

COMMENTS

CONGRESS'S OFFICERS: RESTORING THE ANTI-DIFFUSION PRINCIPLE TO APPOINTMENTS CLAUSE JURISPRUDENCE

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INTRODUCTION

Many Appointments Clause¹ controversies revolve around whether a particular government official wields “significant authority” such that they are an “officer” under the Constitution.² Another aspect of the Appointments Clause, however, deserves greater attention: how do we know when an office has been “established by law,” and when Congress has, “by law,” vested the appointment of inferior officers in the heads of departments?

As this Comment will demonstrate, the lower courts are not in agreement about what it means to be established “by law,” and direct challenges to officers’ authority on that basis persist.³ After a brief overview of Appointments Clause jurisprudence, this Comment will look to prior Supreme Court decisions to find mechanisms that can be fashioned into elements or factors of a more developed “by law” test. It will then examine a circuit split on the “by law” question and discuss how a more developed test would resolve their differences.

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¹ U.S. CONST., art. II, § 2, cl. 2.

² Most recently, the Supreme Court weighed in, but decided the case in a way that does not affect this analysis. *Fin. Oversight & Mgmt. Bd. v. Aurelius Investment, LLC*, 140 S. Ct. 1649 (2020) (finding that members of the Financial Oversight and Management Board of Puerto Rico are not “officers” of the United States).

³ *See, e.g., In re Grand Jury Investigation*, No. 18-3052, 2019 WL 9121692, at *1054, *1056 (D.C. Cir. Feb. 26, 2019) (finding that Congress authorized the Attorney General “by law” to appoint a Special Counsel, and that a Deputy Attorney General is the “head” of a department when the Attorney General is recused).

I. AN OVERVIEW OF THE APPOINTMENTS CLAUSE

The Appointments Clause states that:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by 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.⁴

This clause establishes two modes of appointment for officers of the United States: (1) appointment by the President with the advice and consent of the Senate; and (2) appointment by other officers—namely, the President, the courts of law, or heads of departments.⁵ The latter means of appointment is reserved for “inferior officers,” who wield significant authority but are nonetheless supervised by other “principal” officers.⁶ Below these two strata are “lesser functionaries”⁷—employees not subject to the Appointments Clause—for who, as Justice Kagan recently said, the clause “cares not a whit about who named them.”⁸

The Court has drawn the line between officers and employees by inquiring into whether the potential officer wields “significant authority.”⁹ That significance has been found when the potential officer carries out “important

⁴ U.S. CONST. art. II, § 2, cl. 2.

⁵ *United States v. Germaine*, 99 U.S. 508, 509–10 (1878) (“The Constitution for purposes of appointment very clearly divides all its officers into two classes That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt.”).

⁶ *Id.* at 511; *see also* *Edmond v. United States*, 520 U.S. 651, 663 (1997) (“[W]e think it evident that ‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”); *Buckley v. Valeo*, 424 U.S. 1, 133 (1976) (“Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary.”).

⁷ *See Buckley*, 424 U.S. at 126 n.162 (internal citations omitted) (“‘Officers of the United States’ does not include all employees of the United States Employees are lesser functionaries subordinate to officers of the United States.”); *see also Edmond*, 520 U.S. 651, 662 (1997) (“The exercise of ‘significant authority pursuant to the laws of the United States’ marks . . . as we said in *Buckley*, the line between officer and nonofficer.”).

⁸ *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018).

⁹ *See Buckley*, 424 U.S. at 126. That authority must be “pursuant to the laws of the United States.” *Id.* Furthermore, the Department of Justice Office of Legal Counsel asserts that “significant authority” is akin to the concept of an “office” as delegated sovereign authority, which dates back to the Founders and has roots in English common law. *See Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 83–84 (2007).

functions” such as taking testimony, conducting trials, and ruling on the admissibility of evidence.¹⁰

In addition to a search for “significant authority,” the Court has long considered whether the position is “continuing.”¹¹ As far back as Reconstruction, the Court has found the term “officer” to embrace ideas of “tenure, duration, emolument, and duties.”¹² In *United States v. Germaine*, the Court determined that the position of civil surgeon, appointed by the Commissioner of Pensions, was not an office because the duties were “occasional and intermittent.”¹³ More recently, in *Freytag v. Commissioner*, the court noted that special masters are employed by the court on a “temporary, episodic basis” where Special Trial Judges are not.¹⁴

Finally, a position must be “established by law” to be an office. What it means to be established “by law” is poorly defined. Most recently, in *Lucia v. SEC*, Justice Kagan limited her analysis to noting that the position was created by statute and, by regulation, administrative law judges receive a career appointment.¹⁵ In concurrence, Justices Thomas and Gorsuch treat “by law” and “by statute” as synonymous.¹⁶

Treating “by law” as a synonym for “by statute” leaves many important questions unanswered; importantly, it creates ambiguity around when the

¹⁰ See *Freytag v. Comm’r*, 501 U.S. 868, 882 (1991) (finding that the significant discretion enjoyed by special trial judges (“STJ”) was powerful enough evidence to deem them inferior officers despite the fact that STJs could not enter final decisions). Similarly, administrative law judges wield significant authority because they “critically shape the administrative record.” See *Lucia*, 138 S. Ct. at 2053. Whether *Lucia* applies to some or all administrative law judges has not been firmly settled. See Exec. Order. No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018) (“Given this expanding responsibility for important agency adjudications, and as recognized by the Supreme Court in *Lucia*, at least some—and perhaps all—ALJs are “Officers of the United States” and thus subject to the Appointments Clause.”). Additionally, ‘significance’ can come from either the scope of the office’s power or the degree to which they wield it. *Morrison v. Olson*, 487 U.S. 654, 718 (1988) (Scalia, J., dissenting) (finding that despite being confined to a narrow investigation, the Special Counsel wielded the full authority of the Attorney General within that investigation, and thus wielded “significant” authority.); see also *id.* (“The Ambassador to Luxembourg is not anything less than a principal officer, simply because Luxembourg is small.”). Alternatively, a 2007 Office of Legal Counsel memorandum conceptualized “significant authority” as “delegated sovereign authority,” relying on several early state cases, English common law, treatises, and other sources. See *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 81–84 (2007).

¹¹ *Lucia*, 138 S. Ct. at 2051.

¹² *United States v. Germaine*, 99 U.S. 508, 511 (1878) (citing *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1867)).

¹³ *Id.*

¹⁴ *Freytag*, 501 U.S. at 881.

¹⁵ *Lucia*, 138 S. Ct. at 2047.

¹⁶ *Id.* at 2057 (Thomas, J., concurring) (“For federal officers, that duty is ‘established by Law’—that is, by statute.”).

Clause's "vesting requirement" has been satisfied. Later, this Comment will discuss previously litigated cases in which the "by law" question was very ambiguous. But Part II turns to the importance of separation of powers, and discusses how the Appointments Clause serves an anti-diffusion purpose, requiring Congress to hold on to its role developing the powers and duties of executive officers, and consenting to the President's principal deputies.

II. THE APPOINTMENTS CLAUSE AS A MECHANISM TO PRESERVE THE SEPARATION OF POWERS

The Supreme Court routinely invokes the principle of separation of powers in Appointments Clause cases, often doing so in deeply aphoristic terms. In *Freytag*, the Court called the separation of powers "the central guarantee of a just government."¹⁷ Earlier, in *Myers v. United States*, the Court said:

If there is a principle in our Constitution, indeed in any free Constitution more sacred than another, it is that which separates the legislative, executive and judicial powers. If there is any point in which the separation of the legislative and executive powers ought to be maintained with great caution, it is that which relates to officers and offices.¹⁸

But what the Court has enshrined in law is not separation for separation's sake: the ultimate goal of separation of powers in the appointments context is a measure of democratic accountability in the administrative state. The Appointments Clause establishes a collaborative scheme between Congress and the President, in which Congress creates the offices, assigns the powers, and consents to the President's principal deputies. In addition to a structural role, however, the process laid out in the Appointments Clause preserves democratic accountability by ensuring that Congress, along with the President, faces political consequences for injudicious appointments.

According to the Court, the Framers were trying to prevent the kind of arbitrary appointments they lived with as colonists—considered to be "the most insidious and powerful weapon of eighteenth-century despotism."¹⁹ The Clause prevents Congress from giving away its role in appointments freely to

¹⁷ *Freytag*, 501 U.S. at 870.

¹⁸ *Myers v. U.S.*, 272 U.S. 52, 116 (1926) (quoting 1 ANNALS OF CONG. 581 (1789)).

¹⁹ *Freytag*, 501 U.S. at 883, 885 ("The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government. Given the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint. The Framers recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power.").

the President. “Those who framed our Constitution addressed these concerns by carefully husbanding the appointment power to limit its diffusion Although the debate on the Appointments Clause was brief, the sparse record indicates the Framers’ determination to limit the distribution of the power of appointment.”²⁰

In *Freytag*, the Court described the Appointments Clause as “reflect[ing] our Framers’ conclusion that widely distributed appointment power subverts democratic government.”²¹ Preventing “diffusion” came at the cost of some convenience for either branch.²² Most importantly, the Appointments Clause prevented one branch from “aggrandizing its power at the expense of another branch” or “dispensing it too freely . . . to inappropriate members of the Executive Branch.”²³

More than serving as a bulwark against eighteenth-century despotism, the Appointments Clause allows “the public to hold the President and Senators accountable for injudicious appointments.”²⁴ It establishes a scheme through which voters may direct their outrage at the President *and* their Senators for the acts of high-ranking officials. If necessary, Congress can turn to impeachment as a remedy.²⁵

²⁰ *Id.* at 883–84; *see also* *Ryder v. U.S.*, 515 U.S. 177, 182 (1997) (quoting *Freytag*, 501 U.S. at 878) (“The Clause is a bulwark against one branch aggrandizing its power at the expense of another branch, but it is more: it ‘preserves another aspect of the Constitution’s structural integrity by preventing the diffusion of the appointment power.’”).

²¹ *Freytag*, 501 U.S. at 885 (“The Framers recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power.”).

²² *Id.* at 880 (“[T]he Appointments Clause does not always serve the Executive’s interests. For example, the Clause forbids Congress to grant the appointment power to inappropriate members of the Executive Branch. Neither Congress nor the Executive can agree to waive this structural protection.”).

²³ *Id.* at 878, 80. (“The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political. Our separation-of-powers jurisprudence generally focuses on the danger of one branch’s aggrandizing its power at the expense of another branch. . . . The Appointments Clause not only guards against this encroachment but also preserves another aspect of the Constitution’s structural integrity by preventing the diffusion of the appointment power.”).

²⁴ *Weiss v. United States*, 510 U.S. 163, 186 (1994) (Souter, J., concurring) (quoting *THE FEDERALIST* NO. 77, at 517 (Alexander Hamilton)) (“In the Framers’ thinking, the process on which they settled for selecting principal officers would ensure ‘judicious’ appointments not only by empowering the President and the Senate to check each other, but also by allowing the public to hold the President and Senators accountable for injudicious appointments. ‘[T]he circumstances attending an appointment [of a principal officer], from the mode of conducting it, would naturally become matters of notoriety,’ Hamilton wrote; ‘and the public would be at no loss to determine what part had been performed by the different actors.’”).

²⁵ *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 76 (2007) (citing U.S. CONST. art. I, § 3; U.S. CONST. art. II, § 4) (“By preventing diffusion, the Appointments Clause helps to ensure accountability for the quality of appointments and the

The Supreme Court has dutifully policed the boundaries of Congress, the Presidency, and the Courts to avoid wrongful usurpations of power in the name of maintaining “functionally identifiable” branches of government.²⁶ But the political importance of separation of power remains underappreciated: separation of powers provides the public clear avenues through which to demand accountability—to *compel* the branches to check one another if necessary.

Unitary executive theorists commonly justify strong presidential control over the administrative state on the basis that presidents are the most democratically legitimate figure in the federal government because they uniquely represent a nationwide electorate.²⁷ Other advocates for strong presidential administration, even while critical of unitary executive theory, argue that presidential leadership “enabl[es] the public to comprehend more accurately the sources and nature of bureaucratic power,” and “establishes an electoral link between the public and the bureaucracy, increasing the latter’s responsiveness to the former.”²⁸ When applied to the Appointments Clause however, these claims miss one critical point: the Appointments Clause defends democratic legitimacy by demanding *interbranch* cooperation, preserving a direct role for the Senate in selecting the highest-level executive officials and demanding explicit delegations from Congress for staffing the level immediately below. One source of bureaucratic power is an inattentive

operation of the Government—through a limited number of publicly known and readily discernible sources of appointing authority, and also, ultimately, through the threat of impeachment, by which Congress may both remove a person from any civil “Office” and disqualify him “to hold and enjoy any Office.”)

²⁶ See *Myers v. United States*, 272 U.S. 52, 135 (1926) (“The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.”); *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983) (“Although not ‘hermetically’ sealed from one another . . . the powers delegated to the three Branches are functionally identifiable. When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it When the Executive acts, he presumptively acts in an executive or administrative capacity as defined in Art. II.”).

²⁷ See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 *ARK. L. REV.* 23, 59 (1995) (“First, the President is unique in our constitutional system as being the only official who is accountable to a national voting electorate and no one else. As we have seen, this constitutes the President’s unique claim to legitimacy, and is the factor that differentiates the President from both members of Congress and Article III justices and judges. Senators and representatives are accountable first and foremost to the states and districts that have elected them. It is to those states and districts that they must ultimately return for reelection, and it is from those states and districts that they get the bulk of the constituent feedback to which they really listen.”).

²⁸ Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2331–32 (2001).

or complicit Congress; the interbranch cooperation demanded by the Appointments Clause ensures that our representatives suffer the consequences.

III. A HISTORY OF INTERPRETING “BY LAW,” AND A POTENTIAL “BY LAW” TEST

Determining whether a potential officer wields “significant authority” or a continuing position is a relatively straightforward, fact-laden inquiry. The Court’s current approach to determining if an office was “established by law,” however, is limited to a cursory identification of a pertinent statute. As some of the circuit cases that follow indicate, this shallow inquiry can fail to resist diffusion or preserve interbranch cooperation. By looking to the Court’s sparse history of cases turning on a “by law” question however, we can find the beginning of a workable test to apply in the future.

The Court examined the meaning of “by law,” albeit briefly, in *ex parte Hennen*.²⁹ In *Hennen*, the former clerk of a district court disputed his dismissal by a local judge.³⁰ Despite performing his duties “methodically, promptly, skillfully, and uprightly,” the judge dismissed the clerk in order to commission another, toward whom the judge felt “a sense of duty, and feelings of kindness towards one, between whom and himself the closest friendship had ever existed.”³¹ The Court offered a few potential elements of what it means to be established “by law.” It described the role of clerk as “a *public office* created *by law for a public benefit*; its *duties* are defined by law; and the *mode in which the incumbent is to be appointed*, is expressly designated by law. It does not depend on usage or custom.”³² Other acts of Congress required the clerk to swear an oath and give a bond before entering office.³³

Another early case, *United States v. Hartwell*, takes us a step further.³⁴ In *Hartwell*, a former clerk was charged with a criminal offense that applied to “officers,” and—naturally—the clerk argued that the law did not apply to him. The Court disagreed. The General Appropriation Act of July 23, 1866, authorized the assistant treasurer to appoint salaried clerks.³⁵

²⁹ *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839).

³⁰ *Id.* at 231.

³¹ *Id.* at 232.

³² *Id.* at 243 (emphasis added).

³³ *Id.* at 243–44.

³⁴ *United States v. Hartwell*, 73 U.S. (6 Wall.) 385 (1867).

³⁵ *Id.* at 393 (citing ch. 208, 14 Stat. 191, 200 (1862)).

The employment of the defendant was in the *public service* of the United States. He was appointed pursuant to law, and his *compensation* was fixed by law. Vacating the office of his superior would not have affected the *tenure* of his place. His duties were *continuing and permanent*, not occasional or temporary. They were to be such as his superior in office should prescribe.³⁶

For more than a century, *Hartwell* has been quoted by courts for its straightforward definition of an officer: a “term embrac[ing] the ideas of tenure, duration, emolument, and duties.”³⁷ But it also reaffirms some of the elements suggested by *Hennen*, like being appointed for a public purpose or benefit. The other factors that appear in *Hennen*—prescribed duties and the means of appointment—will reappear in later cases, along with another possible element from *Hartwell*: compensation.

In *Germaine*, a civil surgeon was indicted under a statute that applied to “every officer . . . who is guilty of extortion under color of his office.”³⁸ Naturally, he argued that he was not, in fact, an officer, and the Court agreed. More importantly for our purposes, however, the Court provided a lengthy description of what it means to be established “by law”:

No regular appropriation is made to pay his compensation, which is two dollars for every certificate of examination, but it is paid out of money appropriated for paying pensions in his district, under regulations to be prescribed by the commissioner. He is but an agent of the commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. He may appoint one or a dozen persons to do the same thing. The compensation may amount to five dollars or five hundred dollars per annum. There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case. If Congress had passed a law requiring the commissioner to appoint a man to furnish each agency with fuel at a price per ton fixed by law high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this statute.³⁹

Here, the benefits of applying substantive requirements with respect to salary, duties, and means of appointment become clear. Without provision for payment, a superior officer could pay his supervisees exorbitant amounts, or nothing at all; there are no consequences for failing to carry out one’s duties; there are no limits on the number of people who could be appointed. And such an amorphous position cannot be an officer.

³⁶ *Id.* (emphasis added).

³⁷ *Id.*

³⁸ *United States v. Germaine*, 99 U.S. 508, 509 (1878).

³⁹ *Id.* at 512.

In *Burnap v. United States*, a landscape architect argued that he was an “officer” because he was appointed by the Secretary of War, and therefore entitled to recoup wages after his wrongful termination.⁴⁰ The Court held that merely being supervised by the head of a department does not make someone an officer.⁴¹ More importantly, the Court reasoned that the distinction between officer and employee “does not rest upon differences in the qualifications necessary to fill the positions” or in the character of the service to be performed,” but instead “is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto.”⁴²

The Court flatly concluded that the petitioner could not be an officer because there was no statute that created the office of landscape architect “nor any which defines the duties of the position.”⁴³ It also observed that “the only authority for the appointment or employment of a landscape architect in that office is the legislative, executive, and judicial appropriation Act of June 17, 1910,” which provided for a landscape architect to be employed and paid a salary of “two thousand and four hundred dollars.”⁴⁴ Finally, the Court noted that “[t]here is no statute which provides specifically by whom the landscape architect in the office of public buildings and grounds shall be appointed.”⁴⁵ These are factors we have seen before: establishing an appointment process and duties.

To summarize, the Supreme Court has given us several possible component parts of a “by law” test. If Congress wants to create an office, it must explicitly: (1) define the duties; (2) specify the means of appointment and the number of appointees; and (3) provide for their compensation. The first requirement defines the position and explains its public purpose; the second satisfies the “vesting requirement” of the Appointments Clause; and the third preserves Congress’s power to control public appropriations.

This is a relatively straightforward test that would help resolve ambiguities around whether offices were “established by law.” This might be a formalistic exercise, but it is limited, straightforward, and grounded in Court precedent. Part IV will examine five cases in which this test would have proven useful.

⁴⁰ *Burnap v. United States*, 252 U.S. 512, 514 (1920).

⁴¹ *Id.* at 515. (“Persons employed in a bureau or division of a department are as much employees in the department within the meaning of § 169 of the Revised Statutes as clerks or messengers rendering service under the immediate supervision of the Secretary.”).

⁴² *Id.* at 516.

⁴³ *Id.* at 517.

⁴⁴ *Id.*

⁴⁵ *Id.*

IV. CONTEMPORARY PROBLEMS WITH THE UNDERDEVELOPED “BY LAW” ANALYSIS

The following cases arise from situations in which inferior officers were “established” through broad statutory authorities used to organize departments and hire employees, or through the rulemaking process.

A. *Pennsylvania v. U.S. Department of Health and Human Services*⁴⁶

Pennsylvania v. U.S. Department of Health and Human Services plays an important role in all of the circuit court cases that follow. Each of them will rely upon, or disagree with, the approach the Third Circuit takes to the “by law” question.

The Department of Health and Human Services (“HHS”) denied a total of \$102,241 in claims by the Commonwealth of Pennsylvania for federal funding under the Child Support Enforcement Program.⁴⁷ The Commonwealth appealed the Department’s decision to the HHS Appeals Board, while also challenging the Board’s ability to adjudicate its claim under the Appointments Clause.⁴⁸

The Third Circuit first determined whether members of the Board were officers or employees. After looking to the “broad discretion and authority” vested to the Board by regulation,⁴⁹ the court determined that they were clearly officers.⁵⁰ The court reasoned that they were inferior officers because, although limited in some respects in their ability to remove members of the Board, the Secretary could divest the Board of all but its statutory authority.⁵¹

The state argued that, even if members of the Board were inferior officers, their existence still violated the Appointments Clause because no act of Congress specifically authorized their appointment.⁵² The Secretary of HHS

⁴⁶ *Pennsylvania v. U.S. Dep’t. of Health and Human Serv.* 80 F.3d 796 (3d Cir. 1996).

⁴⁷ *Id.* at 800.

⁴⁸ *Id.*

⁴⁹ *See* 45 C.F.R. § 16.13 (1995).

⁵⁰ *Pennsylvania*, 80 F.3d at 802.

⁵¹ *Id.* at 803.

⁵² *Id.* at 804.

created the HHS Appeals Board in the early 1970s by regulation.⁵³ Although the Secretary created the Board through regulation, Congress subsequently granted the Board additional statutory authorities to resolve quality-control disputes.⁵⁴ The Third Circuit rejected the Commonwealth's argument by relying on the Social Security Act, which authorizes the Secretary "to appoint and fix the compensation of such officers and employees and to make such expenditures as may be necessary for carrying out the functions of the Secretary under this chapter."⁵⁵ Through the Social Security Act, Congress had granted the Secretary broad powers to appoint officers, and the Appointments Clause was satisfied.

The court also rejected the notion that Congress must specifically provide for the appointment of an inferior officer: "the Constitution affords substantial discretion to fashion appointments within the specified constraints."⁵⁶ It reasoned that, in light of the "enormous scope" of the responsibilities of HHS, "Congress gave the Secretary carte blanche to appoint individuals to assist her in carrying out these duties."⁵⁷

The court believed that political accountability would be preserved. "Accountability is ensured and governmental power checked by Congress's assignment of appointing power to the highly accountable head of a federal department like the HHS."⁵⁸ Nor should Congress have to say "HHS Appeals Board" in law to create the office: "requiring Congress to identify the HHS Appeals Board by name in its statutory grant of authority would be legislatively unworkable and defeat the purpose of the relaxed requirements of inferior officer appointments."⁵⁹

Finally, the Commonwealth argued that, although the HHS Appeals Board functioned as administrative law judges, they were improperly appointed under a general civil service power to hire "attorneys."⁶⁰ The attorneys serving on the Board were appointed for life, were only indirectly supervised, and "in many . . . cases, the Secretary [could] not overturn the Appeals Board's decisions."⁶¹ Nonetheless, the court disagreed that members of the Board could be considered ALJs or analogized to them because they

⁵³ *Id.* at 800. *See generally* 45 C.F.R. § 16 (1995).

⁵⁴ *Pennsylvania*, 80 F.3d at 800.

⁵⁵ 42 U.S.C. § 913 (2018).

⁵⁶ *Pennsylvania*, 80 F.3d at 805 (quoting *Silver v. U.S. Postal Serv.*, 951 F.2d 1033, 1037 (9th Cir.1991)).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* (internal quotations omitted).

⁶⁰ *Id.* at 807.

⁶¹ *Id.* at 805.

did not conduct or review formal hearings under the Administrative Procedure Act.⁶² Instead, they were prohibited by regulation from reviewing formal adjudications and merely reviewed a set of disputes delineated in HHS regulations.⁶³

Applying our test, we might argue that *Pennsylvania* was wrongly decided, or at least could have stood on firmer ground. The Board's duties come partly from statute and partly from regulation; the Board's compensation is provided by the Social Security Act by a delegation to the Secretary; and Congress did not provide any means of appointment for the Board at all.

More importantly however, the Third Circuit's belief that the "highly accountable department head" can be given "carte blanche" to appoint inferior officers is at odds with everything that the Supreme Court has said about resisting diffusion.⁶⁴ Under this reasoning, the Secretary may restructure the Department as she sees fit, reshuffling the authorities of her deputies, increasing their number, or determining their salaries without prior approval from Congress.

This case also raises important questions for the proposed test. First, may Congress grant powers to employees *after* the position has been created by the Executive, and thereby elevate them to the status of "officer"? Alternatively, could a position created through regulation be thought of as being "established" through the regulation's enabling statute? These questions will be addressed later, but these issues will present themselves again in the cases that follow.

*B. Varnadore v. Secretary of Labor*⁶⁵ & *Willy v. Administrative Review Board*⁶⁶

The Sixth Circuit, relying on *Pennsylvania*, relied on broad employment powers to determine that the offices in question were "established by law."⁶⁷

⁶² *Id.* at 807–08.

⁶³ *Id.* at 807; *see also* 45 C.F.R. § 16 app. F ("The Board will not review a decision if a hearing under 5 U.S.C. 554 is required by statute, if the basis of the decision is a violation of applicable civil rights or non-discrimination laws or regulations (for example, Title VI of the Civil Rights Act), or if some other hearing process is established pursuant to statute.").

⁶⁴ *See e.g. supra* text accompanying notes 19–20, 24; *see also* *Mistretta v. United States*, 488 U.S. 361, 382 (1989) ("we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.").

⁶⁵ *Varnadore v. Sec'y of Labor*, 141 F.3d 625 (6th Cir. 1998).

⁶⁶ *Willy v. Admin. Review Bd.*, 423 F.3d 483 (5th Cir. 2005).

⁶⁷ *Varnadore*, 141 F.3d at 631 (quoting U.S. CONST., art. II, § 2, cl. 2).

In *Varnadore v. Secretary of Labor*, an employee of Oak Ridge National Laboratory filed complaints with the Department of Labor under the whistleblower provisions of several environmental statutes.⁶⁸ After receiving unfavorable results from the Department's Administrative Review Board, he argued that the Board operated without a specific grant of statutory authority and therefore wielded authority in violation of the Appointments Clause.⁶⁹

The Secretary of Labor established the Board through regulation in 1996 and gave it the full authority to final agency decisions.⁷⁰ The Sixth Circuit determined that members of the Board were inferior officers and held that Congress gave the Secretary the authority to appoint inferior officers through multiple broad statutes.⁷¹ None of the statutes relied upon by the Sixth Circuit explicitly reference hiring "officers."

The Fifth Circuit adopted the reasoning of *Varnadore* in a similar challenge to the Administrative Review Board.⁷² In *Willy v. Administrative Review Board*, an in-house environmental attorney for a petroleum company filed a complaint under some of the same whistleblower provisions as the appellant in *Varnadore*.⁷³ After a lengthy and complicated procedural history in multiple Department tribunals, federal court, and a parallel state court actions spanning more than twenty years, Willy appealed a final dismissal by the Board by challenging its authority under the Appointments Clause.⁷⁴ Specifically, he argued that "Congress'[s] generic delegation to the Secretary of Labor at 29 U.S.C. § 551 contains *no* officer appointment authority, and there is *no* authority in any federal environmental statute to appoint inferior officers for purposes of hearing employee protection claims."⁷⁵

⁶⁸ *Id.* at 626.

⁶⁹ *Id.*

⁷⁰ *Id.* at 629-30 (citing Authority and Responsibilities of the Administrative Review Board, 61 Fed. Reg. 19,978 (May 3, 1996) (emphasis added) ("The Administrative Review Board is hereby delegated authority and *assigned responsibility to act* for the Secretary of Labor in issuing final agency decisions on questions of law and fact arising in review or on appeal . . .").

⁷¹ *Id.* at 631 (first citing 5 U.S.C. § 301 (1996) ("The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property."); then citing 29 U.S.C. § 551 (1996) (establishing the Department of Labor); and then citing 5 U.S.C. § 901 (1996) (declaring the policy of the United States to "promote better execution of the laws").

⁷² *Willy v. Admin. Review Bd.* 423 F.3d 483 (5th Cir. 2005).

⁷³ *Id.* at 487.

⁷⁴ *Id.* at 490.

⁷⁵ *Id.* (emphasis in original).

The court assumed that the members of the Board were inferior officers.⁷⁶ Relying on *Pennsylvania*, the Fifth Circuit held that: “Even though we recognize that no specific federal statute creates the ARB . . . the Secretary possesses the requisite congressional authority to appoint members to the ARB to issue final agency decisions.”⁷⁷ Further, it noted that “[t]he broad language employed by Congress in the Reorganization Plan No. 6 of 1950 and in 5 U.S.C. § 301 vests the Secretary with ample authority to create the ARB, appoint its members, and delegate final decision-making authority to them.”⁷⁸ It also explicitly adopted the Sixth Circuit’s reasoning in *Varnadore*.⁷⁹

The Administrative Review Board would have failed the three-part by law test. Since the Board is not a statutory creation at all, we do not have any congressionally designated means of appointment, duties, or provision for compensation. Additionally, the statutes that the Fifth and Sixth Circuits relied upon say nothing about the appointment of inferior officers. Executive department heads can prescribe regulations pursuant to 5 U.S.C. § 301 “for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.” Section 551 of Title 29 establishes the position of the Secretary of Labor but says nothing about the appointment of inferior officers. Sections 901–12 of Title 5 govern the process of submitting reorganization plans; among its instructions, the chapter notes that a reorganization plan submitted by the President “may provide for the appointment and pay of the head and one or more officers of any agency . . . if the President finds, and in his message transmitting the plan declares, that by reason of a reorganization made by the plan the provisions are necessary.”⁸⁰ This authorization, if anything, suggests that if the President wants to adjust an officer’s salary, she must involve Congress to do it.

C. *United States v. Janssen*⁸¹

So far, the Third, Fifth, and Sixth Circuits have adopted the argument that broad statutory grants of authority, or regulation, satisfy the Appointments

⁷⁶ *Id.* at 491.

⁷⁷ *Id.*

⁷⁸ *Id.* at 491–92.

⁷⁹ *Id.* at 492 (“We agree with the Sixth Circuit and conclude that these provisions imbue the Secretary with the authority to create the ARB, appoint its members, and delegate final decision-making authority to them.”).

⁸⁰ 5 U.S.C. § 904(2) (2018).

⁸¹ *United States v. Janssen*, 73 M.J. 221, 223 (C.A.A.F. 2014).

Clause. The Fifth and Sixth Circuits arguably do not even require Congress to specify that it is delegating the power to create “officers.”⁸² The U.S. Court of Appeals for the Armed Forces, however, was more skeptical of this argument.

In *United States v. Janssen*, a defendant charged with multiple crimes argued that an appellate military judge that heard his case was appointed in a manner inconsistent with the Appointments Clause.⁸³ The Military Justice Act of 1968 established the offices of military judge and appellate military judge.⁸⁴ The Department of Defense argued that the Secretary had the authority to appoint an appellate military judge under 5 U.S.C. § 3101, the “general authority to employ,” as well as 5 U.S.C. § 301.⁸⁵ The Department also cited *Willy* for the proposition that it had broad statutory authority to appoint officers.⁸⁶ The *Janssen* court disagreed, believing that relying on these authority “makes no sense in the face of the statutory structure that Congress has enacted for the Department of Defense.”⁸⁷

The court observed that the structure of the Department of Defense is far more regimented and complex than the Department of Labor:

Chapter 4 of Title 10, United States Code . . . sets out in great detail the officials who make up the Office of the Secretary of Defense, and the procedures to be employed for their appointment. There are, for example, fourteen assistant secretaries of defense, who are appointed by the President with Senate advice and consent, although they are certainly “inferior officers” constitutionally.”⁸⁸

This fact, in the court’s view, leaned against applying the holding in *Willy*.

Since Congress specifically provided for the appointment of certain positions, such as administrative law judges, the court believed it did not make sense to read other, more general, sections of Title 10 to include that same authority.⁸⁹ The court held that the appointment of the appellate military judge in question was invalid.⁹⁰

Janssen rebuked the reasoning employed by the other appellate courts, raising an important question of statutory interpretation: interpreting the statutes at issue in this case, as well as those in *Varnadore* and *Willy*, too

⁸² See *supra* Part IV.B.

⁸³ *Janssen*, 73 M.J. at 223.

⁸⁴ Military Justice Act of 1968, Pub. L. 90-632, 82 Stat. 1335 (1968).

⁸⁵ *Janssen*, 73 M.J. at 225.

⁸⁶ *Id.* at 224.

⁸⁷ *Id.* at 225.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

broadly might render other more specific statutes superfluous. For example, Congress broadly permits agencies to “appoint as many administrative law judges as are necessary” to preside over proceedings consistent with the Administrative Procedure Act.⁹¹ Overly broad interpretations of the authorities at issue might render this grant of authority superfluous. On the other hand, the law also requires that administrative law judges “may not perform duties inconsistent with their duties and responsibilities as administrative law judges.” Therefore, the statute is not entirely superfluous; Congress could continue to place limitations on the duties of certain positions. But this turns Congress’s role into one of withdrawing power rather than explicitly granting it. Alternatively, *Janssen* may stand for the proposition that the overall structural scheme for the agency or department ought to be considered when determining whether a component of it was properly appointed. In other, more loosely organized, departments, a less specific grant of authority might suffice; in another, like the Department of Defense, where more than a dozen inferior officers still require the advice and consent of the Senate to be appointed, a general appointment authority makes no sense.

D. *Tucker v. Commissioner*⁹²

In *Tucker v. Commissioner*, a plaintiff argued before the United States Tax Court that a judgment against him by an employee of the Internal Revenue Service Office of Appeals was invalid because their appointment did not conform to the Appointments Clause.⁹³ Like the HHS Appeals Board in *Pennsylvania*, Congress committed specific responsibilities to the position after its creation.⁹⁴ Although the statute at issue refers to an “appeals officer,” it also notes that hearings conducted by the office will be conducted by an “officer or employee.”⁹⁵ If Congress wanted to assign responsibilities “to a particular rank of ‘Appeals Officer,’” the court reasoned, “it would not have added the phrase ‘or employee.’”⁹⁶ The court also examined legislative intent, finding that “neither the statute itself nor the legislative history shows that Congress intended to ascribe any particular importance or significance to the term ‘appeals officer.’”⁹⁷

⁹¹ 5 U.S.C. § 3105 (2018).

⁹² 135 T.C. 114 (2010).

⁹³ *Id.* at 153.

⁹⁴ *Id.*

⁹⁵ *Id.* at 154; *see also* I.R.C. § 6330 (2018).

⁹⁶ *Tucker*, 135 T.C. at 154.

⁹⁷ *Id.* at 155.

The court took note of the current flexible state of the meaning of “by law”: “It is true that the case law does not posit a bright-line rule that would require an explicit statutory creation of an office before there can be an ‘officer’ for purposes of the Appointments Clause.”⁹⁸ But the court also believed presuming that any office in the federal government is established by law “risks reading out of the Constitution the phrase ‘established by Law.’”⁹⁹ The court ultimately determined that the office in question was not established by law because the authorities in question were given by Congress to the undifferentiated employees of the “Office of Appeals” and not to any particular position within that office.¹⁰⁰

The *Tucker* court’s analysis was an inquiry into whether Congress intended to assign any significance to the position of “appeals officer”; in so doing, it identified the problem with the expansive understanding of “established by law” in *Pennsylvania* and other cases.¹⁰¹ If it had applied the proposed test, it would have achieved the same outcome, but with the authority of case law behind it. Interestingly, Congress recently passed the Taxpayer First Act of 2019, which established an independent Office of Appeals under the supervision of a Chief of Appeals.¹⁰² The law now explicitly (1) establishes an official “to be known as the Chief of Appeals”; and (2) provides for their compensation; and lists the duties of the office.¹⁰³ Under the proposed test, the new Chief of Appeals would certainly qualify as a position “established by law.”

CONCLUSION

Democratic accountability is served by preserving Congress’s role in the appointment of officers. The Appointments Clause establishes an interbranch

⁹⁸ *Id.* at 156.

⁹⁹ *Id.* at 158 (“If this assumption is correct, then it would seem that any ‘Office’ that actually exists in the Federal Government is arguably ‘established by Law’ . . . The Supreme Court has not so held, and the assumption is problematic, in that it risks reading out of the Constitution the phrase “established by Law,” if the Appointments Clause would mean the same thing with or without that phrase. One could argue instead that only a position created by a statute can be “established by Law” for purposes of the Appointments Clause. If a position is created not by Congress but by the Executive, then by definition there is no possibility that Congress both created and filled that position, which is the chief danger against which the clause is a safeguard.”).

¹⁰⁰ *Id.* at 165.

¹⁰¹ *Id.* at 157–58.

¹⁰² Taxpayer First Act of 2019, Pub. L. No. 116-25, 133 Stat. 981 (2019).

¹⁰³ *Id.*

scheme where Congress designs the positions and consents to the President's most important appointments.

The proposed test is simple and drawn from Supreme Court case law. And there is a clear problem among the circuit courts that merits addressing. But the test presents possible questions for future observers and courts to consider. For example, some commenters may disagree about the propriety of assigning duties to a position created by the Executive on its own. Others may believe that Congress should have to establish the office by name, as it has done recently with the Chief of Appeals within the Internal Revenue Service.¹⁰⁴ Further, some may find reason for applying the test differently to different components of the federal government, as some may read *Janssen* to suggest.

The cases in Part IV demonstrate that substantial ambiguity exists around the meaning of "by law," and whether Congress has vested the power to appoint inferior officers in the heads of particular departments. Under the status quo, nearly every person working in the federal government—including those who wield significant authority—holds a position "established by law," and the heads of their respective departments have been vested with the appointment power. In order to resist diffusion of the appointment power and preserve the Constitution's interbranch scheme, courts should apply a narrower test to determining whether positions are "established by law" and whether the Clause's vesting requirement has been met. The political purpose of the Appointments Clause is to give citizens the ability to blame the President *and* their representatives for the actions of federal officers and compel Congress to act when the President has not. The Appointments Clause is an invitation for activism; if the President won't respond to calls from the public, then maybe your Senator will. Although it may try to give its power away, the most powerful officials in government will always remain in part Congress's officers. This interbranch scheme is an important tool in defense of democracy and the public good.

¹⁰⁴ *Id.*