No. 17-130

In the Supreme Court of the United States

RAYMOND J. LUCIA

AND RAYMOND J. LUCIA COMPANIES, INC.

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION

On Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF OF *AMICI CURIAE* SCHOLARS OF CORPUS LINGUISTICS

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QUESTION PRESENTED

Whether administrative law judges of the Securities and Exchange Commission are Officers of the United States within the meaning of the Appointments Clause.

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

In 1798, Thomas Dunn served as Assistant Doorkeeper of the House of Representatives, charged with, among other things, keeping the House's fireplace stocked with firewood and doing standard janitorial work. For these services, Congress paid him "four hundred and fifty dollars per annum."[2] And because of these ministerial services, Congress called him an "*officer* of the House of Representatives." Act of March 2, 1799, ch. 33, 5 Stat. 728 (emphasis added). This historical example of the founding-era usage of "officer" is merely one of many data points for the Court to consider in answering the important question presented in this case—the meaning of the phrase "officer of the United States."

Amici (listed in the Appendix) are scholars of a developing methodology for answering such questions in a systematic, rigorous manner—a methodology known as "corpus linguistics." As Utah Supreme Court Justice Thomas R. Lee puts it,, "corpus linguistics is an empirical approach to the study of language that involves large, electronic databases," which are used to "draw inferences about language from data gleaned

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[1] No one other than *amici* and their counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing in communications on file with the Clerk.

[2] Act of April 12, 1792, ch. 20, 2 Stat. 252 . See also Act of July 16, 1798, ch. 81, 5 Stat. 608 (appointing Dunn).

from real-world language in its natural habitat—in books, magazines, newspapers, and even transcripts of spoken language."[3] Because judges—like linguists and lexicographers—are interested in the "original public meaning" of historic texts and the "ordinary meaning" of modern texts, *amici* believe these databases can be invaluable in resolving difficult questions of constitutional and statutory interpretation.

Empirical evidence derived from historical databases demonstrates that Dunn's status as a federal officer—despite having little authority over anything but the Congressional fireplace—was not an aberration, but rather emblematic of the original understanding of "Officers of the United States." Moreover, linguistic data derived from a modern linguistic database reveals that our contemporary understanding of the word "officer" is far more expansive than some might expect—at least in the public context—encompassing relatively low-level employees.

Thus far, this Court's decisions have always reflected this broad understanding of "Officers of the United States." In *Landry* v. *FDIC,* 204 F.3d 1125, 340 (D.C. Cir. 2000), however, the D.C. Circuit fashioned a balancing test that does not adequately account for this Court's precedent, much less the available linguistic evidence. Because the *Landry* test—and similar tests from other circuits—have no grounding in linguistic fact, *amici* believe they should be overturned in favor of a more capacious understanding of the term "officer" and, hence, of the phrase "officer of the United States."

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[3] Lee & Mouritsen, at 788.

STATEMENT

The Constitution provides that the President "by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *Officers of the United States*." U.S. Const., art. II, § 2. Nevertheless, "Congress may by Law vest the Appointment of such inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Department." *Id.* Thus, an "Officer of the United States" may be appointed by any of three entities: the President (with or without Senate confirmation), the courts, or a department head.

1. However, administrative law judges are not appointed by the President, courts of law, or department heads. Rather, they are hired following a "merit-selection process" that is "administered by the Office of Personnel Management [OPM]." *Bandimere* v. *SEC*, 855 F.3d 1128, 1132 (10th Cir. 2017), en banc denied, 855 F.3d 1128 (Lucero, J., dissenting from denial of en banc review) (citing 5 U.S.C. 1302; 5 C.F.R. § 930.201). OPM requires a candidate to be a "licensed attorney[] with at least seven years of litigation experience" and to take a test that it administers. *Bandimere* v. *SEC*, 844 F.3d 1168, 1176-1177 & n.11 (10th Cir. 2016),[4] en banc denied, 855 F.3d 1128. Following the test's administration, each candidate is ranked according to his or her performance, and the Chief ALJ can then

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[4] For this proposition, the opinion cites Vanessa K. Burrows, Cong. Res. Serv., Administrative Law Judges: An Overview, at 2 (2010), https://perma.cc/T8YY-EE7F; Robin J. Arzt et al., *Advancing the Judicial Independence and Efficiency of the Administrative Judiciary: A Report to the President-Elect of the United States*, 29 J. Nat'l Ass'n Admin. L. Judiciary 93, 101 (2009).

hire any of the top three performers. *Id.* Once hired, ALJs are subject to termination only for cause after review by the Merit System Protection Board. *Id.* Their responsibilities include "conducting public hearings in a manner similar to federal bench trials," "presiding at and regulating the course of th[ose] hearings," and "setting filling deadlines, issuing subpoenas, holding prehearing conferences, and ruling on motions."[5]

2. Petitioner Raymond J. Lucia is an investor who has hosted several free seminars on investing. Pet. App. 34a; 127a–129a. At these seminars, Petitioner would use a slideshow to show the potential of following a retirement plan that he called "Buckets of Money." Pet. App. 23a; 127a–129a. The slideshow presented multiple "hypothetical" examples of how successful a portfolio following his plan could be.

Petitioner did not, however, only call his examples "hypothetical." Instead, he stressed both orally and in writing that they were based on many different assumptions, including assumptions that the history of the market was indicative of its future. Pet. App. 24a–29a; 43a n.10; 45a n.14; 76a–77a.

3. These disclosures, however, were insufficient to protect him from the Securities and Exchange Commission (SEC). In 2012, the SEC charged him with violating the Investment Advisors Act of 1940 and its subsequent interpretations of the Act. Pet. App. 7a–8a. The SEC chose to avoid federal court, and an administrative law judge presided over a trial-like proceeding that included all of the elements of a typical

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[5] U.S. Security and Exchange Commission, *Office of Administrative Law Judges*, https://www.sec.gov/alj.

trial. Pet. App. 239a. Although the case was eventually remanded for further factual findings, the ALJ eventually found Lucia's presentations misleading because he used "'backtest' —a term with no statutory or regulatory definition"—to describe his investment plan. Pet. Br. 6. Petitioner described the "backtest" as the combination of "historical data" and certain "assumptions for other variables, such as inflation and real-estate rates of return." Pet. Br. 5. Because of the supposedly misleading nature of the term, the ALJ "barred Mr. Lucia from working as an investment advisor for the rest of his life, revoked his company's registration, and assessed civil penalties." Pet. Br. 6.

Lucia sought review from the full Commission. He challenged the ALJ's decision on the merits and also argued that the ALJ's office violated the Appointments Clause. Pet. App. 38a–40a. The Commission sustained the ALJ's finding and concluded that SEC ALJs are "not subject to the Appointments Clause." Pet. App. 66a-69a; 86a. It reasoned that SEC ALJs are not inferior officers because their decisions are not "effective and final" until the SEC itself files a "finality order." Pet. App. 90a.

4. A panel of the D.C. Circuit, relying on *Landry* v. *FDIC,* 204 F.3d 1125 (D.C. Cir. 2000), held that the SEC ALJ was an employee but not an "inferior officer." *Lucia* v. *SEC*, 832 F.3d 277, 289 (D.C. Cir. 2016), Pet. App. 21a. *Landry* discussed three "criteria" for courts to consider when distinguishing between inferior officers and employees: "(1) the significance of the matters resolved by the officials, (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions." *Tucker* v. *Comm'r*, 676 F.3d 1129, 1133 (D.C. Cir. 2012).

Petitioner showed that the SEC ALJ's decision, while not binding on the Commission, should not be considered a mere recommendation because, in practice, the Commission's eventual decision was only a "ministerial formality." *Lucia*, 832 F.3d at 286. The court recognized that, although under the organic statute "the Commission *could* have chosen to adopt regulations whereby an ALJ's initial decision would be deemed a final decision of the Commission," it had not. *Id.* (italics in original). Thus, under the current regulatory scheme, the SEC ALJ's decision "becomes final when, and only when, the Commission issues the finality order, and not before then." *Id.* Thus, the court held, the Commission's ALJs neither have been delegated sovereign authority to act independently of the Commission nor, by other means established by Congress, do they have the power to bind third parties, or the government itself, for the public benefit." *Id.*

While recognizing that "*Landry* … did not resolve the constitutional status of ALJs for all agencies," the court below held that Petitioner "failed to demonstrate" that SEC ALJs "perform … duties" sufficient to render them inferior officers. *Id.* at 289. For this reason, the court was unwilling to "cast aside [the] carefully devised scheme stablished after years of legislative consideration and agency implementation" and held that SEC ALJs were mere employees. *Id.*

The D.C. Circuit reheard the case *en banc*, agreeing to resolve the question of whether the ALJ was an inferior officer and therefore subject to the Appointments Clause. Pet. Br. 9. The *en banc* court convened on May 24, 2017. Pet. Br. 9. Equally divided, the *en banc* court issued a *per curiam* opinion denying the petition for review. Pet. App. 1a–2a.

SUMMARY OF ARGUMENT

Petitioners argue that the SEC's administrative law judges should be considered "Officers of the United States" under this Court's precedent, including *Buckley* v. *Valeo*, 424 U.S. 1 (1976). Petitioners' reading of those precedents is strongly supported by a technique called corpus linguistics—the use of electronically-searchable linguistic databases to generate empirical evidence about the meaning of words within in a particular community at a particular time. Application of that methodology shows that the D.C. Circuit's *Landry* test——and similar tests in other circuits——reflects neither the original nor modern meaning of the phrase "Officer of the United States." The Court should reject the *Landry* test in favor of a more capacious understanding of the term.

I. Empirical evidence demonstrates that "Officer of the United States" was not a legal term of art, that its original public meaning was much more expansive than the D.C. Circuit's case law affords, and that it referred to almost any federal employee. That evidence is principally derived from an analysis of the Corpus of Founding Era American English (COFEA)—a huge database containing approximately 150,000 documents from the Revolutionary War era—and a smaller database, created specifically for this case, consisting of all the Statutes-at-Large passed by the first Five Congresses between 1789 and 1799. Among others, these databases reveal references to the following federal "officers":

- The Assistant Doorkeeper of the House of Representatives;
- The Melter and Refiner of the U.S. Mint;

- The Deputy Apothecary of the U.S. Army; and
- The Purveyor of Public Supplies.

If this Court were to apply the original public meaning of the phrase "Officers of the United States," it would almost certainly extend to administrative law judges.

II. Empirical evidence also demonstrates that modern usage of the word "officer"—at least within the public sphere—continues to track the much more expansive original public meaning. To conduct the modern linguistic analysis, *amici* relied on the Corpus of Contemporary American English (COCA), a 560+ million word database capturing actual usages from 1990 to 2017. This corpus search revealed a number of low-level government employees referred to as "officers" that would nonetheless fail the *Landry* test:

- Archaeological preservation Officers (National Parks);
- Foreign Service Officers (State Department);
- Problem Resolution Officers (IRS);
- Safety Officers (FDA); and
- Wildlife Officers (National Park).

Based on this evidence, it is clear that the circuit courts' understanding of the "significant authority" test is also at odds with modern usage of "officer." If the court applied today's ordinary meaning of that word, it would easily extend to administrative law judges because, although their decisions may not be

final, they exercise a non-negligible degree of authority.

ARGUMENT

I. The Court should consider empirical evidence derived from corpus linguistics to inform its decision on the meaning of the Appointments Clause.

This Court has stated that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary . . . meaning." *United States* v. *Sprague*, 282 U.S. 716, 731 (1931). At times, the court has indicated that this means constitutional provisions should be interpreted as they were understood by "ordinary citizens of the founding generation." *District of Columbia* v. *Heller*, 554 U.S. 570, 577 (2008). Other times, the Court has relied on a modern interpretation of the text, stating that the meaning of the Constitution is not "static," but rather informed by "evolving standards of decency." *Trop* v. *Dulles*, 356 U.S. 86, 100–101 (1958); see also Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 7–8 (2005). Regardless of its approach, the Court would benefit from the use of empirical data produced by corpus linguistic tools.

1. Corpus linguistics investigates real-language use and function by analyzing huge electronic databases of naturally-occurring texts. Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L.J. 788 (hereinafter Lee & Mouritsen)(2018). These databases have an esoteric name—corpora (the plural of corpus)—but are simply digitally-searchable collections of real-world sources: books, newspapers, speeches, scholarly articles, television transcripts, etc. *Id.* at 33. The sources are said to occur "naturally" because they "were not elicited for the purpose of the study. That is . . . no one ask[ed] the

speakers or writers whose words are represented in the corpus to speak or write for the purpose of subjecting their words to linguistic scrutiny. Instead, the architect of the corpus assemble[d] her collection of speech and writing samples after the fact." Stephen C. Mouritsen, *The Dictionary is not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning,* 2010 B.Y.U L. Rev. 1915, 1954—1955.

Although corpus linguists use many different tools, when interpreting a historical text scholars often follow the following procedure:

- Identify a corpus that corresponds with the speech community and time period she wishes to investigate;
- Search for the relevant search term using a "Keyword in Context" (KWIC) feature, which finds and displays in context every instance of the queried term in the database;
- Generate a random (and thus likely representative) sample of the returned KWIC lines large enough to generate statistically significant effects; and
- Code each KWIC line in the sample for its relevant word sense, relying on the system's expanded context feature when necessary.[6]

[6] See*, e.g.,* James Cleith Phillips & Jesse Egbert, *Advancing Law & Corpus Linguistics*, 2018 B.Y.U. L. Rev. (forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3057415.

This approach can produce useful quantitative and qualitative data about the real-world usage of the relevant term.

It bears emphasis, however, that the sources contained in the corpus must be pulled from the relevant speech community being investigated. James Cleith Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S.* Constitution, ___ S. Tex. L. Rev. (forthcoming 2018), *available at* https://ssrn.com/abstract=3036938. A corpus composed entirely of the transcripts from Argentinian telenovelas cannot provide relevant data for investigating the speech patterns of American diplomats. Likewise, a 16th century Shakespearean corpus will likely be unhelpful in clarifying the meaning of modern legal texts. But a corpus that is contextually relevant "is like Lexis on steroids." Brief for Open Government Project as Amicus Curiae at 14, *FCC* v. *AT&T Inc.*, 562 U.S. 397 (2011). Searching it for a particular term produces a set of real-world examples (called "KWIC" or "concordance lines") drawn from the database and showing how that term has actually been used within the community in question.

Of course, not all of the examples produced by the corpus will be helpful. Like Google or Westlaw, a corpus search will sometimes identify sources in which the queried term was used in a very different context. Other times the usage will be vague or ambiguous. But analyzing a random sample of concordance lines, as a whole, produces a broader empirical picture, defining the range of potential meanings a word or phrase may take and often revealing trends and patterns that would have otherwise remained unnoticed.

2. This approach should feel familiar to most judges. Courts search for real-world examples of linguistic usage to help make sense of ambiguous legal passages all the time. For example, in *Heller*, this Court considered concrete examples mined from "founding era sources" of how the phrases "keep arms" and "bear arms" were actually used by contemporaries of the Constitution. 554 U.S. at 581-592.

The problem is that until now "a judge has [had] no way of determining whether she is correct in her assessment that her own interpretation is widely shared." Lawrence Solan, *et. al.*, *False Consensus Bias in Contract Interpretation*, 108 Colum. L. Rev. 1268, 1273 (2001). Linguists have long noted the fallibility of human linguistic intuition. Because "humans tend to notice unusual occurrences [of words] more than typical ones," judges run the risk of over-crediting the frequency of obscure word senses. Douglas Biber et. al., Corpus Linguistics: Investigating Language Structure and Use 3 (1998).

To combat this, some judges have turned to electronic databases to help generate more examples of real-world usage than they can think of on their own, as a way to check their linguistic intuition. This Court did so in *Muscarello* v. *United States*, "survey[ing] modern press usage [of the word "carry"] by searching computerized newspaper databases." 524 U.S. 125, 129-130 (1998). Likewise, in *United States* v. *Costello*, Judge Posner performed a Google search "of several terms in which the word 'harboring' appears" on the "supposition that the number of hits per term is a rough index of the frequency of its use." 666 F.3d 1040, 1044 (7th Cir. 2012). While these approaches had

some methodological shortcomings,[7] they are laudable for their efforts to check the court's linguistic assumptions.

Corpus linguistics simply empowers the judge to do this in a systematic—and more scientific—fashion: systematic because it follows a set methodology and relies on principles of statistical significance and random samples; and scientific because it is both falsifiable and repeatable: subsequent researchers can test the validity of any dataset by performing the corpus search again on their own. This approach does not supplant the judge as the ultimate decision maker. It simply furnishes the judge with more and better data to help inform her ultimate decision.

3. Over the last few years, some judges have cautiously begun applying corpus linguistic tools and techniques to issues of statutory interpretation. For example, in 2011 Justice Ginsburg cited corpus linguistics data during oral arguments in *FCC* v. *AT&T, Inc.*, 562 U.S. 397 (2011). See Transcript of Oral Argument in No. 09-1279 at 37. The case boiled down to whether the word "personal" as used in the Freedom of Information Act was merely the 'adjectival form' "of the noun person" so that the phrase "personal privacy" encompassed corporate privacy. See 562 U.S. at 406. While the opinion did not cite corpus linguistics directly, its reasoning largely tracked the amicus brief by the Project on Government Oversight, which did.

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[7] See*, e.g. Muscarello*, 524 U.S. at 129 (Breyer, J.) (describing his own empirical approach as "crude[]"); *State* v. *Rasabout*, 356 P.3d 1258, 1280 (Utah 2015) (Lee, J. concurring) (critiquing Judge Posner's reliance on Google searches); Lee & Mouritsen, at 812-813 (same).

That same year, Justice Lee of the Utah Supreme Court became the first judge in the country to expressly use corpus linguistics in an opinion. *In re Adoption of Baby E.Z.*, 266 P.3d 702 (Utah 2011) (Lee, J. concurring). Relying on empirical data drawn from Brigham Young University's Corpus of Contemporary American English (COCA),[8] he concluded that the term "custody determination" as used in the federal Parental Kidnapping Prevention Act did not extend to adoption proceedings because "the most common family-law sense of the word 'custody' occurs in the setting of a divorce." *Id.* at 724.

Since then, a number of state supreme court justices have followed suit.[9] For example, the majority and dissent in *People* v. *Harris*, a Michigan Supreme Court case in which both the majority and dissent relied on the COCA to analyze whether someone had been forced to make an involuntary statement if the "information" he provided law enforcement officers was actually false. 885 N.W.2d 832.[10]

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[8] Corpus of Contemporary American English, https://corpus.byu.edu/coca/.

[9] See*, e.g.*, *Fire Ins. Exchange* v. *Oltmanns*, —___ P.3d —___ (Utah 2017), 2017 UT 81 ¶57 n.9 (Durham, J. concurring) ("[Corpus linguistic] tools for empirical analysis are readily available for lawyers and should be used when appropriate"); *cf. State* v. *Canton*, 308 P.3d 517 (interpreting the phrase "out of the state" based on an analysis of the use of that phrase in newspaper articles compiled through a Google News search)

[10] Corpus linguistics has also been used to settle trademark disputes at the trial level for many years. See Barton Beebe & Jeanne C. Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion & Congestion*, 131 Harv. L. Rev. 945 (2018).

4. Thus far, all these cases have involved the interpretation of modern statutes and have therefore relied on data derived from modern English corpora such as the COCA. But these tools are less helpful for cases involving constitutional interpretation, at least to the extent the Court is interested in discovering the meaning understood by "ordinary citizens of the founding generation." If one is interested in the original public meaning, a modern corpus is just as unhelpful as a corpus derived from sources from the wrong community—it fails to account for subsequent changes in language patterns. As Justice Lee has explained, "This is the problem of linguistic drift—the notion that language usage and meaning shifts over time." Thomas R. Lee & James Cleith Phillips, *Data-Driven Originalism*, *available at* http://ssrn.com/abstract=3036206 [hereinafter Lee & Phillips] .

Sometimes these changes can be quite dramatic, and occur for no apparent reason. Consider the following (possibly apocryphal) account of the rebuilding of St. Paul's Cathedral in 1675, taken from a linguistics column published during the early twentieth century:

> When architects' drawings for the rebuilding of St. Paul's Cathedral after the fire were submitted, Sir Christopher Wren was told that his design had been chosen because it was "at the same time the most awful and the most artificial." A modern architect would hardly think such a verdict complimentary. Far from being disparagement, it was the highest praise. "Awful" correctly meant inspiring awe, and "artificial" designed with art.

Arthur Ponsonby, *The King's English*, The Baltimore Sun, M15 (March 18, 1928); *see also* John W. Welch, *et. al. The Preamble's Principal Place in Constitutional Law*, 91 S. Cal. L. Rev. (forthcoming 2018), available at http://ssrn.com/abstract=3131207. Such shifts can—and have—occurred with words and phrases contained in the Constitution. For example, Article IV, Section 4 states that "[t]he United States . . . shall protect each of [the states] . . . against domestic violence." At the time of the founding, "domestic violence" referred to civil unrest and public upheaval rather than the abuse of one's spouse or children as it does today. Lee & Phillips at 4 .

5. Until recently, no eighteenth century American English corpus existed. But in late 2017, Brigham Young University Law School launched a beta version of the Corpus of Founding Era American English ("COFEA"). COFEA currently contains approximately 150 million words. The texts were mined from Evans Early American Imprint Series (featuring books, pamphlets, and broadsides covering a broad array of subjects), Hein Online's Legal Database, and the papers and correspondence of George Washington, Benjamin Franklin, John Adams, Thomas Jefferson, James Madison, and Alexander Hamilton, as contained in the National Archives Founders Online Project. Future versions of COFEA will include additional sources such as colonial newspapers, the Records of the Federal Convention of 1787, and the Documentary History of the Ratification of the Constitution. Lee & Phillips at 31.

In the sections that follow, we use COFEA and other founding era corpora to show that the original public meaning of the phrase "Officers of the United

States" encompassed significantly more employees than allowed under the D.C. Circuit's *Landry* test. We then use COCA to show that this original meaning has remained largely unchanged in the public context since the time of the Founding. Accordingly, the Court should reverse the D.C. Circuit's decision, and fashion a test that accords with either the original or modern meaning of the phrase, or both.

II. Empirical evidence from the Founding era shows that "Officers of the United States" was not a legal term of art.

The phrase "Officer(s) of the United States" appears in COFEA just 109 times between 1787 and 1799, with just over a third of those being direct quotations of the Constitution.[11] This is a tiny minority of the 5,353 times the word "officer" appears in the database overall during this same period—even though 59.8% of the time the word "officer" appears in COFEA it is clearly referencing a federal employee.

1. While the relative obscurity of the longer phrase does not prove that it was *not* a legal term of art at the time of the Founding, we perceive no specialized meaning attached to its use. Instead, the appellation was often used simply to clarify that the agent was in the employ of the federal government, as opposed to a private actor or employee of a state or territory.

For example, in a letter to George Washington, General Arthur St. Clair expressed concern that the

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[11] Our raw data can be accessed at goo.gl/7xt8XP under the "COFEA 'Officers of the US' 1787-199" tab. To replicate our re-

Attorney General of the new Ohio territory "would be an Officer of the Territory only, whereas he should be an Officer of the United States." Likewise, Alexander Hamilton wrote to New York merchant William Seton, requesting he purchase public debt on behalf of the federal government since the government had yet to "employ some officer of the United States" for the task.

We do not see any linguistic evidence to suggest that the term was limited to only a small subclass of all federal officials. To the contrary, it applied broadly to all government employees—"civil and military" —exercising any non-trivial federal authority. For instance, in his Eighth Annual Address to Congress at the end of 1797, George Washington called for "legislative revision" of "[t]he compensation to the officers of the United States," particularly "in respect to the most important stations." Had "Officers of the United States" been understood to refer only to those federal employees with a significant degree of authority, as *Landry* suggests, there would be no need to give special emphasis to "the most important stations." Congress responded the following March, raising the salaries of sundry government officials, high and low. Act of March 19, 1798, ch. 18, 5 Stat. 542. Nevertheless, Congress did not use the phrase "Officers of the United States" in the appropriations bill, but instead referred generally to "officers," "offices," and "persons employed." *Id.*

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sults, search COFEA for "Officer of the United States" and "Officers of the United States" for the years 1787-1798. Corpus of Founding Era American English, BYU Law Corpora, https://lawncl.byu.edu/cofea/.

2. Our findings are buttressed by those of Professor Jennifer Mascott, who used aspects of corpus linguistics to demonstrate that the phrase "Officers of the United States" was in use prior to the creation of the Constitution. Jennifer L. Mascott, *Who Are "Officers of the United States"*? 70 Stan. L. Rev. 443 (2018). Using a corpus of 340,000 issues of early American newspapers, she found twenty uses of the phrase "prior to the signing of the Constitution on September 17, 1787." *Id.* at 478. The first reference was in 1780, describing Benedict Arnold as a "general officer of the United States." *Id.* It appeared again in 1783 referring simply to continental officers. Sometimes the phrase was used with "slight variations," showing the phrase was not a term of art. Other uses included "Judicial Officers of the United States" and "commissaries and other officers of the United States" who gave out certifications of debt under the Constitution. *Id.* at 479.

Professor Mascott also performed a corpus analysis of the Journals of the Continental Congress, "a highly relevant source for identifying the well-understood meaning of legally relevant terms and phrases in the time period just prior to…the drafting and ratification of the Constitution." *Id.* at 477. The Journals contain forty-one references to "officer(s) of the United States." Often the phrase was "just another way to describe continental military officers or to identify continental-level, as opposed to state-level, officers." *Id.* at 477-478. For example, one letter distinguished between the time a military officer served as an "officer of the United States" and time served as a captain for his State. *Id.* at 478 n.175.

But even if "Officers of the United States" was a legal term of art, its original meaning was much more

expansive than *Landry* imagines, and appears to have applied to all government employees—"civil and military" —exercising any degree of federal authority. COFEA similarly reveals that the term applied to not just high ranking government officials, but also customs officials,[12] loan officers,[13] and law enforcement officials carrying out warrants.[14]

III. Empirical evidence derived from corpus linguistics demonstrates that the original public meaning of "officer" would have encompassed an ALJ.

If we are correct that "Officers of the United States" was not a new legal term of art, then it is instead simply "a descriptive phrase indicating the officers are federal, and not state or private, actors." Mascott, at 471. The meaning of "officer" in the Constitution should thus correspond with the original public meaning of the term "officer" in general.

1. The word "officer" appears in COFEA 5,353 times between 1787 and 1799. Analysis of a random

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[12] *Letter from Alexander Hamilton to Robert Purviance* (August 22, 1794), *in* XVII The Papers of Alexander Hamilton 127 (Harold C. Syrett, ed., Colum. Univ. Press 1972).

[13] *Letter from Abishai Thomas to Alexander Hamilton* (June 14, 1792), *in* XI The Papers of Alexander Hamilton 520 (Harold C. Syrett, ed., Colum. Univ. Press 1966).

[14] Hugh H. Brackenridge, Incidents of Insurrection in the Western Parts of Pennsylvania, in the Year 1794 57 (1795), *available at* https://quod.lib.umich.edu/e/evans/N21549.0001.001?rgn=main;view=fulltext.

sample of 540 of these concordance lines[15] reveals the title was applied to a startling range of officials, including the President, Vice President, Speaker of the House, Secretary of State, Minister Resident to the Hague, U.S. Attorney, Collector, Naval Officer, auditor, excise officer, custom-house officer, and loan officer.[16]

We also created a specialized corpus of all Statutes-at-Large passed by the first five Congresses of the United States between 1789 and 1799. Congressional understanding of the word is particularly relevant because the Constitution delegates to Congress—and only Congress—the authority to deviate from the standard appointment process: while most officers were to be appointed by the President with the advice and consent of the Senate, "the Congress may by Law vest the Appointment of . . . inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Ironically (given the year of the Constitutional Convention), the word "officer" appears in these statutes 1787 times, although that number goes down to 1411 when footnotes and sidebars—inserted by a later editor—are excluded. Of these 1055, or 74.8%, refer to civil officers; 311, or 22% refer to military officials; and 26, or just under 2%, refer to non-government employees. The remaining 1.3% of concordance lines were too

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[15] This sample gives us a 95% confidence interval with only a 4% margin of error.

[16] Raw data available at goo.gl/7xt8XP under the "'Officer' in Statutes-at-Large (1789-1799)" tab. Our results can be replicated by searching for "officer" in the Corpus of Founding Era Congressional Statutes. Corpus of Founding Era Congressional Statutes, BYU Law Corpora, https://lawncl.byu.edu/cofecs/.

ambiguous to code. The word was used in a number of contexts including the creation of new government positions, the enumeration of responsibilities, and the appropriation of funds.

As with the full phrase "Officers of the United States" the list of government employees referred to as "officers" is expansive. In addition to high-ranking officials such as the President, Vice President, and Secretary of State, specific enumerated officers included less glamorous positions such as the Purveyor of Public Supplies, the accountant of the War Office, and "the melter and refiner [of the U.S. Mint]." Each Port in the United States had three "customs officers" appointed by the President and confirmed by the Senate—a "Collector," "Naval Officer,"[17] and "Surveyor," whose duties included receiving ship manifests and inspecting imports. Even the "doorkeeper" and "assistant doorkeeper" of the House of Representatives—whose responsibilities included such important tasks as "tak[ing] care of the apartments occupied by the" House and "providing fuel and other accommodations" for Congressional sessions—were referred to as both "offices" and "officers"— —three times.[18]

Additionally, the corpus reveals that Congress created a small army of low-ranking government agents throughout the country—some appointed directly by

[17] The term "naval officer" here can be deceptive to modern readers. It was a civil, not military, position within the Treasury Department. See Act of July 31, 1789, ch. 5, 1 Stat. 37.

[18] See Act of April 12, 1792, ch. 20, 2 Stat. 252.

the President[19] and others by heads of departments[20]—including "officers of inspection,"[21] "accounting officers,"[22] patent officers,[23] "revenue officers,"[24] "custom-house officers,"[25] "loan officers,"[26] "health officers,"[27] "recording officers,"[28] and "auxiliary officers."[29] The Treasury Department even appointed individual "officers" to survey each "distillery" and "still" of "spirits" in the Union.[30] Congress sometimes, but not always, referred to clerks and attendants as officers,[31] going as far as to require "each and every clerk and other officer . . . in any of the depart-

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[19] See, *e.g.* Act of Aug. 4, 1790, ch 35, 1 Stat. 175 (noting that the president appoints "officers of the customs")

[20] See, *e.g.* Act of Feb. 25, 1791, ch. 10, 1 Stat. 192 (empowering directors of the Bank of United States to appoint inferior officers).

[21] See, *e.g.* Act of Mar. 3, 1791, ch. 15, 1 Stat. 202.

[22] See, *e.g.* Act of Feb. 12, 1793, ch. 6, 2 Stat. 332.

[23] See, *e.g.* Act of Apr. 10, 1790, ch. 7, 1 Stat. 112.

[24] See, *e.g.*, Act of Mar. 26, 1794, ch. 2, 3 Stat. 400.

[25] See, *e.g.* Act of May 22, 1794, ch. 35, 3 Stat. 370.

[26] See, *e.g.* Act of March 14, 1794, ch. 6, 3 Stat. 343.

[27] See, *e.g.* Act of June 9, 1794, ch. 61, 3 Stat. 394 (consenting to Maryland's creation of s state health officer for the Port of Baltimore and allowing it to impose additional duties on imports to fund the position).

[28] See, *e.g.* Act of June 15, 1798, ch. 54, 5 Stat. 567.

[29] See, *e.g.* Act of July 11, 1798, ch. 71, 5 Stat. 591.

[30] Act of March 3, 1791, ch. 15, 1 Stat. 203-204.

[31] Act of Dec. 23, 1791, ch. 3, 2 Stat. 226.

ments of the United States . . .[to] take an oath or affirmation before one of the justices of the supreme court, or one of the judges of a district court of the United States, to support the constitution."[32] "Officers of the court," included clerks[33] and marshals.[34]

Within the military, there were two classes of "officers" —commissioned and non-commissioned. Commissioned officers, from lowly cornets up to major generals, received their commissions directly from the President. These included some surprising military positions, including chaplains,[35] deputy apothecaries[36] and "a competent number of hospital surgeons,"[37] who each had to be appointed in the same way "as other officers of the United States"—meaning nominated by the President and confirmed by the Senate. Act of March 2, 1799, ch. 27, 5 Stat. 721. Non-commissioned officers, however, were simply soldiers who had moved up through the ranks. They received no presidential commission or appointment, yet they were still considered "officers."

2. Once again, Professor Mascott's empirical work confirms these findings. Using a digitized version of Nathan Bailey's popular eighteenth-century dictionary as a corpus, she identified 500 sentences containing the word "office" or "officer." These included a

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[32] Act of March 3, 1791, ch. 18, 1 Stat. 215.

[33] Act of June 15, 1798, ch. 54, 5 Stat. 567.

[34] Act of March 2, 1799, ch. 22, 5 Stat. 696.

[35] Act of March 5, 1792, ch. 9, 2 Stat. 241.

[36] Act of March 2, 1799, ch. 27, 5 Stat. 721.

[37] *Id.*

number of record-keepers, assistants, and employees assigned menial tasks including:

> (i)The "Agistator" who took cattle into the forest; (ii) the "Chafe-Wax" who "fit[ted] the wax for the sealing of writs"; (iii) the "Expenditor," "a steward or officer, who look[ed] after the repairs of the banks of [a] [m]arsh"; (iv) the "Gauger" who measured liquids carried on a merchant ship; (v) the "Searcher" "whose business [was] to examine, and by a peculiar seal to mark the defects of woolen cloth"; and (vi) the "Swabber," "an inferior officer on board a ship o[f] war, whose office it [was] to take care that the ship be kept clean."

Id. at 492.

Mascott also notes that the term "officer" was used repeatedly in the Federalist and Anti-Federalist papers. Between them, the essays included over 600 uses of the terms "office(s)" or " officer(s)." *Id.* at 474. She asserts that the Anti-Federalists used the term "officer" to reference "rank-and-file officials." *Id.* at 52. For example, Brutus feared Congress's taxation power would lead to "the appointment of a swarm of revenue and excise officers to pray [sic] upon the honest and industrious part of the community . . . ." Brutus, *Federal Taxation and the Doctrine of Implied Powers (Part I)* (1787), *in* The Anti-Federalist Papers. Additionally, Richard Henry Lee wrote: "To discern the nature and extent of this power of appointments, we need only to consider the vast number of officers necessary to execute a national system in this extensive country." *An Anti-Federalist View of the Appointing Power Under the Constitution* (Federal Farmer XIII), *in* The Anti-

Federalist Papers. He also expressed that in the federal capital city, the only non-officer personnel category was that of "servant" or "attendant." *Id.*

The Federalists were not as concerned with the number of federal officers, but this is not because they did not believe the term "officer" accounted for almost all federal employees, but because they disagreed with the Anti-Federalist view that the federal government would be expansive. Mascott, at 502-503. Still, as Alexander Hamilton said: "As to persons to be employed in the collection of the revenues, it is unquestionably true that these will form a very considerable addition to the number of federal officers . . . ." The Federalist No. 84 (Alexander Hamilton).

3. Thus far, this Court's case law has always reflected this broad understanding of "Officers of the United States," acknowledging that even relatively minor government officials such as "a postmaster first class" and a "clerk of the district court" were "inferior officers of the United States within the meaning of the Appointments Clause."[38] Nevertheless, the circuit courts have become distracted by *Buckley*'s "significant authority" language, fashioning balancing tests that do not take into account past case law, much less

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[38] *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976); *Myers* v. *United States*, 272 U.S. 52 (1926) (holding that a "postmaster of the first class" was an "Officer of the United States"); *United States* v. *Germaine*, 99 U.S. 508, 509-510 (1879) ("[A]ll persons who can be said to hold an office under the government . . . were intended to be included within one or the other . . . modes of appointment [specified in the Constitution]."); *Ex parte Hennen*, 38 U.S. 225 (1839) (holding that law clerk was an inferior officer).

available linguistic evidence.[39] For example, in *Landry* v. *FDIC,* 204 F.3d 1125 (D.C. Cir. 2000), the D.C. Circuit established three "criteria" for courts to consider when distinguishing between inferior officers and employees: "(1) the significance of the matters resolved by the officials, (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions." *Tucker* v. *Comm'r*, 676 F.3d 1129, 1133 (D.C. Cir. 2012). Using this test, the court concluded that administrative law judges—who "conduct public hearings in a manner similar to federal bench trials," "preside at and regulate the course of th[ose] hearings," and "set filling deadlines, issue subpoenas, hold prehearing conferences, and rule on motions"[40]——were not inferior officers.

But in light of this Court's precedent and the linguistic norms of the Founding era, a more accurate reading of the *Buckley* test is that an "Officer of the United States" is any federal employee that exercises

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[39] *Samuels, Kramer & Co.* v. *C.I.R.*, 930 F.2d 975, 986 (2d Cir. 1991) (examining the duties of the individual, whether the individual exercises discretion, and whether they perform important functions); *U.S. ex. rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 758 (9th Cir. 1993) (examining whether an individual has "primary responsibility" and "significant authority" to enforce the law); *Bandimere* v. *SEC*, 844 F.3d 1168 (10th Cir. 2016) (examining whether the position is established by law, whether the person exercises significant discretion in performing important functions, and whether the position's salary, duties, and means of appointment are determined by statute).

[40] U.S. Security and Exchange Commission, *Office of Administrative Law Judges*, https://www.sec.gov/alj.

non-negligible government authority. [41] If a judicial law clerk—not to mention the assistant doorkeeper of the House of Representatives—is an "Officer," surely an ALJ is, too.

IV. Empirical evidence derived from corpus linguistics demonstrates that the ordinary meaning of a public "officer" today includes ALJs.

Corpus linguistics analysis also demonstrates that the *Landry* test is at odds with the modern understanding of a public officer. Our findings show that the ordinary meaning of "officer" encompasses a host of employees whom the D.C. Circuit, using its current framework, would likely not classify as such. Specifically, the term "officer" includes public officials responsible for governmental duties of almost any level of significance.

1. To conduct our modern corpus analysis, we used the Corpus of Contemporary American English (COCA), a 560+ million word corpus capturing actual usages from 1990 to 2017. COCA is equally divided

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[41] Recent scholarship has suggested that a corpus analysis can be strengthened by investigating the relative frequency of the queried term's synonyms. See Lawrence M Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2018 B.Y.U. L. Rev. ___ (forthcoming 2018) *available at* https://ssrn.com/abstract=3047150. One recent study found significant overlap in the use of the word "officer" and the phrase "public employment. James Cleith Phillips, *et. al.*, *Investigating the Original Meaning of 'Officers of the United States' with the Corpus of Founding-Era of American English*, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126975.

among spoken, fiction, popular, magazines, newspapers, and academic texts. It strives to capture the full spectrum of American English—containing everything from scholarly medical journals to the transcripts of the Jerry Springer show.

Using COCA, we searched for the term "officer." That initial search resulted in 48,353 hits. From these results, we generated a statistically significant random sample of 604 concordance lines.[42]

Our analysis revealed a stark contrast between the use of the word "officer" in public and private contexts. For our purposes, the public context includes any level of government—be it federal, state, or local—while the private context includes all private entities, including business, non-profit, and religious organizations.

Only 18% of concordance lines referred to *private* officers. And analysis revealed that, in the context of business organizations, officers are "the most senior employees" and "are in charge of the day-to-day operations . . . mak[ing] many of the decisions that define a corporation's activities," D. Gordon Smith & Cynthia A. Williams, Business Organizations: Cases, Problems, and Case Studies 174 (3d ed. 2012). They are what we might refer to as the "top brass" of the organization, with titles that typically include the word "Chief"—Chief Executive Officer, Chief Financial Officer, General Counsel, etc.

But in the public context—represented by 78% of our sample—the original public meaning described

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[42] Raw data may be accessed at goo.gl/7xt8XP under the "'Officer' in COCA" tab. To replicate our results, search for "officer" in the Corpus of Contemporary American English. http://corpus.byu.edu/coca).

above still prevails, with "officer" referring to almost any public employee exercising a modicum of government authority. This is exemplified best in the many references to law enforcement—police officers, FBI agents, highway patrolmen, etc.—which make up 59% of our overall sample. Even the newest cop assigned to the traffic beat of the smallest police department is still referred to as an "officer."

But our sample is replete with other low-level government employees being referred to as "officer." On the federal level, these include: "archaeological protection officers" (National Parks),[43] "foreign service officers" (State Department),[44] "problem resolution

[43] David Holmstrom, *A Summer Camp Where Community Service is Key*, Christian Science Monitor (Aug. 16, 1994), *available at* https://www.csmonitor.com/1994/0816/16101.html.

[44] See*, e.g., Retired Marine Col. James C. Magee, 77, Dies*,, Wash. Post (Dec. 19, 1990), *available at* https://www.washingtonpost.com/archive/local/1990/12/19/retired-marine-col-james-c-magee-77-dies/643eef00-c905-4cb4-95d9-af6719cc39ec/?utm_term=.156253bbba87.

officers" (IRS),[45] "safety officers" (FDA),[46] "regional security officers" (State Department),[47] "intelligence officers" (CIA),[48] "wildlife officers" (National Parks),[49] and "contracting officer."[50] The umbrella is expanded when state and local usage is added to the mix: "prison

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[45] Elizabeth MacDonald, *Six Ways to Survive an IRS Audit*, Buffalo News (Sept. 11, 1994), *available at* http://buffalonews.com/1994/09/12/six-ways-to-survive-an-irs-audit/.

[46] Melissa Block, *Analysis: Lester Crawford officially named head of the FDA*, NPR: All Things Considered, Feb. 14, 2005.

[47] *Lives Could Have Been Saved in Benghazi*, Real Clear Politics Video (Sept. 8, 2013), *available at* https://www.realclearpolitics.com/video/2013/09/08/gregory_hicks_lives_could_have_been_saved_in_benghazi.html.

[48] See*, e.g.*, Robert O'Harrow Jr. et. al., *NSA Leaks Puts Focus on Intelligence Apparatus's Reliance on Outside Contractors*,. Wash. Post (June 10, 2013), *available at* https://www.washingtonpost.com/business/nsa-leaks-put-focus-on-intelligence-apparatuss-reliance-on-outside-contractors/2013/06/10/e940c4ba-d20e-11e2-9f1a-1a7cdee20287_story.html?utm_term=.49d9427e6585.

[49] *Part I—Survival of the Wildest: Stopping Poachers in the Act*, CBS 48 Hours, Mar. 11, 1992.

[50] Steve Inskeep, *The Perfection of Character*, NPR (Oct. 23, 2006), *available at* https://www-s1.npr.org/templates/transcript/transcript.php?storyId=6352680.

officers,"[51] "animal control officers,"[52] "licensing officers,"[53] "truant officers,"[54] "water authority officers,"[55] "child welfare officers,"[56] "community service officers,"[57] "hearing officers,"[58] "placement officers,"[59] and

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[51] Ross B. MacDonals et. al., *The Politics of Victimhood*, 60 J. of Int'l Affairs 173 (2006), *available at* https://www.thefreelibrary.com/The+politics+of+victimhood%3A+historical+memory+and+peace+in+Spain+and+...-a0163049402.

[52] Richard Berman, *A Liberal Dose of State Ballot Measures*, Wash. Times (Nov. 7, 2016), *available at* https://www.washingtontimes.com/news/2016/nov/7/a-liberal-dose-of-state-ballot-measures/.

[53] Kenneth R. Timmerman, *Close-out Sale at Commerce*, 28 Am. Spectator 36 (Aug. 1995).

[54] *Truant Officers Attend to Schools' Needs*, Chicago Sun-Times, (Sept. 11, 1992).

[55] Allison Brown, *Counting Farmers Markets,* 91 Geog. Rev. 655 (Oct. 2001), *available at* https://www.questia.com/library/journal/1G1-93207326/counting-farmers-markets.

[56] Professor X, *In the Basement of the Ivory Tower*, Atlantic (June 2008), *available at* https://www.theatlantic.com/magazine/archive/2008/06/in-the-basement-of-the-ivory-tower/306810/.

[57] *Elgin Community Service Officer Charged with Theft of Explorer Funds*, Chicago Tribune (Jan. 4, 2016), *available at* http://www.chicagotribune.com/suburbs/elgin-courier-news/news/ct-ecn-elgin-police-criminal-charges-st-0105-20160104-story.html.

[58] Christopher N. Osher, *Denver Inmate Abuse Case Brings Up Old Questions about depty conduct*, Denver Post (Apr. 27, 2016), *available at* https://www.denverpost.com/2014/09/03/denver-inmate-abuse-case-brings-up-old-questions-about-deputy-conduct/.

[59] J. Heilemann et. al., *Uncle Sam Doesn't Want You*, 22 Wash. Monthly 38 (Dec. 1990).

"senior fisheries officer[s]."[60] Many of these government officials exercise only *de minimis* authority. Yet they are nonetheless considered "officers" in today's ordinary speech.

References to military officers comprise 28% of our overall sample. As at the Founding, there remains a distinction between "commissioned officers" and "non-commissioned officers" (NCOs). Today, commissioned officers—all 359,090 of them—have each received a presidential commission and confirmed by the Senate.[61] This includes even the most recent ROTC graduate.

By contrast, a non-commissioned officer or NCO is one who climbs to a particular rank among enlisted service members and exercises even modest authority over other enlisted service members.[62] Combined, the two classes of "officers" comprise more than 64.5% of the entire military.[63] And all of them—NCOs as well as commissioned officers—are considered "officers."

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[60] Carlos M. Duarte, *Will the Oceans Help Feed Humanity?*, 59 Bioscience 967 (2009).

[61] U.S. Dep't of Defense, *Officer Rank Insignias*, https://www.defense.gov/About/Insignias/Officers/; Dep't of Defense, 2016 Demographics Report 6 (2016).

[62] See U.S. Dep't of Defense, *Enlisted Rank Insignias*, https://www.defense.gov/About/Insignias/Enlisted/; see also Non-commissioned officer, Black's Law Dictionary 1258 (10th ed. 2014) ("An enlisted person in the Army, Air Force, or Marine Corps in certain pay grades above the lowest pay grade.").

[63] Dep't of Defense, 2016 Demographics Report 6, 15 (2016) (916,078 of 1,419,231; of those, 359,090 are commissioned and 546,988 are NCOs).

Our data also reveal that occasionally the public and private senses of the word "officer" are inverted. The corpus contains a handful of references to corporate employees outside the top brass being referred to as "officers"—i.e "security officer," "officer in the church," and "loan officer." More rare is when a government position is described using corporate jargon. For example, in 2009 President Obama created a position within the White House called the "Chief Technology Officer," tasked with "harness[ing] the power of technology, data, and innovation to advance the future of our Nation."[64] Interestingly enough, the White House did not consider the "Chief Technology Officer" an officer under the *Buckley* test until the position was codified in 2017 legislation.[65]

In light of these data, it is possible that the D.C. Circuit's understanding of the *Buckley* test has its origins in an erroneous—and almost certainly subconscious—importation of the *business* sense of the word "officer" to the Constitution. Contextually this makes little sense. Even today, the ordinary meaning of a government "officer" is much broader—extending to "archaeological preservation officers" and "animal control officers."

In short, our vernacular certainly considers an administrative law judge an "Officer of the United States." Our legal system should, too.

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[64] Office of Science and Technology Policy, *Office of the Chief Technology Officer*, https://obamawhitehouse.archives.gov/administration/eop/ostp/divisions/cto/.

[65] See American Innovation and Competiveness Act, Pub. L. No. 114-329, § 604, 130 Stat. 2969, 3037 (2017).

CONCLUSION

The D.C. Circuit's decision does not reflect either the original or modern sense of the phrase "Officers of the United States" which extends to any federal employee exercising non-negligible government authority. The Court should therefore reverse, and fashion an empirically sound test grounded in the linguistic meaning of the Constitution.

Respectfully submitted,

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APPENDIX

APPENDIX A: List of *Amici*

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