

# “ESTABLISHED BY LAW”: SAVING STATUTORY LIMITATIONS ON PRESIDENTIAL APPOINTMENTS FROM UNCONSTITUTIONALITY

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*In the federal government, over one thousand positions exist that require nomination by the President and confirmation by the Senate. For many of these positions, the statute creating the office contains limitations on whom the President may appoint to the office. These limitations can include simple professional qualifications, policy-based restrictions, and political party balance requirements. Although such restrictions on the pool of individuals eligible for any given office have been used since the first Congress, are ubiquitous throughout the U.S. Code, and have never been successfully challenged in court, several authors, litigants, and executive officials have identified potential constitutional concerns regarding their validity. Limitations on the President's nomination power, it is argued, should be suspect under the separation of powers set up by the U.S. Constitution as a congressional encroachment on an executive prerogative. In this Note, I examine the constitutional issues surrounding statutory limitations on appointments, present the traditional arguments for and against them, and suggest a paradigm shift for how we think about such limitations that may allay the constitutional concerns of their critics.*

## INTRODUCTION

In an early episode of the television series *The West Wing*, President Bartlet, a Democrat, must fill two vacant seats on the Federal Election Commission (FEC) that previously had been held by a Republican and a Democrat.<sup>1</sup> In an attempt to demonstrate the President's bipartisanship, the White House Press Secretary announces, “[T]he President has nominated one Democrat and one Republican, which he was certainly under no legal obligation to do.”<sup>2</sup> However, the Press Secretary later has to amend her statement when she discovers that the President *was* indeed obligated to do so.<sup>3</sup>

*The West Wing* accurately represented the law in this regard: No more than three members of the six-member FEC may belong to the

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<sup>1</sup> *The West Wing: Mandatory Minimums* (NBC television broadcast May 3, 2000).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

same political party.<sup>4</sup> Thus, in appointing new members to the FEC—like many other federal agencies—the President’s choice is limited by the potential members’ party affiliation. Though perhaps the most controversial, these political party balance requirements are only one of many types of limitations on the President’s ability to nominate federal officials: The U.S. Code is rife with qualifications and eligibility requirements for executive officers. The Solicitor General must be “learned in the law.”<sup>5</sup> The Secretary of Defense must have been in civilian life for at least seven years prior to taking office.<sup>6</sup> The Federal Emergency Management Agency (FEMA) Administrator must “be appointed from among individuals who have . . . a demonstrated ability in and knowledge of emergency management and homeland security; and . . . not less than 5 years of executive leadership and management experience.”<sup>7</sup> Other statutes require U.S. citizenship or professional experience.<sup>8</sup> Some eligibility requirements apply to a range of offices, such as the federal anti-nepotism statute, which prohibits the President from appointing relatives to office.<sup>9</sup>

Despite their ubiquity, the constitutionality of statutory limitations on appointments is disputed. A 1989 opinion from President George H. W. Bush’s Office of Legal Counsel<sup>10</sup> argued that statutory political party balance requirements for independent agencies violate the Appointments Clause of the Constitution.<sup>11</sup> Former Presidents Bill Clinton<sup>12</sup> and George W. Bush<sup>13</sup> have, on similar grounds, both

<sup>4</sup> 2 U.S.C. § 437c(a)(1) (2006).

<sup>5</sup> 28 U.S.C. § 505 (2006). This language dates back to the Judiciary Act of 1789, which specified, “[T]here shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district . . . . And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States . . . .” Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93.

<sup>6</sup> 10 U.S.C.A. § 113(a) (West 2010).

<sup>7</sup> 6 U.S.C. § 313(c)(2) (2006).

<sup>8</sup> See, e.g., 35 U.S.C. § 3(a)(1) (2006) (“The powers and duties of the United States Patent and Trademark Office shall be vested in . . . [a] Director . . . , who shall be a citizen of the United States and who shall be appointed by the President, by and with the advice and consent of the Senate.”); *id.* (“The Director shall be a person who has a professional background and experience in patent or trademark law.”).

<sup>9</sup> 5 U.S.C. § 3110(b) (2006) (“A public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official.”); *id.* § 3110(a)(2) (“[P]ublic official’ means an officer (including the President and a Member of Congress) . . . .”).

<sup>10</sup> Common Legislative Encroachments on Executive Branch Authority, 13 Op. O.L.C. 248, 250 (1989) [hereinafter OLC, Common Legislative Encroachments].

<sup>11</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>12</sup> Statement on Signing the Lobbying Disclosure Act of 1995, 2 PUB. PAPERS 1907 (Dec. 19, 1995) [hereinafter Clinton, Signing Statement] (“The Congress may not, of

issued signing statements objecting to statutory qualifications for federal officers.<sup>14</sup> According to all three Presidents, any statutory restrictions on appointments are merely advisory and do not bind either the President or the Senate. An official who is appointed despite being statutorily ineligible, according to these arguments, is nonetheless a valid official.

Although the Supreme Court has never examined the practice of restricting by statute the President's choice of nominees for federal offices, such a restriction may not withstand a constitutional challenge should the Court ever consider the issue. Based on the Court's separation-of-powers jurisprudence, there are strong constitutional arguments against these restrictions; as I describe in Part I, the Court has shown that it will not hesitate to invalidate laws when it believes Congress is usurping an executive prerogative.

In addition, the few articles recently published on the subject all criticize statutory limitations on eligibility. Scholars have argued that the practice violates traditional separation of powers principles,<sup>15</sup> that statutory restrictions are beyond the scope of Congress's power,<sup>16</sup> and

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course, impose broad restrictions on the President's constitutional prerogative to nominate persons of his choosing to the highest executive branch positions, and this is especially so in the area of foreign relations.").

<sup>13</sup> Statement on Signing the Department of Homeland Security Appropriations Act, 2007, 42 WEEKLY COMP. PRES. DOC. 1742, 1742-43 (Oct. 4, 2006) [hereinafter Bush, Signing Statement] (explaining that Homeland Security Appropriations Act "purports to limit the qualifications of the pool of persons from whom the President may select the [FEMA Administrator] in a manner that rules out a large portion of those persons best qualified by experience and knowledge to fill the office" and that "[t]he executive branch shall construe [the law] in a manner consistent with the Appointments Clause of the Constitution"); see also Louis Fisher, *Signing Statements: Constitutional and Practical Limits*, 16 WM. & MARY BILL RTS. J. 183, 201-04 (2007) (describing debate over Bush signing statement and other presidential objections to appointment limitations); Michele Estrin Gilman, *Litigating Presidential Signing Statements*, 16 WM. & MARY BILL RTS. J. 131, 157-59 (2007) (discussing President Bush's objections and possible consequences of signing statement).

<sup>14</sup> See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 326 (2006) (describing recent presidential signing statements that object to restrictions on appointments); Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 747 & n.12 (2008) (same).

<sup>15</sup> See Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 534-35 (1998) (hypothesizing that formal separation of powers analysis "would likely dictate that congressional attempts to legislate qualifications for certain posts would be unconstitutional" but acknowledging that such qualifications would likely be accepted under functional analysis); Richard P. Wulwick & Frank J. Macchiarola, *Congressional Interference with the President's Power To Appoint*, 24 STETSON L. REV. 625, 643-45 (1995) (making formalistic argument against appointment restrictions).

<sup>16</sup> Donald J. Kochan, *The Unconstitutionality of Class-Based Statutory Limitations on Presidential Nominations: Can a Man Head the Women's Bureau at the Department of*

that all statutory qualifications for executive officers are unconstitutional.<sup>17</sup> Others have opined that political party balance requirements are “a deliberate attempt to dilute the President’s ability to select appointees who will carry out his policy preferences.”<sup>18</sup>

The stakes here are high. The validity of potentially hundreds of statutory provisions, including many that are vital to the effective functioning of the administrative state, hangs in the balance. Though much ink has been spilled over the larger issue of the breadth of presidential power and what Congress can do to rein in that power, the question addressed in this Note is an important piece of that puzzle but has received scant attention. Accordingly, my aim is to provide a comprehensive examination of the constitutional issues raised by statutory limitations on the President’s choice of officers and to suggest a means of reconciling these well-established and essential laws with the Constitution.

Part I provides the legal backdrop for this issue, first by showing that, although the Court has never scrutinized statutory limitations, these restrictions have enjoyed a long history of acceptance by presidents, legislators, courts, and scholars. However, because the constitutionality of statutory limitations cannot be determined based on directly apposite precedent, I describe the broader separation-of-powers jurisprudence surrounding presidential appointees, which is much better developed.

Part II hones in on the constitutional arguments surrounding statutory limitations on appointments in particular. The debate hinges on two different methods of interpreting the Constitution: The arguments in favor of statutory limits focus on their functional benefits, while the arguments against focus on the literal meaning of the text. As a doctrinal matter, I agree with the scholars who have written on this topic; viewed as congressional intrusion on the executive prerogative of nomination, limitations on eligibility for presidential appointments are likely unconstitutional. From a functional standpoint, however, this is an unsatisfactory result, as it would eliminate all the benefits of such limitations.

Thus, Part III proposes a means of reconciling fidelity to the constitutional text with the continued functioning of the administrative state, namely by shifting how these statutory provisions are concept-

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*Labor?*, 37 LOY. U. CHI. L.J. 43, 46 (2005) (“[M]andatory, statutory pre-nomination limitations are simply beyond the Senate’s advice and consent power.”).

<sup>17</sup> Volokh, *supra* note 14, at 746.

<sup>18</sup> Note, *Congressional Restrictions on the President’s Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914, 1926 (2007).

alized. Rather than restrictions on the President's appointment power, the statutory limitations should be viewed as an exercise of Congress's uncontroversial power to create and establish administrative offices. Not only does this new theory provide a constitutional justification for these statutory provisions, it also provides its own limiting principle.

Finally, in Part IV, I address briefly the issue of political party balance requirements for independent agencies, the most critical and complex kind of statutory limitation. Because these requirements implicate much larger questions of constitutional law, I provide only the framework under which the debate might proceed.

## I

### SEPARATION OF POWERS JURISPRUDENCE

#### *A. Appointments Jurisprudence*

The starting point for examining Congress's power to limit the President's choice of nominees is the Appointments Clause of the Constitution:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.<sup>19</sup>

#### *1. Lack of Judicial Guidance*

The jurisprudence on the Appointments Clause as it pertains to "principal," as opposed to "inferior," officers is sparse.<sup>20</sup> The major

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<sup>19</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>20</sup> My analysis in this Note is limited to "principal officers," which are officials who require Senate confirmation and generally have important executive or policymaking roles. See *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) ("Principal officers are selected by the President with the advice and consent of the Senate."). The Note does not deal with "inferior officers," which are civil servants who can be appointed in almost any way Congress specifies. U.S. CONST. art. II, § 2, cl. 2 ("[T]he 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."); see also *Buckley*, 424 U.S. at 132 ("*Inferior officers* Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary." (emphasis added)).

What separates a principal officer from an inferior officer is, in general, the manner in which Congress has chosen to provide for the official's appointment—whether by presidential nomination and Senate confirmation or by some other means—although the Supreme Court has given boundaries as to what sort of officers can be deemed "inferior": An inferior officer generally is literally inferior, that is, "subject to removal by a higher . . . official," has "limited duties" that "do[] not include any authority to formulate policy," and holds an office that is "limited in jurisdiction" and "limited in tenure." *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988).

The constitutional questions that arise in this Note regarding principal officers do not apply to inferior officers. See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PRO-*

case in this area is *Buckley v. Valeo*,<sup>21</sup> a 1976 challenge to the constitutionality of the Federal Election Campaign Act (FECA).<sup>22</sup> Although the Court mostly dealt with First Amendment concerns,<sup>23</sup> it also addressed a challenge to the composition of the FEC. At the time, the FEC comprised eight members: two commissioners appointed by the President, two by the Speaker of the House, two by the President Pro Tempore of the Senate, and the Secretary of the Senate and Clerk of the House as ex officio nonvoting members. Each of the three voting pairs had to be composed of members of different political parties, and all members were subject to confirmation by both the House and Senate.<sup>24</sup> The Court held that the FEC commissioners were principal officers and thus could only be nominated by the President and confirmed by the Senate.<sup>25</sup> The plaintiffs in *Buckley* did not challenge—and the Court did not address—the political party balance requirement.

After *Buckley*, Congress amended FECA to provide that the six voting members were all to be appointed by the President with the advice and consent of the Senate, but it retained the restriction that “[n]o more than 3 [voting] members of the Commission . . . may be affiliated with the same political party.”<sup>26</sup> Although the validity of this restriction has never been argued before the Supreme Court, it came before the D.C. Circuit Court of Appeals in *Federal Election Commission v. NRA Political Victory Fund*.<sup>27</sup> In *Political Victory Fund*, the National Rifle Association, in challenging an FEC enforcement action, argued that the political party balance requirement was

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CESS 278–79 (2000) (“[T]here is no doubt that congressional legislation requiring or mandating qualifications for inferior federal offices is constitutionally permissible.”); Volokh, *supra* note 14, at 747 (“If Congress chooses to vest the appointment in one of these appointing authorities, it may also create specific qualifications for the officeholder in the statute.”); *see also* United States v. Perkins, 116 U.S. 483, 485 (1886) (“The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed . . . .” (quoting Perkins v. United States, 20 Ct. Cl. 438, 444–45 (1885))).

<sup>21</sup> 424 U.S. 1 (1976) (per curiam).

<sup>22</sup> Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, amended by Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (current version at 2 U.S.C. §§ 431–56 (2006)).

<sup>23</sup> *Buckley*, 424 U.S. at 11–93.

<sup>24</sup> Federal Election Campaign Act Amendments § 310, 88 Stat. at 1280–81.

<sup>25</sup> *Buckley*, 424 U.S. at 138–41 (holding that “Congress’ power under [the Necessary and Proper] Clause” to create offices “is inevitably bounded by the express language of Art. II, § 2, cl. 2,” so “Officers of the United States” must be appointed by procedures there prescribed).

<sup>26</sup> 2 U.S.C. § 437c(a)(1) (2006).

<sup>27</sup> 6 F.3d 821 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994).

unconstitutional.<sup>28</sup> However, the court did not reach the merits of this claim, instead dismissing it for lack of standing.<sup>29</sup>

The only direct judicial statement on this question is pure dictum from an eighty-five-year-old opinion. In *Myers v. United States*,<sup>30</sup> the petitioner's argument rested on showing that Congress had the power to require Senate approval for the President's removal of officers. One of the petitioner's arguments was that congressional control over removal was directly parallel to the commonly used congressional control over appointments via statutory eligibility requirements. Chief Justice Taft rejected the premise that the two types of control were parallel, but in dictum noted that eligibility requirements were indeed uncontroversial, "provided of course that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation."<sup>31</sup> Congress's powers in the creation of offices, the Chief Justice wrote, included "the establishment of offices, the determination of their 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."<sup>32</sup>

Justice Brandeis, in dissent, agreed with the petitioner's full argument. He accepted the parallellism between the powers of appointment and removal and also agreed that the practice of prescribing qualifications for office had a long pedigree: "[A] multitude of laws have been enacted which limit the President's power to make nominations . . . . Such restriction upon the power to nominate has been exercised by Congress continuously since the foundation of the

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<sup>28</sup> *Id.* at 823–24. The petitioners in *Political Victory Fund* also challenged the continued presence on the FEC of the two ex officio nonvoting members appointed by Congress. The D.C. Circuit held that having legislative officials on an executive commission—even in a nonvoting capacity—violated the constitutional separation of powers. *Id.* at 824, 827. However, the statute constituting the FEC was never actually amended. Four days after the *Political Victory Fund* decision, the FEC voted to exclude the ex officio members from all proceedings. See *Fed. Election Comm'n v. Legi-Tech, Inc.*, 75 F.3d 704, 706 (D.C. Cir. 1996) (describing reconstitution of FEC). In *Legi-Tech*, the D.C. Circuit held that this exclusion remedied the separation of powers problems. *Id.* at 709.

<sup>29</sup> The court held that the plaintiff lacked standing because it was impossible to determine that the law had caused any injury: "It is not the law, therefore, which arguably restrains the President . . . . [W]ithout the statute[,] the President could have appointed exactly the same members." *Political Victory Fund*, 6 F.3d at 825. Thus, a question of statutory qualifications might only be justiciable in the case that one of the requirements is *not* followed and "the government raises [unconstitutionality] as a defense." *Id.* The court also hypothesized that the President might have standing to challenge a qualification as impinging on his appointment power. *Id.* at 825 n.4.

<sup>30</sup> 272 U.S. 52 (1926).

<sup>31</sup> *Id.* at 128.

<sup>32</sup> *Id.* at 129 (emphasis added).

Government.”<sup>33</sup> Thus, despite disagreeing over the removal power, both the majority and dissent in *Myers* found statutory qualifications for office uncontroversial.

## 2. *History of Acceptance*

Both the majority and dissent in *Myers* found statutory qualifications uncontroversial because the practice had a long pedigree. In debating a bill creating the position of the Superintendent of Indian Affairs in 1790, certain members of the House of Representatives objected to the requirement that the position be filled by a military officer.<sup>34</sup>

The motion [to strike the restriction] was supported by the following observations: It was said to infringe the power of the President, and in that view to be unconstitutional . . . .

In objection to the motion, it was observed . . . [how] it is evident that the President and Senate are restricted in their appointments of officers in several other departments. The Attorney-General must be a person learned in the law, or, in other words, a lawyer . . . .<sup>35</sup>

Thus, an early constitutional objection to a statutory eligibility requirement was rebutted only by reference to a preexisting practice—one that was only a year old.<sup>36</sup>

For the next 190 years, most officials and scholars accepted the practice, with varying degrees of caution. An 1871 opinion from Attorney General Amos T. Akerman regarding the Civil Service Commission “admitted” the “unquestioned right” of Congress to impose qualifications on offices, but added that Congress should leave “scope for the judgment and will” of the President.<sup>37</sup> Writing in 1957, Professor Edward Corwin went even further when he noted that Congress’s power to impose qualifications on offices was limited only by the caveat that “some choice, *however small*, must be left [to] the appointing authority.”<sup>38</sup> Indeed, until the 1980s, the practice of imposing restrictions on the President’s choice of nominees stimulated little debate or analysis.

<sup>33</sup> *Id.* at 264–65 (Brandeis, J., dissenting).

<sup>34</sup> Volokh, *supra* note 14, at 770–71.

<sup>35</sup> 2 ANNALS OF CONG. 1523 (1790).

<sup>36</sup> See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (“And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States . . .”).

<sup>37</sup> Civil-Service Commission, 13 Op. Att’y Gen. 516, 520 (1871).

<sup>38</sup> EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1957*, at 74 (1957) (emphasis added).

*B. The Court's Approach to Evaluating  
Congressional Limits on Executive Power*

Because the case law directly addressing statutory limitations on the presidential appointment power is practically nonexistent, the Court—if it were to be presented with a challenge to such a law—would likely look to its own precedents in related and more developed areas of law. Specifically, the Court's jurisprudence concerning congressional attempts to control the President's power to remove federal officers, as well as its precedents concerning Congress's power to intrude on executive prerogatives, provide guidance.

*1. Removal Jurisprudence*

As the powers to appoint and remove officers are opposite book-ends of the President's ability to control the policy executed by his subordinates, any constitutional question regarding the President's ability to control the hiring of his subordinates will likely be influenced by the more developed law surrounding his ability to fire them.<sup>39</sup>

The first major case involving the removal of executive officers was *Myers v. United States*.<sup>40</sup> In *Myers*, the Supreme Court dealt with a statute that required that all postmasters of a certain level be both appointed *and* removed only with the advice and consent of the Senate.<sup>41</sup> Myers, a postmaster first-class in Portland, Oregon, was fired without Senate approval and he sued for back pay, claiming his termination was illegal.<sup>42</sup> The Supreme Court denied Myers's claim, holding that the statute requiring Senate consent for removal was unconstitutional.

The Court's decision rested on two grounds. The first was functional: The Court explained that under the Take Care Clause, the President has the constitutional responsibility to "take Care that the Laws be faithfully executed,"<sup>43</sup> and he therefore must have the ability to control policy through removal of his subordinates.<sup>44</sup> The second

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<sup>39</sup> This is not to say that the powers are always found together or that they are derived from the same source. See Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1783–84 (2006) (arguing against "mistaken" view that appointment and removal powers are coextensive and instead claiming that Constitution permits, at most, removal of *executive* officers only).

<sup>40</sup> 272 U.S. 52 (1926); see also *supra* notes 30–33 and accompanying text (discussing *Myers*).

<sup>41</sup> 272 U.S. at 107.

<sup>42</sup> *Id.* at 106.

<sup>43</sup> U.S. CONST. art. II, § 3.

<sup>44</sup> *Myers*, 272 U.S. at 117 ("[Removal power] is essential to the execution of the laws . . .").

ground focused on the textually delineated powers of each branch of government: The Court criticized Congress for arrogating to itself powers not given to it by the Constitution. Congress, by requiring Senate approval for removal, was not just restricting the President but also giving *itself* a new role in removals.<sup>45</sup> Except as specified in Article II, the Court held, the Constitution “excludes the exercise of legislative power by Congress to provide for appointments and removals.”<sup>46</sup>

Thus, the Court in *Myers* looked at both the functional and incurusive separation-of-powers problems raised by the case.<sup>47</sup> The functional problem involved Congress’s decision to place the removal function somewhere other than where it was required as a textual and practical matter (with the President alone), and the incurusive problem involved Congress’s decision to give the legislative branch a role in a fundamentally executive judgment.

Nine years after *Myers*, in *Humphrey’s Executor v. United States*, the Court upheld a statutory provision that prohibited the President from firing a commissioner on the Federal Trade Commission (FTC) except for cause, such as for inefficiency, neglect of duty, or malfeasance in office.<sup>48</sup> In contrast to *Myers*, the incursion problem was not present in *Humphrey’s Executor* because Congress reserved no role for itself in the removal of the officer. Nor was the functional problem particularly salient: The Court, in upholding the law, emphasized that the FTC was a “non-partisan,” “impartial[ ],” and “quasi-judicial and quasi-legislative” agency.<sup>49</sup> As the FTC was not by nature an *executive*

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<sup>45</sup> *Id.* at 161.

<sup>46</sup> *Id.* at 164.

<sup>47</sup> The functional and anti-incursion approaches have also been called the “positive” and “negative” approaches, respectively. See Burt Neuborne, *In Praise of Seventh-Grade Civics: A Plea for Stricter Adherence to Separation of Powers*, 26 LAND & WATER L. REV. 385, 391 (1991) (positing “‘negative’ separation principle that argues against vesting any group of officials with more than one of the three governmental functions” and “‘functional’ separation principle that argues for the allocation of each function to the institution structurally engineered to perform it best”). Similarly, the Kentucky Supreme Court has stated that Kentucky’s constitution contains provisions both mandating separation of powers *and also* prohibiting “incursion[s]” of one branch into the functions of another. *Legislative Research Comm’n v. Brown*, 664 S.W.2d 907, 912 (Ky. 1984). The court thus described its constitution as having “a double-barreled, positive-negative approach.” *Id.* For the sake of simplicity, in this Note I use the terminology “functional” and “incurusive” to refer to the two different classes of separation-of-powers problems.

<sup>48</sup> 295 U.S. 602, 623–24 (1935).

<sup>49</sup> *Id.* at 624. The emphasis in *Humphrey’s Executor* on the *type* of power being exercised was reiterated in *Wiener v. United States*, 357 U.S. 349 (1958), a similar case involving a commissioner of the War Claims Commission. If the principle that independent agencies may be insulated from presidential removal applied in the case of the FTC, it applied a fortiori in the case of a member of the War Claims Commission, which existed for a limited

agency, restricting the President's ability to remove the commissioner interfered with no *executive* prerogative.

Another major removal case did not arise until 1988, when the Supreme Court decided *Morrison v. Olson*.<sup>50</sup> The Court in *Morrison* examined the constitutionality of a provision in the Ethics in Government Act of 1978<sup>51</sup> that prohibited the President from firing an independent counsel, a position created by that Act.<sup>52</sup> Under the Act, the Attorney General, who was directly subordinate to the President, could only remove an independent counsel "for good cause."<sup>53</sup> An independent counsel exercised prosecutorial power, which was, unlike the FTC's function, quintessentially executive. Despite the apparent functional separation-of-powers problem, the Court upheld the law. The Court ruled that the important criterion in determining whether Congress can bar removal by the President is not whether an official is "purely executive," "quasi-legislative," or "quasi-judicial," but whether the restriction excessively intrudes on the President's constitutional responsibility to "take care that the laws be faithfully executed."<sup>54</sup> Despite the separation-of-powers concerns, restricting the removal power in *Morrison* was allowable because it would not "impede the President's ability to perform his constitutional duty."<sup>55</sup>

After *Morrison*, it is clear that the Court views incursive separation-of-powers concerns as much more problematic than mere functional ones, at least in the context of removals. If the President's removal of a *prosecutor* may be restricted by statute, limiting the President's ability to remove the *postmaster* in *Myers* should have been permissible absent any other constitutional problems.<sup>56</sup> If *Myers* was correctly decided (in light of *Morrison*), then Congress's small incursion—giving itself the power to "confirm" removals—must have

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period, whose purpose was merely to "adjudicate [claims] according to law," and whose function had an "intrinsic judicial character." *Id.* at 350–56.

<sup>50</sup> 487 U.S. 654 (1988).

<sup>51</sup> Pub. L. No. 95-521, 92 Stat. 1824.

<sup>52</sup> *Morrison*, 487 U.S. at 663.

<sup>53</sup> *Id.* at 686.

<sup>54</sup> *Id.* at 689–90 (quoting U.S. CONST. art. II, § 3).

<sup>55</sup> *Id.* at 691; see also Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Agencies*, 52 ADMIN. L. REV. 1111, 1144 (2000) ("After *Morrison*, the fact that a presidential appointee performs any executive functions no longer automatically immunizes that official from congressional efforts to restrict the President's removal power.").

<sup>56</sup> An additional factual wrinkle in this analysis is that Congress designated the independent counsel, unlike the postmaster in *Myers*, as an inferior officer. *Morrison*, 487 U.S. at 691. Although the Court recognized this difference and deferred to Congress's judgment, it did not indicate how central this fact was to its holding.

been sufficient to create a constitutional violation. By contrast, because Congress gave no such powers to itself in *Humphrey's Executor* and *Morrison*, the Constitution was not offended. Thus, what is most important in the *Myers* analysis is not whether Congress has removed power from the President, but whether Congress has given executive-like powers to itself.

This, however, is not to say that functional separation-of-powers concerns can never rise to the level of a constitutional violation. A removal law that interferes too much with the President's "take care" responsibilities can—even in the absence of a congressional incursion into executive powers—still be unconstitutional. The Supreme Court found such a violation in its 2010 decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,<sup>57</sup> in which a double-insulation provision of an act establishing the Public Company Accounting Oversight Board (PCAOB)—where the Securities and Exchange Commission (SEC) could not remove inferior officers (in this case, PCAOB members) without good cause,<sup>58</sup> and the President could not remove SEC commissioners without good cause<sup>59</sup>—was deemed unconstitutional on separation-of-powers grounds.<sup>60</sup>

## 2. *Jurisprudence on Congressional Attempts to Restrain the President*

The Court's evolving removal jurisprudence is better understood as part of the Court's struggle to define the proper separation of powers between Congress and the President. Perhaps *Morrison* makes more sense in the context of the 1977 case *Nixon v. Administrator of General Services*, in which the Supreme Court upheld a law that delegated directly to the Administrator of General Services "the decision whether to disclose Presidential materials."<sup>61</sup> Even though the law bypassed the President by delegating an executive task directly to a subordinate, the Court held that the law did not upset "the proper balance between the coordinate branches."<sup>62</sup> The Court reached its decision by balancing the "disruption" to the President's "constitu-

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<sup>57</sup> 130 S. Ct. 3138 (2010).

<sup>58</sup> Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7211(e)(6) (2006).

<sup>59</sup> The parties agreed that the SEC commissioners could not be removed by the President except for good cause. 130 S. Ct. at 3148.

<sup>60</sup> *Id.* at 3147 ("[M]ultilevel protection from removal is contrary to Article II's vesting of the executive power in the President.").

<sup>61</sup> 433 U.S. 425, 440 (1977).

<sup>62</sup> *Id.* at 443–45.

tionally assigned functions” against the “need to promote objectives within the constitutional authority of Congress.”<sup>63</sup>

The *Nixon* balancing test is fairly permissive of legislative regulation of the executive branch. However, of three major cases decided in the 1980s dealing with the separation of powers between the executive and legislative branches—*INS v. Chadha*,<sup>64</sup> *Bowsher v. Synar*,<sup>65</sup> and *Morrison v. Olson*—the Court employed this balancing test only in *Morrison*.<sup>66</sup> Indeed, the controlling opinions in both *Chadha* and *Bowsher* completely ignored *Nixon*.<sup>67</sup>

In *Chadha*, the Court invalidated a practice known as the “legislative veto.”<sup>68</sup> In the statute at issue in *Chadha*, either house of Congress could override the Attorney General’s decision to suspend a deportation order.<sup>69</sup> The Supreme Court found such legislative vetoes unconstitutional, holding that any action taken by Congress that is “legislative in its character and effect” must be enacted in accordance with the bicameralism and presentment requirements of Article I.<sup>70</sup>

In *Bowsher*, the Court overturned a provision of the Gramm-Rudman-Hollings Act,<sup>71</sup> a law that directed the President to follow the Comptroller General’s recommendations with respect to spending reductions.<sup>72</sup> The Comptroller General was to be selected by the President from a list of three candidates chosen by Congress and removable only by joint resolution of Congress.<sup>73</sup> Therefore, the Court held, he was a *legislative* branch official who could not wield executive authority.<sup>74</sup> In invalidating the law, the Court drastically expanded the import of the relatively narrow ruling in *Chadha*, declaring that “congressional control over the execution of the laws,

<sup>63</sup> *Id.* at 443 (citations omitted) (citing *United States v. Nixon*, 418 U.S. 683, 711–12 (1974)).

<sup>64</sup> 462 U.S. 919 (1983).

<sup>65</sup> 478 U.S. 714 (1986).

<sup>66</sup> 487 U.S. 654, 695 (1988) (“[W]e do not think that the Act . . . ‘disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.’” (alterations in original) (quoting *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. at 443)).

<sup>67</sup> *Cf. Chadha*, 462 U.S. at 1000 (White, J., dissenting) (applying *Nixon* test in arguing that statute in dispute should not be struck down); *Bowsher*, 478 U.S. at 776 (White, J., dissenting) (same).

<sup>68</sup> 462 U.S. at 959 (Powell, J., concurring).

<sup>69</sup> *Id.* at 923–25.

<sup>70</sup> *Id.* at 952–56 (quoting S. REP. NO. 54-1335, at 8 (1897)).

<sup>71</sup> Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (current version at 2 U.S.C. §§ 901–04 (2006)).

<sup>72</sup> *Bowsher*, 478 U.S. at 717–19.

<sup>73</sup> *Id.* at 727–28.

<sup>74</sup> *Id.* at 732.

[as] *Chadha* makes clear, is constitutionally impermissible.”<sup>75</sup> In both *Bowsher* and *Chadha*, Justice White filed strongly worded dissents touting the functional benefit of the schemes that the Court struck down and downplaying the threats they posed to the separation of powers.<sup>76</sup> In *Morrison*, however, the situation was reversed: The Court upheld a law that arguably violated the separation-of-powers principle, and Justice White joined the majority opinion.

Justice Powell’s concurrence in *Chadha* presaged the divergent results by identifying the functional/incursive distinction in the Court’s separation-of-powers jurisprudence. In a functional-type case, one branch merely “interfere[s] impermissibly with the other’s performance of its constitutionally assigned function.”<sup>77</sup> In an incursive-type case, “one branch *assumes a function* that more properly is entrusted to another.”<sup>78</sup> Justice Powell characterized *Chadha* as an incursive separation-of-powers case and agreed with the Court in striking down the law.<sup>79</sup> However, he indicated that had it been a functional separation-of-powers case, the *Nixon* balancing test would have been the controlling precedent.<sup>80</sup>

The 1980s trilogy indicates that mere restrictions on the President’s powers are subject to a lenient balancing test, but congressional usurpations of executive powers are categorically prohibited. The validity of statutory limitations on the appointment of principal officers, therefore, will depend on whether the Court views them as permissible restrictions or prohibited usurpations. As I argue in the next two Parts, this framework means that statutory limitations on presidential appointments—as they are commonly understood—may face constitutional doom. However, I also provide a backdoor route to their salvation.

## II

### THE DEBATE OVER STATUTORY LIMITATIONS ON APPOINTMENTS

One scholar has recently concluded that, “[a]t least insofar as Supreme Court precedent is concerned, the constitutionality of [quali-

<sup>75</sup> *Id.* at 726–27.

<sup>76</sup> *Id.* at 759–76 (White, J., dissenting); *Chadha*, 462 U.S. at 972–73, 998–1002 (White, J., dissenting).

<sup>77</sup> *Chadha*, 462 U.S. at 963 (Powell, J., concurring).

<sup>78</sup> *Id.* (emphasis added).

<sup>79</sup> Justice Powell argued that the separation of powers problem in *Chadha* was not a usurpation of the executive role or a failure of bicameralism and presentment but a usurpation of the *judicial* role. *Id.* at 960.

<sup>80</sup> *Id.* at 963 (citing *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 433 (1977); *United States v. Nixon*, 418 U.S. 683 (1974)).

fications for appointees] is in all likelihood beyond question.”<sup>81</sup> However, at least six scholarly articles or notes have questioned this consensus,<sup>82</sup> as have three presidential administrations.<sup>83</sup> In this Part, I describe the two sides of the debate. First, I present the argument that not only are these statutory limitations essential to the functioning of the federal government, but they also do not present serious separation-of-powers concerns. I then acknowledge that despite the practicality of statutory limitations, the separation-of-powers doctrine laid out in Part I is unforgiving when applied to statutory limitations on appointments: If they are viewed as congressional attempts to specify the identity of federal officers, they present an incursive separation-of-powers problem and are likely unconstitutional.

### A. *Justifications for Statutory Limitations on Appointments*

#### 1. *The Functionalist Justification*

The administrative state has changed a great deal since the founding of the country and even since the 1926 decision in *Myers*. The modern federal regulatory apparatus is far larger than the founders could have imagined. Since the post–New Deal expansion of the federal government, statutory limitations on appointments have played an important role in the functioning of the federal government.

First, the ability of Senate confirmation alone to serve as an effective check on the qualifications of executive officers—what the founders likely intended by the “advice and consent” language<sup>84</sup>—diminishes as the size of the regulatory state grows. As of 2008, there were more than one thousand individuals holding offices that required Senate confirmation.<sup>85</sup> Eligibility requirements can play an important role as a heuristic or shorthand that allows Congress to keep tabs on the federal bureaucracy even when it cannot thoroughly investigate all Senate-confirmable officers in greater detail. In such a large government bureaucracy, it is more efficient to declare *ex ante* that no

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<sup>81</sup> GERHARDT, *supra* note 20, at 274.

<sup>82</sup> See, e.g., Gerhardt, *supra* note 15, at 534–35; Kochan, *supra* note 16; Volokh, *supra* note 14; Wulwick & Macchiarola, *supra* note 15, at 626; Note, *supra* note 18; Adam J. Rappaport, Note, *The Court of International Trade’s Political Party Diversity Requirement: Unconstitutional Under Any Separation of Powers Theory*, 68 U. CHI. L. REV. 1429 (2001).

<sup>83</sup> See *supra* notes 10–14 and accompanying text (describing presidential statements objecting to statutory limitations on appointments).

<sup>84</sup> U.S. CONST. art. II, § 2, cl. 2; see *infra* notes 102–05 and accompanying text (discussing views of Alexander Hamilton).

<sup>85</sup> See HENRY B. HOGUE ET AL., CONG. RESEARCH SERV., PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS (2008), available at <http://fpc.state.gov/documents/organization/113545.pdf> (listing all presidential appointees requiring Senate confirmation).

unqualified individuals will be permitted to slip through the cracks than to be faced with having to debate the qualifications of each nominee.

Second, and more importantly, the federal government has expanded in ways not anticipated by the founders. The original view of the federal government, if the text of the Constitution is any guide, was a small central government with a limited set of functions such as delivering mail,<sup>86</sup> coining money,<sup>87</sup> raising a national military in times of need,<sup>88</sup> and diffusing conflict between the states.<sup>89</sup> Giving a single executive official control over executing this small number of functions is a bounded, albeit important, task. Giving the President unfettered control over a vast administrative state, however, envisions a much more powerful executive branch. Allowing statutory limitations on the President's power over his subordinates, therefore, may actually be the best way to adhere to the intended constitutional model.<sup>90</sup>

Independent regulatory commissions are the paradigmatic example of how the federal government has expanded. Such agencies play critical roles in promoting the national welfare, and Congress has decided that the important decisions they make require bipartisan input. A quick search of the U.S. Code reveals over a dozen commissions (not including various advisory bodies) whose commissioners are appointed by the President, by and with the consent of the Senate, and which are subject to political party restrictions. These include, prominently, the FEC, the FTC, the SEC, the Nuclear Regulatory Commission, and the National Transportation Safety Board.<sup>91</sup> These

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<sup>86</sup> U.S. CONST. art. I, § 8, cl. 7.

<sup>87</sup> U.S. CONST. art. I, § 8, cl. 5.

<sup>88</sup> U.S. CONST. art. I, § 8, cl. 12–16.

<sup>89</sup> U.S. CONST. art. I, § 10; U.S. CONST. art. III, § 2, cl. 1 (extending judicial power of United States to “[c]ontroversies between two or more States”).

<sup>90</sup> Indeed, at least one prominent article argues that an originalist view of the Constitution allows limitations on executive power over administrative agencies. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 41 (1994) (“[T]he framers wanted to constitutionalize just some of the array of power a constitution-maker must allocate, and as for the rest, the framers intended Congress (and posterity) to control as it saw fit.”).

<sup>91</sup> 2 U.S.C. § 437c (2006) (Federal Election Commission); 5 U.S.C. § 1201 (2006) (Merit Systems Protection Board); 5 U.S.C. § 7104 (Federal Labor Relations Authority); 12 U.S.C. § 635a (2006) (Board of Directors for the Export-Import Bank of the United States); 12 U.S.C. § 1752a (National Credit Union Administration Board); 12 U.S.C. § 1812 (Board of Directors of the Federal Deposit Insurance Corporation); 12 U.S.C. § 2242 (Farm Credit Administration); 15 U.S.C. § 41 (2006) (Federal Trade Commission); 15 U.S.C. § 78d (Securities and Exchange Commission); 42 U.S.C. § 2000e-4 (2006) (Equal Employment Opportunity Commission); 42 U.S.C. § 2286 (Defense Nuclear Facilities Safety Board); 42 U.S.C. § 2996c (Board of Directors of the Legal Services Corporation); 42 U.S.C. § 5841 (Nuclear Regulatory Commission); 42 U.S.C. § 7171 (Federal Energy Regulatory Commission); 45 U.S.C. § 154 (2006) (National Mediation Board); 46 U.S.C.

independent agencies wield enormous power over areas such as elections, the economy, and public safety. This power needs to be constrained. For example, consider the FEC, which is entrusted with the enforcement of campaign finance law;<sup>92</sup> selective or ideological enforcement could be inimical to the fundamental democratic activity of electing our representatives.

By necessity, Congress has created a set of bipartisan or nonpartisan independent agencies to deal with critical issues of public concern. To put all of these agencies under the direct control of the President by allowing him to appoint whomever he desired (provided that the Senate confirmed his nominations) would create an executive with more power than the founders could have imagined. Ruling that statutory limitations on appointments are unconstitutional would be cutting off the Constitution's nose to spite its face. Despite any gridlock that might come from party-balanced agencies,<sup>93</sup> it is closer to the founders' vision than the alternative.

## 2. *The Necessary and Proper Clause*

Much of what Congress does is constitutionally permitted by the Necessary and Proper Clause of Article I, which gives Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the [Article I] Powers.”<sup>94</sup> The seminal case in Necessary and Proper Clause jurisprudence is *McCulloch v. Maryland*, in which Chief Justice Marshall penned the famous test for the validity of congressional action under the clause: “Let the end be . . . within the scope of the constitution, and all means . . . plainly adapted to that end, which are not prohibited, . . . are constitutional.”<sup>95</sup>

The Necessary and Proper Clause is a very powerful tool in Congress's relationship with the executive branch because it allows Congress to create and structure the federal bureaucracy.<sup>96</sup> Furthermore, even proponents of strong executive power agree that the

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§ 301 (2006) (Federal Maritime Commission); 49 U.S.C. § 701 (2006) (Surface Transportation Board); 49 U.S.C. § 1111 (National Transportation Safety Board).

<sup>92</sup> 2 U.S.C. § 437c.

<sup>93</sup> See, e.g., Amanda S. La Forge, Note, *The Toothless Tiger—Structural, Political and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations*, 10 ADMIN. L.J. 351, 360 (1996) (“[T]he political dynamic of the FEC plays an enhanced role when the Commission addresses sensitive political issues. Often such problems are left unresolved because the Commission is unable to reach the requisite four-vote majority required to find that a violation has occurred.” (citations omitted)).

<sup>94</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>95</sup> 17 U.S. (4 Wheat.) 316, 421 (1819).

<sup>96</sup> Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 739.

clause gives Congress “broad latitude to tell [officers] how, and on what matters, they will be available to help the President in executing federal law.”<sup>97</sup> Professors Lessig and Sunstein have argued that the original understanding of the clause would have even allowed Congress to give administrative power to officers who were completely independent of the President, provided that such delegation did not infringe on the powers textually committed to the President in Article II.<sup>98</sup>

Given Congress’s vast power to structure the federal bureaucracy under the Necessary and Proper Clause, it would be surprising if Congress did *not* have the power to specify eligibility requirements for certain officers. Recall Chief Justice Taft’s brief discussion of statutory qualifications in *Myers*: “To Congress . . . is given the establishment of offices, the determination of their 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 . . . .”<sup>99</sup> Although he did not cite any authority for this proposition, two Supreme Court opinions (from less than a decade before *Myers*) had described the Necessary and Proper Clause as giving Congress the power to enact “that which was *reasonably* appropriate and *relevant* to the exercise of a granted power.”<sup>100</sup> Chief Justice Taft’s similar language thus suggests that when Congress establishes an office, its “necessary and proper” authority extends to applying reasonable and relevant restrictions to that office—including the enumeration of eligibility requirements.

## B. Arguments Against Statutory Limitations on Appointments

### 1. The Textual Argument

The principal argument against statutory limitations is simply that the text of the Constitution gives the legislative branch one method—and one method only—to restrict the President’s appointment power: by providing or withholding the advice and consent of the Senate. Statutory limitations are not the “consent” of the current Senate; they are *ex ante* statutory restrictions imposed by previous House and Senate votes. Similarly, a binding *ex ante* requirement does not consti-

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<sup>97</sup> Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 *YALE L.J.* 541, 592 (1994).

<sup>98</sup> Lessig & Sunstein, *supra* note 90, at 69.

<sup>99</sup> *Myers v. United States*, 272 U.S. 52, 129 (1926).

<sup>100</sup> *Marshall v. Gordon*, 243 U.S. 521, 537 (1917) (emphasis added); *see also* *York Mfg. Co. v. Colley*, 247 U.S. 21, 24 (1918) (enunciating same test).

tute “advice,” which, by definition, is not binding.<sup>101</sup> Moreover, statutory limitations cannot be construed as part of a “nomination” by the President, as they may have been signed into law by a previous President or even passed by a congressional override of a presidential veto.

Proponents of this reading find support from Alexander Hamilton, who emphasized this feature of the Constitution in *Federalist* 76: “In the act of nomination, [the President’s] judgment alone would be exercised; . . . his responsibility would be as complete as if he were to make the final appointment.”<sup>102</sup>

Hamilton envisioned Senate confirmation only as a check of last resort and he believed it was “not very probable that [the President’s] nomination would often be overruled.”<sup>103</sup> The only time the Senate would need to utilize its power to withhold consent would be if the President made a very ill-advised nomination, in which case the confirmation process would serve “to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.”<sup>104</sup> And even in such cases in which the Senate withholds its consent, its role is a simple yes or no. “They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose* . . . .”<sup>105</sup> Beyond the simple yes or no by the Senate, the President should have complete discretion in his choice of nominees. Statutory qualifications, under this view, have no place in the process.

In light of Hamilton’s concerns regarding nepotism, consider the federal anti-nepotism statute.<sup>106</sup> The statute, which by its express language applies to the President, says that a “public official” may not appoint a relative for any position under his jurisdiction.<sup>107</sup> Hamilton’s understanding of the appointments process was that the only way for Congress to block a nepotistic appointment was for senators to vote against a specific nominee. To bar the President, *ex ante*, from nomi-

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<sup>101</sup> See Volokh, *supra* note 14, at 755–57 (arguing that text of Constitution suggests advice should be given after nomination and citing historic and modern definitions of “advice” as evidence that it means nonbinding recommendation).

<sup>102</sup> THE FEDERALIST NO. 76, at 456–57 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>103</sup> *Id.* at 457.

<sup>104</sup> *Id.*

<sup>105</sup> THE FEDERALIST NO. 66, *supra* note 102, at 405 (Alexander Hamilton) (emphasis in original).

<sup>106</sup> 5 U.S.C. § 3110(b) (2006); *supra* note 9 and accompanying text (describing statute that prohibits President from appointing relatives to office).

<sup>107</sup> 5 U.S.C. § 3110(b).

nating his preferred candidate is to interfere with his basic prerogative to choose his subordinates.

Recent presidential administrations have taken this position.<sup>108</sup> The George H.W. Bush Administration objected to the political party requirements of independent agencies,<sup>109</sup> and Presidents Clinton<sup>110</sup> and George W. Bush<sup>111</sup> both issued signing statements arguing for the unconstitutionality of statutory qualifications.<sup>112</sup>

## 2. *Perhaps Necessary, but Nonetheless Improper*

Furthermore, the argument goes, the Necessary and Proper Clause does not give Congress the power to impose such restrictions on the President. Recall the second part of Chief Justice Marshall's *McCulloch* test: "[A]ll means . . . which are not prohibited . . . are constitutional."<sup>113</sup> As scholars point out, "[t]he word 'proper' is used in the [c]lause in an almost jurisdictional sense, precluding Congress from passing laws that would violate the constitutional structure established in the text of the Constitution itself."<sup>114</sup> If one accepts a reading of the Constitution that expressly forbids limitations on the President's choice of appointees, then the Necessary and Proper Clause gives Congress no power to enact them.<sup>115</sup>

Limitations on appointments involve Congress statutorily tying the hands of the President in his executive prerogative of choosing officers, a process in which Congress normally has no power. The Senate, as Hamilton wrote, has only the power to veto, never to choose.<sup>116</sup> Giving the Senate a choosing role—and giving the House *any* role—is a case of congressional incursion and aggrandizement, and it is thus properly examined as an *incursive* separation of powers problem. The Court's *Chadha* and *Bowsher* decisions indicate that such incursions are categorically prohibited. That such incursions are

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<sup>108</sup> See *supra* notes 10–14 and accompanying text (describing presidential statements objecting to statutory requirements on appointments).

<sup>109</sup> OLC, Common Legislative Encroachments, *supra* note 10, at 250.

<sup>110</sup> Clinton, Signing Statement, *supra* note 12, at 1907.

<sup>111</sup> Bush, Signing Statement, *supra* note 13, at 1743.

<sup>112</sup> Bradley & Posner, *supra* note 14, at 326–27; Volokh, *supra* note 14, at 747 & n.12.

<sup>113</sup> 17 U.S. (4 Wheat.) 316, 421 (1819) (emphasis added).

<sup>114</sup> Calabresi & Prakash, *supra* note 97, at 587.

<sup>115</sup> See Volokh, *supra* note 14, at 762–64 (“Congress is not granted any new powers by the Necessary and Proper Clause.”).

<sup>116</sup> See *supra* text accompanying note 105 (discussing role of Senate in confirmation process).

so common does not save them if they are prohibited by the Constitution.<sup>117</sup>

Given the strength of the incursion argument against statutory limitations on appointments, the authors who have addressed this question in recent years all conclude that such laws are constitutionally prohibited. I agree that, as statutory limitations on appointments are currently viewed, this result appears to follow from the Court's separation-of-powers jurisprudence. There is, however, a different view of statutory limitations on appointments that allows them to fit within the text of the Constitution. I present this view in the next Part.

### III

#### THE ESTABLISHMENT PARADIGM

In order to preserve statutory limitations on the President's appointment power in the face of this constitutional threat, I propose a shift in how such restrictions are viewed in the constitutional analysis: These laws should be interpreted not as putting limits on the *choice of officer* but rather as putting limits on the *scope of the office*. Unlike congressional usurpations of the President's power to choose which persons to appoint to federal office, Congress's power to define the powers and scope of an executive office is well-established, uncontroversial, and expansive. I introduce this paradigm shift through a hypothetical.

##### A. *Valid Officers Lacking Official Power*

The statute creating the FEC commands: "No more than 3 members of the Commission . . . may be affiliated with the same political party."<sup>118</sup> Currently, the FEC is composed of three Democrats and three Republicans. Imagine that one of the Republicans resigns and a Democratic President replaces him with another Democrat, in violation of the statute. Assume a plaintiff with proper standing brings suit, and the court determines that the political party balance requirement is constitutional, legal, and binding.<sup>119</sup> The appointment would violate the FEC's enabling statute, but what would be the proper remedy?

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<sup>117</sup> Indeed, Justice White had lamented that striking down the legislative veto "sound[ed] the death knell for nearly 200 . . . statutory provisions." *INS v. Chadha*, 462 U.S. 919, 967 (1983) (White, J., dissenting).

<sup>118</sup> 2 U.S.C. § 437c(a)(1) (2006).

<sup>119</sup> The court would also have to find that the controversy is not a nonjusticiable political question that would be considered inappropriate for resolution by the courts and best resolved by the two elected branches of government. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 129 (3d ed. 2006) (discussing political question doctrine). The political question doctrine is a plausible way that a court could avoid the appointment power question altogether.

The first possible approach is for the court to focus on the newly appointed commissioner and to rule that he is not a valid officer. However, nothing in the text of the statute commands this outcome; the law merely states that at any particular *moment*, no more than three members “may be affiliated” with a particular party. Furthermore, what if the Commission’s political balance was thrown off because an existing member changed his party affiliation from Republican to Democratic? In that case, the statute has still been violated even though there was no new appointment. Should the rule be that the switching commissioner has to leave the Commission? Such a rule would be inappropriate, as the statutory text simply does not compel the court to focus on a particular commissioner.

A plain reading of the statute leads to the conclusion that the proper remedy is not to remove any particular individual from the Commission, but to *disempower* the Commission as a whole until the defect in the balance between political parties is corrected. Indeed, this was the nature of the Supreme Court’s order in *Buckley*.<sup>120</sup> All six members of the FEC remained validly appointed commissioners who validly held office, but the Commission itself was broken and could not act. In other words, the political party balance requirement is not actually a restriction on the President’s ability to appoint any given commissioner, but a restriction on the Commission’s ability to act at all.

I propose that a similar approach can be used even if the office is occupied only by a single officer. Consider what would happen if the President nominated and the Senate confirmed a Secretary of Defense who was not a civilian, as currently required by law.<sup>121</sup> Under my proposal, he would still be a valid officer—as he would have been validly nominated and confirmed under the Constitution—but he would not be able to exercise the powers of the Secretary of Defense, as being a civilian is part of what it means to be Secretary of Defense.

Lest this proposal be dismissed as fanciful, the idea of separating the powers of an office from the person of the officeholder is actually not new. Professors Calabresi and Prakash, in promoting their views of the breadth of executive power, argue that even if one accepts as constitutional the restrictions on the removal power allowed in *Myers* and *Morrison*, “the President may still revoke [an] officer’s executive

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<sup>120</sup> In *Buckley*, the Court ordered that “[t]he powers conferred by the [FECA] upon the Federal Election Commission . . . cannot be exercised by the Commission as presently constituted.” *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (emphasis added). Although the Court ruled that the Commission could not take official action, it stayed its order for thirty days so that Congress could have time to fix the defect. *Id.* at 143–44.

<sup>121</sup> 10 U.S.C.A. § 113(a) (West 2010).

authority, leaving such an officer with a title and salary but with no authority to exercise executive power.”<sup>122</sup> One can be an officer in title but a “mere cipher” in practice.<sup>123</sup> Under this view, the Constitution allows severability between an officer’s commissioned office and the powers that go with that office. If the President nominates a non-civilian as Secretary of Defense and that nominee is confirmed by the Senate, he will still be Secretary of Defense and validly hold that position (including his place in the presidential line of succession<sup>124</sup>), but he will have no executive authority. He will be a “mere cipher” in the executive hierarchy.<sup>125</sup>

### B. *The Extent of “Establishing” an Office*

In *Buckley*, the Supreme Court explained that Congress may not “vest in itself, or in its officers, the authority to appoint officers of the United States.”<sup>126</sup> However, the Court admitted that “the authority of Congress to *create* an office or a commission . . . is broad indeed.”<sup>127</sup> As I propose, the ability of Congress to restrict the President’s choice of appointees can fit into the text of the Constitution under the

<sup>122</sup> Calabresi & Prakash, *supra* note 97, at 598.

<sup>123</sup> *Id.* at 599.

<sup>124</sup> Under 3 U.S.C. § 19 (2006), in the case of death, resignation, or other inability of the President to act as such, his powers and duties fall upon the next person in the presidential line of succession, which includes the Vice President, the Speaker of the House, the President Pro Tempore of the Senate, and the cabinet secretaries. In my hypothetical, the Secretary of Defense would retain his position in this hierarchy even if he could not carry out the job of Secretary of Defense.

<sup>125</sup> Consider also the inauguration of President Obama, which occurred at approximately 12:10 p.m. on January 20, 2009. Several law professors noted that the Twentieth Amendment, which says that “[t]he terms of the President and Vice President shall end at noon . . . and the terms of their successors shall then begin,” U.S. CONST. amend. XX, § 1, made Mr. Obama the President as of noon. However, Article II’s requirement that the President take the oath of office “[b]efore he enter[s] on the Execution of his Office” may have prevented him from exercising any executive authority until after he took the oath ten minutes later. U.S. CONST. art. II, § 1, cl. 8. As one professor wrote, “[T]he prevailing view seems to be that he became President under the Twentieth Amendment at noon and had to take the oath before he could ‘enter on the [E]xecution’ of his office—in other words, before he could wield any executive power.” Posting of Howard Wasserman, *Who Was President While Perlman Fiddled?*, PRAWFSBLAWG (Jan. 20, 2009, 6:15 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2009/01/who-was-president-while-perlman-fiddled.html> (quoting U.S. CONST. art. II, § 1, cl. 8); *see also* Orin Kerr, *Who Was President from 12:00 to 12:10?*, VOLOKH CONSPIRACY (Jan. 20, 2009, 3:26 PM), <http://www.volokh.com/posts/1232483177.shtml> (“So it looks to me that Obama became the President at noon, and that he was supposed to (and did) take the oath before exercising his executive duties, in this case at 12:10.”). Similarly, in this new interpretation, officers may hold an office without holding the power to perform any official actions.

<sup>126</sup> *Buckley v. Valeo*, 424 U.S. 1, 135 (1976).

<sup>127</sup> *Id.* at 134 (emphasis added).

heading of “establishing,”<sup>128</sup> “constituting,”<sup>129</sup> or “creating”<sup>130</sup> the office, rather than the heading of “appointing” the officer. When Congress establishes an office, it can establish the office’s jurisdiction, its powers, and *how* it must execute the laws;<sup>131</sup> I merely posit that “how” includes “by whom.” This paradigm shift—from viewing a statutory limitation on an appointment as a restriction on the appointment to viewing it as an inherent characteristic of the office—has the ability to redefine the constitutional question. Furthermore, not only does this new theory of statutory eligibility requirements provide a constitutional justification, it also imposes clear limits on its own reach.

### 1. *The “Reasonable and Relevant” Limitation*

If limitations on officers are constitutional because they are inherent in the nature of the office itself, then Congress is limited to those requirements that are rationally conceivable as such—or, as Chief Justice Taft put it in *Myers*, those qualifications that are “reasonable and relevant.”<sup>132</sup> Thus, the requirement that the director of the Patent and Trademark Office (PTO) must “ha[ve] a professional background and experience in patent or trademark law”<sup>133</sup> would be permissible, as it would be covered by any definition of “reasonable and relevant.” And just as clearly *invalid* were the requirements in the National Defense Act of 1916, which allowed a vacancy in the Judge Advocate’s Department to be filled by a person

from civil life, not less than forty-five nor more than fifty years of age, who shall have been for ten years a Judge of the Supreme Court of the Philippine Islands, shall have served for two years as a Captain in the Regular or Volunteer army, and shall be proficient in the Spanish language and laws.<sup>134</sup>

It is unlikely that a statutory requirement that would allow only one person to qualify for the office—in this case Judge Adam C. Carson—would be considered “reasonable.”<sup>135</sup>

<sup>128</sup> *E.g.*, U.S. CONST. art. II, § 2, cl. 2.

<sup>129</sup> *E.g.*, U.S. CONST. art. I, § 8, cl. 9.

<sup>130</sup> *E.g.*, *Buckley*, 424 U.S. at 134.

<sup>131</sup> For example, the Administrative Procedure Act, 5 U.S.C. §§ 500–96 (2006), outlines in detail the procedures that all agencies (including cabinet secretaries) must follow in promulgating regulations.

<sup>132</sup> *Myers v. United States*, 272 U.S. 52, 129 (1926).

<sup>133</sup> 35 U.S.C. § 3(a)(1) (2006).

<sup>134</sup> National Defense Act of 1916, ch. 134, § 8, 39 Stat. 166, 169 (current version at 32 U.S.C. § 104 (2006)).

<sup>135</sup> CORWIN, *supra* note 38, at 363 n.20.

Between these extremes, however, there is room for debate as to where such restrictions become impermissible. Some qualifications are easily classifiable as part of the nature of an office. One can persuasively argue that being in civilian life for at least seven years is part of what it means to be Secretary of Defense in a country with a civilian-led military. Similarly, for many of the offices with professional qualifications—such as the PTO director—one can plausibly argue that the job simply cannot be done by an individual who lacks the relevant professional qualifications, and thus having such qualifications is an essential part of the job.

However, some of the limitations on eligibility stretch beyond mere professional qualifications. Take the fascinating case of Charlene Barshefsky, for instance. In 1997, President Clinton nominated Barshefsky to the post of U.S. Trade Representative.<sup>136</sup> Barshefsky, who had previously served in the deputy position to that post, was well qualified for the job, possessing “extensive experience as a trade negotiator.”<sup>137</sup> However, she had at one point in her career worked for the Canadian government in monitoring lumber import disputes with the United States, rendering her ineligible for the post under a statute that prohibits any person who has “directly represented, aided, or advised a foreign entity . . . in any trade negotiation” from becoming the trade representative.<sup>138</sup> Although it may be preferable or prudent that the trade representative not have advised a foreign government in trade negotiations, this restriction is not easily construed as part of the nature of the office. Whenever a nominee is considered exceptionally qualified but fails to meet the relevant statutory eligibility requirements, this should raise a red flag as to the constitutionality of that statutory requirement. In such cases, it would appear that Congress is not simply creating an office, but is also trying to reach forward in time to affect the substantive outcome of that office’s decisionmaking, an unconstitutional incursion on executive power.

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<sup>136</sup> David E. Sanger, *Charlene Barshefsky: Trade Representative*, N.Y. TIMES, Dec. 14, 1996, at 11.

<sup>137</sup> Helene Cooper, *Must Barshefsky Add Beltway Smarts to Global Skills?*, WALL ST. J., Dec. 12, 1996, at A14.

<sup>138</sup> 19 U.S.C. § 2171(b)(3) (2006). Fortunately for Barshefsky, President Clinton and Congress came up with an ad hoc solution: a specific amendment to the law to permit Barshefsky’s appointment. Joint Resolution of Mar. 17, 1997, 111 Stat. 11 (current version at 19 U.S.C. § 2171 (2006)) (“[N]otwithstanding . . . any other provision of law, the President, acting by and with the advice and consent of the Senate, is authorized to appoint Charlene Barshefsky as the United States Trade Representative.”). As a unique incident, the story of Charlene Barshefsky has been featured prominently in other scholarship on this subject. For example, the story was used as the introduction to Volokh, *supra* note 14, at 745–46, and described in GERHARDT, *supra* note 20, at 279.

This analysis would also likely condemn the federal anti-nepotism statute<sup>139</sup> as applied to presidential appointments of principal officers. It is not in the nature of any office that it cannot be filled by a relative of the appointing power; one can be exceptionally qualified for an office and still be a relative of the President. Hamilton's argument from *The Federalist* can provide a guide: If an eligibility requirement is designed "to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity," then these are signs that the relevant trait is one that cannot constitutionally be barred *ex ante*, but only by the Senate's decision to withhold its approval.<sup>140</sup>

## 2. *The "Take Care" Limitation*

In Part II, I discussed how supporters and opponents of statutory limitations on appointments would divide on the question of whether they presented only functional separation-of-powers concerns (restriction of the power of the President) or also incursive separation-of-powers concerns (incursion by Congress into executive powers). The new establishment paradigm I describe would settle the debate in favor of the "functional only" position. By viewing eligibility limitations as merely part of an office, and separating valid from invalid limitations based on reasonableness and relevancy, this paradigm avoids the Appointments Clause problem described in Part II. Congress is simply creating an office with particular features, not trying to be a part of the appointment process or to specify the identity of an officer. Without any incursion by Congress into an Article II matter, the incursion concern drops out.

However, the functional concern remains: Do statutory limitations on eligibility interfere too much with the Take Care Clause and "the President's ability to perform his constitutional dut[ies]"?<sup>141</sup> As a general matter, the answer is no. Most eligibility requirements are minimal limitations on the President's ability to execute the laws—certainly more minimal than the insulation of an independent counsel from presidential control. Without an incursive separation-of-powers problem, and with the minimal functional separation-of-powers concern, the establishment paradigm fits comfortably within a strict textual reading of the Constitution while still capturing the functional

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<sup>139</sup> 5 U.S.C. § 3110(b) (2006); *supra* note 9 and accompanying text (describing statute that prohibits President from appointing relatives to office).

<sup>140</sup> THE FEDERALIST NO. 76, *supra* note 102, at 457 (Alexander Hamilton).

<sup>141</sup> *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

benefits of allowing Congress to restrict the President's choice of officers *ex ante*.

#### IV INDEPENDENT AGENCIES AND POLITICAL PARTY BALANCE

Finally, I return to the place where I began—the political party balance requirements of independent regulatory commissions. This is the most controversial limitation on the President's power and also the most difficult analytically. The trouble is that even if such requirements pass the “reasonable and relevant” test,<sup>142</sup> they still could fail the *Nixon* balancing test<sup>143</sup> if the Court determines they go too far in interfering with the President's ability to “take care that the laws be faithfully executed.”<sup>144</sup> Because this difficulty implicates issues well beyond the scope of this Note, I do not provide a definitive answer. I merely try to frame the debate.

##### *A. Independent Agencies and Executive Power*

The features of independent agencies that make political party balance requirements important are the very same factors that implicate the President's duty to take care that the laws are faithfully executed. The FEC, the FTC, the SEC, and other independent agencies are not simple adjudicatory bodies; they are bodies whose decisions to bring or not to bring enforcement actions can have an enormous effect on the way elections are overseen, trade is conducted, or securities are traded throughout the country. They regulate extremely important areas of national life, and if a President could pack one of these agencies with members of the same party, regulation of the administrative state might be very different than it is today.

Restrictions on the appointment of agency commissioners thus has the potential to be much more important than any such restrictions on the removal power. In the case of independent agencies, restrictions on removal do not overly interfere with the President's ability to execute laws because the issue of removal never arises for most officers. Controlling policy by removal is an indirect and politi-

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<sup>142</sup> *Myers v. United States*, 272 U.S. 52, 129 (1926); *see also supra* notes 30–33 and accompanying text (discussing Congress's power to impose statutory qualifications on presidential appointees).

<sup>143</sup> *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977); *see also supra* notes 61–67 and accompanying text (discussing balance between President's need to accomplish his constitutionally assigned functions and Congress's need to promote objectives within its constitutional authority).

<sup>144</sup> U.S. CONST. art. II, § 3.

cally expensive way to operate—and often a fruitless one if the President is not free to appoint officers with whom he will have fewer disagreements. A President would rather have the power to appoint commissioners free of political party constraints than the power to remove FEC commissioners with whom he disagreed. The political party balance requirement thus presents a significant restriction on the ability of the President to implement policy as he sees fit. The question remains whether this restriction is constitutionally fatal.

### B. *Theories of Executive Power*

The answer to this question depends, in turn, on the question of the nature of the executive power vested in the President. Entire forests have been sacrificed to discussions of this issue, and there is no universally accepted answer. Without a consensus, trying to determine the fate of bipartisanship requirements is a fruitless exercise. Although this debate is beyond the scope of this Note, I provide the reader with a very brief overview in order to show how the debate should proceed going forward.

There are three basic theories about how modern administrative agencies fit into the constitutional structure. First are “non-executive” theories, which maintain that the Constitution’s vesting of the “executive Power” in the President reserves to the President only a limited number of powers.<sup>145</sup> Professors Lessig and Sunstein suggest that a version of this theory may have been the original intent of the founders.<sup>146</sup> They argue that there is a historical difference between the political “executive” powers and the bureaucratic “administrative” powers.<sup>147</sup> While the President must have plenary power over “executive” offices—foreign affairs, military, treasury, etc.—the same is not true for “administrative” offices that regulate sectors of the American economy.<sup>148</sup>

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<sup>145</sup> Prakash, *supra* note 96, at 707–09. An extreme theory would hold that these are limited to the specific powers listed in Article II, including the nomination power, power to make treaties, and Commander-in-Chief powers. Under this view, Congress can place authority to administer a statutory scheme in the hands of whomever it wants. However, there is little support for such an extreme view.

<sup>146</sup> Lessig & Sunstein, *supra* note 90, at 4 (“Conventional wisdom . . . that the framers believed in a hierarchical executive branch, with the President in charge of all administration of the laws . . . is wrong . . .”).

<sup>147</sup> *Id.* at 39–41.

<sup>148</sup> *Id.* at 54–55. More specifically, Lessig and Sunstein argue:

[W]ith respect to people exercising the President’s constitutionally specified authority, the President must have hierarchical control; but beyond these enumerated aspects of ‘the executive power’ is an undefined range of powers that we would now describe as ‘administrative power,’ marking a domain within

Second is the “chief overseer” theory, generally attributed to Peter Strauss and his seminal 1984 article on the separation of powers in the administrative state.<sup>149</sup> The President, the theory posits, is charged with taking care that the laws “*be faithfully executed*,” not with “faithfully executing” the laws. The President’s proper role in the executive branch may thus be more of an “overseer” than a “decider,”<sup>150</sup> but the President must at least have sufficient oversight of administrative agencies so as to be ultimately responsible for all agency decisions.<sup>151</sup> This theory leaves room for a wide range of permissible levels of insulation between the President and the agencies, and it could allow for the oversight bar to be higher or lower for certain types of subordinates. In Strauss’s view, the ability of Congress to make these decisions is well within its Necessary and Proper Clause powers and raises no serious threat to the separation of powers.<sup>152</sup>

The chief overseer theory draws support from recent separation-of-powers jurisprudence. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the case in which the Supreme Court invalidated the double-insulation feature of the Public Company Accounting Oversight Board, much of the Court’s language points in this direction.<sup>153</sup> According to the Court, the double-insulation provision created “a Board that is not accountable to the President, and a President who is not responsible for the Board.”<sup>154</sup> The Court explained: “The Constitution requires that a President chosen by the entire Nation *oversee* the execution of the laws,”<sup>155</sup> such that the public has the “ability to pass judgment on [the President’s] efforts.”<sup>156</sup> The Court did not go so far as to require anything stronger than “oversight,” and it explicitly did not use *Free Enterprise Fund* as an opportunity to question the holding in *Humphrey’s Executor* that

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which one has a duty to act according not to one’s own judgment, but according to the standards or objectives of a law.

*Id.*

<sup>149</sup> See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 577–78 (1984) (arguing for separation-of-powers theory that focuses more on “separation of functions” and “checks and balances” than rigid categories). The appellation “chief overseer” comes from Prakash, *supra* note 96, at 709–12 (describing Peter Strauss’s theory).

<sup>150</sup> *Id.* at 648.

<sup>151</sup> *Id.* at 648–49.

<sup>152</sup> *Id.* at 623.

<sup>153</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151–61 (2010).

<sup>154</sup> *Id.* at 3153.

<sup>155</sup> *Id.* at 3155–56 (emphasis added).

<sup>156</sup> *Id.* at 3155.

“simple disagreement” with an independent agency’s policies does not constitute “good cause” for removal.<sup>157</sup>

Finally, the “unitary executive” theory posits that the President is the chief executive at the top of the pyramid of the entire federal bureaucracy.<sup>158</sup> For any agency, the President *must* have the power to control that agency’s decisions, either through supplanting or vetoing the agency’s decisions, removing the relevant officer, or revoking the officer’s executive authority.<sup>159</sup> Unitary executive theories are rooted in a very strong reading of the President’s power under the Take Care Clause—that the President cannot fulfill the constitutional mandate of taking care that the laws are faithfully executed without having direct control over every aspect of a law’s execution.

### C. *A Threat to Executive Powers?*

Thus, the question of whether political party balance requirements “prevent[ ] the Executive Branch from accomplishing its constitutionally assigned functions”<sup>160</sup> will depend entirely on how one views the nature of those functions. Under a unitary executive theory, political party balance requirements are clear impositions on the President’s constitutional prerogatives. On a weaker chief overseer theory or a non-executive theory, the requirements do not pose a threat to the President’s administrative responsibilities. Absent the existence of a broadly accepted theory of the President’s role in the administrative state, the constitutionality of the political party balance requirements is an open question.

## CONCLUSION

Statutory limitations on appointees for federal offices have existed since the beginning of the nation’s history. That no President has tried to challenge them is perhaps a testament to the stability of our political system and the commendable suspicion on the part of the American people of any attempts to consolidate political power. I have attempted in this Note to provide some guidelines for how to assess the constitutional validity of such statutory limitations should the issue ever arise. Viewed as congressional incursions into the executive prerogative of nomination, such limitations would raise serious constitutional concerns. Viewed as an exercise of Congress’s power to

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<sup>157</sup> *Id.* at 3157–58.

<sup>158</sup> *See, e.g.,* Prakash, *supra* note 96, at 713–42 (detailing “the textual foundations of the chief executive thesis”).

<sup>159</sup> Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1166 (1992).

<sup>160</sup> *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977).

establish offices, however, they are constitutionally permissible as essential elements of offices. This paradigm shift also provides a limiting function, permitting only “reasonable and relevant” limitations that can actually be considered elements of the office.

The Take Care Clause always remains, however. As legislative restrictions imposed on the President, any statutory limitations are subject to a case-by-case balancing test. Even under the relatively lenient *Nixon* standard, political party balance requirements might be unconstitutional under a strong unitary theory of executive power. However, without a comprehensive and coherent theory about how independent agencies fit into the constitutional structure, we cannot fully analyze the constitutionality of political party balance requirements. Although only time will tell if the issue of statutory limitations on presidential appointments is ever formally challenged, it remains an essential and under-explored piece of the separation-of-powers puzzle contained in the Constitution.