsection (b)(4) and their lack of authority actually to decide those cases, which is reserved exclusively for judges of the Tax Court.").

162. *Id.* at 873.

163. *Id.* at 882.

164. *Lucia,* 138 S. Ct. at 2047–48 ("Freytag's analysis decides this case. The Commission's ALJs, like the Tax Court's STJs, hold a continuing office established by law … and they exercise the same "significant discretion" when carrying out the same "important functions" as STJs do.").

165. *Id.* at 2048 ("SEC ALJs issue decisions much like that in Freytag. STJs prepare proposed findings and an opinion adjudicating charges and assessing tax liabilities.").

an order making the initial decision final.[166] In comparing SEC ALJs to Tax Court STJs, the *Lucia* Court stated:

> [a] regular Tax Court judge must always review a STJ's opinion. And that opinion counts for nothing unless the regular judge adopts it as his own. By contrast, the SEC can decide against reviewing an ALJ decision at all. And when the SEC declines review (and issues an order saying so), the ALJ's decision itself 'becomes final' and is deemed the action of the Commission.[167]

As stated by the *Lucia* Court, "that last word capacity makes this an *a fortiori* case: If the Tax Court's STJs are [O]fficers, as *Freytag* held, then the Commission's ALJs must be too."[168]

In addition to determining that SEC ALJs have final-decision making authority, the ALJs were also found "to exercise the same 'significant discretion' when carrying out the same 'important functions' as [the Tax Court's] STJs." The *Lucia* Court examined specific duties assigned to the ALJs, which included the administration of hearings,[169] and the issuance of decisions setting out "findings and conclusions about all material issues of fact and law … includ[ing] the appropriate order, sanction, relief, or denial thereof."[170] The Court considered these important functions to be "much like that in *Freytag*—except with potentially more independent effect. As the *Freytag* Court recounted, STJs 'prepare prosed findings and an opinion' adjudicating charges and assessing tax liabilities. Similarly, the Commissions ALJs issue decisions containing factual findings, legal conclusions, and appropriate remedies."[171] In the Courts eyes, these important functions were "sufficient to make someone an [O]fficer of the United States."[172]

166. *Id.* at 2046 ("The Commission can review that decision, but if it opts against review, it issues an order that the initial decision has become final.").

167. *Id.* at 2053-54.

168. *Id.* at 2054, 2067 ("[A] prerequisite to officer status is the authority, in at least some instances, to issue final decisions that bind the Government or third parties.") (Sotomayor, J., dissenting).

169. *Id.* at 2049 (Hearings include "supervising discovery; issuing, revoking, or modifying subpoenas; deciding motions; ruling on the admissibility of evidence; administering oaths; hearing and examining witnesses; generally regulating the course of the proceeding and the conduct of the parties and their counsel; and imposing sanctions for contemptuous conduct or violations of procedural requirements.").

170. *Lucia,* 138 S. Ct. at 2049.

171. *Id.* at 2053.

172. *Id.* at 2056.

IV. THE APPLICATION OF THE APPOINTMENTS CLAUSE TO AOS AFTER LUCIA

This section applies to AOs the two-part test used by the Courts in *Tucker I and Tucker II*, but further incorporates the additional analysis provided by the Supreme Court in *Lucia*. The *Lucia* Court considered SEC ALJs to be Officers despite their opinions being subject to oversight and potential dismissal by higher ranking Officers, a quality that the Courts in *Tucker I and Tucker II* found fatal to an Officer status determination under the Appointments Clause. This section, therefore, explores how the holding and analysis in *Lucia* differs from the reasoning employed by the Courts in *Tucker I and Tucker II*, and further explains how the Lucia Court's application of the Appointments Clause to SEC ALJs affects IRS AOs.

A. The Changes Brought by the Lucia Decision to Appointments Clause Jurisprudence

The *Lucia* Court's holding effectively modifies the analysis employed by the Courts in *Tucker I* and *Tucker II* to determine Officer status under the Appointments Clause. In determining the presence of significant authority, the *Lucia* Court found SEC ALJs to have final-decision making powers despite their determinations being subject to review and potential dismissal by the SEC Commissioner.[173] As clarified by the *Lucia* Court, anytime the Commissioner forgoes review, "the ALJ's decision itself 'becomes final' and is deemed the action of the Commission."[174] The Court found this "last word capacity" to be a deciding factor in determining the Officer status of the ALJs.[175] This analysis, however, stands in stark contrast to the analysis employed by the Courts in *Tucker I* and *Tucker II*.

In *Tucker I*, the Tax Court considered AOs "mere employees" because their "determinations [were] subject to supervision," and thus, according to the Court, they lacked final-decision making capacity.[176] The holding and rationale employed by the *Lucia* Court, however, effectively rejects this position. The *Lucia* opinion stands for the proposition that supervision or review of a federal actor, in some instances, is not enough to merit employee status if, in other instances, the federal actor has independent authority to issue final decisions that bind the government.[177] The *Lucia* Court used the

173. *Id.* at 2051.
174. *Id.* at 2054.
175. *Id.*
176. *Tucker*, 135 T.C. at 163 (citing *Landry*, 204 F.3d at 1133-34 (2000)).
177. *See Lucia,* 138 S. Ct. at 2067.

analysis in *Freytag* to buttress their conclusion that an Officer will not lose their "Officer status" in situations where they take-on employee functions.[178] That is, SEC ALJs are not employees because their opinions can be reviewed and dismissed by the Commissioner, they are instead Officers because their opinions *can become* final if the Commissioner opts against such review. The Court in *Tucker I* failed to give credence to the authority of an AO to issue final decisions in certain cases. Instead, the Court equated supervision and oversight with an inability to issue final decisions. That is, *Tucker II* held that AOs were employees because their decisions were subject to review and dismissal by the IRS Commissioner.[179] That holding contradicts the Supreme Court's opinion in *Lucia*, which made clear that supervision and oversight does not strip away Officer status if there are instances where the federal actor has the authority to issue final decisions that bind the Government.[180] Thus, the analysis employed by *Tucker I* is no longer good law after the Supreme Court's holding in *Lucia*.

The *Lucia* holding and rational also frustrate the analysis employed by the D.C. Circuit Court of Appeals in *Tucker II.* There, the Court considered AO discretion to be constrained because AOs are "subject to consultation requirements, to guidelines, and to supervision."[181] For example, the Court noted that AOs must seek advice for novel issues[182] and must receive approval prior to compromising liabilities above certain amounts.[183] However, such constraints are closely reminiscent of the oversight and supervision discussed in *Freytag* and *Lucia*. For example, the STJs in *Freytag* had similar constraints in that their proposed opinions were "subject to review and final decision by a Tax Court judge, regardless of the amount in issue."[184] Similarly, in *Lucia*, the determinations made by SEC ALJs were also subject to review, wherein the Commissioner could "make any findings or conclusion that in [her] judgement are proper and on the basis of the record."[185] Despite similar constraints, the *Tucker II* opinion differed from

178. *Id.* at n.4 ("And we thought it made no sense to classify the STJs as [O]fficers for some cases and employees for others.").

179. *Tucker*, 135 T.C. at 143-144 ("The IRS [] may re-think the [AO's] collection decisions and may take a position—in the litigation or in the settlement of it—that is different from the position reflected in the Office of Appeals' CDP determination.").

180. *Lucia*, 138 S. Ct. at 2065-66 ("Confirming that final decision making authority is a prerequisite to officer status would go a long way to aiding Congress and the Executive Branch in sorting out who is an officer and who is a mere employee.") (Sotomayor J., dissenting).

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

182. I.R.M. § 8.6.3.5.

183. I.R.C. § 7122(b).

184. *Freytag*, 501 U.S. at 874.

185. *Lucia*, 138 S. Ct. at 2066.

the Supreme Court opinion in *Lucia* and *Freytag*, in part, because the Court in *Tucker II* failed to consider instances where AOs exercise unfettered discretion. That is, the *Tucker II* Court ignored an AO's authority to exercise complete discretion to bind the IRS in specific cases. The *Lucia* Court makes clear that consideration of such discretion and authority is necessary to determine Officer status under the Appointments Clause.

The *Lucia* Court clarified "that a perquisite to Officer status is the authority, in at least some instances, to issue final decisions that bind the Government or third parties."[186] This prerequisite, employed with the reasoning set forth by the Supreme Court in *Freytag*, pushes against the *Tucker II* analysis which focused almost entirely on the constrained discretion of an AO. Specifically, the *Freytag* Court made clear that a federal actor, who is an Officer for the purpose of some duties, will not lose their Officer status by performing employee-like functions in other instances.[187] The *Lucia* Court further adds that an Officer who has unfettered discretion and authority, in at least some instances, will not lose their Officer status in other instances where their discretion and authority is constrained.[188] In other words, *Lucia* makes clear that any determination of Officer status requires Courts to look at the discretion and authority of the federal actor in *all instances*. The Court's analysis in *Tucker II* diverges from *Lucia* because, in examining the discretion of an AO, *Tucker II* severed away Officer-like duties from employee-like functions. In doing so, the Court rested its opinion upon the examination of employee functions alone. Such pointed analysis falls short of what is required under *Lucia*.

B. Applying the Appointments Clause to AOs After Lucia

As a preliminary matter, prior to applying the *Lucia* analysis to AOs, some may argue that the ALJs in *Lucia* are entirely different from AOs such that any comparison of the federal actors is without merit. For example, the ALJs in *Lucia*, as well as the STJs in *Freytag*, held positions that conducted formal adversarial hearings, which are unlike the informal CDP hearings conducted by AOs.[189] There is, however, no common-law basis to support

186. *Id.* at 2046, 2054, 2066 (clarifying that officers must, in some instances, have authority to issue final decisions).

187. *Freytag*, 501 U.S. at 882 (stating that Officers will not be considered employees for some of their duties yet Officers for other duties).

188. *Lucia*, 138 S. Ct. at 2046 (clarifying that the prospect of review is not enough to strip an Officer of their Officer status).

189. *See* Treas. Reg. § 601.106(c) (clarifying the informal nature of CDP hearings in that no testimony is taken under oath).

such a position. To the contrary, even the Court in *Tucker II* stated that "we do not understand *Freytag* to suggest that mere informality of proceedings, or the absence of adversarial procedures, could justify denying 'Officer' status to one whose powers would otherwise demand that classification."[190] It would therefore seem that *Lucia* is not distinguishable based on the differences between IRS and SEC appeal procedures.

In determining the Officer status of an IRS AO, *Lucia* requires Courts to examine instances where AOs exercise significant authority and discretion to issue final decisions on behalf of the IRS.[191] If instances of significant authority and discretion are present, AOs will not be considered employees just because there are other instances where their authority is limited or constrained.[192] Instead, under *Freytag*, Courts must confirm AOs as Officers under the Appointments Clause where, as clarified by *Lucia*, there exists instances of significant authority.

In examining instances of significant authority, AOs are delegated broad discretionary powers to issue final decisions on behalf of the IRS. In this vein, there are three such instances. First, AOs are granted complete "authority to represent the regional commissioner in his/her authority to settle all cases docketed in the Tax Court and designated for trial at any place within the territory compromising the region."[193] Second, AOs "may represent the regional commissioner in his/her *exclusive and final authority* for the determination of … tax liability [and] liability for additions to the tax, additional amounts, and assessable penalties provided under Chapter 68 of the Code."[194] Third, "[AOs] of the Appeals office having authority for the administrative determination of tax liabilities … are also authorized to prepare, sign on behalf of the Commissioner, and send to the taxpayer by registered or certified mail any statutory notice of deficiency prescribed."[195]

An IRS AO thus has exclusive and final authority to act on behalf of regional commissioners and the IRS Commissioner himself. Even where constraints are present, in some instances, an AO still has the discretion and authority to issue final decisions. For example, AOs have broad discretion in settling tax liability. That is, an AO's determination to settle liability

190. *Tucker*, 676 F.3d at 1135.

191. *Lucia*, 138 S. Ct. at 2046, 2054, 2066 (clarifying that officers must, in some instances, have authority to issue final decisions).

192. *Freytag,* 501 U.S. at 882 (stating that Officers will not be considered employees for some of their duties yet Officers for other duties).

193. Treas. Reg. § 601.106(a)(1)(i); *see also* I.R.M. § 1.2.47.5 (clarifying that regional commissioners receive appointment and authority delegated by the IRS Commissioner, who is a principal Officer appointed by the President with Senate consent).

194. Treas. Reg. § 601.106(a)(1)(ii)(c) (emphasis added).

195. *Id*. § 601.106(d)(ii).

considers all relevant issues raised by the taxpayer[196] and weighs whether the collection action "balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary."[197] Importantly, this determination includes findings and conclusions about material issues of facts and law. Before any final determination is made, the AO must "obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met."[198] Once verification is received, the AOs decision itself becomes final and is deemed the action of the IRS.[199]

The holding in *Lucia* requires AOs to be considered Officers under the Appointments Clause. In *Lucia*, the Supreme Court recognized the constraints placed on SEC ALJs. Specifically, the Court noted that ALJ opinions were subject to review and potential dismissal by the SEC Commissioner.[200] Despite the presence of this review, according to the *Lucia* Court, once the ALJ's opinion is approved, "the ALJ's decision itself 'becomes final' and is deemed the action of the Commission."[201] The SEC's review over its ALJ opinions is similar to the IRS's review over its AO determinations. The Treasury Secretary must also review and approve AO settlement decisions, and once approved, the AO's decision itself becomes final and is deemed the action of the IRS. In these instances, AOs are afforded the discretion and authority to bind the government and third parties.[202] Thus, AOs wield the significant authority necessary for Officer status under the Appointments Clause, and are therefore required to be appointed as held by the Supreme Court in *Lucia.*

It can, however, be argued that *Lucia* does not change the outcome of *Tucker I* and *Tucker II* because AOs will not meet the first factor of the two-factor test for Officer status. That is, even if there are instances where AOs wield significant authority, their position is not part of an Office established

196. I.R.C. § 6330(c)(1)-(2)(A).

197. *Id*. § 6330(c)(3)(C).

198. *Id*. § 6330(c)(1).

199. Once adopted by the IRS, AO settlement decisions become final and binding; *see* I.R.C. § 7122(c) (verifying that offers in compromise are binding on the IRS); s*ee also* I.R.S. PUB. NO. 556 (clarifying that to receive attorney fees, the taxpayer must "apply for administrative costs within 90 days of the date on which the *final decision* of the IRS Office of Appeals … was mailed to you.") (emphasis added).

200. *Lucia*, 138 S. Ct. at 2046 (By contrast, the SEC can decide against reviewing an ALJ decision at all. And when the SEC declines review (and issues an order saying so), the ALJ's decision itself becomes final and is deemed the action of the Commission).

201. *Id.*

202. *See generally* I.R.C. § 7122; *see also* Treas. Reg. § 301.7122-1 (clarifying that AOs may compromise cases on behalf of the Treasury Secretary and that compromises are binding on the IRS and third-parties).

by law. After all, the Office of Appeals was established by the IRS Commissioner, not by Congress.[203] However, this argument fails on three counts and potentially a fourth count. First, even if the Office of Appeals was created through Executive action under statutory authority, there *now* exists direct statutory authority for the AO position within the RRA passed in 1998.[204] The statutes therein describe in detail the functions, duties and scope of authority delegated to AOs.[205] Second, as noted by the Court in *Tucker I*, prior Courts from the Fifth and Sixth Circuits have considered positions to be "established by law" where the positions were actually within an office established by an Executive act under statutory authority.[206] Such precedent applies directly to AOs because they work within the Office of Appeals, which was established by Executive action under statutory authority.[207] Third, abuse could arise if Officer status is precluded simply because there is no statutory authority for the position to which the Officer holds. As stated by the Court in *Tucker II*, "it would seem anomalous if the Appointments Clause were inapplicable to positions … to which Congress assigned 'significant authority' merely because neither Congress nor the [E]xecutive branch had formally created the position."[208] This would effectively allow Congress to slowly invest a position with significant authority while evading appointment requirement, which is a scenario the Appointment Clause is designed to prevent.[209] Lastly, if the prior three responses were to fail, the Taxpayer First Act, which is a proposed Bill, has the potential to amend I.R.C. Sections 7803 and 7804.[210] Among other changes, the proposed amendments formally establish an "Independent

203. *Tucker*, 135 T.C. at 135 ("Pursuant to [the] congressional mandate [in § 7804], the Commissioner established the Office of Appeals and employed personnel to staff that Office.").

204. *See generally* I.R.C. §§ 6330, 6320.

205. *Willy*, 423 F.3d at 491-92 (5th Cir. 2005); *Varnadore*, 141 F.3d at 631 (6th Cir.1998) (finding an Administrative Review Board (ARB) member to be an inferior Officer under the Appointments Clause despite the ARB being created by order of the Secretary of Labor).

206. *Tucker*, 135 T.C. at 157 (referring to *Willy*, 423 F.3d at 491; *Varnadore*, 141 F.3d at 631 (6th Cir.1998) (finding an Administrative Review Board (ARB) member to be an inferior Officer under the Appointments Clause despite the ARB being created by order of the Secretary of Labor)).

207. *Tucker*, 135 T.C. at 158 (referring to the general power of delegation to the Commissioner under I.R.C. § 7804(a)).

208. *Tucker*, 676 F.3d at 1133.

209. *Tucker*, 135 T.C. at 158 ("For example, Congress could take a pre-existing low-level position (which had been created by the Executive Branch pursuant to a general authorization like section 7804(a), and which was not subject to appointment by the President or a Head of a Department) and could invest it with significant additional power, thus evading the Appointments Clause by seeming to avoid "establishing" the office.").

210. Taxpayer First Act, H.R. 5444, 115th Cong. (as passed by House, Apr. 18, 2018).

Office of Appeals" within the IRS.[211] Thus, if passed by the Senate, the Taxpayer First Act will extinguish any remaining argument that AOs do not hold positions within an office established by law.

V. POLICY REASONS FOR APPLYING THE APPOINTMENTS CLAUSE TO AOS

In addition to legal precedent supporting the conclusion that AOs are subject to the Appointments Clause, there are also policy arguments supporting this conclusion as well. First, as described in the introduction, applying the Appointments Clause to AOs will mitigate appearances of impropriety found in their close relationship with the IRS. After all, the IRS is a party, either directly or indirectly, to the CDP hearings conducted by their AOs.[212] Because AOs are hired and fired by the IRS, issues of impropriety arise.[213] That is, the IRS's power to hire and fire AOs "creates obvious incentives for [Officers] to favor agency positions."[214] Indeed, such "[r]emoval authority has always been associated with control: It is the *sine qua non* of effective supervision—the guarantee that subordinates will take direction."[215] Subjecting AOs to appointment will increase appearances of impartiality "[b]ecause the agency is no longer choosing the judge in its own cause."[216] Further, by placing removal powers outside the IRS's control, "those appearing before [AOs] will feel more confident that the [IRS] is not directing the actions of a marionette [adjudicator]."[217]

211. *Id.* at Sec. 11101 (adding subsection (e)(1) to I.R.C. § 7803 to formally codify an "Independent Office of Appeals" within the IRS).

212. The Most Serious Problems Encountered by Taxpayers, IRS Pub. No. 2104, Vol. 1, WL 9324360, at 139 (2017) ("Revenue Procedure 2012-18 provides Appeals with the discretion to override Counsel. In reality, however, [AOs] may well be reluctant to do so when Counsel actually has a seat at the table. An [AO] may lack the personal confidence or the institutional support necessary to stand firm in exercising independent judgement in the face of opposition . . ."); *see also* I.R.C. § 7122(c) (showing that AO's decision to compromise liability is still binding onto the IRS even where counsel is not present).

213. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1203(a), 112 Stat. 685, 720-721 (1998) (Under the RRA, the Commissioner can only remove AOs for good cause after a finding of misconduct).

214. *ALJ Quandary*, *supra* note 4, at 801 (Author speaking to appointment of ALJs, but also applicable to appointment and removal of Appeals Officers).

215. Ross E. Wiener, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN. L. REV. 363, 421 (2001) (citing Bowsher v. Synar, 478 U.S. 714, 726 (1986)).

216. *ALJ Quandary supra* note 4, at 847-48 (internal quotation marks omitted).

217. *Id.* at 848 (discussing the benefits of interbranch-appointment).

Second, Appeals Officers should be subject to the Appointments Clause because taxpayers have a statutory due process right to appeal disputes to an *independent* Office of Appeal. That due process right is mandated under the Taxpayer's Bill of Rights, in I.R.C. Section 7803, which grants taxpayers a "right to appeal a decision of the IRS in an independent forum."[218] Congress reiterated the right to an independent Appeals Office under the RRA Section 1003, which directs the Treasury Secretary to "ensure an independent appeals function" within the IRS."[219] However, the existing structure allowing AOs to be removed by the IRS in no way fosters independence. This concern has long been expressed by other appointed Officers, including an IRS Commissioner who stated that "it would never be possible to give to the taxpayer the fair and independent review to which [she is rightly entitled] as long as the [trier of fact] is directly under, and its recommendations subject to the approval of, the officer whose duty it is to administer the law and collect the tax."[220] Subjecting AOs to appointment effectively increases the independence of their decisions, and thus increases the general independence of the IRS Appeals Office at large.

Third, as a matter of principle, Congress is prohibited from creating an employee position and then, throughout time, slowly assigning that position significant authority. Such a scenario poses a great threat to Executive powers and political accountability. "Abuse could arise. For example, Congress could take a pre-existing low-level position (which had been created by the Executive branch pursuant to a general authorization like §7804(a)),[221] and which was not subject to the [Appointments Clause] and could invest it with significant additional power, thus evading the Appointments Clause [altogether]."[222] This scenario represents the current state of affairs with AOs, who have maintained employee status since their creation in the late 1920's.[223] Throughout time, their power has grown significantly. Most notably in 1998, with the passage of the RRA, which invested AOs with authority to oversee statutorily mandated CDP

218. I.R.C. § 7803(a)(3)(E).

219. Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1103, 112 Stat. 685, 720-721 (1998).

220. *See* Dubroff & Hellwig, *supra* note 11, at 47 (referring to 65 CONG. REC. 2614, at 2684 (1924) (Committee members "are the party in interest; they are plaintiff and the prosecutor; they are the court and jury") (remarks of Mr. Young)).

221. I.R.C § 7804(a) (clarifying that the Treasury Secretary delegated limited appointment powers to the IRS Commissioner under).

222. *See Tucker*, 135 T.C. at 158.

223. Strekla & Morrison, *supra* note 24, at 28.

hearings,[224] to accept or reject offers in compromise,[225] and to issue final determinations of deficiencies on behalf of the IRS Commissioner.[226] Subjecting AOs to appointment effectively prevents Congress from delegating significant authority to employees without the formal vetting procedures that are inherent to the Appointments Clause process.[227] T hus, it is imperative that AOs are subject to appointment.

Despite the policy reasons above, it can be argued that the appointments process is cumbersome and inefficient. In addition, it can also be argued that appointing IRS AOs would do little to remedy issues of impropriety because the Executive branch would continue to choose the very candidates that fill its adjudicative positions. However, such arguments hold little weight. First, the appointments process is notoriously considered smooth and unburdensome. In fact, even those who criticize its overuse admit the appointments process is effectively automatic.[228] Moreover, as discussed below, the appointments process does not necessarily need to be placed in the hands of the Executive. In fact, where IRS AOs are concerned, the appointments process can most viably be placed in the hands of the Courts. Doing so will effectively extinguish any issues of impropriety that could arise with Executive appointments.

VI. METHODS FOR APPOINTING IRS AOS

As mentioned prior, inferior Officers can be appointed by the President alone, the Courts, or by Department Heads.[229] These methods of appointment are best examined in two baskets: Executive appointments, which includes appointment by the President and Department Heads, and Judiciary appointments, which are accomplished through the Courts. The pros and cons of these two baskets are discussed in turn. However, in the case of IRS AOs, appointment by the Judiciary appears most viable for reasons of impartiality and efficiency.

224. I.R.C § 6320(b)(1).

225. I.R.C. §7122(e)(2).

226. Treas. Reg. § 601.106(d)(ii) ("Officers of the Appeals officer having authority for the administrative determination of tax liabilities referred to in paragraph (a) of this section are also authorized to prepare, sign on behalf of the Commissioner, and send to the taxpayer… any statutory notice of deficiency").

227. THE FEDERALIST NO. 76 (Alexander Hamilton). (claiming that the Appointments Clause effectively discourages undue influence and allows for higher quality officers).

228. *See* Plecnik, *supra* note 83, at 239 (claiming where the appointments process is triggered, "[t]he President, Courts of Law, and Heads of Departments will happily fire up their autopens and appoint every single position in the federal government.").

229. U.S. CONST. art. II, §2, cl. 2.

A. Appointment of AOs by the Executive Branch

Appointment by the Executive branch means that AOs would be appointed by either the President or a Department Head—here, the Treasury Secretary who is a principal Officer and is thus also appointed by the President.[230] As a preliminary matter, the power to remove is incident to the power to appoint.[231] Therefore, if AOs were not appointed by the Executive branch,[232] but were instead appointed by the Judiciary, the Executive would lose its removal powers.[233] The importance of Executive removal powers is found under the "Take Care Clause" of the U.S. Constitution,[234] which ensures that "[t]he President should be able to oversee all people who implement executive policy because doing so is necessary for the President to take care that the law is faithfully executed."[235] By "limiting the appointment power" to the President and his own principal appointees, the framers sought to "ensure that those who wielded [the appointment power] were accountable to political force and the will of the people."[236]

However, allowing AOs to be appointed by the Executive branch triggers two major issues. First, the Executive branch would still be able "to choose the judge in its own cause."[237] That is, the Executive branch could simply appoint a candidate "whom it believes will be most sympathetic to agency positions."[238] The effective outcome would change little from the

230. *See Tucker*, 135 T.C. at 121("(T)here is, so to speak, only one degree of separation between any duly appointed officer and the President himself.").

231. *See Free Enterprise Fund*, 130 S. Ct. at 3161; *see also Burnap*, 252. U.S. at 515 ("The power to remove is, in the absence of statutory provision to the contrary, an incident of the power to appoint.").

232. This paper has consistently compared AOs to SEC ALJs. Currently, agency ALJs are selected by the agency within which they work. *See* 5 U.S.C. § 3105 (granting federal agencies the power to select ALJs as are necessary for the agency to conduct adjudicatory proceedings.).

233. *See Free Enter. Fund*, 537 F.3d at 668-69 (D.C. Cir. 2008) (discussing the limited constraints allowed to be placed on Presidential removal powers).

234. U.S. Const. art. II § 3.

235. *See Tucker*, 135 T.C. at 121; *see also ALJ Quandary*, *supra* note 4, at 815, 834 (discussing interbranch appointments for ALJs, the author states that "[a]gencies, among others, could request that the [Court] discipline or remove an ALJ for inefficiency, neglect of duty, or malfeasance.").

236. *Id.* (citing Freytag v. Commissioner, 501 U.S. at 884).

237. *ALJ Quandary*, *supra* note 4, at 847 (citing Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 886 (2009) (internal quotation marks omitted).

238. *See ALJ Quandary*, *supra* note 4, at 818 (discussing implications of 5 U.S.C. § 3105 (granting agencies powers to select their ALJs); *see also Free Enterprise Fund*, 130 S. Ct. at 3180–81 (2010) (Breyer, J., dissenting) ("My research reflects that the Federal Government relies on 1,584 ALJs to adjudicate administrative matters in over 25 agencies.").

current scheme wherein AOs are hired by the IRS. Thus, as long as the vetting process to select and appoint AO candidates is conducted by the Executive branch, there stands potential for the appointment process to result in a pool of AOs that are partial to IRS agendas. This outcome pushes further against progressive policy goals seeking to ensure an "independent" appeals process within the IRS.[239]

Second, similar issues arise so long as the Executive branch continues to exercise its power to remove AOs because removal powers have long been associated with influence and control.[240] Indeed, even Congress has long been weary of Executive powers to remove adjudicators, which is why tenure protections have become increasingly popular.[241] Thus, taking removal powers away from the IRS and moving it up the "executive chain" does little to displace such mechanisms of influence.[242] After all, the IRS is within the Treasury Department, and the Treasury Department is part of the Executive branch at large. By keeping appointments of AOs within the same political branch, the Appointments Clause is less able to fulfill its designed purpose to ensure that agency adjudicators remain separate, and thus independent, from the agencies to which they must sometimes rule against.[243] Therefore, to fully ensure AO independence, it is best to place appointment powers outside the Executive branch.

B. Appointment of AOs by the Courts

Judicial appointment and removal will mitigate concerns of AO impartiality because the Executive branch will no longer "choose the judge in its own cause."[244] However, despite Judicial appointment and removal (hereafter "interbranch appointment") being a viable means to reduce agency influence over its adjudicators, interbranch appointments are highly contested. For example, the Supreme Court in *Morrison* clarified that Congress' authority to prescribe to the Judiciary the power to appoint

239. *See* Taxpayer First Act, H.R. 5444, 115th Cong. (2018).

240. *Wiener*, *supra* note 215.

241. *ALJ Quandary*, *supra* note 4, at 800 (discussing tenure as congressional means to limit Executive removal); *see also*, Wiener v. United States, 357 U.S. 349, 355-56 (1958) (upheld limitations on Executive removal of agency adjudicators as means to render them "entirely free from the control or coercive influence, direct or indirect.").

242. *RRA, supra* note 48, at §1203(a) (clarifying that the Commissioner of the IRS may terminate IRS employees "for cause on charges of misconduct.").

243. *ALJ Quandary*, *supra* note 4, at 809 (considering issues of ALJ subordination and the separation-of-powers doctrine).

244. *Id*. at 847-848 (quoting Caperton v. A.T. Massey Coal Co. 556 U.S. 868, 886 (2009).)

Executive officials is not unlimited.[245] Indeed, the power for Congress to prescribe interbranch-appointment is limited by the "principal of incongruity."[246] Although there is much debate as to when interbranch-appointments are "incongruous,"[247] there is general agreeance that Courts can appoint inferior Officers if such appointment does not impede the Courts central function under the Constitution, and similarly does not impede the Executive branch's functioning in the same manner under the Constitution.[248]

As a preliminary matter, Article II allows Congress to delegate to the Courts the power to appoint inferior Officers.[249] Moreover, such power is often delegated, especially for the purposes of ensuring adjudicator independence.[250] In considering ALJ appointments, for example, it has been argued that "granting the D.C. Circuit power to appoint adjudicators generally, by itself, almost certainly does not impede the central functioning of the judicial branch—that is, to decide disputes."[251] Support for such an argument points to the knowledge, expertise, and time available to the Court that is delegated the appointment power.[252] For example, in terms of knowledge, the D.C. Circuit is "considered the most influential court on matters of administrative law, including ALJ's decisions."[253] The D.C. Circuit Court also has sufficient time because it maintains the lightest caseload of all the Circuit Courts.[254] It would therefore seem the D.C. Circuit Court is also a viable means to appoint IRS AOs.

245. *Morrison*, 487 U.S. at 675 (1998) ("We do not mean to say that Congress' power to provide for interbranch appointments of 'inferior [O]fficers' is unlimited.").

246. *Id.* at 675-76 ("In addition to separation of power concerns … Congress' decision to vest the appointment power in the courts would be improper if there was some 'incongruity' between the functions normally performed by the courts and the performance of their duty to appoint.").

247. *ALJ Quandary, supra* note 4, at 802 ("... [I]nterbranch appointment[s are] appropriate when (1) Congress has a significant justification for turning to its interbranch-appointment power, (2) the power to appoint (and an incidental power to remove) does not impede the appointing branch's central functioning under the U.S. Constitution, and (3) the lack of appointment (and removal) power does not, likewise, impede the competing branch's central functioning.").

248. *Id.*

249. *See* U.S. Const. art. I., § 2.

250. *See* 28 U.S.C. §§ 152, 631 (2006) (authorizing court appointment of bankruptcy and magistrate judges, respectively).

251. *ALJ Quandary*, *supra* note 4, at 850.

252. *Id.* at 832.

253. *Id.*

254. The D.C. Circuit decided the least cases per active judge in comparison to all other circuit courts. *See Federal Court Management Statistics December 2014*: *Courts of Appeals*,

However, one could argue the Circuit Court lacks the technical knowledge necessary to appoint Officers with such tax and audit-specific duties. The functions of the IRS would be impeded because the D.C. Circuit Court is unable to properly assess AO candidates of their own technical knowledge. In addressing this argument, an alternative Court to the D.C. Circuit Court could be the U.S. Tax Court. The Supreme Court in *Freytag* considered the Tax Court a "Court of [l]aw" under the Appointments Clause, and thereafter granted the Tax Court appointment authority over its STJs.[255] The Tax Court certainly possesses the knowledge and experience necessary to assess AOs of their own technical knowledge. Additionally, there is little concern of impartiality by the Tax Court reviewing the opinions written by the AOs it directly appointed. This is because judges often decide cases "in which they have selected, for instance, defense counsel for the indigent, bankruptcy judges, magistrates, and special masters (all of whom could be the judges former law clerks) without impugning their impartiality."[256]
In either instance, whether AOs are appointed by the D.C. Circuit Court or the U.S. Tax Court, the Executive branch's central functioning will not be impeded. If the removal of an AO is merited, the IRS will traverse the same removal procedures it currently has in place, except it will traverse those procedures before an external authority. Specifically, the IRS can currently remove its employees with cause.[257] The same "for cause" requirements are present in "external" removal proceedings.[258] The only difference is that the IRS will need to persuade an independent entity to remove the AO.[259] Such persuasion entails the same showing of "good cause" that is currently in place.[260] Therefore, by subjecting AOs to interbranch appointment, the IRS will experience little if any impediment to its central function—to enforce U.S. tax law with "integrity and fairness to all."[261]

U.S. COURTS, https://www.uscourts.gov/statistics/table/na/federal-court-managemen t-statist ics/2014/12/31 (last visited Apr. 10, 2019).

255. *Freytag*, 501 U.S. at 913 (1991).

256. *ALJ Quandary*, *supra* note 4, at 854; *see also*, *United States v. Hilario*, 218 F.3d 19 (1st Cir. 2000) (discussing judge-appointed defense counsel and prosecutors).

257. *RRA*, *supra* note 48, at §1203(a).

258. *See* Ramspeck v. Fed. Trial Exam'rs Conference, 345 U.S. 128, 132 (1953) ("Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission after opportunity for hearing and upon the record thereof.") (internal parentheses omitted).

259. *ALJ Quandary*, *supra* note 4, at 856 (discussing interbranch removal, stating "the agency must continue to persuade an independent entity to remove an ALJ.").

260. *RRA*, *supra* note 48, at §1203(a).

261. *IRS Mission Statement and Statutory Authority*, https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority (last visited Apr. 16, 2019).

VI. CONCLUSION

The fairness and independence of the IRS Appeals process is jeopardized so long as the IRS possesses the authority to hire and fire its AOs who were created to be independent adjudicators. Subjecting AOs to the Appointments Clause will mitigate appearances of impropriety by placing authority to hire and fire outside the IRS. Further, AOs are required to be appointed. AOs wield significant authority in issuing final decisions that bind the IRS to settlement agreements with third parties. The Supreme Court's jurisprudence has long required such appointment, but with the most recent opinion in *Lucia,* there is little doubt that AOs possess the necessary authority for Officer status and should be appointed as such.

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