Private Judges, Public Law: The Unconstitutionality of Binding Arbitration Under the Alternative Dispute Resolution Act After *Lucia v. SEC*

C. SCOTT MARAVILLA*

I. INTRODUCTION

II. ARBITRATION UNDER THE ALTERNATIVE DISPUTE RESOLUTION ACT

III. THE APPOINTMENTS CLAUSE
- A. *United States v. Germaine*
- B. *Buckley v. Valeo*
- C. *Freytag v. Commissioner*
- D. *Lucia v. Securities and Exchange Commission*

IV. ARBITRATION

V. ADRA'S ARBITRATION PROVISION IS UNCONSTITUTIONAL

VI. CONCLUSION

* Administrative Judge at the Federal Aviation Administration and Adjunct Law Professor at American University Washington College of Law. Elected Member of the American Law Institute. JD, Georgetown University Law Center.

I. INTRODUCTION

The Administrative Procedure Act of 1946 (APA), a legislative response to the growing power of federal agencies under the New Deal, established the modern administrative state.[1] It includes both legislative and adjudicatory functions. Attorney General Clark appeared before the United States Senate Judiciary Committee and testified, "In many instances of adjudication, on the other hand, the accusatory element is strong, and individual compliance or behavior is challenged; in such cases, special prosecutorial safeguards should be provided to insure fair judgments on the facts as they may properly appear of record."[2]

The Alternative Dispute Resolution Act (ADRA) established the use of alternative dispute resolution (ADR) techniques in the federal government as an alternate to traditional litigation with a hearing on the record.[3] The statute authorizes agencies to use mediation and arbitration.[4] The Supreme Court has held that adjudication presided by a special judge in a legislative court and the use of administrative law judges are exercises of significant authority.[5] Accordingly, they are considered inferior officers under the Appointments Clause of the Constitution, and must be appointed by courts of law or heads of departments to exercise their authority.[6] The question arises whether arbitrators conducting binding arbitration under the ADRA are also inferior officers under Article II. If so, those provisions of the ADRA authorizing the use of binding arbitration by private and public arbitrators with no right of appeal are unconstitutional.

This article will: (1) discuss the authorization of binding arbitration under the ADRA, (2) the requirements of the Appointments Clause to constitute an officer of the United States with an emphasis on adjudication functions, and (3) analyze these precedents in the context of arbitrators.

II. ARBITRATION UNDER THE ALTERNATIVE DISPUTE RESOLUTION ACT

Congress enacted the Alternative Dispute Resolution Act of 1990 (ADRA) to allow government agencies to resolve litigation by using ADR

---

[1] Administrative Procedure Act, 5 U.S.C. §§ 551 -559 (2011).

[2] S. REP. No. 79 -752, at 39 (1946), *as reprinted in* ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, 79TH CONGRESS, 1944 -1964 at 225 (1947).

[3] Administrative Procedure Act, 5 U.S.C. §§ 551 -559 (2011).

[4] *Id.*

[5] Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 869 (1991).

[6] *Id.*

processes.[7] The ADRA facilitated the development of the collaborative administrative state; where the governed enter into a dialogue with those that govern.[8] It defined an ADR neutral as either "a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding."[9]

Section 575(a) of the ADRA authorizes the use of binding arbitration when all of the parties to the controversy agree. A written arbitration agreement outlines whether the parties wish to "(A) submit only certain issues in controversy to arbitration; or (B) arbitration on the condition that the award must be within a range of possible outcomes."[10] An agency is prohibited from compelling binding arbitration as a condition to contract or receiving a gratuity.[11] Only an officer or employee with settlement authority or by delegation may enter into an arbitration agreement on behalf of the agency.[12]

III. THE APPOINTMENTS CLAUSE

Article II, Section 2, Clause 2 of the United States Constitution, the Appointments Clause, provides:

> [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 aw 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.[13]

[7] Alternative Dispute Resolution Act, 5 U.S.C. §§ 571 -584 (1996).

[8] *Compare* Alternative Dispute Resolution Act, 5 U.S.C. §§ 571 -584 (1996), *with* Administrative Procedure Act, 5 U.S.C. §§ 551 -559 (2011).

[9] *Id.* § 573(a).

[10] *Id.* § 575(a)(1)(A)-(B).

[11] *Id.* § 575(a)(3).

[12] *Id.* § 575(b)(1)-(2).

[13] U.S. CONST. art. II, § 2, cl. 2

Referring to the power of nomination by the President with advice and consent of the Senate for officers of the United States, Alexander Hamilton wrote, "The institution of delegated power implies, that there is a portion of virtue and honor among mankind, which may be a reasonable foundation of confidence: and experience justifies the theory."[14] The Supreme Court has drawn the contours of what constitutes an "officer of the United States" under the Clause. Importantly, the Court has held in two cases that those who practice adjudication functions are inferior officers.

A. *United States v. Germaine*

In an 1878 decision, the Supreme Court began to draw the contours of what defines an "officer of the United States" under Article II of the Constitution.[15] *United States v. Germaine* involved the appointment of a civil surgeon by the Commissioner of Pensions under a March 3, 1873 law to take physical exams of pensioners and applicants.[16] The defendant was charged with extortion under the Act of 1825, which provided that officers of the United States found guilty under this law would be subject to a fine or imprisonment.[17] He challenged his prosecution under the Act on the basis that he was not an officer of the United States.[18]

The Court held that Germaine was not an officer.[19] The Commissioner of Pensions was not a head of a department as contemplated by Article II.[20] The term "strongly implies that something different is meant from the inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of departments."[21] They are not the heads themselves.[22]

The Court next looked to the duration of the appointment.[23] An officer "embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary."[24] In the case before the Court, the defendant only acted when needed by the

[14] THE FEDERALIST NO. 76 (Alexander Hamilton).

[15] United States v. Germaine, 99 U.S. 508, 509-10 (1878).

[16] *Id.* at 510.

[17] *Id.* at 509.

[18] *Id.*

[19] *Id.* at 511.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 511-12.

Commissioner.[25] It was not an ongoing position. The Court also looked at the defendant's compensation.[26] He was not paid from an appropriation for his specific position, but from a general appropriation for the payment of pensions.[27] Accordingly, he was found not to be an officer.[28]

B. *Buckley v. Valeo*

Buckley v. Valeo involved a legal challenge to the Federal Election Campaign Act, which enacted campaign finance reforms in the wake of the Watergate scandal.[29] One of the issues before the Supreme Court was the constitutionality of the composition of the Federal Election Commission (FEC) under the Appointments Clause.[30] The FEC, under the law, was to be composed of eight members.[31] Two of them were to be nominated by the President subject to confirmation by *both* the Senate *and* the House of Representatives.[32] Four others were to be appointed by the President Pro Tempore of the Senate and the Speaker of the House of Representatives.[33] The Secretary of the Senate and the Clerk of the House of Representatives were to be on the FEC as nonvoting, ex officio members.[34] Further, the Commission members appointed by the Senate were to be selected with the input of the Senate majority and minority leaders, with the same for the House of Representatives.[35] The legislative branch appointees could not both be from the same party.[36]

The Supreme Court called this scheme "novel and contrary to the language of the Appointments Clause."[37] The Court viewed the appointment of members of the Commission as a violation of the separation of powers

[25] *Id.* at 512.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] Buckley v. Valeo, 424 U.S. 1, 6 (1976).
[30] *Id.* at 10.
[31] *Id.* at 113.
[32] *Id.* at 126.
[33] *Id.*
[34] *Id.* at 113.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 132 ("The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause.").

principle.[38] Congress "cannot ingraft executive duties upon a legislative office," which encroaches upon the prerogative of the President to make executive appointments.[39] The Court held that these provisions of the statute violated Article II, Clause Two by granting the FEC authority to litigate before the United States courts.[40] Law enforcement can only be undertaken by "Officers of the United States" pursuant to Article II, Section Three.[41] The Court stated that "[t]he Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress."[42]

The Constitution's distinction of two classes of executive branch officers is important to the issue of the Constitutional status of administrative adjudication. The *Buckley* Court declined to interrupt Article II "as merely dealing with etiquette or protocol."[43] Instead, it reaffirmed that the Appointments Clause of the Constitution divides officers into two explicit "classes."[44] The first are those appointed by the President with confirmation by the Senate.[45] The second are what the Court established as "inferior officers."[46] Given that the number of officers of the executive has grown over time, appointment for all by the first measure is too cumbersome.[47] Thus, the Framers, foreseeing this issue, provided that these inferior officers could be appointed by the President, courts, or heads of executive departments.[48]

The Court proceeded to define "any appointee exercising significant authority pursuant to the laws of the United States [as] an 'Officer of the United States.'"[49] Accordingly, they "must . . . be appointed in the manner prescribed by [Section] 2, [Clause] 2, of that Article."[50] Thus, the members of the FEC must also be appointed in this manner.[51]

C. *Freytag v. Commissioner*

---

[38] *Id.*
[39] *Id.* at 139 -40.
[40] *Id.* at 140.
[41] *Id.* at 138.
[42] *Id.*
[43] *Id.* at 125.
[44] *Id.* (quoting United States v. Germaine, 99 U.S. 508, 509 -510 (1879)).
[45] *Buckley*, 424 U.S. at 125.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at 126.
[50] *Id.*
[51] *Id.*

Justice Harry Blackmun delivered the opinion of the United States Supreme Court in *Freytag v. Commissioner*, in which the Court held that special trial judges of the United States Tax Court were inferior officers under the Appointments Clause of the Constitution.[52] The Tax Court, an Article I court, was established by Congress as part of the Tax Reform Act of 1969.[53] The Act provided for Court-appointed commissioners to assist the judges.[54] The commissioners were later designated as special trial judges in the Tax Reform Act of 1984.[55] The Chief Judge of the Tax Court appoints the special trial judges, and assigns them to cases.[56]

The issue before the Court in *Freytag* was whether the appointment of special trial judges by the Chief Judge violated the Appointments Clause, Article II, Section Two, Clause Two of the Constitution.[57] The Appointments Clause concerns only an "appointee exercising significant authority pursuant to the laws the United States is an 'Officer of the United States,' [who] must, therefore, be appointed in the manner prescribed by § 2, cl. 2."[58] The "lesser functionaries" of federal government do not need to be selected in conformity with Article II.[59] In other words, most federal employees do not need to be selected in conformity with Article II.

The Court held that a special trial judge of the Tax Court was indeed an inferior officer under the Constitution.[60] In holding that the special trial judges must be appointed in accordance with the requirements of Article II, Section 2, Clause 2, the Supreme Court rejected the argument that the judges lacked the requirement of having significant authority because they were not empowered to issue final, binding decisions.[61] In fact, their "duties, salary, and means of appointment" are established by statute.[62]

The Court observed that the special trial judges "exercise significant discretion" in carrying out their duties, which includes conducting hearings, taking testimony, ruling on the admissibility of evidence, and managing

---

[52] Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 869 (1991).

[53] *Id.* at 870 (citing Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 730 (1969) (codified at 26 U.S.C. § 7441)).

[54] *Id.*

[55] Tax Reform Act of 1984, Pub. L. No. 98-369, § 464(a), 98 Stat. 824 (1984) (codified at 26 U.S.C. § 7456).

[56] *Freytag*, 501 U.S. at 870 -71 (citing 26 U.S.C. §§ 7443A(a) -(b)).

[57] *Id.* at 868.

[58] *Id.* at 881 (citing Buckley v. Valeo, 424 U.S. 1, 126 (1976)).

[59] *Freytag*, 501 U.S. at 880 (citing *Buckley*, 424 U.S. at 126 n.162).

[60] *Freytag*, 501 U.S. at 881.

[61] *Id.* at 881.

[62] *Id.* (citing Burnap v. United States, 252 U.S. 512, 516-17 (1920)). *See also* United States v. Germaine, 99 U.S. 508, 511-12 (1879).

discovery.[63] Under certain circumstances, they may issue a final decision if assigned by the Tax Court Chief Judge to a matter involving a declaratory judgment or a case for a "limited-amount."[64]

Congress clearly granted the appointment authority for special trial judges to the Chief Judge of the Tax Court.[65] The Court reasoned that "Congress' power . . . is inevitably bounded by the express language of Article II, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be 'Officers of the United States.'"[66] The Framers of the Constitution intended to "limit the distribution of the power of appointment."[67] They found that "the power of the appointment to offices" was "the most insidious and powerful weapon of eighteenth century despotism."[68] Therefore, "by limiting the appointment power, [the Framers] could ensure that those who wielded it were accountable to political force and the will of the people."[69] Thus, the Court concluded that "the Clause bespeaks a principle of limitation by dividing the power to appoint the principal federal officers - [like judges] - between the Executive and Legislative Branches."[70]

The *Freytag* Court further rejected the concept that every executive branch agency is a department under Article II.[71] It observed that Article II prohibits Congress from diffusing executive branch power by limiting the number of appointees Congress may designate for appointment because "widely distributed appointment power subverts democratic government."[72] Prophetic of the holding in *Lucia v. SEC*, the Court further provided that "[g]iven the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint."[73]

---

[63] *Freytag*, 501 U.S. at 881 -82.

[64] *Id.* at 882.

[65] *Id.* at 883.

[66] *Id.* (quoting *Buckley*, 424 U.S. at 138 -39).

[67] *Freytag*, 501 U.S. at 884.

[68] *Id.* (quoting *Buckley*, 424 U.S. at 143); *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776 -1787, at 79 -80 (1969).

[69] *Freytag*, 501 U.S. at 884.

[70] *Id.* (citing *Buckley*, 424 U.S. at 129 -31).

[71] *Freytag*, 501 U.S. at 885 ("We cannot accept the Commissioner's assumption that every part of the Executive Branch is a department, the head of which is eligible to receive the appointment power.").

[72] *Id.*

[73] *Id.*

The Supreme Court narrowly interprets the phrase "head of departments" in Article II.[74] As articulated in *Freytag*, "This Court for more than a century has held that the term 'Department' refers only to 'a part or division of the executive government, as the Department of State' as intently established by Congress."[75]

This interpretation is consistent with the Court's view of the Opinion Clause, Article II, Section 2, Clause 1 (the President "may require the Opinion, in writing, of the principal Officer in each of the Executive Departments").[76] It is also noted as "[i]nstructive" that the 25th Amendment providing for the removal of President by a majority of principal Officers of executive departments is interpreted to mean Cabinet level officers.[77]

With respect to the appointment of inferior officers by the judiciary, the Supreme Court has stated that "this Court's time-honored reading of the Constitution as giving Congress wide discretion to assign the task of adjudication in cases arising under federal law to legislative tribunals."[78] The Court found that Judicial power is not limited to Article III courts, but is also the prerogative of legislatively created courts.[79] In *Freytag*, the Court clarified this point from *Buckley* that the appointment of inferior officers by the legislative branch, the President, or the courts must comply with The Appointments Clause.[80] Thus in *Freytag*, the Tax Court was found to "exercise[] a portion of the judicial power of the United States."[81] Accordingly, the appointment of special trial judges by the Chief Judge of the Tax Court was constitutional.[82]

Justice Antonin Scalia in his concurrence weighed in that, jurisdictionally, the Supreme Court should not hear constitutional challenges under the Appointments Clause where, as in *Freytag*, the "Petitioners not only failed to object at trial to the assignment of their case to a special trial judge, but expressly consented to that assignment."[83] He wanted the Court to hold

---

[74] *Id.* at 886 (quoting United States v. Germaine, 99 U.S. 508, 510 -11 (1879). *See also* Burnap v. United States, 252 U.S. 512, 515 (1920) ("The term head of a Department means . . . the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War, who is a member of the Cabinet.").

[75] *Freytag*, 501 U.S.. at 886. *See also* Burnap 252 U.S. at 515.

[76] *Freytag*, 501 U.S. at 886.

[77] *Id.* at 886-87.

[78] *Id.* at 889.

[79] Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 545 (1828); *see also* Williams v. United States, 289 U.S. 553, 565 -67 (1933).

[80] *Freytag*, 501 U.S. at 881 -82.

[81] *Freytag*, 501 U.S. at 890 -91.

[82] *Id.* at 870.

[83] *Id.* at 892.

that "Appointments Clause claims, and other structural constitutional claims, have no special entitlement to review. A party forfeits the right to advance on appeal a nonjurisdictional claim, structural or otherwise, that he fails to raise at trial."[84]

D. *Lucia v. Securities and Exchange Commission*

Justice Kagan wrote the majority opinion of the Court addressing the issue of whether administrative law judges (ALJs) of the Securities and Exchange Commission (SEC) are inferior officers under Article II, Section 2, Clause 2 of the Constitution.[85] The SEC brought an enforcement action under the Investment Advisor Act against the petitioner, Raymond Lucia, for alleged deceptive practices in marketing his retirement scheme "Buckets of Money."[86] After a hearing with live testimony on the record, an ALJ found that Lucia had violated the Act and issued a civil penalty of $300,000 and a lifetime ban on working in securities investments.[87]

The SEC enforces the securities laws and regulations of the United States and has administrative judicial authority to hold hearings or appoint ALJs to hear cases with a right of appeal to the Commission as a whole.[88] In the statutory scheme, however, the ALJs were not properly appointed by the SEC.[89] On appeal to the whole Commission, Lucia asserted that the penalties were invalid because the ALJ had not been appointed in a manner consistent with the requirements of Article II.[90] In other words, the initial decision was unconstitutional for lack of authority, because the ALJ had to be properly appointed as an "Officer of the United States" in a manner consistent with the Appointments Clause.[91] The Commission denied the appeal, holding that the SEC's ALJs were "mere employees."[92] The SEC did not believe the ALJs "'exercise[d] significant authority independent of its own supervision.'"[93] On appeal, the United States Court of Appeals for the District of Columbia affirmed the Commission's decision.[94] Because that decision contradicted

---

[84] *Id.* at 893 -94 (Scalia, J., concurring).
[85] Lucia v. Sec. & Exch. Comm'n, 138 S. Ct. 2044, 2049 (2018).
[86] *Id.* at 2049 -50.
[87] *Id.* at 2050.
[88] *Id.* at 2049; 17 C.F.R. § 201.110 (2019).
[89] *Lucia*, 138 S. Ct. at 2049.
[90] *Id.* at 2050.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*

Bandimere v. SEC, a Tenth Circuit Court of Appeals' decision, the Supreme Court granted certiorari.[95]

The Court sought to distinguish officers from employees, those "lesser functionaries" of government, by saying "the Appointments Clause cares not a whit about who named them."[96] An officer may only be appointed by the President, a court of law, or the head of a department.[97] In analyzing whether SEC ALJs constitute inferior officers under the Appointments Clause, the Court first looked at the permanency of the position.[98] Citing *Germaine*, which dealt with the appointment of civil surgeons, the Court in that case found the surgeons to be employees because they were temporary appointments, not continuing and permanent positions.[99] ALJs hold a continuous position established by statute.[100]

The second requirement identified by the Court is that an officer must "exercise significant authority pursuant to the laws of the United States."[101] Like the special trial judges in *Freytag*, ALJs conduct hearings akin to that of a trial level court.[102] SEC ALJs also possess "extensive [judicial] powers" that include among them managing discovery, presiding over hearings, issuing subpoenas, examining witnesses, ruling on the admissibility of evidence, issuing initial decisions supported by findings of fact and conclusions of law, and imposing sanctions.[103] If a decision by an ALJ is not appealed to the Commission, it becomes a final decision of the SEC.[104] Thus, the ALJs were found to exercise significant authority such that they constituted officers subject to appointment under the requirements of Article II..[105]

The next issue was whether a petitioner needs to raise the constitutional challenge at the trial level. The Court appeared to implicitly adopt the Scalia dissent in *Freytag*.[106] Quoting *Ryder v. United States*, the

---

[95] *Id.*

[96] *Id.* at 2051 (citing United States v. Germaine, 99 U.S. 508, 510 (1879)).

[97] U.S. CONST. art. II, § 2, cl. 2.

[98] *Lucia*, 138 S. Ct. at 2051.

[99] *Id.* at 2052. (citing *Germaine*, 99 U.S. at 511 -12).

[100] *Id.* at 2053.

[101] *Id.* at 2051 (citing-Buckley v. Valeo, 424 U.S. 1, 126 (1976)).

[102] *Id.* at 2053 (citing Butz v. Economou, 438 U.S. 478, 513 (1978)).

[103] *Id.* (citing 17 C.F.R. §§ 201.111, 201.180, 200.14(a), 201.230, 201.360(a)(1),(b), (d)(1) -(2)).

[104] *Id.* at 2054 (citing 15 U.S.C. § 78d-1(c)).

[105] *Id.* at 2055.

[106] *See Freytag*, 501 U.S. at 893 -94 (Scalia, J., concurring) ("In my view the answer is that Appointments Clause claims, and other structural constitutional claims, have no special entitlement to review. A party forfeits the right to advance on appeal a nonjurisdictional claim, structural or otherwise, that he fails to raise at trial.").

Court stated that "'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief."[107]

The majority emphasized that the petitioner in *Lucia v. SEC* raised the issue before the SEC as a whole and continued his assertion throughout appeal.[108] It stated: "Lucia made just such a timely challenge: He contested the validity of Judge Elliot's appointment before the Commission, and continued pressing that claim in the Court of Appeals and this Court."[109] The relief imposed by the Court was a new hearing before a properly appointed ALJ.[110]

IV. ARBITRATION

In *Association of American Railroads v. United States Department of Transportation*, the U.S. Court of Appeals for the D.C. Circuit found the use of arbitration, public and private, to be unconstitutional.[111] [112] The Rail Passenger Service Act of 1970 established Amtrak as a quasi-public, for-profit corporation.[113] The Passenger Rail Investment and Improvement Act of 2008 (PRIIA), provided Amtrak authority to regulate other oil services, and "under certain conditions, an arbitrator of unspecified constitutional authority [could] issue binding final agency rulings."[114] One of the issues before the Court was whether the appointment of arbitrators under PRIIA constituted a violation of the Appointments Clause of the Constitution.[115]

The Court observed it was "[o]verly restrictive access to [the appointments power] [that] crippled our young nation under the Articles of Confederation."[116] It defined inferior officers as "those whose work is directed and supervised at some level by principal officers." [117] PRIIA § 207(a) established that Amtrak and the Federal Railroad Administration (FRA) would

---

[107] *Lucia*, 138 S. Ct. at 2055 (quoting Ryder v. United States, 515 U.S. 177, 182 -83 (1995)).

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] Ass'n of Am. R.R. v. U.S. Dep't of Transp., 821 F.3d 19, 39 (2016).

[112] The case was on remand from the Supreme Court, which called into question Amtrak's use of arbitrator as a violation of the Appointments Clause. *See* U.S. Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1234 (2015).

[113] *U.S. Dep't of Transp.*, 821 F.3d at 23.

[114] *Id.*

[115] *Id.* at 23.

[116] *Id.* at 36.

[117] *Id.* (citing Edmond v. United States, 520 U.S. 651, 663 (1997) (internal quotations omitted)).

"jointly develop[] performance metrics and standards as a means of enforcing Amtrak's statutory priority over other trains."[118] If Amtrak and the FRA differed on the standards and metrics to be imposed, either of them could "petition the Surface Transportation Board [STB] to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration."[119] The statutory scheme did not provide for public or private arbitration to be used, but nonetheless, the D.C. Circuit held both to be unconstitutional.[120] As for private arbitration, the Court simply said that "private entities cannot wield the coercive power of government."[121] In this case, the STB appointed a public arbitrator, who was a government employee.[122] The Court examined whether the public arbitrator under the Act "exercise[es] significant authority pursuant to the laws of the United States."[123] The "significant authority" test "marks, not the line between principal and inferior officer . . . but rather . . . the line between officer and non-officer."[124]

The Circuit found the STB to constitute a department.[125] The members of this independent body are appointed by the President.[126] "Without providing for the arbitrator's direction or supervision by principal officers, PRIIA impermissibly vests power to appoint an arbitrator in the STB."[127] The decisions of the arbitrator were final under the statute, and could not be appealed to the STB or the federal courts.[128]

The Court further reasoned that the ability of the arbitrator to issue binding decision on metrics that impact freight railroads constituted significant

[118] Passenger Rail Investment and Improvement Act of 2008, Pub.L. No. 110-432, § 207(a) (2008); *U.S. Dep't of Transp.*, 821 F.3d at 23 -24.

[119] *U.S. Dep't of Transp.*, 821 F.3d at 24. *See also* Passenger Rail Investment and Improvement Act of 2008, Pub.L. No. 110-432, § 207(d) (2008).

[120] *U.S. Dep't of Transp.*, 821 F.3d at 37 ("Either the arbitrator is a private individual and the clause unlawfully deputizes a private person to issue binding regulations, or she is a public official and her appointment by the STB, rather than 'the President with the advice and consent of the Senate,' violates the Appointments Clause.").

[121] *Id.* (citing Dep't of Transp. v. Ass'n of Am. R.R.s, 135 S.Ct. 1225, 1237 (2015) (Alito, J., concurring) ("When it comes to private entities [exercising governmental powers], however, there is not even a fig leaf of constitutional justification.").

[122] *U.S. Dep't of Transp.*, 821 F.3d at 37.

[123] *Id.*; *see also* Buckley v. Valeo, 424 U.S. 1, 46, 126 (1976).

[124] Edmond v. United States, 520 U.S. 651, 662 (1997).

[125] *U.S. Dep't of Transp.*, 821 F.3d at 38; 49 U.S.C. § 1301(a), (b).

[126] *Id.* (citing Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 511 (2010) (defining a department as "a freestanding component of the Executive Branch, not subordinate to or contained within any other such component.")).

[127] *U.S. Dep't of Transp.*, 821 F.3d at 38.

[128] *Id.* at 37 -38.

authority.[129] Thus, the STB appointed public arbitrator is an officer of the United States exercising significant authority, and must be appointed consistent with the Constitutional requirements of Article II.[130] On the issue of preserving the decision of the Arbitrator on appeal, the DC Circuit stated that while the petitioners did not raise this issue at trial, the government did not assert that it had been waived.[131]

V. ADRA'S ARBITRATION PROVISION IS UNCONSTITUTIONAL

The duties of an arbitrator are identical to that of an administrative law judge and a Tax Court special trial judge, both of which have been held by the Supreme Court to be inferior officers whose authority is derived from constitutional appointment under the terms of Article II.[132] The issue arises whether an arbitrator, who is not a full time adjudicator, requires appointment pursuant to the requirements of Article II. The answer is in the affirmative.

To constitute an officer, an arbitrator must hold position with duration.[133] [insert cite/citation incorrect in FN] In other words, not a temporary appointment. We must distinguish between private and public arbitrators. Under the ADRA, the parties select the arbitrator who may be either a government employee or a private individual pursuant to the statute's definition of ADR Neutral.[134] The type of appointment in *Germaine* is distinguishable from that of an arbitrator. *Germaine* dealt with the appointment of medical doctors to give physical exams to pensioners and pension applicants, a clearly temporary duty under the cognizant statute.[135] If the appellant were found to be a duly appointed officer, then the sanctions under the criminal statute against extortion would apply.[136] That analysis took into account the nature of the appointment and funding for the position to draw a comparison to clerks and other employees.[137] The permanent status of an

[129] *Id.* at 37.

[130] *Id.* at 38.

[131] *Id.* at 25 -26 ("Arguments not raised in the district court are generally deemed waived on appeal . . . The government, however, has waived the waiver argument by not raising it." (quoting United States v. Layeni, 90 F.3d 514, 522 (D.C. Cir. 1998)).

[132] *See, e.g.*, Freytag v. Comm'r of Internal Revenue, 501 U.S. 868 (1991); Lucia v. Sec. & Exch. Comm'n, 138 S. Ct. 2044, 2055 (1991).

[133] United States v. Germaine, 99 U.S. 508, 511 -512 (1878). *See generally* Buckley v. Valeo, 424 U.S. 1 (1976).

[134] Alternative Dispute Resolution Act 5 U.S.C. §577(a) -(b) (1996).

[135] *Germaine*, 99 U.S. at 511 -12.

[136] *Id.* at 509.

[137] *Id.* at 511.

arbitrator is not dispositive of our inquiry into whether they are an inferior officer.

As discussed earlier, private arbitrators are *per se* unconstitutional.[138] A federal employee holds a permanent position with the government, even if the arbitration duties may be collateral. Thus, our inquiry moves to whether a public arbitrator, a federal employee, satisfies the tenure requirement of the Appointments Clause.

The *Freytag* Court distinguished Article III Special Masters because they are hired by the courts on "a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute."[139] Although, some Special Masters, like the U.S. Court of Federal Claims, run Vaccine Program that are established by statute with terms of appointment. An arbitrator could be viewed akin to a Special Master to a court. However, Special Masters are still appointed by courts of law. Under the ADRA, public arbitrators are employees of federal agencies.

In *Freytag*, the Supreme Court stated that "[t]he fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution."[140] The converse also holds true. If an employee performs the duties of an office of the United States, it does not transform their constitutional status if those duties are collateral. Important to the inquiry at hand is the powers of the arbitrator. The significance of an arbitrator's position is that they clearly exercise significant authority under the laws of the United States.

Pursuant to the Supreme Court's precedent established in *Freytag* and *Lucia*, adjudication functions are exercises of significant authority under the laws of the United States.[141] In *Freytag*, the Court found that special trial judges exercise significant authority because their adjudicatory duties include conducting hearings, taking testimony, ruling on the admissibility of evidence, managing discovery, and sometimes issuing final decisions.[142] In Lucia, the Court emphasizes the "extensive [judicial] powers" of ALJs including managing discovery, conducting hearings, issuing subpoenas, examining witnesses, ruling on the admissibility of evidence, issuing initial decisions

[138] *See* Ass'n of Am. R.R. v. U.S. Dep't of Transp., 821 F.3d 19, 39 (2016). Further inquiry into whether the duties of an arbitrator are inherently governmental functions is the subject for another article altogether. For purposes of this analysis, I rely on the D.C. Circuit's conclusion.

[139] *Freytag v. Comm'r*, 501 U.S. 868 at 881.

[140] *Id.* at 882.

[141] *See, e.g.*, Lucia v. Sec. & Exch. Comm'n, 138 S. Ct. 2044 (1991).

[142] *Freytag*, 501 U.S. at 881 -82.

supported by findings of fact and conclusions of law, and imposing sanctions.[143]

A review of the statutory duties of an arbitrator demonstrate that the duties are nearly identical to that of an ALJ. Under the ADRA, an arbitrator has the authority to:

(1) regulate the course of and conduct arbitral hearings;
(2) administer oaths and affirmations;
(3) compel the attendance of witnesses and production of evidence at the hearing ... only to the extent the agency involved is otherwise authorized by law to do so; and
(4) make awards.[144]

The arbitrator's powers are further defined under the subsection of the ADRA addressing hearings as follows:

(1) The parties to the arbitration are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.
(2) The arbitrator may, with the consent of the parties, conduct all or part of the hearing by telephone, television, computer, or other electronic means, if each party has an opportunity to participate.
(3) The hearing shall be conducted expeditiously and in an informal manner.
(4) The arbitrator may receive any oral or documentary evidence, except that irrelevant, immaterial, unduly repetitious, or privileged evidence may be excluded by the arbitrator.
(5) The arbitrator shall interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives.[145]

Like in a court of law or administrative adjudication, the statute also prohibits *ex parte* communication between parties and the arbitrator.[146]

---

[143] *Lucia*, 138 S.Ct. at 2049 (citing 17 C.F.R. §§ 201.111, 201.180, 200.14(a), 201.230, 201.360(a) -(d) (1982)).

[144] Alternative Dispute Resolution Act, 5 U.S.C. § 578 (1996)

[145] *Id.* at § 579c.

[146] *Id.* at § 579(d). ("No interested person shall make or knowingly cause to be made to the arbitrator an unauthorized ex parte communication relevant to the merits of the proceeding, unless the parties agree otherwise. If a communication is made in violation of this subsection, the arbitrator shall ensure that a memorandum of the communication is

A potential distinction between the powers of a judge and an arbitrator is the requirement to make findings of fact and conclusion of law embodied in a written decision. An arbitration award "include[s] a brief, informal discussion of the factual and legal basis for the award, but formal findings of fact or conclusions of law [are] not be required."[147] However, as the D.C. Circuit concluded, it is the binding nature of the award that constitutes significant authority as exercised by arbitrators.[148] Under the ADRA, "[a] final award is binding on the parties to the arbitration proceeding."[149]

Finally, it is significant that there is no appeal to the head of an agency from an arbitration award.[150] Without appeal to the head of an agency, or by extension the courts, that requires constitutional appointment.[151] The ADRA initially provided for oversight of the arbitration proceedings by the head of the agency. [152] It provided that:

> The head of any agency that is a party to an arbitration proceeding conducted under this subchapter is authorized to terminate the arbitration proceeding or vacate any award issued pursuant to the proceeding before the award becomes final . . . ."[153]

This invalidation right by the head of the agency was in the statute because the Office of Legal Counsel concluded that arbitration otherwise ran afoul of the Appointments Clause.[154] That conclusion was later revoked, and the current statutory language substituted. The ADRA now provides that:

---

prepared and made a part of the record, and that an opportunity for rebuttal is allowed. Upon receipt of a communication made in violation of this subsection, the arbitrator may, to the extent consistent with the interests of justice and the policies under- lying this subchapter, require the offending party to show cause why the claim of such party should not be resolved against such party as a result of the improper conduct.").

[147] *Id.* at § 580(a)(1).

[148] Ass'n of Am. R.R. v. U.S. Dep't of Transp., 821 F.3d 19, 37 (2016).

[149] Alternative Dispute Resolution Act § 580(c).

[150] *See* Alternative Dispute Resolution Act, 5 U.S.C. §§ 571 -584 (1996).

[151] *Ass'n of Am. R.R.*, 821 F.3d 19 at 39 ("Without providing for the arbitrator's direction or supervision by principal officers, PRIIA impermissibly vests power to appoint an arbitrator in the STB.").

[152] Alternative Dispute Resolution Act, 5 USC § 580.

[153] *Id.* § 580c.

[154] *See* Constitutional Limitations on Federal Government Participation in Binding Arbitration, 19 O.L.C. 1, 208 n. 2 (1995), https://www.justice.gov/olc/file/626891/download.

> Prior to using binding arbitration under this subchapter, the head of an agency, in consultation with the Attorney General and after taking into account the factors in section 572(b), shall issue guidance on the appropriate use of binding arbitration and when an officer or employee of the agency has authority to settle an issue in controversy through binding arbitration.[155]

Ironically, by changing the statute to allow binding arbitration by Federal agencies, the arbitration provisions of the ADRA are unconstitutional.

VI. Conclusion

The Alternative Dispute Resolution Act established the use of alternative dispute resolution (ADR) techniques in the Federal government. The statute includes authorizing the use of mediation, early neutral evaluation, and other non-binding methods of ADR. It also provides for binding arbitration, first with agency review and later with full decisional authority. A review of Supreme Court and appellate court precedents demonstrates that adjudicatory actions are exercise of significant authority. Accordingly, an arbitrator, like an administrative law judge, is an inferior officer and subject to appointment pursuant to Article II, Section 2, Clause 2 of the U.S. Constitution. The provisions of the ADRA retiring binding final awards are unconstitutional. As are the allowance for the use of private arbitrators.

---

[155] *Id.* § 575(c).