

## Session 2: Appointments, Removal, & Congressional Supervision of Executive Branch Staffing

### I. Congressional Power to Structure Executive Depts & Create Offices

- The Constitution vests the Executive Power in a single person, the President. *See* U.S. Const. art. II, § 1 (Vesting Clause).<sup>1</sup>
  - The President is therefore responsible for, and may be held accountable for, the actions of the Executive Branch.
  - The Supreme Court has indicated that this provision contains authority to supervise all officers and employees within the Executive Branch carrying out the law. *See, e.g., Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020); *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).
- The Appointments Clause then limits this power by giving Congress a role in office creation and the Senate a role in consent.
  - The Constitution does not create any executive offices other than the President (and arguably, the Vice President). Instead, it grants Congress the authority to create offices, and Congress therefore has significant influence over the shape and form of executive branch and administrative agency operations through its control over the structure of executive offices.
- Both the presidential role in supervision and the Senate role in consent are structurally designed to provide electoral accountability for the selection of high-quality officers dedicated to faithfully carrying out their constitutional duties. *See, e.g.,* U.S. Const. art. II, § 3 (Take Care Clause).<sup>2</sup>

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<sup>1</sup> “The executive power shall be vested in a President of the United States of America. . . .” U.S. Const. art. II, § 1.

<sup>2</sup> “[H]e shall take care that the laws be faithfully executed . . . .” U.S. Const. art. II, § 3.



- Office Creation & Conditions: One key, often-overlooked congressional power is Congress’s implicit authority derived from the Appointments Clause of Article II to establish offices “by Law.”<sup>3</sup>
  - The Constitution relies on Congress to enact statutes creating executive offices in part because of the concerns identified in the Declaration of Independence that English practice had been for the monarch to both create offices and to fill them, which tended to give the King the authority to award favorites, including in Parliament.
  - The Constitution generally divides control over government staffing by giving Congress the power to create offices and the President the principal authority to make appointments to fill them.
  - Not only must Congress decide which new offices should exist, the number of those offices, and the duties for which they are responsible, but Congress also may impose reasonable qualifications for the individuals who will fill them.
- “Officers of the United States”: Congress is constitutionally required to “establish[] by Law” only those positions that constitute “office[s] of the United States.”
- “Officer” defined:
  - The Supreme Court has concluded that “officers of the United States” are those who exercise “significant authority.” The Court has concluded that officials like administrative law judges, district court clerks, and postmasters first class are Article II “officers.” *See Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).
- If Congress is creating a position with sufficient authority that it rises to the level of a constitutional office, then Article II of the Constitution requires that the position be created by statute and the Constitution imposes limitations on how the individual filling the role will be selected.
  - In principle, Congress could specify precisely how many offices each agency will have and the precise duties for each officer.

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<sup>3</sup> “[H]e 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.” U.S. Const. art. II, § 2, cl. 2 (emphasis added).

- But in practice, Congress often just authorizes agencies to employ up to a certain maximum number of officers of a certain kind.
  - This practice has been followed to some degree since the 1700s, at least for lower-level administrative offices. The first Congress authorized Cabinet secretaries to employ up to a certain number of clerks as they found necessary. *See Act of Sept. 11, 1789, § 2, 1 Stat. 67, 68 (1789).*
  - Contemporary departments often are similarly structured. Congress has authorized the Department of Justice, for example, to have 12 assistant attorneys general (“AAG”) without specifying the authority for each assistant attorney general, except requiring there to be an AAG for the National Security Division and a civil service-protected AAG for Administration. *See 28 U.S.C. §§ 506, 507, & 508.*

## **II. Methods of Appointment**

- **General Rule:** When a government position constitutes an “office[] of the United States,” the Constitution requires the position to be filled in one of four different ways.
  - The “principal officers,” generally those who report directly to the President, must be appointed by the President with Senate advice and consent (“PAS”).
  - Less senior officers—“inferior officers”—may be PAS appointees or they may be appointed by one of three alternative methods—by the president alone, a department head, or a court of law.
  - Congress cannot change the default appointment mode for “principal,” or “non-inferior,” officers. And if Congress does not specify an officer’s appointment mode, then the default PAS requirement applies.

### **Who Requires PAS Appointment?:**

- *Principal versus “Inferior Officers”?:* There is often some disagreement concerning which officers constitute “principal officers” and thus must be PAS appointees.
  - The Court has said, however, that final binding executive branch decisions must be subject to the supervision and oversight of a principal officer. *U.S. v. Arthrex*, 141 S. Ct. 1041 (2021) (administrative patent judges).

- To be an inferior officer, one must have an executive supervisor other than the President. Courts have evaluated supervision in terms of whether an officer is subject to at-will removal and whether the officer is subject to mandatory direction from a higher-level officer other than the President. *See, e.g., Edmond v. U.S.*, 520 U.S. 651 (1997).
- Congress often *statutorily* requires PAS appointment for officers for which it might not be *constitutionally* required.

### Who can appoint “inferior officers”?

- *General Rule*: The default rule is that all officers must be subject to PAS appointment unless Congress establishes otherwise for “inferior officers.” *See* U.S. Const. art. II, § 2. Congress may establish by statute (e.g., this cannot be done by regulation, executive order, etc . . . ) that an “inferior officer” shall be appointed by a department head, the President alone, or a court of law.
- *“Heads of Departments”*: The term “Head of Department” includes both singular heads of executive departments (like Cabinet Secretaries and the EPA Administrator) and also commissions that supervise multiheaded agencies like the Securities and Exchange Commission and the Federal Trade Commission. *See Free Enterprise Fund*, 561 U.S. 477.
- *Courts of Law*: The Supreme Court has held that this category includes both Article III and non-Article III tribunals, such as Article I courts, that exercise judicial power. *See Freytag v. Commissioner*, 501 U.S. 868, 888-89 (1991).
  - Courts have not definitively opined whether both an individual chief judge or chief commissioner can have the appointing authority, as opposed to the collective body of a court or multimember commission.
  - But it is longstanding practice for individual jurists like the Chief Justice of the United States to appoint officials.
- Congress has discretion to choose from among the four options for each “inferior officer,” so long as there is congruence between the role of the appointing official and the duties of the appointee. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 675-76 (1988) (Special Division of the U.S. Court of Appeals for the D.C. Circuit appointed independent counsels under now-defunct statute).

### Officer Qualifications?

- Contained within Congress’s power to establish offices “by Law” is some power to impose qualifications criteria for offices. For example, the First Congress required appointment of an Attorney General who was “learned in the law.” Judiciary Act of 1789, § 35, 1 Stat. 73, 93.
- Congress can also impose criteria like geographical and educational and character requirements on executive and administrative positions.
  - But Congress may not go so far in specifying qualifications as to usurp the President’s appointment authority. If the criteria are so constraining, then they may be unconstitutional.
  - And legislation requiring the President to pick from among a list of named candidates, without selection according to an objective metric, also could be too constraining.
- Inferior officers likely can be subject to significantly greater and more detailed qualifications criteria than principal officers who are viewed as filling roles more critical to the President’s exercise of executive authority.

#### New Duties or a New Office?

- Once an individual is already serving in an “office,” Congress could assign that officer additional responsibilities or assign that officer to serve in an additional position so long as the new duties are “germane” to the duties of the original office. *Weiss v. United States*, 510 U.S. 163 (1994); *Shoemaker v. United States*, 147 U.S. 282 (1893).
  - It is questionable whether an individual holding an inferior “office” may be assigned the duties of a “principal office,” however
  - But the Supreme Court has indicated that an inferior officer could be assigned principal officer duties on an acting basis. *See United States v. Eaton*, 169 U.S. 331, 343 (1898). E.g., an assistant cabinet secretary could be moved into an Acting Secretary position as temporary head of an executive department without requiring a new appointment.

#### “Acting” Officers? Vacancies Reform

- The Federal Vacancies Reform Act, which provides a complex set of statutory default rules for temporarily filling vacancies in appointments, currently provides a great deal of flexibility to the Executive Branch in filling open offices with temporary acting officials for up to 210 days without Senate confirmation. *See* 5 U.S.C. §§ 3345, 3346.

- Congress could encourage Presidents to fill vacant offices more quickly and with more politically palatable candidates by tightening the vacancies provisions that permit a multiple succession of acting officials in key roles.
  - The requirement of Senate consent is a key way in which the Constitution gave the legislative branch (and indirectly, the States) influence over the staffing in agencies and executive offices.
  - The Vacancies Act could be tightened to enhance this function by reducing the number of positions from which the President can select acting officials, or the 210-day time period for which acting officers can serve without Senate consent.
  - Congress could also choose to exercise more control over executive branch operations and have more influence over nominations by imposing legislative rules that constrain the delegations of authority within executive agencies to lower-level officials.

### **III. Removal Standards**

- The executive power to supervise lower-level officials recognized by the Supreme Court is thought to inherently limit the degree to which Congress can insulate executive officers from firing.
- Some rough rules of thumb established by case law include:
  - Principal officers performing executive duties typically must be subject to at-will removal (Cabinet Secretaries, e.g.). *Myers v. United States*, 272 U.S. 52 (1926).
  - Commissioners at the head of “independent” agencies performing rulemaking and adjudicative functions typically may be subject to tenure protections such as removal only for “good cause” or misconduct. *See Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). Although this limitation has been increasingly challenged in recent years. *See, e.g., Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (finding unconstitutional double for-cause tenure protections); *Seila Law*, 140 S. Ct. 2183 (no tenure protection for single head of the CFPB); *Collins v. Yellen*, 141 S. Ct. 1761 (2021) (no tenure protection for single head of the Federal Housing Finance Agency).
    - Courts have not precisely defined what constitutes “good cause.”

- But as a practical matter, Presidents rarely fire tenure-protected officers.
  - And tenure protections cannot apply to singular heads of agencies. *See Seila Law*, 141 S. Ct. 2183; *Collins*, 141 S. Ct. 1761.
- The Supreme Court has also upheld the constitutionality of tenure protections for subordinate officers appointed by executive department heads. *See U.S. v. Perkins*, 116 U.S. 483 (1886).
- But the Court has indicated that two layers of tenure cannot protect certain executive officers. *See Free Enterprise Fund*, 561 U.S. 477. It is unclear whether this rule would also apply to administrative adjudicators like administrative judges.
- Congress cannot take any role for itself in supervising executive branch removals. *See Myers*, 272 U.S. 52; *Bowsher v. Synar*, 478 U.S. 714 (1986).
- Generally the appointing official also has the removal authority unless Congress specifies otherwise. (*See, e.g.*, presidential authority to fire U.S. attorneys even though they directly report to the Attorney General).
- Statutes creating offices for terms of years implicitly authorize at-will removal unless they specify that the officer may only be fired for cause. (*See, e.g.*, U.S. Attorney terms for four years, 28 U.S.C. § 541(b), and other commission and council positions for terms of years.)
- Potential congressional mechanisms for control other than tenure protections include, among others:
  - Appropriations authority; authority to hold up future nominations; statutory conflict-of-interest or transparency requirements, etc . . .
  - Congress could also require the submission of a report explaining the reasons supporting an officer’s termination.
  - Congress has also attempted to impose notice-and-wait requirements on removals. The Executive Branch often tacitly complies with these requirements but does not necessarily view them as constitutional. Courts have not reached the issue.

#### **IV. Inspectors General and Independent Counsels**

- Over the years Congress has authorized inspectors general and other positions like independent counsels within the Executive Branch to perform internal watchdog functions.
- Arguably, these positions create tension with the constitutional separation of powers because they represent an attempt to regulate and keep tabs on the Executive Branch from within. If one believes that the Executive Branch is subordinate to the President, then there is tension with the idea that a lower-level official might carry out investigate functions for which he is not closely supervised.
- Congress has allowed the independent counsel statute to terminate. In its stead, agencies like the Department of Justice have at times had special counsels governed by internal regulation—a distinct officer category established by regulation in the case of DOJ—conduct investigations. The most well-known recent special counsel investigation was the Mueller investigation regarding the 2016 elections.
- Inspectors general (IGs) are a more common phenomenon.
  - In contrast to the independent counsel, IGs are technically considered subordinate to their department head. IGs have statutory authority to issue subpoenas and question witnesses and collect information within their agencies and then send relevant reports to Congress. But their agency head typically has the statutory authority to review the report prior to its public release. *See* § 3, Inspector General Act of 1978.
  - Presidents can fire IGs but must send a report explaining the reason for the termination to Congress one month before the termination. *See* § 3(b), IG Act. In the past, Presidents have complied with this mandate by reporting very little reasoning to Congress and by placing the IG on administrative leave for the month prior to the termination. The D.C. Circuit has upheld the relevant statutory provisions against a litigation challenge brought after President Obama fired an IG. *See Walpin v. Corporation for Nat. and Community Services*, 630 F.3d 184 (D.C. Cir. 2011).