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TESTIMONY

Statement of

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Before

Rules and Administration Committee
U.S. Senate

Hearing on

"Senate Procedures to Confirm Nominees"

July 30, 2024

Congressional Research Service
7-5700
www.crs.gov

Chairwoman Klobuchar, Ranking Member Fischer, and Members of the Committee:

My name is Sean Stiff, and I am a legislative attorney in the American Law Division of the Congressional Research Service. I am honored to testify at today's hearing to discuss Congress's authority to change the appointment method for federal offices currently appointed through Senate confirmation and possible implications for a decrease in such positions.

Writing in the *Federalist Papers*, Alexander Hamilton argued that "the true test of a good government is its aptitude and tendency to produce a good administration."[1] Producing "good administration," he argued, required an appointment method that would "promote a judicious choice" in federal office holders.[2] To Hamilton, the framework then proposed in the Constitution[3]—the Appointments Clause of Article II, § 2—struck the proper balance for selecting "Officers of the United States."[4] Lodging in the President the authority to nominate certain officers would fix in one person the "sole and undivided responsibility" of the choice of nominee.[5] Lodging in the Senate the power to then confirm the President's nominee would "be an excellent check" on evils that might arise from an appointment power vested only in the President.[6] Having to "submit the propriety" of the President's choice "to the discussion and determination of a different and independent body" would (for example) ensure that the President took care when nominating those subject to Senate advice and consent.[7]

Hamilton was not just a leading proponent of the Appointments Clause. He was the first to receive the Senate's advice and consent to head an executive department.[8] In the years since 1789, the number of positions subject to the Senate's advice and consent has increased substantially. In 2020, based on data supplied by the Office of Personnel Management (OPM), the House Committee on Oversight and Government Reform counted more than 1,100 positions in agencies and departments that were subject to the Senate's advice and consent.[9] Congress continues to establish new requirements for Senate confirmation.[10]

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[1] THE FEDERALIST NO. 76, at 455 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (internal quotation marks omitted).

[2] *Id.*

[3] U.S. CONST. art. II, § 2, cl. 2.

[4] THE FEDERALIST NO. 76, at 455 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[5] *Id.* at 455–56. The Supreme Court has explained that the Clause "adds a degree of accountability" to the Senate as well. United States v. Arthrex, Inc., 594 U.S. 1, 12 (2021) (explaining that the Senate may share "public blame 'for both the making of a bad appointment and the rejection of a good one'" (quoting Edmond v. United States, 520 U.S. 651, 660 (1997))).

[6] THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[7] *Id.* at 457–58; *see also* THE FEDERALIST NO. 77, at 460 (Alexander Hamilton) (arguing that the "restraining" effect on the President of Senate confirmation "is precisely what must have been intended" by the Constitution's drafters).

[8] On September 11, 1789, the Senate received a message from President George Washington listing nine nominees for executive or judicial office, with Alexander Hamilton listed first as the President's nominee to be the first Secretary of the Treasury. The Senate gave its consent the same day. *See* 1 J. OF THE EXEC. PROCEEDINGS OF THE SENATE OF THE UNITED STATES: FROM THE COMMENCEMENT OF THE FIRST, TO THE TERMINATION OF THE NINETEENTH CONGS. 25 (1828). Earlier in the session, the Senate confirmed nominees to other offices, including revenue collectors, naval officers, and surveyors. *See, e.g.*, *id.* at 12–13.

[9] H. COMM. ON OVERSIGHT & GOV'T REFORM, U.S. GOVERNMENT POLICY AND SUPPORTING POSITIONS iii, 212 (2020) [hereinafter 2020 PLUM BOOK] (counting 1,118 positions subject to Presidential appointment with Senate confirmation based on data supplied by the Office of Personnel Management as of June 2020 of "civil service leadership and support positions in the legislative and executive branches of the Federal Government that may be subject to noncompetitive appointment").

[10] For example, in successive National Defense Authorization Acts, Congress established new positions within the Department of State that are subject to the Senate's advice and consent. *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 5562(c)(1), (2)(A), 136 Stat. 2395, 3351–52 (2022) (Ambassador-At-Large for Global Health Security and Diplomacy); National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 6405(b), 137 Stat. 136, 998 (2023) (Special Envoy to the Pacific Islands Forum). In the National Defense Authorization Act for Fiscal Year 2022, Congress required Senate confirmation for any "Special Envoy, Special Representative, Special Coordinator, Special Negotiator, Envoy, Representative, Coordinator, Special Advisor, or other position performing a similar function, regardless of title," if that person would exercise significant authority under federal law. Pub. L. No. 117-81, § 5105, 135 Stat. 1541, 2346 (2021).

While presidential appointment with the Senate's advice and consent is the "default" method of appointment for "Officers of the United States" within the meaning of the Appointments Clause, not all officers must undergo Senate confirmation.[11] The Appointments Clause delineates a class of officers, "inferior Officers," for which Congress has more flexibility in structuring appointments.[12] Congress may direct that inferior officers receive the Senate's advice and consent[13] or dispense with Senate confirmation and vest appointments in the President alone, in a court of law, or in a head of a department.[14] Whatever choice it makes, it must do so "by law."[15] Congress has thus established positions that have never required Senate advice and consent.[16] It has also removed Senate confirmation requirements from existing positions, resulting in appointments vested (for example) solely in the President.[17] Congress may decide to amend statutory appointment frameworks because, as the Supreme Court has recognized, Congress may have elected to employ Senate confirmation where the Clause does not require it.[18]

Decisions about whether to attach a Senate confirmation requirement to a newly established position or to remove such a requirement from an existing position pose legal and practical considerations for Congress. On the legal front, Congress may consider the choices available, as a matter of constitutional law, for directing how a position is to be filled. These choices are determined by answering two questions. The first question is whether the position concerned would be filled by an "Officer[] of the United States."[19] If so, the Appointments Clause would govern. If not, Congress would have discretion to structure appointments in other ways. If a position would be filled by an officer, the second question is whether that individual would be a *principal officer* who may be appointed only by the President, by and with the advice and consent of the Senate, or an *inferior officer* who may, in Congress's discretion, be appointed in the same manner or by the alternative methods described in the Clause.[20] On the practical front, Congress may consider whether the perceived benefits of confirming a nominee when the Constitution does not require it outweigh the perceived costs of granting the Senate's advice and consent.[21]

Structuring Appointments: Legal Considerations

Under the Appointments Clause of the Constitution, the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established

[11] Edmond v. United States, 520 U.S. 651, 660 (1997).

[12] U.S. CONST. art. II, § 2, cl. 2; *see also* United States v. Germaine, 99 U.S. 508, 510 (1879) (stating that the Constitution's drafters foresaw that it might "be inconvenient" to require Senate advice and consent in all cases "when offices became numerous").

[13] *Edmond*, 520 U.S. at 660.

[14] U.S. CONST. art. II, § 2, cl. 2.

[15] *Id*.

[16] *See, e.g.*, 5 U.S.C. § 7119(c)(2) (solely vesting in the President the power to appoint the Chair and members of the Federal Service Impasses Panel).

[17] *See* Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, § 2, 126 Stat. 1283, 1283 (2012) (eliminating Senate confirmation requirements for dozens of positions).

[18] Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC, 590 U.S. 448, 459 (2020) ("At times, Congress may wish to require Senate confirmation for policy reasons.").

[19] *See infra* "Distinguishing Officers of the United States from Functionaries."

[20] *See infra* "Distinguishing Principal Officers from Inferior Officers" and "Vesting Appointment Power."

[21] *See infra* "Structuring Appointments: Other Considerations."

> 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.[22]

Aside from the category of officers who are expressly excluded from the Clause's coverage—those whose appointments are "otherwise provided for" in the Constitution[23]—the Court has stated that "all persons who can be said to hold an office under the [federal] government" were "intended to be included within one or the other of these modes of appointment."[24] Governing all officer appointments in this way, the Court has said, advances important separation of powers interests. For example, by limiting "the universe of eligible recipients" of appointment power to the categories listed, the Clause "prevents Congress from dispensing" appointment power "too freely" and widely.[25]

The Appointments Clause does not "merely deal[] with etiquette or protocol" in making appointments.[26] The Clause has, instead, a "substantive meaning."[27] An individual must be "appointed in the manner prescribed" to lawfully exercise "significant authority pursuant to the laws of the United States."[28] A purported exercise of significant authority by an actor whose appointment does not conform with the Clause is invalid,[29] though judicial remedies in Appointments Clause cases have differed.[30]

Aside from being a prerequisite to an officer's lawful exercise of federal power, the Appointments Clause is notable because it describes one of the few scenarios in which one of the two houses of Congress may act independently of both the other house and of the President in a manner that affects persons outside the legislative branch. Congress usually may only alter the "legal rights, duties and relations of persons" outside of the legislative branch if its action complies with the procedural requirements of Article I, § 7 of the Constitution.[31] For example, a bill cannot become a law until it passes both houses, is presented to the President, and either approved by him or enacted over his veto.[32] The Appointments Clause is one of only

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[22] U.S. CONST. art. II, § 2, cl. 2. The Constitution states that the President may "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." *Id*. art. II, § 2, cl. 3. The Court has referred to this recess-appointment power as "a subsidiary, not a primary, method for appointing officers of the United States." NLRB v. Noel Canning, 573 U.S. 513, 522 (2014). The Appointments Clause is the "primary method." *See id*.

[23] *See* Buckley v. Valeo, 424 U.S. 1, 127 (1976) (per curiam).

[24] United States v. Germaine, 99 U.S. 508, 510 (1879); *see also* Weiss v. United States, 510 U.S. 163, 170 (1994) (stating that "the Appointments Clause applies to military officers"). However, the Court has construed the Appointments Clause's reference to officers "of the United States" to exclude "local officers" who "Congress vests with primarily local duties" when it legislates with respect to the District of Columbia or the territories. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 590 U.S. 448, 460, 464 (2020).

[25] Freytag v. Comm'r, 501 U.S. 868, 880 (1991).

[26] *Buckley*, 424 U.S. at 125.

[27] *Id*. at 126.

[28] *Id*.

[29] *Cf., e.g.*, Collins v. Yellen, 594 U.S. 220, 258 (2021) (characterizing a prior Appointments Clause decision as involving "a Government actor's exercise of power that the actor did not lawfully possess" (citing Lucia v. SEC, 585 U.S. 237 (2018))); Ryder v. United States, 515 U.S. 177, 185 (1995) (explaining that, when it provides "relief to a claimant raising an Appointments Clause challenge," a court "invalidates actions taken pursuant to defective title"). Thus, if Congress were to remove a Senate confirmation requirement from an existing position that, as a matter of law, is occupied by a principal officer, the actions of the officer who occupied that position without Senate confirmation may be vulnerable to legal challenge.

[30] *Compare Buckley*, 424 U.S. at 188 (according "de facto validity" to the past acts of an improperly constituted Federal Election Commission), *with Ryder*, 515 U.S. at 185, 188 (granting the petitioner "a hearing before a properly appointed panel" of the military court that affirmed his conviction and declining to extend *Buckley* or another prior case "beyond their facts" to the extent either "may be thought to have implicitly applied a form of the de facto officer doctrine").

[31] INS v. Chadha, 462 U.S. 919, 952 (1983).

[32] U.S. CONST. art. I, § 7, cl. 2. A bill passed by both houses may also become law, "in like Manner" as if the President "had signed it," if the bill is "not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him." *Id*.

four constitutional provisions that authorize one house to "act alone with the unreviewable force of law, not subject to the President's veto."[33]

Supreme Court decisions result in a two-step analysis for deciding whether the "nature of" an actor's "responsibilities is consistent with their method of appointment,"[34] though not all decisions address both steps in detail.[35] First, a court generally decides whether the Clause governs the actor's appointment at all. In particular, this first step resolves whether the actor is an "Officer[] of the United States."[36] Second, if the Clause governs, a court typically decides whether the actor is a principal officer or an inferior officer.[37] Having made that determination, a court is then able to compare the actor's actual method of appointment to the methods that the Clause allows for the relevant type of officer. This same two-step analysis would govern the choices available to Congress, as a matter of constitutional law, when deciding how new or existing positions might be filled.

Distinguishing Officers of the United States from Functionaries

The first step in deciding whether an actor's responsibilities fit with their method of appointment requires deciding whether the actor is an "Officer[] of the United States," as the Appointments Clause uses that term.[38] The Supreme Court has used several terms to describe an actor who does not fit the officer category, including "lesser functionaries"[39] and "mere employees."[40] The "broad swath" of the government's workforce fall in the "functionary" category.[41] Congress need not structure the selection of functionaries according to the Appointments Clause.[42]

Two features distinguish officers of the United States from functionaries. First, the Court has read the term "officer" to embrace concepts of "tenure, duration, emolument, and duties."[43] Their positions are "established by law" and their "duties and functions" are "delineated in a statute."[44] Officers perform duties that are "continuing and permanent."[45] Functionaries, on the other hand, perform duties that are only "occasional or temporary"[46] Thus, an individual selected ad hoc to advise on a "particular case,"

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[33] *Chadha*, 462 U.S. at 955. The other three types of single-house authority are the House's power to impeach, U.S. CONST. art. I, § 2, cl. 5, and the Senate's powers to try impeachments and concur to treaties, *id*. art. I, § 3, cl. 6, art. II, § 2, cl. 2.

[34] United States v. Arthrex, Inc., 594 U.S. 1, 13 (2021).

[35] *See, e.g*., Morrison v. Olson, 487 U.S. 654, 671 n.12 (1988) ("It is clear that appellant is an 'officer' of the United States, not an 'employee.'").

[36] *See infra* "Distinguishing Officers of the United States from Functionaries."

[37] *See infra* "Distinguishing Principal Officers from Inferior Officers."

[38] U.S. CONST. art. II, § 2, cl. 2.

[39] Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976) (per curiam).

[40] Freytag v. Comm'r, 501 U.S. 868, 882 (1991); *cf*. United States v. Maurice, 26 F.Cas. 1211, 1214 (Marshall, Circuit Justice, C.C.D. Va. 1823) ("Although an office is 'an employment,' it does not follow that every employment is an office.").

[41] Lucia v. SEC, 585 U.S. 237, 245 (2018); *compare* United States v. Germaine, 99 U.S. 508, 509 (1879) (stating that "nine-tenths of the persons rendering service to the government" are an "agent or employ[ee] working for the government and paid by it" but not officers of the United States), *with* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 506 (2010) (estimating that the "applicable proportion" of those serving the federal government who are functionaries "has of course increased dramatically since 1879").

[42] *Lucia*, 558 U.S. at 245 (explaining that "the Appointments Clause cares not a whit about" who names functionaries to their positions).

[43] *Germaine*, 99 U.S. at 511.

[44] *Freytag*, 501 U.S. at 881; *see also* United States v. Smith, 124 U.S. 525, 532 (1888) (holding that the clerk of a collector was not an officer of the United States because although a statute charged the collector with duties connected to public money, their clerk performed "only such duties as may be assigned" by the collector).

[45] United States v. Hartwell, 73 U.S. 385, 393 (1867).

[46] *Germaine*, 99 U.S. at 512.

without more "general functions" or "continuous duties," is not an officer even though a statute provides for that person's limited role.[47]

Second, an officer exercises "significant authority pursuant to the laws of the United States."[48] This factor focuses "on the extent of power an individual wields in carrying out" their "assigned functions."[49] An officer carries out "important" functions while exercising "significant discretion."[50] By contrast, a "ministerial" duty, one that does not entail the exercise of discretion, does not point to officer status.[51]

Although the Supreme Court has not identified the precise boundaries of significant authority,[52] it has identified types of federal authority that are likely to be "significant" for purposes of determining officer status. In the 1976 decision of *Buckley v. Valeo*, the Court examined the powers of the Federal Election Commission (FEC) in light of how its six voting members were then appointed.[53] In particular, none of the voting members were appointed in the manner prescribed by the Appointments Clause.[54] Four voting commissioners were appointed solely by Congressional action.[55] The President nominated the remaining two, subject to confirmation by both houses.[56] Ruling that the FEC was not made up of officers of the United States, the Court held that the FEC could not exercise its statutory power to conduct "civil litigation in the courts of the United States for vindicating public rights" because that would entail the exercise of significant authority under federal law.[57] Likewise, the Court determined that the FEC could not lawfully make rules or determine a person's eligibility for federal elective office because those and related functions also fit the significant-authority category.[58] The FEC could, though, exercise statutory powers of an "investigative and informative nature."[59] Congress could itself exercise these powers, so it could confer them on officials it created, even if those officials were not appointed consistent with the Appointments Clause.[60]

Further examples of "significant authority" appear in the Court's more recent decisions examining the actions of officials charged with adjudicatory functions. In two cases, the Court explained that an official's power to take testimony, conduct trials, rule on the admissibility of evidence, and enforce discovery orders ranked as significant authority.[61] In addition, the official in each case could issue

[47] Auffmordt v. Hedden, 137 U.S. 310, 327 (1890) (concluding that, though a statute called for the "selection" of a "merchant appraiser" to reappraise the value of imported goods after an initial customs appraisal, the merchant appraiser was not an officer of the United States given their episodic duties); *see also Germaine*, 99 U.S. at 511–12 (ruling that a surgeon sometimes tasked with examining pensioners or claimants was not an officer).

[48] Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam).

[49] Lucia v. SEC, 585 U.S. 237, 245 (2018).

[50] Freytag v. Comm'r, 501 U.S. 868, 882 (1991).

[51] *See id.* at 881–82 (stating that functions of special trial judges were "more than ministerial tasks").

[52] *See Lucia*, 585 U.S. at 245–46 (acknowledging that the significant authority "standard is no doubt framed in general terms" but declining to "elaborate" on the standard, reasoning that another precedent resolved the case).

[53] 424 U.S. at 127.

[54] *Id*. at 137.

[55] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 208(a), 88 Stat. 1263, 1281 (vesting in the President pro tempore of the Senate and the Speaker of the House the power appoint two voting members each, subject to confirmation by a majority of both houses).

[56] *Id*. (vesting in the President the power to appoint two voting members, subject to confirmation by a majority of both houses).

[57] *Buckley*, 424 U.S. at 140.

[58] *Id*. at 140–41.

[59] *Id*. at 137.

[60] *Id*. at 138–39.

[61] Freytag v. Comm'r, 501 U.S. 868, 881 (1991) (examining the powers of a special trial judge (STJ) appointed by the Chief Judge of the U.S. Tax Court); *see also* Lucia v. SEC, 585 U.S. 237, 248 (2018) (stating that "point for point—straight from (continued...)

decisions with varying effects on the parties' rights. One official, a U.S. Tax Court special trial judge, could issue proposed findings that only took effect if adopted by a regular judge of the Tax Court.[62] The other official, an SEC administrative law judge (ALJ), had somewhat broader authority. The ALJ's initial decisions were subject to review by the SEC.[63] If the SEC declined review, the ALJ's decision was, by statute, "deemed the action of the Commission."[64] Thus, neither official had the power to issue final decisions not subject to review by another officer.[65] However, as the Court explained, both were officers in view of their other, important discretionary powers, because having "final decision-making authority" is not an essential trait for an officer.[66]

Distinguishing Principal Officers from Inferior Officers

Deciding that an actor is as an officer of the United States means that the Appointments Clause governs the position that person fills, but it does not identify which of the constitutionally described appointment methods may be used to fill that office. A court must also decide whether the officer acts as a principal officer or instead as an inferior officer. Once a court determines an officer's principal- or inferior-officer status, the court may then compare the officer's actual appointment method with constitutionally permissible methods. If the two fit, then the officer's appointment is constitutional.[67]

The Appointments Clause does not itself use the term "principal officers" when identifying the "Officers of the United States" who the President must appoint, by and with the advice and consent of the Senate.[68] Rather, that term has emerged in Supreme Court decisions as "shorthand" to describe "noninferior officers."[69] While having "final decision-making authority" is not an essential trait of an officer,[70] the existence (or not) of final decisionmaking authority helps distinguish a principal officer from an inferior officer.[71]

The Court has explained that the "term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President."[72] An inferior officer, in other words, has a superior aside from the President.[73] While the "chain of command" is the focus, organizational charts and titles do not necessarily

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Freytag's list—the [SEC's] ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries"). In a third case, the Court agreed with the parties that administrative patent judges charged with reconsidering the validity of an issued patent exercised significant authority and thus were officers of the United States. *See* United States v. Arthrex, Inc., 594 U.S. 1, 13 (2021); *see also* Weiss v. United States, 510 U.S. 163, 169 (1994) (reciting the parties' agreement that "because of the authority and responsibilities they possess," military judges empowered to hear appeals from courts martial were officers of the United States).

[62] *Freytag*, 501 U.S. at 873. The Tax Court could assign an STJ cases in four categories. As to the first three categories, but not the fourth, the STJ had the power to "hear *and* decide" assigned cases. *Id.* at 876. However, *Freytag* concerned a case assigned under the fourth category. *Id*. at 876–77; *but see id.* at 882 (alternatively stating that the STJ was an inferior officer due to the powers they wielded in cases assigned in the first three categories).

[63] *Lucia*, 585 U.S. at 242.

[64] *Id*.

[65] *Freytag*, 501 U.S. at 881–82; *Lucia*, 585 U.S. at 249.

[66] *Lucia*, 585 U.S. at 247 (stating that the Court had "explicitly reject[ed]" a dissenting justice's "theory that final decisionmaking authority is a sine qua non of officer status").

[67] *See* United States v. Arthrex, Inc., 594 U.S. 1, 23 (2021) (holding that the "unreviewable authority" of administrative patent judges in certain proceedings was "incompatible with their appointment by the Secretary to an inferior office").

[68] U.S. CONST. art. I, § 2, cl. 2.

[69] *Arthrex, Inc*., 594 U.S. at 12.

[70] *See supra* note 66 and accompanying text.

[71] *Arthrex, Inc*., 594 U.S. at 23.

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

[73] *Id*.

mark one officer as the superior of another for Appointments Clause purposes.[74] An officer has a superior—and thus is an inferior officer—if their "work is directed and supervised at some level by others" who were appointed as principal officers.[75] Review of agency decisions by the federal courts cannot provide the supervision necessary to mark an officer as an inferior officer.[76]

The Court has distinguished principal officers from inferior officers in the context of agency adjudications. There, the Court explained that one executive-branch officer's power to "rehear" and "reverse" the decisions of another equated to the power to direct and supervise the second officer's work.[77] Judges of the Coast Guard Court of Criminal Appeals were inferior officers because the Court of Appeals for the Armed Forces, an executive branch entity, could set aside their decisions.[78] Members of the Patent Trial and Appeal Board, on the other hand, exercised power inconsistent with their appointment as inferior officers because no other principal officer in the executive branch could review their patent validity decisions.[79] In these cases, the Court's analysis focused on the finality of these administrative judges' decisions about private rights because that power (whether final or not) was the "significant authority" that marked them as "Officers of the United States."[80] The added power to wield such significant authority with finality is what can separate a principal officer from inferior officer.[81]

In deciding these two cases, its most recent examinations of the principal-inferior officer divide, the Court emphasized that it was not attempting "to set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes."[82] The Court has written that the two decisions "do not address supervision outside the context of adjudication."[83] Older cases examine the principal-inferior officer divide in the context of nonadjudicatory offices, but how these newer and older cases relate is unclear. In the 1988 decision of *Morrison v. Olson*, the Court rejected an argument that a court-appointed independent counsel acted as a principal officer but was improperly appointed as an inferior officer.[84] Under the statute that provided for their appointment, the independent counsel had the "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice" as to certain high-ranking government officials and offenses.[85] The Attorney General could remove the independent counsel only for cause.[86] The Court said it did not have to "decide exactly where the line falls between" principal and inferior officers because the independent counsel was "clearly" an inferior officer in view of their "limited" duties, jurisdiction, and tenure.[87]

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[74] *Arthrex, Inc*., 594 U.S. at 15, 18.

[75] *Edmond*, 520 U.S. at 663.

[76] *Arthrex, Inc*., 594 U.S. at 17.

[77] *Id*. at 25.

[78] *Edmond*, 520 U.S. at 665 ("What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.").

[79] *Arthrex, Inc*., 594 U.S. at 23.

[80] *See id.* at 14 (explaining that the Patent and Trademark Office was the "boss" of Patent and Trademark Board members on "administrative" matters but not "when it comes to the one thing that makes the [members] officers exercising 'significant authority' in the first place—their power to issue decisions on patentability" (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam))).

[81] *See id.*

[82] *Id*. at 23.

[83] *Id*.

[84] 487 U.S. 654, 671–72 (1988).

[85] *Id*. at 662 (quoting 28 U.S.C. § 594(a)).

[86] *Id*. at 663.

[87] *Id*. at 671–72.

Vesting Appointment Power

When applied to a particular actor, this two-step analysis identifies Congress's legal discretion for structuring an appointment. If the first step of this analysis determines that an actor is a functionary, the Appointments Clause would not constrain Congress.[88] If the analysis identifies the actor as a principal officer, then Congress must require the Senate's advice and consent.[89] If, on the other hand, the actor is an inferior officer, Congress may use the "default manner of appointment for inferior officers," which is appointment by the President with the advice and consent of the Senate.[90] Alternatively, Congress may dispense with Senate confirmation and decide that the President alone, the head of a department, or the courts of law should make the appointment.[91]

Vesting an appointment solely in the President is straightforward.[92] Vesting an appointment in the head of a department entails placing an inferior officer's appointment in the hands of an officer "in charge of a great division of the executive branch."[93] These executive branch divisions include administrative units that are "freestanding component[s] of the Executive Branch,"[94] such as executive departments[95] and independent agencies.[96] The Clause's use of the term "head[]" allows Congress to vest appointment authority in a multimember body that leads a "department[]."[97] Congress may not grant the "heads of bureaus or lesser divisions" the power to appoint inferior officers.[98] These lesser officials are "mere aids and subordinates of the heads of the department."[99] Finally, vesting an appointment in the "Courts of Law" entails placing appointment authority either in an Article III court or in an Article I court that "exercise[s] judicial power and perform exclusively judicial functions."[100] The Court has rejected claims that Congress could not require a federal court to appoint an inferior officer who purportedly would perform only executive duties,[101] but it has raised the possibility that an interbranch appointment could

[88] *See supra* note 42 and accompanying text.

[89] *See supra* note 69 and accompanying text.

[90] *Edmond*, 520 U.S. at 660.

[91] U.S. CONST. art. II, § 2, cl. 2.

[92] *See, e.g.*, 21 U.S.C. § 1703(a)(1)(B) ("There shall be a Deputy Director" of the Office of National Drug Control Policy "who shall report directly to the Director, and who shall be appointed by the President, and shall serve at the pleasure of the President").

[93] Burnap v. United States, 252 U.S. 512, 515 (1920).

[94] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 511 (2010) (citing the Postmaster General as an example of a department head who was historically treated as capable of appointing inferior officers when authorized by law but lacked the "title of Secretary or any role in the President's Cabinet").

[95] *Burnap*, 252 U.S. at 515 (Department of War).

[96] Lucia v. SEC, 585 U.S. 237, 243 (2018) (SEC).

[97] *Free Enter. Fund*, 561 U.S. at 512–13 (finding "no reason why" Congress may not vest an inferior officer appointment in a "multimember body" that heads a department given that the Constitution permits "collective" inferior-officer appointments by the "Courts of Law" and collective appointments by the House of Representatives and Senate of their officers).

[98] *Burnap*, 252 U.S. at 515.

[99] United States v. Germaine, 99 U.S. 508, 511 (1879); *cf.* Freytag v. Comm'r, 501 U.S. 868, 885 (1991) ("We cannot accept" the "assumption that every part of the Executive Branch is a department, the head of which is eligible to receive the appointment power").

[100] *Freytag*, 501 U.S. at 892 ("The Tax Court's exclusively judicial role distinguishes it from other non-Article III tribunals that perform multiple functions and provides the limit on the diffusion of appointment power that the Constitution demands.").

[101] *See, e.g.*, Rice v. Ames, 180 U.S. 371, 378 (1901) ("Congress having provided for commissioners, who are not judges in the constitutional sense, had a perfect right under" the Appointments Clause "to invest the district or circuit courts with the power of appointment"); *Ex parte* Siebold, 100 U.S. 371, 397 (1879) ("It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution.").

raise separation of powers issues if it would "impair the constitutional functions assigned to one of the branches."[102]

Granting Advice and Consent

The Appointments Clause addresses *who* must receive Senate confirmation, but the Court has not interpreted the Clause to address *how* the Senate may consent to a nomination. Article I, Section 5 of the Constitution provides the Senate its authority to structure proceedings on nominations. The provision states that each house may "determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[103] The Court has described this language as a "broad delegation of authority to the Senate to determine how and when to conduct its business."[104] The Senate may decide "all matters of method" to employ in its proceedings as long as there is "a 'reasonable relation between the mode or method of proceeding established by'" a Senate rule "and the result which is sought to be attained."[105] A Senate rule also cannot "ignore constitutional restraints or violate fundamental rights."[106] Thus, for example, when asked to decide whether an individual lawfully held the office of chair of the Federal Power Commission in light of the Senate's attempted reconsideration of its earlier resolution of confirmation, the Court interpreted relevant Senate rules, rather than the Appointments Clause.[107]

Structuring Appointments: Other Considerations

Federal statutes require the President to fill hundreds of positions in the executive branch with the Senate's advice and consent.[108] For positions that need not be filled by a principal officer,[109] though, the Appointments Clause would not compel Senate confirmation, and one Congress may choose to reevaluate the appointment framework established by its predecessor.[110] Several considerations might inform such a reexamination.

Senate confirmation may carry benefits from Congress's perspective. At its core, requiring the Senate's advice and consent allows each Senator to judge a nominee before their appointment to office, which in turn affects how the President might approach selecting nominees for such offices. As Alexander Hamilton noted, the possibility that a nominee might be rejected may give the President "a strong motive to [take] care in proposing" a nominee.[111] The President may (for example) consult with Senators on the suitability of a prospective nominee before making the nomination.[112]

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[102] *See* Morrison v. Olson, 487 U.S. 654, 675–79 (1988) (rejecting a challenge to court appointment of an independent counsel).

[103] U.S. CONST. art. I, § 5, cl. 2.

[104] NLRB v. Noel Canning, 573 U.S. 513, 550 (2014).

[105] *Id*. (quoting United States v. Ballin, 144 U.S. 1, 5 (1892)).

[106] *Id*.

[107] *See* United States v. Smith, 286 U.S. 6, 28, 33 (1932).

[108] *See supra* note 9 and accompanying text.

[109] Congress could also convert a principal officer into an inferior officer by making the "significant authority" that they wield subject to the direction and supervision of another principal officer. *See* "Distinguishing Principal Officers from Inferior Officers."

[110] *Cf*. JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1529 (1833) (noting that in "one age the appointment might be most proper in the president" while "in another age" a head-of-department appointment may be best).

[111] THE FEDERALIST NO. 76, at 458 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[112] CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki (2023), at 2 ("The President would prefer a smooth and fast confirmation process, so he may decide to consult with Senators prior to choosing a nominee.").

Once the President puts forward a nominee, a requirement for Senate advice and consent allows a Senator to judge the nominee according to whichever qualities a Senator considers relevant to the position. A Senator might reject a nominee for policy reasons.[113] Congress might also seek to affect the qualities of a nominee using statutory qualification requirements, but these may be less effective, on their own, than the Senate's advice and consent. First, Congress may only establish statutory qualification requirements through the regular lawmaking process, which requires agreement of both houses and presentment to the President.[114] The Senate confirmation process allows the Senate to "act alone," "not subject to the President's veto."[115] Second, the Constitution may set outer limits on Congress's ability to set statutory qualification requirements. The Supreme Court has not ruled on whether particular statutory qualifications are consistent with the Appointments Clause. It has said, though, that while Congress may set "reasonable and relevant qualifications" for office, those qualifications cannot be so restrictive as to amount to a "legislative designation" of a nominee.[116] The executive branch has argued that certain statutory qualifications exceed Congress's authority under similar reasoning.[117] By contrast, the Court has described the Senate's advice and consent power as "unreviewable,"[118] and the executive branch has conceded the Senate's "'sole responsibility of consenting to the President's choice.'"[119]

The confirmation process also allows Members to secure commitments from a nominee about how they will comport themselves when in office. These commitments can be routine promises "to respond to requests to appear and testify before any duly constituted committee of the Senate."[120] Commitments can also affect weightier issues. During the May 1973 hearing on the nomination of Elliot Richardson to be Attorney General, held following the Watergate break-in, Senators questioned the nominee about his views on the independence necessary for a special prosecutor. Senator Philip Hart urged that confirmation be delayed until the Committee had "an agreement on the ground rules establishing the independence of this special prosecutor."[121] The Senate eventually confirmed Attorney General Richardson, who then appointed Archibald Cox as special prosecutor.[122] When President Richard Nixon directed Attorney General Richardson to fire Cox, Richardson opted to resign, offering his reasons in a resignation letter. Among others, Richardson mentioned that "many" times during his confirmation process he had committed to "assure the independence of the special prosecutor," so he opted to resign rather than break

[113] *Cf.* INS v. Chadha, 462 U.S. 919, 952 (1983) (stating that the Senate's exercise of its advice and consent function is "unreviewable").

[114] U.S. CONST. art. I, § 7, cl 2.

[115] *Chadha*, 462 U.S. at 952.

[116] Myers v. United States, 272 U.S. 52, 128–29 (1926).

[117] *See, e.g.*, Constitutionality of Statute Governing Appointment of U.S. Trade Representative, 20 Op. O.L.C. 279, 279 (1996) (arguing that a statute, now codified at 19 U.S.C. § 2171(b)(4), that bars a person from being appointed as the U.S. Trade Representative if they had advised a foreign entity in a trade dispute with the United States was an "unconstitutional intrusion on the President's power of appointment").

[118] *Chadha*, 462 U.S. at 952.

[119] *Constitutionality of Statute Governing Appointment of U.S. Trade Representative*, 20 Op. O.L.C. at 280 (quoting Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 487 (1989) (Kennedy, J., concurring).

[120] *See, e.g.*, S. EXEC. CALENDAR, 118th Cong., Issue No. 281 at 3 (July 23, 2024) (noting with an asterisk nominees who had made such a commitment).

[121] *See Nomination of Elliot L. Richardson to be Attorney General: Hearing Before the S. Comm. on the Judiciary*, 93rd Cong. 12 (1973) (statement of Sen. Philip A. Hart).

[122] CRS Report R47102, *Executive Privilege and Presidential Communications: Judicial Principles*, by Todd Garvey (2022), at 10.

those commitments.[123] Senators continue to secure substantive commitments from nominees.[124] Along similar lines, if a current federal official expects to be nominated to a position requiring the Senate's advice and consent, they may be more willing to cooperate with the Senate in their current role than they would be if they did not expect to undergo Senate confirmation.

Aside from commitments that Senators may obtain from the nominee themselves, a Senator may use a pending nomination as a point of leverage with an agency. For example, a Senator might place a hold on a nomination and communicate what an agency needs to do for the hold to be lifted.[125]

Senate confirmation of officers may also carry costs from Congress's perspective. Compared to an inferior officer appointment vested solely in another branch, the need to secure the Senate's advice and consent can delay filling positions with potential effects on the duties vested in those positions, particularly at the start of a new presidential administration. The more positions that are subject to Senate confirmation, the longer it may take for the President to submit nominations to the Senate.[126] Further delay may then arise as the Senate deliberates on nominations. Confirmation-related workloads may fall heavier on certain committees than on others. In 2020, based on OPM data, the House Committee on Oversight and Government Reform counted more than 1,100 positions in agencies and departments that were subject to the Senate's advice and consent.[127] Though not all positions receive the same degree of vetting,[128] more than 40% were located in two agencies, the Departments of State (254) and Justice (218).[129] There were far fewer Senate-confirmed positions in any other single agency or department.[130] Though much of "the Senate confirmation process occurs at the committee level," other steps in the Senate's process for providing advice and consent can add to the chamber's workload.[131]

[123] Letter from Elliot Richardson, Att'y Gen'l, U.S. Dep't of Just., to President Richard M. Nixon, (Oct. 20, 1973) ("I trust that you understand that I could not in light of these firm and repeated commitments carry out your direction" that the special counsel be fired), *reprinted in Ziegler Statement and Texts of Letters*, N.Y. TIMES, Oct. 21, 1973, at 61.

[124] *See, e.g.*, Letter from Steven Engel to Sen. Charles Grassley (July 12, 2017) (committing that, if confirmed as Assistant Attorney General, Office of Legal Counsel (OLC), the nominee would ensure that OLC's "legal advice" concerning congressional access to information "would be consistent with" the principle that "the Executive Branch's cooperation should not be simply what could be judicially mandated"), *reprinted in* 163 CONG. REC. S4077, S4079 (daily ed. July 19, 2017).

[125] *See, e.g.*, Letter from Sen. Richard Durbin to Michael Mukasey, Att'y Gen., U.S. Dep't of Just. (Feb. 7, 2008) (advising the Attorney General that a hold placed on a nominee to be Deputy Attorney General would be lifted following an earlier request for information), *reprinted in The Office of Professional Responsibility Investigation into the Office of Legal Counsel Memoranda: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 92–93 (2010). A "hold" is an "informal practice whereby Senators communicate to Senate leaders, often in the form of a letter, their policy views and scheduling preferences regarding measures and matters available for floor consideration." CRS Report R43563, *"Holds" in the Senate*, by Mark J. Oleszek (2017), at 1.

[126] S. REP. NO. 112-24, at 3 (noting that "typically the presidential selection and vetting" process "consumes the majority of the time from vacancy to appointment").

[127] 2020 PLUM BOOK, *supra* note 9, at 209–12.

[128] S. REP. NO. 112-24, at 2 ("As one would expect, the length of time to fill positions varies with the level and nature of the position.").

[129] 2020 PLUM BOOK, *supra* note 9, at 209–12. These figures include only "civil service leadership and support positions in the legislative and executive branches of the Federal Government that may be subject to noncompetitive appointment." *Id*. at iii.

[130] *Id*. at 209–12 (listing the Office of the Secretary of Defense's 44 Senate-confirmed positions as the third-largest single "agency or department" count).

[131] CRS Report R44083, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, by Henry B. Hogue and Maeve P. Carey (2021), at 4–6.

Delay can lead to vacancies in offices that are subject to Senate confirmation. The Federal Vacancies Reform Act (FVRA), among other statutes,[132] ensures that the duties of an office requiring the advice and consent of the Senate can be performed by an acting official in certain circumstances.[133] However, the FVRA does not authorize acting officials for all offices whose regular occupant requires the Senate's advice and consent,[134] which might result in a vacant office whose functions or duties no other individual could perform.[135] When the FVRA does authorize an acting official, it does so subject to limits, which also may impact agency operations.[136] Even if the FVRA permits use of an acting official, a Senator may, in a given case, disfavor that arrangement as a policy matter.[137]

As described above, Senate confirmation requirements create potential points of leverage for Senators to press, but removing confirmation requirements would not necessarily deprive the Senate of effective oversight of inferior officers. Congress has tools beyond the Senate's advice and consent power for conducting oversight, such as its implied constitutional power of inquiry[138] and its authority under the Appropriations Clause.[139] Congress may use its power to inquire, for example, to probe any "subject on which legislation may be had,"[140] which would include an inferior officer's exercise of their statutory authorities.

Congress may decide that, for a given position, the perceived benefits of a Senate confirmation requirement outweigh its perceived costs. For example, Congress may decide that, based on the role filled by certain inferior officers, the Senate should continue to judge nominee qualifications, even if doing so risks delay in filling those offices. Congress may just as well decide, though, that given its other oversight authorities, Senate confirmation is not necessary for those inferior officers. So long as the Appointments Clause does not require Senate confirmation, that judgment is "Congress's to make."[141]

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[132] *See* 5 U.S.C. § 3347(a) (stating that the Federal Vacancies Reform Act (FVRA) is the "exclusive" means for "temporarily authorizing" certain acting officials unless another statute provides authority that meets certain criteria or the President exercises the recess appointment power).

[133] *See, e.g.*, NLRB v. SW Gen., Inc., 580 U.S. 288, 293 (2017) ("Congress has long accounted for this reality by authorizing the President to direct certain officials to temporarily carry out the duties of a" vacant office that normally requires Senate confirmation "in an acting capacity, without Senate confirmation.").

[134] *See* 5 U.S.C. § 3349c.

[135] *See id.* § 3348(b)-(d).

[136] *See* CRS Report R44997, *The Vacancies Act: A Legal Overview*, by Valerie C. Brannon (2022), at 13–15 (discussing for how long an acting official may serve under the FVRA).

[137] For example, the FVRA allows certain individuals to serve an acting official even if the Senate has never confirmed that person to a position requiring advice and consent. *See* 5 U.S.C. § 3345(a)–(b) (permitting either the "first assistant to the office" or "a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate" to perform the functions and duties of the vacant office temporarily in an acting capacity).

[138] *See* CRS Testimony TE10086, *Breaking the Logjam Part 3: Restoring Transparency and Accountability in the Accommodation Process*, by Sean M. Stiff (2023), at 2 (discussing Congress's implied constitutional power of inquiry).

[139] *See* CRS Report R46417, *Congress's Power Over Appropriations: Constitutional and Statutory Provisions*, by Sean M. Stiff (2020), at 13-16.

[140] Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 506 (1975).

[141] Weiss v. United States, 510 U.S. 163, 187 (1994) (Souter, J., concurring).