

## THE TWO APPOINTMENTS CLAUSES: STATUTORY QUALIFICATIONS FOR FEDERAL OFFICERS

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### ABSTRACT

*Congress often exercises control over appointments to federal office by writing job qualifications and putting them directly into the statute creating the office. This practice is best examined by viewing the Appointments Clause not as a single entity, but as two related clauses that set up two very different methods of appointment: presidential nomination and Senate confirmation as the default method, and vesting in one of three authorized appointers as an optional alternative method for certain types of officers. When creating an office, Congress must choose one of these methods for appointing the officer, but cannot create a hybrid method combining the two procedures. In this Article, I examine the text, history, and structure of the Constitution to determine what is required by each of the two appointments processes. I conclude that statutory qualifications are consistent with the Constitution's process for vested appointments, but inconsistent with the nomination and confirmation process.*

### INTRODUCTION

When a cabinet reorganization left the position of U.S. Trade Representative open in 1996, President Clinton knew just whom he wanted to appoint as the nation's chief trade negotiator. Charlene Barshefsky had served as Deputy U.S. Trade Representative for three years, and was widely praised as an accomplished and successful negotiator.<sup>1</sup> But the appointment, which requires the advice and consent of the Senate,<sup>2</sup> hit a snag: a federal statute required that the U.S. Trade Representative be a person who has never "directly represented, aided, or advised a foreign entity . . . in any trade negotiation,

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<sup>1</sup> See Editorial, *Clinton Wisely Fills a Cabinet Void*, CHI. TRIB., Apr. 17, 1996, at N20 (calling Barshefsky an "inside expert" and a "hard-nosed negotiator"); David E. Sanger, *Major Presidential Appointments*, N.Y. TIMES, Dec. 14, 1996, at A11 (noting Barshefsky's experience and successful past deals); Editorial, *Three Good Appointments*, WASH. POST, Apr. 13, 1996, at A20 (describing Barshefsky as "well prepared" to be U.S. Trade Representative, and calling Clinton's nomination of her a "good choice[]").

<sup>2</sup> See 19 U.S.C.A. § 2171(b)(1) (2004) (stating that U.S. Trade Representatives "shall be appointed by the President, by and with the advice and consent of the Senate").

or trade dispute, with the United States.”<sup>3</sup> Barshefsky had previously worked for the government of Canada.<sup>4</sup> Clinton decided to nominate her anyway and petitioned Congress to make an exception to the statutory requirement.<sup>5</sup> Congress did so, passing a private bill specifically allowing the appointment of Charlene Barshefsky, by name,<sup>6</sup> and then confirming her nomination.<sup>7</sup> The statutory requirement remains in force for all future U.S. Trade Representatives.

Avoiding conflicts of interest from the person representing the United States in negotiations is surely an important policy. But the statutory qualifications prescribed in advance for the U.S. Trade Representative nearly prevented the most qualified individual from holding the job. The best time to evaluate the qualifications of an officer who will be confirmed by the Senate is during the nomination and confirmation process—not years or even decades before, when the statute creating the office is written.

More important than the policy considerations, I will argue that statutory requirements are unconstitutional for all appointments that require the advice and consent of the Senate. Despite a long history of statutory qualifications, the text and structure of the Appointments Clause reveal that Congress is not authorized to limit who may hold office in this way. Confirmation by the *Senate*, not statutory restrictions from the *full Congress*, is the process the Founders designed to ensure responsible appointments of officers. Adding statutory qualifications to the mix can bar excellent people from holding office and can also reduce the accountability of the President and Senate when they make bad choices.

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3 *Id.* § 2171(b)(3).

4 See Paul Blustein, *Clinton Expected To Name Barshefsky to Trade Post*, WASH. POST, Nov. 14, 1996, at E1 (“Barshefsky advised the Canadian government in its dispute with the United States over softwood lumber.”).

5 See *Clinton To Request Waiver for Barshefsky; Bill Sought To Exempt Her from Law Barring Nomination To Trade Post*, J. COM., Dec. 19, 1996, at 1A.

6 See *Waiving Certain Provisions of the Trade Act of 1974 Relating to the Appointment of the United States Trade Representative*, Pub. L. No. 105–5, 111 Stat. 11, 11 (1997) (“[N]otwithstanding the provisions of paragraph (3) of section 141(b) of the Trade Act of 1974 (19 U.S.C. 2171(b)(3)) or any other provision of law, the President, acting by and with the advice and consent of the Senate, is authorized to appoint Charlene Barshefsky as the United States Trade Representative.”).

7 See *U.S. Trade Official Wins Confirmation, and a Related Vote*, N.Y. TIMES, Mar. 6, 1997, at A20 (“The Senate today confirmed Charlene Barshefsky as United States trade representative . . .”).

Not all statutory qualifications for officeholders are unconstitutional, however.<sup>8</sup> Appointment of inferior officers does not require the advice and consent of the Senate. When creating an inferior office by statute, Congress can choose to keep the appointment within the default advise and consent process, or it can vest the appointment “in the President alone, in the Courts of Law, or in the Heads of Departments.”<sup>9</sup> If Congress chooses to vest the appointment in one of these appointing authorities, it may also create specific qualifications for the officeholder in the statute. Because Senate confirmation is not available to provide the check on power in these appointments, a similar check can be provided by constraining the appointer’s discretion through statutory requirements. This result is consistent with the text and structure of the Appointments Clause.

Congress has been writing job qualifications into statutes ever since the Judiciary Act of 1789,<sup>10</sup> and this practice is widely used today.<sup>11</sup> However, recent Presidents of both parties have argued that some types of statutory qualifications unconstitutionally restrict the President’s appointment power.<sup>12</sup> These new arguments are

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8 Several scholars have argued or suggested that all or most statutory qualifications are unconstitutional constraints on the President’s appointment power. See Common Legislative Encroachments on Executive Branch Authority, 13 Op. Off. Legal Counsel 248, 250 (1989) [hereinafter Common Legislative Encroachments] (arguing that statutory qualifications for principle officers are unconstitutional, but not stating an opinion about statutory qualifications for inferior officers); Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL’Y 467, 534–35 (1998) (arguing that statutory qualifications for inferior officers are unconstitutional, and that statutory qualifications for principal officers are unconstitutional under a formalist analysis but sometimes constitutional under a functionalist analysis); Donald J. Kochan, *The Unconstitutionality of Class-Based Statutory Limitations on Presidential Nominations: Can a Man Head the Women’s Bureau at the Department of Labor?*, 37 LOY. U. CHI. L.J. 43 (2005) (arguing that all statutory qualifications for officeholders are unconstitutional); Note, *Congressional Restrictions on the President’s Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914 (2007) [hereinafter *Congressional Restrictions*] (arguing that statutory qualifications might be unconstitutional as an original matter but have become legitimate through longstanding practice). Others have focused on particular types of statutory qualifications, such as age, gender, or political party requirements. See, e.g., Adam J. Rappaport, Comment, *The Court of International Trade’s Political Party Diversity Requirement: Unconstitutional Under Any Separation of Powers Theory*, 68 U. CHI. L. REV. 1429 (2001) (arguing that the statutory requirement that no more than five judges on the Court of International Trade be from the same political party is unconstitutional).

9 U.S. CONST. art. II, § 2, cl. 2.

10 See Judiciary Act of 1789, 1 Stat. 73, 92–93 (1789) (requiring that the Attorney General be “learned in the law”).

11 See *infra* notes 125–130 and accompanying text.

12 See, e.g., Statement by President George W. Bush upon Signing H.R. 5441, Department of Homeland Security Appropriations Act 2007, 42 WKLY. COMP. PRES. DOC. 1742 (Oct. 4,

strengthened by the fact that nobody in the earliest Congresses made a principled argument that statutory qualifications are constitutional. Instead, they largely ignored the issue.<sup>13</sup> Despite the longstanding practice of attaching statutory qualifications, the issue of their constitutionality remains very much alive.

In Part I of this Article, I closely read the text of the Appointments Clause and articulate important differences between the two processes for appointing officers. These differences reveal that Congress acting as a whole does not have a role in the appointment of officers who require Senate confirmation. But the Constitution states in relatively straightforward language that Congress can prescribe qualifications for the appointment of officers who will not be confirmed by the Senate.

In Part II, I trace the history of the Appointments Clause from the drafting of the Constitution through the modern era. Finally, in Part III, I discuss structural features of the Appointments Clause that create accountability and prevent abuse of the appointment power.

## I. THE TWO APPOINTMENTS CLAUSES

The Appointments Clause does not set out a single process for appointing federal officers. Instead, it creates two distinct processes and provides guidelines about when each process should be used. The text of the Appointments Clause reads as follows:

[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.<sup>14</sup>

The two appointments processes lead to different requirements that are not apparent on first glance. It is important to separate them from the outset and note their different features.

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2006) [hereinafter Bush Statement on H.R. 5441] (noting that a section of the bill may unconstitutionally limit the President's appointment power by imposing a statutory qualification); Statement by President William J. Clinton Upon Signing S. 1060, 2 PUB. PAPERS 1907 (Dec. 19, 1995) (pointing out constitutional limits on Congress's ability to interfere with the President's appointment power by writing statutory qualifications).

13 See *infra* notes 114–124 and accompanying text.

14 U.S. CONST. art. II, § 2, cl. 2.

In the first process, which *must* be used for appointments of principal officers, the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint” the officer.<sup>15</sup> I will refer to this clause as the *Confirmation Appointments Clause* and to appointments using this process as *confirmation appointments*.<sup>16</sup> The Constitution specifies that this process can be used to 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.”<sup>17</sup>

In the second process, “Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”<sup>18</sup> I will refer to this clause as the *Vested Appointments Clause* and to appointments using this process as *vested appointments*. The Constitution explicitly makes vested appointments available only for inferior officers, but it is not mandatory in any case. All officers *could* be appointed through the confirmation appointments process at Congress’s discretion.

Much ink has been spilled over the question of which officers are “inferior” and can be appointed through the Vested Appointments Clause.<sup>19</sup> That debate is extremely interesting. But for purposes of

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15 *Id.*; see also *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam) (“Principal officers are selected by the President with the advice and consent of the Senate.”); Walter Dellinger, *The Constitutional Separation of Powers Between the President and Congress*, 63 LAW & CONTEMP. PROBS. 514, 539–40 (noting that advice and consent of the Senate is needed for the appointment of principal officers).

16 There is no name for this clause of the Constitution that is as yet widely accepted in the literature. Some people, especially within the executive branch, refer to this appointment process as “PAS” (President with Advice of the Senate). See, e.g., *Guidance on Application of Federal Vacancies Reform Act of 1998*, 1999 WL 1262050 (Off. Legal Counsel) (Mar. 22, 1999) (“[A]ppointment is required to be made by the President, by and with the advice and consent of the Senate (a ‘PAS position’).”).

17 U.S. CONST. art. II, § 2, cl. 2.

18 *Id.*

19 See, e.g., *Morrison v. Olson*, 487 U.S. 654, 671 (1988) (“The line between ‘inferior’ and ‘principal’ officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn.”); *Officers of the United States Within the Meaning of the Appointments Clause*, 2007 WL 1292268 (Off. Legal Counsel) (April 16, 2007), available at <http://www.usdoj.gov/olc/2007/appointmentsclausev10.pdf> (“[T]he only question being whether the counsel was a principal or inferior officer.”); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1536, at 362–63 (3d ed. 1858) (“In the practical course of the government there does not seem to have been any exact line drawn, who are and who are not to be deemed *inferior* officers, in the sense of the Constitution, whose appointment does not necessarily require the concurrence of the Senate.”); Akhil Reed

this Article, the more important distinction is between, on the one hand, offices that Congress has (presumably properly) decided to fill through vested appointments, and on the other hand, those offices that Congress has kept within the confirmation appointments process (because they are either principal offices that must use this process or inferior offices for which Congress has not chosen to allow vested appointments).

These two sections of the Appointments Clause set out fairly detailed procedures for appointing different types of federal officers. When the Constitution specifies detailed procedures, those procedures should be carefully followed.<sup>20</sup> Detailed procedures suggest that the result is either the outcome of a compromise among different factions or a carefully structured set of checks and balances, if not both.<sup>21</sup>

If the procedures in the Appointments Clause are the result of a compromise among the Framers, that means there is no underlying principle that can be given greater force through a broad interpretation of the provision.<sup>22</sup> The written provision is an accommodation of several competing principles, and the only faithful reading of the text is to enforce the compromise as written.<sup>23</sup> The notes from the Constitutional Convention and historical scholarship on the issue shows that this is exactly what happened, and that the Appointments Clause is a compromise between competing political views rather than an outgrowth of a shared political theory.<sup>24</sup>

If a procedure embodies a careful set of checks and balances, deviating from the procedure upsets the Framers' intended allocation

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Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 804–09 (1999) (arguing that an officer is inferior if she is “subordinate to a superior officer or entity”); Dellinger, *supra* note 15, at 539–41 (arguing that in determining whether an officer is an inferior officer, “the most important issues are the extent of the officer’s discretion to make autonomous policy choices and the location of the powers to supervise and to remove the officer”).

20 See generally John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1665 (2004) (“[W]hen the Court confronts a precise and detailed constitutional text, it should adhere closely to the prescribed solution rather than stretch or contract the text in light of the apparent *ratio legis*.”).

21 See *id.* at 1737 (“[W]hen an adopted text establishes a new power and takes care to specify the mode of its exercise, our tradition is to treat such a specification as presumptively exclusive. Otherwise, why would a lawmaking body take the trouble to spell out often elaborate procedures for exercising a grant of power if alternative procedures would do just as well?”).

22 See *id.* at 1690–91.

23 See *id.* at 1702–03.

24 See *infra* notes 93–109.

of power between the branches of government.<sup>25</sup> The Framers intended to place power to act in one constitutional actor and the ability to check that power in certain ways in another. Construing away the checks might let one power run rampant. Adding more checks also disrupts the constitutional structure and may leave the primary actor too little discretion to make appropriate choices. It could also create gridlock that prevents important actions from getting accomplished.

The two procedures are completely separate. Congress cannot pick and choose aspects of each process and combine them into a new process any more than it could create a new process without reference to the Constitution.<sup>26</sup> Changing the process even subtly, or changing the order in which steps of the process happen, can dramatically change the outcomes of the process.<sup>27</sup> To remain faithful to the constitutional plan, therefore, it is imperative that Congress and the President decide in each case which appointments procedure is being used and then follow the requirements for that procedure. The primary evidence for these procedural requirements is in the text of the Constitution itself.

#### A. *Confirmation Appointments*

The Confirmation Appointments Clause is itself composed of two parts. First, the President “shall nominate” people for offices.<sup>28</sup> Second, the President, “by and with the Advice and Consent of the Senate, shall appoint” officers.<sup>29</sup> The requirements of each part must be analyzed separately. The text indicates that Congress cannot place statutory limits on the President’s ability to nominate officers, and that statutory qualifications do not constitute post-nomination advice and consent of the Senate.

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25 See Manning, *supra* note 20, at 1711–12 (pointing out that many provisions in the Constitution prescribe detailed procedures for exercising government powers); *id.* at 1712 n.179 (presenting the Appointments Clause as an example of a detailed constitutional procedure that has been strictly construed).

26 See *Buckley v. Valeo*, 424 U.S. 1, 127 (1976) (per curiam) (“[T]here is no provision of the Constitution remotely providing any alternative means [of appointment] for the selection of the members of the Commission or for anybody like them.”).

27 See generally William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992) (exploring the policy results of different legislative and agency review procedures); Kenneth A. Shepsle & Barry R. Weingast, *Uncovered Sets and Sophisticated Voting Outcomes with Implications for Agenda Institutions*, 28 AM. J. POL. SCI. 49 (1984) (analyzing cyclical voting preferences).

28 U.S. CONST. art. II, § 2, cl. 2.

29 *Id.*

### 1. *Nomination vs. Appointment*

Under the Confirmation Appointments Clause, the President holds the sole power of nominating people to federal offices. After the nomination, the Senate must consent to the nominee before the President may appoint her to office.<sup>30</sup> The Constitution thus limits the President's discretion in appointment, but not in nomination.

Most statutory qualifications are limitations on the President's appointment power, but some of them explicitly or implicitly limit his nomination power as well.<sup>31</sup> In particular, provisions that require the President to select a nominee from a short list of candidates put forward by someone else significantly constrict the President's nomination power.<sup>32</sup>

The text of the Appointments Clause makes a firm distinction between the power of nomination and the power of appointment. The nomination power is given to the President alone, but the actual appointment power is shared with the Senate.<sup>33</sup> The President "shall appoint" officers only "by and with the Advice and Consent of the Senate,"<sup>34</sup> but he "shall nominate" officers without any qualifying lan-

<sup>30</sup> Appointment to office is not automatic after the Senate has consented to the President's nominee. The President may choose not to appoint the nominee even if the Senate consents. See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 72 (4th ed. 1957); John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 *TEX. L. REV.* 633, 639 (1993) (emphasizing that the Senate's role is entirely advisory and the President is solely accountable for the appointment).

<sup>31</sup> In his dissent in *Myers v. United States*, Justice Brandeis characterized all statutory qualifications as limits on the President's nomination power, not the appointment power. See 272 U.S. 52, 265 (1926) (Brandeis, J., dissenting) ("[A] multitude of laws have been enacted which limit the President's power to make nominations, and which, through the restrictions imposed, may prevent the selection of the person deemed by him best fitted.").

<sup>32</sup> See, e.g., 31 U.S.C. § 703(a) (2000) (establishing appointment of the Comptroller General and Deputy Comptroller General by the President, by and with the advice and consent of the Senate, from a list of three or more individuals prepared by a nominating commission); District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 433(a), 87 Stat. 774, 795 (1973) ("[T]he President shall nominate, from the list of persons recommended to him by the District of Columbia Judicial Nomination Commission . . . , and, by and with the advice and consent of the Senate, appoint all judges of the District of Columbia courts.").

<sup>33</sup> U.S. CONST. art. II, § 2, cl. 2. See also *Myers v. United States*, 272 U.S. at 264-65 (1926) (Brandeis, J., dissenting) ("There is not a word in the Constitution which in terms authorizes Congress to limit the President's freedom of choice in making nominations for executive offices. It is to appointment as distinguished from nomination that the Constitution imposes in terms the requirement of Senatorial consent.").

<sup>34</sup> U.S. CONST. art. II, § 2, cl. 2.



guage at all.<sup>35</sup> As John McGinnis cleverly puts it, “the act of nomination is separated from the act of appointment by a comma and a conjunction.”<sup>36</sup> Justice Kennedy has referred to the Appointments Clause—apparently without irony—as a model of constitutional clarity.<sup>37</sup>

The President’s decision of whom to nominate is widely regarded as his choice alone.<sup>38</sup> Neither the Senate in its advice and consent role nor the Congress as a whole through its legislative power can prescribe the individual to hold an office.<sup>39</sup> It is uncontroversial that the President must have considerable discretion to choose a person he thinks will perform the duties of an office well.<sup>40</sup>

35 *Id.* Professors Strauss and Sunstein claim that the Senate’s advice should be given before nomination and consent should be given after, but they provide no support for this assertion and the text of the Constitution seems to plainly disprove it. See David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1494–95 (1992).

36 McGinnis, *supra* note 30, at 638.

37 See *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 487 (1989) (Kennedy, J., concurring) (“The Appointments Clause sets out the respective powers of the Executive and Legislative Branches with admirable clarity.”). But see John M. Burkoff, *Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo*, 22 WAYNE L. REV. 1335, 1336 (1976) (“The Framers of the Constitution were guilty of their usual delphic clarity in denominating the various strata of government personnel and the concomitant [sic] mode of appointment.”).

38 See, e.g., *Pub. Citizen*, 491 U.S. at 483 (Kennedy, J., concurring) (“No role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment.”); *id.* at 487 (“The President has the sole responsibility for nominating . . . officials . . .”); THE FEDERALIST NO. 76 (Alexander Hamilton) (explaining that the President alone will nominate); Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51, 108–09 (1994) (arguing that even a requirement that the President consult with an advisory body before nominating someone to office is unconstitutional); Kochan, *supra* note 8, at 53 (“The President must have full control of, and accountability for, his exercise of the nomination power granted to him in the Constitution.”); McGinnis, *supra* note 30, at 639 (“[The Framers] gave the undiluted power of the nomination to the President so that the initiative of choice would be a single individual’s responsibility . . .”).

39 See, e.g., *Pub. Citizen*, 491 U.S. at 483 (Kennedy, J., concurring) (“No role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment.”); Civil Service Commission, 13 Op. Att’y Gen. 516, 520 (1871) [hereinafter Civil Service Commission] (“A legal obligation to follow the judgment of [a nominating board] is inconsistent with the constitutional independence of the appointing power.”); CORWIN, *supra* note 30, at 74 (“[T]he proposition is universally conceded that some choice, however small, must be left the appointing authority.”).

40 See Civil Service Commission, *supra* note 39, at 525 (arguing that statutory qualifications for officeholders must leave the appointing power with “a reasonable scope for its own judgment and will”); Constitutionality of Statute Governing Appointment of United States Trade Representative, 20 Op. Off. Legal Counsel 279 (1996) [hereinafter U.S. Trade Rep. Opinion] (stating that in the opinion of the Office of Legal Counsel, 19 U.S.C. § 2171(b)(3), which barred the appointment of Barshefsky as U.S. Trade Repre-

The President's discretion to appoint officers is constrained by the Senate's advice and consent role. But his power to nominate is not limited under the Constitution. The nomination power is simply a power of recommending a potential officeholder to the Senate. The Constitution also requires the President to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient."<sup>41</sup> It would be unconstitutional for Congress to pass a law prohibiting the President from recommending certain kinds of legislation.<sup>42</sup> Similarly, the President's power to nominate people to office cannot be limited by law. This does not mean the Senate should necessarily be deferential to the President's choice of nominees any more so than to the President's proposed legislation.<sup>43</sup> But it does place the President squarely in the position of first mover in suggesting a nominee without statutory constraints.

Nothing, of course, restricts the President's ability to *voluntarily* confer with Senators or others before he makes a nomination. The practice of "senatorial courtesy," for example, has historically led Presidents to defer to Senators about choosing nominees for positions in the Senators' home states.<sup>44</sup> Some scholars have called for greater consultation between the President and the Senate at the nomination stage.<sup>45</sup> I take no position on whether these arrangements are wise as matters of policy, but simply note that such voluntary consultation raises no constitutional questions.

sentative until the private exemption was passed, is unconstitutional because of the wide discretion given to the President under the Appointment Clause of the Constitution); Gerhardt, *supra* note 8, at 535 ("Functional analysis would likely [allow statutory qualifications for most offices] because the president would still have considerable latitude to choose nominees from within the set of nominees qualified under the legislative requirements."). *But see generally Congressional Restrictions*, *supra* note 8 (arguing that long-standing acquiescence in a limitation of the nomination power saves that limit from unconstitutionality).

41 U.S. CONST. art. II, § 3.

42 *See generally* J. Gregory Sidak, *The Recommendation Clause*, 77 GEO L.J. 2079, 2118–28 (1989) (arguing that laws prohibiting the President from attempting changes in policy violate the Recommendation Clause).

43 *See* Strauss & Sunstein, *supra* note 35, at 1494 (arguing that an important part of checks and balances is Congress's right to disagree with the President).

44 *See, e.g.,* CORWIN, *supra* note 30, at 73–74 (explaining that the Senate is able to exert great influence on the President's nominations through the practice of senatorial courtesy); Gerhardt, *supra* note 8, at 529–31 (describing the influence senatorial courtesy has exerted over most Presidents). *See also* Strauss & Sunstein, *supra* note 35, at 1501 (recounting examples of Presidents following Senate advice about Supreme Court nominations).

45 *See, e.g.,* Strauss & Sunstein, *supra* note 35, at 1514–16 (arguing that a stronger Senate role in influencing the President's choice of Supreme Court nominees would increase the quality of justices who are confirmed).

Most statutory requirements on officeholders place no legal restraint on whom the President may *nominate* to the office, only on whom he may *appoint*. In the face of a statutory requirement that would prevent his preferred nominee from holding office, the President might stubbornly decide to nominate his candidate anyway<sup>46</sup> and leave it to the Senate to decide whether to ignore the statutory requirement and confirm the nominee,<sup>47</sup> amend the statute to allow the nominee to be appointed,<sup>48</sup> or reject the nominee. Since there is a constitutional distinction between nomination and appointment, nominating someone who does not meet the requirements for appointment is consistent with the President's obligation to "take Care that the Laws be faithfully executed."<sup>49</sup>

## 2. "Advice and Consent"

Statutory qualifications are no more constitutional if they are viewed solely as a limit on the President's power to appoint, not his power to nominate. Some people argue that statutory qualifications are an exercise of the Senate's power to give "Advice and Consent" before the President can appoint a nominee to office.<sup>50</sup> However, the text of the Constitution strongly suggests that advice and consent must be given *after* the President chooses a nominee, not before. Any binding advice and consent also must come from the Senate alone, not the House of Representatives and Senate acting together, as is necessary to pass a statute.

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46 President Clinton took this route when he nominated Charlene Barshefsky to be United States Trade Representative. See *supra* notes 1–7 and accompanying text.

47 This result would put to the President the further choice of whether to violate the explicit terms of the statute by appointing the confirmed nominee. If he believed the statutory restriction to be unconstitutional, he could refuse to follow the requirement. See generally Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (2000). Some scholars argue that refusal to execute unconstitutional laws is a *duty* of the President, not a discretionary *power*. See Saikrishna Prakash, *The President's Duty To Disregard Unconstitutional "Laws,"* 96 GEO. L.J. (forthcoming June 2008). In the context of statutory qualifications for officeholders, Prakash's view would require the President to nominate and appoint his preferred choice for the office regardless of whether that person met the statutory requirements.

48 Amending the statute would of course require the agreement of the House of Representatives. See *infra* Part III.D for a discussion of the House of Representatives' role in appointments and statutory qualifications.

49 U.S. CONST. art. II, § 3.

50 See, e.g., *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 825 (D.C. Cir. 1993) (describing a statutory restriction on officeholders as an exercise of the Senate's advice and consent power).

The Constitution does not specify whether the Senate's advice should be given before or after the nomination, but the text suggests that it should be after. Advice also connotes a non-binding recommendation and therefore cannot be implemented through a legally binding statutory requirement. The word "Consent," while it does connote a binding decision, also strongly points to a post-nomination process rather than a pre-nomination one.

The Senate's advice and consent role is attached to the appointment power, not the nomination power. This can be illustrated by a comparison of the Appointments Clause with the Treaty Clause. Like the Appointments Clause, the Treaty Clause is also specified in two separate steps in the Constitution.<sup>51</sup> First, the President can "make Treaties"; second, the Senate must "concur."<sup>52</sup> But unlike the Appointments Clause, the Treaty Clause requires Senate involvement at both steps. Indeed, the parallel "Advice and Consent" clause is attached to the *first* step in the process: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."<sup>53</sup> Attaching the advice and consent role to only the *second* step in the Appointments Clause thus differentiates it from the treaty power and strongly suggests that advice and consent are not required at the nomination stage.

The word "advice" means a recommendation, not a binding requirement. The meaning of the word has not changed significantly since the time of the Founding. The 1828 edition of Noah Webster's *American Dictionary of the English Language* defined "advice" as "[c]ounsel; an opinion recommended, or offered, as worthy to be followed."<sup>54</sup> Similarly, a more modern edition of Webster's dictionary defines it as a "recommendation regarding a decision or course of conduct."<sup>55</sup> *Black's Law Dictionary* shows that the legal meaning of the word is not significantly different.<sup>56</sup> None of these definitions suggest

51 U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

52 *Id.*

53 *Id.*

54 NOAH WEBSTER, *AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (1828), available at <http://1828.mshaffer.com/d/search/word,advice>.

55 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 32 (1971) (third definition) [hereinafter WEBSTER'S THIRD].

56 BLACK'S LAW DICTIONARY 59 (8th ed. 2004) (defining "advice" as "[g]uidance offered by one person, esp. a lawyer, to another"). See also *id.* (defining "advice and consent" as "generally includ[ing] the right to vote on approval of an appointment").

that the advice given by the Senate regarding appointments can be binding on the President.

The executive branch has long recognized the difference between non-binding advice and binding legal requirements on appointments. Advice may be given by the Senate or other advisory bodies, but it is merely a recommendation and cannot constrain the President's choice.<sup>57</sup> The President routinely consults with Senators and others about judicial and other appointments.<sup>58</sup> Such consultation is politically useful and, since it is non-binding, constitutionally unproblematic.

The Senate's role in advising the President on appointments thus cannot justify setting binding requirements by statute in advance. The Senate's role in consenting to the appointment of an official also does not allow statutory requirements for officeholders. The President may not appoint an official without the consent of the Senate. But the text suggests that this consent must be given *after* the President chooses his nominee, not before.

Like the definition of "advice," the definition of "consent" has not changed much since the Constitution was written. In 1828, Webster's dictionary defined "consent" as "[a]greement of the mind to what is proposed or state[d] by another; accord."<sup>59</sup> Today, the definition is "compliance or approval esp. of what is done or proposed by another."<sup>60</sup> These definitions share an understanding of consent as the approval of a proposal that has *already* been put forward by someone else. In the Appointments Clause context, that conforms to the traditional understanding that the President should nominate an individual for office, and then the Senate should consent (or decline to consent) to the appointment of that individual.

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57 Civil Service Commission, *supra* note 39, at 520 ("The appointing power may avail itself of the judgment of others as one means of information. . . . I see no constitutional objection to an examining board, rendering no imperative judgments, but only aiding the appointing power with information. A legal obligation to follow the judgment of [someone else] is inconsistent with the constitutional independence of the appointing power.").

58 See Yvette M. Barksdale, *Advise and Consent*, 47 CASE W. RES. L. REV. 1399, 1404 (1997) (describing the role played by the Senate's responsibility to advise and consent); *supra* note 44 and accompanying text.

59 NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), available at <http://1828.mshaffer.com/d/search/word,consent>.

60 WEBSTER'S THIRD, *supra* note 55 at 482. "Consent" is also a legal term of art with special meaning in tort law. Legal definitions of "consent" for tort law do not contradict the meaning in common usage, but they also do not have any special relevance to the understanding of the word in this constitutional context. See BLACK'S LAW DICTIONARY, *supra* note 56, at 323 (defining "consent" as "[a]greement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person; legally effective assent").

“Consenting” by statute prior to the announcement of a nominee fits awkwardly into these definitions. Until the President announces his nominee, there is no proposal to which the Senate may consent. The statute is also probably the product of an earlier Senate, so it may not even express the opinion of the current Senate. And regardless of the statute, the Senate also retains its power to consent or withhold consent after the President has chosen a nominee. Thus a statutory qualification is not a form of advance consent to an appointment.

A statutory qualification might be seen not as binding, but instead as an advance warning of the qualifications that the Senate will later demand of an officeholder during the advice and consent process.<sup>61</sup> But under the “advance warning” reading, statutory qualifications for officeholders are probably just advisory, not binding the Senate to consent to a nominee nor constraining the President in whom he may appoint.

Advisory qualifications, even if enacted in statute, pose no constitutional problems. However, since the statutory provisions generally are written in language that appears mandatory,<sup>62</sup> the “advance warning” reading is difficult to defend.<sup>63</sup>

Statutory qualifications are further problematic because they do not reflect the opinion of the Senate alone. To enact a statute, the

61 See, e.g., *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 825 (D.C. Cir. 1993) (“It is not the law . . . which arguably restrains the President, but his perception of the present Senate’s view as it may be assumed to be reflected in the statute.”).

62 See, e.g., 6 U.S.C.A. § 313(c)(2) (2007) (“The Administrator [of FEMA] *shall be* appointed from among individuals who have . . . a demonstrated ability in and knowledge of emergency management and homeland security; and . . . not less than 5 years of executive leadership and management experience in the public or private sector.” (emphasis added)); An Act to Establish a Court of Private Land Claims, and to Provide for the Settlement of Private Land Claims in Certain States and Territories, 51 Cong. Ch. 539, § 226 Stat. 854, 855 (1891) [hereinafter *Private Land Claims*] (“And there shall be appointed by the said court a person *who shall be* when appointed a citizen and resident of some State of the United States, skilled in the Spanish and English languages, to act as interpreter and translator in said court . . . .” (emphasis added)); An Act to Incorporate the Inhabitants of the City of Washington, in the District of Columbia, 7 Cong. Ch. 53, § 5, 2 Stat. 195, 196 (1802) (“[The mayor of D.C.] *must be* a citizen of the United States, and a resident of the city, prior to his appointment.” (emphasis added)).

63 Despite the apparently mandatory language of statutory provisions, Presidents have sometimes construed them as advisory. See, e.g., Bush statement on H.R. 5441, *supra* note 12 (“Section 503(c)(2) vests in the President authority to appoint the Administrator [of FEMA], by and with the advice and consent of the Senate, but purports to limit the qualifications of the pool of persons from whom the President may select the appointee in a manner that rules out a large portion of those persons best qualified by experience and knowledge to fill the office. The executive branch shall construe section 503(c)(2) in a manner consistent with the Appointments Clause of the Constitution.”).

cooperation of both houses of Congress and the President is required.<sup>64</sup> Any statute thus represents a compromise between the opinions of the Senate, the House of Representatives, and the President.<sup>65</sup> Any qualifications for officeholders that come out of the concerns of the House of Representatives cannot be binding, because only the President and Senate have constitutionally prescribed roles in the appointment process.

### *B. Vested Appointments*

The Vested Appointments Clause creates a process entirely separate from the Confirmation Appointments Clause. Limits on vested appointments therefore require a separate analysis from limits on confirmation appointments. The Vested Appointments Clause provides that “the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”<sup>66</sup>

This clause, unlike the Confirmation Appointments Clause, allows Congress to mandate statutory qualifications for officeholders. Statutory qualifications, therefore, are only appropriate for vested appointments, not confirmation appointments.

#### *1. Congress and Law*

The first thing to notice is that the Vested Appointments Clause creates a role for *Congress*, not the Senate acting alone. In contrast to the Confirmation Appointments Clause, the House of Representatives does have a role in vested appointments.

The Vested Appointments Clause also explicitly provides that the power of appointment can be vested “by Law.” This language incorporates the Article I, Section 7 process for creating a law, which requires the concurrence of both the House and Senate as well as presentment to the President.<sup>67</sup> Subjecting the power of vested appointment to statutes created by Congress is in stark contrast to the

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64 See U.S. CONST. art. I, § 7.

65 Cf. Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to The Law of Other States*, 59 STAN. L. REV. 1281, 1295 (2007) (pointing out that in our constitutional system, the House and Senate ask subtly but importantly different questions when considering the same bill).

66 U.S. CONST. art. II, § 2, cl. 2.

67 See *id.* art. I, § 7; *INS v. Chadha*, 462 U.S. 919, 951 (1983) (calling the bicameralism and presentment process a “finely wrought and exhaustively considered procedure” and holding that it is the *only* way to create binding laws).

confirmation appointments process, which, in requiring “the Advice and Consent of the Senate,” is non-statutory and only vaguely defined.<sup>68</sup>

## 2. “As they think proper”

The Vested Appointments Clause contains one of those most dreaded, but most common, of constitutional ambiguities: the confusing comma.<sup>69</sup> Recall, the clause reads as follows:

[B]ut the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>70</sup>

The phrase “as they think proper,” set off by commas on both ends, has at least two possible meanings. The phrase could be read to modify the verb “vest,” meaning that Congress has the power, whenever and however it thinks proper, to vest appointment of an inferior officer in the President.<sup>71</sup> Alternatively, the phrase could be read to modify the noun phrase “such inferior Officers,” making it part of the phrase “such . . . as.” Both readings affirmatively permit statutory qualifications.

A note before beginning this close textual reading: English grammar and punctuation were not highly standardized in the eighteenth century. The use of commas could be particularly idiosyn-

68 The Confirmation Appointments Clause requires that appointments for “other Officers” be “established by Law,” but this refers to the creation of the office, not the vesting of appointment power. *See, e.g.*, Limitations on Presidential Power to Create a New Executive Branch Entity to Receive and Administer Funds under Foreign Aid Legislation, 9 Op. Off. Legal Counsel 76, 77–78 (1985) [hereinafter *Limitations on Presidential Power*] (“That the Constitution distinguishes between the creation of an office and appointment thereto for the generality of national offices has never been questioned. The former is by law . . . [T]he President or heads of . . . agencies select individuals to fill those positions.”).

69 *See generally* Peter Jeremy Smith, *Commas, Constitutional Grammar, and the Straight-Face Test: What if Conan the Grammarian Were a Strict Textualist?*, 16 CONST. COMMENT. 7 (1999) (detailing various Constitutional ambiguities caused by misplaced commas); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 617 n.116 (2000) (discussing the unusual commas in the Second Amendment); Posting of Kurt Paulsen to Property Professor Blog, *The West Wing*, the Takings Clause and Tom Merrill, [http://lawprofessors.typepad.com/property/2006/05/the\\_west\\_wing\\_t.html](http://lawprofessors.typepad.com/property/2006/05/the_west_wing_t.html) (May 11, 2006) (discussing the comma ambiguity in the Fifth Amendment’s Takings Clause that was featured on an episode of *The West Wing*).

70 U.S. CONST. art. II, § 2, cl. 2.

71 For convenience, I will refer to appointments being vested in the President, though they could equally be vested in “the Courts of Law, or in the Heads of Departments.” *Id.* art. II, § 2, cl. 2.



cratic.<sup>72</sup> Removing some or all of the commas from an ambiguous sentence can therefore shed light on possible meanings that might be obscured by modern punctuation conventions. I have removed commas from the constitutional text throughout this section where doing so can highlight a different reading.

The first possible reading, in which Congress may “vest . . . as they think proper,” places strong discretion in Congress to determine when and in what manner to vest the appointment of inferior officers. Congress might think it proper to vest an appointment while constraining the appointer’s discretion through statutory qualifications. Thus, the Vested Appointments Clause on this reading gives affirmative power to Congress to attach statutory qualifications to vested appointments.

The phrase “as they think proper” might seem superfluous if it is read to describe Congress’s power to vest appointments. The Constitution already specifies that “Congress *may* . . . vest the Appointment.” But the addition of “as they think proper” could indicate that the decision of whether and in what way to vest an appointment is a political question committed to Congress and not subject to judicial review.<sup>73</sup>

The second possible reading of “as they think proper” is an even stronger endorsement of Congress’s power to place statutory qualifications for vested appointments. On this reading, “such inferior Officers” means those officers “as [Congress] think[s] proper.” That is, the phrase gives Congress further discretion about the officers themselves, not about the vesting of appointment power.

Other clauses in the Constitution use the “such . . . as” locution. Two of these are particularly parallel to the Appointments Clause because they also include a delegation of power to a specific constitutional actor to make decisions as he “think[s] proper.” First is the President’s power to adjourn Congress. That clause reads: “[I]n Case of Disagreement between [the houses of Congress], with Re-

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72 One popular grammar textbook of the era does not even mention the word “comma,” let alone provide instructions for its proper use. See JOSEPH PRIESTLEY, *THE RUDIMENTS OF ENGLISH GRAMMAR, ADAPTED TO THE USE OF SCHOOLS; WITH EXAMPLES OF ENGLISH COMPOSITION* (1789). Those grammar guides that did discuss the use of commas were as much or more concerned with pauses and voice inflection when reading the sentence aloud than with the grammatical function served by the comma. See, e.g., ROBERT LOWTH, *A SHORT INTRODUCTION TO ENGLISH GRAMMAR* 157–72 (1762).

73 See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (holding that a political question exists when there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department”).

spect to the Time of Adjournment, [the President] may adjourn them to such Time as he shall think proper . . . .”<sup>74</sup> The phrase “such Time as he shall think proper” is a grant of authority to the President to determine the time when Congress shall reconvene.

The second parallel clause is the Slave Trade Clause: “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress . . . .”<sup>75</sup> This delegated authority to then-existing states to continue the slave trade by importing “such persons as . . . [they] think proper.”

Under a reading analogous to the Adjournment and Slave Trade Clauses, the Constitution explicitly allows Congress to impose qualifications for inferior officers by statute: “Congress may by Law vest the Appointment of such inferior Officers[] as they think proper[] in the President alone . . . .”<sup>76</sup> In other words, Congress may pass statutes specifying what types of people it thinks are proper to hold the offices it creates, and then vest the President with the authority to appoint such people to office. These statutory qualifications are binding on the President—anyone appointed who does not meet the qualifications is illegally in office.

However the Vested Appointments Clause is read, it grants discretion to Congress to impose statutory qualifications for vested appointments. This textual commitment further calls into question the propriety of statutory qualifications for confirmation appointments, because the Constitution is silent on that issue.

### C. *The Necessary and Proper Clause*

The Necessary and Proper Clause<sup>77</sup> does not give Congress the power to create statutory qualifications for confirmation appointments. Congress has the power to create offices whenever those offices are necessary and proper to carrying out executive or judicial functions, but the Necessary and Proper Clause does not extend to

<sup>74</sup> U.S. CONST. art. II, § 3.

<sup>75</sup> *Id.* art. I, § 9. The Slave Trade Clause is, of course, no longer in force, but it provides an example of language usage at the time of the Founding.

<sup>76</sup> *Id.* art. II, § 2.

<sup>77</sup> *Id.* art. I, § 8, cl. 18 (“Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

prescribing qualifications for the people who are appointed to hold those offices.<sup>78</sup>

Congress is not granted any new powers by the Necessary and Proper Clause. The clause only prescribes reasonable means—passing laws—that further ends already established in other parts of the Constitution.<sup>79</sup> It does not change the allocation of powers between the legislature and the executive.<sup>80</sup> And it does not allow Congress to create new procedures that supersede ones specified in the Constitution itself.<sup>81</sup>

The Constitution assigns the power of nomination for a confirmation appointment to the President alone,<sup>82</sup> and it allocates the power of confirmation appointments to the President together with the Senate. Congress can pass laws that are necessary and proper to help the President and Senate carry out those functions, such as establishing an agency to help identify and evaluate potential nominees.<sup>83</sup> But *constraining* an executive power is not something that is “necessary and proper for carrying [it] into Execution.”<sup>84</sup> Thus, Congress cannot require that the President limit his nominees to a specific group of individuals named by someone else, or constrain appointments to

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78 Cf. Rosenkranz, *supra* note 65, at 1883 n.72 (“The Treaty Clause individually confers important power of course, and the Necessary and Proper Clause presumptively does too. But there is no reason to assume that the combination of the two clauses confers any additional power.” (citation omitted)). Congress’s power to prescribe statutory qualifications for officers whose appointments are vested in the President or another person derives not from the Necessary and Proper Clause, but from the text of the Vested Appointments Clause itself. See *supra* Part I.B.

79 See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 591 (1994) (“The Necessary and Proper Clause . . . is centrally concerned with *means* and takes the Constitution’s vesting of powers as a given.”).

80 See *id.* at 591 (“Simply put, the Clause has nothing to do with altering constitutionally granted powers and prerogatives; nor does it allow Congress to tell constitutionally empowered actors how they can implement their exclusive powers.”).

81 See Manning, *supra* note 20, at 1737–38 (“[D]espite its general powers under the Necessary and Proper Clause, Congress . . . cannot prescribe a method of appointing ‘Officers of the United States’ different from the specific methods laid out in the carefully drawn terms of the Appointments Clause.”).

82 See *supra* notes 30–40 and accompanying text (describing the President’s clear grant of constitutional authority to nominate).

83 See Calabresi & Prakash, *supra* note 79, at 591 (“Congress [could] institute an agency to help the President wisely employ his pardoning power, or . . . establish a department to assist the President in selecting officers for nomination.”). The Office of Legal Policy in the Department of Justice currently fills this role. See About OLP, <http://www.usdoj.gov/olp/history.htm> (last visited Mar. 4, 2008) (discussing the history of the Office of Legal Policy).

84 U.S. CONST. art. II, § 2; see Calabresi & Prakash, *supra* note 79, at 591–92 (analyzing the Necessary and Proper Clause in relation to the vesting power of Congress).

people who meet a particular set of qualifications, for confirmation appointments.<sup>85</sup>

Even for those who take a broader reading of the Necessary and Proper Clause,<sup>86</sup> there are good reasons to think Congress's power in confirmation appointments is limited. Some scholars see the Necessary and Proper Clause as giving Congress the ability to check presidential powers, or as allowing Congress to regulate presidential powers that do not themselves serve as checks on Congress.<sup>87</sup>

This checks-and-balances approach should give pause when the Constitution specifically and carefully balances power among governmental actors for a particular function. The usual separation of powers struggle involves the President's enumerated or implied powers on the one hand, versus Congress's powers to legislate and control appropriations on the other hand. In appointments, however, the Constitution specifically took the issue out of the ordinary checks-and-balances framework. Instead, the Framers chose to create a different balance of power: the Constitution carefully apportions appointment power between the President and Senate for confirmation appointments. Adding legislation to this mix alters the careful process the Constitution sets up. Congress should not be able to interfere with a power specifically designated to other constitutional actors.

Congress does have the power to create offices. But this power does not include the power to legislatively interfere with the President's power of appointment to those offices.<sup>88</sup> Statutory qualifica-

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85 See Calabresi & Prakash, *supra* note 79, at 591 ("Congress could not require that the President consult with the leadership of Congress before he vetoes a bill.").

86 See, e.g., Harold J. Krent, *The Lamentable Notion of Indefeasible Presidential Powers: A Reply to Professor Prakash*, 91 CORNELL L. REV. 1383 (2006).

87 See, e.g., *id.* at 1396–1400 (arguing that maintaining checks and balances requires a non-absolutist view of the division between executive and legislative powers).

88 See *Buckley v. Valeo*, 424 U.S. 1, 135 (1975) (per curiam) ("Congress could not, merely because it concluded that such a measure was 'necessary and proper' to the discharge of its substantive legislative authority, pass a bill of attainder or *ex post facto* law contrary to the prohibitions contained in § 9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so."); *id.* at 275 (White, J., concurring in part and dissenting in part) ("Congress clearly has the power to create federal offices and to define the powers and duties of those offices, but no case in this Court even remotely supports the power of Congress to appoint an officer of the United States . . ." (citation omitted)); Limitations on Presidential Power, *supra* note 68 (arguing that the President lacks statutory authority to "create a new entity within the Executive Branch to receive and administer funds appropriated under the International Security and Development Act of 1985" because the officer of such an entity must, according to the Appointments Clause, be authorized by Congress).

tions for officeholders with confirmation appointments are one such unconstitutional interference.

Congress may be able to accomplish some of the goals of statutory qualifications by specifying the powers and duties of the office. For instance, instead of requiring that the Solicitor General be learned in the law,<sup>89</sup> the statute could simply require that the Solicitor General personally argue cases in court. Because only lawyers who are members of the bar can appear in court, only trained and certified lawyers would be capable of performing the duties of the Solicitor General. A non-lawyer could still be appointed, but she would be incapable of performing the job.

With a little more planning, Congress might be able to make the office unattractive to people without certain qualifications. For instance, it might specify that the director of the Federal Emergency Management Agency ("FEMA") will receive a salary of \$10 per year unless she has five years of emergency management experience, in which case the director's salary is \$200,000 per year. Since Congress has control over the powers, duties, and salary of the office, this would be permissible. Further, the President and Senate are not prevented from appointing the person of their choice to the office if that person is willing to accept the conditions of employment.

## II. THE ORIGINS AND PRACTICE OF STATUTORY QUALIFICATIONS

The history of the writing and implementation of the Appointments Clause is exceptionally unclear. The clause is a compromise between diametrically opposed views of where the appointment power should be lodged.<sup>90</sup> Indeed, practice has shown Presidents and Congresses to be confused about the propriety of various appointment procedures.<sup>91</sup>

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89 See 28 U.S.C. § 505 (2000) ("The President shall appoint in the Department of Justice, by and with the advice and consent of the Senate, a Solicitor General, learned in the law, to assist the Attorney General in the performance of his duties.").

90 See Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037, 1061 (1987) ("When one examines the history of the Appointments Clause, . . . one finds no evidence of shared convictions or purposes."); *id.* at 1062 ("[R]epresentatives in the Convention had almost as many ideas about the rightful locus of the appointing prerogative as there were representatives.").

91 Not to mention the lasting confusion over removal procedures. See *Morrison v. Olson*, 487 U.S. 654, 685–96 (1988) (holding that appointment of an independent counsel does not violate separation of powers at the expense of the executive); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (holding that the President does not have unilateral removal power over officers whose powers are not purely executive); *Myers v. United*

Many of the debates center around two issues: preventing aggrandizement and promoting accountability. Probably the most important concern was that appointments not be used to aggrandize the individual doing the appointing: the appointer should not grant offices to increase his own power, reward his supporters, or give favors to his friends or relatives. Another central concern was that a single person or entity be accountable for the performance of an officer: if an incompetent person was appointed to the post, the electorate should be able to understand who was responsible for appointing the person. Later, a third concern was raised: efficiency. The task of appointing officers should not cause the government to grind to a halt, but should, in many cases be a delegated, administrative task.

The solution that the Framers worked out in the Appointments Clause addresses all three of these issues. Modern interpreters working out doctrine to implement appointments in the absence of clear constitutional text should also keep these principles in mind.

#### A. *Appointments in the Founding Era*

##### 1. *The Appointments Clause in the Conventions*

The issue of statutory qualifications for officeholders was not discussed at the Constitutional Convention. However, the records of the debates reveal a great deal of discussion about how much of the appointment power should be given to the President and how much to the legislature.

The Appointments Clause grew out of dissatisfaction with the king's prerogative of appointing officers in Britain.<sup>92</sup> The appointment power allowed the king to solidify his personal power by granting favors and making honors and salaries dependent on his will.<sup>93</sup> Many Americans of the founding generation wanted to keep the appointment power out of the hands of a single individual.<sup>94</sup>

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States, 272 U.S. 52 (1926) (holding that the President does not need legislative approval to remove executive branch officials).

92 See GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 143–50 (2d ed. 1998) (describing the skewed power structure created by the king's solitary power to appoint officers); Blumoff, *supra* note 90, at 1069 (“The framers came to Philadelphia mindful of the colonial legacy of monarchical appointment abuses, yet equally fearful of legislative tyranny.”).

93 See WOOD, *supra* note 92, at 144–45 (recounting the significance of the social status conferred by an appointment in addition to the salary it brought with it).

94 See *id.* at 148 (describing Americans' desire to make sure that a single person could not determine the political and social order); Blumoff, *supra* note 90, at 1061–70 (recounting

Some delegates to the Constitutional Convention proposed placing the appointment power in the President alone.<sup>95</sup> But others, fearing the personal power this would create for the President, insisted that the power to appoint officers should be given to Congress alone<sup>96</sup> or to the Senate.<sup>97</sup>

Interestingly, while the issues of anti-aggrandizement and accountability seem to have been widely accepted as centrally important, the delegates had major disagreements on how to accomplish them.<sup>98</sup> Some thought that Congress, or even the Senate alone, was too large a body to exercise the necessary responsible decision-making,<sup>99</sup> and that the President could be held more accountable.<sup>100</sup> Others worried that the President acting alone would have no check on his power and would not exercise it responsibly.<sup>101</sup>

Much debate ensued over whether the President or Congress was more likely to use the appointment power wisely. Some feared that the President would appoint his cronies to office if he had the appointment power.<sup>102</sup> Others pointed out that the members of the Senate and House of Representatives would have many times more personal interests and favors to repay than the President alone did.<sup>103</sup>

the debates in the Constitutional Convention over the best place to lodge the appointing power).

95 See Blumoff, *supra* note 90, at 1062 (“James Wilson . . . [thought] the Executive acting alone would ensure appointments by ‘a single, responsible person.’”).

96 See *id.* (mentioning Randolph’s resolution to place the power to make judicial appointments in the legislature).

97 See *id.* at 1062–63 (discussing Madison’s plan to place the power to make appointments in the Senate alone).

98 See *id.* at 1066 (“[T]he debate focused largely on two questions: Was the Executive or the Legislature more likely to abuse its power? And which entity, the Executive or the Legislature, was more likely to be jealous and create discord if it was not given a role in the process?”).

99 See, e.g., 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 41 (1911) (recounting Ghorum’s argument that the Senate was too large to responsibly appoint officers).

100 See, e.g., *id.* at 43 (quoting Ghorum’s statement that “[t]he Executive would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone”).

101 See *id.* (giving Bedford’s argument that “[t]he responsibility of the Executive so much talked of was chimerical. He could not be punished for mistakes”).

102 See, e.g., *id.* at 81 (recounting Elseworth’s argument that the President “will be more open to caresses & intrigues than the Senate”); Blumoff, *supra* note 90, at 1064 (relating the view of William Martin, Gouverneur Morris, and Sherman); *id.* at 1074 (relating Luther Martin’s objections to the Appointments Clause as making the President virtually a king).

103 See 1 FARRAND, *supra* note 99, at 119 (relating Wilson’s argument that “[i]ntrigue, partiality, and concealment” would be the result of legislative appointment of judges); *id.* at 120, 232–33 (noting Madison’s agreement with Wilson and suggesting appointment by the

Some saw the President as taking more responsibility with his choice of officers;<sup>104</sup> others saw Senators as having more wisdom and knowledge of worthy individuals from their states.<sup>105</sup>

The final product revealed a checks-and-balances compromise between the supporters of a legislative appointment power and those of an executive appointment power.<sup>106</sup> As Gouverneur Morris put it, “[A]s the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.”<sup>107</sup>

The Vested Appointments Clause was added very late, with little recorded discussion.<sup>108</sup> It appears to have been a concession to efficiency, since the appointment of inferior officers might be more trouble to the President and Senate than the extra procedural checks were worth.<sup>109</sup>

After the Constitution was written, several influential Framers emphasized the importance of the combined powers of the President and Senate in appointing people to offices. However, they were careful to distinguish between the power of nomination, which belonged to the President alone, and the power of appointment, which was shared between the President and Senate.

Alexander Hamilton defended the compromise in *The Federalist Papers*. On the President’s nomination power, he wrote that “one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices than a body of men of equal or perhaps even of superior discernment.”<sup>110</sup> The role of the

Senate as a better solution); 2 *id.* at 42 (noting Ghorum’s argument that “[p]ublic bodies feel no personal responsibility and give full play to intrigue & cabal”).

104 See 2 *id.*, at 80 (presenting Madison’s argument that the President “would in general be more capable & likely to select fit characters than the Legislature . . . who might hide their selfish motives under the number concerned in the appointment”).

105 See *id.* at 43 (relating Sherman’s argument that Senators would be as wise as the President and have more knowledge together than the President would have as an individual). Others objected that the ideal of responsibility in appointments could never be met, no matter who had the appointing power. See *id.* at 539 (giving Mr. Gerry’s statement that “[t]he President can not know all characters, and can therefore always plead ignorance”).

106 See *id.* at 80 (recounting Madison’s argument that if the President nominated a bad candidate, the Senate would likely refuse confirmation).

107 *Id.* at 539. Some delegates objected that the Senate’s advice and consent role would prove an ineffective check on Presidential power. See *id.* at 81, 83 (relating statements of Elseworth and Mason).

108 See *id.* at 627–28 (recording just two comments); Blumoff, *supra* note 90, at 1068–69 (remarking that the clause passed after two quick votes).

109 See Blumoff, *supra* note 90, at 1069 n.194 (“The lack of discussion no doubt reflects the unspoken consensus that the President (as well as the judiciary, and the heads of executive departments) must have the authority to hire and fire their own assistants.”).

110 THE FEDERALIST NO. 76, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).



Senate was limited to confirming or rejecting the President's nominee—a safeguard both against sole Presidential control and against too much meddling by the legislature.<sup>111</sup> Because the Senate had no power to choose a nominee, Hamilton argued, it would judge the President's nominee based solely on merit.<sup>112</sup>

James Madison further elaborated the importance of the blended appointment power in a speech on the floor of the House of Representatives.

If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with greater caution, it is that which relates to officers and offices. The powers relative to offices are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the Legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an Executive nature. Although it be qualified in the Constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it. We ought always to consider the Constitution with an eye to the principles upon which it was founded. In this point of view, we shall readily conclude that if the Legislature determines the powers, the honors, and emoluments of an office, we should be insecure if they were to designate the officer also. The nature of things restrains and confines the Legislative and Executive authorities in this respect; and hence it is that the Constitution stipulates for the independence of each branch of the Government.<sup>113</sup>

## 2. *Early Practice of Statutory Qualifications*

The First Congress took several actions relevant to the issue of statutory qualifications of officeholders. Although it did enact several such qualifications, it did not do so with much constitutional analysis.

In the Judiciary Act of 1789, Congress required that the Attorney General and U.S. Attorneys be “learned in the law.”<sup>114</sup> The statute did

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111 See *id.* at 425 (arguing that the Senate in its advice and consent role would not reject a qualified nominee simply because they preferred another, since “they could not assure themselves that the person they might wish would be brought forward by a second or by any subsequent nomination. . . . [or] even be certain that a future nomination would present a candidate in any degree more acceptable to them”); THE FEDERALIST NO. 7 (Alexander Hamilton) (pointing out that the House of Representatives has no role in appointments).

112 THE FEDERALIST NO. 66 (Alexander Hamilton).

113 1 ANNALS OF CONGRESS 581–82 (Joseph Gales ed., 1834).

114 Judiciary Act of 1789, 1 Cong. Ch. 20, § 35, 1 Stat. 73, 93 (1789).

not specify how the officers would be appointed,<sup>115</sup> so Edmund Randolph was appointed as the first Attorney General through presidential nomination and Senate confirmation.<sup>116</sup> When the bill was being discussed in Congress, no constitutional objections were raised regarding the restriction on officers' qualifications.<sup>117</sup>

Objections were raised to statutory qualifications later, however. A bill creating the office of a Superintendent of Indian Affairs would have required that the person appointed be a military officer. Among other objections, the record of the House of Representatives debate reflects that the bill

was said to infringe the power of the President, and . . . to be unconstitutional; that it may counteract the essential interests of the people, by precluding the President from appointing perhaps the most proper character in the United States; that persons in civil life may be found fully competent to the business, many such possessing a perfect knowledge of Indian affairs.<sup>118</sup>

In support of the requirement that the officeholder be a military officer, other members of the House argued that a military officer would in fact be the best fit for the job. Responding to the constitutional argument, only references to precedent are recorded. Nobody defended the constitutionality of statutory qualifications as such. Instead, the argument was that "the President and Senate are restricted in their appointments of officers in several other departments. The Attorney-General must be a person learned in the law . . ."<sup>119</sup>

The provision requiring the Superintendent to be a military officer was later removed from the bill, apparently for non-constitutional reasons.<sup>120</sup> Later, another bill would have created a commission with the Secretary of the Treasury and the Comptroller as members.<sup>121</sup> Some members of Congress viewed this as the creation of a new position (commissioner) and the unconstitutional appointment by Congress of two members (the people serving as Secretary of Treasury

115 See *id.*; DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801*, at 43 (1997) ("[T]he statute did not say who was to appoint or remove them.").

116 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1991, 49-50 (Linda Grant De Pauw ed., 1974).

117 See CURRIE, *supra* note 115, at 43 ("Congress significantly if sensibly restricted the President's discretion in selecting them. Nobody seems to have suggested that in doing so Congress offended the appointment provisions of Article II.").

118 2 ANNALS OF CONGRESS 1523 (1790).

119 *Id.*

120 See CURRIE, *supra* note 115, at 43 n.255 ("[T]he military qualification had disappeared—the precedents suggested for reasons of policy rather than constitutional compulsion.").

121 See *id.* ("[A] bill to create a commission . . . designating the Secretary of the Treasury and the Comptroller as members").

and Comptroller). Against this, defenders of the bill argued that it was constitutional because it consisted only of adding duties to existing offices, not appointing new officers, and because the commission's functions would be legislative.<sup>122</sup> The provision was removed, but it is not clear whether for constitutional or policy reasons.<sup>123</sup>

Two things are of note about these brief constitutional debates. First, nobody actually defended the constitutionality of statutory qualifications on any principled ground, such as political theory, structural constraints between the branches, or constitutional text. The issue might have been resolved quite differently had the constitutional objection been raised before any precedent had been created. Second, the House of Representatives—a body given no say in appointments under the Constitution—found itself debating whether a nominee with certain qualifications would be qualified for office. During the drafting of the Constitution, most of the delegates were strongly against allowing the House any role in appointments.<sup>124</sup>

### *B. Statutory Qualifications After the Founding*

Following the early example of the Attorney General qualifications, Congress has passed countless laws establishing offices and prescribing qualifications for the officeholders.<sup>125</sup> Statutory qualifications have been attached for both confirmation<sup>126</sup> and vested appointments.<sup>127</sup>

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122 See *id.* (“Sedgwick retorted with considerable force that the Constitution did not forbid Congress to attach additional duties to existing offices, and Madison argued that, since the commission’s functions were legislative, Congress could appoint its members.”).

123 See *id.* (“Nevertheless the offending language was removed—whether for reasons of policy or constitutional compulsion was not made clear.”).

124 See THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 110, at 430–31 (noting that the “scheme” of “uniting the House of Representatives in the power of making [appointments]” had “some, though but a few advocates,” and arguing that “[a] body so fluctuating and at the same time so numerous can never be deemed proper for the exercise of [the appointment] power”).

125 See, e.g., *Myers v. United States*, 272 U.S. 52, 265–74 (1926) (Brandeis, J., dissenting) (collecting a large number of statutes prescribing qualifications for officeholders between 1789 and 1926).

126 See, e.g., 6 U.S.C.A. § 313(c)(2) (2007) (listing professional experience requirements for Administrator of FEMA); 2 U.S.C. § 437c(a)(1) (2000) (giving political party requirements for members of FEC); 29 U.S.C. § 12 (2000) (requiring that the Director of Women’s Bureau at Department of Labor must be a woman); An Act to Provide a Government for the Territory of Hawaii, 56 Cong. Ch. 339, § 66, 31 Stat. 141, 153 (1900) (noting citizenship and age requirements for territorial governor of Hawaii); *Private Land Claims*, *supra* note 62 (listing citizenship, residency, and professional requirement for a U.S. Attorney in courts of private land claims); An Act to Remodel the Diplomatic and

The debate has been characterized by a broad agreement that statutory qualifications are generally permitted, but extensive disagreement exists on the details of which sorts of qualifications encroach too much on the President's appointment power. Both the majority and dissent in *Myers v. United States* agreed that statutory qualifications for officeholders were generally constitutional.<sup>128</sup>

Presidents have generally abided by such qualifications,<sup>129</sup> with some notable exceptions.<sup>130</sup> Some Presidents have also noted their objections to statutory qualifications, on principle or in particular cases, while continuing to follow the requirements; this is possibly

Consular Systems of the United States, 33 Cong. Ch. 133, § 9, 10 Stat. 619, 623 (1855) (establishing a citizenship requirement for diplomatic officials, some of whom have confirmation appointments); An Act to Carry into Effect Certain Stipulations of the Treaty Between U.S. and Republic of Mexico, ch. 107, § 2, 9 Stat. 393 (1849) (creating a bilingual fluency requirement for translator).

- <sup>127</sup> See, e.g., 35 U.S.C.A. § 3(b)(1) (2002) (giving the citizenship and experience requirements for the position of Deputy Director of the United States Patent and Trademark Office, with the appointment power vested in the Secretary of Commerce); An Act for Making Appropriations for the Consular and Diplomatic Expenses of the Government for the Year Ending Thirtieth June, Eighteen Hundred and Sixty-Five, and for Other Purposes., 38 Cong. Ch. 136, § 2, 13 Stat. 137, 139 (1864) (listing citizenship, age, and examination requirements for consular clerks); *Private Land Claims*, *supra* note 62 (giving citizenship, residency, and bilingual fluency requirements for a court translator whose appointment is vested in the court); An Act Authorizing the President To Appoint Commissioners To Examine and Report upon the Sutro Tunnel in the State of Nevada, 42 Cong. Ch. 9, 17 Stat. 3 (1871) [hereinafter *Sutro Tunnel*] (setting professional requirements for engineering inspectors); An Act to Regulate the Diplomatic and Consular Systems of the United States, 34 Cong. Ch. 127, § 7, 11 Stat. 52, 55 (1856) (listing citizenship requirement for consular pupils).
- <sup>128</sup> *Myers*, 272 U.S. at 128–29 (holding that limitations are constitutional so long as they do not amount to a legislative designation); *id.* at 264–75 (Brandeis, J., dissenting) (tracing the long history of statutory limitations to the appointment power). Several more recent opinions have agreed. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 740 (1986) (Stevens, J., concurring) (“[I]t is entirely proper for Congress to specify the qualifications for an office that it has created . . .”).
- <sup>129</sup> See *Myers*, 272 U.S. at 265 (1926) (Brandeis, J., dissenting) (“Every President has consistently observed [statutory qualifications for officeholders]. This is true of those offices to which he makes appointments without the advice and consent of the Senate as well as of those for which its consent is required.”); *Kochan*, *supra* note 8, at 47 (noting that the statutory requirement that the head of the Department of Labor’s Women’s Bureau be a woman has always been followed).
- <sup>130</sup> President Jackson once protested that a Senate resolution preferring offices in a state to be filled by citizens of that state, coupled with several refusals to confirm officers not meeting the citizenship preference, was unconstitutional. See *Myers*, 272 U.S. at 275 (1926) (Brandeis, J., dissenting). For other examples, see CORWIN, *supra* note 30, at 74 n.20.

due to political constraints or because their favored candidates happened to meet the requirements.<sup>131</sup>

The executive branch has relatively consistently favored a balancing approach to determine which statutory qualifications are permissible and which restrict the President's appointment power too much.<sup>132</sup> A notable exception is the separation of powers memo written by Assistant Attorney General William Barr in 1989. In that opinion, Barr argued that statutory qualifications for principal officers are unconstitutional, but did not make any statement regarding statutory qualifications for inferior officers.<sup>133</sup>

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131 See, e.g., Statement by President William J. Clinton upon Signing the Lobbying Disclosure Act of 1995, 2 PUB. PAPERS OF WILLIAM J. CLINTON 1907 (Dec. 19, 1995) ("The Congress may not, of course, impose broad restrictions on the President's constitutional prerogative to nominate persons of his choosing to the highest executive branch positions, and this is especially so in the area of foreign relations. However, because as a policy matter I agree with the goal of ensuring the undivided loyalty of our representatives in trade negotiations, I intend, as a matter of practice, to act in accordance with this provision."); Bush Statement on H.R. 5441, *supra* note 12 ("Section 503(c)(2) vests in the President authority to appoint the Administrator [of FEMA], by and with the advice and consent of the Senate, but purports to limit the qualifications of the pool of persons from whom the President may select the appointee in a manner that rules out a large portion of those persons best qualified by experience and knowledge to fill the office. The executive branch shall construe section 503(c)(2) in a manner consistent with the Appointments Clause of the Constitution."); Civil Service Commission, *supra* note 39 (arguing that a requirement to appoint the person who scores highest on an examination is unconstitutional, though statutory qualifications in general are permissible); Common Legislative Encroachments, *supra* note 8, at 250 (arguing that statutory qualifications for principal officers are unconstitutional); U.S. Trade Rep. Opinion, *supra* note 40, at 280 (arguing that particular statutory qualifications for the U.S. Trade Representative unconstitutionally constrain the President's power of appointment, though statutory qualifications in general are permissible).

132 See, e.g., Civil Service Commission, *supra* note 39, at 524–25 (arguing that Congress can establish qualifications for a governmental office); U.S. Trade Rep. Opinion, *supra* note 40, at 280 (advocating a balance between the President's appointment power and the power of Congress to prescribe qualifications).

133 See Common Legislative Encroachments, *supra* note 8, at 250 ("Congress also imposes impermissible qualifications requirements on principal officers. For instance, Congress will require that a fixed number of members of certain commissions be from a particular political party. These requirements also violate the Appointments Clause. The only congressional check that the Constitution places on the President's power to appoint 'principal officers' is the advice and consent of the Senate."). See also Civil Service Commission, *supra* note 39 (taking a functionalist approach and arguing that statutory qualifications that leave the President significant discretion are constitutional while those that are too narrowly restrictive are unconstitutional).

### C. Longstanding Practice and Constitutional Interpretation

With such a long history of statutory qualifications being applied to confirmation appointments, one might ask whether it is best to defer to that practice. For the sake of stability and practicality, it may be worth sticking to long-established procedures that do not cause too much constitutional disruption.<sup>134</sup> But a long history of violating the Constitution does not make continuing violations acceptable. Acquiescence in a practice believed to be unconstitutional can only be reasonable if there is a good argument that the practice is in fact constitutional.

When deciding whether to move away from a long-used process on the grounds that the process is actually unconstitutional, one should examine the arguments put forward to defend the process. In the case of statutory qualifications, there have been no principled arguments presented at all. The constitutionality of statutory qualifications was not discussed the first time the device was used in a law.<sup>135</sup> When the issue was raised shortly thereafter, the defenders of statutory qualifications simply pointed to precedent and raised no further arguments in defense.<sup>136</sup>

Through the years, statutory qualifications have been much used but little discussed. There have been no Supreme Court cases directly addressing the issue. Few cases have even touched on the issue at all.<sup>137</sup> So, despite the longstanding practice of enacting statutory qualifications, there has been almost no actual formal consideration of its constitutionality.

The practices of the First Congress are often considered to be of extra importance in constitutional interpretation because they reflect the understanding of the Framers and the public at the time of the

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134 See, e.g., *Congressional Restrictions*, *supra* note 8, at 1927–34 (making the case for deference to the longstanding practice of statutory restrictions on the appointment power).

135 See *supra* notes 114–117 and accompanying text (discussing the early use of, and objections to, statutory qualifications).

136 See *supra* notes 118–119 and accompanying text (noting a specific example of a statutory qualification).

137 A notable exception is *Myers v. United States*, in which Chief Justice Taft's majority opinion and Justice Brandeis's dissent both discussed statutory qualifications as an example of congressional control over the President's appointment power. 272 U.S. 52, 128–31 (1926); *id.* at 264–75 (Brandeis, J., dissenting). But statutory qualifications were not at issue in *Myers*; the question was whether Congress could limit the President's removal power.

Founding.<sup>138</sup> The First Congress did impose statutory qualifications, but once again, it did so without any significant constitutional analysis.<sup>139</sup> The First Congress was certainly not infallible in its interpretation of the Constitution. Its practices can add weight to an argument about constitutionality, but they cannot be decisive.

The Framers were particularly concerned about Congress aggrandizing its powers and overstepping its constitutional limits. The fact that Congress has successfully done so in the area of statutory qualifications for a long time should not give it license to continue doing so.

### III. PRACTICAL AND THEORETICAL PROBLEMS OF STATUTORY RESTRICTIONS ON THE APPOINTMENT POWER

Allowing statutory qualifications for vested appointments but not confirmation appointments is consistent with the Constitution's structure. History shows that the Framers were concerned with two primary goals in the appointments process: accountability and anti-aggrandizement on the part of both the President and Congress. Additionally, they wanted the procedures to be efficient. The two appointment processes accomplish all of these goals, but in different ways.

#### A. *Checks and Balances*

The primary power of nomination and appointment is given to the President in order to establish accountability in a single person. The Senate's advice and consent role in appointments is designed as a check on the President to prevent abuses of the appointment power. Statutory qualifications for confirmation appointments can under some circumstances hinder this process and lead to less accountability. In vested appointments, however, when the Senate gives up its advice and consent role, statutory qualifications replace confirmation as a useful check on power.

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138 See, e.g., Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1164–76 (2003) (discussing the interpretive force of different kinds of early constitutional practices).

139 See *supra* notes 114–119 and accompanying text (discussing the development of and objections to statutory qualifications).

### 1. Checks and Balances in Confirmation Appointments

The Framers thought the Senate was too large a body to responsibly nominate or appoint officers, so these powers were given primarily to the President.<sup>140</sup> However, fearing that the President might appoint his cronies to office regardless of their fitness for the job, they gave the Senate the advice and consent role.<sup>141</sup> Statutory qualifications have the potential to disrupt this carefully balanced process.

In the confirmation appointments process, statutory qualifications can actually have the effect of *decreasing* accountability. If the Attorney General is required to be “learned in the law,” the President and Senate can claim, on appointing a person who is a bad choice in other respects, that she meets the minimum qualifications. On the other side of the spectrum, if the statutory qualifications are extremely restrictive, as in the case of the U.S. Trade Representative, the President and Senate might not be able to appoint the candidate that they think is best, because she does not meet all the statutory requirements.<sup>142</sup>

Some qualifications might be written into law in a previous Congress and remain for years to limit the discretion, or dull the advice and consent inquiry, of later Senates. The Constitution requires the advice and consent of the *current* Senate, not the dead hand of one from two or ten or fifty years ago.

By contrast, the advice and consent process cannot grow old and stale. It allows—indeed, requires—individualized consideration of the nominee by the Senate. Senators have the opportunity to consider the nominee on her own merits and evaluate her fitness for office. If the President’s choice of nominee is a bad one, he must take full responsibility for the error and cannot hide behind any statutory requirements as forcing his hand.

If certain qualifications are really important, the President will probably not nominate, and the Senate will probably not confirm, someone who does not have those qualifications.<sup>143</sup> Even if the Presi-

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140 See *supra* notes 99–100, 103 and accompanying text (discussing the concerns of the Framers that resulted in balancing the President’s appointment powers with the Senate’s advice and consent role).

141 See *supra* notes 102, 106–107 and accompanying text (same).

142 See U.S. Trade Rep. Opinion, *supra* note 40, at 280 (arguing that particular statutory qualifications for the U.S. Trade Representative unconstitutionally constrain the President’s power of appointment); 2 ANNALS OF CONGRESS 1575 (1790) (debating whether a non-military officer would be qualified for an Indian affairs office).

143 See, e.g., *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 825 (D.C. Cir. 1993) (“[1]t is hard to imagine that the President would wish to alter that balance [of political party represen-



dent chooses to nominate someone who is not qualified for the job, the Senate's advice and consent role provides a check on his ability to appoint that person.

Thus, statutory qualifications for confirmation appointments can be accountability-reducing, counterproductive, or superfluous. The Senate's confirmation is a much better mechanism for ensuring oversight and quality of officers, because it allows an individualized evaluation of the nominee for an important office.

## 2. *Checks and Balances in Vested Appointments*

Vested appointments do not have the structural check of Senate confirmation to make sure the President is appointing qualified individuals to office. Statutory qualifications provide an efficient, if non-individualized, substitute that serves the same purpose. The Framers envisioned that this process would be used primarily for lower-level officials on whom the Senate did not need to keep such a close eye.

The vested appointments process seems designed to efficiently appoint inferior officers. The Framers realized that the Senate need not be bothered with confirmation of every officer, however administrative or trivial her functions were to be.<sup>144</sup> Accountability for the quality of those officers remains primarily with the President, so that the blame for bad performance can be placed directly on his shoulders.

But the Framers did not want to give the President the sole power of appointing officers, since appointment is such a useful tool for increasing personal power.<sup>145</sup> When Senate confirmation is too burdensome a process, statutory qualifications are a good alternative. They limit the President's discretion to reward his supporters and they help ensure that the person appointed to the office will be at least minimally qualified to perform the job.<sup>146</sup>

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tation on the FEC], even if the understanding had not been reflected in the statutory language.”).

144 See 2 FARRAND, *supra* note 99, at 627–28 (describing the Vested Appointments Clause as “too necessary[] to be omitted”); Blumoff, *supra* note 90, at 1068–69 n.194 (arguing that the Vested Appointments Clause “reflects the unspoken consensus that the President (as well as the judiciary, and the heads of executive departments) must have the authority to hire and fire their own assistants”).

145 See WOOD, *supra* note 92, at 143–50 (discussing the belief that an executive who could appoint government officials was in a position to wield great power); *supra* notes 92–94 and accompanying text (noting the debate that surrounded the Appointments Clause).

146 One problem with statutory qualifications is that qualifications relevant when the statute is passed might become superfluous or obsolete over time, and Congress might not

The vested appointments process is not mandatory for inferior officers, but left to Congress's discretion to allow.<sup>147</sup> Because of this, Congress can adjust the balance of appointment power between the President, Senate, department heads, and courts depending on how responsibly they think those individuals and institutions are acting. Vested appointments allow not just a check on the President, but also on the Senate if it is abusing its role in confirmation appointments.

### *B. Constitutional and Statutory Qualifications for Officers*

The Constitution itself imposes some limitations on eligibility to hold federal office.<sup>148</sup> The existence of constitutional qualifications suggests that Congress may not impose additional qualifications by statute.

Congress and the states do not have the power to impose qualifications for holding *elected* office in addition to the qualifications required by the Constitution. The Supreme Court addressed this question in *Powell v. McCormack*<sup>149</sup> and *U.S. Term Limits v. Thornton*.<sup>150</sup> *Powell* involved the House of Representatives' refusal to seat a person elected to that body based on evidence that he had committed crimes.<sup>151</sup> The Court held that the power given to each house of Congress to "be the Judge of the Elections, Returns and Qualifications of its own Members"<sup>152</sup> does not include the authority to impose additional qualifications for holding elective office.<sup>153</sup>

Similarly, in *U.S. Term Limits*, the Court held that states cannot impose qualifications for holding federal elected office. At issue was

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bother to amend the statute. Imagine, for example, an old statute requiring a court reporter to be capable of writing in shorthand, which has become obsolete with the advent of computers and stenographic technology. Congress should regularly reconsider statutory qualifications to ensure that they are up to date.

147 See U.S. CONST. art. II, § 2, cl. 2 (noting that Congress can vest the appointment of inferior officers in the President alone); see also Krent, *supra* note 86, at 1401 (noting that Congress can vest the appointment of inferior officers in the President or heads of departments). See *infra* Part III.D for a discussion of the odd features of allowing Congress, not the Senate alone, to vest appointments.

148 See, e.g., McGinnis, *supra* note 30, at 647 ("That the President has constitutional obligations in his act of nomination is neither startling nor anomalous. Substantial evidence indicates that the Framers contemplated that the President would take account of his constitutional responsibilities when carrying out his presidential duties.")

149 395 U.S. 486 (1969).

150 514 U.S. 779 (1995).

151 See *Powell*, 395 U.S. at 490.

152 U.S. CONST. art. I, § 5.

153 *Powell*, 395 U.S. at 550.

an amendment to the Arkansas Constitution that prevented a candidate for the House of Representatives or Senate from appearing on the ballot if she had served a certain number of terms previously.<sup>154</sup> The Court reaffirmed *Powell's* holding that Congress cannot add to the qualifications required for its members<sup>155</sup> and expanded the holding to deny that power to states as well.<sup>156</sup> The Court noted that the Framers included specific qualifications in the Constitution with the knowledge that they would be understood as the *only* permissible qualifications for holding elected office.<sup>157</sup> With no further restrictions allowed, “the door of this part of the federal government is open to merit of every description.”<sup>158</sup>

The Incompatibility Clause sets a limit both on membership in Congress and on holding an appointed office—namely, that the same person cannot do both at the same time. The Ineligibility Clause imposes an additional limit for appointed offices. The two clauses read as follows:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.<sup>159</sup>

The President, therefore, may not appoint a Senator or Representative to a newly-created office or to one which has increased in salary during that person’s current term in Congress. He also may not appoint a member of Congress to any office unless the person resigns from Congress.

Without any additional grant of power to Congress to set qualifications for officeholders, it would seem that the explicit constitutional qualifications are the only ones. Some people have made this argument.<sup>160</sup> But this ignores the Vested Appointments Clause, which

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154 *U.S. Term Limits*, 514 U.S. at 783.

155 *Id.* at 798.

156 *Id.* at 827.

157 *Id.* at 792–93.

158 *Id.* at 794 (quoting *Powell*, 395 U.S. at 540 n.74).

159 U.S. CONST. art. 1, § 6, cl. 2.

160 See *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 484 (1989) (Kennedy, J., concurring) (“[T]he sole limitation on the President’s power to nominate these officials is found in the Incompatibility Clause . . .”); Kochan, *supra* note 8, at 51–52 (using the *expressio unius* canon to argue that the Ineligibility and Incompatibility Clauses rule out other limitations on appointments).

specifically gives Congress the power to prescribe statutory qualifications for vested appointments.<sup>161</sup>

The constitutional qualifications are the main restrictions on confirmation appointments, but they are not the only ones. All of the President's actions must conform with his duty to "take Care that the Laws be faithfully executed."<sup>162</sup> This means that, whenever an officer would assist in executing the laws, the President has a duty to appoint someone who he believes would faithfully execute the laws, possibly even according to the President's own views of how the law should be interpreted.<sup>163</sup> In the broad run of cases, though, theories of law and constitutional interpretation are of limited importance for an officer. Inferior executive officers must obey the President's directives, so their legal and policy views are less relevant. Many officers, such as goodwill ambassadors,<sup>164</sup> translators,<sup>165</sup> and project inspectors,<sup>166</sup> have no duties that are relevant to law or policy.

Even though statutory qualifications are generally allowed for vested appointments, in some instances the qualifications may go beyond Congress's power to set requirements. The Constitution allows Congress to vest the appointment of an inferior officer in the President, the courts, or the heads of departments, but not in Congress itself. A set of statutory qualifications that is too tightly drawn could constitute a congressional usurpation of the appointment power.<sup>167</sup> In the extreme case, Congress might intentionally require qualifica-

161 See *supra* Part I.B.

162 U.S. CONST. art. II, § 3.

163 Professor McGinnis argues that in judicial nominations, the President has a constitutional obligation to nominate judges who agree with his own philosophy of constitutional interpretation. See McGinnis, *supra* note 30, at 646-52; see also Judges - Appointment - Age Factor, 3 Op. Off. Legal Counsel 388 (1979) [hereinafter Age Factor Opinion] ("In making [nominations for judicial] appointments, the President is constitutionally entitled to exercise his discretion and to follow policies that in his view will serve the interests of the Nation.").

164 See, e.g., Joint Resolution Authorizing the President to Appoint One Woman Commissioner to Represent the United States and the National Society of the Daughters of the American Revolution at the Unveiling of the Statue of Lafayette at the Exposition in Paris, France, in Nineteen Hundred, 56 Res. No. 9, 31 Stat. 711 (1900) (authorizing the President to appoint a commissioner to represent the United States at the unveiling of a statue in Paris, France).

165 See, e.g., *Private Land Claims*, *supra* note 62 (authorizing a court to appoint a translator to assist in its proceedings).

166 See, e.g., *Sutro Tunnel*, *supra* note 127 (authorizing the President to appoint a board of engineers to inspect a tunnel under construction in Nevada).

167 See Civil Service Commission, *supra* note 39, at 524 ("Though the appointing power alone can designate an individual for an office . . . Congress[] by direct legislation . . . can prescribe qualifications . . .").

tions that only a single person possesses.<sup>168</sup> There is no difference between Congress limiting the pool of qualified candidates to one person and naming the individual to hold the office itself. Either move by Congress would overstep its constitutionally granted powers.

Even limiting the President's choice of officers to a small set of individuals is probably an unconstitutional interference with the vested appointments power. The executive branch has long used a functionalist balancing test to decide when statutory qualifications interfere too much with the President's authority.<sup>169</sup> While the functionalist test is not appropriate for confirmation appointments, since those are ruled out by the text and structure of the Constitution, it is useful in determining the extent of Congress's power to place restrictions on vested appointments.<sup>170</sup>

The line between statutory qualifications that encroach too much on the President's power and those that are acceptable may be impossible to draw with precision.<sup>171</sup> The answer may well be different for officers who perform different roles. The President might need more discretion to choose officers who work closely with him and provide advice or officers who perform more important tasks.<sup>172</sup> The fact that the line is not clear in advance, or not the same for all officers, does not mean that the test is unworkable or valueless.<sup>173</sup> Con-

168 See CORWIN, *supra* note 30, at 74 n.20 (detailing examples of Congress requiring appointment of a named individual or an individual with a set of qualifications held by only one person).

169 See *id.* (taking a functionalist approach and arguing that statutory qualifications that leave the President significant discretion are constitutional while those that are too narrowly restrictive are unconstitutional); U.S. Trade Rep. Opinion, *supra* note 40 (following the 1871 Civil Service Commission opinion).

170 Cf. William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 28–29 (1998) (advocating a blend of formalism and functionalism in separation of powers analysis).

171 See Civil Service Commission, *supra* note 39, at 525 (“But it may be asked, at what point must the contracting process [of prescribing statutory qualifications] stop? I confess my inability to answer.”).

172 See U.S. Trade Rep. Opinion, *supra* note 40, at 280 (arguing that particular statutory qualifications for the U.S. Trade Representative unconstitutionally constrain the President's power of appointment because, among other reasons, “the position in question is especially close to the President”); Age Factor Opinion, *supra* note 163, at 389 (“Congress has required that the President appoint members of both parties to certain kinds of boards and commissions; there is serious question whether Congress could constitutionally require the President to follow the same practice with respect to his Cabinet.”).

173 See Civil Service Commission, *supra* note 39, at 525 (“But the difficulty of drawing a line between such limitations as are, and such as are not, allowed by the Constitution, is no proof that both classes do not exist. In constitutional and legal inquiries, right or wrong is often a question of degree.”).

gress and the President must work together to determine the proper mix of accountability and oversight in each case.

*C. The Confirmation Appointments Clause as an Inverse Presentment Clause*

The Confirmation Appointments Clause is structured as almost the inverse of the Presentment Clause.<sup>174</sup> The Presentment Clause requires that for a bill to become a law, it must be created and passed by a majority of both houses, then presented to the President for his approval or veto.<sup>175</sup> The Confirmation Appointments Clause works in reverse—the President must choose and nominate a person for office, and then present that nominee to the Senate<sup>176</sup> for confirmation or rejection.<sup>177</sup>

The Supreme Court has firmly prevented deviations from the Presentment Clause process, calling it a “finely wrought and exhaustively considered[] procedure.”<sup>178</sup> The Confirmation Appointments Clause was also carefully structured by the Framers to achieve the appropriate balance of power and security against bad officeholders.<sup>179</sup> Congress, the President, and the courts should therefore be similarly reluctant to change the procedure.<sup>180</sup>

174 See Blumoff, *supra* note 90, at 1071–73 (comparing the blending of appointment powers between the President and Senate to the veto provision in creating laws). The convention also considered a proposal that would have allowed the President to appoint officers if the Senate did not disagree within a certain number of days. 2 FARRAND, *supra* note 99, at 38. This proposal bears a striking resemblance to the provision of Article II, § 7 which allows a bill to become law without the President’s signature. U.S. CONST. art. I, § 7, cl. 2 (“If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.”).

175 See U.S. CONST. art. I, § 7.

176 The two clauses are non-parallel in that the Presentment Clause involves the President plus *both* houses of Congress, whereas the Appointments Clause involves the President plus only the Senate, to the exclusion of the House of Representatives. Alexander Hamilton argued that the House should not have a part in confirmation of officers because its large size and frequently changing membership would make it unsuitable to the task of providing stability in appointments. THE FEDERALIST NO. 77 (Alexander Hamilton).

177 See U.S. CONST. art. II, § 2, cl. 2.

178 *INS v. Chadha*, 462 U.S. 919, 951 (1983).

179 See THE FEDERALIST NO. 76 (Alexander Hamilton) (arguing that the selection of competent officials is better performed by a single person but that the concurrence of an assembly will help prevent cronyism).

180 1 ANNALS OF CONGRESS 581–82 (Joseph Gales ed., 1834) (“Although [the President’s appointment power] be qualified in the Constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it.”).

Unlike the Presentment Clause, the Appointments Clause creates two alternative procedures by which appointments to federal office can be made. The confirmation appointments method, required for principal officers and optional for inferior officers, is through Presidential nomination and Senate confirmation.<sup>181</sup> The vested appointments method for inferior officers, at Congress's discretion, is to vest the appointment solely in the President, a court, or the head of a department.<sup>182</sup>

Even though two different methods are allowed, the methods both have the status of constitutionally-prescribed procedures. Congress cannot create a hybrid procedure or make up new procedures at its whim.<sup>183</sup> The analogy is obvious in the Presentment Clause context: Congress can pass a law over the President's veto by a two-thirds majority, but it cannot skip presentment entirely if a bill passes by a two-thirds majority in the first instance.

When establishing an appointed inferior office, then, Congress may choose whether to appoint the officer through the confirmation process or the vested process. That decision is an on-off switch. Congress must choose one process or the other. It cannot blend features from the two different processes. It cannot require Senate confirmation (a confirmation appointments process) and simultaneously require statutory qualifications (a vested appointments process).

#### *D. The House of Representatives*

The Constitution specifically and deliberately cuts the House of Representatives out of the process of confirmation appointments.<sup>184</sup> The President has the sole power of nomination. The President and Senate together have the power of appointment. But the House of Representatives is given no direct role, either on its own or together with the Senate. The House has various powers it can use to check

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181 See U.S. CONST. art. II, § 2, cl. 2.

182 See *id.* Congress cannot vest the appointment of officers, even legislative officers, in Congress itself. See *Buckley v. Valeo*, 424 U.S. 1, 127 (1976) (per curiam) (“While the [Appointments] Clause expressly authorizes Congress to vest the appointment of certain officers in the ‘Courts of Law,’ the absence of similar language to include Congress must mean that neither Congress nor its officers were included within the language ‘Heads of Departments’ . . .”).

183 See *Buckley*, 424 U.S. at 127 (“[T]here is no provision of the Constitution remotely providing any alternative means [of appointment] for the selection of the members of the Commission or for anybody like them.”).

184 See *supra* notes 94–107 and accompanying text (citing historical arguments for excluding the House of Representatives from the appointments process).

the appointment powers of the President and Senate. But statutory qualifications for officeholders are not a constitutionally authorized check and instead illegitimately give the House of Representatives a direct role in the appointment of officers.

### *1. The House's Indirect Checks on the Appointment Power*

The House of Representatives does not have a direct role in confirmation appointments, but is not powerless against the appointment powers of the President and Senate. Far from it. The Constitution gives the House numerous tools to check abuses of the appointment power. The House of Representatives is involved in creating offices by statute before anyone can be appointed to them, and in setting the powers, duties, and salary of each office. The House also has a role in deciding whether the appointment to an office will be through the confirmation appointments process or the vested appointments process. Finally, the House can initiate impeachment of any officer. When the available tools are understood, statutory qualifications seem much less important as a means of controlling the appointment power.

First and most basically, no person can be appointed to office until the office is created by law. Passing a law requires the concurrence of both the House of Representatives and the Senate. The House of Representatives therefore has an important role in creating an office in the first place, specifying the powers and duties of the officer, and setting the officer's salary.<sup>185</sup> This is true both when the office is initially created and for any changes to the powers, duties, or salary attached to the office. If the House of Representatives is dissatisfied with an officer's performance, it can initiate legislation to lower the officer's salary, remove duties from the officer, or even eliminate the office altogether.<sup>186</sup>

The House of Representatives also has a say in whether an office is filled through the confirmation appointments process or the vested appointments process. To vest an appointment in the President, the head of a department, or a court, Congress must pass a law. If the House of Representatives is dissatisfied with the Senate's participation

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<sup>185</sup> 1 ANNALS OF CONGRESS 581-82 (Joseph Gales ed., 1834).

<sup>186</sup> These options are unavailable if the officer is a federal judge, because judges have guaranteed salary protection and life tenure. See U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").



in appointing people to a particular office—for instance, if the Senate has been rejecting nominees the House would like to see take office—the House can initiate legislation to vest the appointment in the President alone without confirmation by the Senate.<sup>187</sup> If the House is dissatisfied with the President's nominees, it can initiate legislation that would vest the appointment in one of the other constitutionally authorized appointers.

Granted, the House of Representatives cannot unilaterally pass laws vesting appointments whenever it is dissatisfied with the President or Senate. It must obtain the cooperation of the Senate and President (or a two-thirds majority in both the House and Senate) to move appointments from the confirmation process to the vested process. The Senate and President will likely be reluctant to give up their appointment powers. As in any legislation, the House would need to use bargaining leverage and political tools to accomplish its goals. Even if the law is not actually passed, simply introducing a bill to vest appointments could send a strong message that the House disapproves of the job the President and Senate have been doing.

Once an appointment has been vested by statute, the House *can* unilaterally prevent it from returning to the confirmation appointment process. Going back to a confirmation appointment would require amending or repealing the statute that vested the appointment, neither of which can be done without the concurrence of the House of Representatives.<sup>188</sup>

The House of Representatives also has a pivotal role in removing officers who have behaved criminally. Impeachment and conviction is the only process through which Congress can remove executive and judicial officers from office. The Supreme Court has held that Congress may not retain any other removal power over executive branch officials,<sup>189</sup> and of course federal judges can only be removed by impeachment and conviction.<sup>190</sup> Interestingly, even though the

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187 See John C. Eastman, *The Limited Nature of the Senate's Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633, 636–37 (2003) (advocating that the House of Representatives initiate legislation to vest appointment of federal judges in the President alone when the Senate fails to confirm or reject nominees within a reasonable time period).

188 This is true unless the statute vesting the appointment has a sunset provision. In that case, the appointment would return to the confirmation process after a specified time period without further intervention by statute.

189 See *Bowsher v. Synar*, 478 U.S. 714 (1986).

190 See U.S. CONST. art. III, § 1. *But see generally* Saikrishna Prakash & Steven D. Smith, *How To Remove a Federal Judge*, 116 YALE L.J. 72 (2006) (arguing that the historical meaning of “good behavior” tenure included removal methods other than impeachment).

Senate has a role in the appointments process, it cannot initiate the process of removing an officer through impeachment. The power of impeachment is given exclusively to the House of Representatives.<sup>191</sup> The Senate's role of trying impeachment cases is the second step of the process. The Senate is thus the second mover in both appointment through confirmation and removal through impeachment and conviction.

## 2. *Statutory Qualifications as a Forbidden Direct Role for the House*

The text, history, and structure of the Constitution show that the Framers did not give the House of Representatives any direct role in appointment of officers through the confirmation appointment process. Enacting statutory qualifications contravenes the structure of the Constitution by giving the House of Representatives a direct role in confirming nominees for appointment. Not only is the enactment of a statutory qualification itself an exercise of appointment power, but also the existence of such statutory qualifications creates the opportunity for the House of Representatives to play a role equal to the Senate in later appointments.

The people who set qualifications for officeholders have a direct role in appointment to those positions. Job qualifications limit the set of individuals who can hold the job. Deciding who may and who may not qualify for a job is part of appointing someone to that job, even though it is not the final factor which determines whether an individual will be selected. Most importantly, the power to set officeholder qualifications is an in-advance veto power over appointment to the office. The Constitution gives appointment power—and veto power over appointments—only to the Senate, not to the House of Representatives.

When statutory qualifications limit the pool of individuals who can hold office and the President nominates someone who meets the qualifications, his choice may have been constrained by the will of the House of Representatives. He might not even have considered individuals who could have performed well but failed to meet the statutory qualifications. In many cases, the Senate might have consented to the appointment. The opinion of the House of Representatives, encoded in a statute in advance, prevents the nomination and ap-

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191 U.S. CONST. art. I, § 2, cl. 5 (giving the House of Representatives "the *sole* Power of Impeachment" (emphasis added)).

pointment of anyone outside the set of individuals meeting the statutory qualifications.

Statutory qualifications violate the structure of the Constitution even more profoundly when the person the President and Senate want to appoint does not meet the prescribed qualifications. This was the case when President Clinton nominated Charlene Barshefsky to be U.S. Trade Representative.<sup>192</sup> There are two possibilities in this kind of situation: either the House of Representatives also wants the person to be appointed or it does not. In either situation, the House of Representatives plays a pivotal role in the appointment—a situation that the Framers intended to avoid and the text of the Constitution actually forbade.

In the real-life example, the House of Representatives approved of Charlene Barshefsky's nomination. President Clinton suggested legislation that would amend the statutory qualifications to allow her appointment.<sup>193</sup> Interestingly, though, the bill that was passed did not remove the qualification entirely or amend it in general terms to remove the problem. Instead, it singled out Charlene Barshefsky by name and announced that the statutory qualification did not apply to her but still remained in effect for all future appointees to the position of U.S. Trade Representative.<sup>194</sup>

The Barshefsky amendment to the U.S. Trade Representative qualifications statute was essentially a confirmation by the Senate and House of Representatives together. Both houses had to pass the bill by majority vote before Barshefsky could be appointed to office. The Constitution conspicuously requires officers to be confirmed only by the *Senate*, not both houses of Congress acting together.

Congress could not pass a law requiring all appointees to be confirmed by the House of Representatives in addition to the Senate. But restrictive statutory qualifications create the same effect. Imagine a statute stating, "No person shall be appointed to any office of the United States."<sup>195</sup> Whenever an office needed to be filled, Congress

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192 See *supra* notes 1–7 and accompanying text.

193 See Appointment of U.S. Trade Representative: Waiver of Trade Act Provisions, Pub. L. No. 105–5, 111 Stat. 11 (1997).

194 See *id.* (“[N]otwithstanding . . . any other provision of law, the President, acting by and with the advice and consent of the Senate, is authorized to appoint Charlene Barshefsky as the United States Trade Representative.”).

195 The statute could be phrased even more like a job qualification by prescribing qualifications that nobody meets. For instance, “All persons holding offices of the United States shall be at least 150 years of age,” or “All persons holding offices of the United States shall hold Ph.D. degrees in at least ten different fields of study.”

could pass a private bill stating, "Notwithstanding the ban on appointments, the President may appoint [name of individual] as [name of office]." This would effectively require confirmation by both the House of Representatives and the Senate for all federal appointments.

The President and Senate might agree that a certain person should be appointed even though she does not meet the prescribed statutory qualifications, while the House of Representatives disagrees and does not like the candidate. In that situation, the House of Representatives would have the ability to block the appointment of a person nominated by the President and confirmed by the Senate by refusing to amend the statutory qualifications. This is manifestly not the process created by the Constitution, which does not give the House of Representatives any power to reject nominees for federal office.

This type of appointments scheme runs into a more widely recognized constitutional problem—it effectively transfers *de facto* appointment power to Congress instead of the President with the advice and consent of the Senate.<sup>196</sup> Since the statute limits the number of people able to be appointed (short of amending the statute) to effectively zero, it constrains the appointment power of the President too much.<sup>197</sup> In any case, Congress has shown no interest in limiting appointments in this manner. The Senate has no institutional interest in passing legislation that gives the House of Representatives an equal role in confirming nominees. The example is intended merely to illustrate the fact that statutory qualifications, even modest ones, can lead to confirmation by both houses, as occurred in the Charlene Barshefsky case.

Statutory qualifications create the possibility of officers being confirmed by both the House and Senate. They also create the more distressing possibility of officers being confirmed by the Senate but blocked by the House of Representatives. Both possibilities are con-

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196 The transfer of *de facto* appointment power is even clearer if Congress purports to vest the appointment, but imposes qualifications that limit the pool of potential appointees to zero or close to zero. In that case, Congress would have effectively created a new appointment method not authorized by the Constitution—for instance, appointment by the head of a department by and with the advice and consent of both houses of Congress. This illustrates the importance of a balancing test for statutory qualifications in vested appointments. The power to select officers must remain substantially with one of the constitutionally authorized appointers.

197 See Civil Service Commission, *supra* note 39.

trary to the system set up in the Constitution, which requires confirmation only by the Senate.

### CONCLUSION

The Constitution prohibits statutory qualifications for confirmation appointments, but allows them for vested appointments. This conclusion is apparent from a straightforward reading of the text of the Appointments Clause. Congress cannot place statutory qualifications for officers appointed through the confirmation appointments process simply because Congress as a whole has no role in that process. Instead, the current Senate must give its advice and consent to an individual after that person is nominated by the President.

The history and structure of the Constitution also support this view. The Framers were reluctant to give the House of Representatives a role in appointments because they thought the House was too large to perform this task responsibly. The existence of statutory qualifications also reduces the level of accountability the President and Senate have when appointing officers.

For vested appointments, the situation is quite different. The Constitution does give Congress as a whole a role to play in authorizing vested appointments of officers. The text indicates that statutory qualifications for those officers are permissible. Additionally, there are good structural reasons for allowing statutory qualifications in cases of vested appointments—because the Senate does not provide a check on the appointing power in those appointments, statutory qualifications can provide the check instead.

The President and Senate should exercise their appointment responsibilities with great care. Senate confirmation should not be a rubber stamp for appointment of the President's nominees. While the qualifications that are often included in statutes for confirmation appointments are often sensible ones, the President and Senate must decide for themselves whether each individual nominee is qualified for the office in question. If the nominee is qualified, a statutory restriction might stand in the way. If the nominee is not qualified, a statutory restriction could allow them to look the other way and not accept responsibility for the bad choice of officer. The processes created by the Constitution were carefully considered by the Framers and should be followed.