UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **HARDING ADVISORY LLC and** **WING F. CHAU,** **Respondents.**	Administrative Proceeding File No. 3-15574

MOTION TO SUBMIT SUPPLEMENTAL BRIEFING IN SUPPORT OF RESPONDENTS' APPEAL REGARDING THEIR APPOINTMENTS CLAUSE CLAIMS & SUPPLEMENTAL BRIEFING IN SUPPORT OF THOSE CLAIMS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Exhibits

MOTION TO SUBMIT SUPPLEMENTAL BRIEFING IN SUPPORT OF RESPONDENTS' APPEAL REGARDING THEIR APPOINTMENTS CLAUSE CLAIMS

The Respondents respectfully submit this motion and supplemental brief to respond to certain relevant arguments the Division of Enforcement (the "Division") submitted to the Commission in the context of other matters, but failed to make in its opposition briefing in this matter. In particular, although the Respondents squarely argued that the applicable provisions of the federal securities laws expressly state Congress' intent that cease and desist hearings be held before "officers of the Commission," the Division saved for other cases its arguments that Congress intended Commission hearings to be held by mere "employees"; that this purported intent could be gleaned from the statutory provisions of the Administrative Procedure Act (the "APA") and from a purported review of the APA's legislative history; and that, therefore, the Commission should heed congressional intent and find that its Administrative Law Judges ("ALJs") are not inferior officers of the United States.[1] The Respondents have never had an opportunity to respond to these arguments, even though they were the first to point out that the federal securities laws command that hearings be held by officers.[2]

To be sure, the Division's arguments came in response to the Commission's request for briefing in another case. In that case, *In re Timbervest*, No. 3-15519, the Commission ordered the Division to file a supplemental brief addressing "(1) whether, assuming 'solely for the sake of argument' that Commission ALJs who presided over Respondents' administrative hearing are 'inferior officers' within the meaning of Article II, Section 2, Clause 2 of the Constitution, 'their

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[1] Division's Memorandum of Law in Response to the Commission's May 27, 2015 Order Requesting Supplemental Briefing at 1-2, 4, *In re Timbervest*, No. 3-15519 (July 1, 2015) ("*Timbervest* Div. Br.").

[2] The Division filed its brief on July 1, 2015, when Respondents' briefing had closed, except for its supplemental briefing on its due process claims, to make these points in the *Timbervest* case. The Division's arguments about the legislative history of the APA appeared nowhere in the Division's opposition to Respondents' arguments. *See* Div. Opp. Br. at 33-35 (May 11, 2015).

manner of appointment violates the Appointments Clause;' and (2) 'the appropriate remedy if such a violation [were] found.'" *Timbervest* Div. Br. at 1 (quoting Order Requesting Additional Submissions and Briefing at 2, *In re Timbervest*, No. 3-15519 (May 27, 2015)).

In response, the Division conceded that if SEC ALJs were "inferior officers," their manner of appointment would violate the Appointments Clause. *Timbervest* Div. Br. at 1-2. However, because the Division argued that no constitutional violation occurred, it declined to comply with the Commission's order to brief the issue of remedies. *Id.* at 5-6. In September, the Commission accepted the Division's arguments and repeated them in two of its opinions as well as in briefing to the federal courts, including, most recently, its briefs to the Eleventh and Second Circuit Courts of Appeals. *See* Opinion of the Commission at 28-33, *In re Raymond J. Lucia Companies*, No. 3-15006 (Sept. 3, 2015); Opinion of the Commission at 41-46, *In re Timbervest*, No. 3-15519 (Sept. 17, 2015); Defendant-Appellant Reply Brief at 17-24, *Gray v. SEC*, No. 15-13738 (11th Cir. Oct. 13, 2015); Defendant-Appellant Opening Brief at 30-39, *Duke v. SEC*, No. 15-357 (2d Cir. Oct. 21, 2015). The Division's arguments, therefore, have had a wide-ranging impact on all litigation on the issue of ALJ appointments, including the Respondents' present appeal to the Commission.

Respondents are compelled to submit this brief because, as demonstrated below—through direct quotation of the relevant legislative history (relevant pages of which are also attached as exhibits hereto) and the plain, unambiguous wording of the APA—Congress clearly intended SEC ALJs to be inferior officers of the United States. Given that the Commission accepted the Division's arguments, the harm to Respondents is self-evident and profound. It is also clearly in the public interest to consider the relevant legislative history fully, given the importance of this issue and the keen interest it has generated in the courts and the securities bar.

For all these reasons, the Respondents ask the Commission to consider the statutory language and history set forth below. Failing that, the Commission's consideration of arguments the Division propounded in the context of other cases rather than in its opposition briefs in this case—or a Commission decision to adopt those arguments without hearing from the Respondents—would constitute reliance on an *ex parte* communication and would inflict yet another due process injury on the Respondents.

INTRODUCTION

In briefing their appeal to the Commission, Respondents argued that the plain language of the federal securities laws mandates that cease and desist hearings be held by officers of the United States. *See, e.g.*, Resp'ts Br. at 31-34 (April 1, 2015); Resp'ts Reply Br. at 14-19 (May 26, 2015). The Division responded that the common understanding of the word "officer" at the time of the adoption of the federal securities laws precluded the reading offered by the Respondents. Div. Opp. Br. at 33-35. Respondents disposed of that argument by offering the relevant dictionary definitions as well as a contextual explanation of the wording of the sole case the Division offered in support of its argument. Resp'ts Reply Br. at 18-19. Both the contemporaneous definition and the language of the case the Division cited fully support the Respondents' reading. *Id.* With that, the relevant briefing on this issue ended in the Respondents' case.

After this briefing was completed, in another matter, *In re Timbervest*, No. 3-15519, where the same issues were raised, the Division argued that Congress clearly intended the SEC ALJs to be mere employees, rather than inferior constitutional officers. *Timbervest* Div. Br. at 2-5. Specifically, in *Timbervest*, the Division stated that "[t]he Constitution assigns to Congress the authority to determine, in the first instance, whether a position it creates is that of an officer or of an employee, and '[t]hat constitutional assignment to Congress counsels judicial

deference.'" *Id.* at 2-3 (citations omitted). The Division then argued that at the time of the adoption of the APA, the Supreme Court's view was that the manner of appointment proscribed by Congress determined whether someone was an officer of the United States and that in debatable cases, the fully rational congressional determination merits acceptance. *Id.* at 3 n.2. It then argued, with purported reliance on legislative history, that "Congress has never considered ALJs to be constitutional officers" and that "[t]here is no indication that Congress intended the term 'officers of the Commission' [in the relevant securities statutes] to be synonymous with 'Officers of the United States.'" *Id.* at 4 & n.3. In further support for this argument, the Division stated that: (1) the fact that Congress referred to ALJs as "presiding employees" in the APA meant that Congress intended SEC ALJs to be mere employees; and (2) the manner of ALJs' appointments under the APA reflects congressional views that they are not officers of the United States. *Id.* at 3-4.

These assertions, as discussed in detail below, are demonstrably wrong; they are directly contradicted by the legislative history and plain language of the Securities Act of 1933, the Securities Exchange Act of 1934, and the APA.

- As set forth below in Section I, the legislative history and wording of the relevant securities statutes demonstrate Congress' clear intent that SEC ALJs, at a minimum, be "inferior officers." (The relevant pages of the legislative history are attached to this brief as Exhibits A-1 through A-10 [Securities Act of 1933], and Exhibits B-1 through B-7 [Securities Exchange Act of 1934].).

- As set forth below in Section II(B)(2), including unabridged portions of the relevant statutory provisions, SEC ALJs fit within the definition of "employee" under the APA only because they also fit the APA's definition of "officer." In other words, the term "employee" under the APA specifically includes officers, including Cabinet Secretaries and members of the Commission.

- As set forth below in Section II(B)(2), when the words "presiding officer" were replaced with the words "presiding employee" in the APA, the change was not meant to be substantive. It was made with the understanding that the term "employee" covered officers. In fact, in a number of instances, the word "employees" refers to principal officers, such as individual members of the Commission. Therefore, the fact that SEC

ALJs are sometimes referred to as "presiding employees" in the APA does not negate their officer status under the APA or the federal securities laws. (The relevant portions of the legislative history are reproduced in Section II(B), and attached to this brief as Exhibit G.).

- As set forth below in Section II(C), the legislative history of the APA contains discussion regarding the method of appointment of hearing officers. The appointment of these hearing officers was explicitly left up to the various agencies precisely because Congress intended that their appointments comport with the Appointments Clause of Article II of the Constitution. (Excerpts of this legislative history are set forth in Section II(B), and the relevant pages are attached in full to this brief as Exhibit E at 41-42, 50, 82.).

- As set forth below in Sections I(A)-(B) and II(D), the relevant legislative history leaves no doubt that, at all times, both with respect to the federal securities laws and the APA, Congress understood that it was conferring significant executive powers on ALJs by vesting in them powers such as administering oaths and affirmations, compelling production of documents and testimony, ruling on evidentiary issues, otherwise supervising hearings, and preparing initial decisions (or even recommended decisions). Congress intended ALJs to be officers precisely because it understood that it was conferring significant executive powers. (Excerpts of this legislative history are set forth in Sections I(A)-(B) and II(B)-(D), and the relevant pages are attached in full to this brief as Exhibits A-1 through B-7, E, G, and H.).

Respondents agree with the Division that congressional intent must be given force. Given the relevant legislative history detailed below, on these issues there can be no dispute. Congress intended SEC ALJs to be inferior officers with significant executive powers. SEC ALJs must, therefore, be appointed in a manner consistent with Article II of the Constitution.

ARGUMENT

I. IN PASSING THE RELEVANT SECURITIES STATUTES, CONGRESS MANDATED THAT THE HEARING EXAMINERS BE OFFICERS.

Congress used the following language to authorize the Commission to hold hearings:

> All hearings shall be public and may be held before the Commission or ***an officer or officers of the Commission designated by it***[.]

Securities Act of 1933, 15 U.S.C. § 77u (emphasis added).[3] The fact that an officer designated to hold a hearing holds company with the Commission itself indicates that hearings must be held before someone with the stature and political accountability of a constitutional officer—i.e., an officer empowered to "'exercis[e] significant authority pursuant to the laws of the United States.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 486 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976)). In fact, the most natural reading of this language is that hearings must be held by the full Commission acting together or by one of the Commissioners appointed for that purpose. Nevertheless, the Division has asserted that nothing in the language "an officer or officers of the Commission designated by it" suggests that these words refer to inferior officers of the United States. *Timbervest* Div. Br. at 3-4. The Commission now has accepted this assertion as true. *See* Opinion of the Commission at 28-33, *In re Raymond J. Lucia Companies*, No. 3-15006 (Sept. 3, 2015); Opinion of the Commission at 41-46, *In re Timbervest*, No. 3-15519 (Sept. 17, 2015).

As a start, even in the absence of any legislative history, plain language of legislation must be given its plain meaning. *Hardt v. Reliance Std. Life Ins. Co.*, 560 U.S. 242, 251 (2010) (With a question of statutory construction, "we begin by analyzing the statutory language, assuming that the ordinary meaning of that language accurately expresses the legislative purpose. We must enforce plain and unambiguous statutory language according to its terms.") (citations and internal quotation marks omitted). Unless contrary intent is apparent, in other words, one must assume that Congress meant "officers of the United States" when it used the word

[3] The Securities Act is not alone in requiring that hearings be conducted by the Commission or "an officer or officers of the Commission designated by it." Indeed, all of the major statutes enforced by the SEC have similar language. Securities Exchange Act of 1934, 15 U.S.C. § 78v; Investment Advisors Act of 1940, 15 U.S.C. § 80b-12; Investment Company Act of 1940, 15 U.S.C. § 80a-40.

"officers" for the simple reason that the word "officer" is imbued with significant meaning in our constitutional framework. *See Buckley*, 424 U.S. at 125-26.

Moreover, any non-cursory reading of the legislative history of the Securities Act of 1933 demonstrates beyond any doubt that it was absurd for the Division to claim, as it did in the *Timbervest* brief, that there is "no indication" that when Congress used the word "officer" in the securities laws, it meant "officer" in the constitutional sense. *Timbervest* Div. Br. at 4 n.3. As shown below, a review of the relevant legislative history shows that Congress chose its words deliberately because it was very focused on the significant executive powers to be granted to the executive branch as part of the expansion of the administrative state in the wake of the Great Depression. Congress used the word "officer," in short, because it intended the expanded powers to be wielded by people of rank and responsibility as insurance against abuses of power. Specifically, as detailed below: (1) the relevant language was a product of significant debate; (2) Congress took great pains to use precise, well-thought-out language; (3) where appropriate, Congress used the term "hearing officer" in a manner that makes clear that one could be both a constitutional officer (principal or inferior) and a "hearing officer"; and (4) contemporaneous documents show that the terms "hearing officer," "hearing examiner," and "presiding officer" were used to describe the function of a properly designated and appointed officer; these terms were not used to denote an employee of a lower rank.

A. A review of the legislative history of the Securities Act of 1933 shows congressional intent to make hearing examiners inferior officers.

Empowering administrative agencies with significant adjudicatory powers was a relatively new development in 1933. Indeed, the existence and creation of administrative agencies itself was a relatively new development. *See* U.S. Department of Justice, Attorney General's Committee on Administrative Procedures, *Letter of Submittal and Final Report to the*

United States Senate, at 7-11 (Jan. 22, 1941) ("Exhibit D") ("Attorney General's Committee Report"). In the 1930s alone, Congress created and authorized seventeen federal agencies, including the U.S. Securities and Exchange Commission. *Id.* Congress, therefore, grappled not only with the particulars of what subject areas each federal agency would regulate and what shape those regulations should take, but also with the question of who should wield the newly-expanded powers of the executive branch. Put differently, Congress was intensely focused on which individuals within each agency should exercise certain powers and functions, and, therefore, Congress chose its words carefully.

With this as backdrop, congressional debate in connection with the House bill that eventually became the Securities Act of 1933 reflects deep concerns about vesting the power to hold hearings, administer oaths and affirmations, compel attendance, and recommend severe sanctions with *any* non-judicial officer. Indeed, at the start, there was even dissension as to whether the Commission itself and any of its members—all principal officers under the Constitution—should hold this power.

Specifically, a predecessor provision to Sections 20 and 21 in the initial draft of the House version of the Securities Act would have authorized the Commission to revoke a company's registration if, among other things, it found that the company was in unsound condition. *See, e.g.*, H.R. 4314, 73rd Cong., at 12-15 (1st Sess. 1933) ("Exhibit A-8")[4] (the first bill introduced to the House of Representatives).[5] As the contemporaneous debate showed, certain members of Congress thought that the power to take away someone's business because it

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[4] Selected items from the legislative history of the Securities Act of 1933 and Securities Exchange Act of 1934 are provided in reprinted form from certain volumes of J.S. Ellenberger and Ellen P. Mahar, *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934* (F.B. Rothman for the Law Librarians' Society of Washington, DC 1973) (Exhibits A-1 through B-7).

[5] Note that the current provision providing for Cease-And-Desist Proceedings appears at 15 U.S.C. § 77h-1; the current provision providing for Injunctions and Prosecution of Offenses appears at 15 U.S.C. § 77t; and the current provision providing for Hearings by Commission appears at 15 U.S.C. § 77u.

was "unsound" was both unprecedented and immense. *See, e.g.*, "Federal Securities Act," Hearings before the House Interstate and Foreign Commerce Committee, 73rd Cong., 1st Sess., on H.R. 4314, 73rd Cong. 45 (1933) ("Exhibit A-6") (Representative Clarence Lea described this power as "a rather radically different field" than the one of controlling publicity or disclosures).

The early drafters addressed these concerns by proposing to vest such powers only in principal officers of the United States. An early draft provision, for example, placed officers empowered to act for the Commission on the same footing as Commission members who were principal officers. Specifically, the relevant draft language would have provided:

> SEC. 6. That the Commission may revoke the registration of any security by entering an order to that effect, if upon examination . . . . ***In making such examination the Commission or <u>other</u> officer or officers designated by it shall have access to and may compel the production of*** all the books and papers of such issuers, representatives, or underwriters, and may administer oaths to and examine the officers of such issuers, representatives, underwriters, or other entities or other person connected therewith as to its business and affairs and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities . . . . ***The issuer or other person or entity applying for registration shall on application to the Commission within thirty days from the entry of such order be entitled to a public hearing*** . . . .

Exhibit A-8 at 12-15 (emphasis added). Note that this draft would have empowered the Commission or ***other*** officer or officers designated by it to compel production of information and administer oaths. Initial drafts of this legislation always contemplated that members of the Commission would be principal officers appointed by the President and confirmed by the Senate.[6] Therefore, the use of the word "other" to modify the words "officer or officers" suggests parity, i.e., it reflects congressional intent that investigations and hearings be conducted either by principal officers who are Commissioners or other principal officers designated by the Commission for that purpose.

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[6] Congress initially imbued the Federal Trade Commission with the authority to carry out the Securities Act of 1933. That Commission was and is "composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate." 15 U.S.C. § 41.

Further evidence of intent to vest power in constitutional officers is Congress' concern about vesting this amount of control and power ***even*** with the Commission or any other principal officer. In one telling exchange, Chairman Sam Rayburn, of the House of Representatives Committee on Interstate and Foreign Commerce, questioned Mr. Ollie M. Butler, who participated in drafting the bill, from the Department of Commerce. Noting that "we have passed a lot of laws since we met here on the 5th of March, but I do not think we have given anybody that much power yet," Chairman Rayburn asked, "If you were going to pass upon whether or not a man's business was based upon sound principles, you would want quite a corps of the ablest economists in the land to sit around you, would you not?" Exhibit A-6 at 135. After Mr. Butler conceded that "it would be necessary to give an intelligent opinion on such a subject," Chairman Rayburn pressed his point, stating:

> Do you believe that ***an administrative officer of the Government*** ought to be given that much power, as a general principle—to pass upon whether or not a man's business is based on sound principles? It is mighty easy when you go to write a statute, if you want to delegate absolute authority; you can write that in a very short statute; but the question that this committee has got to determine is whether or not they want to give ***anybody*** that kind of authority. Is it your opinion, as a lawyer and as an economist, that the Federal Trade Commission, or a bureau in the Federal Trade Commission, or ***somebody at the head of a bureau in the Federal Trade Commission***, should be given the power to pass upon whether or not a man's business is based upon sound principles?

Id. (emphasis added).

When Mr. Butler further conceded that the powers at issue were indeed very broad, Chairman Rayburn again asked whether such powers should be conveyed even to ***principal officers*** because, as he observed, those principal officers were only as good as Commission personnel:

> And yet we are committing them into the hands of a commission, of men appointed by the President, and, of course, confirmed by the Senate. But you know, as long as you have been around Washington—you will not have to stay here long to find out—that any law, the administration of which you commit to a board or commission, is just about as good in its administration, or as bad, ***as the personnel of the commission***. Therefore, if

> this commission could always be composed of men who were wise and men who were good, that would be one thing; but it is quite a hazard, is it not, realizing the personnel in the past of some of these commissions?

Id. at 135-36 (emphasis added); *see also* "Securities Act," Hearings before the Senate Banking and Currency Committee, 73rd Cong., 1st Sess., on S. 875, 73rd Cong. 104 (1933) ("Exhibit A-7") (Statement of Senator Byrnes) ("That is quite a lot of power to give an official, to determine that in his opinion a given enterprise is not based upon sound principles.").

Yet another indication that the word "officer" meant constitutional officer is that in its defense of the power to revoke, the executive branch, through Mr. Butler, inserted into the congressional record a comment showing that states have extended this power to "appropriate administrative officers," to wit:

> Subsections (e) and (f) of section 11 (p. 13) which authorized the Commission to revoke registration of a security issue if it should appear that the affairs of the issuer were in an unsound condition or not, based upon sound business principles, were subjected to considerable questioning during the hearing before both committees and four stated that similar provisions do not exist in State legislation.
>
> An examination of State legislation shows that these statements are inaccurate and that there is nothing novel in extending to ***the appropriate administrative officer*** or commission the power to revoke registration or permits for the causes shown, provided always that the revocation order is subject to proper judicial review, a provision for which has been included in the proposed Federal securities bill.

Exhibit A-7 at 243 (emphasis added). This defense of the revocation provisions unquestionably rests on the fact that only appropriate administrative officers or commissions use this authority at the state level.

The revocation clause was not the only place in the original draft bill where Congress expressed its intent that certain powers only be vested in officers. In a related provision authorizing investigations and giving powers to compel production of evidence and take sworn testimony, the draft language was similar. It provided:

> For the purposes of all investigations which, in the opinion of the Commission are necessary and proper for the enforcement of this Act, ***the Commission and officer or officers designated by it*** are empowered to subpena [sic] witnesses, examine them under oath, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry.

Exhibit A-8 at 27 (emphasis added).[7] Given the context of the revocation debate, one cannot seriously assert that this provision did not refer to constitutional officers or that the powers conferred thereby were meant for low-ranking employees.

When Chairman Rayburn introduced an updated version of the bill, H.R. 5480, the new version removed the portions of Section 6 that would have allowed the Commission to revoke registration of securities if it should appear that the business of the issuer was in an unsound condition. *See* H.R. 5480, 73rd Cong., at 11-13 (1st Sess. 1933) ("Exhibit A-9"). In its place remained a somewhat narrower version of this provision that allowed the Commission to enter a stop order suspending the effectiveness of the registration statement if it appeared that the statement included any untrue statement of material fact or omitted a material fact. *Id.* at 15. The new draft, however, retained the provision that allowed for an opportunity for a hearing. *Id.* It also slightly modified the language regarding who could make an examination in advance of a stop order:

> The Commission is hereby empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d). In making such examination the Commission or ***any*** officer or officers designated by it shall have access to and may demand the production of any books and papers of such issuers, representatives, or underwriters, and may administer oaths to and examine the officers of such issuers, representatives, underwriters, or other person connected therewith as to its business and affairs and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities . . . .

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[7] The relevant provision of the Securities Act provides: "For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this subchapter [15 U.S.C. §§ 77a et seq.], ***any member of the Commission or any officer or officers designated by it*** are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing." 15 U.S.C. § 77s(c) (emphasis added).

Id. at 16 (emphasis added).

Two things follow from this language change. First, by removing the word "other" and replacing it with the word "any," the new draft now allowed that not all officers empowered by this provision had to be principal officers. One can infer that once Congress narrowed the grounds on which the Commission could revoke a registration (i.e., it no longer could revoke merely because the business was not based on sound principles), Congress permitted inferior officers, who were not subject to presidential appointment and senatorial approval, to hold examinations and exercise attendant powers. Second, the change evidences focus on the language of the provision; this is a deliberate, considered change because it obviously changes the meaning of the provision. H.R. 5480 was considered by the House of Representatives and passed on May 5, 1933. 77 Cong. Rec. 2910-55 (1933) ("Exhibit A-2").

The Senate version of the original draft bill, S. 875, tracked, for the most part, the language of the original House bill, H.R. 4314, and, thus, S. 875 also included a revocation clause with language allowing the Commission to revoke a registration if it appeared that a business was not based on sound principles. S. 875, 73rd Cong., at 12-15 (1st Sess. 1933) ("Exhibit A-10"). On May 9, 1933, the Senate engaged in a series of procedural moves that resulted in an amended version of H.R. 5480 being passed by the Senate. 77 Cong. Rec. 2978-84, 2986-3000 (1933) ("Exhibit A-3"). The Senate then asked for a Conference with the House of Representatives. *Id.* at 3000. The Conference Report resolved the differences between the House and Senate bills. 77 Cong. Rec. 3891-3903 (1933) ("Exhibit A-4"); 77 Cong. Rec. 2879-88, 4009 (1933) ("Exhibit A-5").

For purposes of this discussion, the Conference Report and final public law had three key parts:

- It retained the language in H.R. 5480 regarding (1) the Commission's authorization to issue a stop order suspending the effectiveness of the registration statement and (2) the powers of "***the Commission or any officer or officers designated by it***" to subpoena witnesses, examine them under oath, and require the production of documents in making any such examination of a stop order (Exhibit A-4 at 3894) (emphasis added);[8]

- It modified the language of H.R. 5480 regarding investigations, so that "***any member of the Commission or any officer or officers designated by it*** are empowered to administer oaths and affirmations, subpena [sic] witnesses, take evidence, and require the production" of documents for purposes of investigations (*Id.* at 3896) (emphasis added);[9,10] and

- It included a new section entitled "Hearings by Commission," in which Congress proclaimed that: "All hearings shall be public and may be held before ***the Commission or an officer or officers of the Commission designated by it***...." (*Id.* at 3896-7) (emphasis added).[11]

This Conference Report was subsequently agreed to by both the House and the Senate on May 22 and 23, 1933, respectively. Exhibit A-4 at 3903; Exhibit A-5 at 4009. Four days later, on May 27, 1933, President Roosevelt signed this bill into law. Securities Act of 1933, Pub. L. No. 28, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77bbbb (1970)) ("Exhibit A-1").

In sum, as the attached legislative history establishes, Congress painstakingly considered the administrative scheme it was creating and to whom it would convey certain executive authority. In particular, Congress grappled with how much authority and autonomy to give to the

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[8] The relevant provision of the Securities Act provides: "Examination for issuance of stop order. The Commission is empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d) of this section. ***In making such examination the Commission or any officer or officers designated by it shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine,*** the issuer, underwriter, or any other person, in respect of any matter relevant to the examination, and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities of the issuer, or its income statement, or both, to be certified to by a public or certified accountant approved by the Commission. If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order." 15 U.S.C. § 77h(e) (emphasis added).

[9] Note that the word "and" was replaced with the word "or," resulting in "the Commission or officer or officers," and indicating that Congress was focused on this provision in the Conference. Notably, the phrase "any member of the Commission" was added, which put hearing examiners on parity with principal officers (i.e., members of the Commission).

[10] *See supra* note 8 for the relevant provision of the Securities Act.

[11] *See supra* at 5-6 for the relevant provision of the Securities Act.

Commission and its officers. Each word was carefully considered. Indeed, during the floor debate preceding the House vote, Representative Greenwood noted that:

> I never have read a bill that appeared to be more carefully drawn, with reference to all of its features and technicalities, than this bill. I am informed that the Committee on Interstate and Foreign Commerce itself and through its subcommittee, has spent a great deal of time and careful thought and has called before it many experts as draftsmen students of economy, commerce, and banking and that they used more care upon particular features of this bill than any bill that has come before the House in many a day.

Exhibit A-2 at 2913.

B. <u>A review of the legislative history of the Securities Exchange Act of 1934 shows congressional intent to make hearing examiners inferior officers.</u>

Within a year of the passage of the Securities Act of 1933, Congress took up a companion act, the Securities Exchange Act of 1934. This act, of course, set up the U.S. Securities and Exchange Commission. In it, Congress again authorized the Commission and the officers it designated to execute certain sovereign functions, such as subpoenaing witnesses, administering oaths, and compelling the production of documents.

Notably, the initial version of the relevant Senate bill included much of the same language and structure as the Securities Act of 1933 on the relevant issues. That draft started by outlining the "Special Powers of the Commission" in Section 18:

> (e) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this Act, ***any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena [sic] witnesses, compel their attendance, take evidence, and require the production of*** any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry . . . . Such power of subpena [sic] and examination shall not abate or terminate by reason of any action or proceeding brought by the Commission under this Act.

S. 2693, 73rd Cong. 33, 36 (2nd Sess. 1934) ("Exhibit B-6"). Again, as with the Securities Act of 1933, this draft would have empowered members of the Commission and any officers designated by the Commission (and no one else) to have certain powers and privileges.

Further edits to the relevant language suggest continued meticulous attention to detail, especially as to the scope and nature of delegated powers. First, both the House and Senate edited the language so that it would cover not just investigations, but also, in the words of the House bill, "all inquiries" and, in the words of the Senate bill, any "provisions under this Act." *See, e.g.*, H.R. 8575, 73rd Cong., at § 6(c) (2nd Sess. 1934) ("Exhibit B-4"); S. 3234, 73rd Cong., at § 6 (2nd Sess. 1934) ("Exhibit B-7"). Second, following the Conference Report (in which the Senate and the House reconciled the differences in the two versions of the draft bill), this provision was further edited so that, in the enacted version of the law, these powers and privileges could be exercised by the Commission, any member of the Commission, or any officer of the Commission in relation to any investigation "or any other proceeding under this title." Securities Exchange Act of 1934, Pub. L. No. 291, 48 Stat. 881, at § 21(b) (codified as amended at 15 U.S.C. §§ 78a-78hh-1 (1970)) ("Exhibit B-1"). That language remains in the statute today.[12]

The attention to the hearings authorization in the wording of the draft bills of the Exchange Act offers further support for the proposition that Congress intended hearings to be held by constitutional officers. It provided:

> SEC. 21. All hearings shall be public and may be held before the Commission, ***any member or members thereof*** or an officer or officers of the Commission designated by it, and appropriate records thereof shall be kept.

Exhibit B-6 at 41 (emphasis added). Note that the highlighted language was an addition to the language in the hearing provision of the Securities Act and that it made it even more explicit that

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[12] The relevant provision of the Exchange Act provides: "For the purpose of any such investigation, or any other proceeding under this chapter [15 U.S.C. §§ 78a et seq.], ***any member of the Commission or any officer designated by it*** is empowered to administer oaths and affirmations, subpena [sic] witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing." 15 U.S.C. § 78u(b) (emphasis added).

not all hearing officers needed to be only principal officers. One can surmise that, having settled (in connection with the passage of the Securities Act) that inferior officers could also hold hearings, Congress added the highlighted language to reflect that understanding—i.e., Congress outlined that hearings could be held by principal officers (members of the Commission) or by inferior officers (officers designated by the head of the agency). Note that in making this change, Congress did not use the words "employee" or "examiner," and it did not modify the words "officer or officers" with the word "hearing" or "presiding." Given the obvious focus on the identification of people empowered to hold hearings, one can infer that Congress meant officer within the meaning of the Appointments Clause. This conclusion is further bolstered by the fact that, here too, even more explicitly than in the parallel provision in the Securities Act, officers designated to hold hearings hold company with principal constitutional officers.

Further evidence of sharp focus on this provision, is that here Congress replaced the word "shall" with "may." In connection with the Exchange Act, Congress focused on and engaged in a fulsome debate weighing the potential dangers of holding public hearings—e.g., disclosure of trade secrets—against the danger of losing public trust by holding private hearings. *See, e.g.*, "Stock Exchange Regulation," Hearings before the House Interstate and Foreign Commerce Committee, 73rd Cong., on H.R. 7852 and H.R. 8720, 73rd Cong. 230 (1934) ("Exhibit B-2"). In the end, after nearly four months of debate and hearings, the language of the "Hearings by Commission" section of the Exchange Act changed from "shall be public" to "may be public."[13] Exhibit B-1 at 901.

Yet another reason to conclude that Congress meant that hearings be held by officers of the United States is the use of the word "officer" in the Exchange Act provision for cases of contumacy or refusal to comply with Commission subpoenas. Under that provision, too, the

[13] The relevant language in the Exchange Act, 15 U.S.C. § 78v, remains the same today.

federal courts would only be able to order a person to appear before the Commission, one of its members, or any officer of the Commission.[14] However, this provision of the Exchange Act is slightly different than a similar provision of the Securities Act and different in a manner that confirms Congress' intent that hearings be held before constitutional officers. In the Exchange Act, the words "or member or officer designated by the Commission" replace the words "one of its examiners designated by it" in the Securities Act. *Compare* 15 U.S.C. § 78u(c), *with* 15 U.S.C. § 77v(b).[15] Two things follow from this change: one, the choice of the word "officer" was deliberate; and two, because these are two references to the same individuals, Congress used the word "examiners" in the Securities Act as a descriptive term for all officers who were designated to conduct hearings or investigations, including, of course, Commission members.

Additional evidence that Congress intended the word "officers" to mean "inferior officers" of the United States is its use of the words "employee" and "officers" in the Exchange Act to mean two different things. For example, Section 4 of the final provision in the enacted law reads:

> SEC. 4. (a) There is hereby established a Securities and Exchange Commission (hereinafter referred to as the "Commission") to be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate . . . .

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[14] The relevant provision of the Exchange Act provides: "In case of contumacy by, or refusal to obey a subpena [sic] issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before ***the Commission or member or officer designated by the Commission***, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question . . . ." 15 U.S.C. § 78u(c) (emphasis added).

[15] The relevant provision of the Securities Act provides: "In case of contumacy or refusal to obey a subpena [sic] issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before ***the Commission, or one of its examiners designated by it***, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof." 15 U.S.C. § 77v(b) (emphasis added.)

> (b) The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and other experts as may be necessary for carrying out its functions under this Act, without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States, and the Commission may, subject to the civil-service laws, appoint such other officers and employees as are necessary in the execution of its functions and fix their salaries in accordance with the Classification Act of 1923, as amended.

Exhibit B-1 at 885. In other words, this provision shows that Congress did not, as the Division's "no indication" argument suggests, use the terms "employees" and "officers" interchangeably.

In addition, the use of the word "appoint" instead of the word "hire" indicates that Congress was sensitive to the significance of the term "officer." For example, initial drafts of this bill introduced in the House and Senate did not authorize the Commission to "appoint" officers or anyone else. *See, e.g.*, H.R. 7924, 73rd Cong., at § 3(e) (2nd Sess. 1934) ("Exhibit B-3"); S. 2642, 73rd Cong., at § 4(e) (2nd Sess. 1934) ("Exhibit B-5"). Rather, the initial Senate draft, for example, read only: "The Commission is further authorized, in accordance with the civil service laws, to employ . . . such officers and employees . . . as may be necessary to carry out the provisions of this Act." Exhibit B-5 at 8. The addition of the word "appoint" in the enacted law signified that Congress understood that officers had to be properly appointed, not simply hired. There is no other reason to add the word "appoint" to this sentence. Note also that the word "officer" is modified by the words "of the United States" in the subsequent statutory language, further evidencing that Congress used the word "officer" in its constitutional sense.[16]

[16] The relevant provision of the Exchange Act provides: "There is hereby established a Securities and Exchange Commission (hereinafter referred to as the 'Commission') to be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate." 15 U.S.C. § 78d(a). It also provides: "The Commission shall appoint and compensate officers, attorneys, economists, examiners, and other employees in accordance with section 4802 of title 5, United States Code." *Id.* at § 78d(b)(1).

C. The SEC's early practices and use of hearing examiners show the Commission's early understanding that Congress intended to make hearing examiners inferior officers.

As the Commission recently recognized, it "has for many decades relied upon ALJs to prepare initial decisions in its administrative proceedings." Opinion of the Commission at 40, *In re Timbervest*. That history is informative. Prior to the drafting and enactment of the APA, the Attorney General of the United States commissioned a report that reviewed the administrative adjudicatory practices of certain agencies, including the U.S. Securities and Exchange Commission, and recommended the adoption of certain practices that would remedy certain problems (both perceived and real) in those agencies' processes and procedures. That committee issued a lengthy report on the SEC adjudicatory process, among other things, after the passage of the Exchange Act. *See* The Attorney General's Committee on Administrative Procedure, *Securities and Exchange Commission*, Monograph No. 26 (June 1940) ("Exhibit C") ("Monograph No. 26 Report").

According to the Monograph No. 26 Report, the Commission designated each hearing examiner as an officer "at the time of, and in, the notice of hearing." *Id.* at 181; *see also*, *In re Harold T. White*, 3 S.E.C. 466, 538 (June 21, 1938) (noting that the standard orders and notices of the hearing included the language that "[a]n officer of the Commission is designated to act as trial examiner, and the place and date of hearing is stated"). The Monograph No. 26 Report also explained:

> [H]earings for the purpose of taking evidence are, with a few exceptions, held before ***trial examiners designated by the Commission***. Unlike the administrative arrangement common to other agencies, there is no Chief Trial Examiner devoting his full time to supervising the staff of examiners, but rather ***one of the commissioners is designated as their Sponsor and Chief Trial Examiner*** . . . . The trial examiners are administratively an independent unit, responsible only to the Commission itself and in no way responsible to the General Counsel's office or other Divisions.

Exhibit C at 177-8 (emphasis added). The fact that the Chief Trial Examiner was a Commissioner disposes of the notion that the term "trial examiner" denotes a special type of an employee who is not an officer of the United States. Other references to "trial examiners" or "presiding officers" in the Monograph No. 26 Report also confirm that these are terms meant to describe the function assigned to a particular individual in a given case; they are not designations meant to indicate lower rank or officer status. *See, e.g., id.* at 93-97.

Moreover, early Commission practice demonstrates that the mere fact that the Commission closely supervised hearing examiners did not mean that examiners were not considered, by the Commission, to be constitutional officers. The Commission's act of appointing officers for purposes of conducting investigations or hearings was not a ministerial act; it was understood from the start to be the means by which certain of the Commission's executive powers were delegated to the hearing examiner or an investigator thereby conferring proper authority to act in official capacity.[17] *See In re Harold T. White*, 3 S.E.C. 466, 538. For example, prior to the passage of the APA, the SEC trial examiners had less discretion than they do today. Among other things, before the APA, SEC hearing officers issued, in certain instances, only "advisory memoranda" to the Commission. *In re Harold T. White*, 1 S.E.C. 574, 576 (July 14, 1936) ("[I]n a preliminary investigation like the one herein considered, the so-called 'trial examiner' is merely the presiding officer designated by the Commission; his 'report' is merely

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[17] *See, e.g.*, Office of Legal Counsel, *Memorandum Opinion for the General Counsels of the Executive Branch: Officers of the United States Within the Meaning of the Appointments Clause*, 17-19, 39 (Apr. 16, 2007) ("Exhibit I") (explaining that officials who administer oaths and affirmations were "no less officers of the United States."); *Buckley*, 424 U.S. at 137 (finding that Commissioners who perform "functions necessary to ensure compliance with the statute and rules informal procedures, administrative determinations and hearing, and civil suits" were officers of the United States who must be appointed in conformance with the Appointments Clause); *see also Freytag v. Comm'r*, 501 U.S. 868, 881-82 (1991) (finding that special trial judges, who take sworn testimony and enforce compliance with discovery orders, are inferior officers); *Myers v. United States*, 272 U.S. 52 (1926) (finding that a postmaster first class was an inferior officer); *Ex parte Hennen*, 38 U.S. 225 (1839) (finding that clerks of district courts were inferior officers); *but see Landry v. FDIC*, 204 F.3d 1125, 1132-33 (D.C. Cir. 2000).

Executive powers cannot be exercised by mere employees, but can only be exercised by principal or inferior officers. *Buckley*, 424 U.S. at 125-26.

an advisory memorandum to the Commission from one of its own employees."); *see also* Exhibit C at 184-87 (noting that the advisory memorandum often did not provide any recommendations regarding the disposition of the case). Nevertheless, the Commission had to designate or appoint "presiding officers." *See, e.g.*, Securities and Exchange Commission, Securities Act of 1933, Release No. 321, 1935 SEC LEXIS 527 (Mar. 30, 1935) ("Pursuant to the provisions of the Securities Act of 1933, the Rules and Regulations of the Securities and Exchange Commission promulgated thereunder and an order of the Commission dated October 24, 1934 designating the undersigned, hereinafter referred to as Examiner, as the officer to take evidence in this matter, hearings were held . . . .").

In short, whether the decision was advisory, initial, or recommended did not control whether the SEC hearing examiner was an "inferior officer"; rather, the SEC hearing examiners had to be officers to exercise certain executive functions delegated to them. As the first Chief Trial Examiner and Commissioner, Robert E. Healy, recognized, even absent the power to issue an initial decision, the ALJs exercise important (and executive) powers:

> The Trial Examiner as the presiding officer has authority over the deportment of those in the hearing room. It is his duty to rule on the admissibility of evidence, to control the contents of the record, to limit argument, and to control similar matters of procedure.

Exhibit C at 183 (quoting from an October 26, 1936 Memorandum from Commissioner Healy to the Hearing Examiners). As the Monograph No. 26 Report similarly explained in 1940:

> Each of the Acts expressly empowers not only any member of the Commission but also "any officer or officers designated" by it to issue subpoenas; the designation of the trial examiner in the order for hearing gives him the power to issue subpoenas by virtue of Rule V of the Rules of Practice.

Id. at 218.

In sum, the language of the securities laws, legislative history, and early practice and reviews confirm that Congress intended that hearings be held before constitutional officers.

Nevertheless, although these early SEC trial examiners exercised certain executive powers (and thus were inferior officers), the Attorney General's Committee, in its final report to Congress (which informed the structure and procedures of the APA), sharply criticized the SEC for withholding power and stature from its hearing officers. Exhibit D at 18-24, 43-45, 182-183; *see also* Exhibit C at 189-191; Administrative Procedure Act Legislative History, S. Doc. No. 248, 79th Cong., 2nd Sess., at 11-42 (1946) ("Exhibit E"). The reason for the SEC withholding power from its trial examiners was that the SEC did not, in the opinion of some, attract candidates of sufficient quality. Exhibit C at 189-191. The APA, in turn, was designed to remedy certain defects by ensuring that those hearing examiners were more capable and, therefore, better able to exercise the authority of officers of the United States. The APA sought to do this by putting the Civil Service Commission in charge of the promotion, tenure, and compensation (although not the appointment) of the SEC trial examiners.

II. THE LEGISLATIVE HISTORY OF THE APA DEMONSTRATES THAT HEARING EXAMINERS ARE INFERIOR OFFICERS.

Even if the legislative history of the federal securities laws did not display clearly congressional intent (elucidated above) to have SEC hearings be held by, at a minimum, inferior officers of the United States, the legislative history of the APA clearly does. In fact, as noted above, the APA was meant to elevate all hearing officers in order to address some of the concerns that early adoption of the administrative state had raised. And lest there be any doubt that Congress meant hearing officers to exercise significant executive power and be inferior officers under the APA, their method of appointment—following lengthy discussions and analysis—was determined with the constraints of Article II of the Constitution in mind. Specifically, as discussed more fully below, the APA left the appointment of hearing officers to heads of departments that selected them precisely because Congress recognized that, as inferior

officers, these hearing examiners had to be appointed in a manner consistent with the Appointments Clause.

A. The Attorney General's Committee recommended that Congress further extend the powers of the hearing examiners to make sure they were independent presiding officers.

The Attorney General's Committee issued its final report in January 1941. That report outlined certain procedural and substantive defects in the then-current administrative functions, including in formal adjudications, and provided an initial draft bill of a proposed Administrative Procedure Act. *See generally* Exhibit D at Letter of Submittal and Letter of Transmittal. The concerns raised in the Attorney General's Committee Report animated the passage of the APA and informed much of its language.

The Committee addressed head-on the serious issues and concerns that arise naturally from the combination of the investigative, prosecutorial, and adjudicative functions in one agency. *Id.* at 55-60. In particular, the Committee was concerned about the agency heads' involvement in all three of these functions. *Id.* at 56. The Committee felt that it was "plainly undesirable" to combine all three functions in one body because doing so eroded the public's confidence that enforcement proceedings were fair and impartial. *Id.* The Committee, therefore, made a series of recommendations to the structure and procedure of the formal agency adjudications, which it felt "to be entirely compatible with the development of deciding officers whose impartiality is universally respected." *Id.* at 59.

First, the Committee recommended that agency heads delegate much of the investigatory and prosecutorial functions to capable officers and the initial adjudicative functions to other independent officers, stating:

> These types of commingling of functions of investigation or advocacy with the function of deciding are thus plainly undesirable. But they are also avoidable and should be avoided by appropriate internal division of labor. . . . Creation of independent hearing

> commissioners insulated from all phases of a case other than hearing and deciding will, the Committee believes, go far toward solving this problem at the level of the initial hearing provided the proper safeguards are established to assure the insulation. A similar result can be achieved at the level of final decision on review by the agency heads by permitting the views of the investigators and advocates to be presented only in open hearing where they can be known and met by those who may be adversely affected by them.
>
> A distinctive function, which may be regarded as one of prosecution, is that of making preliminary decisions to issue a complaint or to proceed to formal hearing in cases which later the agency heads will decide. Before a complaint is issued—if an agency has power to initiate proceedings on its own motion or on charges filed by a private person—or before an application raising doubtful questions is set down for formal hearing, a determination must be made that the action is proper. The Committee has heretofore recommended, on grounds of administrative efficiency, that authority to make such preliminary determinations should be delegated as far as possible to ***appropriate officers***. Where this is done, no question can arise that the ***ultimate deciding officers*** have been biased through having made, ***ex parte***, a preliminary determination in a case which they have later to decide.

Id. at 56 (emphasis added); *see also id.* at 55-57.

Second, the Committee recommended raising the status of hearing officers (across all agencies) to allow them to exercise independent and executive functions. In the Committee's view, hearing officers had to command public confidence that they would issue fair, impartial, and quasi-judicial decisions, which would be separate and divorced from the agency's prior determination to investigate the matter and initiate a case, to wit:

> [I]t is necessary that the evidence be heard and the facts be reported to the agency head by ***an official*** who shall command public confidence both by his capacity to grasp the matter at issue and by his impartiality in dealing with it. . . . If the initial decision—which may dispose of the case or be the statement of it from which appeal may be taken to the heads—can carry a hallmark of fairness and capacity, a great part of the criticisms of administrative agencies will have been met.
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> . . . .
>
> The Committee is impressed also with the fact that where agencies have recognized the importance of ***hearing officers*** in the salaries paid, in the independence of view encouraged and accorded and in the importance given to their decisions, the positions have attracted and held men whose ability and fairness have been recognized by the bar and the public. Where the opposite has happened, progressive decline has occurred. The agency heads have not had confidence in the ability of the ***officials***, and with that the compensation and lack of responsibility have precluded men of sufficient ability to

reverse the trend from accepting the positions. This is the heart of formal administrative adjudication. It cannot succeed without competent and well-paid men ***exercising functions of responsibility and interest.*** This is necessary to protect both the public interest and the private interests which are concerned in the proceedings.

Id. at 43-44, 46 (emphasis added).

Third, the Committee recommended that the hearing officers' initial decisions be given real weight, i.e., the initial decision would become final absent clear error:

> In the absence of appeal by one of the parties to the proceedings (including the representatives of the agency), the determination of a hearing commissioner should be final and binding unless, within a reasonable period, to be stated in applicable regulations, the case is called up for review by the head or heads of the agency on his or their own motion. The findings, conclusions, and recommendations of the hearing commissioner should be included in the record upon which any court of review is sought.
>
> A major purpose of the Committee's recommendations is to increase, in most agencies, the effect of the hearing officer's work in the decision of the case. The Committee contemplates that his decision will serve as the initial adjudication of most cases, and the final adjudication in many, just as does the decision of a trial court. Accordingly, an integral part of the Committee's recommendations is that, in the absence of appeal, the decision of the hearing commissioner be final and effective without further action or consideration by the agency. But to preserve uniformity of decision and effective supervision of an agency's work, the Committee recommends not only that the parties, including the agency's trial attorney, be permitted to appeal, but also that the agency heads may, within the period for appeal, take up any decision for review upon their own motion.
>
> ***In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court.*** Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, ***on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.***

Id. at 50-51 (emphasis added).

Fourth, the Committee recommended that Congress empower the hearing officers to exercise certain executive or sovereign functions:

> Hearing commissioners should be fully empowered by statute to preside at hearings, issue subpoenas, administer oaths, rule upon motions, carry out other duties incident to the proper conduct of hearings, and make findings of fact, conclusions of law, and orders for the disposition of matters coming before them.

Id. at 50.

Fifth, to attract and appoint "men of ability and prestige," the Committee recommended not only that the agency have an important role in selecting and appointing the hearing officers, but also that an independent body be in charge of investigating and approving that person's qualifications:

> ***[T]he hearing commissioner is in a very real sense acting for the head of the agency.*** He is hearing cases because the heads cannot as a practical matter themselves sit. He plays an essential part in the process of hearing and deciding. Those responsible for the work of the agency have a vital interest that this process shall be effectively and fairly performed. The entire usefulness of the agency may be destroyed if the hearing officers are incompetent or if the public loses confidence in their fairness.
>
> So the Committee concludes that agencies themselves should have an important share of the responsibility of selecting the persons who shall be hearing commissioners. But it concludes also that before anyone should undertake these highly responsible duties of a hearing commissioner his judicial qualifications and capacity should be investigated and approved by a body independent of the agency, and whose special concern is the improvement of administrative procedure.

Id. at 46-7 (emphasis added).

B. Congress intended hearing examiners to be "presiding officers," appointed in accordance with the Appointments Clause.

Acting on the above-described arguments underpinning the adoption of the APA, Congress drafted a public law, which, as explained in detail below: (1) made the hearing examiners "presiding officers"; (2) granted them certain executive powers; (3) mandated that the decision of the subordinate officer be given weight and force; and (4) made certain that the appointment of the ALJs are made in conformity with the Appointments Clause of the United States Constitution.

1. Congress referred to all hearing examiners, be they the Commission, individual members of the Commission, or hearing examiners, as "presiding officers."

To start, Congress could have, but did not use the term "presiding employees" in the original legislation. Reading "presiding officers" to mean employees or anything other than "inferior officers" would read the word "officers" out of the original statute. Here is the relevant original statutory language of the APA:

> SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—
> (a) ***PRESIDING OFFICERS.***—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act. . . . The ***functions of all presiding officers and of officers participating in decisions*** in conformity with section 8 shall be conducted in an impartial manner.

Exhibit E at 5-6 (emphasis added). Similar to the hearings provision of the Exchange Act, this provision covered three categories of persons: the Commission acting as a whole, any individual Commissioner, and other persons appointed to hold the hearing. The words "the functions of all presiding officers" referred to all three of these categories, including the full Commission and its individual members who were indisputably principal officers of the United States. The sole sensible reading of this language is that the grouping of examiners with principal officers in this section indicates the elevation of any such examiners to officer status. Moreover, "presiding officer" here simply cannot mean a mere employee because the term encompasses the Commission and its members, who are unquestionably constitutional officers.

The very next provision of the APA as originally adopted supports this reading. It states:

> (b) HEARING POWERS.—***Officers presiding at hearings shall have authority***, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas [sic] authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in

conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

Exhibit E at 6 (emphasis added). The phrase "officers presiding" could mean only one thing: officers who preside; presiding is a verb in a sentence whose subject is "officers." Here again, the term officers covered principal officers (Commission members) and others who were also referred to as officers. Moreover, this provision delegated power to ***all*** officers. The fact that "hearing examiners" were given the same powers as principal officers of the United States is yet another indication that Congress intended delegation of sovereign powers, rendering them inferior officers.

2. The statutory definitions of "officer" and "employee" confirm that Congress intended SEC ALJs to be "inferior officers."

Despite the use of the word "officer" in the original legislative language in every relevant instance in which the current legislation uses the word "employee," the Division rested its argument about congressional intent on the assertion that "when providing that ALJs conduct administrative hearings in the [APA], Congress referred to ALJs as "presiding employees." *See Timbervest* Div. Br. at 4 n.3 (citing 5 U.S.C. § 556(b)).[18] According to the Division, Congress

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[18] The relevant provision of the APA provides: "There shall preside at the taking of evidence—(1) the agency; (2) one or more members of the body which comprises the agency; or (3) one or more administrative law judges appointed under section 3105 of this title [5 U.S.C. § 3105]. This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner." 5 U.S.C. § 556(b). While this provision was amended in 1966 to use the word "presiding employees" in place of "presiding officers," that amendment, as discussed immediately above, does not change the analysis.

The term Administrative Law Judges later replaced the term hearing examiner, in part, also as a means of underlining those officers' status. In 1978, Congress amended the United States Code to change the title of "hearing examiners" to "Administrative Law Judges" and to increase the number of such positions at the GS-16 level. *Hearing Examiners Reclassified as Administrative Law Judges*, 95th Cong., 2d Sess., 95 P.L. 251, 92 Stat. 183 (Mar. 27, 1978) (Note that later that year, the "supergrade" levels, including GS-16, were reclassified.). Before this public law was enacted, the Senate Committee on Governmental Affairs issued a Senate Committee Report. *Increase in Number of Administrative Law Judge Positions*, 95th Cong., 2d Sess., S. Rep. No. 95-697, at 2 (1978) ("Exhibit H"). In this Senate Committee Report, Congress explained that ALJs "are an integral part of the rule making and adjudicatory procedures required by the [APA] of 1946 (now codified as 5 U.S.C. 551 et seq.). To insure the independence and impartiality of the administrative process, section 556 of title 5 requires ALJs to serve

was very precise when it used the word "employee," but was equally imprecise when it used the word "officer." Following this assertion, the Division argued that the use of the word "employee" here is dispositive in demonstrating congressional intent that ALJs not be accorded officer status. Nonetheless, according to the Division, the use of the word "officer" is no indication that Congress meant "officer" or anything other than mere employee. That Congress would be so precise in the use of "employee" and so imprecise in the use of "officer" makes little sense. And, in fact, a review of the relevant statutory definitions and the legislative history demonstrates that the Division's argument is flat wrong. Rather, the definitions of "employee" and "officer," as well as legislative history, demonstrate that Congress explicitly meant for them to be officers.

The background here is that in 1965, in connection with the adoption of the revised Title 5, Congress restated "in comprehensive form, without substantive change, the statutes in effect before July 1, 1965, that relate to Government employees, the organization and powers of Federal agencies generally, and administrative procedure...." H. R. Rep. No. 89-901, at 1 (1965) ("Exhibit G"). "In order to restate the statutes relating to personnel in one comprehensive title, it [was] necessary to make changes in language. Some of the changes [were] necessary to attain uniformity within the title. Others [were] necessary to effect consolidation of related statutes and to conform to common contemporary usage. In making changes in the language, precautions [had] been taken against making substantive changes in any statute." *Id.* at 2.[19] In short,

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as presiding officers with respect to rule making or adjudicatory hearings (unless the agency itself, or one or more of its members, presides)." *Id.* The Senate Committee Report continued and explained that ALJs—unlike mere employees—are provided certain statutory protections, such as being exempt from performance evaluations, being able to be removed only for cause established by the Commission, and receiving periodic step increases in pay without certification by their employing agency. *Id.* The Senate Committee Report explained that "***individuals appointed as ALJs hold a position with tenure very similar to that provided for Federal judges under the Constitution.***" *Id.* (emphasis added).

[19] The House Judiciary Committee's Report accompanying these language changes provides, in relevant part:

Congress made language changes to streamline and standardize terms across various interrelated statutory provisions without changing their meaning.

In connection with these word changes, Congress defined the terms "officer" and "employee" in new Sections 2104 and 2105, respectively. *See generally* Exhibit G at 8, 10, 12-13. According to these new definitions, the term "employee," as discussed below, subsumes the term "officers." Subject to these definitions, in fact, constitutional officers, including Cabinet Secretaries, are employees under Section 2105.

Also as part of this effort:

> The words "employee" and "employees" [were] substituted [in Section 556(b)] for "officer" and "officers" ***in view of the definition of "employee" in section 2105***. The sentence "A presiding or participating employee may at any time disqualify himself." is substituted for the words "Any such officer may at any time withdraw if he deems himself disqualified."

Id. at 13 (emphasis added). Similar changes and qualifying comments were made in Section 557. *Id.* By noting that the substitution of "employee" for "officer" was made in view of the expansive definition of "employee," Congress indicated that it understood that "officer" and "employee" were not interchangeable terms and that, therefore, as originally drafted, officer did not mean employee. *Id.*

Here is the definition of "officer" in Section 2104:

> (a) For the purpose of this title, "officer," except as otherwise provided by this section or when specifically modified, means a justice or judge of the United States and ***an individual who is***—

> ***Substantive change not intended.***—Like other recent codifications undertaken as a part of the program of the Committee on the Judiciary of the House of Representatives to enact into law all 50 titles of the United States Code, there are no substantive changes made by this bill enacting title 5 into law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged....

Exhibit G at 3 (citations omitted) (emphasis in original).

(1) ***required by law to be appointed*** in the civil service ***by*** one of the following acting in an official capacity—

(A) the President;
(B) a court of the United States;
(C) ***the head of an Executive agency***; or
(D) the Secretary of a military department;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an authority named by paragraph (1) of this section, or the Judicial Conference of the United States, while engaged in the performance of the duties of his office.

(b) Except as otherwise provided by law, an officer of the United States Postal Service or of the Postal Regulatory Commission is deemed not an officer for purposes of this title.

5 U.S.C. § 2104 (emphasis added).

The term "employee" in Title 5 of the United States Code is defined as follows:

(a) For the purpose of this title, "employee," except as otherwise provided by this section or when specifically modified, ***means an officer*** and an individual who is—

(1) appointed in the civil service by one of the following acting in an official capacity—

(A) the President;
(B) a Member or Members of Congress, or the Congress;
(C) a member of a uniformed service;
(D) an individual who is an employee under this section;
(E) the head of a Government controlled corporation; or
(F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

5 U.S.C. § 2105 (emphasis added). This language is clear: Congress defined "employee" to include all federal government personnel, including principal officers, inferior officers, and others.

Consistent with congressional intent to make no substantive changes in replacing the word "officer" with the word "employee," SEC ALJs fit the definition of "employee" only because they are officers. SEC ALJs may not be appointed by any of the persons listed in Subsection (a)(1) of Section 2105. Rather, they have to be designated by the Commission under the securities laws (as discussed above) and, under the APA, they have to be appointed by the "agency." *See* 5 U.S.C. § 3105 ("Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title."). Therefore, SEC ALJs fit the definition of "officer" in Section 2105 because they are required to be appointed by the head of an executive agency (the Commission); they perform their duties under authority of law and execute certain executive functions, such as issuing subpoenas and taking sworn testimony; and they are subject to supervision by the head of an executive agency (the Commission).

The Division tries to evade this basic conclusion by claiming Congress' use of the word "agency" and not "agency head" in the original Section 11 of the APA or, its successor, 5 U.S.C. § 3105, shows that Congress did not intend ALJs to be inferior officers. *Timbervest* Div. Br. at 3-4. In other words, according to this logic, ALJs do not fit the "officer" definition of Section 2104 because the APA calls for them to be appointed by the "agency," which the Division reads to mean something other than "the head of an executive agency." Of course, if this reading were correct, SEC ALJs would not even be employees under Section 2105 because an "agency" is not an "individual who is an employee" or any of the other categories listed in Section 2105(a)(1).

To address the Division's point about the use of the word "agency" directly, however, "agency" and "agency head" are the same thing here. As noted earlier, 5 U.S.C. § 556(b) provides, in relevant part: "There shall preside at the taking of evidence—(1) the agency; (2) one

or more members of the body which comprises the agency; or (3) one or more administrative law judges appointed under section 3105 of this title." The word "agency" clearly refers to the entire body that comprises the agency, i.e., all Commissioners acting together as a Commission.[20] The Commission acting together is the head of the agency. *See* Opinion of the Commission 41 n.137, *In re Timbervest*, No. 3-15519 (Sept. 17, 2015) ("The Commission constitutes the 'head of a department' when its commissioners act collectively." (quoting *Free Enter. Fund*, 561 U.S. at 512-13)); *see also Free Enter. Fund*, 561 U.S. at 512-13 ("The Commission as a whole, on the other hand, [ ]meet[s] the requirements of the Act, including its provision [in 5 U.S.C. § 904] that 'the head of an agency [may] be an individual or a commission or board with more than one member.'"). "Agency" is, therefore, another way of referring to the agency head.

Legislative history is consistent with this understanding. "Agency" was defined originally in the APA as "each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia." Exhibit E at 1. When Congress used the term "agency" in the rest of the public law, it meant the authority within the agency that had the power to review the initial decisions. *See, e.g., id.* at 6; *see also id.* at 268 (Report of House Judiciary Committee) ("Also recognized as hearing officers are those, including State representatives, specially provided for or named in other statutes. But the reference to other

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[20] The current definition of "executive agency" is as follows: "For the purpose of this title, 'Executive agency' means an Executive department, a Government corporation, and an independent establishment." 5 U.S.C. § 105. The Commission is neither an executive department nor a government corporation. *See* 5 U.S.C. §§ 101, 103. It is, however, an independent establishment. *See* 5 U.S.C. § 104 ("an establishment in the executive branch (other than the United States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment...").

statutory officers would not prevent an ***agency, such as the head of a department or a board,*** from utilizing examiners as provided by the bill." (emphasis added)).[21]

C. Congress explicitly made certain that the ALJs' appointment complied with the Appointments Clause of the United States Constitution.

To dispel any lingering doubt about congressional intent in using the word "officer" to mean "inferior officer" of the United States when referring to ALJs in the APA, Congress directly addressed whether hearing officers had to be appointed in conformity with the Appointments Clause. Its answer was yes. That is an explicit recognition by Congress that hearing officers are inferior officers.

The Attorney General's Committee Report recommended that hearing officers be appointed by an independent government body. Exhibit D at 47-48. To accomplish this, the Committee recommended the formation of an "Office of Administrative Justice," whose Director would be appointed by the Judicial Conference and who would, in turn, appoint hearing examiners. Exhibit E at 41-42 (Senate Judiciary Committee Print). The Committee made this recommendation in order to make hearing examiners independent and not beholden to the agency for their appointment, promotion, and termination. *Id.*

This appointment proposal was rejected, however, because it ran afoul of the Appointments Clause. As explained first by the Senate Judiciary Committee:

> The legal difficulty with the suggestion, however, is that the ***Constitution provides for the placing of powers of appointment*** "in the courts of law" whereas the Judicial Conference is a committee and not a court and hence may not be within the constitutional authorization for appointing powers.

Id. at 42 (emphasis added). This concern was made more explicit by David A. Simmons, then President of the American Bar Association, who testified before the House of Representatives' Judiciary Committee:

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[21] *See also*, Exhibit E at 80, 91-129 (House Judiciary Committee Hearing).

> Third is a suggestion that the Judicial Conference appoint an officer to appoint and remove examiners. This suggestion is attractive, but may present constitutional problems as to the appointing power. Perhaps a solution would be for the Presidential appointment of such an officer or officers, with provision for the Judicial Conference to make recommendations to the President.

Id. at 50 (House Judiciary Committee Hearings). This concern was again echoed by Carl McFarland, Chairman of Special Committee on Administrative Law for the American Bar Association:

> The third proposal has been made recently, and that is that ***either the selection or the approval of the examiner be vested in some official appointed by the Judicial Conference.*** That was put forward as a rather good solution because it would fit into what was conceived to be a nonpolitical office and therefore would require less provision concerning how it should operate. However, ***that presents a very serious constitutional question as to whether you could have the Judicial Conference make the appointment of an executive official when the Constitution vests the power of appointment only in the President, the head of a department[, or] a court.*** The Judicial Conference is not a court.

Id. at 82 (House Judiciary Committee Hearings) (emphasis added). In other words, hearings examiners are inferior officers of the United States and must be appointed in conformity with Article II of the United States Constitution.

To address this issue, Congress edited the proposed bill to make certain it complied with the Appointments Clause. The very next suggestion taken up (and ultimately adopted) by the Senate Judiciary Committee was that the "examiners be appointed '***by*** each agency' rather than [just] 'for each agency.'" *Id.* at 42 (Senate Judiciary Committee Print) (emphasis in original). In those instances where agency heads are heads of departments, such as the SEC, this change facilitated proper Article II appointments.

D. Congress thought it was conferring significant executive powers in the APA.

A significant motivating force behind the APA, as discussed above, was to create a corps of officers who were independent of the agencies where they worked, but who, nonetheless, had the power and authority of office and could command respect. Congress balanced the

appointment issue against its other priorities and compromised by vesting the appointment power with the agencies but the supervision with the Civil Service Commission.

The compromise reached by Congress was reflected in the following provision:

> SEC. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. . . .

Id. at 9;[22] *see also id.* at 371 (Proceedings from Congressional Record) ("Section 11 recognizes that agencies have a proper part to play in the selection of examiners in order to secure personnel of the requisite qualifications. However, once selected, under this bill the examiners are made independent in tenure and compensation by utilizing and strengthening the existing machinery of the Civil Service Commission."); *Ramspeck v. Fed Trial Exam'rs Conference*, 345 U.S. 128, 132 (1953) ("Congress intended to make hearing examiners 'a special class of semi-independent subordinate hearing officers.'" (quoting § 11 of the APA)). In the words of the Senate Judiciary Committee Report:

> The purpose of this section is to render examiners independent and secure in their tenure and compensation. The section thus takes a different ground than the present situation, in which examiners are mere employees of an agency, and other proposals for a completely separate "examiners' pool" from which agencies might draw for hearing officers.

Exhibit E at 215.

Finally, there would have been no need for Congress to satisfy the Appointments Clause unless Congress understood that it was conferring significant executive powers on ALJs, thereby

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[22] Section 11 of the enacted APA became 5 U.S.C. § 3105 (2015). The relevant portion of the statutory provision currently reads, "Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title [5 U.S.C. §§ 556 and 557]."

rendering them inferior officers. For example, the following comment reflects congressional understanding of the significant powers it was conferring:

> It has been suggested that this bill should grant the subpena [sic] power to all hearing officers, ***whether or not the agency has been granted such power***. It may seem logical that hearing officers should have compulsory process powers, but it has been felt that the grant of such powers is of a nature and so important as to be better left to Congress in connection with specific legislation rather than dealt with by a general statute.

Id. at 29-30 (emphasis added). There would be no reason to consider giving ALJs independent subpoena powers if Congress meant them to be mere employees whose job was limited to serving as aids to the Commission, as the Commission asserted in its *Timbervest* and *Lucia* opinions. *See* Opinion of the Commission at 28-33, *In re Raymond J. Lucia Companies*; Opinion of the Commission at 41-46, *In re Timbervest*. Note that the decision not to vest ALJs with independent subpoena power did not rest on their status as mere employees or aids. Rather, Congress saw the delegation of subpoena power to be significant enough to require a specific grant. *A fortiori*, the grant of subpoena powers to SEC ALJs, is a delegation of significant executive power.

To be sure, the original APA text distinguished between supervising officers and subordinate officers, but that distinction does not bear on whether the subordinate officer is a constitutional officer because every inferior officer, by definition, is subordinate to, and is subject to supervision by, a principal officer. In referring to subordinate examiners, therefore, Congress used the word "officer"; to wit:

> SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7—
>
> (a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, ***the officer who presided*** (or, in cases not subject to subsection (c) of section 5, ***any other officer or officers*** qualified to preside at hearings pursuant to section 7) shall ... Whenever ***such officers*** make the initial decision ... On appeal from or review of the initial decisions ***of such officers*** ... Whenever the agency makes the initial decision without having presided at the reception of the evidence, ***such officers***...

> (b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the ***decision of subordinate officers***...

Exhibit E at 6-7 (emphasis added). It is hard to fathom what Congress could have meant here if not that the persons conducting hearings were to be constitutional officers—i.e., Commission members who are subordinates for this purpose—or their subordinates, inferior officers.

The fact that ALJs issue initial decisions does not alter the analysis of congressional intent. Congress allowed, in contradiction to the Attorney General's Committee recommendations, agencies to choose to continue their practice of allowing certain decisions to be recommendations rather than initial decisions.[23] In either case, however, Congress expressed its intention that hearing officers be afforded responsibility and status. *See, e.g., id.* at 29 ("The statement of the powers of administrative hearing officers is designed to secure that responsibility and status which the Attorney General's Committee stressed as essential."). Indeed, Congress explicitly recognized the great power that had been given to ALJs to make factual findings and credibility decisions:

> The provision that on agency review of initial examiners' decisions the agency shall have all the powers it would have had in making the initial decision does not mean that the initial examiners' decision (or their recommended decisions) are without effect. They become a part of the record in the case. They would be of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing. . . . In a broad sense the agencies' reviewing powers are to be compared with that of courts under section 10(e) of the bill.

Id. at 272-73 (Report of House Judiciary Committee); *see also* U.S. Department of Justice, *Attorney General's Manual on the Administrative Procedures Act*, at 83-84 (1947), *reprinted in* WM. W. Gaunt & Sons, Inc., *Attorney General's Manual on the Administrative Procedures Act* (1973) ("Exhibit F") (After citing the relevant provision of the enacted law, the manual stressed

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[23] Here, of course, the hearing officer has the power to issue an "initial decision" (e.g., not a recommended decision), which is then reviewed by the Commission under certain (but not all) circumstances. *See* 17 C.F.R. § 201.360.

that even though the "agency is in no way bound by the decision of its subordinate officer," in cases where the determination of credibility is key "it is apparently assumed that agencies will attach considerable weight to the findings of the examiner who saw and heard the witnesses.").

In short, Congress empowered ALJs purposefully and knowingly. In the Senate Committee Report on the APA, the Senate Judiciary Committee explained that Section 7(b) was "designed to assure that the presiding officer will perform a real function rather than serve merely as a notary or policeman." Exhibit E at 207; *see also id.* at 269 (Report of House Judiciary Committee). Similarly, the Chairman of the Senate Judiciary Committee, Pat McCarran, wrote that the APA "is intended as a guide to him who seeks fair play and equal rights under the law, as well as those invested with executive authority." Exhibit E at Foreword to Senate Report.

CONCLUSION

It is clear from the foregoing that both in the securities legislation and in the APA as it applies to SEC ALJs, Congress intended hearings to be held by either principal officers or inferior officers of the United States. An inferior officer by definition is subject to supervision by and review of the principal officers.[24] The fact that inferior officers are subject to supervision does not diminish their status as constitutional officers. In fact, as the Office of Legal Counsel for the Department of Justice had determined, post *Landry*, one's status as an inferior officer is

[24] *See, e.g.*, 5 U.S.C. § 2104(a)(3) (An officer is "subject to the supervision of" the President, a court of the United States, the head of an executive agency, or the secretary of a military department); *Edmond v. United States*, 520 U.S. 651, 663 (1997) ("[W]e think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1338-1341 (D.C. Cir. 2012) (D.C. Circuit found post *Landry* that the fact that the Copyright Royalty Judges' opinions were final made them principal officers as opposed to inferior officers.).

not a function of one's level of discretion.[25] The relevant question is whether significant executive power is delegated to the inferior officer.[26] There can be no dispute, based on the discussion above, that Congress considered the powers given to hearing officers under the securities laws, and to ALJs under the APA—such as administering oaths and affirmations, compelling production of evidence and testimony by subpoena, supervising hearings, making evidentiary rulings, making credibility determinations, as well as issuing initial decisions that could become final in the absence of an appeal—to be significant executive powers.[27] It was also very important to Congress, as discussed above, for SEC ALJs to be inferior officers in order to maintain the public's confidence in the impartiality and fairness of ALJ proceedings. Finally, the Commission does not have the power to diminish ALJs' status as inferior officers.[28] *See Free Enter. Fund*, 561 U.S. at 495-97; *cf.* Opinion of the Commission 44, *In re Timbervest LLC*, No. 3-15519 (Sept. 17, 2015) (discussing that the Commission does not exercise its powers not to

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[25] Exhibit I at 19 ("It is not necessary to the existence of delegated sovereign authority (and thus to the existence of an office) that a position include the exercise of discretion, all the more is it not necessary that a position include some sort of 'independent' discretion in carrying out sovereign functions.").

In any event, reliance on *Landry v. FDIC* is misplaced. The D.C. Circuit did not address, in that case, the relevant legislative history, and the fact that FDIC statutes do not require hearings to be held by "officers." *See also* Resp'ts Reply Br. at 17-18.

[26] Exhibit I at 19 ("The question for purposes of this first element is simply whether a position possesses delegated sovereign authority to act in the first instance, whether or not that act may be subject to direction or review by superior officers[.]").

[27] The point that the Commission reviews all decisions is overstated. It ignores what happens when no one petitions the Commission for a review of the initial decision. When an aggrieved person fails to file a timely petition for review of an initial decision and the Commission does not order review on its own, the Commission does not hold any particular or additional proceedings, the Commission does not review the SEC ALJ's factual findings or conclusions of law, and the Commission does not make any of its own factual findings. It merely, by designation to the Office of General Counsel, issues a notice that the initial decision of the ALJ has become final in all respects. *See, e.g.*, Notice that Initial Decision Has Become Final, *In re Horizon Wimba*, No. 3-16568, (Sept. 16, 2015), *available at* https://www.sec.gov/litigation/admin/2015/34-75929.pdf. That means that in certain cases (as distinguished from *Landry*) the SEC ALJ's decision becomes final without any substantive action by the Commission.

[28] The Department of Justice, in its early manual on the APA, stressed that the agencies cannot revoke, change, or alter the powers that Congress had vested in the ALJs. *See* Exhibit F at 74. (The section on hearing powers "automatically vests in hearing officers the enumerated powers to the extent that such powers have been given to the agency itself, i.e., 'within its powers.' In other words, not only are the enumerated powers thus given to hearing officers by section 7(b) without the necessity of express agency delegation, but an agency is without power to withhold such powers from its hearing officers.").

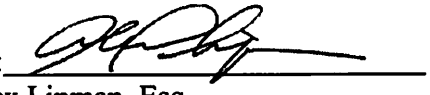
review the ALJ decisions). Not even the President has that power. *Free Enter. Fund*, 561 U.S. at 495-97. That power, as even the Division concedes, resides with Congress.

In short, SEC ALJs were intended by Congress to be inferior officers of the United States in the constitutional sense. Congress delegated significant executive powers to them, thereby effectuating their officer status. Congress also made sure that their appointments comport with the Appointments Clause of Article II of the United States Constitution. SEC ALJs are, therefore, inferior officers and must be appointed in accordance with constitutional and congressional mandates. The Division's incorrect arguments to the contrary, while purporting to rely on statutory language and legislative history, in fact ignore that language and history. The Commission's adoption of those incorrect arguments is therefore also incorrect, contrary to statute, legislative history, congressional intent, and the Appointments Clause of the Constitution.

Dated: October 23, 2015

Respectfully submitted,

BROWN RUDNICK, LLP

By: 

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **HARDING ADVISORY LLC and** **WING F. CHAU,** **Respondents.**	Administrative Proceeding File No. 3-15574 **CERTIFICATE OF SERVICE**

Pursuant to Commission Rule of Practice 150, I hereby certify that on October 23, 2015, a true and correct copy of MOTION TO SUBMIT SUPPLEMENTAL BRIEFING IN SUPPORT OF RESPONDENTS' APPEAL REGARDING THEIR APPOINTMENTS CLAUSE CLAIMS & SUPPLEMENTAL BRIEFING IN SUPPORT OF THOSE CLAIMS was served via electronic mail on:

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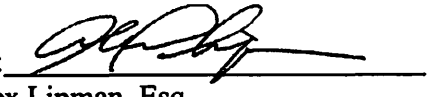
By: 

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