



**Congressional
Research Service**

Informing the legislative debate since 1914

The Appointments Clause: Responses to Frequently Asked Questions

Updated May 1, 2026

Congressional Research Service

<https://crsreports.congress.gov>

R48481



R48481

May 1, 2026

Victoria L. Killion
Legislative Attorney

The Appointments Clause: Responses to Frequently Asked Questions

The Appointments Clause is a provision in Article II, Section 2, Clause 2 of the Constitution that provides the “exclusive means” of appointing “Officers of the United States,” as distinct from “mere employees” or “lesser functionaries” of the federal government. *Lucia v. SEC*, 585 U.S. 237, 241, 244–45 (2018). According to the Supreme Court, an officer subject to the Clause is a person who “occup[ies] a ‘continuing’ position established by law” and “exercis[es] significant authority pursuant to the laws of the United States.” *Id.* at 245. A position is usually considered to be “continuing” for purposes of this standard where its duties are ongoing rather than temporary or intermittent, even if the occupants change due to a fixed term of office. The Court has identified rulemaking authority, enforcement authority, and certain adjudicatory functions to be forms of significant authority, though this list is not exclusive.

There are two classes of federal officers: principal officers and inferior officers. Principal officers must be appointed by the President with the advice and consent of the Senate, and generally include positions such as Cabinet-level department heads or the heads of independent agencies. An inferior officer is someone whose “work is directed and supervised at some level” by one or more principal officers. *Edmond v. United States*, 520 U.S. 651, 663 (1997). While advice and consent is the default method of appointment for inferior officers, the Appointments Clause permits Congress to “vest” the appointment of inferior officers “by Law” in “the President alone,” in “the Courts of Law,” or in “the Heads of Departments.” U.S. CONST. art. II, § 2, cl. 2. In other words, Congress, by statute, can authorize one of these three to appoint inferior officers. Case law suggests that wholesale delegation of appointment authority might violate the Clause, whereas assistance from lower-level officials or third parties in the vetting and selection process might be constitutional where the appointing authority makes the final decision. *See, e.g., Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 785 n.6 (2025); *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 392 (1867).

An Appointments Clause violation occurs if an officer is not appointed according to any of the constitutionally prescribed methods, or if there is a mismatch between the way the officer was appointed and the officer’s status as a principal or inferior officer. If a court finds that an Appointments Clause violation occurs, it may order a new administrative proceeding (in the case of a discrete agency enforcement action) or determine whether it can “sever” a portion of the statute governing that position to align the appointment method with the person’s status as a principal or inferior officer. In one case, the Supreme Court accorded “de facto validity” to a federal commission’s work rather than vacating its past decisions, providing Congress an opportunity to correct the constitutional problem. *Buckley v. Valeo*, 424 U.S. 1, 142 (1976) (per curiam).

Congress has several options to address potential Appointments Clause concerns. Congress could, for example, amend a statute to specify an appointment method consistent with an officer’s status as a principal or inferior officer; amend a statute to remove certain duties and discretion from an office so that the occupant no longer exercises significant federal authority; or retain the existing statutory language with the option of observing whether the issue arises in litigation and how courts resolve the question.

Contents

What Is the Appointments Clause?.....	1
Why Is the Appointments Clause Relevant for Congress?.....	2
Who Are “Officers of the United States”?.....	3
What Does It Mean to Occupy a Continuing Position Established by Law?.....	3
Continuing Position	4
Established by Law	6
What Does It Mean to Exercise Significant Authority Pursuant to the Laws of the United States?	9
Recognized Forms of Significant Authority	10
Final Decisionmaking Authority.....	11
Federal Grantmaking or Contracting Authority	12
Can State, Local, or Territorial Officials Be Officers of the United States?	13
What Are the Permissible Methods of Appointing Officers?	14
What Distinguishes a Principal Officer from an Inferior Officer?	15
How Does Congress “Vest” the Authority to Appoint Inferior Officers?.....	17
Can Appointment Authority Be Delegated or Shared?.....	20
PAS Officers.....	21
Presidentially Appointed Officers	24
Officers Appointed by Department Heads	25
Can Congress Limit the Pool of Individuals Eligible for Appointment?.....	26
Does the Designation of an Acting Officer Need to Comply with the Appointments Clause?	29
What Remedies Might a Court Order for an Appointments Clause Violation?.....	30
What Are Congress’s Options If It Identifies a Potential Appointments Clause Concern?	34

Contacts

Author Information.....	36
-------------------------	----

What Is the Appointments Clause?

The Appointments Clause is a provision in Article II of the Constitution that reads:

[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.¹

The Clause provides the “exclusive means” of appointing “Officers of the United States” (officers) as distinct from “mere employees” or “lesser functionaries” of the government.² As interpreted by the Supreme Court, the Clause divides officers³ into “two classes”: principal officers and inferior officers.⁴ The distinction between the two classes is discussed in a later section of this report.⁵ Whether a position is a principal or an inferior office dictates what method or methods of appointment are available to the government under the Appointments Clause.⁶

While the Clause does not apply to nonofficer federal employees, all officers—whether principal or inferior—must be appointed according to its strictures.⁷ “No class or type of officer is excluded because of its special functions.”⁸ Neither the title of the position nor its location in an agency’s organizational chart conclusively determines whether the Appointments Clause applies.⁹

The Supreme Court has called the Appointments Clause one of the “significant structural safeguards of the constitutional scheme,” because the Clause helps to preserve the separation of powers.¹⁰ The Clause “prevents congressional encroachment upon the Executive and Judicial Branches,” by empowering the President to “select the principal (noninferior) officers of the United States.”¹¹ At the same time, the Clause requires Senate confirmation of the President’s choice of nominee “to curb Executive abuses of the appointment power,” to encourage “judicious” selection of officers, and to “ensure public accountability for both the making of a bad appointment and the rejection of a good one.”¹²

¹ U.S. CONST. art. II, § 2, cl. 2. See Libr. of Cong., *Overview of Appointments Clause*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artII-S2-C2-3-1/ALDE_00013092/ (last visited Apr. 8, 2026).

² *Lucia v. SEC*, 585 U.S. 237, 241, 244–45 (2018).

³ The remainder of this report uses the term “officers” to refer to “all other Officers of the United States”—principal and inferior—whose appointments are not “otherwise provided for” in the Clause, thus excepting “Ambassadors, other public Ministers and Consuls, [and] Judges of the supreme Court.” U.S. CONST. art. II, § 2, cl. 2.

⁴ *United States v. Germaine*, 99 U.S. 508, 509 (1879).

⁵ See *infra* “What Distinguishes a Principal Officer from an Inferior Officer?”

⁶ See *infra* “What Are the Permissible Methods of Appointing Officers?”

⁷ *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam). See also *Lucia*, 585 U.S. at 245 (remarking that “the Appointments Clause cares not a whit about who named” nonofficer employees).

⁸ *Buckley*, 424 U.S. at 132.

⁹ See *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 590 U.S. 448, 465 (2020) (explaining that a statute providing that a particular board was not a department or agency of the federal government showed at most “that Congress did not intend to make the Board members ‘Officers of the United States,’” not whether “insofar as the Constitution is concerned, they succeeded”).

¹⁰ *Edmond v. United States*, 520 U.S. 651, 659 (1997).

¹¹ *Id.*

¹² *Id.* at 659–60.

According to the Supreme Court, the Constitution’s Framers recognized that appointment of every officer by the President with the Senate’s advice and consent might prove “inconvenient” as the number of offices in the federal government grew.¹³ The Appointments Clause thus provides that “Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”¹⁴ This “Excepting Clause” allows Congress to dispense with Senate confirmation for certain officers,¹⁵ while “prevent[ing] Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint.”¹⁶

Why Is the Appointments Clause Relevant for Congress?

Under the U.S. constitutional structure, Congress has the power to establish federal offices through lawmaking.¹⁷ Unless the Constitution provides otherwise for a particular office, such as the presidency, Congress’s power includes “the determination of [an office’s] functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed and their compensation.”¹⁸

The Appointments Clause may constrain how Congress structures positions within the federal government. As a threshold matter, the Clause applies only if Congress assigns a “continuing” position “significant” federal authority.¹⁹ If so, the “default” method of appointment is appointment by the President with the Senate’s advice and consent.²⁰ Congress can change that method “by Law,” but only for “inferior Officers” and only by choosing the President, the courts, or a department head to appoint such inferior officers.²¹ Case law interpreting the Appointments Clause can serve as a guide to Congress when it is considering legislation to create a new position within a federal agency or on a statutorily created board or commission. Such legal standards may also be relevant if Congress is amending the duties of an existing position or designating an existing official to perform functions outside of their typical duties.²²

Congress could require Senate confirmation of more types of officers if it so chooses, to play a greater role in the appointment process. By default, the Appointments Clause divides the power to

¹³ *United States v. Germaine*, 99 U.S. 508, 510 (1879).

¹⁴ U.S. CONST. art. II, § 2, cl. 2.

¹⁵ *Edmond*, 520 U.S. at 660.

¹⁶ *Freytag v. Comm’r*, 501 U.S. 868, 885 (1991).

¹⁷ *Myers v. United States*, 272 U.S. 52, 129 (1926).

¹⁸ *Id.*

¹⁹ See *infra* “Who Are ‘Officers of the United States?’”

²⁰ *Edmond*, 520 U.S. at 660.

²¹ U.S. CONST. art. II, § 2, cl. 2.

²² In *Weiss v. United States*, the Supreme Court held that “the Appointments Clause by its own force does not require a second appointment before military officers,” who are already appointed through advice and consent, could “discharge the duties of [a military] judge.” 510 U.S. 163, 176 (1994). The Court reasoned that there was little evidence that Congress sought to “circumvent[] the Appointments Clause” by effectively creating a new office and selecting the officer holder, because the statute “authorized an indefinite number of military judges, who could be designated from among hundreds or perhaps thousands of qualified commissioned officers.” *Id.* at 174. Additionally, the new duties were germane to military service, the Court reasoned, because “all military officers, consistent with a long tradition, play a role in the operation of the military justice system.” *Id.* at 174–75.

select individuals to serve in federal offices between the President (through appointment) and the Senate (through advice and consent).²³ Thus, unless Congress prescribes a different method of appointing a particular inferior officer, the Senate retains a role in appointing officers through the confirmation process.²⁴ The confirmation process is also a form of congressional oversight.²⁵ Confirmation hearings “can be used to provide policy direction to nominees, inform nominees of congressional interests, and seek commitments on future behavior.”²⁶

Once a nominee is confirmed, both chambers of Congress can exercise oversight over the appointee’s performance. Congress can use its oversight authority to determine whether Senate-confirmed appointees are adhering to the commitments made during their confirmation hearings.²⁷ Acting through its committees, Congress can also, if it so chooses, conduct hearings or investigations to determine whether other persons exercising significant federal authority are appointed consistent with the Appointments Clause.

Who Are “Officers of the United States”?

The Supreme Court has interpreted the term “Officers of the United States” as used in the Appointments Clause as having two components. First, an officer is someone who “occup[ies] a ‘continuing’ position established by law.”²⁸ Second, an officer “exercis[es] significant authority pursuant to the laws of the United States.”²⁹ These features distinguish officers from “lesser functionaries” or “mere employees” of the federal government.³⁰

What Does It Mean to Occupy a Continuing Position Established by Law?

The Supreme Court described the concept of a federal “office” in its 1867 decision in *United States v. Hartwell*.³¹ The Court explained that an “office is a public station, or employment, conferred by the appointment of government” and “embraces the ideas of tenure, duration, emolument, and duties.”³² The Court held that the defendant, who was indicted under federal law for embezzlement, was an officer within the meaning of the statute because he was employed “in the public services of the United States,” “appointed pursuant to law” and “by the head of a department” within the meaning of the Appointments Clause, “his compensation was fixed by

²³ *Edmond*, 520 U.S. at 660. See *Freytag v. Comm’r*, 501 U.S. 868, 884 (1991) (“[T]he Clause bespeaks a principle of limitation by dividing the power to appoint the principal federal officers—ambassadors, ministers, heads of departments, and judges—between the Executive and Legislative Branches.”).

²⁴ *Edmond*, 520 U.S. at 660.

²⁵ See CRS Report RL30240, *Congressional Oversight Manual*, coordinated by Ben Wilhelm, Todd Garvey, and Christopher M. Davis (2026).

²⁶ *Id.* at 24.

²⁷ *Id.*

²⁸ *Lucia v. SEC*, 585 U.S. 237, 245 (2018) (quoting *United States v. Germaine*, 99 U.S. 508, 511 (1879)).

²⁹ *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)).

³⁰ *Id.*

³¹ 73 U.S. 385, 393 (1867).

³² *Id.*

law,” and his “duties were continuing and permanent, not occasional or temporary.”³³ Subsequent decisions reiterated these elements of an office in the context of Appointments Clause disputes.³⁴

Continuing Position

In 1879, in *United States v. Germaine*, the Supreme Court held that a civil surgeon appointed by the Commissioner of Pensions to “make the periodical examination of pensioners which are or may be required by law” was not an officer of the United States.³⁵ The duties of a civil surgeon, the Court explained, “are *not* continuing and permanent, and they *are* occasional and intermittent.”³⁶ “The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination.”³⁷ Other characteristics of the surgeon’s employment also factored into the Court’s analysis, including that the surgeon was “required to keep no place of business for the public use” and apparently took “no oath.”³⁸ Additionally, while the surgeon was paid from federal funds for each examination, “[n]o regular appropriation [was] made to pay his compensation.”³⁹

The Supreme Court reached a similar conclusion in *Auffmordt v. Hedden*, an 1890 case concerning a customs dispute over the valuation of imported goods.⁴⁰ A federal statute authorized reappraisals of a collector’s initial valuation by a general appraiser and a “merchant appraiser” selected by the collector.⁴¹ The Court rejected the importers’ claim that the merchant appraiser who performed its reappraisal was an officer within the meaning of the Appointments Clause.⁴² The Court described a merchant appraiser as “an expert” who is “selected for his special knowledge in regard to the character and value of the particular goods in question” for a specific reappraisal.⁴³ The Court observed that the position had “no general functions” and did not “fall within the provisions of the civil service law.”⁴⁴ In sum, the merchant appraiser’s position was “without tenure, duration, continuing emolument, or continuous duties, and he act[ed] only occasionally and temporarily.”⁴⁵

³³ *Id.* Cf. *United States v. Avalos*, 162 F.4th 948, 958–59 (9th Cir. 2025) (per curiam) (reasoning that certain Department of Homeland Security (DHS) officials who issue administrative removal orders do not occupy a “continuing position established by law” because “[n]o statute sets forth [their] duties, functions, salary, nor means of appointment”; the “regulation delineating the position provides for duties that are ‘occasional and intermittent’ rather than ‘continuing and permanent’”; by “regulation, any number of enumerated DHS employees—or ‘another immigration officer designated’ by particular officials—may serve” in the role; and “the regulation does not provide for any ‘regular appropriation’ to pay [their] compensation”).

³⁴ *E.g.*, *United States v. Germaine*, 99 U.S. 508, 511 (1879).

³⁵ *Id.* at 508, 512.

³⁶ *Id.* at 512 (emphasis added).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 137 U.S. 310, 327 (1890).

⁴¹ *Id.* at 312–13.

⁴² *Id.* at 326.

⁴³ *Id.* at 326–27. The Court further observed that the statute used the word “select” rather than “appoint.” *Id.* at 327.

⁴⁴ *Id.* at 326.

⁴⁵ *Id.* at 327.

An individual does not have to serve indefinitely to be an officer. A position with a set term of office can be “continuing” if its next occupant would assume the duties assigned to the position.⁴⁶

Still, the line between a “continuing” and a “temporary” position is not always clear, and courts have found positions with temporary features to be offices in some cases.⁴⁷ In *United States v. Eaton*, the Supreme Court held that a vice consul—a subordinate officer “charged with the duty of temporarily performing the functions of the consular office” under “special and temporary conditions”—remained an inferior officer.⁴⁸ In *Morrison v. Olson*, the Court found it “clear” that an independent counsel appointed to investigate a particular matter was an officer of the United States, focusing instead on the question of whether he was an inferior or a principal officer.⁴⁹ In the course of that analysis, the Court described the independent counsel’s duties as temporary in nature.

[A]ppellant’s office is limited in tenure. There is concededly no time limit on the appointment of a particular counsel. Nonetheless, the office of independent counsel is “temporary” in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated, either by the counsel herself or by action of the Special Division. Unlike other prosecutors, appellant has no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for and authorized by the Special Division to undertake. In our view, these factors relating to the “ideas of tenure, duration . . . and duties” of the independent counsel are sufficient to establish that appellant is an “inferior” officer in the constitutional sense.⁵⁰

In a 2022 decision, the U.S. Court of Appeals for the Second Circuit⁵¹ applied “three factors” derived from *Germaine* and *Auffmordt* to determine “whether a temporary position is an office: (1) the position is not personal to a particular individual; (2) the position is not transient or fleeting; and (3) the duties of the position are more than incidental.”⁵² Based on these factors, the court concluded that certain court-appointed special prosecutors occupied a continuing position.⁵³

In a January 16, 2025, opinion,⁵⁴ the Department of Justice’s Office of Legal Counsel (OLC) offered an additional consideration for “determining whether a newly created, temporary position

⁴⁶ *United States v. Donziger*, 38 F.4th 290, 297 (2d Cir. 2022) (stating that “to qualify as an office, the position must not depend on the identity of the person occupying it, and the duties should ‘continue, though the person be changed’” (quoting *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823)). See also *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd. (PCAOB)*, 561 U.S. 477, 501 (2010) (ruling implicitly that members of the PCAOB, who served five-year terms, were officers for constitutional purposes); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 620, 631–32 (1935) (upholding Congress’s authority to fix a seven-year term of office for Commissioners of the FTC, subject to removal by the President only for certain enumerated causes).

⁴⁷ *E.g.*, *New Mexico v. Musk*, No. 25-CV-429, 2026 WL 799635, at *10 (D.D.C. Mar. 23, 2026) (holding that the plaintiff-states sufficiently alleged that the leader of the Department of Government Efficiency [DOGE] holds a continuing position, in part because “the position will exist for at least 18 months” and is not personal to a particular individual; that is, it “does not disappear” after its occupant “leaves government”).

⁴⁸ 169 U.S. 331, 343 (1898). In particular, the vice consul was performing the duties of the consular office during the illness of the consul-general. *Id.*

⁴⁹ 487 U.S. 654, 670 n.12 (1988).

⁵⁰ *Id.* at 672 (citations omitted).

⁵¹ Subsequent references to a particular circuit in this report refer to the U.S. Court of Appeals for that circuit (e.g., D.C. Circuit).

⁵² *Donziger*, 38 F.4th at 297.

⁵³ *Id.* at 295–99.

⁵⁴ Within the executive branch, OLC opinions may be authoritative or controlling on questions of law, but they are not binding on the legislative or judicial branches. See 28 U.S.C. §§ 511–513 (directing the Attorney General to advise the President, the heads of executive departments, and the Secretaries of military departments on “questions of law” upon (continued...))

is ‘continuing.’”⁵⁵ OLC stated that a temporary position might nevertheless be continuing for Appointments Clause purposes “if the position’s bundle of duties has historically been performed by an officer” and those duties, “although vested in a new temporary position, would continue to be exercised by a single position in the government in a largely unbroken chain across time.”⁵⁶

Established by Law

The requirement that an office be “established by Law” comes from the text of the Appointments Clause.⁵⁷ As with other concepts in Appointments Clause cases, however, its meaning is not precisely defined. The standard is usually met where “the duties, salary, and means of appointment for that office are specified by statute.”⁵⁸ OLC and some courts have cautioned that the absence of one or more of these statutory elements does not necessarily render an official a nonofficer.⁵⁹ For example, OLC reasoned in a 2007 opinion that individuals who receive no federal compensation may nevertheless occupy a position established by law due to the nature of their statutorily prescribed duties.⁶⁰

Questions can arise as to whether a position was “established by Law” when it was created by executive order or regulation rather than by statute. Similar questions can arise when statutory duties are assigned to a position “extant in the bureaucratic hierarchy.”⁶¹ Several lower courts have held that a position created by regulation was established by law, where the regulation was based on a statute authorizing the agency head to appoint or designate “officers or employees” or promulgate “necessary and appropriate regulations” to carry out certain functions.⁶² Other lower

request); *Citizens for Resp. & Ethics in Washington v. DOJ*, 922 F.3d 480, 484 (D.C. Cir. 2019) (discussing OLC’s position that its “formal written opinions” are binding on the executive branch).

⁵⁵ *The Test for Determining “Officer” Status Under the Appointments Clause*, 49 Op. O.L.C. slip op. at 6 (Jan. 16, 2025).

⁵⁶ *Id.*

⁵⁷ *See* U.S. CONST. art. II, § 2, cl. 2 (stating that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law”).

⁵⁸ *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991). *See also Lucia v. SEC*, 585 U.S. 237, 248 (2018) (holding that SEC ALJs occupied a position established by law because their “appointment is to a position created by statute, down to its ‘duties, salary, and means of appointment’” (citing *Freytag*, 501 U.S. at 878)).

⁵⁹ *See, e.g., Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 697 (9th Cir. 1997) (analyzing whether state governors, who formally held no federal position, nonetheless “perform[ed] duties reserved for officers of the United States” under a specific statute).

⁶⁰ *See Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 119, 121 (2007) (opining that “an emolument” is “not essential” for an official to qualify as an officer within the meaning of the Appointments Clause).

⁶¹ *Tucker v. Comm’r*, 676 F.3d 1129, 1130–31 (D.C. Cir. 2012).

⁶² *Manis v. U.S. Dep’t of Agric.*, 731 F. Supp. 3d 685, 694 (M.D.N.C. 2024) (reasoning that although “Congress itself did not explicitly create the office of Judicial Officer, it did explicitly grant the Secretary authority to do so”), *affirmed on other grounds*, No. 24-1367, 2025 WL 2389422, at *3, 5 (4th Cir. 2024) (per curiam); *United States v. Alaska*, No. 22-CV-00054, 2024 WL 1348632, at *9 (D. Alaska Mar. 29, 2024) (holding that a board created by regulation was established by law because a statute authorized the relevant agency heads to “prescribe such regulations as are necessary and appropriate to carry out” certain statutory duties and “properly enacted regulations have the force of law”), *affirmed on other grounds*, 151 F.4th 1124, 1136 n.5 (9th Cir. 2025); *McConnell v. U.S. Dep’t of Agric.*, No. 23-CV-24, 2023 WL 6960365, at *2 (E.D. Tenn. Oct. 20, 2023) (having “no issue concluding that the Judicial Officer holds an office established by law” because the position was “established by regulation, pursuant to the statutory authorization of Congress”). *Cf. SEC v. Musk*, No. 23-MC-80253, 2024 WL 2875096, at *4 (N.D. Cal. May 14, 2024) (concluding that a Senior Counsel at SEC held “a continuing office established by law,” citing 5 U.S.C. § 4802(b), which authorizes the SEC to “appoint and fix the compensation of such officers, attorneys, . . . and other employees as may be necessary for carrying out its functions under the securities laws”).

court decisions suggest that a position must be specifically named or described in statute to be established by law.⁶³

Another open question concerns the constitutional ramifications of a government employee exercising significant authority while in a role that is not “established by Law.”⁶⁴ In other words, does the Appointments Clause apply to a person exercising the powers of an officer of the United States without holding a statutorily established position? As of the date of this writing, this issue is being litigated with respect to actions that Elon Musk allegedly took in connection with the Department of Government Efficiency (DOGE).⁶⁵

The Supreme Court’s most recent cases elaborating on the distinctions between officers and nonofficers have not reached this question, because the positions at issue were expressly set out in statute.⁶⁶ Nevertheless, the Court’s framing and application of the legal standards in those cases may be instructive. In both its 1991 decision in *Freytag v. Commissioner* concerning special trial judges of the U.S. Tax Court and its 2018 decision in *Lucia v. SEC* concerning an administrative law judge (ALJ) at the Securities and Exchange Commission (SEC), the Court observed that the positions in question were “established by Law” before analyzing whether their holders exercised significant authority.⁶⁷ The *Lucia* Court reasoned, for example, that

[f]ar from serving temporarily or episodically, SEC ALJs ‘receive[] a career appointment.’ And that appointment is to a position created by statute, down to its ‘duties, salary, and means of appointment.’⁶⁸

⁶³ See *Navarro v. U.S. Ctr. for SafeSport*, No. 24-CV-00030, 2025 WL 209166, at *16 (W.D. Va. Jan. 15, 2025) (concluding that the position of director on the board of directors of the U.S. Center for SafeSport is not “established by law” because the “Amateur Sports Act says nothing about SafeSport’s board of directors”), *appeal filed*, No. 25-1150 (4th Cir. 2025) (oral argument heard on Dec. 10, 2025).

⁶⁴ U.S. CONST. art. II, § 2, cl. 2. While the same concerns might arise if a private person (i.e., not a federal employee) were to exercise significant federal authority, that scenario might implicate the private nondelegation doctrine, another facet of separation-of-powers jurisprudence. See *Fed. Comm’n v. Consumers’ Rsch.*, 606 U.S. 656, 697 (2025) (explaining that a law “violates the private nondelegation doctrine when it allows non-governmental entities to govern”); *Hight v. Dep’t of Homeland Sec.*, 135 F.4th 996, 1009 (D.C. Cir. 2025) (“Generally, a delegation of authority to a private entity is constitutional so long as the private entity acts only ‘as an aid’ to an accountable government agency that retains the ultimate authority to ‘approve[], disapprove[], or modif[y]’ the private entity’s actions and decisions on delegated matters.” (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940))).

⁶⁵ See *Does 1-26 v. Musk*, 771 F. Supp. 3d 637, 668–69 (D. Md. 2025) (restating the plaintiffs’ “claim under the Appointments Clause that Musk has acted as an Officer of the United States without having been duly appointed to such a role,” and holding that the plaintiffs were likely to succeed on this theory with respect to at least one decision allegedly attributed to Musk), *staying preliminary injunction pending appeal*, No. 25-1273 (4th Cir. 2025); *New Mexico v. Musk*, 784 F. Supp. 3d 174, 200 (D.D.C. 2025) (restating the defendants’ “primary argument” that “because Musk does not occupy an office vested with formal powers by Congress, he is insulated from the Appointments Clause,” and rejecting that argument). In these cases, the defendants also contest that Musk was exercising significant authority, arguing that he was merely an advisor. *E.g.*, *Musk*, 784 F. Supp. 3d at 204.

⁶⁶ *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991); *Lucia v. SEC*, 585 U.S. 237, 247–48 (2018).

⁶⁷ *Freytag*, 501 U.S. at 881 (“The office of special trial judge is ‘established by Law,’ and the duties, salary, and means of appointment for that office are specified by statute. These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute.” (internal citations omitted)); *Lucia*, 585 U.S. at 247–48 (“To begin, the Commission’s ALJs, like the Tax Court’s [special trial judges], hold a continuing office established by law. Indeed, everyone here—*Lucia*, the Government, and the amicus—agrees on that point.” (internal citations omitted)).

⁶⁸ See *Lucia*, 585 U.S. at 247–48 (internal citations omitted).

On one reading, the *Lucia* Court’s reasoning is simply an explanation of why ALJs mirrored the special trial judges in *Freytag*.⁶⁹ The case could also be read, however, as stating a prerequisite for officer status, suggesting that an individual must occupy a position established by law (and a continuing one at that) to be an officer subject to the Appointments Clause.⁷⁰ On this reading, a lower court might conclude that an Appointments Clause challenge to an official’s actions would necessarily fail if the official had no such established position,⁷¹ because nonofficer employees “need not be selected in compliance with the strict requirements of Article II.”⁷²

In some judges’ estimation, forgoing constitutional scrutiny of significant federal authority due to the absence of a statutorily established position would contravene the text and design of the Appointments Clause. In a 2012 decision, the D.C. Circuit remarked that “it would seem anomalous if the Appointments Clause were inapplicable to positions extant in the bureaucratic hierarchy, and to which Congress assigned ‘significant authority,’ merely because neither Congress nor the executive branch had formally created the positions.”⁷³ Instead, the court said the “established by Law” inquiry “may but need not be the start of an Appointments Clause analysis.”⁷⁴ In that case, the court “ultimately bypass[ed]” the question of whether certain positions within the Internal Revenue Service’s Office of Appeals were established by law, but its reasoning reflects a skepticism on the part of some judges that Congress or the executive branch could avoid the Constitution’s appointment requirements by declining to establish a specific position by law.⁷⁵

At least one sitting Supreme Court Justice has argued that the exercise of significant federal authority outside of a congressionally created or authorized office constitutes a violation of the Appointments Clause and general separation-of-powers principles.⁷⁶ Separately concurring in *Trump v. United States*, Justice Clarence Thomas wrote that by “requiring that Congress create federal offices ‘by Law,’ the Constitution imposes an important check against the President—he cannot create offices at his pleasure.”⁷⁷ Justice Thomas explained as follows:

The limitation on the President’s power to create offices grew out of the Founders’ experience with the English monarchy. The King could wield significant power by both creating and filling offices as he saw fit. . . . In fact, one of the grievances raised by the American colonists in declaring their independence was that the King “ha[d] erected a

⁶⁹ *See id.* at 247 (“*Freytag* says everything necessary to decide this case.”).

⁷⁰ *See id.* at 245 (synthesizing the “basic framework for distinguishing between officers and employees,” and observing that the Court in 1879 “made clear that an individual must occupy a ‘continuing’ position established by law to qualify as an officer”).

⁷¹ *E.g.*, *Navarro v. U.S. Ctr. for SafeSport*, No. 24-CV-00030, 2025 WL 209166, at *16 (W.D. Va. Jan. 15, 2025), *appeal filed*, No. 25-1150 (4th Cir. 2025) (oral argument heard on Dec. 10, 2025).

⁷² *Freytag*, 501 U.S. at 880.

⁷³ *Tucker v. Comm’r*, 676 F.3d 1129, 1130–31 (D.C. Cir. 2012).

⁷⁴ *Id.* at 1133 n.1.

⁷⁵ *Id.* at 1133; *see also* *New Mexico v. Musk*, No. 25-CV-429, 2026 WL 799635, at *11 (D.D.C. Mar. 23, 2026) (“Under that interpretation, the President could evade Appointments Clause scrutiny by (1) usurping Congress’s power to create a principal office and assign it powers, and (2) unilaterally appointing an official to that office without Senate confirmation. . . . The court will not countenance such a two-fold attack on Congress’s role in our system of checks and balances.”); *Does 1-26 v. Musk*, 771 F. Supp. 3d 637, 665 (D. Md. 2025) (“To deny Plaintiffs’ Appointments Clause claim solely on the basis that, on paper, Musk has no formal legal authority relating to the decisions at issue, even if he is actually exercising significant authority on governmental matters, would open the door to an end-run around the Appointments Clause.”), *staying preliminary injunction pending appeal*, No. 25-1273 (4th Cir. 2025).

⁷⁶ *Trump v. United States*, 603 U.S. 593, 643–50 (2024) (Thomas, J., concurring in part) (arguing with respect to the prosecutor in the case that the position of “Special Counsel” may not have been “established by law”).

⁷⁷ *Id.* at 643.

multitude of New Offices, and sent hither swarms of Officers to harass our people and eat out their substance.” Declaration of Independence ¶12. . . .

The Founders broke from the monarchial model by giving the President the power to *fill* offices (with the Senate’s approval), but not the power to *create* offices.⁷⁸

In the past, the executive branch has argued that the absence of a formal office within the federal government does not necessarily make the Appointments Clause inapplicable. In a 2007 opinion, OLC posited that “Congress could not evade the Appointments Clause by, for example, the artifice of authorizing a contract for the supervision of the Justice Department, on the ground that no ‘office’ of Attorney General would be created by law—even where the statutory authorization for the contract were to delegate sovereign authority and establish the continuance of the contractual position.”⁷⁹ OLC issued a more recent opinion on the meaning of “officer” on January 16, 2025, that referred readers to its “prior writings” on the phrase “established by Law,” stating that “the Supreme Court has not focused on [this language] in the ensuing years.”⁸⁰

In sum, while the Supreme Court has described an office, for Appointments Clause purposes, as a “continuing position established by law,”⁸¹ it has not squarely decided whether the absence of a statute creating or authorizing a contested position would defeat an Appointments Clause claim, nor has the Court decided whether it would violate the separation of powers for such an individual to exercise significant authority.

What Does It Mean to Exercise Significant Authority Pursuant to the Laws of the United States?

While the Supreme Court has not delineated the precise bounds of “significant authority,” the Court has identified rulemaking authority, enforcement authority, and adjudicatory functions in presiding over adversarial proceedings to be forms of significant authority.⁸² Final decisionmaking authority on matters related to these functions can be an indicator of officer status, though it is not required for someone to qualify as an officer.⁸³ The Supreme Court has suggested that the power to decide “eligibility for funds” may also be a form of significant authority but has not ruled on whether or in what circumstances federal grantmaking or contracting authority qualifies.⁸⁴

⁷⁸ *Id.* at 645–46.

⁷⁹ *See* Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 117–118 (2007).

⁸⁰ The Test for Determining “Officer” Status Under the Appointments Clause, 49 Op. O.L.C. slip op. at 3 n.2 (Jan. 16, 2025) (stating that the Court has not focused on these concepts “beyond the passing statement from *Lucia*” that an officer occupies “a ‘continuing’ position established by law”).

⁸¹ *Lucia v. SEC*, 585 U.S. 237, 245 (2018) (internal quotation marks omitted).

⁸² *Lucia*, 585 U.S. at 248; *Buckley v. Valeo*, 424 U.S. 1, 138–41 (1976) (per curiam). *See* *United States v. Avalos*, 162 F.4th 948, 957 (9th Cir. 2025) (stating that the Supreme Court “has taken a broad, holistic approach” in determining significant authority, “considering the individual’s authority as a whole and comparing it to the authority exercised by individuals previously deemed to be inferior officers”).

⁸³ *See* *Freytag v. Comm’r*, 501 U.S. 868, 882 (1991) (reasoning that special trial judges would be officers even if they did not have important adjudicatory duties in some contexts because they could “render the decisions of the Tax Court” in certain other contexts which resulted in them acting “as inferior officers who exercise independent authority”); *Lucia*, 585 U.S. at 247 n.4 (stating that final decisionmaking authority is not “a *sine qua non* of officer status”).

⁸⁴ *Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (per curiam).

Recognized Forms of Significant Authority

The Supreme Court’s 1976 decision in *Buckley v. Valeo* was the first to expound on the significant authority standard.⁸⁵ The *Buckley* Court examined the authority of Federal Election Commission (FEC) members, several of whom were appointed by Members of Congress, to take various actions to implement the Federal Election Campaign Act (FECA).⁸⁶ The Court first observed that Article II of the Constitution gives the President both the responsibility to ensure that federal laws are “faithfully executed” and the power of “administrative control” over those executing the laws.⁸⁷ The Court then considered which of the FEC’s functions were “merely in aid of congressional authority to legislate” or “sufficiently removed from the administration and enforcement of public law” such that nonofficers could perform them.⁸⁸

The Court upheld a delegation to the FEC to receive, disseminate, and investigate information about elections. The Court concluded that these investigative and informational powers could be exercised by nonofficers because these functions are legislative in nature and “fall[] in the same general category as those powers which Congress might delegate to one of its own committees.”⁸⁹

In contrast, the Court held that only a constitutionally appointed officer could exercise the FEC’s “broad administrative powers” and its authority to enforce FECA through administrative determinations and civil actions.⁹⁰ With respect to administrative powers, the Court observed that FECA empowered the Commission to make rules, render advisory opinions, and determine candidates’ eligibility for funds—all “free from day-to-day supervision of either Congress or the Executive Branch.”⁹¹ Explaining that such functions were “usually performed by independent regulatory agencies” or executive branch departments implementing a federal statute, the Court described the functions as “more legislative and judicial in nature than” the FEC’s enforcement powers.⁹² Nevertheless, the Court reasoned that “each” administrative function reflected “the performance of a significant governmental duty exercised pursuant to a public law.”⁹³ The Court also concluded that the FEC’s “primary responsibility” for instituting civil actions for certain violations of federal election law “cannot possibly be regarded as merely in aid of the legislative function of Congress.”⁹⁴ For the Court, such enforcement authority fell squarely within the executive branch’s “responsibility to ‘take Care that the Laws be faithfully executed.’”⁹⁵ Because the FEC exercised “significant authority” and because some of its members were selected by Congress alone—that is, outside the parameters of the Appointments Clause—the *Buckley* Court held that the FEC could not exercise most of its powers “as presently constituted.”⁹⁶

In 2018, in *Lucia v. SEC*, the Supreme Court held that administrative law judges at the SEC were officers of the United States because they performed a range of “important” adjudicatory

⁸⁵ *Id.*

⁸⁶ *Id.* at 109, 113.

⁸⁷ *Id.* at 135–36 (quoting *Myers v. United States*, 272 U.S. 52, 117, 163–64 (1926)).

⁸⁸ *Id.* at 141.

⁸⁹ *Id.* at 137.

⁹⁰ *Id.* at 138–41.

⁹¹ *Id.* at 140.

⁹² *Id.* at 140–41.

⁹³ *Id.* at 141.

⁹⁴ *Id.* at 138, 140.

⁹⁵ *Id.* at 138 (quoting U.S. CONST. art. II, § 3).

⁹⁶ *Id.* at 143.

functions.⁹⁷ In particular, ALJs “take testimony,” “receive evidence,” “examine witnesses,” “conduct trials,” “administer oaths,” “rule on motions,” “generally ‘regulat[e] the course of’ a hearing, as well as the conduct of parties and counsel,” “rule on the admissibility of evidence,” and “have the power to enforce compliance with discovery orders.”⁹⁸ They also issue initial “decisions containing factual findings, legal conclusions, and appropriate remedies,” which become the agency’s final decisions if the Commission declines to review them.⁹⁹ In sum, in the *Lucia* Court’s view, SEC ALJs possessed “nearly all the tools of federal trial judges” and thus exercised significant federal authority.¹⁰⁰

The Supreme Court has thus identified at least three types of authority that may qualify as “significant authority” for purposes of the Appointments Clause: (1) rulemaking authority; (2) enforcement authority; and (3) adjudicatory authority. Judicial decisions and OLC administrative opinions after *Buckley* suggest that not every function that falls within one of these categories rises to the level of significant authority. For example, “purely advisory” or investigative functions related to rulemaking or enforcement decisions may not qualify as significant authority.¹⁰¹ Additionally, OLC has reasoned that “purely ministerial and internal functions, such as building security, mail operations, and physical plant maintenance, which neither affect the legal rights of third parties outside the Government nor involve the exercise of significant policymaking authority,” do not involve the exercise of significant authority.¹⁰² These decisions demonstrate that whether a person exercises significant authority can depend on “a range of factors, including the scope and breadth of the individual’s authority, the degree of discretion afforded, and the individual’s procedural powers.”¹⁰³

Final Decisionmaking Authority

The authority to render a final decision on behalf of a federal agency may qualify as significant authority under some circumstances. Prior to the Supreme Court’s decision in *Lucia*, lower courts had split on whether the authority to issue final decisions was a necessary characteristic for officer status.¹⁰⁴ Some courts equated officer status with the ability to take actions that “bind third parties, or the government itself, for the public benefit.”¹⁰⁵ In *Lucia*, the Court clarified that final

⁹⁷ 585 U.S. 237, 248 (2018).

⁹⁸ *Id.*

⁹⁹ *Id.* at 249.

¹⁰⁰ *Id.* at 248.

¹⁰¹ *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 756, 761 (2025) (“Before 2010, members of the Preventive Services Task Force were not officers at all. The Task Force was an advisory body, and the Task Force members made only non-binding recommendations.”). *See, e.g., Arnesen v. Lutnick*, 170 F.4th 965, 975–76 (5th Cir. 2026) (reasoning that a regional fishery management council’s authority to “propose plans and amendments” to the Secretary of Commerce did not qualify as “significant authority” where the Secretary had the “ultimate responsibility . . . for fishery management plans, which includes the power to partially or fully disapprove plans for any reason”); *SEC v. McMillan*, No. 24-CV-00919, 2025 WL 531776, at *2 (N.D. Tex. Feb. 18, 2025) (reasoning that “prosecuting attorneys” at the SEC do not exercise significant authority because they “merely conduct investigations at the request of the [C]ommission and cannot bring a lawsuit without again seeking their permission”).

¹⁰² Const. Limits on “Contracting Out” Dep’t of Just. Functions Under OMB Circular A-76, 14 Op. O.L.C. 94, 99 (1990).

¹⁰³ *United States v. Avalos*, 162 F.4th 948, 957–58 (9th Cir. 2025).

¹⁰⁴ *See generally* CRS Legal Sidebar LSB10061, *UPDATED: Supreme Court Agrees to Hear Constitutional Challenge to SEC Administrative Law Judges*, by Victoria L. Killion (2018).

¹⁰⁵ *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 286 (D.C. Cir. 2016), *rev’d*, *Lucia*, 585 U.S. 237.

decisionmaking authority is not a prerequisite for officer status.¹⁰⁶ In other words, even if an individual lacks final decisionmaking authority, they may be an officer based on their other “important functions” and “significant discretion.”¹⁰⁷ The *Lucia* Court suggested, however, that the power to render a decision that might have “independent effect” without agency approval—for example, where agency review of the decision is not automatic—may be “significant” enough, standing alone, to trigger the Appointments Clause.¹⁰⁸ After *Lucia*, then, it is possible that final decisionmaking authority could be sufficient to confer officer status, even if not necessary.

The kinds of decisions at issue in *Lucia* involved factual findings and legal conclusions made by ALJs presiding over adversarial proceedings in administrative enforcement actions against regulated entities.¹⁰⁹ It is not clear whether authority to make other types of final decisions on an agency’s behalf would qualify as significant authority, such as when a decision involves a “ministerial” task performed according to specific statutory criteria.¹¹⁰ In some cases, whether the individual in question has the “last[] word”¹¹¹ on a matter within the executive branch can be the dividing line between an inferior and a principal officer.¹¹²

Federal Grantmaking or Contracting Authority

It is unsettled whether the authority to make grants or enter into contracts on the federal government’s behalf qualifies as “significant authority” within the meaning of the Appointments Clause. There are some aspects of managing and spending federal funds that, standing alone, may not rise to the level of significant federal authority.¹¹³ For example, federal funding is often disbursed to states and private entities through programs authorized by statute.¹¹⁴ Many of these funding recipients are not appointed federal officials, yet they are sometimes authorized to decide how to spend allocated funds or what entities will receive funding as subrecipients. The degree of discretion varies according to parameters specified by Congress in the program statute or relevant appropriations or by the disbursing agency in regulations or grant agreements.¹¹⁵

¹⁰⁶ See *Lucia*, 585 U.S. at 247 n.4 (stating that *Freytag*’s “primary analysis explicitly reject[ed]” the view that “final decisionmaking authority is a *sine qua non* [an essential element] of officer status”).

¹⁰⁷ *Id.* at 238.

¹⁰⁸ *Id.* at 248–49.

¹⁰⁹ *Id.*

¹¹⁰ See *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991) (explaining that special trial judges, whom the Court determined to be officers, “perform more than ministerial tasks”). Cf. *Morrison v. Olson*, 487 U.S. 654, 681 (1988) (holding that it did not violate the separation of powers for a court, rather than an appointee in the executive branch, to “exercise some judgment and discretion” with respect to powers that were “themselves essentially ministerial”).

¹¹¹ *Lucia*, 585 U.S. at 249.

¹¹² See *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 765 (2025) (“[I]n evaluating inferior-officer status, the Court has also examined whether the relevant officer has the ‘power to render a final decision on behalf of the United States’ without review by a principal officer.” (quoting *Edmond v. United States*, 520 U.S. 651, 665 (1997))); e.g., *United States v. Arthrex, Inc.*, 594 U.S. 1, 24–25 (2021) (reasoning that “[i]n every respect save the insulation of their decisions from review within the Executive Branch, [administrative patent judges] appear to be inferior officers”). See *infra* “What Distinguishes a Principal Officer from an Inferior Officer?”

¹¹³ OLC, for example, has distinguished between “legal authority over [government] contracts” (which, in its view, can be significant authority) and “proprietary” functions “simply involving the management of governmental property” (which might not be significant authority). Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 89 (2007).

¹¹⁴ See, e.g., 20 U.S.C. § 1070a (establishing Federal Pell Grants for low-income students).

¹¹⁵ E.g., 34 U.S.C. § 10152 (authorizing the Attorney General to “make grants to States and units of local government” according to a statutory formula, “for use by the State or unit of local government to provide additional personnel, (continued...)”).

Other aspects of grantmaking and federal contracting could implicate significant authority—though, again, the question is unsettled. An agency entering into a grant or contract has the potential to bind the government and an instrument to enforce against the private party that entered into the agreement. In a 2007 opinion, OLC concluded that the authority to enter into contracts on the government’s behalf is significant federal authority.¹¹⁶ Additionally, an agency’s allocation of federal funds may involve policy judgments that Congress has delegated to the head of the agency.¹¹⁷

Can State, Local, or Territorial Officials Be Officers of the United States?

The Appointments Clause “governs the appointments of all officers of the United States” regardless of where they are located geographically.¹¹⁸ At the same time, the phrase “officers of the United States” refers only to officials exercising significant *federal* authority.¹¹⁹ Individuals “whose powers and duties are primarily local in nature” are not considered officers of the United States, even if their duties derive from an act of Congress and amount to “considerable power.”¹²⁰

In 2020, the Supreme Court considered whether members of the Financial Oversight and Management Board for Puerto Rico were officers of the United States.¹²¹ Congress created the Board through a federal statute, using its authority with respect to U.S. territories under Article IV of the Constitution.¹²² The statute authorized the President to appoint seven of the Board’s eight members and specified the Board’s duties.¹²³ The Board could “hold hearings,” “issue subpoenas,” “develop its own budget,” “control[] the issuance of new debt for Puerto Rico, and” “initiate bankruptcy proceedings for Puerto Rico.”¹²⁴ Its “broad investigatory powers” were “backed by Puerto Rican, not federal law,” however.¹²⁵ Additionally, the Board exercised its budgetary and bankruptcy authority on behalf of the Commonwealth of Puerto Rico, not the United States.¹²⁶ Based on the “local nature of the legislation’s expressed purposes, the representation of local interests in bankruptcy proceedings, the focus of the Board’s powers upon

equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice or civil proceedings”); 42 U.S.C. § 604(a) (generally authorizing states to use grants for Temporary Assistance for Needy Families “in any manner that is reasonably calculated to accomplish the purpose” of the statute).

¹¹⁶ See *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 89–90 (2007) (reasoning that the authority to “receive” and “disburse[]” public funds on the government’s behalf is significant authority).

¹¹⁷ See *City of Los Angeles v. Barr*, 929 F.3d 1163, 1169, 1171 (9th Cir. 2019) (explaining that a certain grant program for public safety and community policing “gives broad discretion to DOJ to allocate grants and administer the grant program for the purposes set forth” in the statute and that DOJ’s “scoring process” for applications “is designed to allocate federal assistance to programs, focuses, or conduct that DOJ deems to best further statutory purposes and federal goals”).

¹¹⁸ *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 590 U.S. 448, 453 (2020).

¹¹⁹ *Id.* at 468.

¹²⁰ *Id.* at 453, 467.

¹²¹ *Id.* at 453.

¹²² U.S. CONST. art. IV, § 3, cl. 2. See Libr. of Cong., *Power of Congress over Territories*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIV-S3-C2-3/ALDE_00013511/ (last visited Apr. 8, 2026).

¹²³ *Aurelius*, 590 U.S. at 454–55 (explaining that the Governor of Puerto Rico serves as an ex officio member and the President must select six of the members from lists prepared by congressional leaders).

¹²⁴ *Id.* at 466–67.

¹²⁵ *Id.* at 466.

¹²⁶ *Id.*

local expenditures, the local logistical support, the reliance on local laws in aid of the Board’s procedural powers,” and the history of Puerto Rico and the U.S. territories, the Supreme Court concluded that the Board members had “primarily local duties.”¹²⁷ Accordingly, the Court held that the Board members were not officers of the United States and need not be appointed in conformity with the Appointments Clause.¹²⁸

What Are the Permissible Methods of Appointing Officers?

The “default” method of appointment for any officer of the United States is appointment by the President with the advice and consent of the Senate.¹²⁹ This process is also the required method of appointment for principal officers.¹³⁰ In what is sometimes called the “Excepting Clause,”¹³¹ the Appointments Clause permits Congress to “vest” the appointment of inferior officers “by Law” in “the President alone,” in “the Courts of Law,” or in “the Heads of Departments.”¹³² In other words, Congress, by statute, can authorize one of these three to appoint inferior officers.

The language “the President alone” is generally understood to mean the President appointing an inferior officer without Senate confirmation.¹³³ The “Courts of Law” include courts established under Article III of the Constitution, such as the federal district courts.¹³⁴ The phrase also captures “non-Article III tribunals” (i.e., “legislative courts”) that “exercise judicial power and perform exclusively judicial functions,” such as the U.S. Tax Court.¹³⁵ A department head, for Appointments Clause purposes, means a cabinet-level Secretary (e.g., the Secretary of Labor) or the leader of a “freestanding component of the Executive Branch,” which can be a multimember body (e.g., the Securities and Exchange Commission).¹³⁶ “Inferior commissioners and bureau officers” are not usually considered department heads.¹³⁷

¹²⁷ *Id.* at 467.

¹²⁸ *Id.* at 471–72.

¹²⁹ *Edmond v. United States*, 520 U.S. 651, 660 (1997). The Appointments Clause also specifies certain officers—“Ambassadors, other public Ministers and Consuls, [and] Judges of the supreme Court”—who must be appointed through the advice and consent process. U.S. CONST. art. II, § 2, cl. 2.

¹³⁰ *Edmond*, 520 U.S. at 660.

¹³¹ *Id.*

¹³² U.S. CONST. art. II, § 2, cl. 2.

¹³³ *See Myers v. United States*, 272 U.S. 52, 161 (1926) (describing “the action of Congress in removing the necessity for the advice and consent of the Senate and putting the power of appointment in the President alone”).

¹³⁴ *Freytag v. Comm’r*, 501 U.S. 868, 891 (1991); Libr. of Cong., *Overview of Establishment of Article III Courts*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-8-1/ALDE_00013557/ (last visited Apr. 8, 2026).

¹³⁵ *Freytag*, 501 U.S. at 889, 892.

¹³⁶ *Id.* at 878; *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 511 (2010).

¹³⁷ *Freytag*, 501 U.S. at 886 (quoting *United States v. Germaine*, 99 U.S. 508, 511 (1878)).

What Distinguishes a Principal Officer from an Inferior Officer?

The Supreme Court has not adopted “an exclusive criterion for distinguishing between principal and inferior officers.”¹³⁸ Both types of officers exercise “significant authority pursuant to the laws of the United States.”¹³⁹ The main difference between the two seems to be who oversees their work and in what ways. “Principal officers in the Executive Branch encompass at least the Heads of Departments, who report directly to the President,” such as “the Secretary of State, Secretary of the Treasury, Secretary of Defense, and Attorney General.”¹⁴⁰ By comparison, the work of inferior officers is “directed and supervised at some level” by one or more principal officers.¹⁴¹ In other words, an inferior officer has a superior “other than the President.”¹⁴²

In *United States v. Edmond*, a 1997 decision, the Supreme Court concluded that certain military judges had the requisite supervision to qualify as inferior officers, even though no single principal officer had “complete” control over their work.¹⁴³ A Senate-confirmed official, the Judge Advocate General, had “administrative oversight” over their functions through the issuance of “uniform rules of procedure” for the court.¹⁴⁴ He could also remove the judges from their judicial assignments “without cause,” which the Court considered a “powerful tool for control.”¹⁴⁵ Although the Judge Advocate General was statutorily prohibited from influencing the judges’ decisions, an appellate court within the executive branch could review their rulings.¹⁴⁶ Accordingly, the military judges had “no power to render a final decision” on the federal government’s behalf “unless permitted to do so by other Executive officers.”¹⁴⁷

The authority to render a final decision on the government’s behalf took on “particular importance” in a 2021 case involving administrative patent judges (APJs).¹⁴⁸ In *United States v. Arthrex, Inc.*, the Supreme Court ruled that APJs acted as principal officers when they issued decisions after presiding over certain proceedings to challenge a patent.¹⁴⁹ The statutory framework lacked the “review by a superior executive officer” that was present in *Edmond*, rendering APJs’ “unreviewable authority” during these proceedings “incompatible with their

¹³⁸ *Edmond v. United States*, 520 U.S. 651, 661 (1997).

¹³⁹ *Id.* at 662. See *supra* “Who Are ‘Officers of the United States?’”

¹⁴⁰ *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 761 (2025).

¹⁴¹ *Edmond*, 520 U.S. at 663, 666 (reasoning that certain military judges were inferior officers “by reason of the supervision over their work exercised by the General Counsel of the Department of Transportation in his capacity as Judge Advocate General and the Court of Appeals for the Armed Forces”). See also *United States v. Arthrex, Inc.*, 594 U.S. 1, 14 (2021) (reasoning that administrative patent judges acted as principal officers in proceedings where “no principal officer at any level within the Executive Branch” directed and supervised their work).

¹⁴² *Arthrex*, 594 U.S. at 13.

¹⁴³ *Edmond*, 520 U.S. at 653, 664 (holding that the appointment of civilian members of the Coast Guard Court of Criminal Appeals by the Secretary of Transportation, the head of a department, complied with the Appointments Clause).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (citing 10 U.S.C. § 837).

¹⁴⁷ *Id.* at 665.

¹⁴⁸ *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 765 (2025) (stating that final decisionmaking authority “has taken on particular importance in assessing whether adjudicative officers are principal or inferior” (citing *United States v. Arthrex, Inc.*, 594 U.S. 1, 13–14 (2021))).

¹⁴⁹ 594 U.S. at 23.

appointment by the Secretary to an inferior office.”¹⁵⁰ The Court resolved the issue by “severing” (i.e., declaring unenforceable) a statutory provision that effectively barred rehearing of APJ decisions stemming from these proceedings by the Director of the Patent and Trademark Office, thus allowing a principal officer within the executive branch to review APJ decisions.¹⁵¹ The Court explained that “the Director need not review every decision,” stating that “[w]hat matters is that the Director have the discretion to review decisions rendered by APJs.”¹⁵² “In this way,” the Court reasoned, “the President remains responsible for the exercise of executive power—and through him, the exercise of executive power remains accountable to the people.”¹⁵³

In its 2025 decision in *Kennedy v. Braidwood Management, Inc.*, the Supreme Court applied the principles from *Edmond* to members of the U.S. Preventive Services Task Force (the Task Force), a group within the Department of Health and Human Services (HHS) that develops recommendations for clinicians on interventions to prevent disease, such as health screenings.¹⁵⁴ The Task Force used to be a “purely advisory” body, but with the enactment of the Affordable Care Act in 2010, Congress required private health plans and insurers to cover—without any out-of-pocket costs to insured patients—certain items or services recommended by the Task Force.¹⁵⁵ The *Braidwood* plaintiffs, which included an employer providing health insurance coverage for its employees, argued that Task Force members are principal officers and thus their appointment by the Secretary of HHS—rather than by the President with the advice and consent of the Senate—violated the Appointments Clause.¹⁵⁶ Before the Supreme Court, the government argued that Task Force members are inferior officers and thus properly appointed by a department head.¹⁵⁷

The Supreme Court held that Task Force members are inferior officers because a principal officer (the Secretary of HHS) “directed and supervised” their work in two main ways.¹⁵⁸ First, in the absence of a statute specifying permissible grounds for removal, the Secretary could remove Task Force members at will (i.e., without cause), which the Court reaffirmed is a “powerful tool for control.”¹⁵⁹ Second, the Secretary could “review and block the Task Force’s recommendations” before they took effect by, for instance, invoking his statutory authority to delay the effective date of a particular recommendation and asking members to withdraw or amend that recommendation (subject to potential removal from their position).¹⁶⁰ The Court also interpreted a “collection of statutes” concerning the Secretary’s “general supervisory authority over the Task Force” to authorize the Secretary to “directly block a recommendation he disagrees with,” without having

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 24–27 (plurality opinion).

¹⁵² *Id.* at 27.

¹⁵³ *Id.*

¹⁵⁴ *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748 (2025); see also CRS Legal Sidebar LSB11341, *Supreme Court’s Appointments Clause Ruling Preserves ACA Preventive-Services Coverage Requirements*, by Wen W. Shen and Jennifer A. Staman (2025); CRS In Focus IF13100, *The United States Preventive Services Task Force*, by Alexa C. DeBoth and Kavya Sekar (2025).

¹⁵⁵ *Braidwood Mgmt.*, 606 U.S. at 754, 761–62; 42 U.S.C. § 300gg-13(a)(1).

¹⁵⁶ *Braidwood Mgmt.*, 606 U.S. at 757–58.

¹⁵⁷ *Id.* at 754.

¹⁵⁸ *Id.* at 762 (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)).

¹⁵⁹ *Id.* at 762–63 (quoting *Edmond*, 520 U.S. at 664) (reasoning that “[w]hen a statute empowers a department head to appoint an officer, the default presumption is that the officer holds his position ‘at the will and discretion of the head of the department,’ even if ‘no power to remove is expressly given’” (quoting *Ex Parte Hennen*, 38 U.S. 230, 13 Pet. 230, 259–60 (1839))).

¹⁶⁰ *Id.* at 764–65, 776.

to invoke the threat of removing Task Force members.¹⁶¹ In this way, the Court reasoned, Task Force members lack the “power to render a final decision on behalf of the United States,” consistent with inferior officer status.¹⁶² The Court explained that the Secretary “need not review every decision,”¹⁶³ nor must he have the ability to “directly order” or “compel” the Task Force to make a particular recommendation to exercise adequate supervision for Appointments Clause purposes.¹⁶⁴ What counts is that a principal officer in the executive branch has “the *discretion* to review” the official’s decisions.¹⁶⁵

Under *Edmond* and its progeny, then, the “importance of [an officer’s] responsibilities” is not determinative of principal or inferior officer status, because both types of officers exercise significant authority.¹⁶⁶ Instead, courts identify inferior officers based on the supervision and direction provided by one or more Senate-confirmed principal officers, who need not be the appointing authority. The *Braidwood* decision reinforces *Edmond*’s focus on a principal officer’s ability to (1) remove the appointee in question at will; and (2) review the appointee’s decisions on matters involving significant authority, without deciding whether either supervisory tool is sufficient, standing alone, to render the appointee an inferior officer.¹⁶⁷ Potentially noteworthy for appointees with regulatory or enforcement authority, the Court in *Braidwood* clarified that “control” over an inferior officer’s decisions need not include the ability to “compel a subordinate to take an affirmative act affecting private parties,” such as initiating an investigation or issuing “a particular decision in the first instance.”¹⁶⁸

How Does Congress “Vest” the Authority to Appoint Inferior Officers?

The Appointments Clause’s Excepting Clause states that “Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”¹⁶⁹ Few Supreme Court decisions have examined the meaning of the words “may by Law vest” or what it requires of Congress. Early cases suggested that, at a minimum, there must be a statute authorizing the President, a department head, or a court to appoint the official in question.¹⁷⁰ A 1997 decision clarified that the statute need not name

¹⁶¹ *Id.* at 766.

¹⁶² *Id.* at 767 (quoting *Edmond*, 520 U.S. at 665).

¹⁶³ *Id.* (quoting *United States v. Arthrex, Inc.*, 594 U.S. 1, 27 (2021)).

¹⁶⁴ *Id.* at 777.

¹⁶⁵ *Id.* at 767 (quoting *Arthrex*, 594 U.S. at 27).

¹⁶⁶ *Edmond*, 520 U.S. at 662.

¹⁶⁷ See *Braidwood*, 606 U.S. at 765 (“Regardless of whether the Secretary’s authority to remove Task Force members at will suffices on its own to render them inferior officers, the Secretary also has statutory power to directly review and block Task Force recommendations before they take effect. That power confirms that the Task Force members are inferior officers.”). The Court in *Braidwood* suggested that the potential for principal officer review of significant decisions was sufficient, standing alone, to make the administrative patent judges in *Arthrex* inferior officers. *Id.* at 769 (“[I]n *United States v. Arthrex*, after ensuring that the Director of the Patent and Trademark Office had authority to review final decisions issued by [APJs], the Court deemed those judges to be inferior officers—even though they were removable only *for cause* and thus insulated from at-will removal.”).

¹⁶⁸ *Id.* at 777.

¹⁶⁹ U.S. CONST. art. II, § 2, cl. 2.

¹⁷⁰ See *United States v. Smith*, 124 U.S. 525, 531, 533 (1888) (reciting the Excepting Clause in a case involving whether a “clerk of a collector of customs” was an “officer of the United States,” and concluding, based on that (continued...))

the precise position that the appointee would occupy when vesting appointment authority for an inferior office.¹⁷¹ As to whom Congress vests the authority to appoint an inferior officer (i.e., the President, a department head, or the courts), existing statutes vary in their particularity.¹⁷² Some judges and legal commentators have argued for a “clear statement rule”¹⁷³ requiring Congress to explicitly vest appointment authority in one of the three eligible persons or entities in order to bypass the default appointment mechanism of presidential appointment and Senate confirmation for inferior officers.¹⁷⁴ As of the date of this writing, the Supreme Court has not expressly adopted such a rule, and a recent case could be read as a tacit rejection of one.¹⁷⁵

In 2025, in *Kennedy v. Braidwood Management, Inc.*, the Court considered whether Congress successfully vested the appointment of members of the Task Force in a department head, specifically, the Secretary of HHS.¹⁷⁶ The plaintiffs challenging the constitutionality of the Task Force argued that the Secretary lacked statutory authority (and thus constitutional authority) to appoint Task Force members, who, as a result, needed to be appointed by the default method, that is, by the President with the Senate’s advice and consent.¹⁷⁷ They argued that, if anything, Congress authorized the Director of the Agency for Healthcare Research and Quality (AHRQ)—a lower-level official within HHS who is not a department head within the meaning of the Appointments Clause—to appoint Task Force members, in violation of the Clause.¹⁷⁸ The statute establishing the Task Force and its duties begins as follows:

provision, that “[t]here must be, therefore, a law authorizing the head of a department to appoint clerks of the collector” before the clerk can be considered properly appointed through the Excepting Clause); *United States v. Hartwell*, 73 U.S. 385, 393–94 (1867) (concluding that a statute authorizing an assistant treasurer to appoint certain clerks “with the approbation of the Secretary of the Treasury” sufficed to authorize appointment of an officer by a department head).

¹⁷¹ See *Edmond v. United States*, 520 U.S. 651, 656 (1997) (reasoning that a statute authorizing the Secretary of Transportation to “appoint and fix the pay of officers and employees of the Department of Transportation” gave the Secretary the power to appoint judges of the Coast Guard Court of Criminal Appeals, even though “the statute [did] not specifically mention” them, because the judges were indisputably “officers of the Department of Transportation”).

¹⁷² Compare 35 U.S.C. § 6(a) (“The administrative patent judges shall be persons of competent legal knowledge and scientific ability who are appointed by the Secretary [of Commerce], in consultation with the Director.”), with 5 U.S.C. § 3105 (“Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title.”); *Lucia v. SEC*, 585 U.S. 237, 248 (2018) (citing 5 U.S.C. § 3105 as the statute specifying the “means of appointment” for administrative law judges at the SEC (quoting *Freytag v. Comm’r*, 501 U.S. 868, 878 (1991))).

¹⁷³ See *United States v. Trump*, 740 F. Supp. 3d 1245, 1262 (S.D. Fla. 2024) (“Clear statement rules do not require Congress to ‘use magic words’ or to ‘state its intent in any particular way,’ but they do require Congress to speak clearly—not merely ‘plausibly’—as discerned through traditional tools of statutory construction.” (quoting *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 298 (2023) and *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality opinion)), *appeal dismissed*, No. 24-12311, 2024 WL 6081345 (11th Cir. Nov. 26, 2024), and *appeal dismissed sub nom.* *United States v. Nauta*, No. 24-12311, 2025 WL 2017539 (11th Cir. Feb. 11, 2025). See also CRS Legal Sidebar LSB11084, *Clear Statement Rules, Textualism, and the Administrative State*, by Benjamin M. Barczewski and Valerie C. Brannon (2023).

¹⁷⁴ *United States v. Naviwala*, No. 2:24-CR-00099, 2026 WL 658885, at *14 (D.N.J. Mar. 9, 2026). In *Naviwala*, a federal district court applied such a clear statement rule, reasoning that although Congress “need not use magic words,” the “relevant statutory scheme must still clearly create an office and provide for a method to fill it.” *Id.* The court surmised that “[u]nless Congress clearly states that an officer with certain authority may be appointed without Presidential nomination and Senate consent, the Executive may not take such action.” *Id.*

¹⁷⁵ See *Trump*, 740 F. Supp. 3d at 1263 (observing that “the Supreme Court has not expressly addressed whether a clear statement rule applies in the context of the Appointments Clause”).

¹⁷⁶ *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 779–93 (2025). See *supra* notes 154–165 and accompanying text for additional background on the *Braidwood* case.

¹⁷⁷ *Braidwood Mgt.*, 606 U.S. at 779.

¹⁷⁸ *Id.* at 788.

The [AHRQ] Director shall convene an independent Preventive Services Task Force (referred to in this subsection as the “Task Force”) to be composed of individuals with appropriate expertise.¹⁷⁹

After examining the statutory text, context, and history, the Supreme Court ruled that Congress lawfully vested appointment authority for the Task Force in the HHS Secretary, albeit “in two steps.”¹⁸⁰ The Court explained that at step one, Congress authorized the AHRQ Director to appoint the Task Force members when Congress established the Task Force in statute in 1999.¹⁸¹ The Court reasoned that “the AHRQ Director’s power to ‘convene’ is naturally read to include the power to appoint in this specific context.”¹⁸² Although in past cases the absence of the word “appoint” created doubt about Congress’s intention to vest appointment authority in a particular official,¹⁸³ the Court in *Braidwood* clarified that “Congress need not use magic words to confer appointment authority,” and emphasized the importance of statutory context.¹⁸⁴ With respect to the Task Force, the Court reasoned that because there was “no separate statutory provision specifying who is to appoint the individuals to be called together or assembled, the obvious conclusion is that the person with the power to convene is also the person with the power to appoint.”¹⁸⁵

Appointment of Task Force members by the AHRQ Director alone, the Court explained, would pose “a constitutional problem,” at least at the time of the *Braidwood* litigation.¹⁸⁶ In 1999, the Task Force served as a purely advisory body such that its “members were mere employees who could be appointed by the AHRQ Director.”¹⁸⁷ With the passage of the Affordable Care Act in 2010, however, certain Task Force recommendations became legally binding coverage requirements for private health plans and insurers, such that Task Force members exercised “significant authority”—a hallmark of officer status.¹⁸⁸ Since 2010, then, the Constitution required their appointment to conform to one of the methods specified in the Appointments Clause.¹⁸⁹ According to the Court, Congress already had provided for such a method.¹⁹⁰ In 1984, Congress statutorily ratified a 1966 Reorganization Plan that transferred to the Secretary of HHS¹⁹¹ “all functions of the Public Health Service,” its “officers and employees,” and “agencies of or in [the Service].”¹⁹² Because AHRQ is part of the Public Health Service, the majority reasoned, when Congress passed the 1999 law authorizing the AHRQ Director to convene the

¹⁷⁹ 42 U.S.C. § 299b-4(a)(1).

¹⁸⁰ *Braidwood Mgt.*, 606 U.S. at 779.

¹⁸¹ *Id.*

¹⁸² *Id.* at 781.

¹⁸³ *E.g.*, *Edmond v. United States*, 520 U.S. 651, 657 (1997) (“Conspicuously absent from [the statutory provision,] however, is any mention of the ‘appointment’ of military judges. Instead, the statute refers to judges ‘who are assigned to a Court of Criminal Appeals’ (emphasis added). The difference between the power to ‘assign’ officers to a particular task and the power to ‘appoint’ those officers is not merely stylistic.”).

¹⁸⁴ *Braidwood*, 606 U.S. at 780–81.

¹⁸⁵ *Id.* at 781 (explaining that the inference “is especially so when the person charged with convening is required to ensure that members of the body to be convened meet certain qualifications, such as ‘appropriate expertise’” (quoting 42 U.S.C. § 299b-4(a)(1))).

¹⁸⁶ *Id.* at 783.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*; *see supra* “Who Are ‘Officers of the United States?’”

¹⁸⁹ *Braidwood Mgt.*, 606 U.S. at 783.

¹⁹⁰ *Id.*

¹⁹¹ The Reorganization Plan transferred functions to the Secretary of the Department of Health, Education, and Welfare, HHS’s predecessor agency. *Id.* at 784.

¹⁹² *Id.* at 783–84.

Task Force, the Reorganization Plan—at step 2—“vested” the Director’s appointment authority in the HHS Secretary.¹⁹³ In other words, the statute authorizing the AHRQ Director to convene the Task Force, “together with [the 1966] Reorganization Plan . . . as ratified by Congress in 1984, expressly vests appointment authority in the Secretary.”¹⁹⁴

Braidwood and earlier Supreme Court cases analyzing the Excepting Clause thus suggest that (1) Congress may identify an inferior office by name or position description or by reference to “officers” in the applicable department or agency;¹⁹⁵ (2) Congress “need not use magic words” to vest appointment authority, but the word “appoint” more clearly indicates vesting than other terms such as “convene,” “direct,” or “assign”;¹⁹⁶ and (3) Congress may vest appointment authority through a combination of statutes, though “more direct ways” of achieving this end—such as ensuring a single statutory provision clearly identifies the appointing authority as, for example, the President or a department head—might mitigate the potential for litigation over whether Congress properly vested appointment authority for an inferior officer.¹⁹⁷

Can Appointment Authority Be Delegated or Shared?

A legal and practical consideration in appointing an officer is how much of the vetting and selection process can be delegated to or shared with lower-level officials, other agencies,¹⁹⁸ or nongovernmental consultants.¹⁹⁹

When it comes to implementing federal laws and policies, delegation within the executive branch is common and presumptively authorized.²⁰⁰ In a case involving a reduction-in-force plan

¹⁹³ *Id.* at 780, 784–85. The six Justices in the majority read the 1966 Reorganization Plan to effect “an ongoing transfer of authority” to the HHS Secretary, such that “any new powers granted to the Public Health Service and its officers by Congress after 1966”—including the AHRQ Director’s power to convene (and thus appoint) Task Force members—“would be transferred to the Secretary.” *Id.* at 789. The three dissenting Justices argued that the Reorganization Plan did not encompass the authority to appoint officers and, in any event, did “not apply to functions that did not exist when the Plan was issued in 1966.” *Id.* at 810–11, 821 (Thomas, J., dissenting) (“If Congress is not utterly irrational, its detailed allocations of authority to agencies within the Public Health Service in post-Reorganization Plan statutes must at least carry some precatory force. In other words, . . . Congress at least *recommended* that the AHRQ Director exercise the power to convene the Task Force.”).

¹⁹⁴ *Id.* at 787 (majority opinion). In the majority’s view, to the extent there is “any doubt” on whether Congress had properly vested appointment authority in the HHS Secretary, “the canon of constitutional avoidance . . . would . . . dispel it,” given that it is “at a minimum ‘reasonable’ to read [the 1966] Reorganization Plan . . . to have transferred the AHRQ Director’s appointment power to the Secretary.” *Id.* at 792.

¹⁹⁵ See *Edmond v. United States*, 520 U.S. 651, 656 (1997) (finding vesting through a statute authorizing the Secretary of Transportation to “appoint and fix the pay of officers and employees of the Department of Transportation”).

¹⁹⁶ *Braidwood*, 606 U.S. at 780–81; cf. *Edmond*, 520 U.S. at 657 (reasoning that a statute providing for the assignment of military judges to certain tribunals did not confer appointment authority).

¹⁹⁷ *Braidwood*, 606 U.S. at 785.

¹⁹⁸ BEERMANN & MASCOTT, RESEARCH REPORT ON FEDERAL AGENCY ALJ HIRING AFTER *LUCIA* AND EXECUTIVE ORDER 13843, at 1–3 (2019) (describing the Office of Personnel Management’s involvement in the selection process for administrative law judges before the Supreme Court’s 2018 ruling in *Lucia v. SEC* that SEC ALJs were inferior officers), available at *Adjudication*, ACUS.gov, <https://www.acus.gov/page/adjudication>.

¹⁹⁹ See *Pub. Citizen v. U.S. Dep’t of Just.*, 491 U.S. 440, 443 (1989) (explaining that the American Bar Association’s Standing Committee on Federal Judiciary has advised Presidents on nominations to federal judgeships (Senate-confirmed offices) since 1952).

²⁰⁰ See *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (“When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent.”).

developed and primarily executed by an unappointed official, the D.C. Circuit explained the following:

[I]t is an everyday occurrence in the operation of government for staff members to conceive and even carry out policies for which duly appointed or elected officials take official responsibility. Our government in fact depends on such delegation of responsibility, and it does not offend the Appointments Clause so long as the duly appointed official has final authority over the implementation of the governmental action.²⁰¹

Whether delegation of appointment authority is constitutionally permissible may depend on the appointment mechanism and whether the authority to appoint an officer of the United States is, itself, significant authority. Case law suggests that, at least for Senate-confirmed principal or inferior officers, and inferior officers appointed by a department head, delegation of appointment authority would not comport with the Appointments Clause. It is an open question whether a department head or other executive branch official can appoint inferior officers whom Congress authorized the President to appoint without Senate confirmation. Additionally, there is some legal authority to suggest that persons other than the appointing authority can assist with the vetting and selection process so long as the appointing authority makes the final decision to appoint the individual.

PAS Officers

For offices that require appointment by the President with the Senate’s advice and consent (sometimes abbreviated as “PAS”),²⁰² an appointment proceeds in three main steps: (1) nomination by the President; (2) confirmation by the Senate;²⁰³ and (3) appointment by the President.²⁰⁴ The last step is evidenced by the President’s signing of a commission.²⁰⁵

²⁰¹ *Andrade v. Regnery*, 824 F.2d 1253, 1257 (D.C. Cir. 1987).

²⁰² S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., 118TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS, at v (Comm. Print 2024), <https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2024/pdf/GPO-PLUMBOOK-2024.pdf> [<https://perma.cc/HB6K-9BHP>]. As explained *supra* in “What Are the Permissible Methods of Appointing Officers?” principal officers must be appointed by the President and confirmed by the Senate, whereas presidential appointment and Senate confirmation is the default appointment mechanism for inferior officers (i.e., where Congress has not vested appointment authority in the President, the courts, or a department head).

²⁰³ Some nominations are rejected or returned to the President, in which case the President may need to submit a new nomination if the President still wants the Senate to consider that individual. CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki and Michael Greene (2025).

²⁰⁴ See CRS Report R44083, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, by Henry B. Hogue and Maeve P. Carey (2021) (describing the three stages of the advice-and-consent process); CRS Report R44234, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote*, by Barry J. McMillion (2026) (describing the process of appointing Supreme Court Justices after Senate confirmation).

²⁰⁵ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157 (1803) (“This is an appointment made by the President, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case therefore the commission and the appointment seem inseparable; it being almost impossible to shew an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment; though conclusive evidence of it.”); see also *id.* (“The last act to be done by the President, is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed.”).

The weight of legal authority suggests that the President may not wholly delegate the authority to appoint a PAS officer. First, although often described in terms of the President’s “power,”²⁰⁶ the text of the Constitution could be read to suggest that the President has a duty, rather than simply discretion, to appoint PAS officers.²⁰⁷ The Appointments Clause expressly states that the President “shall nominate” and “shall appoint” officers of the United States (subject to the Excepting Clause for certain inferior officers).²⁰⁸ By comparison, other clauses in the same section refer explicitly to the President’s “Power,” for example, “to grant Reprieves and Pardons” or “to make Treaties” with the Senate’s advice and consent.²⁰⁹

Second, the Supreme Court has repeatedly stated that the Appointments Clause is not a mere rule of “etiquette or protocol.”²¹⁰ Delegation of appointment authority for PAS officers could undermine the “structural safeguards” that the Clause provides to “preserve political accountability” and the separation of powers.²¹¹ In *United States v. Arthrex, Inc.*, the Supreme Court wrote that “[o]nly the President, with the advice and consent of the Senate, can appoint noninferior officers, called ‘principal’ officers as shorthand in our cases.”²¹² Although that case did not involve a formal delegation of appointment authority from the President to a department head, the Court’s reasoning is instructive. The Court explained the following:

Assigning the nomination power to the President guarantees accountability for the appointees’ actions because the “blame of a bad nomination would fall upon the president singly and absolutely.” The Federalist No. 77, p. 517 (J. Cooke ed. 1961) (A. Hamilton). . . . The Appointments Clause adds a degree of accountability in the Senate, which shares in the public blame “for both the making of a bad appointment and the rejection of a good one.” *Edmond v. United States*, 520 U.S. 651, 660 . . . (1997).²¹³

Accordingly, if the President were to delegate the appointment of a PAS officer to a department head or lower-level official, that official, rather than the President, might bear the brunt of “accountability for the appointe[e]’s actions.”²¹⁴ Even if a department head made the appointment following Senate confirmation, that process would not comport with the text of the Appointments Clause, because only Congress “by Law” may “vest” appointment in a department head, and only for “inferior” officers, whose work is supervised and directed by a principal officer.²¹⁵

²⁰⁶ *E.g.*, *Freytag v. Comm’r*, 501 U.S. 868, 884 (1991) (stating that “the Clause bespeaks a principle of limitation by dividing the power to appoint the principal federal officers” between the President and the Senate).

²⁰⁷ *Cf.* *United States v. Germaine*, 99 U.S. 508, 509–10 (1878) (“The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate.”). *See also* *Myers v. United States*, 272 U.S. 52, 118 (1926) (stating that within Article II of the Constitution, the “executive power was given in general terms strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed”).

²⁰⁸ U.S. CONST. art. II, § 2, cl. 2. The Constitution further provides that the President “shall Commission all the Officers of the United States.” *Id.* art. II, § 3.

²⁰⁹ *Id.* art. II, § 2, cl. 1–2.

²¹⁰ *Buckley v. Valeo*, 424 U.S. 1, 125 (1976) (per curiam); *Edmond v. United States*, 520 U.S. 651, 659 (1997).

²¹¹ *Edmond*, 520 U.S. at 659, 663.

²¹² *United States v. Arthrex, Inc.*, 594 U.S. 1, 12 (2021).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *See id.* (“[T]he Appointments Clause permits Congress to dispense with joint appointment, but only for inferior officers.”).

Third, according to a 2005 administrative opinion from OLC,²¹⁶ the “Attorney General and this Office have long held the view that the President’s power to appoint officers requiring Senate confirmation must be exercised by the President and may not be delegated.”²¹⁷

Though the President has the authority—and likely, the ultimate responsibility—to appoint PAS officers, persons inside and outside of the government have sometimes assisted with proposing or vetting nominees.²¹⁸ Courts have acknowledged the practical need for an appointing authority to “seek[] advice” on prospective appointees.²¹⁹ Additionally, while not controlling on the constitutional question, the Eleventh Circuit has concluded that some aspects of the vetting process, such as interviewing potential nominees, do not involve the exercise of governmental authority,²²⁰ which suggests that nonofficers can perform some functions related to identifying eligible candidates for appointment. Accordingly, the mere involvement of federal employees or other elected or appointed officials in the selection process for a PAS officer might not raise a constitutional issue so long as the President makes the final decision to nominate and appoint the officer.²²¹

The degree to which private individuals or organizations can be involved in the nomination process (as a constitutional matter) involves open legal questions. On one hand, the Supreme Court has observed that in granting the President the “exclusive power” to select principal officers, the “Framers anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body.”²²² On the other hand, the Court has implicitly approved of at least some degree of third-party involvement in the nomination process, suggesting that statutory limits on the President’s ability to consult with private groups on appointment matters “would present formidable constitutional difficulties.”²²³

²¹⁶ See *supra* note 54.

²¹⁷ Assignment of Certain Functions Related to Mil. Appointments, 29 Op. O.L.C. 132, 134 (2005) (citing Relation of the President to the Exec. Dept’s, 7 Op. Att’y Gen. 453, 465 (1855); Presidential Succession and Delegation in the Case of Disability, 5 Op. O.L.C. 91, 94 (1981)).

²¹⁸ See *Statton v. Fla. Fed. Jud. Nominating Comm’n*, No. 19-CV-485, 2019 WL 1763239, at *4 (M.D. Fla. Apr. 22, 2019) (stating, in the context of a Freedom of Information Act action, that although “the President retains the exclusive power to nominate judges pursuant to the Appointments Clause,” because “the Appointments Clause does not specify any particular process to identify judicial nominees, the President considers various sources of information and advice”), *aff’d on other grounds*, 959 F.3d 1061 (11th Cir. 2020); Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 929 (2009) (“Before the president nominates someone to a high-level agency job, the White House has to figure out the job’s requirements (including any statutory qualifications), look for and evaluate potential candidates, and then select a nominee.”).

²¹⁹ See *In re Charge of Jud. Misconduct or Disability*, 39 F.3d 374, 376, 380 (D.C. Cir. Jud. Council 1994) (“Common sense dictates and history confirms that prudent exercise of the appointment power under Article II necessitates consultation by those making appointments. . . . I am aware of no constitutional or ethical precept that prohibits the President, judges, or heads of departments from consulting with other persons when acting under Article II . . .”).

²²⁰ See *Statton v. Fla. Fed. Jud. Nominating Comm’n*, 959 F.3d 1061, 1063–64 (11th Cir. 2020) (concluding that a committee created by two U.S. Senators to help “provide the President recommendations for filling federal judicial vacancies within the state” was not an agency for purposes of the Freedom of Information Act, finding “no hint that the Commission exercises any Executive Branch authority,” because “any private organization” could “send out questionnaires and conduct interviews”).

²²¹ See *Presidential Succession and Delegation in the Case of Disability*, 5 Op. O.L.C. 91, 94 (1981) (listing the “power to nominate and appoint the officers of the United States” as a “nondelegable” function of the President). *But cf. infra* notes 249–250 and accompanying text, discussing the participation of subordinates in the selection of inferior officers.

²²² *Edmond v. United States*, 520 U.S. 651, 659 (1997).

²²³ See *Pub. Citizen v. U.S. Dep’t of Just.*, 491 U.S. 440, 443, 466–67 (1989) (holding that the Federal Advisory Committee Act did not apply to the American Bar Association’s Standing Committee on Federal Judiciary, which, since 1952, has advised Presidents on nominations to federal judgeships (Senate-confirmed offices), and therefore not (continued...))

Presidentially Appointed Officers

When it comes to inferior officers for whom Congress has vested appointment authority in the President alone, it is an open question whether the President can lawfully delegate that authority to a department head or other executive branch official. Some courts have interpreted Supreme Court precedent to state that the President may delegate the authority to appoint military officers.²²⁴ These opinions primarily rely on a 1953 Supreme Court decision, *Orloff v. Willoughby*.²²⁵

In *Orloff*, an Army doctor asked the courts to discharge him from military service because he was not appointed as a commissioned officer.²²⁶ The Supreme Court responded by saying the judicial branch had no authority “to control the appointing power either in civilian or military positions.”²²⁷ The Court reasoned that “the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief,” whom Congress had given the sole authority “to appoint Army officers in grades up to and including that of colonel, above which the advice and consent of the Senate is required.”²²⁸ The Court explained that the doctor, a private in the Army, could obtain a promotion to a higher rank only “by or under authority of the President.”²²⁹ Some lower courts have interpreted the “under authority” language as express or tacit endorsement of presidential delegations of appointment authority—at least in the context of military appointments.²³⁰ In past administrative opinions, OLC concluded that the President may delegate the authority to appoint military officers, but only in the case of inferior officers and only to department heads.²³¹

The reasoning of *Orloff* may not apply outside the context of military appointments and promotions. The Court in *Orloff* largely focused on the separation-of-powers question of whether courts may interfere with the selection of military officers, a power “within the province of the President as Commander in Chief.”²³² The Appointments Clause also protects another aspect of the separation of powers, though, dividing powers between the President and Congress.²³³ The Supreme Court has “not hesitated”²³⁴ to apply the “structural safeguards” of the Appointments

reaching the constitutional question of whether application of the statute would interfere with the President’s Article II appointment authority).

²²⁴ See, e.g., *Dysart v. United States*, 369 F.3d 1303, 1312–13 (Fed. Cir. 2004) (“The Supreme Court has assumed that the authority to appoint military officers can be delegated.” (citing *Orloff v. Willoughby*, 345 U.S. 83, 90 (1953) and *United States v. Moore*, 95 U.S. 760, 762 (1877))).

²²⁵ See, e.g., *Rodriguez v. Penrod*, No. 18-CV-00240, 2020 WL 686012, at *23 (D.D.C. Feb. 11, 2020) (“The President may delegate his authority to appoint military officers to subordinate executive officials.” (citing *Orloff*, 345 U.S. at 90)), *aff’d sub nom.* *Rodriguez v. Blanks*, 852 F. App’x 13 (D.C. Cir. 2021) (per curiam).

²²⁶ *Orloff*, 345 U.S. at 83–85.

²²⁷ *Id.* at 90.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See *Dysart*, 369 F.3d at 1312 (emphasizing the “under authority” language in *Orloff*).

²³¹ See *Assignment of Certain Functions Related to Mil. Appointments*, 29 Op. O.L.C. 132, 135 (2005) (“[P]residents have long delegated to the heads of departments authority to appoint inferior officers when Congress has vested that discretion in the President, and this Office has affirmed the legality of the practice.”).

²³² *Orloff*, 345 U.S. at 90.

²³³ *Edmond v. United States*, 520 U.S. 651, 659 (1997).

²³⁴ *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (“[W]e have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.”).

Clause to preserve this division of power,²³⁵ opining on the constitutionality of a variety of appointments.²³⁶

Where Congress has exercised its authority under the Excepting Clause to vest the appointment of an inferior officer in the President, delegation of that authority to a department head or other official could be viewed as violating the separation of powers—at least in the absence of clear statutory authorization for the delegation. Additionally, if the authority to appoint an officer of the United States is itself significant authority—as Supreme Court decisions have suggested without squarely deciding²³⁷—delegation of that authority to an unappointed, nonofficer employee would violate the Appointments Clause, because only officers can exercise significant federal authority.²³⁸

In a 2005 opinion, OLC reasoned that the Excepting Clause “plainly gives Congress some discretion to allocate the appointment power” and “[n]othing in the text precludes Congress from vesting the power by law in the President while permitting him to delegate it to the head of a department subject to his supervision.”²³⁹ It does not appear that OLC has extended its reasoning to delegations by the President below the level of department head, or delegations by department heads to subordinate officials, declining to reach these questions in its 2005 opinion.²⁴⁰

Thus, there is some authority suggesting that the President can delegate the appointment of military officers (at least inferior officers) to the head of a department, and open questions remain regarding the permissibility of nonmilitary delegations of presidential appointment authority.

Officers Appointed by Department Heads

At least where Congress has vested the appointment authority for an inferior officer in a department head,²⁴¹ case law suggests that the appointing authority cannot delegate or reassign that authority to another person. The clearest pronouncement against delegation came in the Supreme Court’s 2025 decision in *Kennedy v. Braidwood Management, Inc.* There, the Court wrote (in a footnote) that a department head cannot delegate its statutory appointment authority to a lower-level official, even if delegation of other duties is permissible.²⁴² In earlier cases that did not specifically address delegations within the executive branch, the Court also suggested the language of the Excepting Clause intentionally guards against diffusing the appointment power. In *Freytag v. Commissioner of Internal Revenue*, the Supreme Court observed that the

²³⁵ *Edmond*, 520 U.S. at 659.

²³⁶ *E.g.*, *Lucia v. SEC*, 585 U.S. 237 (2018) (administrative law judges at the SEC); *United States v. Arthrex, Inc.*, 594 U.S. 1 (2021) (administrative patent judges); *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748 (2025) (members of the U.S. Preventive Services Task Force).

²³⁷ *See Lucia*, 585 U.S. at 244 (stating that the “Appointments Clause prescribes the *exclusive means* of appointing ‘Officers,’” and that “[o]nly” persons named in the Clause may make such appointments (emphasis added)).

²³⁸ *See Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (per curiam) (describing powers of the Federal Election Commission that could “be exercised only by ‘Officers of the United States,’ appointed in conformity with” the Appointments Clause).

²³⁹ *Assignment of Certain Functions Related to Mil. Appointments*, 29 Op. O.L.C. 132, 134 (2005).

²⁴⁰ *See id.* at 135 (“The question whether Congress may permit the President or the head of a department to delegate appointment authority to an officer below the head of a department is a difficult one, and we cannot provide a definitive answer at this time.”).

²⁴¹ *See supra* “How Does Congress “Vest” the Authority to Appoint Inferior Officers?”

²⁴² *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 785 n.6 (2025) (“With respect to most functions, the Secretary [of HHS] may delegate responsibility to carry out the function back to the Public Health Service. . . . But where the Constitution requires that the Secretary personally perform a particular function, like appointing the Task Force members [who are inferior officers], delegation is not an option.”).

“Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint.”²⁴³ The Court declined to read the Clause’s reference to the “Heads of Departments” to encompass “every part of the Executive Branch,”²⁴⁴ stating specifically that it “does not embrace ‘inferior commissioners and bureau officers.’”²⁴⁵ Instead, the Court reasoned, the phrase refers to “executive divisions like the Cabinet-level departments.”²⁴⁶ According to the Court, this “limiting construction” served to “constrain[] the distribution of the appointment power” so that department heads “are subject to the exercise of political oversight and share the President’s accountability to the people.”²⁴⁷ Later, in *Lucia v. SEC*, the Supreme Court stated that the “Appointments Clause prescribes the exclusive means of appointing ‘Officers,’” and that, with respect to inferior officers, “[o]nly the President, a court of law, or a head of department can do so.”²⁴⁸

Appointments Clause cases to date do not foreclose the involvement of subordinate officers or employees in the vetting or selection of a candidate for an inferior office, where the department head makes the final decision to appoint that individual or approves the selection. In an 1867 case, *United States v. Hartwell*, the Supreme Court held that a clerk “appointed by the assistant treasurer with the approbation of the Secretary of the Treasury” was appointed as a federal officer “by the head of a department within the meaning of” the Appointments Clause.²⁴⁹ Based on *Hartwell*, OLC has opined that “so long as a head of a department approves the selection of an inferior officer, the department head’s subordinates may do much of the legwork of the appointment process.”²⁵⁰

In sum, Supreme Court cases strongly suggest that department heads cannot delegate their statutory authority (vested by Congress) to appoint an inferior officer to a lower-level official, although there appears to be room for other executive branch officers or employees to assist with the vetting or selection process, subject to the department head’s approval.

Can Congress Limit the Pool of Individuals Eligible for Appointment?

Sometimes Congress seeks to influence the appointing authority’s choice through statutory consultation, qualification, or eligibility requirements. Such requirements can raise separation-of-powers questions because the Constitution limits Congress’s role in the appointment process.²⁵¹

²⁴³ 501 U.S. 868, 885 (1991).

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 886 (quoting *United States v. Germaine*, 99 U.S. 508, 511 (1878)).

²⁴⁶ *Id.* In a subsequent decision, the Court clarified that a department head can include the governing body of a “freestanding component of the Executive Branch,” such as the full commission of the Securities and Exchange Commission. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 511 (2010).

²⁴⁷ *Freytag*, 501 U.S. at 886.

²⁴⁸ 585 U.S. 237, 244 (2018).

²⁴⁹ 73 U.S. (6 Wall.) 385, 392 (1867).

²⁵⁰ *Appointment & Removal of Fed. Rsv. Bank Members of the Fed. Open Mkt. Comm.*, 43 Op. O.L.C. 263, 276–77 (2019) (citing *Assignment of Certain Functions Related to Mil. Appointments*, 29 Op. O.L.C. 132, 135–36 (2005)).

²⁵¹ *See Fed. Election Comm’n v. NRA Pol. Victory Fund*, 6 F.3d 821, 824 (D.C. Cir. 1993) (“Congressional limitations—even the placement of burdens—on the President’s appointment power may raise serious constitutional questions.”). *See also Application of 28 U.S.C. § 458 to Presidential Appointments of Fed. Judges*, 19 Op. O.L.C. 350, 357 (1995) (opining that “Congressional attempts to limit the class of persons from whom the President may appoint the highest officers of the government, including judges, raise serious constitutional concerns”).

By default, only the President can “nominate” officers of the United States.²⁵² Congress has the power to create federal offices, and for inferior officers, to decide whether they will be appointed through advice-and-consent or by the President alone, a department head, or the courts.²⁵³ As part of its authority to create offices, Congress can also prescribe “reasonable and relevant qualifications and rules of eligibility of appointees.”²⁵⁴ All of this Congress does through the “finely wrought” lawmaking process laid out in the Constitution.²⁵⁵ Once it passes a law, though, Congress’s “participation ends.”²⁵⁶ It cannot control the execution of the law directly,²⁵⁷ nor may it assign its Members or agents to executive offices that allow them to implement or enforce the law.²⁵⁸ Simply stated, Congress may not choose the appointee.²⁵⁹ Accordingly, laws that effectively direct the appointment of a particular person or that unduly constrain the appointing authority’s choice of nominee run the risk of exceeding Congress’s constitutional authority.²⁶⁰

Congress’s experience with the Board of Review for the Metropolitan Washington Airports Authority (MWAA) is instructive. In 1991, the Supreme Court held that the statute establishing the Board violated the separation of powers because Congress assigned the Board federal powers and “exercise[d] substantial power over the appointment and removal” of its members.²⁶¹ By statute, the Board was comprised of nine Members of Congress, eight from specified congressional committees, who were to serve in their “individual capacities.”²⁶² The Court found it “significant[.]” that “appointments *must* be made from . . . lists” supplied by congressional leadership, and there was “no requirement that the lists contain more recommendations than the number of Board openings.”²⁶³ The Court concluded that the “list system, combined with congressional authority over committee assignments, guarantees Congress effective control over appointments,” which was unconstitutional in light of the Board’s federal powers.²⁶⁴

In response to the Court’s decision, Congress amended the Board of Review’s authorities and substituted the original requirement that Board members be chosen from Members of Congress with other qualification standards.²⁶⁵ Additional legal challenges to the Board’s structure ensued.

²⁵² U.S. CONST. art. II, § 2, cl. 2.

²⁵³ See *supra* “Why Is the Appointments Clause Relevant for Congress?”

²⁵⁴ *Myers v. United States*, 272 U.S. 52, 129 (1926).

²⁵⁵ *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983).

²⁵⁶ *Bowsher v. Synar*, 478 U.S. 714, 733 (1986).

²⁵⁷ *Id.* at 733–34 (“Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.”).

²⁵⁸ *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991); *Fed. Election Comm’n v. NRA Pol. Victory Fund*, 6 F.3d 821, 827 (D.C. Cir. 1993) (“Congress enjoys ample channels to advise, coordinate, and even directly influence an executive agency. It can do so through oversight hearings, appropriation and authorization legislation, or direct communication with the Commission. What the Constitution prohibits Congress from doing, . . . is to place its agents ‘beyond the legislative sphere’ by naming them to membership on an entity with executive powers.”).

²⁵⁹ See *Buckley v. Valeo*, 424 U.S. 1, 135 (1976) (per curiam) (opining that Congress may not “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”).

²⁶⁰ *Cf. Weiss v. United States*, 510 U.S. 163, 174 (1994) (explaining that, in a previous case involving Congress’s assignment of “new duties to two existing offices,” the Court “sought to ensure that Congress was not circumventing the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office”).

²⁶¹ *Metro. Washington Airports Auth.*, 501 U.S. at 255, 268.

²⁶² *Id.* at 267–68.

²⁶³ *Id.* at 268–69.

²⁶⁴ *Id.* at 269.

²⁶⁵ *Hechinger v. Metro. Washington Airports Auth.*, 36 F.3d 97, 98, 100 (D.C. Cir. 1994).

The D.C. Circuit held that the Board still exercised federal power under congressional control in violation of the separation of powers.²⁶⁶ The court found that “as a practical matter, relatively few individuals other than members or alumni of [congressional transportation] committees will be able to meet the new [qualification] criteria,” and also raised concerns about “the manner in which the members of the Board are selected.”²⁶⁷ Although Board members were “no longer required to be Members of Congress, . . . they must still be nominated by the Speaker of the House or the President *pro tempore* of the Senate.”²⁶⁸ Citing the Supreme Court’s concern about lists that cabin the universe of candidates, the court explained that although the appointing authority could request the submission of additional names, it was unlikely to do so because delays in filling vacancies could trigger a statutory provision that blocked the MWA from using certain authorities.²⁶⁹ Following “two successful challenges” to its structure, “the Board [of Review] was dismantled, leaving the Board of Directors in control” of the MWA.²⁷⁰

Although qualification standards or eligibility criteria often draw objections from the executive branch,²⁷¹ not all such requirements violate the separation of powers. In *Mistretta v. United States*, the Supreme Court upheld a statutory requirement that at least three members of the U.S. Sentencing Commission “be Federal judges selected [by the President] after considering a list of six judges recommended to the President by the Judicial Conference of the United States.”²⁷² The argument from the challenger in *Mistretta* was that requiring at least three judges to serve with nonjudges “undermine[d] the integrity of the Judicial Branch.”²⁷³ After finding that the nation’s history and the Court’s precedents did not necessarily preclude “extrajudicial service,”²⁷⁴ the Court ruled that the composition of the Commission did not violate the separation of powers, reasoning that “Congress has provided, not inappropriately, for a significant judicial voice on the Commission” because “judicial participation . . . ensures that judicial experience and expertise will inform” the rules for sentencing, which is part of the “business” of courts.²⁷⁵ The Court also dispelled concerns about improper presidential influence over the judicial members of the Commission, citing the requirement that the President “consider a list of six judges submitted by the Judicial Conference” as a potential limit on the President’s use of Commission appointments “for political purposes.”²⁷⁶

²⁶⁶ *Id.* at 105.

²⁶⁷ *Id.* at 101.

²⁶⁸ *Id.* (citing 49 U.S.C. § 2456(f)(1)).

²⁶⁹ *Id.* (citing 49 U.S.C. § 2456(f)(2)(D)).

²⁷⁰ *Kerpen v. Metro. Washington Airports Auth.*, 907 F.3d 152, 157 (4th Cir. 2018).

²⁷¹ *E.g.*, Common Legislative Encroachments on Exec. Branch Auth., 13 Op. O.L.C. 248, 250 (1989) (stating that “Congress also imposes impermissible qualifications requirements on principal officers,” such as “requir[ing] that a fixed number of members of certain commissions be from a particular political party”); Statement On Signing the Morris K. Udall Scholarship and Excellence In National Environmental and Native American Public Policy Act of 1992, 1 PUB. PAPERS 472, 473–73 (Mar. 19, 1992) (President George H. W. Bush) (“Regrettably, I must note a serious deficiency in the bill. S. 2184 purports to set qualifications, including requirements as to political party affiliation, for the trustees who will administer the foundation created by the bill. Under the Appointments Clause . . . congressional participation in such appointments may be exercised only through the Senate’s advice and consent with respect to Presidential nominees. Accordingly, I will treat these provisions as precatory.”).

²⁷² 488 U.S. 361, 397 (1989) (quoting 28 U.S.C. § 991(a)).

²⁷³ *Id.*

²⁷⁴ *Id.* at 404.

²⁷⁵ *Id.* at 408.

²⁷⁶ *Id.* at 410 n.31.

Overall, case law on the constitutionality of eligibility standards or other limits on the appointing authority's choice of appointee is sparse.²⁷⁷ The constitutionality of any given requirement may depend on the type of office and the degree to which the requirement aggrandizes the powers of one branch of government over another.

Does the Designation of an Acting Officer Need to Comply with the Appointments Clause?

The duties of a Senate-confirmed officer “may go unperformed if a vacancy arises and the President and Senate cannot promptly agree on a replacement.”²⁷⁸ According to the Supreme Court, “Congress has long accounted for this reality by authorizing the President to direct certain officials to temporarily carry out the duties of a vacant [advice-and-consent] office in an acting capacity, without Senate confirmation.”²⁷⁹ A federal statute, the Federal Vacancies Reform Act of 1998 (FVRA), currently prescribes the rules for many such temporary designations.²⁸⁰ In addition, agency-specific statutes may authorize acting service in specific offices.²⁸¹

An official's temporary service as an acting officer can prompt questions about whether that official must be appointed in accordance with the Appointments Clause, and if so, whether the governing statutes prescribe the correct method of appointment. Some lower courts have upheld specific appointments made under the FVRA against constitutional challenges. Many of these courts cited *United States v. Eaton*, the 1898 Supreme Court case mentioned above, in which the Court rejected an Appointments Clause challenge to the acting service of a vice consul.²⁸² For example, the Fourth Circuit held that the President's selection of a particular individual to serve as the Acting Attorney General under the FVRA satisfied the Appointments Clause, because one “who temporarily performs the duties of a principal officer is an inferior officer for constitutional purposes, and accordingly may occupy that post without having been confirmed with the advice and consent of the Senate.”²⁸³ The parties to the appeal had agreed that the FVRA authorized the President to designate that individual—the former Attorney General's chief of staff—as the Acting Attorney General.²⁸⁴ The Fourth Circuit concluded that, for constitutional purposes, the FVRA served as the statute that “vest[ed]” the appointment of an Acting Attorney General, an inferior officer, “in the President alone.”²⁸⁵

²⁷⁷ See, e.g., *Fed. Election Comm'n v. NRA Pol. Victory Fund*, 6 F.3d 821, 824 (D.C. Cir. 1993) (holding that the “appellants’ challenge to the alleged restriction on the President’s appointment power to select more than three commissioners from one party” was “not justiciable” because it was “impossible to determine in this case whether the statute actually limited the President’s appointment power”).

²⁷⁸ *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 292 (2017).

²⁷⁹ *Id.* at 293.

²⁸⁰ *Id.* See CRS Report R44997, *The Vacancies Act: A Legal Overview*, by Valerie C. Brannon (2026). This 1998 law is the most recent iteration of a statute generally governing acting service in the executive branch; Congress first enacted a law called “the Vacancies Act” in 1868, and has provided for acting service in specific positions since 1792. *SW Gen.*, 580 U.S. at 294.

²⁸¹ See, e.g., 29 U.S.C. § 552 (providing that the Deputy Secretary of Labor “shall (1) in case of the death, resignation, or removal from office of the Secretary, perform the duties of the Secretary until a successor is appointed, and (2) in case of the absence or sickness of the Secretary, perform the duties of the Secretary until such absence or sickness shall terminate”).

²⁸² 169 U.S. 331, 343 (1898). See *supra* “Continuing Position.”

²⁸³ *United States v. Smith*, 962 F.3d 755, 764 (4th Cir. 2020).

²⁸⁴ *Id.* at 762–63; *United States v. Smith*, No. 18-CR-00115, 2018 WL 6834712, at *2 (W.D.N.C. Dec. 28, 2018).

²⁸⁵ *Smith*, 962 F.3d at 764–65 (quoting U.S. CONST. art. II, § 2, cl. 2).

While current case law suggests acting service is constitutional in at least some circumstances, courts have not always been consistent in their reasoning. Thus, whether a particular individual’s acting service complies with the Appointments Clause likely depends on the circumstances. The Fourth Circuit’s reasoning may not apply in all situations, such as when an individual “automatically serve[s] pursuant to the operation of the Vacancies Act or an agency-specific statute rather than through presidential designation,” and there may be other grounds to uphold certain forms of temporary service.²⁸⁶ In a March 2025 opinion, OLC posited that the President has “inherent” authority to designate acting officials “when necessary to fulfill his constitutional duties, at least where no statute precludes it.”²⁸⁷ Some courts have rejected this argument, though litigation over the question is ongoing.²⁸⁸

What Remedies Might a Court Order for an Appointments Clause Violation?

An Appointments Clause violation occurs if an officer is not appointed according to any of the constitutionally prescribed methods, or if there is a mismatch between the way the officer was appointed and the officer’s status as a principal or inferior officer.²⁸⁹ For example, a principal officer’s appointment by a department head would violate the Appointments Clause. Congress and the executive branch can take steps to correct an Appointments Clause issue.²⁹⁰ If, in a legal challenge, a court holds that an Appointments Clause violation occurred, the court may order a specific remedy.

The Supreme Court has taken different approaches to redressing Appointments Clause violations over the years. In *Buckley v. Valeo*, a 1976 case, the petitioners sought a declaration and order from the Court that selection of members of the Federal Election Commission (FEC) violated the Appointments Clause.²⁹¹ Ultimately, the Supreme Court agreed, holding that the FEC’s composition violated the Appointments Clause because (1) its commissioners were “officers of the United States” and (2) Members of Congress appointed several of the FEC commissioners.²⁹² Nevertheless, the Court “accorded de facto validity” to the past acts of the Commission, analogizing to cases in which the Court upheld the acts of legislators who had been elected under an unconstitutional apportionment plan.²⁹³ As the Court explained in a later case, the “*de facto* officer doctrine” from which its remedy stemmed “confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person’s appointment or election to office is deficient.”²⁹⁴ The doctrine “springs from the fear of the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government despite technical defects in title to

²⁸⁶ CRS Report R44997, *The Vacancies Act: A Legal Overview*, *supra* note 280, at 35.

²⁸⁷ Temporary Presidential Designation of Acting Board Members of the Inter-American Foundation and the United States African Development Foundation, 49 Op. O.L.C. slip op. at 4–5 (Mar. 14, 2025).

²⁸⁸ *E.g.*, *Aviel v. Gor*, 780 F. Supp. 3d 1, 12 (D.D.C. 2025), *appeal dismissed*, No. 25-5105, 2025 WL 2553305 (D.C. Cir. Sept. 2, 2025); *see also* CRS Report R44997, *The Vacancies Act: A Legal Overview*, *supra* note 280, at 1.

²⁸⁹ *United States v. Arthrex, Inc.*, 594 U.S. 1, 23 (2021).

²⁹⁰ *See infra* “What Are Congress’s Options If It Identifies a Potential Appointments Clause Concern?”

²⁹¹ 424 U.S. 1, 8–9, 113, 118 (1976) (per curiam).

²⁹² *Id.* at 126–27, 140–43.

²⁹³ *Id.* at 142.

²⁹⁴ *Ryder v. United States*, 515 U.S. 177, 180 (1995).

office.”²⁹⁵ By deeming the FEC’s past actions to be valid, the *Buckley* Court signaled that it would not vacate or set aside the FEC’s previous “administrative actions and determinations.”²⁹⁶ At the same time, the Court ruled that the Appointments Clause violation meant that the FEC as structured at that time could not exercise “most of [its] powers” going forward.²⁹⁷ The Court stayed its judgment for thirty days to allow Congress to “reconstitute the Commission by law or to adopt other valid enforcement mechanisms.”²⁹⁸

Approximately twenty years later, in *Ryder v. United States*, the Supreme Court considered whether to similarly grant de facto validity to a decision of the Coast Guard Court of Military Review (Coast Guard Court), which the United States Court of Military Appeals (Court of Military Appeals) had upheld despite finding an Appointments Clause violation.²⁹⁹ Specifically, the Court of Military Appeals held that two of the three judges sitting on the petitioner’s Coast Guard Court panel were not properly appointed pursuant to the Appointments Clause, but nevertheless affirmed the petitioner’s conviction, reasoning, based on *Buckley*, that the panel’s actions were de facto valid.³⁰⁰ Considering what the proper remedy should be for the Appointments Clause violation, the Supreme Court acknowledged its decision to uphold the FEC’s past acts in *Buckley*.³⁰¹ Nonetheless, the Court limited *Buckley* to its facts, noting that the *Buckley* petitioners were awarded the precise relief they had sought (i.e., declaratory and injunctive relief)³⁰²—whereas the *Ryder* petitioner sought reversal of the decisions affirming his conviction and a new hearing due to the alleged constitutional defect.³⁰³ The Court reasoned that “one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred.”³⁰⁴ The Court then held that the petitioner was “entitled to a hearing before a properly appointed panel” of the Coast Guard Court and remanded the case for further proceedings.³⁰⁵

The Court reaffirmed its approach from *Ryder* in its 2018 decision in *Lucia v. SEC*. There, an improperly appointed ALJ had ruled against the petitioners, an investment advisor and his company, in an agency proceeding alleging violations of the federal securities laws.³⁰⁶ The Court reasoned that, as in *Ryder*, the petitioners brought a “timely challenge” to the validity of the presiding official’s appointment because the petitioners raised the issue before the agency and on appeal.³⁰⁷ The Court concluded once again that “the ‘appropriate’ remedy for an adjudication tainted with an appointments violation is a new ‘hearing before a properly appointed’ official.”³⁰⁸ The Court added that the official presiding over the new hearing could not be the same ALJ that issued the original decision “even if he has by now received (or receives sometime in the future) a

²⁹⁵ *Id.* (quoting 63A AM. JUR. 2D, PUBLIC OFFICERS AND EMPLOYEES § 578, at 1080–81 (1984)).

²⁹⁶ *Buckley*, 424 U.S. at 142.

²⁹⁷ *Id.* at 143.

²⁹⁸ *Id.* at 142–43.

²⁹⁹ 515 U.S. at 179–80.

³⁰⁰ *Id.* at 180.

³⁰¹ *Id.* at 182–83.

³⁰² *Id.* at 183–84.

³⁰³ *Id.* at 179. *See also* Brief for Petitioner at *23, *Ryder v. United States*, 515 U.S. 177 (1995) (No. 94-431).

³⁰⁴ *Ryder*, 515 U.S. at 182–83.

³⁰⁵ *Id.* at 188.

³⁰⁶ *Lucia v. SEC*, 585 U.S. 237, 242, 251 (2018).

³⁰⁷ *Id.* at 251.

³⁰⁸ *Id.*

constitutional appointment.”³⁰⁹ The Court reasoned that having already heard and decided the claims against the petitioners, the original ALJ “cannot be expected to consider the matter as though he had not adjudicated it before.”³¹⁰ “To cure the constitutional error,” the Court ruled, “another ALJ (or the Commission itself) must hold the new hearing.”³¹¹ The Court suggested in a footnote that consideration by a different officer may not be “required for every Appointments Clause violation,” such as when the violation affects an entire commission and “there is no substitute decisionmaker,” suggesting that in those circumstances, a court may order a rehearing by the same multimember body that initially issued the decision.³¹²

Although the remedy in *Lucia* was limited to the case before the Court, the Court’s holding regarding the officer status of SEC ALJs and its judgment ordering a new hearing before a properly appointed ALJ had sweeping effects throughout the federal government. The Department of Justice reportedly advised department heads to ratify the appointments of existing ALJs and reassign administrative cases involving timely Appointments Clause challenges,³¹³ which many agencies proceeded to do.³¹⁴ A month after the *Lucia* decision, the President issued an executive order placing ALJs in the excepted service, where positions are not subject to competitive examination.³¹⁵ The Office of Personnel Management (OPM) interpreted the order to reduce OPM’s role in evaluating and ranking ALJ candidates, giving agency heads greater flexibility to hire candidates of their choice.³¹⁶ As a result of the *Lucia* decision and the executive order, many agencies changed how they hired and appointed ALJs.³¹⁷

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.* at 251–52.

³¹² *Id.* at 251 n.5.

³¹³ Alison Frankel, *In Confidential Memo to Agency GCs, DOJ Signals ‘Aggressive’ Stand on Firing ALJs*, REUTERS (July 23, 2018), <https://www.reuters.com/article/us-otc-dojmemo/in-confidential-memo-to-agency-gcs-doj-signals-aggressive-stand-on-firing-aljs-idUSKBN1KD2BB/>; Debra Cassens Weiss, *Justice Department Memo Gives More Power to Agency Chiefs to Remove Administrative Law Judges*, ABA J. (July 25, 2018), https://www.abajournal.com/news/article/justice_department_memo_gives_more_power_to_agency_chiefs_to_remove_adminis.

³¹⁴ *See, e.g.*, SSR 19-1p, 84 Fed. Reg. 9582 (Mar. 15, 2019) (announcing procedures for new hearings before ALJs at the Social Security Administration); *Morris & Dickson Co., LLC; Decision & Order*, 88 Fed. Reg. 34523, 34532 (Drug Enf’t Admin. May 30, 2023) (stating that the Attorney General “ratified the prior appointment” of ALJs at the Drug Enforcement Administration on Oct. 25, 2018); FDIC Rules of Practice and Procedure; Technical Revisions, 86 Fed. Reg. 2246 (Jan. 21, 2021) (to be codified at 12 C.F.R. pt. 308) (stating that “[a]lthough the *Lucia* decision did not directly affect the FDIC [Federal Deposit Insurance Corporation] or the ALJs for the FDIC, the Board nevertheless elected to formally appoint the ALJs that preside over FDIC enforcement proceedings”).

³¹⁵ Excepting Administrative Law Judges from the Competitive Service, Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 10, 2018) (codified at 5 C.F.R. §§ 6.3, 6.8 (2025)). *See also* CRS Report R45635, *Categories of Federal Civil Service Employment: A Snapshot*, by Jon O. Shimabukuro and Jennifer A. Staman (2019).

³¹⁶ *See* Administrative Law Judges, 85 Fed. Reg. 59207, 59208 (proposed Sept. 21, 2020) (to be codified at 5 C.F.R. pts. 212, 213, 303, 930) (“In light of the Executive Order, OPM terminated the ALJ competitive service register, its centralized list of eligible ALJ applicants, as the Executive Order ended the need for competitive examination, rating and ranking, and selection from competitive certificates of eligibles issued by OPM.”).

³¹⁷ Jack M. Beermann & Jennifer L. Mascott, *Research Report on Federal Agency ALJ Hiring after Lucia and Executive Order 13843* (Admin. Conf. of the United States, May 31, 2019), <https://www.acus.gov/sites/default/files/documents/Submitted%20final%20draft%20JB.pdf>.

In federal court, litigation ensued against ALJs in other agencies, including the Social Security Administration (SSA), the largest employer of ALJs at the time.³¹⁸ If the SSA denies a claim for benefits, the claimant can seek review of the decision by an ALJ, and potentially appeal the ALJ's decision to the Appeals Council at SSA.³¹⁹ Decisions of the Appeals Council can then be appealed to a federal court in certain circumstances.³²⁰ In 2021, the Supreme Court ruled that claimants in SSA benefits proceedings need not raise an Appointments Clause challenge during their first appearance before an ALJ to state a "timely" Appointments Clause claim in their appeal to a federal court.³²¹

After *Lucia*, litigants also challenged the appointment of other types of adjudicators, such as immigration judges, based on the reasoning in that decision.³²² The holding in *Lucia* that SEC ALJs are officers also revived a latent constitutional challenge to the statutory requirements for removing ALJs based on a 2010 Supreme Court ruling.³²³

In separation-of-powers cases decided after *Lucia*, the Court did not automatically order the remedy of a new trial or hearing before a properly appointed officer or properly constituted agency. In *Arthrex*, discussed above, the Court resolved the incompatibility of administrative patent judges' appointment as inferior officers while having attributes of principal officers by severing a statutory provision barring review of certain APJ decisions by the agency's Director.³²⁴ The Court did not, however, order a new hearing before a different panel of APJs.³²⁵ Instead, it remanded the case to the Acting Director "for him to decide whether to rehear the petition" challenging the patent in question.³²⁶ The Court explained that "[b]ecause the source of the constitutional violation is the restraint on the review authority of the Director, rather than the appointment of APJs by the Secretary," the petitioner was not entitled to the remedy of a new proceeding under *Lucia*.³²⁷

³¹⁸ *ALJs by Agency*, OFF. OF PERS. MGMT., <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> (last visited Mar. 18, 2025). See also *id.* (June 4, 2018 archived site) [<https://web.archive.org/web/20180604052359/https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency>].

³¹⁹ *Appeal a Decision We Made*, SSA, <https://www.ssa.gov/apply/appeal-decision-we-made> (last visited Apr. 8, 2026).

³²⁰ *Id.*

³²¹ See *Carr v. Saul*, 593 U.S. 83, 92–96 (2021) (holding that unlike in *Ryder* and *Lucia*, an Appointments Clause claim cannot be adequately developed, debated, and decided in the context of a benefits hearing before an ALJ).

³²² See *Duenas v. Garland*, 78 F.4th 1069, 1073 (9th Cir. 2023) (holding that immigration judges and members of the Board of Immigration Appeals are officers based on the reasoning in *Lucia*); *McIntosh v. Dep't of Def.*, 53 F.4th 630, 641 (Fed. Cir. 2022) (holding that plaintiff forfeited her argument that administrative judges on the Merit Systems Protection Board, who decided her case in 2019, were improperly appointed inferior officers, but observing that "any issues with their appointment have since been remedied" because a "quorum of the reconstituted Board . . . issued a Ratification Order on March 4, 2022 that ratified the prior appointments of administrative judges").

³²³ See *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 492 (2010) (holding that "the dual for-cause limitations on the removal of [Public Company Accounting Oversight] Board members contravene[d] the Constitution's separation of powers"). E.g., *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446, 463 (5th Cir. 2022) (holding that "the statutory removal restrictions for SEC ALJs are unconstitutional"), *aff'd on other grounds and remanded*, 603 U.S. 109 (2024), and *adhered to*, 132 F.4th 745 (5th Cir. 2024).

³²⁴ *United States v. Arthrex, Inc.*, 594 U.S. 1, 23–26 (2021). See *supra* "What Distinguishes a Principal Officer from an Inferior Officer?"

³²⁵ *Arthrex*, 594 U.S. at 27.

³²⁶ *Id.* at 26.

³²⁷ *Id.* at 27.

The Court took a similar approach in cases involving allegations that a statute unconstitutionally insulated a particular officer from removal at will by the President. In *Seila Law v. CFPB*, the Court held that “the CFPB’s leadership by a single independent Director violate[d] the separation of powers.”³²⁸ To remedy this violation, the Court severed a statutory provision that barred the President from removing the CFPB Director at will.³²⁹ The Court declined to order petitioner’s preferred remedy of denying the government’s pending petition to enforce a civil investigative demand and dismissing the case.³³⁰ Instead, the Court remanded the decision so that the lower courts could decide whether an Acting CFPB Director removable at will by the President had validly ratified the civil investigative demand issued by the former CFPB Director.³³¹ On remand, the appellate court held that the CFPB Director’s ratification of the contested agency action was proper and “remedie[d] any constitutional injury that *Seila Law* may have suffered due to the manner in which the CFPB was originally structured.”³³² In *Collins v. Yellen*, the Court held that the Director of the Federal Housing Finance Agency (FHFA) was unconstitutionally insulated from removal. As in *Seila Law*, the Court declined to set aside the contested agency actions, because the officials who took them, including the Director, were properly appointed.³³³ The Court reasoned that the petitioners might be entitled to “retrospective relief,” but only if they showed “compensable harm.”³³⁴

Whether post-*Lucia* cases reflect an emerging trend away from unwinding agency decisions in response to separation-of-powers violations remains to be seen, especially because two of the three cases involved constitutional challenges to statutory removal protections rather than appointment defects.

What Are Congress’s Options If It Identifies a Potential Appointments Clause Concern?

Congress has several options to address a potential Appointments Clause problem, depending on the nature of the concern. An Appointments Clause question may arise if a statute provides for appointing an officer using a method not permitted by the Appointments Clause, such as authorizing a deputy or manager subordinate to the department head to appoint the person who will serve in that office without approval from the department head. Another scenario might involve appointment by the President alone or a department head of a principal officer.³³⁵ In these situations, Congress may have the option to:

³²⁸ 591 U.S. 197, 232 (2020).

³²⁹ *Id.* at 238.

³³⁰ *Id.* at 232.

³³¹ *Id.* at 232, 238.

³³² *CFPB v. Seila L. LLC*, 997 F.3d 837, 846 (9th Cir. 2021).

³³³ 594 U.S. 220, 257 (2021).

³³⁴ *Id.* at 259–60 (offering, as an example, a hypothetical scenario in which “the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way”).

³³⁵ *E.g.*, *United States v. Arthrex, Inc.*, 594 U.S. 1, 23 (2021) (holding that “the unreviewable authority wielded by” administrative patent judges during certain proceedings was “incompatible with their appointment by the Secretary to an inferior office”).

- Amend the statute to specify an appointment method consistent with the officer’s status:
 - For a principal officer, require presidential appointment and Senate confirmation;
 - For an inferior officer, either require presidential appointment and Senate confirmation or vest appointment authority in the President, the courts, or a department head;
- Amend the statute to remove certain duties and discretion from the office so that the occupant no longer exercises significant federal authority and the Appointments Clause no longer applies to the position;
- If the position in question appears to involve a principal officer who is appointed under current law as an inferior officer, amend the statute such that another principal officer within the executive branch would supervise and direct the officer’s work on matters involving the exercise of significant authority; or
- Retain the existing statutory language and potentially observe whether the issue arises in litigation and how courts resolve the question.

In the event a court finds an Appointments Clause violation, Members of Congress have the options of monitoring any appeals from the decision,³³⁶ evaluating how a court-ordered remedy plays out in the affected agency and the courts, or responding to the ruling through legislation, as discussed above. These options are not necessarily mutually exclusive, and alternative approaches may be available depending on the circumstances.

If a particular officer was not appointed according to the constitutionally prescribed method, but a statute provides for the correct method of appointment, then Congress could take steps to direct or incentivize the correct appointing authority to appoint the officer anew or “ratify” the officer’s appointment. Such steps might take the form of a bill or resolution stating the Sense of Congress that, for example, the President should nominate or appoint an individual to serve in a particular position,³³⁷ or legislation directing a department head to implement recordkeeping or reporting requirements related to the appointment of officers at that agency.³³⁸

³³⁶ Depending on the court and stage of the appeal, a Member of Congress or group of Members may seek the court’s permission to file an amicus brief stating their views on the legal questions presented. *E.g.*, Brief of Amici Curiae Members of Congress in Support of Petitioners, *FCC v. Consumers’ Rsch.*, Nos. 24-354, 24-422 (U.S. filed Jan. 16, 2025); Brief of Current and Former Members of Congress as Amici Curiae in Support of Affirmance, *Seila L. LLC v. CFPB*, 591 U.S. 197 (2020) (No. 19-7).

³³⁷ *Cf.* National Aeronautics and Space Administration Authorization Act of 2008, S. 3270, 110th Cong. § 18 (stating “the sense of Congress that the President should appoint members to the National Space Council in accordance with section 501 of the National Aeronautics and Space Administration Authorization Act, Fiscal Year 1989”).

³³⁸ *Cf.* 18 U.S.C. § 3602 (directing federal district courts to appoint probation officers and stating that the “order of appointment shall be entered on the records of the court, a copy of the order shall be delivered to the officer appointed, and a copy shall be sent to the Director of the Administrative Office of the United States Courts”).

Ratification of an appointment, which typically takes the form of an affidavit or agency notice or order, is a way for the correct appointing official to approve the prior, improper selection of an individual to serve in that office.³³⁹ Ratification of an appointment does not necessarily foreclose claims based on decisions made while the officer in question was not properly appointed, but courts have generally considered ratification documents to effectuate a valid appointment for purposes of future actions or decisions by the officer in question.³⁴⁰

Author Information

Victoria L. Killion
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

³³⁹ See *Carr v. Saul*, 593 U.S. 83, 86–87 (2021) (stating that “a few weeks after *Lucia* was decided, the SSA’s Acting Commissioner pre-emptively ‘address[ed] any Appointments Clause questions involving Social Security claims’ by ‘ratif[ying] the appointments’ of all SSA ALJs and ‘approv[ing] those appointments as her own.’” (quoting 84 Fed. Reg. 9583 (2019)). *E.g.*, Ratification and Reconsideration Order, C.F.T.C. (2018) (ratifying the appointment of a Judgment Officer), <https://www.cftc.gov/sites/default/files/2018-04/ogcorder040918.pdf>.

³⁴⁰ See, e.g., *K&R Contractors, LLC v. Keene*, 86 F.4th 135, 144 (4th Cir. 2023) (concluding that “the Secretary’s express ratification of [the ALJ’s] appointment cured any constitutional defect in his original hiring by [the agency]” such that the ALJ “had been constitutionally appointed by the time [he] took any action in this case”); *McIntosh v. Dep’t of Def.*, 53 F.4th 630, 641 (Fed. Cir. 2022) (reasoning that any appointment defect with administrative judges at the Merit Systems Protection Board had “since been remedied” because a “quorum of the reconstituted Board, who qualify as ‘heads of departments’ under the Appointments Clause, issued a Ratification Order . . . that ratified the prior appointments of administrative judges”).