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## Congressional Power over Office Creation

**ABSTRACT.** The Constitution leaves the creation of the institutions of government to ordinary political processes. While intricate constitutionalized procedures govern the election of Congress, the President, and the Vice President, the Constitution anticipated but did not establish a host of other personnel and positions. Instead, it leaves the task of institution building to Congress. This Note argues that text, structure, and history demonstrate that the Constitution gives Congress exclusive authority over office creation. Textually, the Appointments Clause and the Necessary and Proper Clause together empower Congress alone to “establish[] by Law” federal offices. Structurally, Congress has the democratic and technical capacity to organize the government. And Congress’s power to “constitute” federal institutions mimics the original act of Constitution making: just as “We the People” could “ordain and establish this Constitution,” the Appointments Clause allows Congress to “establish[] by Law . . . all other Officers of the United States.”

Congress’s exclusive office-creating power has surprising and important implications for a series of live constitutional controversies. In this Note, I discuss three issues regarding the balance of power between the President and Congress in structuring the administrative state. First, I evaluate the related problems of statutory qualifications clauses and for-cause removal provisions. Perhaps counterintuitively, I conclude that qualifications clauses should almost never raise constitutional issues, but for-cause removal provisions almost always should. The Constitution’s distinction between *ex ante* office creation and *ex post* presidential control justifies such differential treatment. And it explains why *Free Enterprise Fund v. Public Company Accounting Oversight Board* was rightly decided, but also articulates a limiting principle on the President’s authority to control the executive branch. Second, I discuss the constitutionality of temporary appointments. Drawing on Justice Thomas’s concurrence in *NLRB v. SW General, Inc.*, I show that, in some circumstances, the Federal Vacancies Reform Act of 1998 makes an unconstitutional “end-run around the Appointments Clause.” But my interpretation of the Clause still gives Congress broad discretion to allow for temporary appointments. Third, this Note clarifies the employee/officer distinction in Appointments Clause jurisprudence. The Court’s decision in *Lucia v. SEC* presents a series of puzzles for the employee/officer distinction that this Note attempts to resolve. Together, these three doctrinal issues illustrate how Congress’s exclusive office-creating power ought to inform the constitutional analysis in separation-of-powers cases.



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## INTRODUCTION

The Constitution of 1789 left the creation of the institutions of government to ordinary political processes. The document included an intricate set of procedures that would allow Congress, the President, and the Vice President to take their positions in the new national government.<sup>1</sup> Yet it anticipated, but did not establish, a host of other personnel and positions – including “Heads of Departments,” “Ambassadors,” “Judges of the supreme Court,” a “Chief Justice,” and “principal Officer[s].”<sup>2</sup>

Between 1789 and 1791, the First Congress – often aware that its precedents would clarify and settle the Constitution’s meaning<sup>3</sup> – outlined many of the institutions that remain a part of the fabric of America’s constitutional order.<sup>4</sup> By September of 1789, for instance, Congress had established the Department of Foreign Affairs, the Department of War, the Department of the Treasury, the Office of the Attorney General, and the federal judiciary.<sup>5</sup> With these framework statutes, Congress asserted its vast power to create, alter, define, and limit the

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1. See, e.g., U.S. CONST. art. I, § 2 (setting the procedures for the election of the House of Representatives); *id.* art. I, § 3 (same for the Senate); *id.* art. II, § 1, cls. 2-4 (same for the President and Vice President).
  2. *Id.* art. I, § 3, cl. 6; *id.* art. II, § 2, cls. 1, 2.
  3. See David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 777 n.10 (1994) (referencing statements of James Madison and George Washington); see also Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 232 (1989) (arguing that early Congresses and Presidents understood the precedential power of their communications). President Washington was particularly keen to establish strong precedents. See, e.g., 1 ANNALS OF CONG. 28 (statement of President Washington) (enjoining the House and Senate to set aside “local prejudices or attachments” so “that the foundations of our national policy will be laid in the pure and immutable principles of private morality, and the pre-eminence of free Government be exemplified by all the attributes which can win the affections of its citizens, and command the respect of the world”); Letter from George Washington, President of the U.S., to John Adams, Vice President of the U.S. (May 10, 1789), in 2 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 246-47 (Dorothy Twohig ed., 1987) [hereinafter PAPERS OF GEORGE WASHINGTON] (“Many things which appear of little importance in themselves and at the beginning, may have great and durable consequences from their having been established at the commencement of a new general Government.” (brackets omitted)).
  4. See Currie, *supra* note 3, at 777 (describing Congress’s task as one “partly of interpretation and partly of interstitial creation, for the Framers had been too wise to attempt to regulate all the details themselves”). See generally DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801* (1997) (detailing federal office creation at the Founding).
  5. See Act of July 27, 1789, ch. 4, 1 Stat. 28 (Department of Foreign Affairs); Act of Aug. 7, 1789, ch. 7, 1 Stat. 49 (Department of War); Act of Sept. 2, 1789, ch. 12, 1 Stat. 65 (Department of Treasury); Judiciary Act of 1789, ch. 20, 1 Stat. 73 (Attorney General and federal judiciary).

scope and powers of federal institutions. Since then, Congress's predominance as institution-builder-in-chief has remained a basic feature of the Constitution's separation-of-powers framework.<sup>6</sup>

Drawing on this theme of creation and construction, this Note explores Congress's role in the creation of executive-branch offices. In particular, I ask what is meant by the Constitution's mandate that "all other Officers of the United States, whose Appointments are not herein otherwise provided for, . . . shall be established by Law."<sup>7</sup> One could imagine limitless other approaches to this allocation of responsibility. For example, the Constitution could have created more Article II offices besides those of the President and Vice President, listing, for instance, the Departments of War, Treasury, or State<sup>8</sup> — and maybe going so far as to allow the electoral college to select them directly.<sup>9</sup>

By contrast, the Founders also could have taken their cue from the British, vesting the authority both to create offices and to appoint officers in the executive. Indeed, the Constitution pursues this approach elsewhere, as it collapses the office-creation and officer-appointment powers for "Ambassadors," "Consuls," and "other public Ministers."<sup>10</sup> Tacking in another direction, the Founders

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6. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 110 (2005) ("In truth, the real sweep of section 8's final clause extended not downward over states but sideways against other branches of the federal government."); Saikrishna Bangalore Prakash, *Congress as Elephant*, 104 VA. L. REV. 797, 826-31 (2018); William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS. 102, 107 (1976) (arguing that Congress alone has the responsibility to determine by law what additional authority, if any, the executive and courts are to have).
  7. U.S. CONST. art. II, § 2, cl. 2 (emphasis added).
  8. The Framers considered provisions that would create offices in the Constitution itself. See, e.g., 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 342-44 (M. Farrand ed., 1937) (Aug. 20) [hereinafter FARRAND'S RECORDS] (recording a motion by Governor Morris to establish a "Secretary of Domestic Affairs," "Secretary of Commerce and Finance," "Secretary of foreign affairs," "Secretary of War," and "Secretary of the Marine").
  9. *But cf.* Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointments Clause*, 37 SYRACUSE L. REV. 1037, 1073 (1987) ("Consistent with Madison, Hamilton dismissed as inefficient and 'impracticable' popular election of the judiciary."):
  10. U.S. CONST. art. II, § 2; see Caleb Cushing, *Ambassadors and Other Public Ministers of the United States*, 7 Op. Att'y Gen. 186, 193 (1855) ("In a word, the power to appoint diplomatic agents, and to select for employment any one out of the varieties of the class, according to his judgment of the public service, is a constitutional function of the President, not derived from, nor limitable by, Congress, but requiring only the ultimate concurrence of the Senate; and so it was understood in the early practice of the Government."). *But see* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 309 n.336 (2001) (questioning "whether the Constitution permits the President to appoint to a diplomatic post in the absence of a statute first creating the diplomatic post").

could have followed New York’s model by vesting office creation and officer appointment in a Council of Appointment.<sup>11</sup> Or finally, the Founders might have followed the model of the Articles of Confederation by vesting these powers *entirely* in Congress.<sup>12</sup>

Although these alternatives may seem fanciful possibilities today, their prevalence at the Founding offers an opportunity to reflect on the Constitution’s conscious allocation of responsibility: Congress creates and defines *offices* “by Law,” and the President “nominates” and “appoints” the *officers* that will fill those offices (usually subject to the Senate’s approval).<sup>13</sup> Textually, the Appointments Clause and the Necessary and Proper Clause together give Congress exclusive power over office creation. What’s more, this interpretation accords with Congress’s position as the first among equals and with the Constitution’s origins in an act of popular sovereignty. Congress’s power to “constitute” governmental institutions mimics the act of Constitution making: just as “We the People . . . ordain[ed] and *establish*[ed] this Constitution,” the Appointments Clause allows Congress to “*establish*[ ] by Law” “*all other Officers of the United States, whose Appointments are not herein otherwise provided for.*”<sup>14</sup>

Congress’s exclusive office-creating power has surprising and important implications for a host of live constitutional controversies. This Note addresses three such issues. *First*, a perennial debate in separation-of-powers scholarship concerns the President’s power to remove executive-branch officials—or, phrased differently, the limit on Congress’s power to insulate those officials from presidential control. Most recently, this debate arose during the now-concluded litigation over the constitutionality of the Consumer Financial Protection Bureau

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11. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 433 (2d ed. 1998) (describing the New York plan).

12. See ARTICLES OF CONFEDERATION OF 1781, art. IX, paras. 4-5 (“The United States in Congress assembled shall also have the sole and exclusive right and power of . . . appointing all officers of the land forces, in the service of the United States, excepting regimental officers[;] appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States[;] . . . and [appointing] such other committees and civil officers as may be necessary for managing the general affairs of the United States . . .”).

13. Although the Constitution uses the word “Officers” instead of “Offices,” the Appointments Clause makes much more sense if one understands it to refer to offices. Chief Justice Marshall agreed: “I feel no diminution of reverence for the framers of this sacred instrument, when I say that some ambiguity of expression has found its way into this clause. If the relative ‘which,’ refers to the word ‘appointments,’ that word is referred to in a sense rather different from that in which it had been used. It is used to signify the act of placing a man in office, and referred to as signifying the office itself. *Considering this relative as referring to the word ‘offices,’ which word, if not expressed, must be understood* [to be implied] . . .” *United States v. Maurice*, 26 F. Cas. 1211, 1213 (C.C.D. Va. 1823) (No. 15,747) (emphasis added).

14. U.S. CONST. pmbl. (emphasis added); *id.* art. II, § 2, cl. 2 (emphasis added).

(CFPB).<sup>15</sup> Yet the framing of the constitutional question in the CFPB litigation – whether the CFPB’s structure “attenuate[s] presidential control over core executive functions”<sup>16</sup> – invites a problematic functional analysis. Scholars have noted, for instance, that for-cause removal provisions are just one way to insulate agencies from presidential control.<sup>17</sup> But if the Constitution forbids Congress from weakening the President’s hold, then the Court will have to scrutinize a whole host of now-permissible administrative structures.<sup>18</sup> What should the Court do, for instance, about technical or professional qualifications, partisan-balance requirements, interagency consultation procedures, and other substantive statutes that structurally limit the President’s control over law execution?<sup>19</sup>

This Note’s analysis of Congress’s office-establishing power offers a sensible bright-line rule rooted in the text and structure of the Constitution.<sup>20</sup> Put simply,

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15. In *PHH Corp. v. CFPB*, the D.C. Circuit sitting en banc upheld the constitutionality of a “single Director protected against removal by the President without cause.” *PHH Corp. v. CFPB*, 881 F.3d 75, 78 (D.C. Cir. 2018) (en banc). Although PHH declined to petition for certiorari, see Yuka Hayashi, *PHH Decides Not to Appeal CFPB Case to Supreme Court*, WALL ST. J. (May 3, 2018), <https://www.wsj.com/articles/phh-decides-not-to-appeal-cfpb-case-to-supreme-court-1525369924> [<https://perma.cc/TU6N-9YBV>], the reasoning of the dissenting opinion could well be adopted by the Court in later iterations of the same challenge, see, e.g., Jonathan H. Adler, *En Banc D.C. Circuit Upholds Constitutionality of CFPB*, REASON: VOLOKH CONSPIRACY (Jan. 31, 2018, 11:03 PM), <https://reason.com/volokh/2018/01/31/en-banc-dc-circuit-upholds-constitutiona> [<https://perma.cc/3ZEG-9MED>]; Barbara S. Mishkin, *Fifth Circuit Agrees to Hear Challenge to CFPB’s Constitutionality*, CONSUMER FIN. MONITOR (Apr. 26, 2018), <https://www.consumerfinance.com/2018/04/26/fifth-circuit-agrees-to-hear-challenge-to-cfpbs-constitutionality> [<https://perma.cc/BFT9-L2Q2>].
  16. *PHH Corp.*, 881 F.3d at 80.
  17. For a sampling of the literature, see Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599 (2010); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013); Brian D. Feinstein, *Designing Executive Agencies for Congressional Influence*, 69 ADMIN. L. REV. 259 (2017); Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9 (2018); and Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013).
  18. *But see* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 523 (2010) (Breyer, J., dissenting) (“Compared to Congress and the President, the Judiciary possesses an inferior understanding of the realities of administration, and the manner in which power, including and most especially political power, operates in context.”).
  19. See generally *infra* notes 217–219 (citing literature on agency independence); Matthew A. Samburg, Note, “Established by Law”: *Saving Statutory Limitations on Presidential Appointments from Unconstitutionality*, 85 N.Y.U. L. REV. 1735 (2010) (canvassing the literature on the constitutionality of qualifications).
  20. See *infra* Section II.A.

the Constitution disaggregates the power to create offices from the power to appoint and control them, vesting the former with Congress and the latter with the President. Because of this distinction, I shall argue, *ex ante* limitations on the President's appointment power (i.e., qualifications clauses, partisan balance requirements, and so on) satisfy the structural constitutional requirements, while *ex post* or ongoing limitations on the President's control of his subordinates (i.e., for-cause removal requirements) are unconstitutional.

*Second*, I discuss an undertheorized (though practically important) bureaucratic practice: ensuring administrative continuity through acting officials or temporary appointees.<sup>21</sup> Once again, a CFPB-related controversy has raised this issue in the public's attention. Richard Cordray's resignation as Director led to a flurry of controversy and litigation over who was his legitimate successor.<sup>22</sup> Pursuant to the Federal Vacancies Reform Act of 1998 (FVRA), President Trump appointed Office of Management and Budget (OMB) Director Mick Mulvaney to serve as acting Director.<sup>23</sup> Cordray's Deputy Director, Leandra English, sued President Trump, arguing that she had become acting Director "by operation of the Dodd-Frank Act."<sup>24</sup> The district court denied English's request for a preliminary injunction, and she has since resigned and terminated her appeal in the D.C. Circuit.<sup>25</sup>

Lurking beneath the statutory dispute is a constitutional one: how can these sorts of vacancies acts be squared with the text of the Appointments Clause? After all, the Director of the CFPB is a principal officer who must be appointed with the advice and consent of the Senate.<sup>26</sup> In this case, then, the CFPB contro-

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21. See generally Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913 (2009) (examining vacancies in executive agencies from President Carter to President George W. Bush).

22. See Yuka Hayashi, *CFPB Head Cordray to Step Down, Paving Way for Change at Watchdog*, WALL ST. J. (Nov. 15, 2017, 2:35 PM), <https://www.wsj.com/articles/cfpb-director-richard-cordray-to-step-down-1510766617> [<https://perma.cc/8KGM-Q577>].

23. See *English v. Trump*, 279 F. Supp. 3d 307, 311 (D.D.C. 2018).

24. *Id.*

25. See Emily Flitter, *Consumer Bureau Official Who Sued Trump to Step Down and Drop Her Suit*, N.Y. TIMES (July 6, 2018), <https://www.nytimes.com/2018/07/06/business/cfpb-leandra-english.html> [<https://perma.cc/2A75-JAUE>]; see also Lalita Clozel, *Appeals Court Skeptical of Mulvaney's Ability to Independently Lead CFPB*, WALL ST. J. (Apr. 12, 2018, 1:06 PM), <https://www.wsj.com/articles/appeals-court-skeptical-of-mulvaney-ability-to-independently-lead-cfpb-1523552808> [<https://perma.cc/Q65B-S5PV>] (discussing oral argument in English's since-terminated appeal to the D.C. Circuit).

26. See U.S. CONST. art. II, § 2, cl. 2; *PHH Corp. v. CFPB*, 881 F.3d 75, 152 (D.C. Cir. 2018) (Henderson, J., dissenting) ("As no one disputes, the Director is a *principal officer*.").



versy casts doubt on both the Dodd-Frank Act's automatic-promotion provision<sup>27</sup> (which English claimed automatically promoted her to acting Director) and the FVRA's temporary-appointment provisions<sup>28</sup> (which President Trump used to elevate Mulvaney). Worse, the Constitution's Recess Appointments Clause provides a constitutional mechanism for filling up vacancies which the FVRA seems to have circumvented. Therefore, in a concurring opinion in *NLRB v. SW General, Inc.* last term, Justice Thomas argued that the FVRA makes an impermissible "end-run around the Appointments Clause."<sup>29</sup>

But this Note's emphasis on Congress's office-establishing authority can resolve this apparent constitutional problem. In particular, I articulate two mutually reinforcing theories of the Appointments Clause that justify statutorily authorized vacancies acts.<sup>30</sup> First, because *acting* officers perform only "special and temporary" duties, they might be *inferior* officers under the Appointments Clause. If so, Congress "may by Law vest the[ir] Appointment . . . in the President alone, in the Courts of Law, or in the Heads of Departments."<sup>31</sup> Second, because Congress's office-creating authority allows it to specify what I will call *contingent duties* (i.e., duties that become actual only upon the satisfaction of some condition precedent), the Constitution also generally allows automatic-promotion provisions like the one in the Dodd-Frank Act. Put differently, Congress can condition an officer's duties on the vacancy of another office.

Generally, careful application of one or both of these theories should justify a particular vacancies act. But I also attempt to articulate a limiting principle. Congress cannot pass statutes that allow acting officers to indefinitely perform the functions of principal officers without Senate approval. The ongoing controversy surrounding the CFPB raises just this issue. Critics of President Trump's next appointee, for instance, "accused the administration of making a placeholder nomination to keep Mick Mulvaney . . . in power longer."<sup>32</sup> Following Justice Thomas, I suggest that the prolonged tenure of temporary appointees can be constitutionally impermissible.

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27. 12 U.S.C. § 5491(b)(5)(B) (2018).

28. 5 U.S.C. § 3345 (2018).

29. 137 S. Ct. 929, 949 (2017) (Thomas, J., concurring).

30. See *infra* Section II.B.2.

31. U.S. CONST. art. II, § 2, cl. 2.

32. Lalita Clozel, *Kathy Kraninger to Be Nominated to Head Consumer Financial Protection Bureau*, WALL ST. J. (June 16, 2018, 8:18 PM), <https://www.wsj.com/articles/kathy-kraninger-to-be-nominated-to-head-cfpb-1529183308> [<https://perma.cc/5SR6-4SB4>].

*Third*, this Note’s analysis offers more guidance on the employee/officer distinction in Appointments Clause jurisprudence.<sup>33</sup> The distinction remains murky after the Court in *Lucia v. SEC* determined that the Security and Exchange Commission’s administrative law judges (ALJs) were “inferior officers” under Article II, but declined to “elaborate on *Buckley*’s ‘significant authority’ test.”<sup>34</sup> Nevertheless, Justice Kagan’s majority, Justice Thomas’s concurrence, and Justice Sotomayor’s dissent each offer a competing articulation of the distinction. Relying entirely on *Freytag v. Commissioner*,<sup>35</sup> the majority reasoned that the ALJ exercised “‘significant discretion’ when carrying out [its] ‘important functions’”—like “ensur[ing] fair and orderly adversarial hearings.”<sup>36</sup> Justice Thomas, joined by Justice Gorsuch, would define “Officers of the United States” to include “all federal officials with ongoing statutory duties.”<sup>37</sup> Justice Sotomayor would gloss the “significant authority” test to require “the ability to make final, binding decisions on behalf of the Government.”<sup>38</sup> None of the opinions, however, engages with Chief Justice Marshall’s cogent discussion of the Appointments Clause in *United States v. Maurice*.<sup>39</sup> This Note attempts to offer the “more detailed legal criteria” that the Court in *Lucia* declined to provide.<sup>40</sup> In particular, I highlight—and try to resolve—some of the puzzles raised by *Lucia*.

The argument proceeds in two Parts. In Part I, I elaborate the textual, structural, and historical arguments that demonstrate congressional supremacy in office creation. In Section I.A, I argue that the Constitution reflects a conscious attempt to tack between the competing extremes of (1) the British Constitution

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33. For some recent attempts to deal with this question, see Aditya Bamzai, *The Attorney General and Early Appointments Clause Practice*, 93 NOTRE DAME L. REV. 1501 (2018); Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443 (2018); and E. Garrett West, *Clarifying the Employee-Officer Distinction in Appointments Clause Jurisprudence*, 127 YALE L.J.F. 42 (2017).

34. See *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018). For the symposium on *Lucia* hosted by the *Yale Journal on Regulation*, see *Symposium on Lucia v. SEC*, YALE J. ON REG.: NOTICE & COMMENT (2018), <http://yalejreg.com/nc/category/symposia/symposium-on-lucia-v-sec> [<https://perma.cc/9X8N-8WKP>].

35. 501 U.S. 868 (1991).

36. *Lucia*, 138 S. Ct. at 2053 (quoting *Freytag*, 501 U.S. at 878); see *id.* (“*Freytag* says everything necessary to decide this case.”).

37. *Id.* at 2057 (Thomas, J., concurring).

38. *Id.* at 2065 (Sotomayor, J., dissenting).

39. See *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747); see also Garrett West, *Chief Justice Marshall and the Appointments Clause*, YALE J. ON REG.: NOTICE & COMMENT (Apr. 6, 2018), <http://yalejreg.com/nc/chief-justice-marshall-and-the-appointments-clause-by-garrett-west> [<https://perma.cc/HK32-LXNF>] (discussing *Maurice*); West, *supra* note 33, at 46-48 (same).

40. See *Lucia*, 138 S. Ct. at 2052.

and (2) the Revolutionary state constitutions and the Articles of Confederation. The Constitution's institutional middle road distinguishes the power to create offices from the power to fill them, vesting Congress with exclusive office-creating authority. In addition to a plain-text reading, this Section explores the drafting history of the Appointments Clause as well as an early circuit court opinion by Chief Justice Marshall to confirm this reading. In Section I.B, I show that early constitutional practice likewise supports this interpretation. President Washington and the First Congress (generally) respected the careful institutional balance that the Constitution set in place. In Section I.C, I double back to preconstitutional history to show that my interpretation of the Appointments Clause makes good sense in light of the Framers' experience under British rule and early state constitutions. In Section I.D, I briefly explain a few exceptions to my interpretation of the Clause. In sum, Part I argues that the Framers consciously vested Congress with exclusive office-creating authority.

Part II explains why this argument from text and structure matters. In Section II.A, I discuss the related problems of statutory qualifications clauses and for-cause removal provisions. Relying on the distinction between *ex ante* office creation and *ex post* presidential control, I argue that qualifications clauses should almost never raise constitutional problems, but for-cause removal provisions almost always should. In Section II.B, I discuss the constitutionality of temporary appointments. Drawing on Justice Thomas's recent concurrence in *NLRB v. SW General, Inc.*,<sup>41</sup> I show that the FVRA sometimes (but only sometimes) makes an unconstitutional "end-run around the Appointments Clause."<sup>42</sup> In Section II.C, I argue that this Note also helps clarify the employee/officer distinction in Appointments Clause jurisprudence and elaborate on the reasoning in *Lucia v. SEC*.

## I. CONGRESS AND THE APPOINTMENTS CLAUSE

This Part argues that the Constitution strikes a careful institutional balance that gives Congress exclusive authority over office creation but gives the President the power to appoint and control those officers. This institutional balance finds support in the Constitution's text and structure, conforms to early practice under President Washington and the First Congress, and improves on the Founders' unsatisfactory experience under the British and early state constitutions.

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41. 137 S. Ct. 929, 945 (2017) (Thomas, J., concurring).

42. *Id.* at 949.

### A. Text and Structure

Read with care, the Constitution’s text strikes a subtle institutional balance between Congress’s authority to create offices and the President’s power to appoint (and control) officers.<sup>43</sup> Before the President may select and appoint someone to assist with the execution of the laws, he or she must rely on general authorizing statutes that vest him or her with the authority to appoint. Put another way, the officer holds an office that must be “established by Law.”

First, the Necessary and Proper Clause and the Appointments Clause must be read together to show that Congress has the *exclusive* authority to create executive-branch civil offices.<sup>44</sup> Most generally, the Necessary and Proper Clause gives sweeping authority to Congress to structure the other branches of the federal government—what some have called its horizontal effect.<sup>45</sup> Under this Clause, Congress enjoys the power to “carr[y] into Execution” not only the “foregoing Powers” (that is, its own Article I, Section 8 powers), but also “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>46</sup> Because the text of this grant of congressional power references the Vesting Clauses of Article II and Article III, it allows Congress to pass laws augmenting and channeling the powers of the executive and judicial branches.<sup>47</sup> Rightly understood, the Clause reinforces

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43. This distinction between officers and offices has long been well recognized. See, e.g., Edward Bates, *Plurality of Offices*, 10 Op. Att’y Gen. 446, 447-48 (1863) (arguing that nothing prevents one person from holding multiple offices); Caleb Cushing, *Duplicate Offices*, 8 Op. Att’y Gen. 325, 325-26 (1857) (stating that he is “not aware” of any provision that “forbids the holding of two distinct offices or appointments by the same person”); see also *Limitations on Presidential Power to Create a New Executive Branch Entity to Receive and Administer Funds Under Foreign Aid Legislation*, 9 Op. O.L.C. 76, 77-78 (1985) [hereinafter *Limitations on Presidential Power*]; *supra* note 13 (discussing Chief Justice Marshall’s view of this distinction).

44. The Office of Legal Counsel claims that there might be a residual set of cases in which the President may create an office. See *Limitations on Presidential Power*, *supra* note 43, at 78 n.1 (“There may be cases, however—in a national emergency, for example—in which we would conclude that the President may, in effect, create an office in order to carry out constitutional responsibilities that otherwise could not be fulfilled.”). This Note takes no stance on whether the President has emergency powers that would alter the normal constitutional scheme. Cf. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 11 (1993) (arguing that the President possesses a general power to “protect and defend the personnel, property, and instrumentalities of the United States from harm” but no emergency powers).

45. AMAR, *supra* note 6, at 110-12.

46. U.S. CONST. art. I, § 8, cl. 18.

47. See U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States” (emphasis added)); *id.* art. III, § 1 (“The judicial Power of the United States, shall be vested . . . .” (emphasis added)).

the structural principle that *Congress* should be first among equals in the construction and definition of the federal government.<sup>48</sup>

Still, the Necessary and Proper Clause does not alone carry the argument that Congress should have exclusive control over office creation. If the Article II Vesting Clause is read to include the authority to create offices, then reliance on the Necessary and Proper Clause to establish Congress's exclusive control over office creation would seem question begging. The Necessary and Proper Clause vests a dependent power by requiring legislation to be "proper for carrying into Execution . . . other Powers."<sup>49</sup> Thus, this power must be defined by and tailored to the exercise of powers granted elsewhere.<sup>50</sup> If the grant of "executive power" is interpreted to include office creation, then Congress's horizontal power would be to assist the President with his or her power to create offices.

This reading of the Article II Vesting Clause would surely preclude *exclusive* congressional authority. The objection proceeds as follows: looking to historical practice, the British Constitution gave the King the "sole power of creating . . . offices."<sup>51</sup> Thus, one could argue that the Article II Vesting Clause vests this traditional notion of "executive power" in the President.<sup>52</sup> Consider by analogy the Constitution's treatment of lower federal courts. Because the "English

48. See Van Alstyne, *supra* note 6, at 116-17; see also John F. Manning, *The Supreme Court 2013 Term – Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 78-84 (2014) (arguing that the Necessary and Proper Clause enshrines a rule of Thayerian deference to Congress's decisions about how to structure the administrative state).

49. U.S. CONST. art. I, § 8, cl. 18.

50. See Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 274-75 (1993) (discussing the Sweeping Clause as "tied to the exercise of some other identifiable constitutional power of the national government"); cf. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1880-1912 (2005) (arguing that the exercise of power under the Necessary and Proper Clause is limited by the scope of the substantive power it seeks to "carry[] into Execution").

51. See 1 ALPHEUS TODD, ON PARLIAMENTARY GOVERNMENT IN ENGLAND: ITS ORIGIN, DEVELOPMENT, AND PRACTICAL OPERATION 165 (London, Sampson, Low, Marston & Co. 1892) ("The crown, besides being the fountain of dignity and honours, is likewise entrusted by the constitution with the sole power of creating such offices . . ."); see also THE DECLARATION OF INDEPENDENCE (U.S. 1776) ("He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance."); 1 WILLIAM BLACKSTONE, COMMENTARIES \*261-62 ("For the same reason therefore that honours are in the disposal of the king, offices ought to be so likewise; and as the king may create new titles, so may he create new offices."); THE FEDERALIST NO. 69, at 421 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[The King] not only appoints to all offices, but can create offices.").

52. See, e.g., Prakash & Ramsey, *supra* note 10, at 234 ("As we seek to establish in this Article, the ordinary eighteenth-century meaning of executive power—as reflected, for example, in the works of leading political writers known to the constitutional generation, such as Locke, Mon-

Crown had historically created courts by royal prerogative,”<sup>53</sup> Article 1, Section 8 specifically invests Congress with the power to “constitute Tribunals inferior to the supreme Court.”<sup>54</sup> With respect to courts, then, the Framers seemed to think that the horizontal Necessary and Proper Clause did not itself mark the departure from the British constitutional baseline. The objection can be stated simply: if the Framers thought that the Inferior Tribunals Clause was necessary to depart from the British practice regarding *court* creation, then perhaps the Necessary and Proper Clause is *also* insufficient to break from the British practice regarding *office* creation. Therefore, the objection goes, the Article II Vesting Clause gives the President the authority to create offices.

But this objection misses the critical point that the text of the Appointments Clause itself suggests Congress’s exclusive prerogative of office creation. The Clause describes the mechanism by which the President may appoint officers, but its text also draws out a background principle of constitutional structure:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and *which shall be established by Law*: but the Congress *may by Law* vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>55</sup>

Best read, this Clause shows that Congress enjoys exclusive power to create offices.<sup>56</sup> The language admits of no exceptions. *All* offices, besides those established elsewhere in the Constitution (e.g., the Presidency<sup>57</sup>) and mentioned earlier in the Appointments Clause (e.g., ambassadors), *shall* be established by law.

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tesquieu, and Blackstone – included foreign affairs powers.”). *But see generally* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (challenging what the authors call the “Vesting Clause Thesis,” which they attribute to Prakash & Ramsey, *supra*).

53. AMAR, *supra* note 6, at 111.

54. U.S. CONST. art. I, § 8, cl. 9; *see also id.* art. III, § 1, cl. 1 (vesting the “judicial Power” in “such inferior Courts as the Congress may from time to time ordain and establish”).

55. *Id.* art. II, § 2, cl. 2 (emphasis added).

56. *See Weiss v. United States*, 510 U.S. 163, 187 n.2 (1994) (Souter, J., concurring) (“Indeed, the Framers added language to both halves of the Appointments Clause specifically to address the concern that the President might attempt unilaterally to create and fill federal offices.”).

57. The Presidency is an “office.” *See, e.g.,* Saikrishna Bangalore Prakash, *Why the Incompatibility Clause Applies to the Office of the President*, 4 DUKE J. CONST. L. & PUB. POL’Y 143 (2009). For a discussion of the various uses of “officer” in the Constitution, *see* Seth Barrett Tillman, *Originalism & the Scope of the Constitution’s Disqualification Clause*, 33 QUINNIAC L. REV. 59 (2014); and William Baude, *Constitutional Officers: A Very Close Reading*, JOTWELL (July 28,

Within the Constitution's text, "shall" imposes an obligation, while "may" introduces discretion.<sup>58</sup> Notably, the Inferior Officers Appointments Clause contrasts directly with the obligation imposed in the first half of Article II, Section 2: Congress "may" vest appointment power in inferior officers, but it "shall" establish all offices. Of course, the Clause does not quite say that "Congress shall," but the phrase clearly contemplates congressional legislation. Under the Constitution, only Congress exercises legislative power, and the Constitution's uses of "by Law" consistently assume Congress as the subject of the command.<sup>59</sup>

What's more, those two words ("by Law") subtly specify the President's narrow role in the creation of offices. By adverting to law, the Constitution triggers the requirements of Article I, Section 7 processes.<sup>60</sup> Because statutes must be presented to the President for his or her signature, the President has a say in the statutory structure. But this authority is confined to his or her participation in the lawmaking process. Thus, the Appointments Clause specifies that the President retains a role in office creation, but only in his or her capacity as a participant in congressional lawmaking.

Besides the Appointments Clause's uses of "shall" and "by Law," the selection of "establish" carries deeper significance, tying the Clause to the Constitution's democratic origins. The text echoes the Constitution's bookends – the Preamble ("We the People . . . do ordain and *establish* this Constitution") and Article VII

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2016), <https://conlaw.jotwell.com/constitutional-officers-a-very-close-reading> [<https://perma.cc/E7T5-2E8P>], which reviews Seth Barrett Tillman, *Who Can Be President of the United States?: Candidate Hillary Clinton and the Problem of Statutory Qualifications*, 5 BRIT. J. AM. LEGAL STUD. 95 (2016).

58. See Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 782-86 n.147 (1984) (cataloging in detail the uses of "shall" and "may" in the Constitution's text); see also, e.g., AMAR, *supra* note 6, at 116 & n.16 (citing Clinton, *supra*, and applying this canon of interpretation to Article III).
59. See, e.g., U.S. CONST. art. I, § 2, cl. 3 ("as they [Congress] shall *by Law* direct" (emphasis added)); *id.* art. § 4, cl. 1 ("the Congress may at any time *by Law* make or alter such Regulations" (emphasis added)); *id.* art. § 4, cl. 2 ("The Congress shall assemble . . . on the first Monday in December, unless they shall *by Law* appoint a different Day." (emphasis added)); *id.* art. § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made *by Law*." (emphasis added)); *id.* art. II, § 1, cl. 6 ("the Congress may *by Law* provide for . . ." (emphasis added)); *id.* art. III, § 2, cl. 3 (" . . . Congress may *by Law* have directed." (emphasis added)).
60. See U.S. CONST. art. 1, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law be presented to the President of the United States"); *INS v. Chadha*, 462 U.S. 919 (1983) (discussing the requirements of bicameralism and presentment); AMAR, *supra* note 6, at 181-85 (discussing the President's role in the law-making process).

(“*establishment* of this Constitution”).<sup>61</sup> With this repetition, the Appointments Clause hints that *Congress* should continue the Framers’ work of constituting a working government. Just as “We the People . . . *establish[ed]* this Constitution,” the Appointments Clause requires that Congress – the people’s representatives – “*establish[]* by Law” “*all* other Officers of the United States.”

More broadly, this qualified congressional supremacy makes good sense as a matter of political theory. During the 1780s, “American legal theorists . . . conceptually relocated sovereignty from Parliament to the people themselves.”<sup>62</sup> The Constitution subsequently enacted this abstract theory of popular sovereignty, first with ink on parchment, then with the votes of the American people.<sup>63</sup> After this extraordinary act of ratification, though, the government would have to continue to draw its legitimacy from We the People during periods of normal politics.<sup>64</sup> While the Preamble’s bold language (“We the People . . . do ordain and establish this Constitution”) declared the People’s sovereignty, the Constitution elaborated a set of institutions that would persist beyond the extraordinary act of ratification<sup>65</sup> – that is, “during periods of normal politics,” when “there can be no hope of capturing the living reality of popular sovereignty.”<sup>66</sup>

Of course, during ordinary political moments, both the President and the judiciary can also claim to be We the People’s agents.<sup>67</sup> But Congress still remains

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61. See U.S. CONST. pmb. l.; *id.* art. VII; AMAR, *supra* note 6, at 29 (discussing the close textual link between the Preamble and Article VII).

62. AMAR, *supra* note 6, at 106.

63. See *id.*; see also, e.g., Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States (Nov. 26, 1787), in 1 COLLECTED WORKS OF JAMES WILSON 178, 213–14 (Kermit L. Hall & Mark David Hall eds., 2007) (“I mentioned, that Blackstone will tell you, that in Britain, [sovereignty] is lodged in the British Parliament . . . [But] the truth is, that the supreme, absolute, and uncontrollable authority remains with the people. I mentioned, also, that the practical recognition of this truth was reserved for the honor of this country. I recollect no constitution founded on this principle; but we have witnessed the improvement, and enjoy the happiness of seeing it carried into practice.”).

64. See 1 BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS 173–190 (1993) (describing and confronting this problem and offering constitutional “dualism” as an answer); cf. Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 149, 153 (1928) (discussing the origins of the American idea of the Constitution as “superior to the will of human governors”). For the second part of Corwin’s Article, see Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 365 (1929).

65. See THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[Y]ou are called upon to deliberate on a new Constitution for the United States of America.”) (emphasis omitted).

66. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1028 (1984) (emphasis omitted).

67. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1443 (1987).



the closest analogue to, and representative of, We the People.<sup>68</sup> Within the Constitution's text, Article I bridges the gap between abstract notions of sovereignty and institutional reality; schematically, it follows the Preamble but precedes the Articles defining the executive and judicial powers.<sup>69</sup> And the members of the House were to be "chosen by the People of the several States," so that they would most directly represent the people themselves.<sup>70</sup> Given the House's democratic bona fides, cutting it out of the loop of office creation would run contrary to the Constitution's broader democratic ethos. Just as We the People established the Constitution's framework for politics, our representatives in Congress should craft the institutions of day-to-day governance. Therefore, the Constitution's ordainment as an act of popular sovereignty supports the textual argument that Congress should have exclusive office-creating authority.<sup>71</sup>

Now we can double back to dispense with the objection presented above—that the Necessary and Proper Clause does not require that Congress have *exclusive* control over the office-creation function.<sup>72</sup> In brief, the Constitution departs from the British constitutional baseline by affirming that Congress shall "establish[] by Law" "all other Officers of the United States."<sup>73</sup> Because the Appointments Clause vests this authority in the federal government's exclusive lawmaking body (Congress), it withholds the office-creation function from the domain

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68. See, e.g., U.S. CONST. art. I; AMAR, *supra* note 6, at 190 (referring to the House of Representatives as "the people's house").

69. See Amar, *supra* note 67, at 1443 n.71.

70. Compare U.S. CONST. art. I, § 2, cl. 1 (mandating election for the House by the "people of the several States" and making the voting qualifications "requisite for Electors of the most numerous Branch of the State Legislature"), with *id.* art. I, § 3, cl. 1 (mandating that the Senate be chosen by the state's legislature), and *id.* art. II, § 1 (providing for the election of the President through the electoral college). For more on the connection between the House and the people, see AMAR, *supra* note 6, at 78-81 (discussing the debate over the size of the House and the importance for Madison and his allies of "strong bonds of sympathy and confidence linking legislators and constituents"); and 1 FARRAND'S RECORDS, *supra* note 8, at 416 (statement of James Wilson) ("Every man will possess a double Character, that of Citizen of the US. & [that] of a Citizen of an individ[ual] State—The National Legis. will apply to [the] former Charact[e]r—it ought then to be elected or appointed by the Citizens of the US, not the Legislatures of the Indiv[idual] States . . .").

71. For discussions that suggest some possible implications of this argument for the structure of the administrative state, see generally Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 598-99, 601 (1984); and Cass R. Sunstein & Lawrence Lessig, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

72. See *supra* text accompanying notes 49-54.

73. U.S. Const. art. II, § 2, cl. 2.

of law execution (the President). Because the President’s constitutional authority, then, is defined to exclude the office-creation power, the Necessary and Proper Clause allows Congress – and only Congress – to write laws that create offices that assist the President with “carrying into execution” the “executive Power.”<sup>74</sup> Just as the Inferior Tribunals Clause marks the departure from the English Constitution for judicial appointees, the Appointments Clause marks the departure for executive branch offices. Read with care, the Constitution’s text vests in Congress the exclusive power of office creation.

### 1. *Drafting History*

The records from the Convention confirm this reading of the Appointments Clause.<sup>75</sup> When the Committee of Detail returned with its draft, the proto-Appointments Clause read: “[the President] shall commission all the officers of the United States; and shall appoint officers in all cases not otherwise provided for by this Constitution.”<sup>76</sup> Unlike the final Appointments Clause, this draft language omits the “established by Law” requirement or any other reference to legislation in the process of office creation. Noticing this absence in both the proto-Appointments Clause and the Necessary and Proper Clause,<sup>77</sup> James Madison sought to clarify Congress’s role. Along with Charles Pinckney from South Carolina, he suggested that the Necessary and Proper Clause be altered to give Congress power to “establish all offices,” claiming that it was “liable to cavil” that the power to make “all laws necessary and proper” did not already include it.<sup>78</sup>

James Wilson, Gouverneur Morris, and others “urged that [it] could not be necessary,” and this amendment was rejected.<sup>79</sup> But supporters of Madison’s view were not dissuaded. On August 24th, 1787,

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74. See *id.* art. I, § 8; *id.* art. II, § 1.

75. See Blumoff, *supra* note 9, at 1061-70 (discussing the legislative history of the Clause).

76. See 2 FARRAND’S RECORDS, *supra* note 8, at 185 (Aug. 6). This phrasing matched what the whole Convention sent to the Committee of Detail. On July 23, the Convention agreed: “Resolved, That a national Executive be instituted . . . with Power to carry into Execution the national Laws [and] to appoint to Offices in Cases not otherwise provided for.” *Id.* at 132 (July 23) (resolutions for the Committee of Detail).

77. The Committee of Detail presented the Necessary and Proper Clause in its final form (except for a few minor changes in punctuation and capitalization). See 2 FARRAND’S RECORDS, *supra* note 8, at 182 (Aug. 6).

78. *Id.* at 344-45 (Aug. 20).

79. *Id.* at 345.

Mr. Sherman objected to the sentence “and shall appoint officers in all cases not otherwise provided for by this Constitution”. He admitted it to be proper that many officers in the Executive Department should be so appointed – but contended that many ought not, as general officers in the army in time of peace &c. Herein lay the corruption in G. Britain . . . *He moved to insert “or by law” after the word, “Constitution”*.<sup>80</sup>

Building on Sherman’s suggestion, Madison argued that “officers’ [be struck] out and ‘to offices’ inserted, in order to obviate doubts that he might appoint officers without a previous creation of the offices by the Legislature.”<sup>81</sup> Yet again, this particular motion failed, but Dickinson finally won the Convention’s approval with the following: “[The President] shall appoint *to all offices* [reflecting Madison’s suggestion] established by this Constitution, except in cases herein otherwise provided for, and *to all offices which may hereafter be created by law*.”<sup>82</sup> Despite the support of the Convention, this victory for Madison and his supporters would prove short lived. When the Committee of Eleven reported back on September 4th with a new draft, the text as amended again dropped the requirement that offices be created by law.<sup>83</sup> The Convention twice considered the language without amending it,<sup>84</sup> and the Committee of Style’s draft was substantially similar to the Committee of Eleven’s.<sup>85</sup>

Nevertheless, the substance of Madison’s amendment was adopted during the final review of the Committee of Style’s draft. During this last-minute discussion, the Convention adopted two final amendments to the Appointments Clause. First, it accepted that “Congress may by law vest the appointments of such inferior officers as they think proper, in the President alone, in the Courts

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80. *Id.* at 405 (Aug. 24) (emphasis added).

81. *Id.*

82. *Id.* (emphasis added).

83. *Id.* at 498-99 (Sept. 4) (“The President . . . shall nominate and by and with the advice and consent of the Senate shall appoint . . . all other Officers of the U[nited] S[tates], whose appointments are not otherwise herein provided for.”).

84. *Id.* at 538-39 (Sept. 7); *id.* at 550 (Sept. 8) (“Mr. Gerry movd. that no officer be app[ointe]d but to offices created by the Constitution or by law – This was rejected as unnecessary by six no’s & five ays.”); *see also id.* at 553 (“Mr. Gerry repeated his motion . . . , which was again negatived.”).

85. *Id.* at 599 (Sept. 12) (“[The President] shall nominate, and by and with the advice and consent of the senate, shall appoint . . . all other officers of the United States, whose appointments are not herein otherwise provided for.”).

of law, or in the heads of Departments”<sup>86</sup> – that is, it accepted the Inferior Officers Appointments Clause.<sup>87</sup> Second, the Convention added the final phrase to the Appointments Clause: “and which shall be established by law.”<sup>88</sup> With these final changes, the language of the Constitution’s Appointments Clause came together.

It is worth highlighting in this drafting history the seemingly unanimous support for the Clause’s substance. Although several such amendments were rejected, these rejections were made at the “urg[ing]” of eminent members “that [it] could not be necessary.”<sup>89</sup> Of course, from the textual analysis above, we know that the Constitution’s allocation of office-creation responsibilities would have remained doubtful without Madison’s final amendment. But no one in the Convention – at least so far as *Farrand’s Records* show<sup>90</sup> – advocated for the continuation of the British Constitution’s approach. With this silence, we can confirm the conclusions compelled by the Constitution’s text and structure.

## 2. United States v. Maurice

In addition to these conventional arguments from text, structure, and drafting history, an early judicial opinion lends further support to this interpretation. While riding circuit, Chief Justice Marshall was presented with the opportunity to interpret the Appointments Clause in *United States v. Maurice*.<sup>91</sup> Although he conceded that the Clause was not “entirely unambiguous,” Chief Justice Marshall ultimately concluded that the Clause vested exclusive control in Congress. He began by identifying two possible readings:

[I]t is not perfectly clear whether the words “which” offices “shall be established by law,” are to be construed as ordaining, that all offices of the

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86. *Id.* at 627 (Sept. 15).

87. See Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 YALE L.J. 991, 993 (1993); Kevin H. Rhodes, *Structure Without Foundation: A Reply to Professor Froomkin*, 88 NW. U. L. REV. 1406, 1412 (1994).

88. See 2 FARRAND’S RECORDS, *supra* note 8, at 628 (Sept. 15).

89. *Id.* at 345 (Aug. 20).

90. See generally Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620 (2012) (discussing the reliability of and uses for *Farrand’s Records*); Gregory E. Maggs, *A Concise Guide to the Records of the Federal Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707 (2012) (similar).

91. 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747).

United States shall be established by law, or merely as limiting the previous general words to such offices as shall be established by law.<sup>92</sup>

In other words, the Constitution's text could be read broadly to require that Congress establish all offices or it could be read extraordinarily narrowly such that the Appointments Clause's strictures applied only to those offices that had already been "established by Law."

Chief Justice Marshall went on to consider these two possibilities in more detail. "Understood in the first sense," he reasoned, the Appointments Clause would institute two distinct requirements: (1) "all offices . . . shall be established by law" and (2) the President should "appoint to all offices of the United States."<sup>93</sup> Under the second reading, the Appointments Clause applies to "those offices only which might be established by law."<sup>94</sup> In other words, the second reading would institute a conditional rule: *if* Congress establishes an office, *then* the President should appoint the officers according to the Clause's strictures; otherwise, the President (or those "entrusted with the execution of the laws") could *both* "create in all laws of legislative omission[] such offices as might be deemed necessary" *and* "afterwards to fill those offices."<sup>95</sup>

Therefore, with this "last sense" of the Clause, Chief Justice Marshall considered a reading that granted even more power to the executive than the British system. As under the British Constitution, this reading would allow the President to "create . . . such offices as might be deemed necessary."<sup>96</sup> But it would go further still, as it would also allow "those who might be entrusted with the execution of the laws" to do the same.<sup>97</sup>

Chief Justice Marshall rejected this position. Although he was unsure "whether this question ha[d] ever occurred to the legislat[ure] or executive of the United States," he selected the first interpretation because "it accords best with the general spirit of the constitution, which seems to have arranged the creation of office among legislative powers."<sup>98</sup> Buttressing this structural claim, Chief Justice Marshall argued that the Inferior Officers Appointments Clause "indicates an opinion in the framers of the constitution, that they had provided

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92. *Id.* at 1213.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

for all cases of offices.”<sup>99</sup> He concluded, “The constitution then is understood to declare, that all officers of the United States, except in cases where the constitution itself may otherwise provide, shall be established by law.”<sup>100</sup> The interpretation in *Maurice* is particularly good evidence of the Constitution’s meaning. The 1823 decision was the earliest major judicial opinion interpreting the Clause,<sup>101</sup> and Chief Justice Marshall’s opinions generally carry great weight.<sup>102</sup>

### B. Early Constitutional Practice

Early practice also supports the position that Congress – and not the President – should create offices. The House of Representatives, the Senate, and President Washington all acted in ways that suggest that the President needed authorizing legislation before appointing officers. For example, the House of Representatives passed a series of statutes – the War Department Act, the Foreign Affairs Act, and the Treasury Act – that created offices for the President to fill.<sup>103</sup> The Treasury Act, for instance, stated that “there shall be a Department of Treasury, in which shall be the following officers, namely: a Secretary of the Treasury, to be deemed head of the department; a Comptroller, an Auditor, a Treasurer, a Register, and an Assistant to the Secretary of the Treasury, which assistant shall be appointed by the said Secretary.”<sup>104</sup> The War Department Act

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99. *Id.*

100. *Id.* at 1214.

101. See Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 933–37 (2017) (discussing the well-established canon that “*contemporanea expositio est optima et fortissima in lege*—or, ‘a contemporaneous exposition is the best and most powerful in law’”).

102. See *Hans v. Louisiana*, 134 U.S. 1, 20 (1890) (describing Chief Justice Marshall as “one who seldom used words without due reflection”).

103. Act of Sept. 2, 1789, ch. 12, 1 Stat. 65 (establishing the Department of Treasury); Act of Aug. 7, 1789, ch. 7, 1 Stat. 49 (establishing the Department of War); Act of July 27, 1789, ch. 4, 1 Stat. 28 (establishing the Department of Foreign Affairs).

104. § 1, 1 Stat. at 65. Interestingly, Congress later passed a statute that would allow the Secretary of the Treasury to appoint as many clerks as deemed necessary. Act of Sept. 11, 1789, ch. 13, § 2, 1 Stat. 67, 68 (“[T]he heads of the three departments [including Secretary of the Treasury] first above mentioned, shall appoint such clerks therein respectively as they shall find necessary . . .”). Because this statute delegates limitless authority to hire new clerks, it might violate that provision of the Appointments Clause that all offices be “established by Law.” See U.S. CONST. art. II, § 2, cl. 2. Under a strict reading of the Clause, Congress must specify the *number* of offices, else the executive branch could circumvent the Clause by unilaterally appointing endless officers. Nonetheless, two possible arguments justify this particular statute. First, the offices would still be “established by Law,” and the *duties*—even if not the number—would remain constrained by the statute. By analogy, these absolute delegations of narrow

and Foreign Affairs Act contained similar language. David Currie claims that when the House of Representatives drafted and passed these statutes, the representatives assumed without debate that it would fall to Congress to create these offices.<sup>105</sup>

By contrast, the Senate briefly debated whether the President should have the authority to create new offices with the consent of the Senate. When presented with the House's version of the Foreign Affairs Act, Senator William Maclay commented:

I [do not] see the necessity of having made this business a Subject of legislation. [T]he point of View in which it presented itself to me was [ ] [t]hat the President should signify to the Senate [ ] his desire of appointing a Minister of foreign affairs, and nominate the Man and so of the other necessary departments. [I]f the Senate agreed to the necessity of the office and the Man they would concur, if not, they would negative. & ca. the House would get the Business before them when Salaries came to be appointed, and could then, give their Opinion by providing for the officer or not.<sup>106</sup>

His argument more closely tracked the process under the British Constitution. Because the monarch is “emphatically and truly styled the fountain of honor,” Hamilton recalled in *The Federalist*, he “not only appoints all offices, but can create offices.”<sup>107</sup> To Senator Maclay, the House's attempt to establish a precedent that required congressional office creation was an act of self-aggrandizement by

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office-creation authority could be like the “permanent appropriations” that satisfy the Appropriations Clause. See Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1378-81 (1988). Second, the clerks might not be “Officers of the United States,” but rather employees, and so the Appointments Clause wouldn't apply at all. See, e.g., *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976) (per curiam) (“Employees are lesser functionaries . . .”). See generally Mascott, *supra* note 33 (attempting to define the original meaning of “officers”).

105. See CURRIE, *supra* note 4, at 36 n.205 (quoting Casper, *supra* note 3, at 233).

106. Diary of William Maclay (July 9, 1789), in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 104, 104-05 (Charlene Bangs Bickford et al. eds., 2004) [hereinafter DOCUMENTARY HISTORY]; see also Casper, *supra* note 3, at 225 (discussing this statement).

107. THE FEDERALIST NO. 69, *supra* note 51, at 421; see also EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 69-70 (4th rev. ed. 1957) (explaining that it was “an element of the royal prerogative in England to create offices as well as to appoint to them”).

that body.<sup>108</sup> Nevertheless, Senator Maclay’s interpretation was rightly rejected by the Senate.<sup>109</sup>

President Washington’s behavior also seems to concede that Congress would enjoy the exclusive power of office creation. Most important, his early nominations filled offices only after they had been created by acts of Congress. For example, on July 31st, Congress passed a statute that provided for the “collection of the duties imposed by law on the tonnage of ships and vessels, and on goods, wares and merchandises imported into the United States.”<sup>110</sup> The complex, technical statute divided the states into districts, delineated ports of entry and ports of delivery,<sup>111</sup> and provided for three kinds of officers – naval officers, collectors, and surveyors – that would ensure the collection of tariffs.<sup>112</sup> On August 3rd, President Washington sent a letter to the Senate with his nominations.<sup>113</sup> The letter carefully filled each of the offices created by this statute – and *only* those offices.<sup>114</sup> Likewise, although the President had been in communication with Alexander Hamilton early in his term,<sup>115</sup> he did not nominate Hamilton to serve as Secretary of the Treasury until after Congress established the office.<sup>116</sup>

Nonetheless, some early practice does suggest that the President and Congress were not overly scrupulous about the strictures of the Appointments Clause. When Congress established executive departments that had existed under the Articles of Confederation, the officers sometimes remained within the department without presidential appointment. For example, Henry Knox simply

108. See Diary of William Maclay, *supra* note 106.

109. See *id.*

110. Act of July 31, 1789, ch. 5, § 1, 1 Stat. 29, 29.

111. See *Port of Entry*, BLACK’S LAW DICTIONARY (4th ed. 1968); *Port of Delivery*, BLACK’S LAW DICTIONARY (4th ed. 1968)

112. See § 1, 1 Stat. at 29-35 (delineating districts, ports of entry, and ports of delivery, and establishing officers to attend to their duties at those ports); §§ 5-9, 1 Stat. at 36-38 (articulating the distinct duties of the three types of officers). The actual rates for the duties were established in statutes passed previously. See Act of July 20, 1789, ch. 3, 1 Stat. 27 (setting duties on tonnage); Act of July 4, 1789, ch. 2, 1 Stat. 24 (establishing duties on goods, wares, and merchandise).

113. See Letter from George Washington, President of the U.S., to the U.S. Senate (Aug. 3, 1789), in 3 PAPERS OF GEORGE WASHINGTON, *supra* note 3, at 377, 377-82.

114. See *id.*

115. See, e.g., Letter from Alexander Hamilton to George Washington, President of the U.S. (May 5, 1789), in 2 PAPERS OF GEORGE WASHINGTON, *supra* note 3, at 211, 211-14.

116. See Act of Sept. 2, 1789, ch. 12, 1 Stat. 65 (establishing the Treasury Department); Letter from George Washington, President of the U.S., to the U.S. Senate (Sept. 11, 1789), in 4 PAPERS OF GEORGE WASHINGTON, *supra* note 3, at 19, 19 (nominating Hamilton as Secretary of the Treasury).



continued his post as Secretary of War between the Constitution's ratification and the establishment of the Department of War.<sup>117</sup> After Congress established the Department of War, he continued for a month in that position without re-appointment.<sup>118</sup> But he was soon nominated and confirmed.<sup>119</sup> Likewise, Congress readopted a statute that created a Board of Commissioners to settle accounts between the states and the national government, but the Board's members continued with their duties without appointment by the President.<sup>120</sup> Still, President Washington did not appoint any new members to the Board of Commissioners until Congress reauthorized it.<sup>121</sup> Instead, he waited until after its reauthorization to appoint a Commissioner to a vacancy that had been open for some time during his presidency.<sup>122</sup> Similarly, President Washington reappointed Governor Arthur St. Clair "in conformity to the Law re-establishing the Government of the Western Territory [i.e., the Northwest Territory]."<sup>123</sup>

President Washington also consulted with the holdovers of the executive departments under the Articles of Confederation. Writing to John Jay in the Office of the Secretary of Foreign Affairs under the old government, President Washington claimed that he was "desirous of employing [himself] in obtaining an

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117. See, e.g., Letter from Henry Knox, Sec'y of War, to George Washington, President of the U.S. (July 6, 1789), in 3 PAPERS OF GEORGE WASHINGTON, *supra* note 3, at 123, 123 (sending an official letter from the War Office).

118. See, e.g., Henry Knox, A Statement of the Troops in the Service of the United States (Aug. 8, 1789), in 3 PAPERS OF GEORGE WASHINGTON, *supra* note 3, at 413, 416.

119. See S. EXEC. JOURNAL, 1st Cong., 1st Sess. 25-26 (1789); see also Act of Sept. 11, 1789, ch. 13, § 2, 1 Stat. 67, 68 (establishing the salary for the Secretary of War and other top officials).

120. See Act of Aug. 5, 1789, ch. 6, § 1, 1 Stat. 49, 49 (providing for the "settlement of accounts between the United States and the individual States").

121. See *id.*; Letter from George Washington, President of the U.S., to the U.S. Senate (Aug. 6, 1789), in 3 PAPERS OF GEORGE WASHINGTON, *supra* note 3, at 394, 394 ("By the act for settling the accounts between the United States and individual States, a person is to be appointed to fill the vacant seat at the Board of Commissioners for settling the accounts . . . ; I therefore nominate John Kean . . . to fill the vacant seat at the said Board of Commissioners.").

122. See Letter from Abraham Baldwin, U.S. Representative, to George Washington, President of the U.S. (Apr. 30, 1789), in 2 PAPERS OF GEORGE WASHINGTON, *supra* note 3, at 148, 148 (resigning his position on the Board of Commissioners); Letter from George Washington, President of the U.S., to Abraham Baldwin, U.S. Representative (May 7, 1789), in 2 PAPERS OF GEORGE WASHINGTON, *supra* note 3, at 224, 224 ("I have duly received your letter . . . and shall cause it to be filed in the proper office as soon as the necessary arrangem<sup>t</sup> [sic] of departments shall have been made." (emphasis added)).

123. See Letter from George Washington, President of the U.S., to the U.S. Senate (Aug. 18, 1789), in 3 PAPERS OF GEORGE WASHINGTON, *supra* note 3, at 495, 495; see also Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (readopting the Northwest Ordinance).

acquaintance with the real situation of the several great Departments.”<sup>124</sup> He sought information also from the former Board of Treasury and the Post Office, in addition to the Office of Foreign Affairs.<sup>125</sup> Nonetheless, President Washington noted that “the present unsettled state of the Executive Departments” meant that he “d[id] not conceive it expedient to call upon [Jay] for information *officially*.”<sup>126</sup> Similarly, writing to the head of the Post Office, he stated: “As I have (without doing it *officially*) requested [information] from the heads of the several Executive Departments . . . , I have thought fit to ask, in the same informal manner, for specific information [regarding] . . . the Post Office.”<sup>127</sup> These early consultations do not represent President Washington’s avoidance of the requirements of the Appointments Clause. Instead, his emphasis on the *informality* of the discussions underscores that he thought it beyond his power to rely on these appointees without congressional approval.<sup>128</sup>

In short, President Washington’s actions during his first term confirm that the Constitution gives Congress the exclusive office-creation authority. These early practices are particularly good evidence of the Constitution’s meaning because of President Washington’s unique role within the nation’s history. After all, President Washington was acutely aware that his actions would “have great and

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124. See, e.g., Letter from George Washington, President of the U.S., to John Jay (June 8, 1789), in 2 PAPERS OF GEORGE WASHINGTON, *supra* note 3, at 455, 455.

125. Letter from George Washington, President of the U.S., to Ebenezer Hazard, U.S. Postmaster Gen. (June 8, 1789), in 2 PAPERS OF GEORGE WASHINGTON, *supra* note 3, at 454, 454 (requesting information on Post Office); Letter from the Bd. of Treasury to George Washington, President of the U.S. (June 9, 1789), in 2 PAPERS OF GEORGE WASHINGTON, *supra* note 3, at 456, 456 (notifying Washington that the Board of Treasury would provide the requested information on itself).

126. Letter from George Washington to John Jay, *supra* note 124, at 455 (emphasis added).

127. Letter from George Washington to Ebenezer Hazard, *supra* note 125, at 454 (emphasis added). President Washington sought similar information from the Board of Treasury. See, e.g., Letter from the Bd. of Treasury to George Washington, *supra* note 125, at 456.

128. President Washington’s first appointment also occurred before the Congress had created any executive-branch offices. On June 15th, President Washington appointed William Esquire to replace Thomas Jefferson as the Minister of the United States at the Court of France. See Letter from George Washington, President of the U.S., to the U.S. Senate (June 15, 1789), in 2 PAPERS OF GEORGE WASHINGTON, *supra* note 3, at 498, 498 n.3; see also List of the Public Acts of Congress, 1 Stat. xvii (1789) (showing that only the Oaths of Office Act had been passed by June 15th). But this appointee was an “Ambassador,” “public Minister,” or “Consul,” positions that need not be “established by Law” under the Appointments Clause. See U.S. CONST. art. II, § 2; see also *infra* Section I.D.

durable consequences from their having been established at the commencement of a new general Government.”<sup>129</sup>

### C. Preconstitutional History

The Constitution’s commitment of the office-creation power to Congress makes good sense in light of preconstitutional history. The Founders’ appointments system purposefully broke with the British tradition.<sup>130</sup> Defending the Constitution in *The Federalist*, Hamilton distinguished the Constitution’s President from Great Britain’s Crown: “The king of Great Britain is emphatically and truly styled the fountain of honor. He not only appoints to all offices, *but can create offices.*”<sup>131</sup> Doubtless, Hamilton wrote with Blackstone close at hand. Blackstone’s *Commentaries*, like *The Federalist*, claimed that “the king is likewise the fountain of honour, of office, and of privilege . . . . For the same reason therefore that honours are in the disposal of the king, offices ought to be so likewise; *and as the king may create new titles, so may he create new offices.*”<sup>132</sup>

Within England, this prerogative arguably allowed the monarch to ensure a functioning and effective government.<sup>133</sup> But the extensive use of patronage to

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129. Letter from George Washington to John Adams, *supra* note 3, at 246-47; *see also supra* note 3 and accompanying text.

130. *Cf. Fleming v. Page*, 50 U.S. (9 How.) 603, 618 (1850) (“But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them . . . . Our own Constitution and form of government must be our only guide.”).

131. THE FEDERALIST NO. 69, *supra* note 51, at 421 (emphasis added). *But see* THE FEDERALIST NO. 76, at 454 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (forgetting to include the clause “which shall be established by law” when quoting the Appointments Clause).

132. 1 BLACKSTONE, *supra* note 51, at \*261-62 (emphasis added). Blackstone’s description of the monarch’s power functions as both description and justification of the constitutional order. *See* DAVID LINDSAY KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485, at 293 (9th ed. 1969). Hamilton might have overstated the King’s power, however. Blackstone notes that the King was still restrained: “he cannot create new offices with new fees annexed to them, nor annex new fees to old offices; for this would be a tax upon the subject, which cannot be imposed but by act of parliament.” 1 BLACKSTONE, *supra* note 51, at \*262.

133. *See* GOLDWIN SMITH, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 372 (1990); Archibald S. Foord, *The Waning of ‘The Influence of the Crown,’* 62 ENG. HIST. REV. 484, 484 (1947).

secure political power came to be seen as a corrupting influence in the political system.<sup>134</sup> Steven Calabresi and then-Professor Joan Larsen have explained:

It would be hard to overstate the effect that the King's unscrupulous use of patronage (and the system of "royal influence") had on the conduct of politics in seventeenth- and eighteenth-century England . . . . A whole generation of young men went to Parliament with the express purpose of making their fortunes by obtaining an office.<sup>135</sup>

Likewise, Goldwin Smith writes that "[t]he importance of patronage, family connection, and 'influence' in eighteenth century politics cannot easily be overstressed,"<sup>136</sup> and he defined this influence as "the various methods by which the king and his ministers could persuade a majority of the members of Parliament to vote for government measures . . . [with] appeal . . . to men hungry with ambition or greed or both."<sup>137</sup>

In time, Americans began to lament the corrupting influence of the English monarch.<sup>138</sup> According to Gordon Wood, for example, the Crown's influence over life in the colonies had contributed to "a more elusive social and political

134. See, e.g., KEIR, *supra* note 132, at 328 ("Even the least important appointments in the gift of the Crown were gradually drawn into this system for inducing political support by offering material rewards. To treat subordinate executive positions as political spoils was obviously detrimental to efficient administration . . . . With the use of existing offices for electoral purposes went the wholesale creation of new offices."); TODD, *supra* note 51, at 165 ("Persons were appointed to places of trust and emolument, or removed therefrom, on mere political grounds, and in furtherance of political intrigues . . . . Sinecure offices, gifts of places in reversion, and secret pensions for political services to the court were multiplied; and the illegitimate influence of the crown was thereby greatly increased.").

135. Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1053 (1994) (citing L.B. NAMIER, *THE STRUCTURE OF POLITICS AT THE ACCESSION OF GEORGE III 1-61* (1929)); see also *id.* ("The King's patronage power gave him two key tools through which he could control Parliament. First, by promoting influential Members of Parliament (M.P.s) to ministerial office, the King could win their backing in Parliament for his programs. Second, by dangling the prospect of a lucrative office, pension, or title of nobility, the King could induce even non-office holding M.P.s to support him in hopes of benefiting from the royal largesse."). After the Glorious Revolution, the Settlement Act "contained a strict incompatibility rule" that would render officers of the Crown "ineligible to serve in the House of Commons," but it was "never put into effect." *Id.* at 1055-56.

136. SMITH, *supra* note 133, at 396.

137. *Id.* at 396 n.1.

138. See *id.* at 1054 n.27 (collecting critiques from the "'left' opposition both in England and America"); *id.* at 1056-57 (discussing the "indelible impression [left] on American memories" by the "corruption of the British system of influence").

rancor that lent passion to the Revolutionary movement.”<sup>139</sup> Springing from this supposed “fountain of honors,” the Crown had caused an “influx of new royal officials since 1763.”<sup>140</sup> John Jay, writing to the citizens of Great Britain, accused these officials of incompetence and corruption: “We might tell of dissolute, weak, and wicked governors having been set over us; . . . of needy and ignorant dependants on great men advanced to the seats of justice, and to other places of trust and importance.”<sup>141</sup> What’s more, American elites began to perceive corruption and dissipation in their own ranks, and they blamed the monarch<sup>142</sup>: “The Crown actually seemed to be bent on changing the character of American society,” Gordon Wood writes.<sup>143</sup> “Throughout the society, . . . an artificial inter-colonial aristocracy—springing ultimately from the honors and dignities bestowed by the Crown—was entrenching itself, consolidating and setting itself apart from the mass of American yeomen by its royal connections and courtier spirit of luxury and dissipation.”<sup>144</sup>

Besides the issues of the corrupt and incompetent aristocracy, unilateral creation and appointment of offices left legislatures too dependent on the executive branch.<sup>145</sup> Colonial governors had “used their power to influence and control the other parts of the constitution” by “appointing [representatives] to executive or judicial posts, or by offering them opportunities for profits through the dispensing of government contracts and public money.”<sup>146</sup> Ultimately, these concerns

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139. WOOD, *supra* note 11, at 79.

140. *Id.* at 78-79.

141. John Jay, Address to the People of Great Britain (Sept. 5, 1774), in 1 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 17, 26 (Henry P. Johnston ed., New York, G.P. Putnam’s Sons 1890); see also WOOD, *supra* note 11, at 78-79 (“And in the eyes of the Whigs America possessed too many of these ‘fawning parasites and cringing courtiers,’ too much soothing and flattering of great men . . . . Indeed, on the eve of the Revolution it seemed to some Whigs that the Crown’s influence was turning the social world upside down: ‘Virtue, Integrity, and Ability’ had become ‘the Objects of Malice, Hatred and Revenge of the Men in Power,’ while ‘folly, Vice, and Villany’ were being everywhere ‘cherished and supported.’”).

142. See WOOD, *supra* note 11, at 107-14.

143. *Id.* at 111.

144. *Id.*

145. See Calabresi & Larsen, *supra* note 135, at 1055-57.

146. WOOD, *supra* note 11, at 156-57; see also *id.* at 157-58 (“Even though the governors in most of the [revolutionary] constitutions no longer controlled the appointment of executive officials, so infecting and so incompatible with the public liberty or the representation of the people was magisterial power believed to be that the Americans felt compelled to isolate their legislatures from any sort of executive influence or impingement . . .”).

worked their way into the Declaration of Independence: “He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance.”<sup>147</sup>

Given this unscrupulous use of the appointment power, “Americans [in 1776] felt compelled to isolate their legislatures from any sort of executive influence or impingement.”<sup>148</sup> These concerns not only animated the movement toward provisions like the Constitution’s Incompatibility Clause,<sup>149</sup> but also motivated the complete withdrawal of the office-creating power from the executive branch.<sup>150</sup> The Articles of Confederation and many newly drafted state constitutions did just that, vesting the authority in legislatures or special councils.<sup>151</sup> For example, the New York Constitution created a Council of Appointment.<sup>152</sup> Although most of the offices within New York were established by custom, the Council of Appointments also created offices without the assistance of the legislative branch.<sup>153</sup>

The Constitution drafted in Philadelphia, however, would tack towards a middle road – rejecting the British Crown’s plenary office-creation authority, but vesting the *selection* and *control* of these offices in the President.<sup>154</sup> By then, it had

147. THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776).

148. WOOD, *supra* note 11, at 158.

149. See U.S. CONST. art. I, § 6, cl. 2 (“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”); WOOD, *supra* note 11, at 158 n.58 (listing similar state constitutional provisions); Calabresi & Larsen, *supra* note 135, at 1052-97 (discussing the history behind the Incompatibility Clause); see also AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION 378-81 (2012) (discussing this Clause).

150. See Calabresi & Larsen, *supra* note 135, at 1058 (“In addition, no state entrusted its executive with a power to create offices (or titles of nobility) at will. The office-creating power was in all cases vested with the legislature.”).

151. See ARTICLES OF CONFEDERATION of 1781, art. IX, paras. 4-5; WOOD, *supra* note 11, at 449 (“The governors’ power of appointment was clipped . . . all in the name of Montesquieu’s principle of the separation of powers.”).

152. See WOOD, *supra* note 11.

153. See J.M. Gitterman, *The Council of Appointment in New York*, 7 POL. SCI. Q. 80, 98-99 (1892) (recounting that the Council of Appointment independently created and distributed offices for political reasons).

154. See generally *United States v. Weiss*, 510 U.S. 163, 184 (1994) (Souter, J., concurring) (“[T]he delegates to the Philadelphia Convention could draw on their experiences with two flawed methods of appointment.”); CORWIN, *supra* note 107, at 70 (“The Constitution . . . assigns the power to *create offices* to Congress, while it deals with the *appointing power* in . . . Article II . . .”); *id.* at 70-75 (detailing the President’s appointing power under the Constitution).

become clear that the decision to lodge the exclusive appointment power in the legislature had become the “principal source of division and faction.”<sup>155</sup> Returning a measure of the appointment power to the President cut against the lessons learned under British rule, but the Constitution as written still excluded the power of office creation from the President.<sup>156</sup> What remains, then, is a careful institutional balance: on the one hand, it avoids the corruption and inefficiency caused by vesting unilateral office creation and appointment in the legislature; on the other, it forbids the kind of unilateral office creation that had, under the British Constitution, so plagued the American colonists.

#### *D. Some Exceptions to the Rule*

So far, this Part has ignored a few notable exceptions to the Appointments Clause’s scope. Most significantly, the requirement that all offices be “established by Law” has not been interpreted to extend to “Ambassadors, other public Ministers and Consuls.”<sup>157</sup> In this Section, I show why this exception makes good sense in light of history, structure, and the law of nations. While the President should have greater control over the creation of offices concerning foreign relations, Congress must have exclusive control over the creation of domestic offices, including Justices of the Supreme Court.

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155. *Freytag v. Comm’r*, 501 U.S. 868, 904 n.4 (1991) (Scalia, J., concurring in part and in the judgment) (quoting WOOD, *supra* note 11, at 407); *see also* WOOD, *supra* note 11, at 403-09 (discussing the dangers of vesting power in the legislature); Blumoff, *supra* note 9, at 1062-70 (cataloguing debates at the Convention about the appropriate appointing authority); *cf.* THE FEDERALIST NO. 76, *supra* note 131, at 456 (rejecting appointment by an “assembly of men” because it would lead to “a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly,” and because the choice “made under such circumstances, will of course be the result either of a victory gained by one party over the other, or of a compromise between the parties”).

156. *See* WOOD, *supra* note 11, at 551 (discussing the decision to vest the appointment power in the President).

157. U.S. CONST. art. II, § 2, cl. 2; *see* CORWIN, *supra* note 107, at 70-71; *Ambassadors and Other Public Ministers of the United States*, 7 Op. Att’y Gen. 186, 193-94 (1855) (“In a word, the power to appoint diplomatic agents, and to select for employment any one out of the varieties of the class, according to his judgment of the public service, is a constitutional function of the President, not derived from, nor limitable by, Congress, but requiring only the ultimate concurrence of the Senate; and so it was understood in the early practice of the Government.”). *But cf.* *Case of the Office of Minister to Venezuela*, 12 Op. Att’y Gen. 457 (1868) (finding that the President has no legal right to fill the office of minister to Venezuela after Congress criminalized appointment to the office and refused to appropriate funds for the provision).

Textually, “which shall be established by Law” can be interpreted to modify the Clause in one of two ways. First, the phrase might modify all of the government agents in the Clause – that is, “Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States.” Second, it might be read to modify only “other Officers of the United States.” Under this second reading, the Clause simply assumes the existence of the before-mentioned offices of “Ambassadors, other public Ministers and Consuls, [and] Judges of the supreme Court.”<sup>158</sup> Professor Edward Corwin offers this textual interpretation.<sup>159</sup> Given background assumptions about the relationship between the law of nations and the Constitution, this second reading makes more sense.<sup>160</sup> Attorney General Cushing, for example, reasoned that the offices were “derived from the law of nations.”<sup>161</sup> Finally, historical practice supports the exception.<sup>162</sup> Practice dating back to President Washington has exempted ambassadors from the requirement that Congress first create an office.<sup>163</sup> President Washington’s first appointment, for instance, replaced Thomas Jefferson as the Minister of the United States at the Court of France, and he lacked statutory authority to do so.<sup>164</sup>

This exception for foreign officers, however, raises a curious question of text and structure: why doesn’t the same exception apply to the “Judges of the supreme Court”? If the phrase “which shall be established by Law” applies only to “all other Officers of the United States,” then both “Ambassadors [et al.]” and

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<sup>158</sup>. U.S. CONST. art. II, § 2, cl. 2.

<sup>159</sup>. See CORWIN, *supra* note 107, at 69–70 (reasoning that the Constitution itself created the Supreme Court, and that the ambassadors and other public ministers were created by the law of nations).

<sup>160</sup>. Discussion of the relationship between the law of nations (or customary international law) and domestic law is well beyond the scope of this Note. See generally RICHARD H. FALLON, JR. ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 712–17 (7th ed. 2015) (canvassing the literature on “customary international law and federal common law”). For recent discussions of this relationship, see Nathan Chapman, *Due Process of War*, 94 NOTRE DAME L. REV. (forthcoming 2018) (manuscript at 27) (on file with author) (“By the late eighteenth century, English common-law theorists recognized that the law of nations was part of the law of the land, a view American jurists embraced.”); and Ryan M. Scoville, *Ad Hoc Diplomats*, 68 DUKE L.J. (forthcoming 2018) (manuscript at 7) (on file with author) (claiming that “a wealth of original historical sources show that the founders understood the law of nations as supplying the definition of the term ‘public Ministers’”).

<sup>161</sup>. 7 Op. Att’y Gen. at 194.

<sup>162</sup>. See CORWIN, *supra* note 107, at 70 (noting that “until 1855 Congress left it entirely with the President” to appoint these foreign officials).

<sup>163</sup>. See *supra* note 128.

<sup>164</sup>. *Id.*



“Judges of the Supreme Court” would be excluded. Under this reading, inferior federal judges would need to have their offices created by Congress,<sup>165</sup> but the President and Senate could appoint a Justice of the Supreme Court alone. Indeed, such an interpretation could allow the President and Senate to appoint—without passing a statute—a tenth or eleventh Justice. Worse still, the House would have no ex post say through the Appropriations Clause because the Constitution mandates the salaries of federal judges.<sup>166</sup> When Senator Maclay (wrongly) defended the President’s power to unilaterally create offices, he emphasized that the House would retain some control through subsequent appropriations.<sup>167</sup> No such backstop protects the House’s power in this case because a federal judge’s salary “shall not be diminished.”<sup>168</sup> This interpretation, then, seems especially doubtful: it would cut the chamber with unquestioned democratic bona fides<sup>169</sup> out of a crucial decision about the institutional design of the least accountable branch.

Despite this textual absurdity, both historical practice and structural considerations gloss the text to forbid the President and Senate from circumventing the House’s role. First, history’s gloss confirms that the President and Senate may not appoint Supreme Court Justices without the House’s prior authorizing statute. In the Judiciary Act of 1789, Congress established a six-man Supreme Court, and the President complied.<sup>170</sup> Even President Roosevelt’s court-packing plan relied on a statute.<sup>171</sup> Were it constitutionally possible to act with just the Senate, President Roosevelt would have done so. Second, the Constitution gives the President greater control over “Ambassadors,” “Consuls,” and “other Public Ministers,” because he is the “sole organ of the nation in its external relations.”<sup>172</sup>

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165. See U.S. CONST. art. I, § 8, cl. 9.

166. See U.S. CONST. art. III, § 1.

167. See *supra* text accompanying notes 106–109.

168. U.S. CONST. art. III, § 1. Of course, if Congress refused to appropriate salaries for these questionable new Justices, the other branches could not do anything about it. See Jed Glickstein, *After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801*, 24 YALE J.L. & HUMAN. 543, 560–61 (2012) (noting that the “midnight judges” whose offices were abolished when President Jefferson and the Republicans repealed the Judiciary Act of 1801 were unable to recover their salaries); Stith, *supra* note 104, at 1392 (arguing that there can be “no judicial enforcement of the Constitution’s appropriations requirements against Congress itself”).

169. See *supra* text accompanying notes 67–71.

170. See AMAR, *supra* note 6, at 215.

171. See Stephan O. Kline, *Revisiting FDR’s Court Packing Plan: Are the Current Attacks on Judicial Independence So Bad?*, 30 MCGEORGE L. REV. 863, 909–10, 910 n.274 (1999) (discussing the specifics of the plan).

172. 10 ANNALS OF CONG. 613 (1800) (statement of Rep. Marshall); see also *Zivotofsky ex rel. Zivotofsky v. Kerry* (*Zivotofsky II*), 135 S. Ct. 2076, 2084–94 (2015) (discussing the President’s

This enhanced foreign-affairs authority helps explain why the President should have greater authority to act without the House’s prior blessings. What’s more, the Constitution elsewhere excludes the House – but includes the Senate – in international issues.<sup>173</sup> And finally, unlike with foreign officials, the law of nations had nothing at all to say about the Supreme Court.

With strong historical precedent and structural arguments against a power to create positions for new Supreme Court Justices without the House, any President and Senate embarking on such an adventurous and unprecedented Court-packing plan could be soundly criticized for violating the Constitution. Therefore, the Appointments Clause’s “established by Law” requirement should be interpreted to apply to all *domestic* offices, including to “Judges of the supreme Court.”

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This Part argued that the Constitution’s text and structure, as informed by the experience of Americans under British rule and early state constitutions, give Congress the exclusive power of office creation. This constitutional commitment affirms Congress’s role as first among equals and institution-builder-in-chief. This textual, structural, and historical argument has important implications for the doctrinal analysis of separation-of-powers questions. The next Part explores these implications.

## II. IMPLICATIONS OF CONGRESS’S EXCLUSIVE POWER OF OFFICE CREATION

Because the Appointments Clause sits within Article II, most discussions of the provision focus on the limits and restrictions it places on the President or officials within the executive branch.<sup>174</sup> The Court has long held, for instance, that government “employees” need not satisfy the strictures of the Appointments

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exclusive power over the recognition of foreign states); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (quoting early congressional statements identifying the President as the nation’s representative in foreign relations).

173. See U.S. CONST. art. II, § 2, cl. 2 (outlining the treaty power).

174. Cf. *Freytag v. Comm’r*, 501 U.S. 868, 904 n.4 (1991) (Scalia, J., concurring in part and in the judgment) (“The Court apparently thinks that the Appointments Clause was designed to check executive despotism. This is . . . quite simply contrary to historical fact.” (citation omitted)). Justice Scalia is right that the Appointments Clause serves to withdraw powers granted to legislatures under the Articles of Confederation and under the early state constitutions. That said, the Clause does hamper executive power if compared to the baseline of the British Constitution.

Clause,<sup>175</sup> and the Clause by its terms applies differently to principal and inferior officers. The category that an executive-branch agent falls into – employee, inferior officer, or principal officer – constrains the executive branch’s authority to hire or appoint her. Therefore, commentators have often attempted to distinguish between officers and employees<sup>176</sup> and between principal and inferior officers.<sup>177</sup>

But this Note’s unique contribution is to highlight what the Appointments Clause says about *Congress*. This emphasis on Article I expands the focus from the executive branch and highlights the Clause’s interbranch implications. To show this, this Note discusses three related sets of constitutional questions: (1) Can Congress impose statutory qualifications on who can hold particular offices, and can it insulate executive-branch officials from presidential control?<sup>178</sup> (2) When, if at all, can the President (or an executive-branch official) fill temporary vacancies without using the Recess Appointments Clause? (3) How should the Court draw the line between officers and employees for purposes of the Appointments Clause?<sup>179</sup> I address each in turn.

#### A. *Qualifications and Control*

The Constitution carefully separates the powers of office creation and of appointment and control of officers. In this Section, I argue that this distinction sheds light on two perennial questions related to Appointments Clause litigation: (1) to what extent may Congress impose statutory qualifications when it

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175. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

176. See, e.g., Mascott, *supra* note 33, at 451 nn.29–39 (canvassing the literature); West, *supra* note 33; see also *Freytag*, 501 U.S. at 880 (labeling as employees the group of officials who have less authority than inferior officers).

177. See, e.g., *Edmond v. United States*, 520 U.S. 651 (1997); *Morrison v. Olson*, 487 U.S. 654 (1988); see also Nick Bravin, Note, *Is Morrison v. Olson Still Good Law?: The Court’s New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1135–37 (1998) (arguing that the independent counsel created by the Ethics in Government Act is not an inferior officer); Adrian Vermeule, *Morrison v. Olson Is Bad Law*, LAWFARE (June 9, 2017), <https://www.lawfareblog.com/morrison-v-olson-bad-law> [<https://perma.cc/4QYM-6XDQ>] (arguing that *Morrison* is “anticanonical”).

178. For a discussion of statutory qualifications, see Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745 (2008). For a discussion of presidential control over executive-branch offices, compare, for example, Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994), with Sunstein & Lessig, *supra* note 71.

179. See generally *Buckley*, 424 U.S.; Mascott, *supra* note 33, at 451–52 (discussing the literature on the employee/officer distinction); West, *supra* note 33 (setting forth an employee/officer distinction in line with the Constitution’s text and structure and Supreme Court precedent).

creates offices, and (2) to what extent may it insulate officers from the President's control? I argue that Congress's exclusive power over office creation explains why Congress may impose qualifications even though it cannot insulate officers from the President's control with for-cause removal provisions.<sup>180</sup>

### 1. Statutory Qualifications

Congress's complete authority over office creation should generally include the lesser authority to impose conditions on offices.<sup>181</sup> Qualifications clauses date back to the Founding. The First Congress, for instance, mandated that the Attorney General be "learned in the law."<sup>182</sup> Since then, Congress has filled the statute books with qualifications, many of which were collected in Justice Brandeis's *Myers v. United States* dissent. These statutes limited who could hold offices based on their citizenship, residency, professional attainments, and occupational experience, and sometimes Congress named particular individuals to hold the office.<sup>183</sup> Most recently, Congress has imposed partisan-balance requirements on offices within supposedly bipartisan or independent agencies.<sup>184</sup>

Despite the pedigree of these qualifications, Presidents and academics often argue that Article II precludes Congress from limiting whom the President can appoint.<sup>185</sup> President Arthur, for example, objected to a provision that "the President be . . . authorized to nominate and, by and with the advice and consent of

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180. *But see Myers v. United States*, 272 U.S. 52, 264 (1926) (Brandeis, J., dissenting) ("The assertion that the mere grant by the Constitution of executive power confers upon the President as a prerogative the unrestricted power of appointment and of removal from executive offices, except so far as otherwise expressly provided by the Constitution, is clearly inconsistent also with those statutes which restrict the exercise by the President of the power of nomination.").

181. See CORWIN, *supra* note 107, at 74 ("By far the most important limitation on presidential autonomy in this field of power is, however, that which results from the fact that, in creating an office, Congress may stipulate the qualifications of appointees thereto.").

182. An Act to Establish the Judicial Courts of the United States, ch. 20, § 35, 1 Stat. 73, 92-93 (1789); *see also* 28 U.S.C. § 505 (2018) (requiring the Solicitor General to be "learned in the law").

183. *See Myers*, 272 U.S. at 265-74 (Brandeis, J., dissenting) (listing hundreds of statutes); *see also* CORWIN, *supra* note 107, at 362 n.19 (citing *Myers* for this point).

184. Ronald J. Krotoszynski, Jr. et al., *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 984-85 (2015) ("The President must appoint a number of officials from an opposing political party to positions of strength within the executive branch—whether or not she wishes to do so."); *see also id.* at app., tbl.1 (listing partisan balance requirements within the administrative state).

185. *See, e.g., id.* at 985-86 ("Article II does not permit Congress to aggrandize itself by dictating the persons whom the President will appoint to principal offices within the executive

the Senate, to appoint Fitz John Porter . . . to the position of colonel in the Army of the United States.”<sup>186</sup> When President Arthur vetoed the provision, he argued:

[T]his bill . . . will create a new office upon condition that the particular person designated shall be chosen to fill it. Such an act, as it seems to me, is either unnecessary and ineffective or it involves an encroachment by the legislative branch of the Government upon the authority of the Executive. As the Congress has no power under the Constitution to nominate or appoint an officer and *cannot lawfully impose upon the President the duty of nominating or appointing to office any particular individual of its own selection*, this bill, if it can fairly be construed as requiring the President to make the nomination and, by and with the advice and consent of the Senate, the appointment which it authorizes, is in manifest violation of the Constitution.<sup>187</sup>

President Arthur’s argument applies most forcefully to statutes that single out one person who can take the job.<sup>188</sup> But the same reasoning applies to other qualifications; if Congress constrains who can be appointed, then it has interfered with the President’s authority to select the nominee and appoint the officer.

Within recent literature, Hanah Volokh offers a unique two-tiered theory of qualifications clauses.<sup>189</sup> Volokh powerfully (but ultimately unsuccessfully) argues that qualifications interfere with the President’s appointment and nomination powers. Some qualifications, she notes, require the President to select a nominee from a list “put forward by someone else,” such as a nominating commission.<sup>190</sup> These provisions infringe upon the President’s authority to nominate whomever he or she thinks is fitting. Other qualifications limit the President’s

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branch.”); Volokh, *supra* note 178, at 746-48 (arguing that the Constitution does not allow Congress to impose statutory qualifications with respect to principal officers).

186. CORWIN, *supra* note 107, at 364 n.20.

187. *Id.* (emphasis added); *see also id.* at 365 n.21 (quoting President Monroe’s statement that “Congress ha[s] no right under the Constitution to impose any restraint by law on the power granted to the President so as to prevent his making a free selection of proper persons for these [newly created] offices from the whole body of his fellow citizens”).

188. *See* 13 Op. Att’y Gen. 516 (1871); Note, *Power of Appointment to Public Office Under the Federal Constitution*, 42 HARV. L. REV. 426, 429-30 (1929); *see also* CORWIN, *supra* note 107, at 74-76, 363-65 (discussing qualifications clauses).

189. *See generally* Volokh, *supra* note 178 (arguing that Congress may impose qualifications on inferior officers, whose appointments need not be subject to Senate confirmation, but may not impose qualifications on principal officers).

190. *Id.* at 752.

appointment power by narrowing the field of candidates that he or she may lawfully select.<sup>191</sup> But Volokh is careful to narrow the scope of this claim: the Constitution permits qualifications on *inferior offices* per the plain text of the Inferior Officers Appointments Clause,<sup>192</sup> which gives Congress the authority to vest the power of appointment “by Law.”<sup>193</sup> Therefore, the Clause allows Congress to depart downward from the advice-and-consent default and to impose qualifications as the price of this departure.

But Volokh’s textual argument for this exception swallows up the original argument. Just as the Constitution gives Congress the authority to “by Law vest the Appointment of such inferior officers,” so too it gives Congress the responsibility to “establish[] by Law” all offices. Both clauses make Congress responsible for office creation, and both circumscribe the President to his or her supervisory role under the Bicameralism and Presentment Clause. True enough, this language “refers to the creation of the office, not the vesting of appointment power.”<sup>194</sup> But it’s not clear why that should matter. After all, statutory qualifications can just as much be interpreted as conditions on the nature of the office itself (like, for example, its salary or duration) as limitations on the President’s appointment power.

Put differently, qualifications do not “impose upon the President the duty of nominating or appointing,”<sup>195</sup> but rather put him or her to the choice: select an officer that suits these qualifications or forgo the officer.<sup>196</sup> Congress has the right to put the President to these choices. The Constitution creates only the offices of the President and Vice President. After that, it puts it to Congress to “establish[] by Law” “all other Officers of the United States.” Qualifications do not impose an impermissible burden on the President because the Constitution

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191. See, e.g., *id.* at 773 n.133 (discussing restrictions based on political party). Anticipating an objection, Volokh also argues that qualifications cannot be construed as the Senate’s exercise of its “Advice and Consent” function for at least two reasons: (1) advice and consent must be given *after* nomination, see *id.* at 755 n.50 (citing *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 825 (D.C. Cir. 1993)); *id.* at 757, and (2) a statutory qualification represents a compromise judgment of the “Senate, the House of Representatives, and the President” – not just the Senate, see *id.* at 759.

192. *Id.* at 747–65 (referring to the “Vested Appointments Clause”).

193. *Id.*

194. *Id.* at 760 n.68.

195. CORWIN, *supra* note 107, at 364 n.20 (quoting President Arthur).

196. Cf. Samberg, *supra* note 19, at 1755–56 (“These laws should be interpreted not as putting limits on the *choice of officer* but rather as putting limits on the *scope of the office*.”).

promises the President nothing.<sup>197</sup> Because every office is a privilege, a qualification cannot be a coercive condition on the officer. Therefore, statutory qualifications should generally be constitutional.<sup>198</sup>

Of course, Congress may not compel the President to appoint or nominate someone. The question, though, is what counts as “compulsion.” So, statutes that state that the President “shall nominate *X*” might seem unconstitutional, but I would interpret this statute as a conditional offer rather than a coercive command. It is uncontroversial that Congress may put the President to some such choices. For example, Volokh writes:

With a little more planning, Congress might be able to make the office unattractive to people without certain qualifications. For instance, it might specify that the director of the Federal Emergency Management Agency (“FEMA”) will receive a salary of \$10 per year unless she has five years of emergency management experience, in which case the director’s salary is \$200,000 per year.<sup>199</sup>

But a President could just as easily object to a provision like this on the ground that it still, effectively, forces him or her to appoint someone with five years of experience – just as if it were a traditional statutory qualification.

The real question is, at what point does a qualification become so coercive that it interferes with the President’s appointment and nomination powers? Volokh argues that Congress can legitimately use its authority over “powers, duties, and salary” to force the President’s hand.<sup>200</sup> I would go even further. Because Congress may use its authority to “establish [the office] by Law,” it may also use this authority to force the President’s hand. The question turns on whether an office is a privilege or a right, and thus whether a qualification is a caveat or an

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197. Cf. Charles L. Black, Jr., *Some Thoughts on the Veto*, 40 *LAW & CONTEMP. PROBS.* 87, 88-89 (1976) (“[I asked] myself, ‘To what state could Congress, without violating the Constitution, reduce the President?’ I arrived at a picture of a man living in a modest apartment, with perhaps one secretary to answer mail; that is where one appropriation bill could put him, at the beginning of a new term. I saw this man as negotiating closely with the Senate, and from a position of weakness, on every appointment, and as conducting diplomatic relations with those countries where Congress would pay for an embassy. But he was still vetoing bills.”).

198. Of course, the Constitution elsewhere provides that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” U.S. CONST. art. VI.

199. Volokh, *supra* note 178, at 765.

200. *Id.*

unconstitutional condition. This Note’s analysis in Part I demonstrates that qualifications are just caveats to a privilege – not unconstitutional conditions on a right.<sup>201</sup>

Readers might object that this interpretation would allow Congress to reduce the President to impotence. Perhaps so, but bicameralism and presentment give the President the last word on these statutes. Doubtless, he or she would veto any truly radical bills. Congress would also likely put its popular legitimacy at risk if it attempted to hamstring the administration of the laws or make the President its lackey, and the House faces the constant threat of biennial election. What’s more, such theoretically endless power is not outside the norm. For example, Congress could use its authority under the Appropriations Clause to shutter the government and reduce the President to total destitution. And in any event, the President’s unity gives him or her a structural advantage in inter-branch disputes that makes additional constitutional protections seem unnecessary.<sup>202</sup> Qualifications clauses pose no serious threat to the Republic, and the Constitution leaves it to Congress to impose them as it sees fit.

## 2. *Removal and Control*

For-cause removal provisions present a different question than qualifications clauses. As a general matter, these provisions claim that the President may only remove the officer for “inefficiency, neglect of duty, or malfeasance in office.”<sup>203</sup> Given the pro-Congress defense of qualifications clauses that this Note advances, it might seem implausible to argue that Congress may not impose for-cause removal restrictions. As with qualifications clauses, Congress writes these provisions into the statute itself. What’s more, it could be argued that the same unconstitutional-conditions-style reasoning supports the constitutionality of

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201. This analysis also clarifies President Arthur’s objection. *See supra* text accompanying notes 185-188. Although Congress cannot impose a “duty of nominating or appointing to office any particular individual,” *see* CORWIN, *supra* note 107, at 364, such congressional statutes should not be construed as compulsory. President Arthur seems to recognize the force of this line of argument. His veto message claims that the provision is *either* “an encroachment by the legislative branch” *or* “unnecessary and ineffective.” *Id.*

202. *Cf.* *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2605 (2014) (Scalia, J., concurring) (“In any controversy between the political branches over a separation-of-powers question, staking out a position and defending it over time is far easier for the Executive Branch than for the Legislative Branch.”).

203. Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1144-45 (2000) (quoting Act of Feb. 4, 1887, ch. 104, § 11, 24 Stat. 369, 383).



these provisions. If Congress does not owe the President a single office, the objection would go, then it may condition an office on a good-cause removal provision. Indeed, Justice Brandeis used qualifications as a counterpoint to Chief Justice Taft's opinion in *Myers v. United States*.<sup>204</sup>

Nevertheless, for-cause removal provisions are unconstitutional. Instead of imposing *ex ante* qualifications on the office itself, these for-cause provisions attempt to limit the President's *ex post* control over officers. These restrictions extend beyond the appointments process into the execution of the laws – the President's core power.<sup>205</sup> Drawing on the literature favoring the unitary executive, I shall argue that text, theory, and doctrine all support my position – even in light of my defense of qualifications.

Beginning with the text, Article II states: “The executive Power shall be vested in a President of the United States.”<sup>206</sup> Likewise, the Take Care Clause requires that the President “shall take Care that the Laws be faithfully executed.”<sup>207</sup> Through the Vesting Clause and the Take Care Clause, then, the Constitution establishes a President “who alone is accountable for executing federal law and who has the authority to control its administration.”<sup>208</sup> As Saikrishna Prakash explains, the Constitution gives the President control over law execution in two ways:

First, the president may use his executive power to execute the laws himself. When a statute requires an executive action to be taken or an execu-

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204. See *supra* note 180.

205. See Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 713 (explaining that the Constitution vests only the President with the responsibility to control law execution, and that he or she must have the authority to execute the laws, or to direct subordinates to do so).

206. U.S. CONST. art. II, § 1, cl. 1.

207. U.S. CONST. art. II, § 3, cl. 5; see also Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835 (2016) (discussing this Clause and the various Supreme Court doctrines interpreting it).

208. Prakash, *supra* note 87, at 991; see also Calabresi & Prakash, *supra* note 178 (detailing the arguments for the unitary executive theory through textual and historical lenses); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165-68 (1992) (describing various formulations of the unitary executive theory and reviewing the case law that supports each theory); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2325-26 (2001) (describing the views of unitary executives); Prakash, *supra* note 205 (discussing the textual and historical foundations for a “chief executive” theory). For a response to these arguments, see Sunstein & Lessig, *supra* note 71, at 4, which argues: “Any faithful reader of history must conclude that the unitary executive, conceived in the foregoing way, is just myth”; and sources cited *infra* note 210.

tive decision to be made, the president may act or make the choice because the Constitution establishes that only he enjoys the executive power. Second, the president may use his exclusive grant of executive power to direct the law execution of officers. In lieu of executing the law himself, the chief executive may direct his subordinate executives in their law execution.<sup>209</sup>

Put simply, the Constitution authorizes the President to execute the law. Congress may draft those laws in a way that specifies with exactitude the substantive content of the law itself, but *all* of the execution of these laws remains the ultimate responsibility of the President. Even if a statute purports to vest a duty in a particular officer, the President may “substitute his own judgment” for the subordinate’s.<sup>210</sup>

Under this theory, this Note’s distinction between qualifications and for-cause removal provisions makes good sense. Congress may *ex ante* define the minutiae (if it chooses) of substantive federal law, but it must leave the President to execute those laws. Likewise, Congress may *ex ante* define with exacting specificity the officer’s qualifications, but it must leave to the President the capacity to control the officer when she takes the job. What’s more, unlike qualifications, these for-cause removal provisions do not simply give Congress power over the

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209. Prakash, *supra* note 205, at 713.

210. Prakash, *supra* note 87, at 992. Of course, this approach is not universally advanced, and there’s interneine disagreement among unitary executives. See, e.g., Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014) (arguing that removal is necessary and sufficient to ensuring presidential control). And obviously not everyone takes this unitary-executivist approach. Some defend Congress’s broad authority to structure the executive branch. See, e.g., Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 534-46 (1989) (acknowledging the need for presidential management while demonstrating Congress’s power to “create[e] and confin[e] executive coordinating powers”); A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787, 789 (1987) (arguing that the Constitution “permits Congress to create executive agencies with substantial autonomy”). Still others chart a middle way. See, e.g., AMAR, *supra* note 6, at 193-94 (arguing that Congress cannot limit the President’s power to “unilaterally remove a high-level executive-branch appointee gone sour” but Congress “might properly vest authority over truly technical issues of fact in experts immune from presidential reversal or reprisal”); Kagan, *supra* note 208, at 2326 (declining to “espouse the unitarian position” but claiming to be “highly sympathetic to the view that the President should have broad control over administrative activity”). The Court’s doctrine has tended to tack between the extremes. Compare *Myers v. United States*, 272 U.S. 52 (1926) (opinion of Taft, C.J.) (defending a broad version of the removal power), with *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935) (allowing Congress to include for-cause removal provisions for some quasi-judicial or quasi-legislative positions).

President. Rather than transferring power from the President to Congress, independent agencies transfer power from the President to the independent agency. Congress may not constitutionally do so.

Finally, my distinction between qualifications clauses and for-cause removal provisions both justifies and cabins the Court's current doctrinal trend.<sup>211</sup> In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, for example, the Court held that "multilevel [for-cause removal] protection[s]" violated "Article II's vesting of the executive power in the President."<sup>212</sup> The Court has indicated an appetite to again strike down these for-cause removal provisions, and commentators have suggested that this decision reflects an expansive view of executive power.<sup>213</sup> The CFPB's novel structure – a single director with for-cause removal protections – could also give the Court another opportunity to embrace *Free Enterprise's* unitary-executivist jurisprudence. In *PHH Corp. v. CFPB*, for example, the en banc D.C. Circuit upheld against constitutional challenge the for-cause removal protection for the single director of the CFPB.<sup>214</sup> Although PHH declined to petition for certiorari,<sup>215</sup> similar litigation is ongoing.<sup>216</sup>

Read for all it's worth, though, the reasoning of *Free Enterprise* could extend well beyond for-cause removal protections. Recent scholarship argues that many other factors can create agency independence.<sup>217</sup> Kirti Datla and Richard Revesz discuss a "broad set of indicia of independence: removal protection, specified tenure, multimember structure, partisan balance requirements, litigation authority, budget and congressional communication authority, and adjudication authority."<sup>218</sup> If these structural features insulate agencies from presidential control, then an aggressive reading of *Free Enterprise* might require the Court to craft

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211. See Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 357–60 (2016) (discussing the trend in removal jurisprudence).

212. 561 U.S. 477, 486–87 (2010).

213. See, e.g., Huq & Michaels, *supra* note 211, at 364 ("Whether *Free Enterprise Fund's* new rule will be extended remains to be seen."); Richard H. Pildes, *Free Enterprise Fund, Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration*, 6 DUKE J. CONST. L. & PUB. POL'Y 1, 1–2 (2010); Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 FORDHAM L. REV. 2541, 2550 (2011).

214. 881 F.3d 75, 78 (D.C. Cir. 2018) (en banc).

215. See Hayashi, *supra* note 15.

216. See Mishkin, *supra* note 15.

217. Datla & Revesz, *supra* note 17; Vermeule, *supra* note 17, at 1163.

218. Datla & Revesz, *supra* note 17, at 772.

rules to limit Congress’s ability to use them. Commentators have already suggested, for instance, that *Free Enterprise’s* reasoning extends to partisan-balance requirements.<sup>219</sup>

Nevertheless, this Note’s distinction between congressional creation of *offices* and presidential control of *officers* presents a limiting principle: for-cause removal provisions interfere with the President’s control, but qualifications clauses fall within Congress’s power of office creation. Indeed, *Free Enterprise* itself seems to adopt this distinction: “Congress has plenary control over the salary, duties, and even existence of executive offices. Only Presidential oversight can counter its influence.”<sup>220</sup> This Note’s analysis presents extensive historical and textual support for this balance of power between the President and Congress.

### B. Temporary Appointments

In *NLRB v. SW General*, Justice Thomas suggested that the FVRA raised “grave constitutional concerns.”<sup>221</sup> This complicated vacancies act allows the President to “direct certain officials to temporarily carry out the duties of a vacant [office requiring Presidential appointment and Senate confirmation] in an acting capacity, without Senate confirmation.”<sup>222</sup> The FVRA has antecedents in statutes passed by the First and Second Congresses,<sup>223</sup> but it raises a broader question: when, if at all, may the President make temporary appointments that do not satisfy the Recess Appointments Clause?<sup>224</sup>

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219. See Krotoszynski et al., *supra* note 184.

220. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 500 (2010).

221. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring).

222. *SW Gen.*, 137 S. Ct. at 929 (majority opinion); see Vacancies Reform Act of 1998, 5 U.S.C. § 3345 (2018); see also Joshua L. Stayn, Note, *Vacant Reform: Why the Federal Vacancies Reform Act of 1998 Is Unconstitutional*, 50 DUKE L.J. 1511, 1522-25 (2001) (describing how the Federal Vacancies Reform Act functions).

223. See, e.g., Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281; Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 65; Act of Aug. 7, 1789, ch. 7, § 2, 1 Stat. 49, 50.

224. The best interpretation of the Recess Appointments Clause is well beyond the scope of this Note. For a sampling of the literature, see Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487 (2005); Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204 (1994); and Stuart J. Chanen, Comment, *Constitutional Restrictions on the President’s Power to Make Recess Appointments*, 79 NW. U. L. REV. 191 (1984). The Court’s decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), however, settled many of these controversies—though the decision’s narrow majority suggests that the doctrine might be subject to change. This Note remains agnostic about the correct interpretation of the Recess Appointments Clause, but my argument interacts with the Clause in a few ways. First, the Recess Appointments Clause sets

The Appointments Clause does in fact limit the President's capacity to make these temporary appointments. Building on Justice Thomas's critique in *SW General*, this Section sketches the limits on temporary appointments – even temporary appointments with statutory approval. This Section argues: (1) the President lacks the constitutional authority to make temporary domestic appointments without a statutory provision; and (2) Congress has the power to give the President temporary appointment power because of both (i) the Inferior Officers Appointments Clause and (ii) the authority to “establish[] by Law” the “Office[s] of the United States.” Nevertheless, I articulate a limit on Congress's authority to allow for temporary offices: Congress may not promulgate a statute that allows an acting officer to serve longer than she otherwise could under the Recess Appointments Clause. Such a statute would mark an impermissible “end-run around the Appointments Clause.”<sup>225</sup>

### 1. *Inherent Power*

Although commentators have suggested that the President has some authority to direct officers to temporarily perform the functions of vacant offices without statutory authority, I will demonstrate that the Constitution clearly forbids this practice. A number of legal scholars have argued that the President has authority to make acting appointments by virtue of Article II. The Office of Legal Counsel (OLC), for example, has strongly suggested that the President has the residual authority to make acting appointments without legislative authorization.<sup>226</sup> OLC argues that this power flows from the Take Care Clause's instruction that the President “shall take care that the laws be faithfully executed.”<sup>227</sup> Likewise, Edward Corwin argued that, even though “a situation of this nature is [usually] provided for in advance by a statute . . . , in lack of such a provision,

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the constitutional minimum for permissible vacancies; Congress may augment the President's authority with statutory mechanisms that allow temporary appointments. Second, the Recess Appointments Clause also imposes a constitutional limit—call it the “anticircumvention” rule—that prevents Congress from completely abdicating its responsibilities under the Appointments Clause. If a congressional statute allows temporary officers to serve for a longer term than the Recess Appointments Clause would otherwise allow, then it is an impermissible end-run around the Appointments Clause. Put simply, this Note claims that the Recess Appointments Clause serves as both a “floor” and a “ceiling” that limits congressional discretion over temporary appointments, but the Note makes no claims about what those limits are.

225. *SW Gen.*, 137 S. Ct. at 949 (Thomas, J., concurring).

226. See *The Constitutional Separation of Powers Between the President & Cong.*, 20 Op. O.L.C. 124, 161 (1996).

227. U.S. CONST. art. II, § 3.

theory and practice alike concede the President the power to make a designation.”<sup>228</sup>

Nevertheless, the Constitution’s text clearly forbids the President from making temporary appointments without prior congressional authorization.<sup>229</sup> Most importantly, Part I of this Note shows that the Constitution strictly cabins executive-branch discretion with regard to “Officers of the United States.” That argument refers to office creation, but it also supports the structural inference that the President should not be granted plenary, unenumerated power respecting the creation and deployment of the government’s officers. In addition, the Appointments Clause’s text requires that the President “*shall* nominate, and by and with the consent of the Senate, *shall* appoint . . . *all other Officers*.”<sup>230</sup> Again, the Constitution’s use of “shall” is usually mandatory,<sup>231</sup> and this provision does not admit of exceptions (“*all other Officers*”). The Constitution’s text thus assumes that the President will seek the Senate’s approval. An inherent temporary-appointments power would circumvent this commitment.

The two exceptions to this advice-and-consent baseline prove the rule. First, the Inferior Officers Appointments Clause allows that Congress “may by Law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Head of Departments.”<sup>232</sup> With this Clause, the Constitution introduces a degree of flexibility into the appointments process.<sup>233</sup> But it gives this flexibility to *Congress*: they “*may*” vest the appointment “*by Law*” if “*they think proper*.” Congress must exercise its own discretion *before* the President may make use of a discretionary appointments mechanism. Second, the Recess Appointments Clause gives the President direct flexibility. The Clause recognizes that the President might need officers even when the Senate cannot meet, but it provides a specific mechanism for filling “[v]acancies that

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228. CORWIN, *supra* note 107, at 79. Nonetheless, Lois Reznick’s student comment argues persuasively to the contrary. See Lois Reznick, Comment, *Temporary Appointment Power of the President*, 41 U. CHI. L. REV. 146, 151 n.29 (1973) (challenging Corwin’s reading of the Opinions of the Attorney General on which he bases the conclusion).

229. See *Weiss v. United States*, 510 U.S. 163, 187 (1994) (Souter, J., concurring) (“[T]he President may neither select a principal officer without the Senate’s concurrence, nor fill any office without Congress’s authorization.”); Reznick, *supra* note 228, at 150–51.

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

231. See *supra* note 58.

232. U.S. CONST. art. II, § 2.

233. See, e.g., *Weiss*, 510 U.S. at 186–87 (Souter, J., concurring) (“A degree of flexibility was thought appropriate in providing for the appointment of officers who, by definition, would have only inferior governmental authority.” (citing 2 FARRAND’S RECORDS, *supra* note 8, at 627)).

may happen during the Recess of the Senate.”<sup>234</sup> These specific exceptions to the advice-and-consent baseline confirm that the Constitution excludes a general power to make temporary appointments that are neither authorized by statute nor pursuant to the Recess Appointments Clause.<sup>235</sup>

## 2. *Vacancies Acts*

Congress has long passed statutes that “allow some breathing room in the constitutional system for appointing officers to vacant positions.”<sup>236</sup> These vacancies acts supplement the Recess Appointments Clause (the Constitution’s “floor”) with statutory mechanisms for temporary appointments. Still, these statutes raise some constitutional problems. This Section (1) discusses the history and basic mechanisms of vacancies acts; (2) lays out the constitutional problems that these acts raise; and (3) articulates two theories of the Appointments Clause that both justify and limit these statutes. Because congressional statutes should be presumed to be constitutional, a vacancies act should be construed to satisfy the Appointments Clause if it can be sustained under either theory.<sup>237</sup>

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<sup>234</sup> U.S. CONST. art. II, § 2, cl. 3.

<sup>235</sup> And even if the constitutional question were doubtful, Congress has spoken directly to the issue in the FVRA. See 5 U.S.C. § 3347 (2018) (specifying that the FVRA is the “exclusive means” for temporary appointments). Therefore, any attempt to circumvent the FVRA would be incompatible with the expressed will of Congress. The *Youngstown* framework places such actions in an especially suspect “Category III.” See Reznick, *supra* note 228, at 153–54.

<sup>236</sup> *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 211 (D.C. Cir. 1998), *superseded by statute*, Federal Vacancies Reform Act of 1998, Pub. L. No. 105-277, § 151, 112 Stat. 2681, 2681-611 to -616, *as recognized in* *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 70-71 (D.C. Cir. 2015). See generally VALERIE C. BRANNON, CONG. RESEARCH SERV., R44997, THE VACANCIES ACT: A LEGAL OVERVIEW (Oct. 30, 2017), <http://fas.org/sgp/crs/misc/R44997.pdf> [<https://perma.cc/S4YR-MFXF>] (describing the FVRA’s general authorization of temporary-government-employee performance of the nondelegable functions and duties of a vacant advice-and-consent executive-agency position); MORTON ROSENBERG, CONG. RESEARCH SERV., 98-892, THE NEW VACANCIES ACT: CONGRESS ACTS TO PROTECT THE SENATE’S CONFIRMATION PREROGATIVE (Nov. 2, 1998), [http://www.everycrsreport.com/files/19981102\\_98-892\\_e35b004e5166781e938da36cf87598c023b03614.pdf](http://www.everycrsreport.com/files/19981102_98-892_e35b004e5166781e938da36cf87598c023b03614.pdf) [<https://perma.cc/BY88-44CR>] (documenting the legislative history of the FVRA); Thomas A. Berry, S.W. General: *The Court Reins in Unilateral Appointments*, 2017 CATO SUP. CT. REV. 151 (analyzing the FVRA through the lens of *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929).

<sup>237</sup> See generally Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 184-89 (discussing the canon of constitutional avoidance).

a. *The History of the Vacancies Acts*

The First Congress established such statutory backstops within each department's organic statutes. Briefly discussing the history of these statutes will be useful for two reasons. First, early constitutional practice is powerful evidence of the Constitution's original public meaning.<sup>238</sup> Because Congress passed these statutes so soon after the Constitution's ratification, Congress today should be presumed to have similar powers. Second, the early history provides helpful examples of the types of vacancies acts that Congress creates today: namely, what I will call "automatic-promotion" provisions and "presidential-authorization" provisions.

Consider the 1789 Act that established the Treasury Department. After creating the positions of "Treasurer" and "Assistant Treasurer," the statute stated that the Assistant "shall, during the vacancy [of the Treasurer], have the charge and custody of the records."<sup>239</sup> The Act creating the Departments of Foreign Affairs and of War included similar language.<sup>240</sup> In 1792, though, Congress altered and expanded these provisions for temporary officers. Under this new statute, the incapacitation of the "Secretary of State, Secretary of the Treasury, or of the Secretary of the War" would allow the President "to authorize any person or persons at his discretion to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease."<sup>241</sup>

The 1792 amendment made three relevant alterations to the 1789 provisions. First, it broadened *who* qualified for the temporary office from the "inferior officer" within the department to "any person." Second, it expanded *what* these officers were responsible for, shifting their responsibilities from "charge and custody" of records to "perform[ing] the duties" of the office. Third, it altered *how* the temporary-office provisions were triggered (i.e., from an automatic-promotion provision to a presidential-authorization provision). Three years later, Congress again amended the statute to limit temporary appointees to six months in the position.<sup>242</sup> Congress then enacted the first generalized vacancies act in

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238. See *supra* notes 3-4; see also Bamzai, *supra* note 33, at 1506 ("The Supreme Court often tests the validity of present-day constitutional doctrine and practice by referring to the actions of the First Congress.").

239. Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 65, 67.

240. See Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29; Act of Aug. 7, 1789, ch. 7, § 2, 1 Stat. 49, 50.

241. See May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281.

242. Act of Feb. 13, 1795, ch. 21, 1 Stat. 415; see also Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision, 139 F.3d 203, 209 (D.C. Cir. 1998) (discussing the history of vacancies acts).



1868,<sup>243</sup> and Congress has legislated from time to time to update the temporary-appointments schemes.<sup>244</sup>

Passed in 1998, the FVRA functions much like the 1789 and 1792 temporary-appointment statutes. The FVRA creates a transsubstantive statutory default rule that governs temporary appointments across the executive branch. Indeed, it claims to be the “exclusive means” for temporary appointment to offices that require the Senate’s advice and consent,<sup>245</sup> although conflicts sometimes arise when conflicting statutes appear to say otherwise.<sup>246</sup>

The FVRA allows temporary officers to take on their new jobs in two ways: (1) with automatic-promotion provisions and (2) with presidential-authorization provisions. First, the statute provides that, if a qualifying office becomes vacant, then the “first assistant . . . shall perform the functions and duties of the office temporarily.”<sup>247</sup> Second, despite the first assistant’s elevation by operation of law, the President may “direct” certain other persons to temporarily perform the duties.<sup>248</sup> This distinction – between automatic promotion (which has its antecedent in the 1789 statute) and presidential direction (which has its antecedent in the 1792 statute) – matters for purposes of the Appointments Clause.

#### b. Constitutional Concerns

In *NLRB v. SW General*, Justice Thomas’s solo concurrence argued that the FVRA raises “grave constitutional concern.”<sup>249</sup> In that case, the President had directed a senior employee in the NLRB to perform the functions of the General

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243. See July 23, 1868, ch. 227, 15 Stat. 168.

244. See generally *Doolin*, 139 F.3d at 209-12 (discussing the history of the Vacancies Act).

245. 5 U.S.C. § 3347 (2018); see also *id.* § 3347(a)(1)-(2) (exempting cases when other statutes “expressly” allow a temporary appointment or when the President appoints someone “pursuant to” the Recess Appointments Clause).

246. For example, the recent controversy over Richard Cordray’s successor as Director of the CFPB involved a (perceived) conflict between the CFPB’s organic statute and the FVRA. See Stacy Cowley, *Battle for Control of Consumer Agency Heads to Court*, N.Y. TIMES (Nov. 26, 2017), <http://www.nytimes.com/2017/11/26/business/trump-cfpb-consumer-agency.html> [<https://perma.cc/TLD5-5QMB>]; Memorandum from Steven A. Engel, Assistant Att’y Gen., Office of Legal Counsel, to Donald F. McGahn II, Counsel to the President (Nov. 25, 2017), [http://www.justice.gov/sites/default/files/opinions/attachments/2017/11/25/cfpb\\_acting\\_director\\_olc\\_op\\_o.pdf](http://www.justice.gov/sites/default/files/opinions/attachments/2017/11/25/cfpb_acting_director_olc_op_o.pdf) [<https://perma.cc/8SF7-E47W>] (discussing how the Acting Director for the CFPB should be determined).

247. 5 U.S.C. § 3345(a)(1) (emphasis added).

248. *Id.* § 3345(a)(2)-(3).

249. 137 S. Ct. 929, 946 (Thomas, J., concurring).

Counsel.<sup>250</sup> The Court invalidated this temporary appointment on statutory grounds,<sup>251</sup> but Justice Thomas concurred to raise a constitutional issue. Put simply, he argued that the NLRB’s General Counsel was a “principal officer” under the Court’s jurisprudence;<sup>252</sup> that the FVRA could, in some instances, allow the President to appoint principal officers without the advice and consent of the Senate; and that, therefore, the FVRA might partially violate the Appointments Clause. “That the Senate voluntarily relinquished its advice-and-consent power in the FVRA,” Justice Thomas claimed, “does not make this end-run around the Appointments Clause constitutional.”<sup>253</sup> Worse still, Justice Thomas might have added, the automatic-promotion provisions could allow the “first assistant” to serve as a principal officer even without the President’s say-so.<sup>254</sup>

This Note offers two responses to Justice Thomas’s critique: (1) the FVRA allows the President, by virtue of the Inferior Officers Appointments Clause, to appoint people to temporary, inferior offices distinct from the original, permanent office; and (2) Congress’s authority to “establish [offices] by Law” allows it to vest duties in certain offices contingent on another office becoming vacant. Each theory explains the constitutionality of certain provisions of the FVRA. Because Congress’s statutory handiwork should be upheld if *either* theory can sustain its constitutionality, these two theories should together render the FVRA mostly constitutional. Put differently, if a provision can be sustained under either

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250. *Id.* at 937 (majority opinion).

251. *Id.* at 944.

252. *Id.* at 947-48 (Thomas, J., concurring) (“Although the Board has power to define some of the general counsel’s duties, and the general counsel represents the Board in certain judicial proceedings, the statute does not give the Board the power to remove him or otherwise generally to control his activities.” (citations omitted)). Justice Thomas relied on the reasoning in both *Edmond v. United States*, 520 U.S. 651 (1997), and in *Morrison v. Olson*, 487 U.S. 654 (1988). See *SW Gen.*, 137 S. Ct. at 947 n.2 (Thomas, J., concurring).

253. *SW Gen.*, 137 S. Ct. at 949 (Thomas, J., concurring).

254. See 5 U.S.C. § 3345(a)(1) (2018). Deputy Director of the CFPB, Leandra English, made a similar argument under the CFPB’s organic statute. See Complaint for Declaratory and Injunctive Relief at 4, *English v. Trump*, 279 F. Supp. 3d 307 (D.D.C. 2018) (No. 1:17-cv-02534), 2017 WL 5727846 (“As an additional measure of independence, Congress ensured that the President could not circumvent the need for Senate confirmation by naming a temporary replacement for a Director who leaves before the expiration of his or her term. Instead, Congress provided that the Bureau’s Deputy Director, who is ‘appointed by the Director,’ shall ‘serve as acting Director in the absence or unavailability of the Director.’”). The district court refused to grant a preliminary injunction, and the case was appealed to the D.C. Circuit. It has since been dismissed, following English’s resignation from the CFPB. See Donna Borak, *CFPB Official Who Challenged Mulvaney for Top Job is Stepping Down*, CNN (July 6, 2018, 5:38 PM ET), <https://www.cnn.com/2018/07/06/politics/cfpb-deputy-leandra-english-resigns/index.html> [https://perma.cc/JCK9-PNPK].

theory, then the FVRA survives. But even together, I will argue, certain applications of the FVRA will remain unconstitutional. The rest of this Section addresses each theory in turn.

*c. Theories of Constitutionality*

*i. Appointment to Temporary Inferior Offices*

The FVRA could be construed to “establish by Law” a parallel set of temporary offices. Every office to which the FVRA applies, the argument goes, has a related, distinct, and temporary office that the President may appoint someone to fill. The National Labor Relations Act, for instance, creates the office of the “General Counsel for the NLRB,” but the FVRA creates the distinct office of “*Acting* General Counsel for the NLRB.” Of course, Congress did not write the FVRA in this way. Instead, the FVRA states that the President may direct qualifying officials “to perform the functions and duties of the vacant office temporarily in an acting capacity.”<sup>255</sup> But Congress should not have to use magic words to establish an office. If the special-and-temporary-office theory salvages the FVRA without working “gruesome surgery” on the text,<sup>256</sup> then the Court should adopt it.<sup>257</sup>

But the special-and-temporary-office theory requires a second argument. The Inferior Officers Appointments Clause allows Congress to give the “President alone” the authority to appoint only “inferior Officers.” If the original office is a principal office, then wouldn’t the temporary one be so too? Perhaps not. Because such an acting officer would only have special and temporary powers, the position might be an inferior one.<sup>258</sup> President George W. Bush’s OLC relied on this reasoning to allow the appointment of an Acting Director of the Office of Management and Budget.<sup>259</sup> Indeed, if the special and temporary nature of the acting-officer position were not sufficient to render it inferior, then the Constitution would “void any and every delegation of power to an inferior to perform

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255. 5 U.S.C. § 3345(a)(2).

256. See *Bond v. United States*, 134 S. Ct. 2077, 2097 (2014) (Scalia, J., concurring in the judgment).

257. See generally Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275 (2016) (discussing the canon of constitutional avoidance); Hasen, *supra* note 237, at 184-89 (same).

258. See *United States v. Eaton*, 169 U.S. 331, 343 (1898).

259. Designation of Acting Dir. of the Office of Mgmt. & Budget, 27 Op. O.L.C. 121, 123 (2003) (“Although the position of Director is a principal office, we believe that an Acting Director is only an inferior officer.”).

under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered.”<sup>260</sup> And these sorts of delegations, it should be reiterated, have their antecedents in statutes passed by the First and Second Congresses.<sup>261</sup> Such longstanding historical practice should be declared unconstitutional only with thoroughly convincing evidence.

Justice Thomas, however, anticipated and addressed this line of reasoning. The official in *SW General* was “appointed ‘temporarily’ to serve as *acting* general counsel,” but Justice Thomas did not “think the structural protections of the Appointments Clause c[ould] be avoided based on such trivial distinctions.”<sup>262</sup> Otherwise, the Senate (aided and abetted by the House) could surrender its advice-and-consent responsibilities to the President. After all, Justice Thomas noted, the official did end up serving for over three years in a position that Congress limited to a four-year term.<sup>263</sup>

The difficult issue, then, is the distinction between “special and temporary” and “effectively permanent.” A structural analogy to the Recess Appointments Clause might resolve the question. The FVRA exists to ensure the continuity of government while the President and Senate select, vet, and confirm a suitable candidate for office. By analogy, the Recess Appointments Clause “ensure[s] the continued functioning of the Federal Government when the Senate is away.”<sup>264</sup> Because the Recess Appointments Clause functions as the constitutional backstop, and because Congress should not be allowed to make an “end-run around the Appointments Clause,”<sup>265</sup> the FVRA should not allow temporary appointees to serve for longer terms than the Recess Appointments Clause would permit. That Clause states that the recess appointment “shall expire at the End of their next session.”<sup>266</sup> In *Noel Canning*, the Court interpreted the Clause to ensure that the “President and the Senate always have at least a full session to go through the nomination and confirmation process.”<sup>267</sup> The Court suggested that appoint-

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260. *Eaton*, 169 U.S. at 343; see also *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 101 n.11 (2007) (citing *Eaton*).

261. See *supra* text accompanying notes 239–244.

262. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 946 n.1 (2017) (Thomas, J., concurring).

263. *Id.*

264. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2561 (2014).

265. *SW Gen.*, 137 S. Ct. at 949 (Thomas, J., concurring).

266. U.S. CONST. art. II, § 2, cl. 3.

267. *Noel Canning*, 134 S. Ct. at 2565. Justice Scalia disagreed, arguing that the Recess Appointments Clause only ensures that the President has the help of subordinates until the Senate has

ments as long as “1½; or almost 2 years” would not raise a constitutional problem.<sup>268</sup> By contrast, Justice Scalia’s interpretation of the Clause “would permit the appointee to serve for about a year.”<sup>269</sup>

Neither of the time limits advanced in *Noel Canning* supports the FVRA’s generous allowances. As a baseline, the statute allows the acting officer to serve “for no longer than 210 days.”<sup>270</sup> But if a nomination is submitted to the Senate, then the acting officer can continue to serve “for the period that the nomination is pending,” and for 210 more days if the nomination is “rejected by the Senate, withdrawn, or returned to the President by the Senate.”<sup>271</sup> And the statute allows this process to repeat for a *second* nomination.<sup>272</sup> In total, then, the statute allows the person to serve for up to 210 days until a nomination, *then* during the pendency of the first nomination, *then* for 210 days longer, *then* during the second pending nomination, *and then* for another 210 days.

Worse still, the FVRA’s time limits go well beyond what Congress has historically allowed. Congress’s 1792 statute prohibited the appointee from serving “for a longer term than six months.”<sup>273</sup> The Vacancy Act of 1868 limited the appointee to ten days, which became thirty days in 1891, and then 120 days in 1988.<sup>274</sup> None of these previous laws allowed the clock to restart if the President’s nominee failed.<sup>275</sup> So, the 1998 amendments not only extended the time limit longer than it had ever been (to 210 days), but also allowed the clock to restart *twice*. Put simply, these unprecedented and overly generous time limits constitute an “end-run around the Appointments Clause.”<sup>276</sup> In an appropriate case, the Court should clip the scope of the FVRA by severing the most generous time limit provisions.

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an “opportunity to act on the subject.” *Id.* at 2597 (Scalia, J., concurring in the judgment) (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1551, at 410 (Boston, Hillard, Gray & Co. 1833)).

268. *Id.* at 2565 (majority opinion).

269. *Id.*

270. 5 U.S.C. § 3346(a)(1) (2018).

271. *Id.* § 3346(a)(2), (b)(1).

272. *Id.* § 3346(b)(2).

273. Act of Feb. 13, 1795, ch. 21, 1 Stat. 415.

274. *Doolin Sec. Sav. Bank, F.S.B., v. Office of Thrift Supervision*, 139 F.3d 203, 210-11 (D.C. Cir. 1998) (recounting this history).

275. *See, e.g.*, 5 U.S.C. § 3345 (1994).

276. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 949 (2017) (Thomas, J., concurring).

ii. *Contingent Duties*

The automatic-promotion mechanism raises different constitutional problems. Because the “first assistant” inherits the principal officer’s duties by operation of law, the Inferior Officers Appointments Clause cannot justify the appointment. Instead, the temporary duties must be construed as contingent powers appended to the original office.<sup>277</sup> Put another way, the first assistant’s vested duties might include responsibilities *X* and *Y*, but *if* a vacancy arises, he or she also has responsibility *Z*. Generally, Congress has the capacity to make the effect of a law contingent on facts on the ground or on some other government official’s determination.

But the constitutionality of such a statute turns in part on whether the first office is appointed as an *inferior* officer or as a *principal* officer. Begin with inferior officers. Suppose that the assistant who will be automatically promoted to a principal office was *not* confirmed by the Senate – or, with English in the CFPB case, was unilaterally appointed by the Director.<sup>278</sup> In the case of an inferior officer, then, the automatic-promotion provision raises graver concerns that the statute marks an end-run around the Appointments Clause. Because the promotion occurs by operation of law, neither the President nor the Senate is directly involved in the new appointment – even though the Constitution requires this involvement for all principal officers.<sup>279</sup>

Nevertheless, the analysis in the last Section can resolve this tension. Just as with the temporary appointees, *United States v. Eaton*’s allowance for “special and temporary” duties suggests that even an inferior officer can still take on the principal’s duties – at least for a time.<sup>280</sup> Therefore, these automatic-promotion provisions should be constitutional when an inferior officer assumes the duties of a principal officer *if*: (1) the inferior officer’s original appointment satisfies the Appointments Clause (i.e., she was lawfully appointed by the President, head of

277. OLC has in fact relied on this theory before: “[F]or anyone who is already an ‘Officer of the United States’ and who was appointed after the enactment of the Vacancies Reform Act, . . . any duties arising under the Vacancies Reform Act can be regarded as part and parcel of the office to which he was appointed.” Designation of Acting Dir. of the Office of Mgmt. & Budget, 27 Op. O.L.C. 121, 122 n.3 (2003).

278. See *English v. Trump*, 279 F. Supp. 3d 307, 319 (2018) (citing 12 U.S.C. § 5491(b)(5)(B) (2018)).

279. This lack of involvement might be especially problematic when, as in the CFPB’s case, the Director is insulated from presidential control already. See, e.g., *id.* at 328 (“Under English’s interpretation, however, Cordray could have named *anyone* the CFPB’s Deputy Director, and the President would be virtually powerless to replace that person upon ascension to acting Director – no matter how unqualified that person might be.”).

280. See 169 U.S. 331, 343 (1898).

the department, or a court of law) and (2) the contingent duties are truly “special and temporary.” So long as both of these conditions are satisfied, promotion by operation of law should be perfectly constitutional.

Now consider principal officers. Suppose that an officer who has already been confirmed by the Senate takes on new responsibilities. In that case, the contingent duties need not be “special and temporary” at all. When the Senate confirmed the first officer, it should be presumed to have known that the principal officer stood to inherit the responsibilities of vacant offices. Put differently, the contingent duties were part and parcel with the original office. Therefore, the Appointments Clause likely places no limits on principal officers inheriting the duties of other principal offices.<sup>281</sup>

### C. Officers and Employees

The Appointments Clause only applies to “Officers of the United States” — not to mere “employees.” This distinction has a long history that dates back at least to an 1823 circuit court opinion penned by Chief Justice Marshall.<sup>282</sup> Since 1823, however, the Court has addressed the distinction only infrequently. The rare decisions that consider the question often technically deal with questions of statutory interpretation,<sup>283</sup> and modern decisions have been especially sparse. *Buckley v. Valeo*, for instance, held that officers were those who exercise “significant authority,” while employees were “lesser functionaries subordinate to officers.”<sup>284</sup> More recently, the Court applied the Clause to special trial judges in the

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**281.** This line of argument raises a thorny question for Mulvaney’s ongoing tenure at the head of the CFPB. Mulvaney was appointed to Acting Director under the FVRA’s temporary-appointment provisions — *not* the automatic-promotion provisions. Therefore, one way to think about Mulvaney’s job at the CFPB is as an *additional* temporary office along with his office as Director of OMB. If so, Mulvaney can only hold the second office so long as the duties remain special and temporary. But another way of thinking about his CFPB-based duties is that the President triggered the contingent duties when he “direct[ed]” Mulvaney to take the job. If so, then the duties of Acting Director were part and parcel with the office the Senate has already allowed him to hold — i.e., the Director of OMB. This Note’s discussion could cut either way. On the one hand, Congress’s handiwork should be presumed to be constitutional. On the other hand, it strains credibility to say that the duties of Acting Director of the CFPB are contingent duties already included within the office of Director of OMB.

**282.** See *United States v. Maurice*, 26 F. Cas. 1211, 1213-14 (C.C.D. Va. 1823) (No. 15,747); see also West, *supra* note 33, at 46-50 (discussing *Maurice* and other early case law).

**283.** See, e.g., *Auffmordt v. Hedden*, 137 U.S. 310 (1890); *United States v. Germaine*, 99 U.S. 508 (1878); *United States v. Hartwell*, 73 U.S. 385 (1867).

**284.** 424 U.S. 1, 126 & n.162 (1976) (per curiam).

United States Tax Court in *Freytag v. Commissioner*.<sup>285</sup> And finally, in *Lucia v. SEC*, the Court once again reaffirmed the modern line of cases – but refused to elaborate “any more detailed legal criteria.”<sup>286</sup>

This Note’s discussion of Congress’s office-creation power attempts to provide these more detailed legal criteria. This Section argues that (1) only “delegated sovereign authority”<sup>287</sup> – or, duties that “alter legal rights or obligations on behalf of the United States”<sup>288</sup> – can be sufficient to create “officer” status; and (2) to determine whether the officer exercises this “sovereign authority,” judges must look to *both* the statute that “established [the office] by Law” *and* the regulations, if any, that subdelegate responsibilities to that officer.<sup>289</sup>

This test would also resolve several puzzles left over after the Court’s decision in *Lucia*.<sup>290</sup> First, the functional version of the “significant authority” test does not provide an obvious reason to distinguish between de facto importance and de jure authority when evaluating the job’s significance. This distinction matters because it makes sense of the President’s traditional reliance on informal advisors and “czars” and because it shows how that reliance coheres with the Appointments Clause.<sup>291</sup> Second, the test narrows the category of “Officers of the United

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**285.** 501 U.S. 868, 882 (1991) (finding the special trial judges to be inferior officers, not employees, under the *Buckley* formulation).

**286.** 138 S. Ct. 2044, 2052 (2018).

**287.** Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 77 (2007).

**288.** See West, *supra* note 33 (proposing this test based on administrative law doctrine).

**289.** See, e.g., *Buckley*, 424 U.S. at 126 (defining an officer as one who exercises authority “pursuant to the laws of the United States”). This test draws on each of *Lucia*’s three opinions, but does not directly adopt any opinion’s analysis. This Note’s test is more formalistic than the approach the majority took. Unlike Justice Thomas’s concurrence, however, it requires more than just an “ongoing statutory duty,” *Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring) (quoting *NLRB v. S.W. Gen., Inc.*, 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring)) – rather, it requires that the duty be of a certain kind. And unlike Justice Sotomayor’s dissent, which requires the officer to exercise “final decisionmaking authority,” *id.* at 2065 (Sotomayor, J., dissenting), the alters-legal-rights test is triggered by a more capacious category of authority.

**290.** I do not attempt to defend this test at great length. Instead, I attempt to show that this test can resolve some of the puzzles raised by the Court’s fractured opinions in *Lucia*.

**291.** See *Examining the History and Legality of Executive Branch Czars: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 12 (2009) [hereinafter *Czars Hearing*] (statement of Professor John Harrison) (“The next point I want to make is that there is a difference between actual legal power between formal authority and influence and importance in the Government. There are a great many people in all three branches of Government who do not have any actual legal authority but who, nevertheless, are quite important to the process of formulating policy or in the judicial branch, thinking of law clerks, to the process of deciding cases.”).



States” as compared to the “ongoing statutory duties” test adopted by Justices Thomas and Gorsuch. Although this Note cannot rival the extensive historical research mustered by Professor Mascott and cited by the Justices, I suggest a few tensions that the ongoing-duties test creates. Third, I discuss how courts should deal with “contingent duties” when determining whether an official must be appointed according to the Appointments Clause.

### 1. *Advisors and Czars*

Presidents have long relied on informal advisors – today, sometimes referred to as “czars”<sup>292</sup> – to assist them with their official duties.<sup>293</sup> Relying on these advisors without congressional approval might seem to violate the Appointments Clause. On the one hand, the President might be circumventing the Constitution’s mandate that Congress has exclusive office-creating authority.<sup>294</sup> If each office must be “established by Law,” then the President should not hire officials without congressional authorization.<sup>295</sup> Critics often advance this line of

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292. See, e.g., Aaron J. Saiger, *Obama’s “Czars” for Domestic Policy and the Law of the White House Staff*, 79 *FORDHAM L. REV.* 2577, 2598 (2011) (discussing whether presidential czars should be considered officers); Kevin Sholette, Note, *The American Czars*, 20 *CORNELL J.L. & PUB. POL’Y* 219, 226-37 (2010) (discussing constitutional questions raised by czars). For an excellent history of these informal advisors, see Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 *YALE L.J.* 51, 56-76 (1994).

293. Professor Corwin recounts that President Theodore Roosevelt relied on volunteer commissioners to “investigat[e] certain factual situations and report[] their findings to the President.” CORWIN, *supra* note 107, at 71. President Herbert Hoover followed Roosevelt’s lead in relying on “fact-finding commissions, most of them without statutory basis.” *Id.* at 71-72. For simplicity, this Section discusses only presidential advisors. Similar issues should also apply to agency advisory committees. See generally Michael H. Cardozo, *The Federal Advisory Committee Act in Operation*, 33 *ADMIN. L. REV.* 1 (1981) (discussing executive advisory committee processes); Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 *YALE J. ON REG.* 451, 458-60 (1997) (discussing the history of advisory committees as they relate to agencies and the President).

294. Cf. *Weiss v. United States*, 510 U.S. 163, 187 (1994) (Souter, J., concurring) (“[N]o branch may aggrandize its own appointment power at the expense of another.”).

295. Today, an overlapping set of laws impliedly authorizes nearly any informal advisor that the President could appoint. See, e.g., 3 U.S.C. § 105(a)(1) (2018) (“[T]he President is authorized to appoint and fix the pay of employees in the White House Office . . . . *Employees so appointed shall perform such official duties as the President may prescribe.*”) (emphasis added); Advisory Comms. – Application of the Russell Amendment (31 U.S.C. § 696), 3 *Op. O.L.C.* 263, 264 (1979) (observing that the Federal Advisory Committee Act provides generalized authority to establish advisory committees); see also Saiger, *supra* note 292, at 2598-2600 (relying on the definition of “agency” under FOIA and the APA to justify the appointment of czars as employees, not officers). Nevertheless, these statutes *do* put limits on the President’s authority to hire these informal advisors. For example, the text of those statutes might only authorize the

argument, as then-Professor Bybee persuasively showed.<sup>296</sup> And these arguments have been revitalized recently to challenge modern Presidents' reliance on informal, nonstatutory czars to advance their policy visions.<sup>297</sup>

Nevertheless, the Appointments Clause should be construed to allow this practice. Presidents stretching back to Washington have claimed broad authority to rely on informal advisors.<sup>298</sup> Here again, early practice is powerful evidence of its constitutionality.<sup>299</sup> This claim to authority usually rests on the Take Care Clause or, depending on the purpose of the advisors, on the Recommendations Clause.<sup>300</sup> Recently, President Obama's White House Counsel made a similar argument.<sup>301</sup> Accordingly, the best view is that czars and informal advisors should be excluded from the class of "officers of the United States."

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President to hire employees (i.e., not officers), see 3 U.S.C. § 105(a)(1) (2018) (referring to employees), and so the statutory question and the constitutional question might be coextensive. What's more, a future Congress, perhaps in retaliation for perceived corruption in the White House, might strictly limit the President's authority to hire staff to assist him or her. Perhaps the Appropriations Clause allows Congress to refuse to appropriate funds, see U.S. CONST. art. I, § 9, cl. 7; Stith, *supra* note 104, at 1360-63, but this Note argues that it could not forbid the President from consulting them. For a recent attempt to grapple with the problem of when Congress can refuse to fund the President's constitutional responsibilities, see Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357 (2018).

296. See Bybee, *supra* note 292, at 63-70. Consider one example. President Roosevelt created a Council of Fine Arts, directed that its "advice [be] followed" in the executive branch, and requested that Congress ratify the Council. *Id.* at 63. Instead, Congress attempted to ban appropriations to pay the salary of such a council, and members of Congress claimed that "such a body should be created by the legislative body and not by the executive." *Id.* at 64.
297. See, e.g., 155 CONG. REC. S9497 (daily ed. Sept. 17, 2009) (statement of Sen. Alexander) (questioning the use of czars and claiming that "we take seriously our responsibilities under Article II"); *id.* at S9499 (letter from Sen. Feingold); Sholette, *supra* note 292, at 220 (asking whether "presidential practice of appointing experts to influential positions within the executive branch without Senate confirmation violates Section II, Clause 2 . . . of the United States Constitution, commonly known as the Appointments Clause").
298. See *supra* notes 117-128 and accompanying text; cf. *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 453 (1989) ("[I]t cannot have been Congress'[s] intention, for example, to require the filing of a charter, the presence of a controlling federal official, and detailed minutes any time the President seeks the views of the [NAACP] before nominating Commissioners to the Equal Employment Opportunity Commission, or asks the leaders of an American Legion Post he is visiting for the organization's opinion on some aspect of military policy.>").
299. See *supra* note 238.
300. See U.S. CONST. art. II, § 3, cl. 2 (Recommendations Clause); U.S. CONST. art. II, § 3, cl. 5 (Take Care Clause); Bybee, *supra* note 292, at 62 (recounting an argument advanced by President John Tyler).
301. See *Czars Hearing*, *supra* note 291, at 96-99 (2009) (letter from Gregory B. Craig, White House Counsel, to Sen. Russell D. Feingold).

But the Court's doctrine does not easily explain why these advisors should be excluded from the Clause's scope. True enough, the original formulation in *Buckley* required "significant authority pursuant to the laws."<sup>302</sup> But the language of "significance" does not easily distinguish between "actual legal power" and practical "influence" in the administrative state – or, in other words, between de facto importance and de jure authority.<sup>303</sup> The majority in *Lucia* mostly focused on actual legal authority, but at times it suggested that informal authority could influence the categorization of a government official as an officer or employee.<sup>304</sup>

The test articulated in this Note, however, explains why nonstatutory duties and responsibilities should not trigger the Appointments Clause: they cannot be the exercise of "delegated sovereign authority," and they cannot "alter legal rights or obligations on behalf of the United States."<sup>305</sup> White House positions with informal authority might be "extremely influential,"<sup>306</sup> but they cannot lawfully bind the government or third parties. That sort of authority must be exercised pursuant to valid substantive law.<sup>307</sup> Indeed, challenging the actions of nonstatutory czars is just a roundabout way of saying that the deprivation wasn't authorized by statute.<sup>308</sup> Put differently, the correct interpretation of the Appointments Clause should cohere with the Constitution's basic principle of legality.

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302. *Buckley v. Valeo*, 424 U.S. 1, 126 (1975) (per curiam) (emphasis added).

303. See *Czars Hearing*, *supra* note 291, at 12 (statement of Professor John C. Harrison).

304. See *Lucia v. SEC*, 138 S. Ct. 2044, 2054 (2018) ("And anyway, the Commission often accords similar deference to its [administrative law judges], even if not by regulation"); *id.* ("[A] judge who will, in the end, issue an opinion complete with factual findings, legal conclusions, and sanctions has *substantial informal power* to ensure the parties stay in line." (emphasis added)).

305. Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 77 (2007); West, *supra* note 33, at 57-58 (proposing this test based on administrative law doctrine).

306. See *Czars Hearing*, *supra* note 291, at 12 (statement of Professor John C. Harrison).

307. Cf. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679 (2012) ("From at least the middle of the fourteenth century, however, due process consistently referred to the guarantee of legal judgment in a case by an authorized court in accordance with settled law."); Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1914 n.146 (2014) (collecting sources that support the claim that governmental deprivations of rights must be authorized by substantive law).

308. Cf. West, *supra* note 33, at 51 ("The Appointments Clause, similarly, ought to capture any person whose activity, if it causes a cognizable harm, can be legally attributable to the U.S. government. Those vested with the capacity to alter legal rights on behalf of the U.S. government wield the state's power.").

## 2. “Ongoing Statutory Duty” Test

In *Lucia*, Justices Thomas and Gorsuch adopted the definition of “Officers of the United States” that Jennifer Mascott advanced in a recent *Stanford Law Review* article: that “all federal officials with ongoing statutory duties [must] be appointed in compliance with the Appointments Clause.”<sup>309</sup> Stated in Mascott’s words, an officer is anyone “whom the government entrusts with ongoing responsibility to perform a statutory duty of any level of importance.”<sup>310</sup> Mascott’s persuasive Article undertakes an impressive review of the historical record that this Note cannot rival, but Mascott’s test does raise a few puzzles worth addressing here — puzzles that could be resolved by adopting the definition favored by this Note.<sup>311</sup>

First, this broader definition would treat statutorily created officials differently from similarly situated officials whose positions weren’t directly created by statute. Suppose, for instance, that Congress passed a statute that allowed employees within the EPA “to appoint a chauffeur, who shall drive employees to related work events, and during each drive, this chauffeur shall provide these employees with bottled water, snacks, and pleasant conversation.” If so, this statute would violate the Appointments Clause. By contrast, if the EPA officials called cabs, or if the EPA contracted with a chauffeur company, those drivers would not suddenly become officers.<sup>312</sup> But distinguishing these two categories as a matter of constitutional law makes little sense.

Second, the broader definition does not easily explain what makes someone an officer of the United States. If the relevant distinction between them is that “[o]fficers engage[] in tasks assigned to the executive branch by law,” but employees engage in “tasks that no statute require[s],”<sup>313</sup> then it becomes difficult to explain why lots of other duties that Congress imposes on people don’t make

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309. *Lucia*, 138 S. Ct. at 2057 (Thomas, J., concurring) (citing Mascott, *supra* note 33, at 507-45). Justice Thomas also cited Mascott’s article in an earlier case, see *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring).

310. Mascott, *supra* note 33, at 454.

311. See *supra* notes 287-288. Notably, Mascott’s definition would rightly exclude informal presidential advisers.

312. See Mascott, *supra* note 33, at 508 (“For example, clerks maintaining statutorily required records were selected in conformity with Article II even though statutes assigned the recordkeeping requirements generally to an executive department or to a higher-level officer. In contrast, positions such as office-keeper and messenger apparently were not Article II offices. Such positions appeared on federal civil payroll lists or in other early documentary records, but no federal statute specifically required completion of the tasks in which these officials engaged.” (footnotes omitted)).

313. *Id.* at 514.

them officers. For example, Congress often imposes duties on private parties<sup>314</sup> and state governments,<sup>315</sup> but these entities are clearly not officers of the United States. For that reason, relying on the mere presence of a statutory duty to distinguish officers does not answer the real question: what duties count as those of the United States? By contrast, the emphasis on “sovereign authority” resolves this problem.

Third, the broader definition cannot easily draw the line when officers *delegate* authority to others – an issue that the next Section will address in more detail. In short, statutes often give an officer the authority to delegate responsibilities to lower-ranking officers or employees.<sup>316</sup> These delegated responsibilities, it seems, should probably still count as statutory responsibilities that can trigger officer status.<sup>317</sup> But if *any* statutory duty triggers officer status, and if delegated duties count as statutory duties, then it would seem to transform any person who could possibly be delegated “significant authority” into an officer.<sup>318</sup> Perhaps one way to draw the line would be to focus only on subdelegations that occur by regulation, rather than those created through a contractual relationship. But this formalism would allow officers to circumvent the Appointments Clause simply by relying on contractors or agents.<sup>319</sup>

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314. See, e.g., I.R.C. § 5000A (2018) (requiring applicable individuals to maintain minimum essential health coverage); *id.* § 6012 (requiring people to file tax returns).

315. See, e.g., 42 U.S.C. § 7410 (2018) (requiring states to submit state implementation plans under the Clean Air Act).

316. See generally Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473 (2017) (discussing this phenomenon).

317. See, e.g., Brief of Professor Jennifer L. Mascott as Amicus Curiae in Support of Petitioners at 2, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130), 2018 WL 1156628, at \*2 (“SEC ALJs carry out tasks that Congress has assigned to the SEC. Therefore, the SEC’s ALJs are ‘officers’ under the ‘statutory duty’ test.” (citations omitted)).

318. This problem could also possibly be resolved by using constitutional avoidance. In other words, statutes could be construed to disallow delegation of “significant authority” to parties that look more like employees. Cf. *Lucia*, 138 S. Ct. at 2058-59 (Breyer, J., concurring in the judgment in part and dissenting in part).

319. See Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 117-18 (2007) (“Congress could not evade the Appointments Clause by, for example, the artifice of authorizing a contract for the supervision of the Justice Department, on the ground that no ‘office’ of Attorney General would be created by law – even where the statutory authorization for the contract were to delegate sovereign authority and establish the continuance of the contractual position.”).

### 3. *Subdelegating to Contingent Offices*

Delegation raises unique issues for any theory of the employee/officer distinction that looks to statutory duties. In particular, it raises the problem of *contingent offices*. Consider the organic statute for the SEC ALJs at issue in *Lucia v. SEC*. The statute allows the SEC to “delegate, by published order or rule, any of its functions to . . . an administrative law judge, or an employee or employee board . . . .”<sup>320</sup> The SEC must “retain a discretionary right to review” these delegated actions, but the statute does state that, if not reviewed, the action “shall . . . be deemed the action of the Commission.”<sup>321</sup> Some of these delegable functions would certainly trigger officer status (e.g., the authority to promulgate rules defining the scope of insider trading liability).<sup>322</sup> Put simply, Congress can draft statutes that vest statutory responsibilities – including responsibilities that trigger officer status – only on certain conditions.<sup>323</sup> How should the Appointments Clause cope with these contingent offices?

Consider three possibilities: First, an officer might be anyone who has the potential to exercise significant authority. Because the Constitution requires that every office be “established by Law” – the argument might go – courts should look only to the statute. Nothing else counts as “law,” so nothing else should be relevant to the decision of whether or not someone counts as an “officer of the United States.” Moreover, relying on agency regulations would allow those agencies to determine for themselves whether or not their officials should be treated as officers. But this reading of the Appointments Clause would be overbroad. With respect to the SEC, for example, § 78d-1(a) allows the SEC to delegate “any of its functions” to any “employee.”<sup>324</sup> Under this approach, every single employee within the SEC would be an officer, since any employee could be delegated the SEC’s functions. Therefore, the Clause should require something more concrete than the mere possibility of “significant authority.”

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<sup>320.</sup> 15 U.S.C. § 78d-1(a) (2018).

<sup>321.</sup> *Id.* § 78d-1(b), (c).

<sup>322.</sup> See *United States v. O’Hagan*, 521 U.S. 642, 650-53 (1997) (describing this authority and quoting 15 U.S.C. § 78j(b)).

<sup>323.</sup> Chief Justice Marshall seemed to find these sorts of delegations unobjectionable. See *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) (“The army regulations are referred to in acts of congress, passed previous and subsequent to the execution of the bond under consideration. A copy of those regulations . . . has been laid before the court, and referred to by both parties. These regulations provide for the appointment, and define the duties of the agents of fortifications.”).

<sup>324.</sup> 15 U.S.C. § 78d-1(a).

Second, the Appointments Clause might be triggered only when an official actually performs the function that renders him or her an officer. (Notably, this theory only makes sense if one accepts that some statutory duties are too insignificant to make one an officer.) Under this theory, the Clause only protects against particularized violations of the Clause. For instance, even if an ALJ has the authority to issue final decisions at other times, the Appointments Clause has not been violated unless and until that ALJ actually issues a final decision. But the Court in *Freytag* rejected this reading:

Special trial judges are not inferior officers for purposes of some of their duties under § 7443A, but mere employees with respect to other responsibilities. The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution.<sup>325</sup>

Because the Clause governs who can hold an office, the violation occurs when the official “by Law” has the powers of an officer but has not been appropriately appointed. This approach thus reads the Clause too narrowly.

Neither of these two extremes suits the Appointments Clause. Judges should neither speculate about the powers and duties that the official *could* exercise under the statute, nor should they confine themselves to the *actual* exercise of authority being challenged. Instead, the touchstone of this analysis should be the legal effect of the statute that Congress created. Congress must “establish [offices] by Law,” so the office itself is a creature of statute. But well-accepted principles of administrative law allow Congress to make the legal effect of a statute turn on subsequent executive-branch action. For example, Congress may write a statute so that an action by the President alters the legal regime,<sup>326</sup> and so too Congress may “delegate” to administrative agencies rulemaking authority that alters the substantive effect of the law.<sup>327</sup> In the same way, Congress may vest the President or an administrative agency with the authority to alter the nature and scope of an officer’s duties.<sup>328</sup>

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325. *Freytag v. Comm’r*, 501 U.S. 868, 882 (1991).

326. *See, e.g., Republic of Iraq v. Beaty*, 556 U.S. 848, 856–57 (2009) (“To a layperson, the notion of the President’s suspending the operation of a valid law might seem strange. But the practice is well established, at least in the sphere of foreign affairs.”).

327. *Cf. Thomas W. Merrill, The Accardi Principle*, 74 GEO. WASH. L. REV. 569 (2006) (explaining the principle that agencies themselves are bound by their own regulations because those regulations alter the legal landscape); Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629 (1974) (same).

328. *See* *Nou*, *supra* note 316.

In *Lucia*, that’s exactly what § 78d-1 does: it allows the SEC, “by published order or rule,” to alter the legal effect of the statute that “establish[es] by Law” the position of SEC ALJ. Generally, the Court in *Lucia* rightly relied on the agency’s regulations in assessing the authority of the office. Justice Kagan referenced the regulations – not the statute itself – that gave the ALJs authority to receive evidence, examine witnesses, rule on the admissibility of evidence, and more.<sup>329</sup> The Court, however, also seemed to rely somewhat on the ALJ’s *informal* authority. It noted, for instance, that the SEC accords “deference to its ALJs, even if not by regulation.”<sup>330</sup> But such considerations should not influence the Appointments Clause analysis. If the SEC has given deference to its ALJs without basis in law, then the appropriate legal challenge is a traditional arbitrary-and-capricious claim. Officers cannot change the nature of the office simply by acting inconsistently with it, since the office is a creature of the statutory scheme. Though subdelegations raise thorny questions for Appointments Clause challenges, they also highlight that the appropriate object of inquiry is only the statutory scheme that purports to create the office.

## CONCLUSION

This Note has argued that the Appointments Clause and the Necessary and Proper Clause together give Congress the exclusive domestic office-creation authority under the Constitution. Put differently, every domestic “Office[] of the United States” must trace its existence to some congressional statute that “establish[es it] by Law.” This argument follows from the texts of the Necessary and Proper Clause and the Appointments Clause. It also respects Congress’s primacy over the structure of the government, and suits the Constitution’s origins in an act of popular sovereignty. Finally, history confirms this interpretation. The Founders’ institutional design rejects the unscrupulous patronage that plagued the British Constitution, but avoids the failures of the Articles of Confederation. I then apply this principle of constitutional design to a series of doctrinal puzzles. Together, these three doctrinal questions illustrate how Congress’s exclusive power over office creation should inform constitutional analysis of modern separation-of-powers cases.

This Note also highlights the interbranch implications of the Appointments Clause. In an era of presidential administration, we often focus on the President’s role in controlling the flesh-and-blood officers that together perform the task of governance. But this Note’s argument shows that the Constitution’s more fundamental commitment is to *congressional* control of those offices and institutions

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329. See *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018).

330. *Id.* at 2054.



without which the government's agents would be impotent. When evaluating novel separation-of-powers issues, then, we should remain cognizant of Congress's qualified supremacy. Sometimes, the President should yield to Congress's authority to create and design the very institutions that make such administration possible.