BURNING DOWN THE ADMINISTRATIVE STATE: *LUCIA* AND THE THREAT TO THE DECISIONAL INDEPENDENCE OF VETERANS LAW JUDGES

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"The essence of Government is power; and power, lodged as it must be in human hands, will ever be liable to abuse."

—James Madison[1]

I. INTRODUCTION

For well over a century, Congress has steadily asserted itself in the supervision of the President's subordinates.[2] It has done so by, among other measures, limiting the President's power of removing high-ranking civil servants.[3] This trend, however, appears to be reversing.

Recently, federal courts diverged on the question of whether the bureaucratic selection process for appointing federal Administrative Law Judges ("ALJs"),[4] officials who perform quasi-judicial functions across executive agencies, is constitutional.[5] Specifically, challengers of the process argued that ALJs are "inferior officers" under the

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1. JAMES MADISON, *Speech in the Virginia State Convention of 1829–1830*, *in* 4 LETTERS & OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES 51 (J.B. Lippincott & Co. 1867).

2. *See* Todd Garvey & Daniel J. Sheffner, *Congress's Authority to Influence and Control Executive Branch Agencies*, CRS NO. R45442, at 2–3 (2018) (discussing how the First Congress sought to retain influence and control over the Departments of Treasury, War, and Foreign Affairs, among others).

3. *See, e.g.*, *infra* pt. III.A. (describing Title VI of the Ethics in Government Act, which limited the President's supervision of independent counsel); pt. IV (describing the Administrative Procedures Act, which endowed hearing examiners within the Executive Branch with heightened protections from removal).

4. *See* 5 U.S.C. § 3105 (2018) (creating the office of ALJ); 5 C.F.R. § 930.204 (2020) (outlining the process of appointing ALJs).

5. *See* Burgess v. Fed. Deposit Ins. Corp., 871 F.3d 297, 301–303 (5th Cir. 2017) (granting motion for stay); Lucia v. SEC, 832 F.3d 277, 283–89 (D.C. Cir. 2016), *rev'd and remanded*, 138 S. Ct. 2044 (2018); Bandimere v. SEC, 844 F.3d 1168, 1179–82 (10th Cir. 2016).

Appointments Clause of the Constitution and, therefore, must be appointed by either the President, the Courts of Law, or the heads of departments.[6]

During the writing of this Article, the Supreme Court held in *Lucia v. SEC*[7] that ALJs employed by the Securities and Exchange Commission ("SEC") are, more broadly speaking, "officers" and, as such, fall within the purview of the President's appointment power. In so doing, the Court stirred a perennial constitutional dispute: the extent of presidential power. If the process of hiring SEC ALJs is unconstitutional due to their status as officers, then so too may be laws protecting them from removal by the President.[8]

At first glance, it could appear that Veterans Law Judges ("VLJs") are spared from the controversy at hand. Unlike ALJs, VLJs are appointed by the Department of Veterans Affairs ("VA") Secretary with the approval of the President.[9] However, like ALJs, VLJs enjoy certain protections from removal under the Administrative Procedure Act (APA)—protections that are now in question.[10] The office of VLJ is analogous to that of ALJ.[11] As members of the Board of Veterans' Appeals (BVA), an administrative tribunal within VA, VLJs are charged with adjudicating appeals arising from agency decisions on claims for veterans benefits.[12] *Lucia* also comes amidst ascendant skepticism surrounding the role of the federal government.[13] Such skepticism can only be friendly to the prospect of restraining bureaucratic decisionmakers.

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6. U.S. CONST. art. II, § 2, cl. 2; *see Burgess*, 871 F.3d at 299; *Lucia*, 832 F.3d at 280; *Bandimere*, 844 F.3d at 1172.

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

8. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 509 (2010) (citing Sampson v. Murray, 415 U.S. 61, 70 n.17 (1974); Myers v. United States, 272 U.S. 52, 119 (1926); *Ex parte* Hennen, 38 U.S. 230, 259–60 (1839)) ("[R]emoval is incident to the power of appointment.").

9. *See* 38 U.S.C. § 7101A(a)(1) (2018).

10. *See infra* pts. III.C., V.A. (describing protections VLJs enjoy from removal).

11. *See infra* pt. II.C. (comparing the duties of VLJs with those of ALJs in the SEC).

12. *See* 38 U.S.C. § 7101A(a) (2018) (creating the office of "member of the Board"); 38 C.F.R. § 20.101(b) (2020) ("A member of the Board (other than the Chairman) may also be known as a Veterans Law Judge."); 38 C.F.R. § 20.103 (2020) (enumerating the principal functions of BVA).

13. In April 2019, only 17% of Americans polled said they trusted the federal government. *Public Trust in Government: 1958-2019*, PEW RESEARCH CTR. (Apr. 11, 2019), https://www.pewresearch.org/politics/2019/04/11/public-trust-in-government-1958-2019/. Deep distrust in government coincides with calls to "deconstruct[] the administrative state." Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for 'Deconstruction of the Administrative State*,' WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html (quoting then-White House Chief Strategist Steve Bannon). Critics of large federal bureaucracy led the charge in supporting the 2018–2019 federal government shutdown. *See generally*, Damian Paletta et al., *The Partisan Warrior Leading the White House's Shutdown Response,* WASH. POST (Jan. 8, 2019), https://www.washingtonpost.com/business/economy/the-partisan-warrior-leading-the-white-houses-shutdown-

This Article argues that VLJs are likely inferior officers and, as such, are subject to the presidential powers of appointment *and* removal under the Appointments Clause. It then argues that, due to their officer status, VLJs likely enjoy unconstitutional protection from removal. Additionally, this Article argues that the degradation of VLJs' removal protection would threaten their decisional independence and undermine fairness and public confidence in the veterans benefits appeals system. Finally, it recommends that Congress place VLJs under the supervision of the Courts of Law by transferring the powers to appoint and remove VLJs to the United States Court of Appeals for Veterans Claims ("CAVC"). Under this hybrid model of supervision, Congress would also transfer the powers to appoint and remove CAVC judges to an Article III court, thus insulating VLJs from extrajudicial influence from the Executive Branch. First, however, the office of VLJ must be contextualized in the debate over the status of ALJs and the limits of executive supervision.

II. VETERANS LAW JUDGES IN CONSTITUTIONAL CONTEXT

The "Appointments Clause" reads as follows:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[14]

The Appointments Clause reflects, at once, the doctrine of separation of powers and the idea that the branches of government should not be entirely isolated from one another.[15] The Appointments Clause

response/2019/01/08/b9daa54c-136c-11e9-b6ad-9cfd62dbb0a8_story.html; Lisa Rein et al., *The Shutdown is Giving Some Trump Advisers What They've Long Wanted: A Smaller Government*, WASH. POST (Jan. 14, 2019), https://www.washingtonpost.com/politics/the-shutdown-is-giving-some-trump-advisers-what-theyve-long-wanted-a-smaller-government/2019/01/14/70b22348-1427-11e9-90a8-136fa44b80ba_story.html?utm_t erm=.aca1b0ea1ad1.

14. U.S. CONST. art. II, § 2, cl. 2.

15. *See* Buckley v. Valeo, 424 U.S. 1, 120–40 (1976) ("[It] is also clear . . . that the Constitution by no means contemplates total separation of each of [the] . . . branches of Government. . . . The [Framers] were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.").

effectively divides the President's subordinates into three categories: principal officers, inferior officers, and, implicitly, nonofficer subordinates.[16] Principal officers may only be appointed by the President with the advice and consent of the Senate.[17] Inferior officers, pursuant to the laws of Congress, may be appointed by the President, a Court of Law, or a head of department.[18] It is established that the appointment power provided in Article II applies only to officers—not to nonofficer subordinates.[19] As such, the President's subordinates are subject to varying degrees of executive supervision depending on their status under the Appointments Clause.[20]

A. Officers of the United States and Nonofficer Subordinates

Historically, the Supreme Court has provided limited, sometimes inconsistent guidance in distinguishing officers from nonofficer subordinates. The Court has held that officers are appointees exercising continuing and permanent duties[21] and, elsewhere, that officers are "appointee[s] exercising significant authority pursuant to the laws of the United States."[22]

The Supreme Court addressed this distinction in *Freytag v. Comm'r of Internal Revenue*.[23] In that case, the Court reviewed the question of whether the Tax Reform Act of 1969 violated the Appointments Clause by permitting Special Trial Judges ("STJs") to preside over Tax Court cases in lieu of presidentially-appointed United States Tax Court

16. *Id.* at 126 n.162 ("lesser functionaries subordinate to officers"); *see also* Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 882 (1991) ("mere employees").

17. U.S. CONST. art. II, § 2, cl. 2.

18. *Id.* The last portion of the Appointments Clause is known as the "Excepting Clause." The purpose of allowing Congress to vest the President, Courts of Law, and heads of departments with the power to appoint certain officers without the Senate's advice and consent was for administrative convenience. *See* Edmond v. United States, 520 U.S. 651, 660 (1997) (citing United States v. Germaine, 99 U.S. 508, 510 (1879) ("[F]oreseeing that when offices became numerous, and sudden removals necessary, this mode [requiring nomination by the President and confirmation by the Senate] might be inconvenient. . . .")). Essentially, the Excepting Clause allows Congress to waive its check on the Executive Branch provided in the first portion of the Appointments Clause. However, by vesting the power of appointing "such inferior Officers" outside of the presidency, Congress may also empower courts and independent executive agencies at the expense of the President. *See infra* pt. V.C. (discussing judicial supervision of officers).

19. *See Buckley*, 424 U.S. at 269–70.

20. *See Edmond*, 520 U.S. at 663 ("[I]t [is] evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with advice and consent of the Senate.").

21. *See Germaine*, 99 U.S. at 511–12 (holding so without regard to the significance of an appointee's authority).

22. *See Buckley*, 424 U.S. at 126 (holding so without regard to the continuity of an appointee's duties).

23. 501 U.S. 868 (1991).

Judges.[24] The tax law empowered the Chief Judge of the Tax Court to designate Tax Court proceedings to STJs.[25] STJs, however, possessed the authority to make final decisions only in certain classes of cases.[26] Regardless, the Supreme Court held that STJs were officers—inferior officers, to be precise—whose appointment must conform to the Appointments Clause.[27] Specifically, the Court noted that (1) the office to which an STJ is appointed is established by law; (2) "the duties, salary, and means of appointment [of an STJ] are specified by statute"; and (3) STJs exercise significant discretion in carrying out important functions.[28] In regard to their discretion, the Court noted that STJs "perform more than ministerial tasks," including taking testimony, conducting trials, ruling on the admissibility of evidence, and enforcing compliance with discovery orders.[29]

Following *Freytag*, lower courts struggled to delineate the boundary between officers and nonofficers subordinates. In *Landry v. FDIC*, the United States Court of Appeals for the D.C. Circuit held that ALJs employed in the Federal Deposit Insurance Corporation (FDIC) are not inferior officers but nonofficer subordinates because they do not have final decision-making authority.[30] The D.C. Circuit read *Freytag* as laying "exceptional stress" on the final decision-making power of STJs in certain cases.[31] The D.C. Circuit subsequently held in *Lucia v. SEC* that ALJs employed by the SEC are not inferior officers because SEC Commissioners have, at the very least, the discretionary right to finalize all ALJ decisions.[32] In so holding, the Court upheld the constitutionality of the appointments of ALJs, who, as nonofficers, need not be appointed by the President.

Conversely, the United States Tenth Circuit Court of Appeals held in *Bandimere v. SEC* that inferior officers do not need to have final decision-making authority.[33] The Tenth Circuit reasoned that the *Freytag* Court found STJs to be inferior officers based on the significance of their duties

24. *Id.* at 876–77.
25. *Id.* at 870–71.
26. *Id.* at 875–77.
27. *Id.* at 882.
28. *Id.* at 881–82.
29. *Id.*
30. *See* Landry v. Fed. Deposit Ins. Corp., 204 F.3d 1125, 1133 n.2 (D.C. Cir. 2000) (denying petition for review).
31. *Id.* at 1134.
32. *See* Lucia v. SEC, 832 F.3d 277, 283–90 (D.C. Cir. 2016), *rev'd and remanded*, 138 S. Ct. 2044 (2018) (citing *Landry*, 204 F.3d at 1133).
33. *See* Bandimere v. SEC, 844 F.3d 1168, 1183–85 (10th Cir. 2016) (noting, however, that final decision-making authority is still relevant in determining whether a subordinate exercises significant authority).

and the discretion that they possessed rather than their inability to make final decisions.[34] Applying *Freytag* to the case of SEC ALJs, the Tenth Circuit found that the ALJs exercised significant discretion in carrying out important functions, including taking testimony; regulating document production and depositions; ruling on the admissibility and credibility of evidence; receiving evidence; ruling on dispositive and procedural motions; issuing subpoenas; and presiding over trial-like hearings.[35] In addition, the court cited to cases in which the Supreme Court recognized executive branch employees as inferior officers without regard to final decision-making authority.[36] Accordingly, the court held that SEC ALJs are inferior officers and were, therefore, unconstitutionally appointed.[37] The United States Fifth Circuit Court of Appeals agreed in a subsequent opinion.[38]

Following *Bandimere*, the petitioner in *Lucia* filed a petition for a writ of certiorari with the Supreme Court.[39] In a surprising turn of events, the SEC conceded that its ALJs are officers and ratified the judges' prior appointments, arguably satisfying the requirements of the Appointments Clause.[40] Nonetheless, the Supreme Court proceeded to hold that SEC ALJs are, indeed, officers for purposes of the Appointments Clause.[41] Without determining the judges' specific officer status, the majority reasoned that SEC ALJs, like the STJs in *Freytag*, hold a continuing office established by law; hold an office whose duties, salary, and means of appointment are created by statute; and exercise significant discretion when carrying out the same important functions as STJs, such as taking testimony, conducting trials, administering oaths, ruling on motions, generally regulating the course of hearings and the conduct of parties and counsel, ruling on the admissibility of evidence, and issuing decisions.[42] The Court also echoed the Tenth Circuit's

34. *Id.* at 1183.

35. *See id.* at 1179–801 (citing 5 U.S.C. § 556(b)–(c); 17 C.F.R. §§ 200.14(a), 201.111, 201.220, 201.230, 201.233, 201.250).

36. *Id.* at 1884 (citing Edmond v. United States, 520 U.S. 651, 663 (1997); Buckley v. Valeo, 424 U.S. 1, 126 (1976)).

37. *Bandimere*, 844 F.3d at 1188.

38. *See* Burgess v. Fed. Deposit Ins. Corp., 871 F.3d 297, 301–03 (5th Cir. 2017).

39. Petition for a Writ of Certiorari, Lucia v. SEC, 832 F.3d 277 (D.C. Cir. 2016), *rev'd and remanded*, 138 S. Ct. 2044 (2018) (No. 17-130) (available at https://www.scotusblog.com/wp-content/uploads/2017/09/17-130-petition.pdf).

40. *See* Securities Act of 1933 Release No. 10440, 2017 SEC LEXIS 3724 (2017); *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 511 (2010) (Because the SEC "is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a 'Department'" for the purposes of the Appointments Clause.).

41. *See* Lucia v. SEC, 138 S. Ct. 2044, 2052 (2018).

42. *See id.* at 2049.

reading of *Freytag* that SEC ALJs are officers even when their decisions are not necessarily final.[43] Therefore, it concluded that SEC ALJs had been unconstitutionally appointed.[44] The Court declined to provide a more specific test for significant authority or discretion.[45]

As Justice Stephen Breyer observed, the majority's analysis may differ across agencies due to ALJs' varying functions.[46] Regardless, *Lucia* now calls the removal protections of many ALJs—and VLJs—into question.

B. Principal Officers and Inferior Officers

While the Supreme Court adopted a case-specific approach in distinguishing officers from nonofficer subordinates, the distinctions between principal officers and inferior officers are comparatively straightforward and merit brief review.

For purposes of the Appointments Clause, principal and inferior officers are largely distinguished by whether their work is directed and supervised at some level by others who were appointed by presidential nomination with the Senate's advice and consent.[47] In *Edmond v. United States*, the Supreme Court held that judges of the Coast Guard Court of Criminal Appeals are not principal officers because they do not have the power to render final decisions unless permitted to do so by the Court of Appeals for the Armed Forces, whose judges are nominated by the President and confirmed by the Senate.[48] The Court also found significant the power of the Judge Advocate General, an executive officer nominated by the President and confirmed by the Senate, to remove a Coast Guard Court of Criminal Appeals judge from his or her judicial assignment without cause.[49] Similarly, in *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.,* the Court held that members of the Public Company Accounting Oversight Board (PCAOB) are not principal officers because they are subject to oversight and removal by the SEC Commissioners, who are nominated by the President and confirmed by the Senate.[50] In other words, a principal officer is an officer who (1) is

43. *Id.* at 2052–53.
44. *See id.* at 2051.
45. *Id.* at 2051–53.
46. *Id.* at 2058 (Breyer, J., concurring in part and dissenting in part).
47. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 510 (2010) (citing Edmond v. United States, 520 U.S. 651, 662–63 (1997)).
48. *See Edmond*, 520 U.S. at 664–65.
49. *Id.* at 664.
50. *See Free Enter. Fund*, 561 U.S. at 510; *see infra* pt. III.B (discussing *Free Enterprise Fund* in greater detail).

nominated by the President and appointed with the Senate's advice and consent, (2) has final decision-making authority, and (3) is not subject to removal by another officer.

C. Veterans Law Judges Are Inferior Officers

Applying *Freytag*, it is likely that VLJs are inferior officers under the Appointments Clause. Beginning with the first *Freytag* criterion, the office of VLJ is established by law under the title "Member of the Board."[51] Second, the duties, salary, and means of appointment of VLJs are specified by statute.[52] The law charges Members of the Board with conducting hearings and properly disposing of appeals in a timely manner.[53] The law also pegs the Members' basic pay to that of ALJs, whose pay is also established by law.[54] In addition, the law provides that the VA Secretary appoint VLJs based on recommendations of the BVA Chairman and with approval of the President, thereby placing VLJs under the supervision of a principal officer.[55]

Turning to the third *Freytag* criterion, the duties of VLJs are analogous to those of SEC ALJs, whom *Lucia* recognized as officers. Both VLJs and SEC ALJs take testimony; conduct hearings; rule on motions for subpoenas; administer oaths; determine the admissibility of evidence; prepare decisions containing factual findings and legal conclusions; hold pretrial conferences; regulate the course of hearings; and can, to some extent, punish the contemptuous conduct of hearing attendees.[56] They also share certain limitations—most notably, that neither SEC ALJs nor VLJs have final decision-making authority.[57]

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51. 38 U.S.C. § 7101A (2018); 38 C.F.R. § 20.101(a)–(b) (2020).
52. 38 U.S.C. § 7101A (2018); 38 C.F.R. §§ 20.103, 20.705(b) (2020).
53. *See id.*
54. *See* 5 U.S.C. § 5372 (2018); 38 U.S.C. § 7101A(b) (2018).
55. *See* 38 U.S.C. § 7101(a)–(b)(1) ("[t]he Chairman shall be appointed by the President").
56. *Compare* 17 C.F.R. § 201.111 (2020) (enumerating the powers of SEC ALJs), *with* 38 C.F.R. § 20.705 (2020) (enumerating the functions of VLJs, including admitting evidence, administering oaths, ruling on procedural questions, and "[t]aking any other steps necessary to maintain good order and decorum"), *and* 38 C.F.R. § 20.709 (2020) (assigning VLJs to rule on motions for subpoenas). *See also* Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 881–82 (1991) (outlining the analogous duties of special trial judges).
57. An appellant may file a motion for reconsideration of a prior decision by a VLJ "at any time." 38 C.F.R. § 20.1002 (2020). The chairman is charged with reviewing and deciding on the motion. If the chairman grants reconsideration, she then convenes a reconsideration panel comprising of other VLJs, who may include the chairman, to determine whether or not to vacate the initial decision. 38 C.F.R. §§ 20.1004, 20.1100 (2020). A presiding VLJ's decision is also subject to review by the board's Office of Quality Review, headed by the principal vice chairman. *See* INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, *A 21ST CENTURY SYSTEM FOR EVALUATING VETERANS FOR DISABILITY BENEFITS* 164–65 (Michael McGeary et al. eds. 2007); U.S. DEP'T OF VETERANS AFFAIRS BOARD OF

Admittedly, there is a certain disparity between the discretion afforded to VLJs and SEC ALJs. Hearings before VLJs are non-adversarial.[58] Consequently, VLJs cannot cross-examine appellants or witnesses.[59] In contrast, both SEC ALJs and STJs preside over adversarial proceedings, a commonality emphasized by the *Lucia* Court.[60] In addition, SEC ALJs enjoy greater discretion in sanctioning appellants and their representatives for contemptuous conduct and procedural violations; namely, they may summarily suspend a person's representation at any point during the proceedings.[61] SEC ALJs may also prohibit the introduction of evidence or exclude testimony for failure to cure a deficient filing.[62] Further, whereas a VLJ's power to subpoena witnesses is limited by distance from the place of hearing, an SEC ALJ's subpoena power is not.[63] In these respects, SEC ALJs enjoy a broader measure of discretion.

Regardless, caselaw is replete with officers accorded with as much or less authority or discretion than VLJs. Officers include a district court clerk in charge of keeping court records and receiving fees;[64] election monitors;[65] "thousands of clerks in the Departments of the Treasury, Interior," and other departments;[66] and even a cadet in the Navy.[67] The functions carried out by these officers are no less important than those carried out by VLJs. A VLJ's decision can result in the payment of hundreds of thousands—even millions—of dollars in long-term government outlays.[68] Their decisions, the majority of which become

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VETERANS' APPEALS, *ANNUAL REPORT FISCAL YEAR 2018* 11, https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2018AR.pdf [hereinafter *Annual Report Fiscal Year 2018*].

58. 38 C.F.R. § 20.700(c) (2020).

59. 38 C.F.R. § 20.705(b)(6) (2020) (prohibiting VLJs from cross-examining appellants and witnesses).

60. *See* Lucia v. SEC, 138 S. Ct. 2044, 2053 (2018).

61. *Compare* 17 C.F.R. § 201.180(a) (2020), *with* 38 C.F.R. § 20.705 (2020) (empowering VLJs to maintain good order in hearings, including by terminating hearings or directing an offending party to leave the hearing for disruptive or threatening behavior).

62. *See* 17 C.F.R. §§ 201.180(b)–(c) (2020).

63. *Compare* 38 C.F.R. § 20.709 (2020) ("[T]he appellant, or his or her representative, may move that a subpoena be issued to compel the attendance of witnesses residing within 100 miles of the place where a hearing on appeal is to be held and/or to compel the production of tangible evidence."), *with* 17 C.F.R. § 201.232 (2020).

64. *Ex parte* Hennen, 38 U.S. 230, 258 (1839).

65. *Ex parte* Siebold, 100 U.S. 371, 397 (1879).

66. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 540 (2010) (Breyer, J., with Stevens, Ginsburg, and Sotomayor, JJ., dissenting) (citing United States v. Germaine, 99 U.S. 508, 511 (1879)).

67. United States v. Moore, 95 U.S. 760, 762 (1877); *see also* Weiss v. United States, 510 U.S. 163, 182 (1994) (Souter, J., concurring) ("[M]ilitary judges, like ordinary commissioned military officers, are 'inferior officers' within the meaning of the Appointments Clause.").

68. A single ALJ was able to grant more than 1,700 disability applications during his tenure, resulting in the payout of $550 million in taxpayer money. *Former SSA Administrative Law Judge*

final,[69] have a tremendous impact on the welfare of appellants, who include not only veterans but also their spouses and dependent children—many of whom depend on veterans benefits to fund basic living and education expenses.[70]

One of the most important functions of a VLJ is the dual role he or she serves as the face of the VA and the Judiciary. As a kindred officer put it, a VLJ

> holds a position of high prominence within the VA and his core duties are to render fair, impartial[] and unbiased decisions. [He] is expected to uphold the values of the VA and should conduct himself in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.[71]

In light of these significant duties and functions, VLJs are likely officers within the meaning of the Appointments Clause. As officers, VLJs would undoubtedly qualify as inferior officers as they are not appointed with the Senate's advice and consent, nor do they have final decision-making authority.

III. INFERIOR OFFICER REMOVAL PROVISIONS

The status of VLJs under the Appointments Clause may appear to be of little consequence thus far. After all, VLJs are appointed by the VA Secretary—a "Head[] of Department[]"—and, therefore, in compliance with the Appointments Clause.[72] However, as inferior officers, VLJs would not only be subject to the President's power of appointment—they would also subject to the President's power of removal.[73] A review

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Sentenced to 4 Years in Prison for Role in $550 Million Social Security Disability Fraud Scheme, OFFICE OF THE INSPECTOR GEN. SOC. SECURITY ADMIN. (Aug. 25, 2017), https://oig.ssa.gov/audits-and-investigations/investigations/aug25-daugherty-sentenced; Stephen Dinan, *Social Security Fraud Judge Gets 4 Years in Prison*, THE WASH. TIMES (Aug. 25, 2017), https://www.washingtontimes.com/news/2017/aug/25/social-security-fraud-judge-gets-4-years-prison/. VLJs share comparable discretion in binding the federal government to pay large sums of money over appellants' lifetimes.

69. While VLJs technically do not issue final decisions, in practice their decisions almost always become final unless appealed and vacated by a higher court. *See* 38 U.S.C. §§ 1975, 1984(a) (2018); 38 C.F.R. § 20.1100 (2020).

70. There are an estimated 6 million beneficiaries of VA benefit programs. The VA Secretary estimates that payments for these benefits will amount to over $114 billion in 2019. That is approximately $19,000 in spending per beneficiary for benefits like disability compensation, education benefits, home loans, and unemployment. *See Budget in Brief*, DEP'T OF VETERANS AFFAIRS (2019), https://www.va.gov/budget/products.asp.

71. VA v. Markey, 2017 MSPB LEXIS 4774, at *47 (M.S.P.B. Nov. 9, 2017) (the opinion of an ALJ affirming the removal of a VLJ).

72. *See* U.S. CONST. art. II, § 2, cl. 2; 38 U.S.C. § 7101A(a)(1) (2018).

73. Morrison v. Olson, 487 U.S. 654, 686 (1988).

of the limits on executive removal power is thus essential to understanding the implications that inferior officer status would have on a VLJ's decisional independence.

A. Permissible Limits on Executive Removal Power

Article II of the Constitution confers upon the President general administrative control of those executing the laws of the United States, including the power to remove officers.[74] In *United States v. Perkins*, the Supreme Court held that Congress may limit and restrict the Executive Branch's power to remove inferior officers "as it deems best for the public interest."[75] More recently, the Supreme Court has focused on the extent to which Congress can limit executive supervision of inferior officers.

In *Morrison v. Olson*, the Court reviewed the question of whether Title VI of the Ethics in Government Act ("Title VI" or "the Act") impermissibly interfered with the President's Article II removal power.[76] Specifically, the Act allowed for the appointment of an independent counsel by a special court upon request of the attorney general when there are reasonable grounds to believe that investigation or prosecution of high-ranking government officials for violations of federal criminal laws is warranted.[77] In addition, the Act entailed a "good cause" removal provision: other than by impeachment and conviction, the independent counsel could be removed from office "only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance" of his or her duties.[78]

In determining the constitutionality of Title VI's good cause removal provision, the Supreme Court narrowed the question to "whether the removal restrictions are of such a nature that they *impede the President's ability to perform his constitutional duty*."[79] The Court found no such interference in the President's exercise of executive power.[80] First, the Court noted that independent counsels were inferior officers "with limited jurisdiction and tenure and lacking policymaking

74. *See* Myers v. United States, 272 U.S. 52, 163–64 (1926).
75. United States v. Perkins, 116 U.S. 483, 485 (1886).
76. *See* 28 U.S.C. §§ 591–599 (1982); *Morrison*, 487 U.S. at 659–60.
77. *Morrison*, 487 U.S. at 660–61.
78. *Id.* at 663.
79. *Id.* at 691 (emphasis added).
80. *Id.*

or significant administrative authority."[81] Therefore, the Court "[did] not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President."[82]

Second, the Court noted that the Act's good cause removal provision left "ample authority" to the Executive Branch, through the attorney general, "to assure that the [independent] counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act."[83] Although the Act did limit the attorney general's power to remove an independent counsel, the Court indicated that it was Congress' legislative intent to establish the "necessary independence of the office," and that such a limitation as it stood did not sufficiently deprive the President of "control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure faithful execution of the laws."[84] Finally, the Court found that Title VI did not impermissibly undermine the powers of the Executive Branch—in part, because it gave the attorney general several means of supervising or controlling the prosecutorial powers wielded by an independent counsel, including the good cause removal provision.[85]

B. Multilevel Protections from Removal

In upholding Title VI's good cause removal provision, the *Morrison* Court validated a scheme that provided inferior officers one level of protection from removal. The President could remove the attorney general at-will, but the attorney general exercised limited authority in removing the independent counsel.[86] Subsequently, the Supreme Court dealt for the first time with a statutory scheme entailing multiple levels of tenure protection and came to a different conclusion.[87]

As mentioned, in *Free Enterprise Fund* the Supreme Court held that officers subject to the oversight and removal by SEC Commissioners are inferior officers.[88] The central question of the Court's decision, however,

81. *Id.*
82. *Id.* at 691–92.
83. *Id.* at 692.
84. Id. at 693.
85. *Id.* at 696.
86. Edmond v. United States, 520 U.S. 651, 661 (1997).
87. *Id.*
88. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 510 (2010).

was whether the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") was contrary to the President's removal power under the Appointments Clause.[89] The law provided, in the relevant part, for the creation of a board—here, the PCAOB—charged with enforcing the law's provisions, securities laws, SEC rules, its own rules, and professional accounting standards.[90] In fulfilling its duties, the PCAOB "promulgate[d] auditing and ethics standards, perform[ed] routine inspections of all accounting firms, demand[ed] documents and testimony, and initiate[d] formal investigations and disciplinary proceedings."[91]

Sarbanes-Oxley placed the members of the PCAOB under the SEC's oversight.[92] The SEC appointed PCAOB members and reviewed its rules and sanctions upon appeal.[93] However, the SEC could only remove PCAOB members "for good cause shown" and "in accordance with certain procedures."[94] Those procedures required the SEC find that the member willfully violated provisions of Sarbanes-Oxley, PCAOB rules, or securities laws; willfully abused his or her authority; or, without reasonable justification or excuse, failed to enforce compliance with any such provision or rule, or with certain professional standards.[95] In turn SEC commissioners, as principal officers, can only be removed by the President for "inefficiency, neglect of duty, or malfeasance in office."[96]

In effect, Sarbanes-Oxley created multilevel protections from removal for PCAOB members. The President was restricted in his ability to remove SEC commissioners, who, in turn, were restricted in removing PCAOB members.[97] This, the Court held, contravened the Constitution's separation of powers.[98] The Court explained that the second level of tenure protection—the restriction on SEC Commissioners from removing PCAOB members except for good cause—prevented the President from holding the SEC fully accountable for the PCAOB's conduct.[99] It left the President "powerless" to intervene in a PCAOB member's conduct unless it could remove an SEC Commissioner, thereby preventing the President from faithfully executing the laws and bearing

89. *Id.* at 487, 495–96.
90. *Id.* at 485.
91. *Id.*
92. *Id.* at 486.
93. *Id.* at 489.
94. *Id.* at 486 (internal quotations omitted).
95. *Id.*
96. *Id.* at 487 (citation omitted).
97. *Id.* at 486–87.
98. *Id.* at 492.
99. *Id.* at 496.

responsibility for the actions of the Executive Branch.[100] In contrast, without the second layer of tenure protection the SEC could remove a PCAOB member at any time.[101] "The President could then hold the [SEC] to account for its supervision of the [PCAOB], to the same extent that he may hold the [SEC] to account for everything else it does."[102]

C. MSPB Protection from Removal for Veterans Law Judges Is Unconstitutional

In holding that multilevel protections from removal are unconstitutional, the *Free Enterprise* Court has called the protected tenure of thousands of inferior officers into question.[103] As Justice Breyer observed in his dissent, all ALJs may very well be officers,[104] and the Supreme Court's recognition of SEC ALJs as officers in *Lucia* only bolsters that conclusion.[105] Statutory law provides that ALJs are removable only for good cause established and determined by the Merit Systems and Protection Board (MSPB).[106] However, members of the MSPB are themselves protected from removal by the President absent good cause, creating an impermissible level of tenure protection.[107]

VLJs share the same protection from removal as ALJs, with one exception.[108] VLJs may only be removed for good cause through the MSPB.[109] This good cause protection creates multiple layers of tenure protection between the President and VLJs, just as in *Free Enterprise* between the President and SEC ALJs.[110] Therefore, consistent with the Supreme Court's logic thus far, VLJs' MSPB protection from removal is likely unconstitutional.

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100. *Id.*
101. *Id.* at 495.
102. *Id.* at 495–96.
103. *Id.* at 492.
104. *Id.* at 542 (Breyer, J., dissenting).
105. Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018).
106. *See* 5 U.S.C. § 7521(a)–(b) (2005); *see also infra* pt. III (describing the legislative history of ALJs' MSPB removal protection).
107. *See* 5 U.S.C. § 1202(d) (2011).
108. *See* 38 U.S.C. § 7101A(e)(1) ("A member of the Board (other than the Chairman or a member of the Senior Executive Service) may be removed as a member of the Board *by reason of job performance* only as provided in subsections (c) and (d). Such a member may be removed by the Secretary, upon the recommendation of the Chairman, for any other reason as determined by the Secretary.") (emphasis added); §§ 7101A(c)–(d) (governing the performance review process of VLJs, also known as recertification); *infra* pt. IV.A. (describing the recertification process).
109. *See id.* § 7101A(e)(2) ("[T]he removal of the member of the Board shall be carried out subject to the same requirements as apply to removal of an administrative law judge under [section 7521 of title 5].").
110. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 495 (2010).

IV. THE PERILS OF GREATER EXECUTIVE OVERSIGHT OF VETERANS LAW JUDGES

Less than a month after *Lucia*, the Executive Branch sprang into action.[111] The President signed an executive order excepting all ALJs from the competitive service, thereby bypassing the established bureaucratic selection process for appointing ALJs.[112] Under the order, the only requirement for ALJs is that they possess a professional license to practice law and be authorized to practice law.[113] Practitioners and academics alike cried foul.[114] Attorneys feared the loss of agency independence, which had been safeguarded by a "clearly defined process of vetting, ranking and selecting candidates for ALJ hiring."[115] One administrative law expert described the development as "a movement to burn down the entire administrative state,"[116] and another expressed concern it would permit court-packing that "is going to lead to a one-sided culture within the ALJ corps."[117]

The specter of court-packing applies to the veterans benefits appeals system as well. In 2018, after the decision in *Lucia*, the White House rejected half of all candidates recommended for VLJ vacancies after it "required them to disclose their party affiliation and other details of their political leanings."[118] The rejected candidates were Democrats and an Independent—and of the candidates appointed to judgeships, three were Republicans and one had no party affiliation but voted in Republican primaries.[119] Since the inception of BVA, the President has

111. *See* Excepting Administrative Law Judges from the Competitive Service, Exec. Order No. 13,843, 83 Fed. Reg. 32755 (July 10, 2018).

112. *Id.*; *see also* Anti-Corruption and Public Integrity Act, S. 3357, 115th Cong. § 405(a) (2018) (proposing legislation in the Senate that would override Exec. Order No. 13,843 by placing all current and future ALJs in the competitive service).

113. *See* Exec. Order No. 13,843, 83 Fed. Reg. at 32,756–57 § 3(ii)(b).

114. *E.g.*, Nicholas Feden, *The Potential Impact of 'Lucia' on the Social Security Administration*, THE LEGAL INTELLIGENCER (Oct. 4, 2018), https://www.law.com/thelegalintelligencer/2018/10/04/the-potential-impact-of-lucia-on-the-social-security-administration/; Alison Frankel, *As Trump Claims Power to Pick Federal Agency Judges, Skeptics Fear Court-Packing*, REUTERS (July 11, 2018), https://www.reuters.com/article/us-otc-alj/as-trump-claims-power-to-pick-federal-agency-judges-skeptics-fear-court-packing-idUSKBN1K12YA.

115. Feden, *supra* note 114.

116. Frankel, *supra* note 114 (quoting University of Georgia law professor Kent Barnett).

117. *Id.* (quoting Loyola Marymount law professor Adam Zimmerman).

118. Lisa Rein, *'I've Never Seen These Positions Politicized': White House Rejection of Veterans Judges Raises Concerns of Partisanship*, WASH. POST (Oct. 23, 2018), https://www.washingtonpost.com/politics/ive-never-seen-these-positions-politicized-white-house-rejection-of-veterans-judges-raises-concerns-of-partisanship/2018/10/23/f488046a-ce51-11e8-920f-dd52e1ae4570_story.html.

119. *Id.*

retained a veto over the appointments of prospective VLJs.[120] However, never before had VLJs been appointed on such a seemingly political basis.[121] *Lucia* may have emboldened the Executive to end the tradition of nonpartisan ratifications of VLJ appointments for reasons that go beyond the fair and effective adjudication of veterans' appeals.

Admittedly, court-packing alone may not impact the decisional independence of VLJs. VLJs appointed on political bases would still enjoy for-cause protections from removal—enter *Free Enterprise*.[122] Without the tenure protection afforded by the MSPB, the Executive could more easily remove VLJs who stray too far from the party line. While an individual veteran's appeal may not implicate the same interests as, for example, the proposed merger of multibillion-dollar corporations,[123] a VLJ judgeship may still be used as a means of achieving political ends. For example, the Executive may remove a VLJ and reward his or her judgeship to a political sympathizer with little regard for his or her expertise in veterans law. Other traditionally nonpartisan offices have recently been politicized in a similar fashion.[124] The Executive may then abuse the recertification process by screening those VLJs for continued political affiliation.[125]

Political appointments and removals of VLJs may also help accomplish broader political objectives. For example, a President tackling the federal budget deficit may pressure adjudicatory agencies, including BVA, to cut procedural corners in ways that result in more denials of appeals. Conversely, a populist regime may pressure adjudicatory agencies to liberally construe laws and regulations in ways that result in greater entitlement spending—a modern rendition of bread and circuses. Those VLJs who appear too liberal or too conservative in their decisions, or who in some way resist directives from up the executive chain of command, risk replacement by loyalists.[126] Both scenarios are all the more perilous in a country that is

120. *See* 38 U.S.C. § 7101A(a)(1) (2018) ("with the approval of the President").

121. *See* Rein, *supra* note 118.

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

123. *See, e.g.*, *Administrative Law Judge Upholds FTC's Complaint Allegations that Merger of Major Titanium Dioxide Companies Would Have Harmed Competition*, FED. TRADE COMM'N (Dec. 17, 2018), https://www.ftc.gov/news-events/press-releases/2018/12/administrative-law-judge-upholds-ftcs-complaint-allegations.

124. *See* Rein, *supra* note 118 ("The Trump administration has . . . reassign[ed] senior executives at the Interior Department, transferr[ed] dozens of career diplomats at the State Department to clerical work, install[ed] loyalists in positions previously held by experts at a federal aid agency[.]").

125. *See infra* pt. IV(A) (detailing the virtues and pitfalls of the recertification process).

126. The Executive may also threaten VLJs with removal for failure to comply with increased decision goals aimed at reducing the veteran appeals backlog, a vaunted political goal. *See* U.S. SENATE, *THE VA CLAIMS BACKLOG WORKING GROUP MARCH 2014 REPORT* 5–7 (2014),

becoming, at once, more indebted and dependent on entitlement spending.[127]

Extrajudicial pressure on administrative decision-making is what motivated the creation of the APA in the first place.[128] During the turn of the twentieth century, a vast expansion of the Executive Branch resulted in the formation of numerous agencies charged with both executive and judicial duties.[129] The vesting of enforcement and adjudicatory functions in the same agency created palpable conflicts of interest.[130] A report to President Franklin D. Roosevelt found that "[p]ressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible."[131] This, the report concluded, "not only *undermines judicial fairness*; it *weakens public confidence* in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the Commission, in the role of prosecutor, presented to itself."[132] A subsequent report by the attorney general echoed these findings.[133]

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https://www.casey.senate.gov/download/va-backlog-march-2014-report (outlining the history of the appeals backlog and the numerous initiatives undertaken by Congress and the President to eliminate it). However, regulations already permit the removal of VLJs for job performance without the MSPB's consent. *See* 38 U.S.C. §§ 7101A(c)–(d), (e)(2) (2018). Nonetheless, politically motivated quotas also threaten VLJs' decisional independence and warrant review. *See, e.g.*, Joe Davidson, *Judges Complain that Social Security 'Quota System' for Cases Hurts Taxpayers*, WASH. POST (May 1, 2013), https://www.washingtonpost.com/politics/federal_government/social-security-judges-complain-that-quota-system-for-cases-hurts-taxpayers/2013/05/01/2e3b67e6-b293-11e2-bbf2-6f9e9d79e19_story.html?noredirect =on&utm_%20term=.a14488641d1b&utm_term=.7d9b3dbd033a ("Quotas are the result of poor management which, when combined with fiscal, political and other extra-judicial considerations, result in exactly the type of pressures [that are] anathema to decisional independence.").

127. Due to an aging population, Social Security and Medicare are expected to run trillion-dollar deficits in the near future, resulting in net interest costs equal to total yearly spending on Social Security itself. *See The 2018 Long-Term Budget Outlook*, CONG. BUDGET OFFICE (June 26, 2018), https://www.cbo.gov/publication/53919.

128. *See* Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENVTL. L. REV. 207, 212–13 (2016).

129. *See* REPORT OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT 36 (Government Printing Office, 1937) (also known as the Brownlow Committee Report) (describing the development of executive agencies).

130. *See id.*

131. *Id.*

132. *Id.* at 36–37 (emphasis added).

133. *See* Jeffrey S. Lubbers, *APA-Adjudication: Is This the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65, 65–66 (1996) (summarizing the findings of the 1941 Report of the Attorney General's Committee on Administrative Procedure).

The APA addressed these concerns, in part, by creating a corps of hearing examiners, later renamed ALJs,[134] with heightened protections from removal now enforced by the MSPB.[135] Judicial "independence is a prerequisite to resolving administrative proceedings in a fair and expeditious manner and to maintaining litigants' confidence in the fairness and integrity of the judicial process."[136] Stripping VLJs of MSPB protection, albeit legally warranted, would compromise the independence of and public faith in administrative decision-making that the APA intended to preserve.

The decision in *Free Enterprise* is premised on the opposite view.[137] As discussed above, the Supreme Court held that more than one layer of removal protection prevented the President from holding inferior officers accountable.[138] It reasoned further that, "[w]ithout a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall."[139] Public confidence in the Executive Branch would instead hinge on the President's responsibility over his officers and his ability to hold them accountable for their conduct. While that may be true, VLJs are a special breed of officers. Unlike clerks and most officers in the military, VLJs are officers with quasi-judicial functions.[140] They decide the rights of millions of veterans and their families, all of whom expect, and are entitled to, a fair decision. In all likelihood, a VLJ is the only judge a veteran will ever appear before in his or her lifetime. To a veteran, the VLJ *is* the face of justice, and knowledge that the VLJ may be subject to executive machinations will impact the perception of fairness of whatever decision the judge makes. The rationale in *Free Enterprise* overlooks the special nature of VLJs and their influence on public confidence in the veterans benefits appeals system, the Judiciary, and institutions generally.

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134. *See* Pub. L. No. 95-251, 92 Stat. 183, 183 (1978) (amending 5 U.S.C. §§ 554(a)(2), 556(b)(3), 559, 1305, 3344, 4301, 5335, 5362, 7251).

135. *See* Civil Service Reform Act of 1978, Pub. L. No. 95–454, 92 Stat. 1111, 1121–22 (1978) (creating the MSPB, which inherited many of the duties and responsibilities of the United States Civil Service Commission); *see also supra* pt. II(C).

136. Robin J. Arzt et al., *Advancing the Judicial Independence and Efficiency of the Administrative Judiciary: A Report to the President-Elect of the United States*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 93, 96 (2009).

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

138. *See id.* at 492–97; *see also supra* pt. II(B).

139. *Free Enter. Fund*, 561 U.S. at 498 (internal quotations omitted).

140. *See Appellant Questions and Answers*, U.S. MERIT SYS. PROT. BD., https://www.mspb.gov/appeals/appellantqanda.htm (last visited Sept. 7, 2020).

V. SAFEGUARDING THE DECISIONAL INDEPENDENCE OF VETERANS LAW JUDGES

A legally correct outcome does not necessarily make for good public policy. Unfortunately, this is the case following *Lucia*. VLJs are likely inferior officers under the Appointments Clause and, as such, their MSPB protection from removal is likely unconstitutional. The result is a threat to the decisional independence of VLJs and, ultimately, fairness and public confidence in the veterans benefits appeals system. Accordingly, Congress must act. As discussed below, numerous alternative schemes regulating the supervision of VLJs would cure the constitutional defect in their current protection from removal. However, the only acceptable solution is one that sufficiently insulates VLJs from extrajudicial influences while remaining faithful to the Constitution. That solution lies in a particular form of judicial supervision.

A. Removal by Recertification Panel

As noted earlier, there is already an exception to VLJs' MSPB protection from removal.[141] The VA Secretary may remove a VLJ by reason of job performance without the MSPB's consent.[142] However, the Secretary may not do so outright—the BVA Chairman must recommend that the VLJ be "noncertified."[143] In order for a VLJ to be noncertified, the Chairman must first assemble a panel comprised of the Chairman and two VLJs.[144] The Chairman is required to "periodically rotate membership on the panel so as to ensure that each member of the Board (other than the Vice Chairman) serves as a member of the panel for and within a reasonable period."[145] Generally, the panel reviews VLJs performance no less than once every three years.[146] If a VLJ meets the Board's performance standards, then the chairman must recertify the VLJ's appointment to the Board.[147] If a VLJ fails to meet performance standards, the chairman may, "based upon the individual circumstances," either grant a conditional recertification or recommend to the Secretary that the member be noncertified.[148]

141. *See supra* pt. II(C) (describing VLJs' MSPB removal protection).
142. *See* 38 U.S.C. §§ 7101A(c)–(d), (e)(1) (2018).
143. *Id.* § 7101A(c)(3)(B).
144. *Id.* § 7101A(c)(1)(A).
145. *See id.*
146. *Id.* § 7101A(c)(1)(B).
147. *Id.* § 7101A(c)(2).
148. *Id.* §§ 7101A(c)(3)(A)–(B).

In the wake of receding MSPB removal protection, the recertification process could simply be extended to *all* proposed removals of VLJs. A VLJ's removal for *any* reason would require the input of VLJs whose membership on the presiding review panel is not predetermined. Moreover, the BVA Chairman enjoys a heightened level of removal protection.[149] The chairman may only be removed by the President and only for "misconduct, inefficiency, neglect of duty, or engaging in the practice of law or for physical or mental disability[.]"[150] Congress expressly prohibited removals "on any other grounds."[151] The chairman's protections from removal are, in fact, equivalent to those of a judge of CAVC, which hears appeals arising from BVA decisions.[152] Extending the recertification process could serve as a "quick fix" to the perilous vacuum that the stripping of MSPB protection would leave behind without encroaching upon executive removal power.

Over time, however, the recertification process would not suffice as a guarantor of decisional independence. First, statute leaves it up to the Executive to determine the standards that VLJs must satisfy in order to be recertified.[153] While those standards must "establish objective and fair criteria," the objectivity of recertification panels may be compromised over time as more politically based appointments are made. Standards of removal like "good cause shown" are not always well-defined and could provide a biased recertification panel enough cover to finagle an acceptable rationale for removing a VLJ.[154]

Second, the self-regulating nature of recertification panels is very limited. While the panel must comprise of two VLJs appointed on a rotating basis, the law does not actually provide them any decisional authority over a VLJ's tenure.[155] The law does not specify how the panel makes determinations or specifically require the BVA Chairman, as

149. *See id.* § 7101(b)(2).

150. *Id.*

151. *Id.*

152. *Id.* §§ 7252 (giving the United States Court of Appeals for Veterans Claims (CAVC) exclusive jurisdiction to review BVA decisions), 7253(f)(1) ("A judge of [CAVC] may be removed from office by the President on grounds of misconduct, neglect of duty, or engaging in the practice of law. A judge of the Court may not be removed from office by the President on any other ground.").

153. *See* 38 U.S.C. § 7101A(f) (2018) ("The Chairman, subject to the approval of the Secretary, shall establish standards for the performance of the job of a member of the Board (other than the Chairman or a member of the Senior Executive Service). Those standards shall establish objective and fair criteria for evaluation of the job performance of a member of the Board.").

154. 5 U.S.C. § 7521 fails to define "good cause," and courts have employed an analysis that is analogous to the "I know it when I see it" definition of obscenity. *See* Brennan v. Dep't of Health and Human Serv., 787 F.2d 1559, 1563 (Fed. Cir. 1989); Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (concurring opinion). The MSPB has recognized that "good cause" is susceptible to multiple interpretations. *See* Soc. Sec. Admin. v. Goodman, 19 M.S.P.R. 321, 325 (1984).

155. *See* 38 U.S.C. §§ 7101A(c)(1)(A)–(B) (2018).

member of the recertification panel, to ratify any proposed determinations made by the panel.[156] The law also leaves it entirely up to the chairman whether to recommend noncertification to the VA Secretary or to unilaterally grant a conditional recertification.[157]

Finally, while the BVA Chairman has heightened protection from removal, her tenure is relatively short—six years compared to fifteen years for a CAVC judge.[158] The chairman would face greater pressure to accede to the demands from up the executive chain of command if she seeks reappointment. Moreover, the VA Secretary is entirely beholden to the President and may simply refuse to recertify VLJs or may grant conditional recertifications against the chairman's advice in order to maintain a politically desirable composition of judges.[159]

B. Expansion of CAVC Judgeships

Theoretically, Congress could swell the ranks of CAVC judges, abolish BVA, and steer the venue of veterans' appeals directly to CAVC, converting it into a trial-level tribunal. Not only do CAVC judges have greater protected tenure, as noted above, but statute regulates the partisan makeup of the bench.[160]

The simplicity of this approach is deceiving. It would require the appointment of a horde of trial judges in order to manage the inexorable flow of veterans' appeals.[161] The appointment of a CAVC judge requires the advice and consent of the Senate.[162] Currently, there are 78 vacancies in federal courts[163]—not including vacancies in most Article I tribunals.[164] Appointing a sufficient number of judges to CAVC would require years of political wrangling in the Senate and likely prove

156. *See generally id.* § 7101A.
157. *See id.* § 7101A(c)(3).
158. *See id.* §§ 7101(b)(1), 7253(c).
159. *See id.* § 7101A(c)(5).
160. *Id.* § 7253(b) ("Not more than the number equal to the next whole number greater than one-half of the number of judges of the Court may be members of the same political party.").
161. In 2018, BVA received over 69,000 cases, including approximately 63,000 original substantive appeals. *Annual Report Fiscal Year 2018*, *supra* note 57, at 22.
162. *See* 38 U.S.C. § 7253(b).
163. United States Courts, *Current Judicial Vacancies*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies (last updated Sept. 7, 2020).
164. The MSPB, for example, is functioning with only one appointed member, resulting in an unprecedented appeals backlog. *See* Louis C. LaBrecque, *Backlog of 1,500 Cases at Worker Appeal Board Likely to Grow*, BLOOMBERG L. (Oct. 17, 2018, 10:44 AM), https://news.bloomberglaw.com/daily-labor-report/backlog-of-1-500-cases-at-worker-appeal-board-likely-to-grow.

infeasible in the current political climate. The Appointments Clause was drafted with this sort of predicament in mind.[165]

The long wait for appointing a sufficient number of CAVC judges would exacerbate another serious problem: the appeals backlog.[166] Even if BVA could perform its adjudicatory functions in the interim, the laborious process of seeking advice and consent of the Senate would mean a ballooning appeals backlog anytime a CAVC judge seeks reappointment or a vacancy opens up. While this has proven politically tolerable in other tribunals,[167] the subject of veterans benefits is particularly sensitive.[168] Any fix to the constitutional defects in the supervision of VLJs that contributes to the appeals backlog would be politically unacceptable.

C. Judicial Supervision

The wiser solution lies within the text of the Appointments Clause: "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."[169]

Congress should vest the power to appoint—and remove—VLJs in the "Courts of Law." This has been proposed in the context of ALJs, who, as discussed, face a similar dilemma following *Lucia*.[170] Under that proposal, ALJs would be placed under the supervision of the United States Court of Appeals for the D.C. Circuit.[171] Such an arrangement would both avoid violating the Appointments Clause and insulate ALJs from extrajudicial pressures that could undermine public confidence in the fairness of their decisions. Further, because ALJs would be appointed

165. The purpose of allowing the President alone, Heads of Departments, and Courts of Law to appoint inferior officers was for administrative convenience, which the Framers deemed to outweigh the benefits of the more cumbersome procedure of requiring the advice and consent of the Senate. *See* Edmond v. United States, 520 U.S. 651, 660 (1997) (citing United States v. Germaine, 99 U.S. 508, 510 (1878)).

166. *See infra* pt. IV(C)(1) (describing the veterans' appeals backlog).

167. *See, e.g.*, LaBrecque, *supra* note 164.

168. *See infra* pt. IV(C)(2) (describing strong public interest in veterans benefits and the uniqueness and complexity of veterans law); *see also Public Trust in Government: 1958-2019*, *supra* note 13 (recording low public trust in the federal government).

169. U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

170. *See Lucia*, 138. S. Ct. at 2059 (Breyer, J., concurring in part and dissenting in part) ("If the *Free Enterprise Fund* Court's holding applies equally to the [ALJs] . . . then to hold that the [ALJs] are 'Officers of the United States' is, perhaps, to hold that their removal protections are unconstitutional."); Kent Barnett, *Resolving the ALJ Quandry*, 66 VAND. L. REV. 797, 832 (2013) (anticipating the constitutional dilemma that *Lucia* now poses in conjunction with *Free Enterprise*'s proscription of multilevel protections from removal).

171. *Id.*

and removed under a "Court[] of Law," *Free Enterprise* would not apply because the President would not have any implied removal power.[172]

Congress could apply variations of this scheme to the veterans benefits appeals system, each posing different advantages and disadvantages. However, one particular variation—a hybrid model of supervision—would be the ideal solution to the dilemma posed by *Lucia*.

1. Supervision by CAVC

The simplest approach to judicial supervision would be to place VLJs under the supervision of CAVC. Although CAVC is not an Article III court, the Supreme Court has held that the "Courts of Law" include Article I tribunals for purposes of the Appointments Clause.[173] Such a scheme would vest CAVC judges with the power to appoint and remove VLJs, thereby mitigating executive pressures that threaten their decisional independence. Because the tenure of a CAVC judge will tend to surpass two presidential terms,[174] a CAVC judge would be less susceptible than the BVA Chairman to executive pressure in the appointment and removal of VLJs. Removal would require the consent of a majority of CAVC judges, analogous to the process of removing certain Article I judges.[175] Simultaneously, the Executive would retain some control over VLJs by allowing the VA Secretary to initiate removal proceedings with CAVC and through its removal power of CAVC judges.[176] The Secretary would be able to base a removal on productivity, job performance, and any other currently permitted ground.[177] This model strikes a balance between safeguarding the decisional independence of VLJs and the power of the Executive Branch to enforce veterans laws and regulations. Above all, it does so in a manner consistent with the Appointments Clause.

Crucially, this model would not add to the appeals backlog. It merely transfers from the Executive Branch the powers to appoint and remove VLJs to CAVC, including the power to remove VLJs who prove

172. *Id.* at 845–46.
173. Freytag v. Comm'r of Internal Revenue, 501 U.S 868, 890 (1991).
174. 38 U.S.C. § 7253(c) (2018).
175. *See, e.g.*, 28 U.S.C.A. § 176(a) (Westlaw through Pub. L. No. 116-159) (removing judges of the United States Court of Federal Claims), 152(e) (removing bankruptcy judges); *see also* Barnett, *supra* note 170, at 849–50 (describing interbranch appointments).
176. *See* 38 U.S.C. § 7253(f)(1) (providing that a CAVC judge may be removed by the President, but only for misconduct, neglect of duty, or engaging in the practice of law, generally); Barnett, *supra* note 170, at 847 (proposing that the Executive have the power to initiate removal proceedings of ALJs with a supervising Article III court).
177. *See* 38 U.S.C. § 7101A(e).

unproductive. Moreover, this model would potentially lower the backlog by allowing CAVC to establish superior measures of job performance. Currently, BVA imposes a production goal on VLJs of 25 to 30 decisions each week.[178] While BVA has not labeled it as a "quota," the production goal effectively determines whether or not a VLJ is recertified.[179] The production goal constituted a "huge" increase made in an effort to tackle the appeals backlog.[180] The result, however, was plummeting morale, poorer work performance, and more decisional errors.[181] Decisions that are appealed and found erroneous are remanded to BVA,[182] thereby perpetuating the appeals backlog. VA benefits regulations are highly complex, and a single appeal often entails thousands of pages that often must be reviewed *de novo*.[183] As CAVC judges are better insulated from extrajudicial pressures than the BVA Chairman,[184] they would have the flexibility to implement measures of job performance that promote correct decision-making rather than simply quicker adjudications. The more cases VLJs "get right" in the first instance, the less cases will return on remand and the more time VLJs will have to dispose of original appeals and lower the backlog.

Supervision by CAVC has ancillary advantages as well. By vesting CAVC with the power to appoint VLJs, it will have the liberty to decide the manner of appointment. CAVC could adopt a meritocratic selection process akin to the scrapped process of appointing ALJs.[185] Such a process could emphasize objective measures of a prospective VLJ's aptitude and experience. This model would also hold CAVC judges themselves more accountable for CAVC decisions that impair the effective adjudication of veterans' appeals. In recent years, CAVC has increased the complexity of veterans law, resulting in more remands for correcting decisional errors.[186] Meanwhile, the number of cases pending

178. *See* Daniel E. Ho & David Marcus, *When the VA Misrepresents Performance, Veterans Suffer*, THE HILL (Mar. 5, 2019, 07:30 AM), https://thehill.com/opinion/national-security/432196-when-the-va-misrepresents-performance-veterans-suffer.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *See* 38 U.S.C. § 7261 (2018).

184. *See id.* § 7253(f)(2).

185. *See* 5 C.F.R. § 930.201 (2020); Excepting Administrative Law Judges from the Competitive Service, Exec. Order No. 13,843, 83 Fed. Reg. 32755, (Jul. 10, 2018).

186. *See, e.g.*, Sharp v. Shulkin, 29 Vet. App. 26, 36 (2017) (requiring VA to attempt to examine a veteran during a flare-up and, if it cannot, offer a professional opinion on how the veteran could be functionally limited during a flareup); Correia v. McDonald, 28 Vet. App. 158, 169–70 (2016) (requiring additional range of motion tests).

before BVA has increased astronomically, from about 66,000 cases in 2014 to over 153,000 in 2017 under official estimates.[187]

As supervisors of VLJs, CAVC judges would feel the brunt of their own sweeping decisions which cause an avalanche of appeals and push overwhelmed VLJs into performance-based removal proceedings. By placing CAVC in charge of removing VLJs, this model would encourage CAVC judges to tailor their decisions to correct the injustices before them without needlessly perpetuating the appeals backlog.

2. Supervision by an Article III Court

Undoubtedly, supervision by an Article III court would provide VLJs even greater independence from the Executive. An Article III judge may not be removed so long as he or she holds office during good behavior.[188] Moreover, the process of impeachment, required for removing an Article III judge,[189] excludes the Executive Branch.[190] In contrast, CAVC judges fall within the Executive's removal authority.[191] Supervision by an Article III court may also provide some of the same ancillary benefits of CAVC supervision.[192] While the supervision of VLJs would add to Article III judges' hefty obligations, VLJs form a relatively small corps of officers, making their appointment and removal uncommon.[193] The United States

187. *Compare* U.S. DEP'T OF VETERANS AFFAIRS BOARD OF VETERANS' APPEALS, *Annual Report Fiscal Year 2014* 18 (2014), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/ BVA2014AR.pdf, *and* U.S. DEP'T OF VETERANS AFFAIRS BOARD OF VETERANS' APPEALS, *Annual Report Fiscal Year 2017* 22 (2017), https://www.bva.va.gov/docs/Chairmans_Annual _Rpts/BVA2017AR.pdf. *But see* Ho & Marcus, *supra* note 178 ("Some 90 BVA judges decide cases, with an 'inventory' of over *425,000 cases pending*.") (emphasis added).

188. U.S. CONST. art. III, § 1 ("[t]he Judges, both of supreme and inferior Courts, shall hold their Offices during good Behaviour").

189. U.S. CONST. art. II, § 4 ("[A]ll civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

190. U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."); *Id.* § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."); *see also* 28 U.S.C. §§ 354–355 (2018) (empowering judicial councils and the United States Judicial Conference to investigate impeachable conduct and refer such conduct to the House of Representatives for consideration of impeachment).

191. *See* 38 U.S.C. § 7253(f)(1) (2018) (providing that CAVC judges may be removed by the President).

192. *See supra* pt. V.C.1 (improving the VLJ selection process, promoting more effective and efficient decision-making, and reducing the appeals backlog).

193. There are 92 VLJs, plus the BVA Chairman and Vice Chairman. *Annual Report Fiscal Year 2018*, *supra* note 57, at 7. *That* is less than five percent of the total number of ALJs, the vast majority of which are employed by a single agency, the Social Security Administration. *See Administrative Law Judges*, OFFICE OF PERSONNEL MANAGEMENT (Mar. 2017), https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency.

Court of Appeals for the Federal Circuit and the D.C. Circuit are both located near BVA and would be natural candidates.[194]

To entirely discount CAVC as a potential supervisor, however, ignores a "unique and highly specialized area of law."[195] The veterans benefits appeals system is "strongly and uniquely pro-claimant" and entails a large body of complex regulations.[196] CAVC possesses expertise in applying veterans law in a veteran-friendly manner.[197] Further, because its jurisdiction is much more limited than the Federal Circuit or the D.C. Circuit,[198] CAVC would be better able to devote resources towards supervising VLJs. CAVC may, therefore, in a better position to supervise VLJs than an Article III court.

Alternatively, Congress could convert CAVC into an Article III court and vest it with the power to appoint and remove VLJs. The elevation of an Article I court to Article III court has precedence in the United States Court of International Trade.[199] However, current trends highlight a crucial, counterintuitive advantage to remaining outside of the Article III Judiciary. VLJs under an Article III court would be dependent on the federal judicial administration, including the Administrative Office of United States Courts, for resources and administrative support.[200] As an

194. *See* Barnett, *supra* note 170, at 832–33 (describing in detail the advantages of D.C. Circuit supervision of ALJs, including proximity to agencies based out of Washington, D.C., relatively light caseload, and influence in administrative law).

195. Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL'Y 303, 303 (2004).

196. Rory E. Riley, *The Importance of Preserving the Pro-Claimant Policy Underlying the Veterans' Benefits Scheme: A Comparative Analysis of the Administrative Structure of the Department of Veterans Affairs Disability Benefits System*, 2 VETERANS L. REV. 3, 78 (2010) (quoting Hodge v. West, 155 F.3d 1356, 1362 (Fed. Cir. 1998)).

197. *See generally supra* pt. V.C.1.

198. *See* 38 U.S.C. § 7252 (2018).

199. The United States Court of International Trade (CIT) succeeded the United States Customs Court to become a trial-level Article III court. *See* 28 U.S.C. § 251(a) (2018); The Customs Court Act of 1980, Pub. L. 96-417, 94 Stat. 1727 (1980). Theoretically, Congress could also expand CAVC judgeships in the place of VLJs judgeships, thereby converting CAVC into an Article III trial court. However, this would require the Senate to confirm a politically prohibitive number of judicial appointments in order to timely decide tens of thousands of veterans' appeals. *Compare Annual Report Fiscal Year 2018*, *supra* note 57, at 22, *with U.S. Court of International Trade – Judicial Business 2018*, U.S. COURTS (2018), https://www.uscourts.gov/statistics-reports/us-court-international-trade-judicial-business-2018 (reporting that CIT received a mere 242 case filings in 2018); *see also supra* pt. V.B. (describing the challenges of expanding CAVC judgeships).

200. *See, e.g.*, Matthew E. Glassman, *Judiciary Appropriations, FY2018*, CONG. RESEARCH CTR (Aug. 30, 2017), https://fas.org/sgp/crs/misc/R44935.pdf ("Three specialized courts within the federal court system are not funded under the judiciary budget: the U.S. Court of Appeals for the Armed Forces (funded in the Department of Defense appropriations bill), the U.S. Court of Appeals for Veterans Claims (funded in the Military Construction, Veterans Affairs, and Related Agencies appropriations bill), and the U.S. Tax Court (funded under Independent Agencies, Title V, of the FSGG bill)."); *Judicial Administration*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/judicial-administration (last visited Sept. 28, 2020).

Article I court, CAVC is "largely on its own" in this regard.[201] Veteran service-related institutions, however, are in the privileged position of being relatively unscathed by the growing level of political dysfunction in federal government.[202] Leading up to the 2018–2019 government shutdown, Congress fully funded the VA, ensuring continuity in BVA's adjudicatory and administrative functions.[203] CAVC also continued to function albeit with reduced staff.[204] This is unsurprising as veterans benefits are the most popular form of federal government spending, even during budgetary battles.[205] In contrast, the shutdown wrought havoc on Article III courts, forcing civil proceedings to halt and criminal proceedings to proceed with or without compensated staff.[206] CAVC supervision would keep VLJs firmly within the "family" of veteran service-related institutions, reducing the risks of VLJs being furloughed, disrupting of the adjudication of veterans' appeals, and worsening the appeals backlog.[207] Ultimately, however, it alone would not provide VLJs the highest permissible level of independence from the Executive.

3. Hybrid Model of Supervision

Congress need not settle for either of these models. To harness the advantages of both CAVC and Article III supervision over VLJs, Congress may vest the powers of appointment and removal in CAVC and, in turn,

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201. Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider Its Future*, 58 CATH. U. L. REV. 361, 401 (2009).

202. *See Secretary Wilkie: VA Not Affected in the Event of Partial Government Shutdown*, DEP'T OF VETERAN AFFAIRS (Dec. 21, 2018), https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5170.

203. *Id.*

204. *See Government Shutdown: Court Remains Open to Process Cases*, U.S. COURT OF APPEALS FOR VETERANS CLAIMS (2018), https://www.uscourts.cavc.gov/special.php?ann_id=91.

205. *See With Budget Debate Looming, Growing Share of Public Prefers Bigger Government*, PEW RESEARCH CTR (Apr. 24, 2017), https://www.people-press.org/2017/04/24/with-budget-debate-looming-growing-share-of-public-prefers-bigger-government/ (finding that 75 percent of those polled in a national survey would increase spending on veterans benefits).

206. *See*, *e.g.*, Patrick Berry & Tim Lau, *Here's How a Shutdown Could Affect the Courts*, BRENNAN CTR FOR JUST. (2019), https://www.brennancenter.org/blog/heres-how-a-shutdown-could-affect-the-courts; Ben Lefebvre et al., *'What A Mess': Federal Court Cases Go into Deep Freeze During Shutdown*, POLITICO (Jan. 24, 2019), https://www.politico.com/story/2019/01/24/federal-courts-government-shutdown-1108046; Tovia Smith, *'Justice Delayed is Justice Denied' As Government Shutdown Affects Federal Courts*, NAT'L PUB. RADIO (Jan. 23, 2019) https://www.npr.org/2019/01/23/687949428/justice-delayed-is-justice-denied-as-government-shutdown-affects-federal-courts.

207. The 2018–2019 government shutdown illustrates how a shutdown can exacerbate the appeals backlog. The Executive Office of Immigration Review was forced to cancel and reschedule over 60,000 hearings, resulting in what one AR immigration judge called a "devastating" impact on the already staggering backlog of immigration cases. *Cancelled Immigration Court Hearings Grow as Shutdown Continues*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Jan. 14, 2019), https://trac.syr.edu/immigration/reports/543/.

vest these powers vis-à-vis CAVC judges in the Federal Circuit or the D.C. Circuit. This hybrid model of supervision would place CAVC judges, specialists in veterans law, in first-line supervision of VLJs while removing them from the executive chain of command. The Executive Branch, through the VA Secretary, would still retain the power to initiate removal proceedings with CAVC but be unable to exercise pressure on VLJs through CAVC judges.

The supervision of Article I judges by an Article III court is not novel.[208] Congress created the current bankruptcy court system, including the office of bankruptcy judge.[209] In doing so, it vested the powers of appointment and removal of bankruptcy judges, not in the Executive Branch, but in the United States Court of Appeals.[210] The Supreme Court has limited the authority of bankruptcy judges due to their non-Article III status.[211] However, the Court has left their appointments undisturbed.[212] By analogy, placing CAVC judges under the supervision of the Federal Circuit or the D.C. Circuit would be constitutionally permissible.[213]

This hybrid model of supervision is the ideal answer to the dilemma posed by *Lucia*. It maximizes protection against extrajudicial influences from the Executive Branch while vesting supervisory powers over VLJs in veterans law experts. Unlike expanding CAVC or Article III judgeships, this model would not exacerbate the veteran appeals backlog as it simply transfers supervisory powers over VLJs to the Judiciary.[214] Judicial supervision would provide additional advantages that may, in fact, lower the appeals backlog.[215] But by also placing VLJs under the supervision of CAVC, the hybrid model keeps them within the "family" of veteran service-related institutions, which have proven more resilient

208. *See* 28 U.S.C. § 151 (2018).

209. *Id.*

210. *Id.* §§ 152(a)(1), (e) (providing that each bankruptcy judge is appointed, and may be removed, by the court of appeals for the bankruptcy judge's respective district).

211. *See* Stern v. Marshall, 564 U.S. 462, 499 (2011) (holding that a bankruptcy court did not have the authority to rule on a state law counterclaim even though Congress granted it that power); Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76 (1982) (plurality opinion).

212. *See also* Barnett, *supra* note 170, at 845 ("[T]he judiciary currently has the incidental, interbranch-removal power over Article I bankruptcy judges. . . . [C]ourts have never held that the executive branch must have the power to remove [inferior officers], much less have the same kind of supervisory power over officials who exercise only impartial, adjudicatory powers.") (citations omitted).

213. *But see* Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233 (2008) (arguing that bankruptcy judge appointments may violate the Appointments Clause).

214. *See supra* pt. V.C.1. (CAVC supervision of VLJs), *contra supra* pt. V.B. (abolishing BVA and expanding CAVC judgeships); note 212 (converting CAVC into an Article III trial court).

215. *See supra* note 193.

to political dysfunction in federal government than the Article III judiciary.[216]

The hybrid model is not without its legislative challenges. It would require divesting the Executive Branch of supervisory powers over two tribunals and likely elicit opposition from proponents of a strong Executive. The empowerment of VLJs and CAVC judges would also face assault from critics of autonomous decision-making in government.[217] The hybrid model also raises questions. What happens to BVA as a separate entity? Would the ways BVA and CAVC are funded and supported change? Which Article III court would supervise CAVC judges best? BVA as a separate entity under CAVC may appear superfluous but could still help VLJs implement administrative directives and manage their swelling corps of staff attorneys.[218] CAVC and its subsidiary VLJs should maintain sources of funding and administrative support separate from the rest of the Judiciary in order ameliorate the impact of government shutdowns, which are increasing in frequency.[219] The D.C. Circuit, with its expertise in administrative law, appears to be in a better position than other Article III courts to supervise VLJs.[220] These concerns could be easily addressed by statute but require concerted study.

Admittedly, it is not clear that further insulation of CAVC judges is necessary to preserve their independence and the decisional independence of subsidiary VLJs.[221] That CAVC judges may have

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216. *See supra* pt. V.C.2. (describing the disparate impact on BVA, CAVC, and Article III courts during 2018-2019 government shutdown and public support for funding for veterans benefits spending).

217. *See* Rucker & Costa, *supra* note 13 ("the administrative state").

218. Between 2013 and 2018, the number of attorneys at BVA doubled, from approximately 400 to 800 attorneys; the number of VLJs has also grown in recent years. *See Annual Report Fiscal Year 2018*, *supra* note 57, at 21; U.S. DEP'T OF VETERANS AFFAIRS BOARD OF VETERANS' APPEALS, *ANNUAL REPORT FISCAL YEAR 2013* 3 (2013), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2013AR.pdf.

219. Since 1976, the year Congress introduced the modern budget process, there have been 20 "funding gaps." However, most of these were relatively minor. There have been four major government shutdowns: two in 1995 through 1996, one in 2013, and one again in 2018 through 2019. The most recent shutdown was the longest and came within a year of a shorter government shutdown followed by a funding gap. *See Q&A: Everything You Should Know About Government Shutdowns*, COMM. FOR A RESPONSIBLE FED. BUDGET (Feb. 12, 2019), http://www.crfb.org/papers/qa-everything-you-should-know-about-government-shutdowns.

220. *See* Barnett, *supra* note 170.

221. *See* Allen, *supra* note 201, at 399 ("By all appearances, the members of the Court consider themselves to be highly independent of political influence even though they do not have constitutional tenure or salary protection. Moreover, there has not, to my knowledge, been any suggestion that the judges of the Court lack the independence necessary to perform their important work."); *see also Fiscal Year 2018 Annual Report*, *supra* note 57, at 3 (noting that, in fiscal year 2018, CAVC remanded, vacated, or reversed in whole or in part at least 40 percent of BVA decisions); *c.f.* James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide*

exercised independence from political influence thus far, however, does not rule out their susceptibility to extrajudicial pressures. One only has to look at the case of VLJ appointments—for nearly a century a nonpartisan affair that appears to have become politicized.[222]

Regardless of the decision he or she receives, a veteran would feel confident in knowing that the judge who decided his or her appeal did so based solely on faithful application of the law. A hybrid model of supervision would instill the public confidence that the APA intended to protect.[223]

VI. CONCLUSION

Historically, the adjudication of veterans' appeals has been treated in a nonpartisan fashion. However, history and recent trends place that tradition into serious question. In light of *Lucia*, VLJs are likely inferior officers under the Appointments Clause. If so, VLJs likely enjoy unconstitutional protections from removal. Stripping VLJs of MSPB protection, albeit consistent with caselaw thus far, would threaten their decisional independence and undermine fairness and public confidence in the veterans benefits appeals system.

Placing VLJs under the "Courts of Law" would insulate VLJs from extrajudicial pressures from the executive. It would preserve the decisional independence of VLJs and public confidence in the fairness of their decisions. In one such model, CAVC would appoint and remove VLJs, limiting but not eliminating the executive supervision over VLJs. This model would serve as a compromise between the interests of the Executive Branch and VLJs' decisional independence while remaining consistent with the Appointments Clause. Alternatively, Congress could veer in the opposite direction and place VLJs under the supervision of an Article III court, such as the Federal Circuit or D.C. Circuit. While this model would remove VLJs from the executive chain of command, CAVC is better positioned to supervise adjudicators of veterans law.

A model combining CAVC and Article III supervision would be the best approach. Under this hybrid model, VLJs would fall under the supervision of CAVC while CAVC judges would fall under the supervision

Fairness to Claimants, 53 ADMIN. L. REV. 223, 232, 234 (2001) (criticizing CAVC of not being sufficiently independent of VA).

222. *See* Rein, *supra* note 118.

223. This, of course, is not an exhaustive review of alternative models of supervision over VLJs. The Author hopes this article alerts stakeholders of the veterans benefits appeals system to incipient threats to VLJs' decisional independence and provides them a guiding light towards a solution.

of the Federal Circuit or D.C. Circuit. This model would remove VLJs from the executive chain of command while placing them under the supervision of judges specialized in the unique and complex area of veterans law. It would leave the Executive Branch with the power to initiate proceedings with CAVC to remove VLJs but prevent it from exercising pressure on VLJs through CAVC judges. Not without its own challenges, this hybrid model of supervision provides the advantages of both CAVC and Article III supervision and is, thus, the ideal answer to *Lucia*.

However Congress decides to act, stakeholders of the veterans appeals system must remain vigilant against resurgent presidential power over VLJs. "The power to remove officers . . . is a powerful tool"[224] regardless of who wields it.

224. Edmond v. United States, 520 U.S. 651, 664 (1997) (citing Bowsher v. Synar, 478 U.S. 714, 727 (1986); Myers v. U.S., 272 U.S. 52, 71 (1926)).