WHY CONGRESS CANNOT DELEGATE AUTHORITY TO CREATE OFFICES, BUT CAN AUTHORIZE ADMINISTRATIVE DELEGATIONS FROM OFFICES

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ABSTRACT

The Appointments Clause, which governs appointments to offices, also addresses how offices are created, providing that they "shall be established by Law." Courts and commentators generally agree that this provision gives Congress a role in creating offices, but have otherwise given it far less attention than the Clause's rules for appointments. Based on textual, historical, and structural perspectives, I identify three implications that these authorities largely overlook.

First*, congressional power over office creation is exclusive. Statutes must directly vest positions with the significant authority of an office and*

cannot delegate this task to another branch. Second*, although Congress cannot delegate authority to create offices, it may authorize officers to administratively delegate duties to agents acting on their behalf, because such delegations do not create new offices. They therefore need not be established and filled pursuant to the Clause even when officers broadly delegate authority.* Third*, as a matter of constitutional law, administrative delegations are ineffective once a delegator's office is vacant, leaving no officer in whose name an agent can exercise delegated authority. Instead, the Executive Branch should address vacancies by making appointments to offices vested with acting duties by statute.*

I. INTRODUCTION

Robert Mueller's designation as Special Counsel to investigate Russian interference in the 2016 presidential election[1] sparked a sharp debate over whether his appointment violated Article II of the Constitution. Arguments raged in multiple fora, from Twitter[2] and the legal blogosphere[3] to mainstream press opinion columns[4] and academic journals.[5] The D.C. Circuit ultimately upheld the designation as a valid

1. U.S. Dep't of Just., Order No. 3915-2017, Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (May 17, 2017) [hereinafter DOJ Order 3915-2017].

2. *Compare, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (June 4, 2018 10:04 am), https://twitter.com/realdonaldtrump/status/1003637916919320577? [https://perma.cc/F8TD-CGM3] ("The appointment of the Special Counsel is totally UNCONSTITUTIONAL!"), *with* Steve Vladeck (@SteveVladeck) TWITTER (May 24, 2018 12:28 pm), https://twitter.com/steve_vladeck/status/999688652044230662 [https://perma.cc/2Z7T-HTYQ] ("[T]he hysteria and hyperbole surrounding Mueller and the Appointments Clause is way, way off—and is somewhere between incoherent and disingenuous.").

3. *E.g.,* George Conway, *The Terrible Arguments Against the Constitutionality of the Mueller Investigation*, LAWFARE (June 11, 2018 5:54 pm), https://www.lawfareblog.com/terrible-arguments-against-constitutionality-mueller-investigation [https://perma.cc/W3AS-9XUX].

4. *E.g.*, Jennifer Rubin, Opinion, *A Trump Appointee Dismisses a Bogus Argument Challenging Mueller*, WASH. POST (Aug. 13, 2018 12:45 pm), https://www.washingtonpost.com/blogs/right-turn/wp/2018/08/13/a-trump-appointee-dismisses-a-bogus-argument-challenging-the-special-prosecutor [https://perma.cc/V7BG-XNQF]; Steven G. Calabresi, Opinion, *Mueller's Investigation Crosses the Legal Line*, WALL ST. J. (May 13, 2018), https://www.wsj.com/articles/muellers-investigation-crosses-the-legal-line-1526233750 [https://perma.cc/VNN2-6J3Y].

5. *Compare* Stephen Gillers*, Because They Are Lawyers First and Foremost: Ethics Rules and Other Strategies to Protect the Justice Department from a Faithless President*, 57 GA. L. REV. 163, 188 (2022) ("Mueller's appointment should . . . be upheld.") *with*

appointment under the Appointments Clause[6] to an "inferior office[]" exempt from presidential nomination and Senate confirmation ("PAS").[7] Despite the extensive debate, most commentators paid little attention to the implications of a statute cited as authority for the designation, which allows the Attorney General to "authoriz[e] performance by any other officer [or] *employee* . . . of the Department of Justice of *any function of the Attorney General*."[8] Almost without exception, both sides assumed that Mr. Mueller wielded the powers of a distinct office, appointments to which had to comply with the Clause.[9]

More recently, Justice Gorsuch, joined by Justice Kavanaugh, dissented from the denial of certiorari in *Donziger v. United States*.[10] Attorney-activist Steven Donziger had sought review of a district court's appointment of private counsel under Fed. R. Crim. P. 42(a)(2) to prosecute him for contempt after the U.S. Attorney declined prosecution due to insufficient resources.[11] The dissent asserted that Rule 42, which was adopted by the Judiciary rather than by an Act of Congress, was not a permissible instance of "Congress . . . by Law" exempting an inferior office from the PAS process.[12] But the dissent did not address a related issue, raised by Professor Mascott in an amicus brief, concerning whether Rule 42, regardless of its appointment mechanism, violates a threshold requirement that offices "shall be established by Law."[13]

The Mueller and *Donziger* controversies may appear to have little in common besides the broad issue of appointments. But both implicate a specific aspect of Appointments Clause jurisprudence concerning the nature of offices subject to the Clause, albeit one that received little

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Steven G. Calabresi & Gary Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, 95 NOTRE DAME L. REV. 87 (2019).

6. U.S. CONST. art. II, § 2, cl. 2.

7. *In re* Grand Jury Investigation, 916 F.3d 1047, 1052 (D.C. Cir. 2019) (quoting U.S. CONST. art. II, § 2, cl. 2).

8. 28 U.S.C. § 510 (emphasis added), *cited by* DOJ Order 3915-2017, *supra* note 1.

9. *E.g.*, Conway, *supra* note 3 ("Mueller is an inferior officer . . . ."); Calabresi, *supra* note 4 ("Only a principal officer . . . can behave the way Mr. Mueller is behaving."). *But see* Marty Lederman, *The Constitutional Challenge to Robert Mueller's Appointment (Part II): Is Mueller Even an Officer Subject to the Appointments Clause?* JUST SECURITY (Oct. 26, 2018), https://www.justsecurity.org/61227/constitutional-challenge-special-counsel-mueller-post-no-2-office-appointments-clause-applies [https://perma.cc/5GDN-H3KR].

10. 143 S.Ct. 868 (2023) (Gorsuch, J., dissenting).

11. *See* United States v. Donziger, 38 F.4th 290, 295 (2d. Cir. 2022), *cert. denied sub. nom. Donziger v. United States*, 143 S.Ct. 868 (2023).

12. *Donziger*, 143 S.Ct. at 869 (Gorsuch, J., dissenting) (quoting U.S. CONST. art. II, § 2, cl. 2).

13. Brief for Professor Jennifer L. Mascott as Amicus Curiae in Support of Petitioner at 2–3, 7–10, Donziger v. United States, 143 S. Ct. 868 (2003) (No. 22-274) (quoting U.S. CONST. art. II, § 2, cl. 2).

attention in the ensuing debates. Historically, there was understood to be a critical difference between offices subject to the Clause, which must be "established by Law,"[14] and delegation of comparable authority by nonlegislative action, which cannot create an "Office" within the meaning of Article II.[15] This distinction is rarely explored in contemporary jurisprudence or commentary but has important ramifications due to two increasingly common agency practices. First, agencies often create office-like positions to facilitate effective governance, ranging from adjudicatory bodies[16] to Mr. Mueller's Special Counsel position.[17] Second, as agencies grapple with a growing number of vacancies in PAS roles,[18] they often rely on delegations by outgoing officers to enable others to exercise "acting" duties once the delegator's position is vacant.[19]

Although the Supreme Court has not directly addressed the validity and permissible scope of these practices, they raise critical questions concerning Congress' prerogative under the Appointments Clause to shape the federal bureaucracy, whose structure serves to "channel and constrain" Executive power.[20] Certain administrative assignments of duties, such as wholesale delegations of adjudicatory power to other agencies,[21] use of "czars" outside of statutory departmental structures,[22] or

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14. U.S. CONST. art. II, § 2, cl. 2.

15. *E.g.*, United States v. Smith, 124 U.S. 525, 532 (1888) (distinguishing a nonofficer "discharging only such duties as may be assigned to him by [an] officer" from "officers . . . charged by some act of Congress with duties").

16. *E.g.*, 20 C.F.R. §§ 404.967–404.982 (2023) (providing for benefits appeals to a nonstatutory Social Security "Appeals Council"); 29 C.F.R. §§ 1614.109, 1614.404–1614.405 (2023) (providing for nonstatutory "Administrative Judge[s]" and an "Office of Federal Operations" to adjudicate federal employee discrimination complaints on behalf of the Equal Employment Opportunity Commission ("EEOC")).

17. 28 C.F.R. §§ 600.1–600.10 (2023) (defining the Special Counsel role).

18. Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 636–57 (2020).

19. Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?,* 72 ADMIN. L. REV. 533, 561 (2020) (describing a "cadre of shadow acting officials" exercising delegated authority).

20. Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller*, 38 YALE J. REG. 90, 91 (2021).

21. *See generally* Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 YALE J. REG. 279 (2017).

22. *See, e.g.,* Kevin Sholette, Note, *The American Czars*, 20 CORNELL J.L. & PUB. POL'Y 219, 237–40 (2010) (describing Treasury regulations creating a "Pay Czar" position charged with "reviewing and approving the pay for top executives at the largest institutions that the government provided with TARP funding").

reliance by multimember agencies on staff delegations to circumvent statutory quorum requirements,[23] potentially undermine this authority.[24]

Delineating the scope of the Appointments Clause has become especially pressing due to increasing agency reliance on administrative delegations to address vacancies in PAS roles.[25] Some subordinate officials continue exercising delegated authority that they routinely exercised before a delegating officer's departure,[26] while others are expressly delegated duties in anticipation of a vacancy.[27] Whether such officials in effect hold offices with acting duties matters due to the holding in *United States v. Eaton*[28] that non-PAS officials, appointed pursuant to the Clause to inferior offices assigned acting duties *by statute*,[29] may temporarily perform the duties of vacant noninferior offices that the Clause subjects to the PAS process.[30] But the Federal Circuit recently relied on *Eaton* to uphold an *administrative* delegation of acting duties in *Arthrex, Inc. v. Smith & Nephew, Inc.* ("*Arthrex II*"),[31] dramatically extending *Eaton*'s reach.

In Part II of this article, I argue that assessment of these practices' validity should begin with the principle that offices subject to the

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23. *See, e.g.*, Paige Smith, *EEOC Delegated Duties to Work Around Lack of a Quorum*, BLOOMBERG LAW (Jan. 16, 2019 3:14 pm), https://news.bloomberglaw.com/daily-labor-report/eeoc-delegated-duties-to-work-around-lack-of-quorum-1 [https://perma.cc/TTA7-24B8].

24. In addition to such Executive Branch actions, Fed. R. Crim. P. 42, by which the judiciary authorizes court-appointed counsel to prosecute contempt, may also impinge on congressional authority by creating what the Second Circuit deemed an office subject to the Clause, United States v. Donziger, 38 F.4th 290, 296–99 (2d. Cir. 2022), responsible for prosecutions that occupants of offices vested *by Congress* with prosecutorial discretion "decline[]" to bring. FED. R. CRIM. P. 42(a)(2).

25. *See supra* notes 18–19 and accompanying text.

26. For example, the Social Security Commissioner, who may delegate to subordinates, 42 U.S.C. § 902(a)(7), created an "Appeals Council" to adjudicate benefits appeals. 20 C.F.R. §§ 404.967–404.982 (2023). Despite the lack of a confirmed or acting Commissioner in the first half of April 2018, Patterson v. Berryhill, No. 2:18-CV-00193, 2018 WL 8367459, at *1 (W.D. Pa. June 14, 2018) (discussing vacancy), the Council continued to act in the name of a (nonexistent) Commissioner. *See, e.g.*, Ragudo v. Saul, 411 F. Supp. 3d 1125, 1129 (S.D. Cal. 2019) ("On April 9, 2018, the ALJ's decision became the final decision of the Commissioner when the Appeals [Council] denied Plaintiff's request for review.").

27. *See, e.g.*, U.S. Pat. & Trademark Off., Agency Organization Order 45-1 § II.D (2016) (order by former Director providing for performance of the "functions and duties of" her office by subordinates whenever it is vacant).

28. 169 U.S. 331 (1898).

29. *Id.* at 336, 343 (citing 18 Rev. Stat. § 1674).

30. *Id.* at 343–44.

31. 35 F.4th 1328, 1333–35 (Fed. Cir. 2022), *cert. denied*, 143 S. Ct. 2493 (2023).

Appointments Clause must be "established by Law,"[32] *i.e.*, by Act of Congress, so nonlegislative action purporting to create offices is invalid. The Framers deliberately divided primary responsibility for creating and filling offices between Congress and the Executive Branch, respectively, reflecting historical discontent with the power the British Crown had wielded by controlling both functions.[33] This division of two powers implicating the very structure and makeup of government furthers the Clause's role as "a bulwark against one branch aggrandizing its power at the expense of another branch . . . ."[34] The limited commentary on office creation often assumes that Congress' general ability to broadly delegate to other branches[35] allows it to authorize agencies to create offices.[36] But I argue that the Clause's text, history, and purposes imply a clear statement rule precluding such delegations. Thus, if the concept of an office implies direct responsibility for public duties[37] representing "significant authority,"[38] a statute must expressly assign such responsibility to a position.

Although Congress cannot delegate its power to create offices, I argue in Part III that its power to define the contours of offices allows Congress to authorize officers to (re)delegate such statutorily-vested duties to agents acting in their name, for whose actions the delegator remains accountable. Despite the Supreme Court's current focus on significant authority in defining officer status, it has not repudiated prior precedents tying officer status to direct responsibility for official duties, in contrast to agents' derivative responsibility for the duties of another's office.[39] Thus, although many commentators and courts treat administrative delegations as distinct offices subject to the Clause,[40] I argue that delegations of derivative responsibility do not create offices, and therefore do not violate the

32. US. CONST. art. II, § 2, cl. 2.

33. Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?* 79 CORNELL L. REV. 1045, 1053–54 (1994).

34. Ryder v. United States, 515 U.S. 177, 182 (1995).

35. Mistretta v. United States, 488 U.S. 361, 372–74 (1989) (citations omitted).

36. *E.g.*, E. Garrett West, Note, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 226, 228–29 (2018); *accord*, Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 117–18 (2007) (emphasis added) (asserting that "established by Law" means created "by *or under authority of* a statute.").

37. *Cf.* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1979 (2021) ("[O]fficers [are] accountab[le] to the public.").

38. Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam), *superseded in part by statute on other grounds*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

39. *E.g.*, Steele v. United States, 267 U.S. 505, 508 (1926).

40. *E.g.*, *In re* Grand Jury Investigation, 916 F.3d 1047, 1049 (D.C. Cir. 2019); Lauren Shapiro, Note, *Legal Constraints on Executive Power to Manage Agency Vacancies*, 2021 HARV. J. LEGIS. ONLINE 1, 21–30 (2022).

Clause's mandate that offices "shall be established by Law," nor implicate its rules for appointments. Direct responsibility for duties implicating the significant authority of an office remains with an occupant of an office established by law, rather than the officer's agent, who does not occupy a distinct office. So if Mr. Mueller wielded only delegated power on behalf of the Attorney General and was allowed to do so by statute, his appointment, however made, could not have violated the Clause, because he did not himself occupy an office.

But Congress' exclusive power to create offices limits which administrative assignments of duties constitute permissible delegations. Contrary to some unitary executive claims of an inherent Executive Branch power to reassign duties,[41] I argue that only Congress can determine whether and on what terms the duties vested in the offices it creates may be redelegated. And because nonlegislative action cannot create offices, only delegations of *derivative* responsibility for statutory duties are permissible. Nonlegislative assignment of direct responsibility for significant authority that is not tethered to a delegator's existing statutory office improperly creates *de facto* offices not "established by Law," as may have occurred in *Donziger*.[42]

While few courts have assessed the constitutionality of nonlegislative delegations in light of Congress' exclusive power to create offices,[43] I argue in Part IV that this power precludes the common agency practice of using administrative delegations to address vacancies. Instead, the Executive Branch must use statutory "acting" offices like those created by the Federal Vacancies Reform Act of 1998 ("FVRA"),[44] which attaches acting duties to some permanent positions and also permits presidential appointments to standalone acting roles.[45] Consistent with *Eaton*'s treatment of acting positions as distinct inferior offices separate from the

41. *See generally* Tuan Samahon, *The Czar's Place in Presidential Administration, and What the Excepting Clause Teaches Us About Delegation*, 2011 U. CHI. LEGAL F. 169, 175–76 (2011).

42. *But see infra* note 283 (discussing authorities indicating that for reasons unrelated to congressional power over office creation, the *Donziger* prosecutors might not have wielded the significant authority of an office).

43. The dearth of precedent likely results from the typical focus by litigants raising Appointments Clause challenges on the manner that agents delegated authority are *appointed* rather than on the delegation itself. *E.g.*, Arthrex, Inc. v. Smith & Nephew, Inc., 35 F.4th 1328, 1333 (Fed. Cir. 2022), *cert. denied*, 143 S. Ct. 2493 (2023) (referencing argument that an agent administratively delegated authority required a PAS appointment).

44. 5 U.S.C. §§ 3345–3349d.

45. *Id.* § 3345.

vacant PAS positions whose duties they perform,[46] acting roles must be created "by Law" and not by administrative delegation. And only the President, a court of law, or a head of department can be authorized to appoint the officer entrusted with temporarily fulfilling the duties of a vacant office.

Some commentators, relying on appellate rulings implying that agency action can establish offices, suggest that agencies may use administrative delegations to create "acting" offices.[47] But if the mandate that offices "shall be established by Law" requires creation by statute, such delegations cannot create an acting office. When no delegating officer is present to bear direct responsibility for performing official duties, any justification for the constitutionality of the delegation vanishes, since any putative agent purporting to exercise delegated authority no longer acts as the mere alter ego of an occupant of a statutory office. Such officials instead bear sole and direct responsibility for exercising the significant authority of an office, which was improperly vested in their position by administrative fiat rather than "by Law."

II. CONGRESSIONAL POWER OVER OFFICE CREATION IS EXCLUSIVE AND NONDELEGABLE

The Appointments Clause provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[48]

46. *See supra* notes 28–30 and accompanying text; *see also, e.g.*, Edmond v. United States, 520 U.S. 651, 661 (1997) (describing the acting position in *Eaton* as an inferior office).

47. *E.g.,* O'Connell, *supra* note 18, at 684 ("[I]n the vacancies context . . . Article II . . . does not mandate that Congress create the specific office . . . . The issue is [whether] Congress . . . delegate[d] the power to create the position to the agency head?" (citing Penn. Dep't of Public Welfare v. U.S. Dep't of Health & Human Servs., 80 F.3d 796, 804–05 (3d Cir. 1996))). *But see infra* notes 66–68 and accompanying text (explaining the limited relevance of such cases).

48. U.S. CONST. art. II, § 2, cl. 2.

While most of this text concerns how offices are filled, it also addresses how they are created, providing that they "shall be established by Law."[49] In this part, I review the relevant jurisprudence, which suggests that statutes must directly create offices. I also argue on textualist, originalist, and structuralist grounds that the Clause requires purely legislative action to create offices.[50] Statutes must therefore directly create offices, rather than delegating this authority to another branch.

A. Jurisprudence on Office Creation

Courts consistently read the provision that offices "shall be established by Law" as giving Congress a role in their creation.[51] The jurisprudence has at times been inconsistent about what characteristics "establish[]" an office,[52] but the weight of authority indicates that statutes create offices, by, *inter alia*, charging them with responsibility for official duties.[53] Courts have long tied the very concept of an office to responsibility for

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49. Despite referring to "Officers," this phrase has been consistently read as referencing *offices*. *E.g.*, Freytag v. Comm'r, 501 U.S. 868, 888 (1991); United States v. Maurice, 26 F. Cas. 1211, 1213 (Marshall, Circuit Justice, C.C.D. Va. 1823) (No. 15,575).

50. A narrow exception may apply to the offices of "Ambassadors, other public Ministers and Consuls, [and] Judges of the Supreme Court," referenced in the Clause before "all other Officers of the United States . . . which shall be established by Law," U.S. CONST. art. II, § 2, cl. 2, on the basis that these particular offices are established by the Constitution itself or by customary international law. James Durling & E. Garrett West, *Appointments Without Law*, 105 VA. L. REV. 1281, 1292, 1312 (2019). Thus, although it has been suggested that First Congress legislation funding diplomatic posts not previously created by statute implies that Congress need merely "authorize" rather than create offices, Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution Part III: The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, 62 S. TEX. L. REV. 349, 385 (2023) (citation omitted), this legislation could have simply reflected the understanding that these posts fell into the small category of offices created by international law or the Constitution itself.

51. *E.g.*, Lucia v. SEC, 138 S. Ct. 2044, 2047, 2051 (2018) (equating "established by law" with "created by statute") (citations omitted).

52. For example, some early cases determined if positions were offices subject to the Clause based primarily on whether they were filled pursuant to the Clause. *E.g.*, United States v. Mouat, 124 U.S. 303, 307–08 (1888); United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1867). As noted by Landry v. FDIC, 204 F.3d 1125 (D.C. Cir. 2000), contemporary courts rarely find this "circular logic" helpful or persuasive. *Id.* at 1132 (citations omitted).

53. *E.g.*, *Lucia*, 138 S. Ct. at 2051; United States v. Germaine, 99 U.S. 508, 511–12 (1878).

specified duties[54] that are "continuing and permanent,"[55] delineate the position's contours,[56] define a new office if substantially modified,[57] and determine if a position wields the significant authority of an office[58] as well as whether it is an inferior or noninferior office.[59] Moreover, officer status was traditionally associated with direct responsibility for performing official duties vested in the officer's position, rather than derivative responsibility for the duties of another's position.[60] The jurisprudence has been less clear about whether Congress' power to create offices is nondelegable, such that a statute must directly vest a position with the significant authority of an office, or if Congress can authorize other branches to create offices. But the weight of authority generally suggests that legislation must expressly establish offices rather than delegating this power to other branches.

Judicial ambiguity on the issue dates back to *United States v. Maurice*,[61] the first major case construing the Appointments Clause,[62] in which Chief Justice Marshall, riding circuit, held that statutes must "expressly" establish offices, and that Executive Branch regulations cannot independently do so.[63] But confusingly, he also held that army regulations issued in 1816 under a *prior* statutory grant of rulemaking authority "in connexion with" a *later* 1821 statute "adopt[ing]" these rules

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54. *See, e.g.*, Gomez v. United States, 490 U.S. 858, 864 (1989) ("When a statute creates an office to which it assigns specific duties, those duties outline the attributes of the office."); Metcalf & Eddy v. Mitchell, 269 U.S. 514, 520 (1926) ("An office . . . embraces the idea of . . . duties fixed by law."); The Floyd Acceptances, 74 U.S. (7 Wall.) 666, 676–77 (1869) ("We have no officers . . . who do[] not hold office under the law, with prescribed duties . . . ."); *Maurice*, 26 F. Cas. at 1214 (defining office as "a public charge").

55. *Lucia*, 138 S. Ct. at 2051 (quoting *Germaine*, 99 U.S. at 511–12).

56. *Gomez*, 490 U.S. at 864.

57. Weiss v. United States, 510 U.S. 163, 174–76 (1994); Shoemaker v. United States, 147 U.S. 282, 301 (1893).

58. Freytag v. Comm'r, 501 U.S. 868, 881 (1991) (holding that "the significance of the duties and discretion" vested in a position rendered it an office subject to the Clause).

59. *E.g.*, United States v. Arthrex, Inc., 141 S. Ct. 1970, 1985 (2021) (holding that the authority to issue "a final decision binding the Executive Branch" would "exceed[] the permissible scope of . . . duties" that can be vested in an inferior office); *Weiss*, 510 U.S. at 182 (Souter, J., concurring) ("Military officers performing ordinary military duties are inferior officers.").

60. *E.g.*, Matthews v. United States, 32 Ct. Cl. 123, 133–34 (1897) (emphasis added) (stating that a nonofficer agent of an officer lacks direct responsibility for "carry[ing] into effect *any duties devolving upon him as such*"), *aff'd on other grounds sub nom.* United States v. Matthews, 173 U.S. 381 (1899); *see also* discussion *infra* Part III.B.

61. 26 F. Cas. 1211 (C.C.D. Va. 1823).

62. West, *supra* note 36, at 187.

63. *Maurice*, 26 Fed. Cas. at 1214; *see also id.* (holding that an office of "agent of fortifications . . . cannot be considered as having been established by the acts empowering the president, generally, to cause fortifications to be constructed").

had the effect of creating an office as of 1818.[64] He thus did not clearly indicate if prospective congressional delegation in 1816 allowed the later regulations to create an office, or if retroactive congressional ratification[65] by the 1821 statute had been necessary.

In recent decades, some appellate rulings involving positions assigned duties by agency action have implied that statutes can authorize agencies to create offices.[66] But the litigants bringing these cases only challenged the authority of heads of department to fill the positions without utilizing the PAS process, rather than their authority to assign official duties to these positions in the first place.[67] Since office creation was not directly at issue,[68] the associated judicial discussion is arguably dicta and largely conclusory.

The Supreme Court has not directly addressed the issue but has given several indications that statutes must expressly create offices. It has held that the "duties, salary, and means of appointment for [an] office are specified by statute"[69] or "specifically provided for" by Congress,[70] implying that statutes must create offices of their own force. In addition, some early cases distinguished offices from other positions by noting that offices are vested with official duties by statute and not by administrative action.[71] More recently, the Court held that statutory authority to administratively "assign" or "detail" officials to certain tasks does not

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64. *Id.* at 1215.

65. *Cf.* Mattingly v. Dist. of Columbia, 97 U.S. 687, 690 (1878) ("Congress . . . ha[s] power to ratify the acts which it might have authorized.").

66. *E.g.*, Willy v. Admin. Review Bd., 423 F.3d 483, 491–92 (5th Cir. 2005) (stating that statutes allowing department heads to delegate duties and to issue rules on the "distribution and performance of [department] business" authorized agency "creat[ion]" of offices "that no specific federal statute creates"); *In re* Sealed Case, 829 F.2d 50, 55–57 (D.C. Cir. 1987) (stating that the Attorney General had "statutory authority to create the Office of Independent Counsel: Iran/Contra," whose occupant is an "inferior Officer"); Penn. Dep't of Pub. Welfare v. U.S. Dep't of Health & Human Servs., 80 F.3d 796, 800–04 (3d Cir. 1996) (treating members of appeals board described as having been "created . . . by a regulation" as officers).

67. *E.g.*, *In re* Sealed Case, 829 F.2d at 55 (referencing contention that the official at issue was a noninferior officer requiring a PAS appointment).

68. *E.g.*, *Willy*, 423 F.3d at 491 ("The Secretary does not contest that ARB members are 'inferior officers,' so, for purposes of this appeal, we assume that they are.").

69. Freytag v. Comm'r, 501 U.S. 868, 881 (1991) (citations omitted).

70. Burnap v. United States, 252 U.S. 512, 516 (1920) (citations omitted).

71. *E.g.,* United States v. Smith, 124 U.S. 525, 532 (1888) (holding that a clerk "discharging only such duties as may be assigned to him by [an] officer" is not himself an officer "charged by some act of Congress with duties"); Converse v. United States, 62 U.S. (21 How.) 463, 468–69 (1859) (holding that additional responsibilities assumed by officer at department head's request "were not the duties of an office created by law, but a mere agency of one of the departments").

implicate appointment to a distinct office.[72] And it has usually relied on statutes defining official duties, rather than on nonlegislative action, to classify positions for purposes of the Clause.[73] For example, *Freytag v. Commissioner*[74] referenced powers granted to Tax Court Special Trial Judges by the Internal Revenue Code in holding that they wield the significant authority of an office,[75] rather than citing Tax Court rules describing their powers.[76] Similarly, *Morrison v. Olsen*[77] relied on Ethics in Government Act provisions delimiting the duties of an independent counsel[78] to deem her an inferior officer,[79] rather than on a court order outlining her "jurisdiction."[80]

The Court has departed from reliance on such statutory provisions when classifying positions for purposes of the Clause only twice,[81] each time without any express analysis or holding on the issue. First, in *United States v. Mouat,*[82] it held that a Navy clerk was not an officer, noting that his appointment was not vested "by law" in a head of department by either a statute or *Navy regulation*.[83] In a 2010 dissent, Justice Breyer implied that *Mouat* held that offices can be "created . . . by 'regulations,'"[84] but the Court has never described *Mouat* in such terms. *Mouat* did not explain its reference to the regulation, which may have been dictum[85] or reflected an

72. Weiss v. United States, 510 U.S. 163, 171–72 (1994).

73. *E.g.*, United States v. Arthrex, Inc., 141 S. Ct. 1970, 1986–87 (2021) (citing 35 U.S.C. § 6(c)); *Weiss*, 510 U.S. at 171–72 (citing 10 U.S.C. §§ 826(a), -(c), 866); Go-Bart Importing Co. v. United States, 282 U.S. 344, 352 n.1 (1931) (citations omitted), United States v. Eaton, 169 U.S. 331, 336, 343–44 (1898) (citing 18 Rev. Stat. § 1674).

74. 501 U.S. 868 (1991).

75. *Id.* at 880–82 (citing 26 U.S.C. § 7443A).

76. *E.g.*, TAX CT. R. 183, 218 (26 U.S.C. app. (1988)).

77. 487 U.S. 654 (1988).

78. 28 U.S.C. §§ 591–599 (1988).

79. *Morrison*, 487 U.S. at 671–73.

80. Order, Div. No. 86-1 (D.C. Cir. Spec. Div. Apr. 23, 1986). Although *Morrison* noted that "an independent counsel can only act within the scope of the jurisdiction that has been granted by the [court]," 487 U.S. at 672, what it found relevant was that a *statute* allowed a court to limit the officer's authority in this manner.

81. United States v. Nixon, 418 U.S. 683 (1973), described the Watergate Special Prosecutor, whose authority was outlined in an agency regulation, 28 C.F.R. § 0.37 (1973), as a "subordinate officer." 418 U.S. at 694. But in doing so, it cited to a *statute* establishing prosecutorial positions. *Id.* (citing 28 U.S.C. § 533).

82. 124 U.S. 303 (1888).

83. *Id.* at 307–08.

84. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 539 (2010) (Breyer, J., dissenting) (quoting *Mouat*, 124 U.S. at 307–08).

85. The Government, which argued that the position was not an office, itself referenced the regulation without arguing that it could not constitutionally authorize an appointment, presumably because the regulation did not purport to do so. *See* Brief for Appellant at 5, United States v. Mouat, 124 U.S. 303 (1888) (No. 1070).

unstated understanding that a later statute adopted the regulation by reference.[86] Only two weeks after *Mouat*, the same Court, in an opinion citing *Mouat* elsewhere on another issue, held that a clerk assigned duties administratively was not an officer because he was not "charged by some act of congress with duties,"[87] and the Court has since cited *Mouat* only for the principle that *statutes* must establish offices.[88]

More recently, *Lucia v. SEC*[89] cited to statutes delineating Administrative Law Judge ("ALJ") duties in explaining that the ALJ position is "established by law" because it is "created by statute, down to its duties, salary, and means of appointment."[90] But the Court proceeded to primarily cite regulations and even agency practice when identifying ALJ duties implicating the significant authority of an office,[91] rather than these statutes, which the cited regulations largely tracked.[92] Some commentators therefore read *Lucia* as indicating that Congress can delegate authority to create offices,[93] but *Lucia* made no express statement on the issue and did not explain its reliance on nonlegislative action,[94] while its only express statement about office creation "by Law" referenced *statutory* duties.[95] In contrast, the Court's other contemporary

86. The referenced regulation was nearly identical to a prior regulation*, compare* Naval Regulations of 1876 ch. IX, § III.9 *with* Naval Regulations of 1870 § 891, which arguably remained in force, *see* Naval Regulations of 1876 (fourth page) (indicating intent for consistent prior directives to "remain in force"), and was incorporated by reference in a later statute. Smith v. Whitney, 116 U.S. 167, 180–81 (1886) (noting that subsequent statutory "recognition" of the 1870 regulations gave them the "sanction of the law") (citation omitted).

87. United States v. Smith, 124 U.S. 525, 532 (1888).

88. *E.g.,* Burnap v. United States, 252 U.S. 512, 516 (1920) (stating that whether positions are offices depends on "the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto" (citing *Mouat*, 124 U.S. 303, and other authorities)).

89. 138 S. Ct. 2044 (2018).

90. *Id.* at 2053 (citing 5 U.S.C. §§ 556, 557, 5372, 3105; Freytag v. Comm'r, 501 U.S. 868, 878, 881 (1991)) (internal quotation marks omitted).

91. *Id.* at 2052–55 (citations omitted).

92. *Compare, e.g.*, 15 C.F.R. § 201.111(c) (2018), *cited by Lucia*, 138 S. Ct. at 2053 (noting that ALJ powers include "receiving relevant evidence and ruling upon the admission of evidence and offers of proof"), *with* 5 U.S.C. § 556(c)(3) (stating that ALJs may "rule on offers of proof and receive relevant evidence").

93. *E.g.*, West, *supra* note 36, at 166–67.

94. The Court may have cited the regulations simply because the conflicting circuit rulings at issue had uniformly done so. *See* Bandimere v. SEC, 844 F.3d 1168, 1177–78 (10th Cir. 2016); Raymond J. Lucia Cos. v. SEC, 832 F.3d 277, 286, 288 (D.C. Cir. 2016), *rev'd sub. nom* Lucia v. SEC, 138 S. Ct. 2044 (2018). It may also have cited the regulations as a convenient restatement of the statutory provisions that it held had established the office.

95. *Lucia*, 138 S. Ct. at 2053. Earlier in the opinion, *Lucia* referenced a statute allowing delegations to ALJs and other agency personnel, *id.* at 2049 (citing 15 U.S.C. § 78d–1(a)),

Appointments Clause rulings, including post-*Lucia* jurisprudence, rely on statutory provisions to classify positions for purposes of the Clause,[96] making *Lucia* an outlier. The weight of judicial authority thus suggests that statutes must expressly create the offices referenced in the Clause.

B. Textualist Interpretation

The Constitution's plain text indicates that Congress has exclusive and nondelegable power to create offices. The Elastic Clause[97] allows Congress to create offices. Use of "by Law" in the Appointments Clause makes legislation the sole means of doing so, and the requirement that such legislation "establish[]" offices mandates that a statute must conclusively create an office of its own force, rather than delegating this authority.

1. The Elastic Clause's Grant of Congressional Authority to Create Offices

The Elastic Clause, which authorizes "all Laws which shall be necessary and proper for carrying into Execution the . . . Powers vested . . . in the Government of the United States, or in any Department or Officer thereof,"[98] empowers Congress to create offices. The President cannot personally execute every law, so legislation providing for officers is "necessary and proper for carrying into Execution the . . . Powers vested" in the Executive Branch. As the Supreme Court has noted, this provision "undoubtedly" allows Congress to create offices.[99]

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but did not cite it as authority when holding that ALJ positions are "established by Law," *id.* at 2053, nor state that such delegation provisions can establish offices.

96. *See supra* notes 73–80 and accompanying text. United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021), decided after *Lucia*, potentially implicated both statutory and regulatory provisions referencing the authority of Patent Trial and Appeal Board ("PTAB") judges to render final agency decisions. *Compare* 35 U.S.C. §§ 6(c) (permitting only the PTAB to grant rehearing), *and* 318(c) (requiring agency action to conform to PTAB decisions) *with* 37 C.F.R. § 42.3(a) (2020) (giving the PTAB exclusive jurisdiction over proceedings it adjudicates); *id.* § 42.80 (requiring agency action to conform to PTAB decisions). But *Arthrex* relied exclusively on a *statutory* provision in holding that the PTAB's authority rendered its judges noninferior officers. 141 S. Ct. at 1986–87 (citing 35 U.S.C. § 6(c)).

97. U.S. CONST. art. I, § 8, cl. 18.

98. *Id.*

99. Buckley v. Valeo, 424 U.S. 1, 138 (1976) (per curiam), *superseded in part by statute on other grounds*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

2. The Appointments Clause's Prohibition on Nonlegislative Office Creation

While the Elastic Clause *permits* Congress to establish offices, the Appointments Clause, by stating that offices "shall be established by Law,"[100] *precludes* any other means of creating offices. "[S]hall" indicates a command,[101] and reference to creation "by Law" is redundant other than as a restriction, since the Elastic Clause already permits office creation by legislation.

Moreover, while the Constitution uses "Law" elsewhere more broadly,[102] its use of "by Law" only references statutes. First, apart from the "established by Law" provision, all instances of "by Law" appear in Article I[103] or expressly name Congress as the actor.[104] The omission of an express reference to Congress in the "established by Law" phrase does not suggest that Congress need not establish offices; it instead indicates that this provision serves to limit *Executive* power[105] rather than to define congressional authority. Other uses of "by Law" outside Article I provide that "Congress may by Law" take action not already referenced in Article I or that might be called into doubt by provisions in other articles.[106] In contrast, because the Elastic Clause allows Congress to establish offices, the Appointments Clause grants *Congress* no new power in this regard. It thus does not state that "*Congress may* by Law establish offices," because its purpose is to deny the *Executive Branch* this power by mandating that statutes "shall" create offices.

Second, the Constitution uses "by" elsewhere in a manner indicating that "by Law" only references statutes. Setting aside use to identify actors

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100. U.S. CONST. art. II, § 2, cl. 2.

101. Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 782 (1984) ("[T]he drafters . . . almost invariably used 'shall' where a mandatory obligation was intended"); *id.* n.147 (citing examples).

102. *E.g.*, U.S. CONST. art. I, § 8, cl. 10 ("Law of Nations"); *id.* art. VI, cl. 2 (including treaties in "the supreme Law of the Land").

103. *Id.* art. I, § 2, cl. 3; *id.* § 4, cls. 1–2; *id.* § 6 cl. 1; *id.* § 9, cl. 7.

104. *Id.* art. II, § 1, cl. 7; *id.* § 2, cl. 2; *id.* art. III, § 2, cl. 3.

105. This restriction may have been included to preclude Article II's Vesting Clause, U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President . . . ."), from being read as vesting power over office creation, which had historically been considered an executive prerogative. *See infra* notes 120–124 and accompanying text.

106. Article II states that "Congress may by Law" determine presidential succession, U.S. CONST. art. II, § 1, cl. 6, which Article I does not address. The Appointments Clause, after generally mandating the PAS process, makes an exception, stating "but the Congress may by Law vest" some appointments elsewhere. *Id.* § 2, cl. 2. And after imposing venue rules for criminal prosecutions, Article III clarifies these strictures' outer bounds, stating that "Congress may by Law" determine the venue for certain trials. *Id.* art. III, § 2, cl. 3.

in passive phrases, "by" appears before singular nouns lacking articles to reference taking action via one or more of the noun.[107] For example, electors and representatives are to select a President "by Ballot,"[108] and crimes must be tried "by Jury."[109] "Established by Law" thus mandates creation by means of one or more "Law[s]," indicating that the referenced "Law" is a countable noun. Only countable nouns ordinarily take an indefinite article,[110] and the only part of the Constitution where "Law" appears with the indefinite article is in the Presentment Clause,[111] which references "a Law" four times when describing the process for enacting *a statute*.[112] So when the Constitution mandates action "by Law," it requires legislation enacted pursuant to the Presentment Clause,[113] and offices "which shall be established by Law" must therefore be created by statute.

3. The Appointments Clause's Requirement that Statutes Directly "Establish" Offices

The requirement that statutes "establish[]" offices precludes congressional delegation of this power. Unlike terms allowing Congress to authorize action by other branches, such as "provide for,"[114] or "vest" (as the Appointments Clause permits for inferior officer *appointments*), "established" indicates that statutes must create offices of their own force. Eighteenth-century definitions of "establish" included to "settle firmly,"

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107. *Cf.* 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington et al. 6th ed. 1785), https://archive.org/details/dictionaryofengl01john uoft/page/n317/mode/2up?ref=ol&view=theater (defining "by" as "the instrument" or "the means by which any thing is performed, or obtained").

108. U.S. CONST. art. II, § 1, cl. 3.

109. *Id.* art. III, § 2, cl. 3.

110. CHICAGO MANUAL OF STYLE § 5.7 (17th ed. 2017), *cited by* Niz-Chavez v. Garland, 593 U.S. 155, 162–63 (2021).

111. U.S. CONST. art. I, § 7, cl. 2.

112. *Id.* In contrast, other uses of "Law" in the Constitution without the preposition "by," *e.g.*, U.S. CONST. art. I, § 8, cl. 10 ("Law of Nations"); *id.* art. VI, cl. 2 ("Law of the Land"), concern typically uncountable nouns not ordinarily used with the indefinite article in the way the Constitution uses "a Law" to describe a statute.

113. *Accord*, Edwards v. Carter, 580 F.2d 1055, 1058–59 (D.C. Cir. 1978) (holding that a treaty requiring expenditures is not self-executing because the requirement that appropriations be made "by Law" "clearly precludes any method of appropriating money . . . other than through the enactment of laws by the full Congress" (citing U.S. CONST. art. I, § 9, cl. 7)).

114. U.S. CONST. art. I, § 8, cl. 15 ("Congress shall have power . . . [t]o provide for calling forth the Militia"); *see* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 585 n.173 (1994) ("Congress . . . may only 'provide for calling forth the Militia.' Someone else (i.e., the President) must call forth the militia.").

"fix unalterably," "confirm," "make firm," or "fix immovably,"[115] reflecting a conclusive act.[116] The Constitution itself is "establish[ed]"[117] in a fixed form unless a formal amendment process is followed.[118] As one court noted with respect to similar statutory language,

> [t]he most obvious meaning of the phrase "established by Act of Congress" is that it covers those entities *directly created* by a Congressional Act. [An entity] created by the independent actions, choices, or judgment of a third party has not been "established by Act of Congress," even if *authorization* or support from Congress was a logically necessary part of [its] creation.[119]

Consequently, to "establish" an office, a statute must expressly create it and cannot delegate this power. A statute either establishes an office or it does not, regardless of what follows.

C. Originalist Arguments

Reading the Clause as precluding nonlegislative office creation also comports with its historical background, which indicates that the Framers purposely denied the Executive Branch a role in creating offices outside the legislative process. Early practice under the Constitution also reflects an understanding that office creation is a nondelegable legislative power.

1. Views of the Framers

Preratification history strongly suggests that the Framers intended to give Congress sole power over office creation. Both "erecting and disposing of offices" were executive prerogatives of the British Crown.[120] Since offices were "sources of social distinction and financial security," the King was thought to wield undue influence by using them for

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115. JOHNSON, *supra* note 107, at 713, https://archive.org/details/dictionaryofeng l01johnuoft/page/n713/mode/2up?ref=ol&view=theater.

116. The static nature of an "established" office also comports with the continuing and relatively fixed duties associated with the concept of an office. *See supra* notes 55–57 and accompanying text.

117. U.S. CONST. prmbl.

118. *Id.* art. V.

119. Ozenne v. Chase Manhattan Bank (*In re* Ozenne), 818 F.3d 514, 517 (9th Cir. 2016) (emphases added), *reh'g en banc granted*, 828 F.3d 1012 (9th Cir.), *decided on other grounds*, 841 F.3d 810 (9th Cir. 2016) (en banc).

120. 1 WILLIAM BLACKSTONE, COMMENTARIES 271 (Sharswood ed., J.B. Lippencott Co. 1893); *see also id.* ("[A]s the king may create new titles, so may he create new offices . . . .").

patronage purposes in an era when Parliament was "filled with 'parties, cliques, and factions of men, prowling and hunting for office in packs.'"[121] The Declaration of Independence claimed that the King had abused this power, complaining that "[h]e has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance."[122] This experience prompted the Framers to separate the power to create offices from the power to fill them;[123] thus, in arguing for ratification, Alexander Hamilton compared the "great inferiority" of the President's power to that of "[t]he King of Great Britain[, who] not only appoints to all offices, *but can create offices*."[124]

Constitutional Convention records also reflect an intent for Congress to have exclusive power to create offices. During proceedings on an early draft of the Appointments Clause that did not reference legislation,[125] James Madison and Charles Pinkney moved to have the Elastic Clause expressly empower Congress to "establish *all* offices,"[126] implying exclusivity. They argued it would otherwise be "liable to cavil" that Congress lacked such power,[127] but the proposal failed after others claimed it "would not be necessary."[128] Four days later, Roger Sherman suggested adding a reference to appointments provided for "by Law," citing "the corruption in G. Britain."[129] Madison successfully moved to build on this proposal by having a reference to appointment of "'officers' struck out and 'to offices' inserted, in order to obviate doubts that [the President] might appoint officers without a previous creation of the offices by the Legislature," but the proposal, as modified, was at first voted down.[130] However, a similar measure passed later that day, providing for appointments "to all offices which may hereafter be created by law."[131] Later committee drafts omitted this change,[132] and an attempt by Elbridge

121. Calabresi & Larsen, *supra* note 33, at 1053–54 (quoting GOLDWIN SMITH, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 372 (1955)).

122. THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776).

123. West, *supra* note 36, at 192–96; *accord,* Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1656–57 (2020) (explaining that the Appointments Clause was adopted in response to abuses of royal power over offices).

124. THE FEDERALIST NO. 69, at 421 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

125. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 185 (Max Farrand ed., 1911) [hereinafter "FARRAND'S RECORDS"] ("[The President] shall appoint officers in all cases not otherwise provided for by this Constitution.").

126. *Id.* at 344–45 (emphasis added).

127. *Id.* at 345.

128. *Id.*

129. *Id.* at 398, 405.

130. *Id.* at 405.

131. *Id.* at 405–06.

132. *Id.* at 498–99, 538–39, 599.

Gerry to add back a reference to appointments "'to offices created by the Constitution or by law' . . . was rejected as unnecessary."[133] But in proceedings on the final draft, the "established by Law" language was added.[134] Available records do not explain this reinsertion of a reference to legislation. But as West notes, all prior statements on the issue either sought language giving Congress exclusive power, or claimed it was "unnecessary,"[135] suggesting that such power was implied elsewhere. They thus indicate a consensus that only Congress could create offices.[136]

2. Early Practice

Early congressional practice also indicates that nonlegislative action cannot create offices, and that Congress cannot delegate this power. Such original understanding is reflected in early congressional debates and in First Congress statutes that expressly created offices or permitted officers to administratively delegate duties without thereby creating new offices.[137]

The first office-creating statute established a Department of Foreign Affairs.[138] In a preceding House debate, Madison described office creation as a purely legislative act, stating that "[t]he powers relative to offices are partly legislative and partly executive. The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the legislative power ceases."[139] He thus treated office creation as a legislative process that "ceases" once a statute "defines" the contours of an office, implying that statutes must create offices without reliance on further Executive Branch action. Madison also implied that Congress cannot delegate this power even if it can delegate elsewhere, asserting that "[i]f there is any point in which the separation of the legislative and executive powers ought to be maintained with greater caution, it is that

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133. *Id.* at 550.

134. *Id.* at 628.

135. West, *supra* note 36, at 185.

136. In fact, most debate over offices concerned what role, if any, Congress should have in making *appointments*. *See* Damien M. Schiff & Oliver J. Dunford, *Distinguishing Between Inferior and Non-Inferior Officers Under the Appointments Clause–A Question of "Significance,"* 74 RUTGERS U. L. REV. 469, 487 (2022) (citations omitted).

137. Early practice on appropriations, which must also be made "by Law," U.S. CONST. art. I, § 9, cl. 7, also indicates that this phrase only references statues. The Constitution uses "Law" broadly in one sense to encompass treaties, *id.*, art. VI, cl. 2, but President Washington obtained a congressional appropriation for a treaty imposing financial obligations, rather than viewing the treaty itself as an appropriation "Law." Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 246–49 (1989) (citations omitted).

138. Act of July 27, 1789, ch. 4, 1 Stat. 28.

139. 1 ANNALS OF CONGRESS 604 (Joseph Gales ed., 1834).

which relates to officers and offices."[140] These comments presaged his remarks in a Second Congress debate on congressional delegations, which cited "delegat[ion of] the power to create [offices]" as a prototypical impermissible delegation.[141]

The final Foreign Affairs bill expressly provided for the department to have a "principal officer" and an "inferior officer,"[142] and the other First Congress organic acts had similar provisions,[143] suggesting that statutes could not authorize the Executive Branch to create offices, as might have been implied if these acts simply established departments without referencing specific offices. It is noteworthy in this regard that Senator Maclay took offense at "having made this business a Subject of legislation," asserting that instead, "the President should signify to the Senate his desire of appointing a Minister of foreign affairs, and nominate the Man, [and] when Salaries came to be appointed, [the House would] give their Opinion by providing for the officers or not."[144] As West notes, the fact that his view did not prevail and the office-creating provision remained in the final bill suggests an understanding that statutes must establish offices.[145] By not making the existence of offices depend on subsequent Executive Branch action, these early organic acts also indicate that this power is nondelegable.

Other early legislation also indicates that Congress cannot delegate its power to create offices. The next act after the Foreign Affairs bill addressed customs personnel.[146] It listed collectors and surveyors among "officers to be appointed by virtue of this act,"[147] but omitted "deput[ies]" whom a collector could name to "execute and perform" official duties on his behalf,[148] as well as inspectors whom surveyors could "put on board"

140. *Id.*

141. 3 ANNALS OF CONGRESS 238 (Joseph Gales ed., 1834) ("[T]he President is invested with the power of filling . . . offices; but does it follow that we are to delegate to him the power to create them?").

142. Act of July 27, 1789, §§ 1–2, 1 Stat. at 28–29.

143. Act of Aug. 7, 1789, ch. 7, §§ 1–2, 1 Stat. 49, 49–50 (using identical phrasing for the Department of War); Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65 (providing for "a Department of Treasury, in which shall be the following officers," followed by an enumeration of each office in the Department and its responsibilities).

144. Diary of William Maclay (July 9, 1789), *in* 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789–1791 104–05 (Charlene Bangs Bickford et al. eds., 2004).

145. West, *supra* note 36, at 188–89.

146. *See generally* Act of July 31, 1789, ch. 5, 1 Stat. 29.

147. *Id.* § 5, 1 Stat. at 36.

148. *Id.* § 6, 1 Stat. at 37; *see also* Jennifer L. Mascott, *Who Are "Officers of the United States"?,* 70 STAN. L. REV. 443, 515–18 (2018) (discussing similar treatment in a superseding act).

ships to execute tasks they otherwise had to personally perform.[149] These and similar provisions in other early acts[150] suggest that an Executive Branch act – delegating to subordinates – could not create offices even if authorized by statute. Since the First Congress delegated broadly elsewhere,[151] its refusal to do so with respect to office creation suggests that it did not view this power as delegable.

D. Structuralist Considerations

Structuralist concerns also support reading the mandate that offices "shall be established by Law" as requiring exclusively congressional action to create offices. Since offices form the basic structure of government, a dangerous aggregation of power would result if a single branch could both create and fill them. In fact, the similar mandate that appropriations be "made by Law"[152] is considered "one of the most important constitutional checks on executive power" partly because it allows Congress to control which agency can utilize a given appropriation.[153] The mandate that Congress itself determine "by Law" whether to create and assign duties to particular offices serves as an equally important check.

Nonlegislative office creation can undermine this important check,[154] and while all delegations to agencies potentially reduce democratic accountability by shifting power to unelected officials, reduced accountability is especially problematic when it directly implicates the separation of powers, as office creation does. For example, statutory reorganizations, like the relocation of various agencies and functions to the newly-created Department of Homeland Security,[155] represent congressional choices with administrative and policy implications that could be undermined if the Executive Branch could create its own offices

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149. Act of July 31, 1789, § 6, 1 Stat. at 37.

150. *See* Mascott, *supra* note 148, at 515-20 (citations omitted); *infra* text accompanying notes 223–230; *see also infra* notes 245–250 and accompanying text (describing similar nineteenth-century enactments).

151. *See generally* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021).

152. U.S. CONST. art. I, § 9, cl. 7.

153. Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886, 898 (2012) (citations omitted).

154. Moreover, construing "by Law" in the Appointments Clause as encompassing agency action impacts both separation of powers and federalism by giving a self-interested party – the Executive – a role in determining when a "Law" waives the Senate's prerogative to consent to inferior officer appointments.

155. Jonathan Thessin, *Recent Development: Department of Homeland Security,* 40 HARV. J. LEGIS. 513, 519–20 (2003) (citations omitted).

in whichever department it chose and assign them similar responsibilities. Nonlegislative office creation may also undermine other congressional powers; for example, allowing courts to create court-funded prosecutor positions to bring charges that the government declines to pursue due to lack of resources, as occurred in *Donziger*,[156] may undermine congressional decisions on funding for prosecutorial activities. And limits that Congress places on the authority of offices it establishes, such as statutory quorum rules at multi-member agencies,[157] may be undermined if agencies could create offices free of such constraints.[158]

Clear-statement-type rules should therefore preclude Congress from delegating its power to create offices. For example, the housekeeping statute allowing department heads to issue "regulations for the government of [a] department [and] distribution and performance of its business"[159] is too vague to "establish[]" any office, since it does not itself vest any position (apart from existing department head offices) with authority. In contrast, the statute creating the position of the U.S. Attorney renders it an office, since it expressly vests the position with significant authority by making it responsible for criminal prosecutions and other government litigation.[160]

Courts have limited congressional power to delegate in other areas by adopting similar clear statement rules that protect important constitutional interests.[161] For example, such rules preclude Congress from giving agencies discretion to construe laws in a manner raising serious constitutional questions or preempting state law.[162] The importance of offices to the separation of powers similarly suggests that statutes alone must determine if a position is an office, rather than leaving it to agency action to clothe positions with the significant authority of offices.

III. CONGRESS CAN AUTHORIZE ADMINISTRATIVE DELEGATIONS BY OFFICERS

Although only Congress can create offices, not all nonlegislative action purporting to task officials with duties implicating the significant

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156. United States v. Donziger, 38 F.4th 290, 295 (2d. Cir. 2022).

157. *E.g.*, 42 U.S.C. § 2000e-4I (stating the EEOC quorum requirement).

158. *Cf.* Smith, *supra* note 23 (describing EEOC reliance on "delegations" to circumvent quorum requirements).

159. 5 U.S.C. § 301.

160. 28 U.S.C. § 547(1)–(2); United States v. Gantt, 194 F.3d 987, 999 (9th Cir. 1999) (stating that U.S. Attorneys exercise the "significant authority" of officers (citing § 547)).

161. *See generally*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

162. *Id.* at 331–32 (citations omitted).

authority of an office violates the Appointments Clause, because Congress can permit officers to redelegate the duties it vests in their positions to agents acting in their name. Since the First Congress, statutes have allowed such delegations, without treating them as distinct offices in their own right.[163] Many current statutes permit delegations of specific duties,[164] and organic acts often allow department heads or other officers to delegate almost all their duties to others.[165] Such statutes often permit delegations to both "officers and employees,"[166] and thus do not mandate that delegations be made only to officers.

In this part, I argue that Congress may allow such nonlegislative delegations to other agency personnel because these delegations do not create distinct offices implicating the Clause's rules for office creation or appointments.[167] I first explain that such delegations assign purely derivative responsibility for duties vested "by Law" in a delegating officer's position. I then review historical jurisprudence that the Supreme Court has never overruled, which distinguishes such derivative responsibility from the direct responsibility of officers and indicates that only direct responsibility implicates the Clause's limitations. I also argue on textualist, structuralist, originalist, and historical grounds that Congress may permit officers to delegate. In contrast, I argue that the Executive Branch lacks inherent power to delegate duties absent congressional authorization. I further explain that permissible delegations may assign only derivative responsibility for duties vested by statute in an existing office occupied by a properly-appointed official, as they otherwise would create distinct *de facto* offices vested with significant authority by administrative fiat rather than "by Law." I conclude by applying this framework to demonstrate that the Special Counsel position at the

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163. *See supra* notes 148–149 and accompanying text; *see also infra* Part III.C.3–4.

164. *E.g.*, 10 U.S.C. § 2736(a)(3) (allowing secretaries of military departments to delegate authority to pay claims).

165. *E.g.*, 49 U.S.C. § 322(b) (allowing the Secretary of Transportation and other Department of Transportation officers to delegate their "duties and powers" to other departmental officers or employees); *see also* 6 U.S.C. § 112(b)(1) (allowing the Secretary of Homeland Security to "delegate any of the Secretary's functions to any officer, employee, or organizational unit of the Department"); L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 31 (D.D.C. 2020) (statutes comparable to § 112 are "found throughout the Executive Branch").

166. *E.g.*, 42 U.S.C. § 902(a)(7) (authorizing the Social Security Commissioner to delegate "to such officers and employees of the Administration as the Commissioner may find necessary").

167. This paper does not address delegations outside agencies, including delegations to states or private actors, which are likely permissible in principle, but may be subject to additional constitutional limitations. *See, e.g.*, Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. MIAMI L. REV. 507, 538–55 (2011).

Department of Justice ("DOJ"), despite wielding substantial power, is an example of a permissible delegation that does not itself create an office.

A. Delegees Bear Only Derivative Responsibility for Another Official's Duties

I define permissible delegations as principal-agent relationships authorized by statute, in which a delegating officer ("Delegator" or "Principal") relies on agents ("Delegees") to perform duties vested in the Delegator's office. As agents, Delegees act on a Delegator's behalf and subject to the Delegator's control,[168] and wield power no greater than that of the Delegator,[169] who remains accountable for their actions.[170] Thus, a Delegee's authority is entirely derivative of the Delegator's powers; the Delegee is not vested with direct responsibility for official duties, but instead performs duties vested in the *Delegator's* office.

B. The Jurisprudence Indicates That Only Direct Responsibility Implicates Appointments Clause Limitations

Contemporary cases usually treat "significant authority" as the defining trait of offices subject to the Appointments Clause,[171] but a holistic reading of the jurisprudence, including older cases, demonstrates that only positions with *direct* responsibility for such authority are offices subject to the Clause. Thus, assignment to Delegees of *derivative* responsibility for duties for which other officials are directly responsible does not create offices, even if such duties represent significant authority. Because no contemporary Appointments Clause rulings by the Supreme Court have concerned positions wielding only delegated powers, the Court has not overruled these prior precedents, which qualify the significant authority test by indicating that delegations do not create offices implicating the Clause's limits on office creation or appointments.

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168. *Cf.* RESTATEMENT (FIRST) OF AGENCY § 1(1) (Am. L. Inst. 1933) (stating that agents "act on [a principal's] behalf and subject to his control").

169. *Cf.* RESTATEMENT (THIRD) OF AGENCY § 3.04 cmt. b (Am. L. Inst. 2006) (describing an agent's power as "coextensive with the principal's capacity to do the act in person").

170. *Cf., e.g.,* RESTATEMENT (FIRST) OF AGENCY § 216 (Am. L. Inst. 1933) ("[A] principal may be liable [for] the tortious conduct of a servant or other agent . . . .").

171. *E.g.*, Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam), *superseded in part by statute on other grounds*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

Early cases distinguished Delegees, often referred to as "deputies,"[172] from officers. One judge explained that a Delegee "is not a permanent officer . . . . He is the mere personal substitute of the [Delegator]."[173] Another explained that "a deputy, in the discharge of duties devolving upon the [officer] for which he is deputized, has no official character" and is "not an officer" since he acts "in the name of his principal . . . to whom he is alone responsible and from whom such duties emanate," and who is "answerable for his deputy's acts."[174] A third judge similarly implied that the derivative nature of Delegees' responsibility distinguishes them from officers, describing a marshal as an "*officer* [who] executes process *himself in person, or through his deputies*," while his deputy "executes [process] *in the name of the marshal*."[175]

The Supreme Court has also distinguished deputies and other Delegees bearing only derivative responsibility from officers, explaining that "[a]lthough deputies are recognized by law as necessary to the proper administration of the *marshal's office* . . . the government has no dealings directly with them. [They] are appointed by the marshal . . . and are *accountable to him alone* . . . ."[176] The Court has also held that tasks delegated to an "agent" by the head of a department vested by law with these responsibilities "were not the duties of an office."[177] *Steele v. United States*,[178] the most recent Supreme Court case addressing the status of Delegees, similarly explained that when an officer "exercise[s] *his* powers and perform[s] *his* duties by deputy," the deputy, who performs the *officer's* duties, "is not in the constitutional sense an officer of the United States."[179] It deemed such deputies nonofficers despite noting that they "have the *like authority* which by law is vested in the [officer] himself," and "exercise *great responsibility and discretion*."[180]

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172. *See supra* notes 148–149 and accompanying text; *infra* notes 225–236, 245 and accompanying text.

173. United States v. Barton, 24 F. Cas. 1025, 1027 (E.D. Pa. 1833) (No. 14,534).

174. Matthews v. United States, 32 Ct. Cl. 123, 137–38 (1897), *aff'd on other grounds sub nom.* United States v. Matthews, 173 U.S. 381 (1899).

175. Powell v. United States, 60 F. 687, 688 (C.C.D. Ala. 1894) (emphases added); *see also*, Matthews, 32 Ct. Cl. at 133–34 (emphases added) (quotation marks omitted) (stating that a deputy marshal is not an officer since his "duties . . . are authorized by law, not [to] enable[e] the deputy to [perform] duties devolving *upon him as such*, but as necessary to a proper administration of the *marshal's office*"); *accord*, United States v. King, 147 U.S. 676, 681 (1893) ("[W]hen the law provides expressly for the appointment of a deputy [clerk of court] there can be no question that his acts as such deputy should be recognized as the acts of the clerk himself . . . .").

176. Douglas v. Wallace, 161 U.S. 346, 348–49 (1896) (emphases added).

177. Converse v. United States, 62 U.S. (21 How.) 463, 468–69 (1859).

178. 267 U.S. 505 (1926).

179. *Id.* at 508 (emphases added).

180. *Id.* (emphases added).

Consistent with such distinctions, the Court has held that delegations of derivative responsibility do not implicate constitutional rules applicable to offices. In *United States v. Germaine*,[181] the Court held that an official aiding an officer "in the performance of *his own official duties*" was "an agent" who need not be appointed pursuant to the Appointments Clause.[182] In *United States v. Smith*,[183] the Court held that a customs clerk's "appointment is not made by the secretary [of the Treasury], *nor is his approval thereof required*," since he was not "*charged* by some act of congress with duties," but instead performed tasks "*assigned* to him by [an officer]."[184] Lastly, in *United States v. Eaton*,[185] the Court took a broad view of the scope of permissible delegations. It held that an act allowing the President to "provide for the appointment of vice consuls . . . under such regulations as he shall deem proper" vested such appointments in the President *and* allowed him to delegate this power to consuls,[186] who were not heads of department[187] in whom Congress could vest direct responsibility for such appointments. *Eaton* thus indicates that officers may redelegate derivative responsibility for duties vested in their office, without implicating constitutional rules governing how or where *direct responsibility* for such duties can be vested.

The Court has not repudiated these older precedents tying constitutional limits on offices to direct responsibility for official duties. Its modern "significant authority" cases concerned positions with direct responsibility for such authority,[188] and not derivative responsibility for authority vested in another's office.[189] In fact, the Court's recent statement that officers are "accountab[le] to the public"[190] comports with its traditional emphasis on direct responsibility as a hallmark of officer status.

181. 99 U.S. 508 (1878).

182. *Id.* at 512 (emphasis added).

183. 124 U.S. 525 (1888).

184. *Id.* at 532 (emphases added).

185. 169 U.S. 331 (1898).

186. *Id.* at 336–37 (quoting 18 Rev. Stat. § 1695), *id.* at 343; *see also id.* at 339 ("It is plain that the [rulemaking provisions] confer upon the President full power, in his discretion, to appoint vice-consuls and [t]he regulations [authorizing appointment by consuls] come clearly within the power thus delegated.").

187. *See, e.g.*, 47 Rev. Stat. §§ 4075, 4077 (subjecting consular actions to supervision by the Secretary of State).

188. *See generally supra* notes 73–80 and accompanying text.

189. Lucia v. SEC, 138 S. Ct. 2044 (2018), concerned a position that amicus argued was a mere delegation, but was in fact charged by statute with direct responsibility for duties that constituted significant authority. *See supra* notes 90–92 and accompanying text (discussing the source of the duties at issue); *infra* notes 277–281 and accompanying text (arguing that as a statutory matter, these duties could not have been administratively delegated).

190. United States v. Arthrex, Inc., 141 S. Ct. 1970, 1979 (2021).

Since it has not overruled its older precedents in this regard, they remain good law.[191] They qualify the "significant authority" test by indicating that those who hold office, unlike Delegees, bear direct responsibility for exercising such authority, and imply that the Appointments Clause's bar on nonlegislative creation of offices does not preclude nonlegislative delegations of derivative responsibility.

C. The Appointments Clause Does Not Prohibit Administrative Delegations

In this subpart, I argue on multiple grounds that administrative (re)delegations of duties do not violate the Appointments Clause. From a textualist perspective, Congress' power to establish offices allows it to vest them with power to delegate, and no constitutional provision bars such arrangements. Structuralist considerations also favor the constitutionality of delegations. Delegations are a pragmatic application of agency principles that inform Appointments Clause jurisprudence elsewhere and do not unduly undermine the Clause. Furthermore, there are sufficient incentives not to use delegations to work around the Clause. Lastly, both pre-constitutional and early practice indicate that officers may redelegate duties, as does longstanding historical practice reflected in statutes and Attorney General opinions.

1. Textualist Considerations

Congress' plenary power over office creation and the lack of a restriction on delegations comparable to the requirement that offices "shall be established by Law" allows it to vest offices with power to redelegate duties. The Elastic Clause's authorization for "all Laws . . . necessary and proper"[192] to enable officers to execute their powers gives Congress "broad authority to . . . structure . . . offices as it chooses."[193] Since it can establish offices, which may be viewed as an agency arrangement by which sovereign power is delegated to officers acting on behalf of the public,[194]

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191. Hohn v. United States, 524 U.S. 236, 252–53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." (citing Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989))).

192. U.S. CONST. art. I, § 8, cl. 18.

193. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 500 n.5 (2010) (citing *id.* at 515 (Breyer, J., dissenting)).

194. *See* Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 77 (2007) ("[An] office involves a position to which is delegated by legal

in defining the scope of this agency, Congress can allow redelegation to subagents.[195] This premise comports both with traditional agency principles allowing an agent's powers to potentially include discretion to redelegate,[196] and the Elastic Clause's broad language, which generally permits Congress to grant some discretion to other branches.[197]

While other provisions may limit congressional power under the Elastic Clause,[198] no such provision bars Congress from allowing officers to delegate. The mandate that offices "shall be established by Law" is the textual basis for barring nonlegislative office creation.[199] This language requires Congress to vest positions with the direct responsibility for official duties that is a hallmark of offices,[200] but it does not follow that Congress cannot also vest these offices with discretion to execute such duties by delegation. Officer status often implies discretion on how to perform official duties,[201] and eighteenth-century conceptions of the term "office" encompassed the ability to deputize to agents.[202] Since such assignment of derivative responsibility does not create a distinct office, it does not violate the mandate that offices "shall be established by Law." Congress can thus vest offices with discretion to carry out duties via administrative delegation.

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authority a portion of the sovereign powers of the federal Government [that] involve binding the Government or third parties for the benefit of the public.").

195. F. Andrew Hessick & Carissa Bryne Hessick, *The Non-Redelegation Doctrine*, 55 WM. & MARY L. REV. 163, 191–92 (2013) (footnotes omitted).

196. *E.g.*, RESTATEMENT (FIRST) OF AGENCY § 5 cmt. a. (Am. L. Inst. 1933) (describing subagency relationships).

197. *E.g.*, Mistretta v. United States, 488 U.S. 361, 388 (1989) (stating that the Elastic Clause allows Congress to delegate rulemaking power to the judiciary).

198. *E.g.*, Buckley v. Valeo, 424 U.S. 1, 138–39 (1976) (per curiam), *superseded in part by statute on other grounds*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003) ("Congress' power under [the Elastic] Clause is inevitably bounded by the express language of [the Appointments Clause].").

199. *See* discussion *supra* Part II.B.2–3.

200. *See* discussion *supra* Part III.B; *see also* 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington et al. 6th ed. 1785), https://archive.org/details/dictionaryofengl02johnuoft/page/n227/mode/1up (giving one definition for "office" as "[a] publick charge").

201. *See* Freytag v. Comm'r, 501 U.S. 868, 882 (1991).

202. *E.g.*, JOHNSON, *supra* note 107, https://archive.org/details/dictionaryofengl01johnuoft/page/n571/mode/2up?ref=ol&view=theater (defining "deputy" as "[In law.] One that exercises any office . . . in another man's right, whose forfeiture or misdemeanour shall cause the officer . . . to lose his office.").

2. Structuralist Arguments

From a structuralist perspective, delegations facilitate execution of the law, and do not unduly undermine the Appointments Clause. They avoid the need for new legislation whenever unforeseen circumstances impede an officer's ability to personally perform official duties, and thus facilitate effective governance. Treating the agency principles underlying delegations as a practical gloss on the Clause also comports with jurisprudence applying such principles to delegations by officers[203] as well as the incorporation in the Appointments Clause jurisprudence of other agency principles such as ratification.[204]

Moreover, because delegations differ from offices, they do not unduly undermine the Clause. The Clause ensures accountability for poor selections,[205] and delegations do not attenuate such accountability. The removal jurisprudence indicates that the ability to relieve subordinates of duties ensures the accountability of the superior.[206] Delegators can readily reassign delegated duties without an act of Congress,[207] as is necessary to reassign an office's statutory duties, and thus sufficient accountability still rests directly with them and ultimately, those who appointed them.[208] Historically, when officers could face legal liability for official acts,[209] such accountability made them liable for Delegees' actions.[210] The expansion of official immunity has reduced such *legal* exposure,[211] but

203. *See infra* Part III.C.4; *see also*, *e.g.,* United States v. Bank of Ark., 24 F. Cas. 984, 985 (C.C.D. Ark. 1846) (applying agency principles to hold that notice to a deputy marshal gives notice to his "principal," the marshal).

204. *See*, *e.g.,* Ortiz v. United States, 138 S. Ct. 2165, 2181–82 (2018); Wilkes-Barre Hosp. Co., LLC v. NLRB, 857 F.3d 364, 371 (D.C. Cir. 2017) (citing Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 796 F.3d 111, 117–21, 124 (D.C. Cir. 2015)).

205. United States v. Arthrex, Inc., 141 S. Ct. 1970, 1979 (2021) (citing THE FEDERALIST No. 77, at 517 (Alexander Hamilton) (J. Cooke ed., 1961)).

206. *Id.* at 1982 (citing Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 496 (2010)).

207. *In re* Grand Jury Investigation, 916 F.3d 1047, 1052 (D.C. Cir. 2019) (stating that even agency regulations purporting to require "cause" to terminate a delegation can be "rescind[ed] at any time").

208. *Cf.* Jennifer Mascott & John F. Duffy, *Executive Decisions After Arthrex*, 2021 SUP. CT. REV. 225, 260 (2022) ("If [Delegators] were still formally accountable and responsible for any [Delegee's] determination, such formal accountability might well be all the Constitution requires.").

209. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1334 (2006).

210. *See infra* notes 228–229 and accompanying text; *see also infra* notes 245–246 and accompanying text.

211. David Zaring, *Personal Liability as Administrative Law*, 66 WASH & LEE L. REV. 313, 323–26 (2009).

sufficient *political* accountability remains, as shown by the fallout from recent scandals. For example, reports of misconduct or mismanagement by nonofficer Delegees at the Department of Veteran Affairs and General Services Administration prompted resignations and dismissals of heads of department and other officers.[212]

Nor do delegations unduly undermine the Clause's separation of powers purposes. Congressional control limits the Executive's ability to delegate around the Clause. As explained in Part III.D, *infra*, Congress can decide whether and on what terms to allow delegations, and ordinary canons of construction tend to limit the ability to use delegations to "work around" offices that Congress vests with similar responsibilities, absent express statutory authorization.[213]

Delegations are also imperfect substitutes for offices, which provides incentives not to overuse them in lieu of offices subject to the Clause. There may be greater prestige to holding an office,[214] and officers have greater certainty than Delegees that their duties, which are defined by statute, will not be administratively diminished. Overuse of delegations also potentially burdens Principals due to the need to oversee a large number of Delegees for whose acts they are accountable. And delegations are an especially imperfect substitute for offices due to associated legal hazards, since the validity of Delegees' acts may be challenged based on either lack of statutory authority for the delegation or improper appointment of their Principal.[215] Moreover, as I argue in Part IV, Delegees cannot act when a Principal's office is vacant, so the growth in PAS vacancies should create incentives not to excessively delegate. These disincentives to use delegations in lieu of offices help to ensure that they do not unduly undermine the Clause.

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212. *See, e.g.*, Greg Jaffe & Ed O'Keefe, *Obama Accepts Resignation of VA Secretary Shinseki*, WASH. POST (May 30, 2014, 8:15 PM), https://www.washingtonpost.com/politics/shinseki-apologizes-for-va-health-care-scandal/2014/05/30/e605885a-e7f0-11e3-8f90-73e071f3d637_story.html [https://perma.cc/YD4U-3DFK]; Jonathan Weisman, *Agency Administrator Fires Deputies, Then Resigns, Amid Spending Inquiry*, N.Y. TIMES (Apr. 4, 2012), https://www.nytimes.com/2012/04/03/us/politics/general-services-administration-chief-resigns.html [https://perma.cc/YM23-RXLG].

213. *See infra* notes 274–276 and accompanying text.

214. An officer receives, *inter alia*, a presidential commission, U.S. CONST. art. II, § 3, and if a PAS appointee, the lifetime honorific "the Honorable." U.S. STATE DEP'T OFFICE OF THE CHIEF OF PROTOCOL, PROTOCOL REFERENCE, https://www.state.gov/protocol-reference [https://perma.cc/AVM2-7PNS] (last visited May 23, 2023).

215. *See generally infra* Part III.D–E.

3. Original Understanding

Pre-constitutional and First Congress practice indicates that the founding generation understood the concept of an office as potentially encompassing authority to delegate to agents. The Articles of Confederation required the Continental Congress to "appoint . . . officers,"[216] but a 1782 ordinance allowed the Postmaster General to "appoint. . . such and so many deputy postmasters as he shall think proper, for whose fidelity he shall be accountable."[217] This and similar pre-constitutional enactments indicate that Delegees for whose conduct a Delegator was responsible were viewed as mere agents rather than officers in their own right.[218]

Another indication comes from Constitutional Convention proceedings on a motion by Gouverneur Morris to add to the Appointments Clause the current language allowing Congress to authorize the President, courts of law, or heads of department to appoint inferior officers.[219] James Madison suggested that "Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices," but Morris responded that "[t]here is no necessity. Blank Commissions can be sent,"[220] and the motion subsequently passed without modification.[221] This exchange suggests an understanding that even important powers that Congress may only vest in specific offices can be administratively redelegated to others.

First Congress practice also indicates that administrative delegations do not create offices implicating the Clause. As previously noted, early acts allowed officers to designate nonofficer agents to act on their behalf.[222] The first act concerning customs personnel allowed *either* a collector, who was not a head of department in whom officer appointments could be vested,[223] or "such person as he shall authorize or appoint on his behalf," to receive and confirm receipt of certain goods.[224] It also allowed

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216. ARTICLES OF CONFEDERATION OF 1781, art. IX., para 5.

217. *An Ordinance for Regulating the Post Office of the United States of America (1782)*, *in* 23 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789 670 (Gaillard Hunt ed., 1914).

218. *See* Mascott, *supra* note 148, at 544 (stating that the 1782 ordinance reflects "an early understanding that *responsibility* is a required element for officer status"); *id.* at 543–44 (describing other Continental Congress enactments with similar provisions).

219. 2 FARRAND'S RECORDS, *supra* note 125, at 627.

220. *Id.*

221. *Id.* at 627–28.

222. *See supra* notes 148–150 and accompanying text.

223. *E.g.*, Act of July 31, 1789, ch. 5, §§ 5, 9, 1 Stat. 29, 37, 38 (making collectors subject to supervision by the Secretary of the Treasury).

224. *Id.* § 15, 1 Stat. at 49.

him to name a "deputy" to broadly "perform on his behalf, all and singular the powers, functions and duties of collector" in specified circumstances.[225] The act did not treat such agents as officers, omitting them from a description of "officers to be appointed by virtue of this act,"[226] and penalizing those who "impede any *officer* of the customs, *or their deputies*."[227] Consistent with agency principles making principals liable for agents' conduct,[228] the act made a collector "answerable for the neglect of duty, or other mal-conduct of his said deputy in the execution of the office."[229] An early excise tax act similarly provided for officers "or their lawful deputy" to administer oaths and for an officer to verify "by himself or deputy" that goods claimed as tax-exempt were intended for export.[230] It indicated that these deputies were not themselves officers, referencing allowances for both "deputies and officers."[231]

The first Judiciary Act similarly allowed a marshal, who was not a head of department,[232] to "appoint . . . one or more deputies,"[233] and required that before assuming "*the duties of his office*, he shall become bound for the faithful performance of the same, by himself and *by his deputies*," who swore to "faithfully execute all lawful precepts directed *to the marshal* . . . ."[234] It also provided that "the defaults or misfeasances in office of such deputy or deputies shall be adjudged a breach of the condition of the bond given *by the marshal* . . . ."[235] Deputy marshals were thus expected to perform duties of *the office of the marshal*, who remained accountable for their conduct, and were not treated as holding a distinct office subject to the Clause.[236]

225. *Id.* § 6, 1 Stat. at 37.

226. *Id.* § 5, 1 Stat. at 36.

227. *Id.* § 27, 1 Stat. at 44 (emphases added).

228. RESTATEMENT (FIRST) OF AGENCY § 216 (1) (Am. L. Inst. 1933); JOHNSON, *supra* note 107, https://archive.org/details/dictionaryofengl01johnuoft/page/n571/mode/2up?ref=ol&view=theater (defining "deputy" as an officer's agent "whose forfeiture or misdemeanour shall cause the officer . . . to lose his office.").

229. Act of July 31, 1789, § 6, 1 Stat. at 37.

230. Act of March 3, 1791, ch. 15, §§ 50, 52, 1 Stat. 190, 210, 211.

231. *Id.* § 58, 1 Stat. at 213.

232. *See Ex parte* Siebold, 100 U.S. 371, 397 (1879) (indicating that marshals are inferior officers).

233. Act of Sept. 24, 1789, ch. 20, § 27, 1 Stat. 73, 87.

234. *Id.* (emphases added).

235. *Id.* § 28, 1 Stat. at 88 (emphasis added).

236. Consistent with such treatment, these deputies were omitted from an early roster of federal officers. Alexander Hamilton, *List of Civil Officers of the United States, Except Judges, with Their Emoluments, for the Year Ending October 1, 1792* (1793), *in* 1 AMERICAN STATE PAPERS: MISCELLANEOUS 57 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1834).

The evolving treatment of inspectors in early customs acts is also probative. Under the first customs personnel act, they were not appointed as officers; rather, collectors could freely "employ" them.[237] The act allowed them to function as Delegees for surveyors, who had the "duty . . . to go on board ships or vessels . . . *or to put on board one or more inspectors*" to verify a ship's cargo.[238] It also expressly imposed legal liability on surveyors and others designated as officers without similarly holding inspectors accountable.[239] But a 1799 revision charged inspectors solely with distinct duties,[240] and expressly subjected them to liability for failure to perform such duties.[241] Having thus clothed their position with the direct responsibility of an office, this act treated their position as an inferior office subject to the Appointments Clause by making their employment subject to the "approbation of the principal officer of the treasury department."[242]

Such early legislation reflects an original understanding that officers could delegate derivative responsibility for their duties to Delegees, who did not thereby become officers subject to the Appointments Clause, and for whose actions Delegators remained accountable. In contrast, officials charged with direct responsibility for performing their own official duties occupied distinct offices that were assigned duties by statute and filled in accordance with the Clause.

4. Longstanding Historical Practice

Since longstanding historical practice by the political branches can clarify the Constitution,[243] it is significant that the political branches have a long history of acquiescing to delegation provisions that do not treat delegations as offices subject to the Appointments Clause. In the last 75 years, Congress and the President have acquiesced to broad delegation provisions in multiple organic statutes allowing agency heads to delegate

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237. Act of July 31, 1789, ch. 5, § 5, 1 Stat. 29, 37.

238. *Id.* (emphasis added).

239. *E.g.*, *id.* § 8, 1 Stat. at 38 (requiring oath of both officers and inspectors, but fining only noncompliant officers).

240. Act of March 2, 1799, ch. 32, §§ 21, 53, 1 Stat. 627, 643, 667.

241. *Id.* § 53, 1 Stat. at 667 (fining and disqualifying inspectors "who shall neglect or in any manner act contrary to the duties hereby enjoined").

242. *Id.* § 21, 1 Stat. at 643. Similar to the evolving treatment of inspectors, although early acts used the term "deputy" solely to refer to nonofficer Delegees, later acts also created positions with the "deputy" title that were directly charged with responsibility for their own duties, expressly referred to as offices, and filled pursuant to the Clause. Mascott, *supra* note 148, at 520–522 (citations omitted).

243. NLRB v. Noel Canning, 573 U.S. 513, 524–26 (2014).

duties to nonofficer "employees."[244] Perhaps more significantly, since the founding of the Republic, Congress has often authorized officers to delegate to nonofficers, and early Executive Branch opinions recognized that such delegations did not create distinct offices implicating the Clause.

Various nineteenth-century statutes authorized administrative delegations to nonofficer agents. Like First Congress acts referenced above, many statutes gave discretion to officers who were not heads of departments to appoint "deput[ies]" who could exercise the "authority" of the appointing officer, sometimes termed the "principal," for whose conduct this officer or his bond remained "responsible" or "liable."[245] Other statutes permitted officers to "depute" duties to others without providing for these agents' appointment as officers, and often expressly made Delegators accountable for such agents' actions.[246] An 1899 statute allowed the Secretary of War to "delegate" the weighty decision to "remove or destroy" vessels obstructing waterways, and referred to his Delegee as "an agent or officer,"[247] indicating that delegation to a nonofficer "agent" did not effect appointment to an office. The Department of Justice's 1870 organic act included a provision similar to broad delegation provisions in modern organic statutes, allowing the Attorney General to "require any solicitor or officers of the Department of Justice to perform any duty required of . . . any officer thereof,"[248] thus

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244. Stephen Migala, The Vacancies Act and its Anti-Ratification Provision 12–16 (Nov. 29, 2019) (unpublished manuscript) (citations omitted), https://ssrn.com/abstract=3486687 [https://perma.cc/G5XM-3REX]; *see also supra* notes 164–166 and accompanying text.

245. *See*, *e.g.*, Act of Feb. 19, 1864, ch. 11, § 5, 13 Stat. 4, 5 (authorizing circuit court clerks to appoint deputies with "the same authority, in all respects, as their principal" and making "the clerk and the sureties on his official bond . . . liable for all the official acts of each deputy"); Act of March 3, 1849, ch. 124, § 4, 9 Stat. 410, 412 (authorizing a district court clerk to appoint a deputy granted "all the official powers of the said clerk" without "excus[ing] or releas[ing] the said clerk from legal responsibility for acts performed by his said deputy, in behalf of said clerk in the office aforesaid"); Act of Aug. 16, 1842, ch. 130, 5 Stat. 506 (same); *see also, e.g.*, Act of July 22, 1813, ch. 16, § 20, 3 Stat. 22, 30 (authorizing tax collectors to appoint deputies with "like authority in every respect to collect the tax" and stipulating "that each collector shall[,] in every respect, be responsible both to the United States and to individuals . . . for all moneys collected and for every act done . . . by any of his deputies").

246. *E.g.*, Act of June 7, 1872, ch. 322, § 3, 17 Stat. 262 (providing for a court-appointed shipping commissioner to employ clerks, "depute such clerks to act for him in his official capacity . . . [whose acts] shall be as valid and binding as if done by the shipping commissioner," and making him "responsible for the acts of every such clerk or deputy, and . . . liable for any penalties [they] may incur"); Act of March 3, 1853, ch. 145, § 10, 10 Stat. 244, 248 (requiring a Surveyor-General in the Department of Interior to make inspections or "depute a confidential agent to" do so).

247. Act of March 3, 1899, ch. 425, § 20, 30 Stat. 1121, 1154–55.

248. Act of June 22, 1870, ch. 150, § 14, 16 Stat. 162, 164.

permitting delegation of officers' duties to nonofficer "solicitor[s]." Some of these statutes allowed Delegees to act during a Principal's "absence,"[249] while others referenced necessity or imposed no limitation on delegated action.[250]

The Executive Branch endorsed this practice. An 1871 Attorney General opinion justified the constitutionality of statutes vesting appointment of deputies in officers who were not heads of department by explaining that such deputies were not officers. It noted that "the persons appointed are representatives of the officers who appoint them, and who, in some particulars, are responsible for their conduct" so that "the office was substantially in the principal."[251] An 1865 opinion deeming unconstitutional an act allowing officials who were not heads of department to appoint assistant tax assessors[252] took pains to distinguish such officers from Delegees not subject to the Clause. It explained that "the act of Congress establishing the place of assistant assessor, and prescribing its powers, functions, and duties, constitutes it, in the strictest legal sense, an 'office,'" whose duties are "*not the duties of another*, which he performs *in right of*, *and by deputation* from that other," as do "deputies . . . or agents of the collectors."[253] Longstanding practice by the political branches thus reflects an understanding that administrative delegations do not create distinct offices subject to the Clause's rules, and therefore indicates that such delegations can be effected administratively rather than "by Law."

D. Congress Controls Whether and on What Terms Officers Can Delegate

Although administrative delegations are constitutionally permitted, the Executive Branch lacks inherent power to redelegate duties absent congressional authorization. This result flows from Congress' power over office creation, as well as many of the same textualist, structuralist, originalist, and historical considerations that justify the constitutionality

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249. *E.g.*, Act of March 3, 1849, § 4, 9 Stat. at 412.

250. *Compare*, *e.g.,* Act of June 7, 1872, § 3, 17 Stat. at 262 (shipping commissioners may "depute . . . in case of necessity") *with* Act of Feb. 19, 1864, § 5, 13 Stat. at 5 (setting no conditions on deputy clerk's "exercise [of] official powers").

251. Civil Serv. Comm'n, 13 Op. Att'ys Gen. 516, 521 (1871).

252. Appointment of Assistant Assessors of Internal Revenue, 11 Op. Att'ys Gen. 209 (1865).

253. *Id.* at 211–12 (emphases added). *See also* Aditya Bamzai, Symposium, *The Attorney General and Early Appointments Clause Practice*, 93 NOTRE DAME L. REV. 1501, 1509–14 (2018) (summarizing such early opinions).

of delegations in the first place. Congress thus has broad authority to permit, bar, or regulate delegations by statute.

1. The Basis for Congressional Control

Congressional control of administrative delegations logically results from the textual grant to Congress of exclusive power to "establish[]" offices and thereby define their contours. Structuralist considerations relating to the separation of powers further support congressional control over delegations, as does First Congress and longstanding historical practice, under which statutes have routinely delineated which delegations are allowed and on what terms.

From a textualist view, the requirement that offices "shall be established by Law" gives Congress sole power to "structure . . . offices as it chooses,"[254] and thus determine how official duties may be carried out. Some unitary executive theorists claim that the Article II Vesting Clause[255] or Take Care Clause[256] grant the Executive Branch independent authority to reassign duties.[257] But the Appointments Clause, which *constrains* executive power both by restricting how the President makes appointments *and* vesting in Congress what had historically been an Executive prerogative to create offices,[258] limits these provisions' scope. Just as the Appointments Clause limits any inherent authority the President might otherwise have to fill offices without Senate confirmation or congressional authorization, it also bars the Executive Branch from redrawing the contours of offices by granting them authority to delegate that Congress did not grant.[259] And to the extent that offices are a type of agency relationship by which sovereign power is delegated to officers,[260] discretion to redelegate is a power that may or may not be granted to an

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254. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 515 (2010); *accord*, United States v. San Jacinto Tin Co., 125 U.S. 273, 284–85 (1888) ("[I]f restrictions are to be placed upon the exercise of . . . authority by the attorney general, it is for the legislative body which created the office to enact them.").

255. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

256. *Id.* cl. 3 ("[The President] shall take Care that the Laws be faithfully executed.").

257. Samahon, *supra* note 41, at 175–76.

258. *See supra* notes 120–124 and accompanying text.

259. Article II, however, may limit Congress' ability to restrict *termination* of delegations to subordinates with tenure protections. Such restrictions may interfere with presidential authority over subordinates, *Free Enter. Fund*, 561 U.S. at 483–84, since the ability to effect removal, by withdrawing duties or via outright dismissal, is a "powerful tool for control." Edmond v. United States, 520 U.S. 651, 664 (1997).

260. *See supra* note 194 and accompanying text.

agent.[261] The mandate that offices "shall be established by Law" lets Congress determine the scope of officers' agency, allowing it to decide if their powers may be redelegated.

From a functionalist perspective, Congress' power over delegations can limit Executive Branch attempts to unilaterally delegate around the Clause, which could undermine Congress' authority under the Appointments Clause as well as other provisions such as the Appropriations Clause.[262] Congressional control over delegations thus provides an important check that helps make them constitutional in the first place.[263]

Both First Congress and longstanding practice provide further support. First Congress enactments expressly authorized administrative delegations[264] and subjected them to various limits, such as allowing some Delegees to act only during a Delegator's "necessary absence."[265] Notably, only five weeks before enacting the first such statute, in proceedings on the bill creating a Department of Foreign Affairs, the House struck draft language authorizing presidential removal of officers to avoid implying that such authorization was constitutionally required.[266] Thus, Congress' decision shortly afterwards to expressly authorize and regulate administrative delegations—as it also did in subsequent statutes—was likely a deliberate choice reflecting an understanding that Congress controlled whether and how officers redelegate duties. Similar enactments by later Congresses[267] represent a longstanding historical practice confirming that Congress can regulate administrative delegations.

2. How Congress Regulates Administrative Delegations

Congress can decide whether to permit delegations in the first place,[268] and can limit their scope or impose procedural limitations. For example,

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261. *See supra* notes 195–196 and accompanying text.
262. *See supra* notes 156–158 and accompanying text.
263. *See supra* text accompanying note 213.
264. *See supra* notes 223–238 and accompanying text.
265. *E.g.*, Act of July 31, 1789, ch. 5, § 6, 1 Stat. 29, 37.
266. 1 ANNALS OF CONGRESS 600–03, 608, 614 (Joseph Gales ed., 1834).
267. *See supra* notes 245–250 and accompanying text.
268. The primary Supreme Court cases addressing statutory authority to delegate involved agencies with broad general delegation statutes, and thus focused on possible exceptions to these provisions. United States v. Giordano, 416 U.S. 505, 513–14 (1974); Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 120–23 (1947). But appellate courts generally read these cases as holding that intra-agency delegations are presumptively allowed by Congress even without a general delegation statute, absent express or implied statutory limits. *E.g.*, United States Telecom Ass'n v. F.C.C., 359 F.3d 554, 565 (D.C. Cir. 2004) (citing cases from multiple circuits).

Congress may bar some delegations,[269] decide which functions can be delegated and in what circumstances,[270] require delegations to be made to or with concurrence of specified officials[271] or effected "by published rule,"[272] and may mandate procedures for Principals' review of delegated action.[273] Apart from express limits,[274] in construing delegation statutes, limits on broad authorizations may be inferred from other provisions, such as those expressly permitting more limited delegations.[275] Action purporting to delegate duties that fails to comply with such restrictions or is otherwise not authorized by statute exceeds the Delegator's authority, and is invalid just like any other *ultra vires* act.[276]

For example, court-appointed amicus in *Lucia* argued that ALJs are mere Delegees of the Securities and Exchange Commission,[277] which the Administrative Procedure Act ["APA"] vests with adjudicatory duties.[278] But the APA also vests ALJs with similar duties,[279] and implicitly precludes roundabout delegations to others. It limits who can preside over adjudications to the agency, its members, or ALJs appointed as such.[280] And the Commission's delegation statute states that it does not "supersede" these provisions.[281] The applicable statutes thus envision a closed universe of presiding officers acting in their own name, precluding delegation of this authority. Thus, due to Congress' control over

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269. *E.g.*, 52 U.S.C. § 30106(c) ("A member of the [Federal Election] Commission may not delegate to any person his or her vote or any decisionmaking authority or duty vested in the Commission.").

270. *E.g.*, 10 U.S.C. § 2736(a)(3) (allowing delegations to pay claims only in amounts of up to $25,000); 50 U.S.C. § 1804(d)(1)(B), -(d)(2)(A) (allowing a Delegee to act only when a Delegator is "disabled or otherwise unavailable").

271. *E.g.*, 5 U.S.C. § 411(a) (allowing agency chair to delegate specified responsibilities only to the vice-chair); 12 U.S.C. § 2245(c)(3) (requiring approval by board heading a multimember agency for delegations by the agency's chair).

272. *E.g.*, 47 U.S.C. § 155(c)(1).

273. *E.g.*, 15 U.S.C. § 78d-1(b) (requiring Securities and Exchange Commission to provide for discretionary review of delegated action upon the vote of one Commissioner and categorically mandating review of certain delegated actions).

274. *E.g.*, 5 U.S.C. § 3105 (prohibiting ALJs from "perform[ing] duties inconsistent with their duties and responsibilities as administrative law judges").

275. *E.g.*, United States v. Giordano, 416 U.S. 505, 513–14 (1974) (construing 18 U.S.C. § 2516(a)).

276. *Id.* at 508 (suppressing evidence obtained by wiretap authorized by an official delegated authority in contravention of implied statutory limitations).

277. Brief for Court-Appointed *Amicus Curiae* in Support of Judgment Below at 32–34, Lucia v. SEC, 138 S. Ct. 2047 (2018) (No. 17-130).

278. *See* 5 U.S.C § 556(b)(1).

279. *See generally id.* §§ 556–557.

280. *Id.* § 556(b).

281. 15 U.S.C. § 78d-1(a).

delegations, the Commissioners could not have avoided *Lucia*'s holding by delegating their own adjudicatory duties to nonofficer employees.

E. Only True Delegations, Rather Than De Facto *Offices, Are Constitutional*

Given Congress' exclusive and nondelegable power to create offices, nonlegislative assignments of duties implicating significant authority, even if permitted by Congress, may only assign derivative responsibility for the duties of an existing office created by statute. Otherwise, such action would improperly create distinct *de facto* offices. As explained in Part III.A-C, *supra*, Delegees can wield the powers of officers without holding offices "established by Law" or filled pursuant to the Appointments Clause because they do not wield *their own* significant authority. Instead, they are agents of Delegators who retain direct responsibility for performing official duties, either personally or by Delegee. This rationale implies two limits on nonlegislative assignments of responsibility constituting the type of authority implicating the Clause. If such action purports to assign significant authority not formally tethered to an existing office, the result is an unconstitutional *de facto* office not "established by Law."[282] The same result obtains if a putative Delegee is tasked with actions that a Principal could not personally take, due to limitations on the Principal's office or because the office lacks a properly-appointed Principal. And because first-line duties are distinct from supervisory duties for Appointments Clause purposes, supervision of such *de facto* officers by other officers does not cure the defect.

1. Delegations Must Be Tethered to Existing Offices Established by Law

Nonlegislative assignments of duties are permissible delegations only if they assign derivative responsibility for the duties of existing offices "established by Law," *i.e.*, a Delegee may only wield authority that Congress already vested in an office, rather than power that a nonlegislative actor assigned to a position *ex nihilo*. For example, to the extent that contempt prosecutors appointed under Fed. R. Crim. P. 42, as

282. A limited exception may allow certain administrative assignments of tasks to an office that are closely related to its statutory duties, even if these responsibilities are not delegated from another office, because they are "germane" to existing duties, such that adding them does not create a new office. Weiss v. United States, 510 U.S. 163, 171–72, 174–75 (1994) (holding that statutory authority to "assign" or "detail" officers who already have a role in the military justice system to military tribunals does not implicate appointment to a new and distinct office) (citations omitted).

in *Donziger*, wield the significant authority of officers,[283] they are not true Delegees since such authority was not delegated from an existing office. Rule 42 does not identify an office whose powers it purportedly delegates,[284] and it tasks the prosecutors with bringing cases that "the government declines" to bring.[285] They are thus expected to act *contrary* to decisions made by officers granted prosecutorial discretion *by statute*, and hence wield their own authority, rather than acting on a Delegator's behalf.

2. The Delegating Officer Must Be Able to Exercise the Delegated Powers

Even when officials purport to exercise delegated authority, if a Principal lacks power to perform an act taken by a putative Delegee, the "delegation" is not a true delegation but rather an improper *de facto* office, since true Delegees have no more authority than their Principals.[286] A constitutional violation therefore occurs when Congress has not vested the delegated powers in the putative Principal's office, or when a putative Delegee claims to act for an improperly appointed delegating or successor Principal who cannot personally wield the delegated powers.

A typical example of delegations purporting to assign authority that Congress denied to a Principal is the common practice by multimember agencies of relying on staff acting pursuant to previously delegated authority, after the delegating officers lose the ability to personally act due to statutory quorum rules. For example, between January 3, 2019 and May 15, 2019, the Equal Employment Opportunity Commission lacked a statutory quorum,[287] but its staff relied on prior delegations to take action

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283. It is not clear that these prosecutors in fact wield such authority. The government has credibly argued that their tenure and authority are too limited to render them officers. Brief for the United States in Opposition at 9–10, Donziger v. United States, 143 S. Ct. 868 (2023) (No. 22-274). Historical evidence also suggests that nonofficers may be able to initiate or conduct certain criminal or quasi-criminal proceedings. *See generally* Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History,* 38 AM. U. L. REV. 275 (1989).

284. *See generally* FED. R. CRIM. P. 42(a)(2).

285. *Id.* (authorizing appointment only "[i]f the government declines" to prosecute).

286. *See supra* note 169 and accompanying text; *see also*, *e.g.*, Taylor v. Kercheval, 82 F. 497, 501 (C.C.D. Ind. 1897) ("The deputy was empowered to act for the marshal, and his authority and power were limited by those of his principal."); Tenure of Off. of Inspectors of Customs &c., 2 Op. Att'ys Gen. 410, 413 (1831) (describing Delegee as "the shadow of his principal – having no authority distinct from him"); RESTATEMENT (THIRD) OF AGENCY § 3.04 cmt. b (Am. L. Inst. 2006) (agent's authority "is coextensive with the principal's capacity to do the act in person").

287. Press Release, EEOC, Janet Dhillon Becomes Chair of the Equal Employment Opportunity Commission (May 15, 2019), https://www.eeoc.gov/

that the Commissioners could not themselves take.[288] A Westlaw search shows that the Commission's "Office of Federal Operations," which is delegated power to adjudicate appeals of discrimination complaints by federal employees,[289] ruled "for the Commission" on 1,265 appeals during this time,[290] when the Commissioners could not do so themselves.[291] Employees deciding these appeals were not exercising power derivative of the Commissioners' authority, and thus were improperly acting as occupants of *de facto* offices not "established by Law."

Even if an office is vested with authority that was properly delegated, if it comes to be occupied by an improperly appointed official, any "Delegees" purporting to continue to act as such are not true Delegees, and are instead improperly wielding the powers of a distinct *de facto* office. Improperly appointed officials cannot exercise significant authority and their actions may consequently be set aside.[292] Therefore, since a true Delegee exercises only derivative authority, when a putative Delegee claims to act for an improperly appointed Principal, the "Delegee" is not truly acting pursuant to authority derivative of the Principal's own (nonexistent) power. Such "Delegees" thus improperly exercise independent authority not vested in their position "by Law."[293] As explained in Part IV, *infra*, the same result obtains when, instead of a defective appointment to a Principal's office, *no appointment* is made after the office becomes vacant. The common practice of relying on delegations from offices that subsequently become vacant as a means of enabling "acting" service is therefore unconstitutional.

3. Supervision by Officers Does Not Make De Facto *Offices Constitutional*

When nonlegislative action improperly creates a *de facto* office, supervision of its incumbent by a statutory officer, as may be the case for

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newsroom/janet-dhillon-becomes-chair-equal-employment-opportunity-commission [https://perma.cc/BL6N-VRB9].

288. Smith, *supra* note 23.

289. 29 C.F.R. § 1614.405(a) (2023).

290. *E.g.*, Myrtie P. v. Dep't of Homeland Security, EEOC Appeal No. 0120180246, 2019 WL 1397864 at *12–*13 (March 19, 2019) (ordering an agency to pay $230,927.66 to a prevailing complainant).

291. S*ee* 42 U.S.C. § 2000e–4(c) (establishing statutory quorum requirement for the EEOC).

292. Ryder v. United States, 515 U.S. 177, 182–88 (1995).

293. As a pragmatic matter, any other result would allow the Executive Branch to circumvent the Clause's rules for appointments by relying on delegations previously made from offices that are subsequently filled in violation of the Clause.

Rule 42 prosecutors,[294] does not cure any defect, since first-line and supervisory duties are distinct for purposes of the Appointments Clause. Supervision by another officer thus merely indicates that a position directly responsible for exercising significant authority may be an inferior *office*,[295] and the Supreme Court has not excused violations of the Clause when other officers supervised or reviewed the actions of the officials at issue.[296] A position purportedly assigned its own significant authority by nonlegislative action is thus an unconstitutional *de facto* office regardless of how it is supervised.

F. Broad Delegations Can Be Constitutional: The Example of DOJ Special Counsel

Subject to the above limitations, the Appointments Clause does not bar even broad delegations, as demonstrated by the position of DOJ Special Counsel, which wields broad investigatory and prosecutorial powers. Despite extensive litigation and debate about the position's constitutionality, courts and most commentators did not assess if it was a permissible delegation, focusing instead on whether incumbents were properly appointed to a distinct office.[297] For example, Professors Calabresi and Lawson argue that Congress did not create a Special Counsel office to which Robert Mueller could be appointed, or did not and could not have exempted such an office from the PAS process.[298] These authorities overlook a threshold question concerning whether the position is a distinct office, since Special Counsel designations in the last 50 years have generally been made pursuant to orders or regulations citing 28 U.S.C. § 510, a delegation provision in DOJ's organic statute.[299] It broadly

294. United States v. Donziger, 38 F.4th 290, 299–302 (2d. Cir. 2022) (holding that the Attorney General supervises Rule 42 prosecutors).

295. *E.g.*, Edmond v. United States, 520 U.S. 651, 663 (1997) ("[W]e think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by [noninferior officers] . . . .").

296. Thus, Lucia v. SEC, 138 S. Ct. 2044 (2018), granted a new administrative hearing because an improperly-appointed ALJ made a *recommended* decision, *id.* at 2055, although he was subject to supervision by the agency heads, who could, *inter alia*, remove him or reject his recommendation. 5 U.S.C. §§ 557(b), 7521.

297. *See supra* notes 7–9 and accompanying text; *see also In re* Sealed Case, 829 F.2d 50, 56–57 (D.C. Cir. 1987) (concluding that the position was properly filled as an inferior office).

298. Calabresi & Lawson, *supra* note 5, at 87–88.

299. All such regulations since 1973 have cited § 510 as authority, including regulations "[e]stablishing the Office of Watergate Special Prosecution force," 38 Fed. Reg. 30738 (codified at 28 C.F.R. pt. 0, subpt. G-1 (1973)), regulations authorizing Lawrence Walsh to investigate the Iran/Contra matter, 28 C.F.R. pts. 600, 601 (1987), and current regulations promulgated in 1999. 28 C.F.R. pt. 600 (2023). The appointing instruments for

permits "[t]he Attorney General [to] make such provisions as he considers appropriate authorizing the performance by *any* other officer [or] *employee* of the Department of Justice of *any* function of the Attorney General."[300] If a Special Counsel designation falls within the scope of this facially broad authorization, and the incumbent only exercises derivative responsibility for duties vested by statute in the Attorney General's office, the arrangement would pass constitutional muster.

A Special Counsel designation appears to fall within the scope of this delegation provision. The Special Counsel "exercise[s] all investigative and prosecutorial functions of any United States Attorney,"[301] which are also powers of the Attorney General, in whose office "[a]ll functions of other officers of the Department of Justice . . . are vested" under 28 U.S.C. § 509, a provision that Special Counsel regulations and designations also cite as authority.[302] The powers wielded by the Special Counsel are thus "function[s]" of the Attorney General delegable under § 510, unless other statutory provisions implicitly limit its reach. Professors Calabresi and Lawson discount § 510's significance, stating without elaboration that it "is qualified by background constitutional and statutory understandings about the nature of delegable authority," and "leaves to other sources of law the determination of which functions are delegable and to whom."[303] Elsewhere, they quote from portions of 28 U.S.C. §§ 515–518 providing for DOJ "officer[s]" to exercise authority similar to that exercised by a Special Counsel.[304] To the extent the implication is that these provisions implicitly "qualif[y]" § 510 by "determin[ing] which functions are delegable and to whom"[305] *within* DOJ, such an inference is likely incorrect.

Rather, these provisions appear to delineate the authority of Main Justice officers *vis-à-vis officers elsewhere in the government*. Sections 516–518 originate in DOJ's organic act,[306] which affirmed Main Justice

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Special Counsel not designated under these rules also cite § 510 as authority. *See, e.g.,* DOJ Order 3915-2017, *supra* note 1; Letter from James B. Comey, Acting Attorney General, to Patrick J. Fitzgerald, United States Attorney (Dec. 30, 2003), https://www.justice.gov/archive/osc/documents/2006_03_17_exhibits_a_d.pdf [https://perma.cc/YRZ8-T98F] (scroll to the second page).

300. 28 U.S.C. § 510 (emphases added).

301. 28 C.F.R. § 600.6 (2023); *see also* Calabresi & Lawson, *supra* note 5, at 99 ("[Mr. Mueller] wielded the full powers of any United States Attorney.").

302. *E.g.*, 28 C.F.R. pt. 600 (2023); DOJ Order 3915–2017, *supra* note 1.

303. Calabresi & Lawson, *supra* note 5, at 107.

304. *Id.* at 107–10 (quoting 28 U.S.C. §§ 515(a), 516–517, 518(b)).

305. *Id.* at 107.

306. *Compare* 28 U.S.C. §§ 517, 518(b) *and id*. § 516 *with* Act of June 22, 1870, ch. 150, § 5, 16 Stat. 162, 162–63 *and id.* § 14, 16 Stat. at 164.

control over litigation historically conducted by District Attorneys (predecessors of U.S. Attorneys) and officers in other departments.[307] Reading these sections as delineating DOJ's powers rather than regulating delegations *within* DOJ comports with another portion of that act, a forerunner to §§ 509 and 510 allowing the Attorney General to "require any *solicitor* or officers of the Department of Justice to perform any duty required of said Department or any officer thereof."[308] The act thus allowed delegation of duties vested by these provisions in "any officer" to a nonofficer "solicitor." And § 515(a), enacted in 1906 to clarify that Main Justice officials could appear before grand juries,[309] similarly appears to grant Main Justice additional authority rather than limiting delegations *within* DOJ. Accordingly, these provisions do not implicitly limit the broad authority granted by Congress to the Attorney General in § 510 to delegate to a Special Counsel or other agent who is either a DOJ "officer" or a mere "employee" not appointed pursuant to the Appointments Clause.

Moreover, assignment of authority to a Special Counsel is a true delegation rather than a *de facto* office. It is tied to an existing statutory office, since it is made pursuant to § 510, which allows delegation of "function[s] of the Attorney General" that, as noted above, include the powers granted to a Special Counsel. And unlike Rule 42 prosecutors responsible for bringing cases that occupants of statutory offices *decline* to bring,[310] a Special Counsel is appointed when "[t]he Attorney General . . . determines that criminal investigation . . . is warranted."[311]

The Special Counsel also exercises purely derivative responsibility. DOJ regulations seem to grant the position some measure of independence,[312] but courts rightly disregard this purported independence for constitutional purposes, since the Attorney General can do away with

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307. *See generally* Rebecca Roiphe, *A Typology of Justice Department Lawyers' Roles and Responsibilities*, 98 N.C. L. REV. 1077, 1083–86 (2020).

308. Act of June 22, 1870, § 14, 16 Stat. at 164 (emphasis added).

309. An Act to Authorize the Commencement and Conduct of Legal Proceedings Under the Direction of the Attorney-General, ch. 3935, 34 Stat. 816 (1906). The statute followed a ruling that DOJ's organic statute did not authorize Main Justice personnel to participate in grand jury proceedings. United States v. Rosenthal, 121 F. 862, 868 (C.C.S.D.N.Y. 1903). Congress overruled *Rosenthal* by authorizing, among others, "any officer of the Department of Justice" to "conduct any kind of legal proceeding . . . including grand jury proceedings . . ., which District Attorneys now are or hereafter may be by law authorized to conduct." 34 Stat. at 816–17.

310. FED. R. CRIM. P. 42(a)(2).

311. 28 C.F.R. § 600.1 (2023).

312. *E.g.*, *id.* § 600.7(b) (exempting the Special Counsel from "day-to-day supervision [by] any official of the Department"); *id.* § 600.7(d) (establishing "good cause" standard for removal of Special Counsel).

these rules, the entire position, and any incumbent at the stroke of a pen.[313] This practical truth renders Attorneys General directly responsible for the Special Counsel's acts, as reflected in testimony by Rod Rosenstein, who, as Acting Attorney General, appointed Mr. Muller, that the position "is a special counsel, it's not an independent counsel. And I'm accountable for what they're doing . . . ."[314] A Special Counsel designation is thus a true delegation by the Attorney General, who retains responsibility for the Delegee's performance of official duties. It is not an improper *de facto* office as long as a validly appointed Attorney General serves as Principal.[315]

IV. ADMINISTRATIVE DELEGATIONS CANNOT ASSIGN "ACTING" DUTIES

A potentially controversial implication of my analysis is that it casts constitutional doubt on the common agency practice of using administrative delegations to address vacancies in PAS positions, in lieu of appointments to offices assigned acting duties by statute. Agencies may rely on such delegations to avoid limitations applicable to statutory acting roles. For example, the FVRA, which attaches acting duties to "first assistant" positions and also creates freestanding acting offices,[316] restricts who can exercise acting duties in these roles and for how long.[317] Administrations that want to designate or retain acting officials who do not meet these strictures often claim that the officials are merely "performing the duties and functions" of a vacant office pursuant to administrative delegations by prior incumbents.[318] Apart from such purported delegations typically made in anticipation of a vacancy, agencies that routinely rely on delegations of various responsibilities while

313. *In re* Sealed Case, 829 F.2d 50, 56 (D.C. Cir. 1987), *cited by In re* Grand Jury Investigation, 916 F.3d 1047, 1052 (D.C. Cir. 2019); *see also* Edmond v. United States, 520 U.S. 651, 664 (1997) (recognizing the authority to withdraw administrative assignment of duties as "a powerful tool for control").

314. *Oversight Hearing with Deputy Attorney General Rod Rosenstein Before the H. Comm. on the Judiciary*, 115th Cong., 1st Sess. 14 (2017).

315. The validity of the appointment of two Acting Attorneys General serving during Mr. Mueller's tenure was in fact litigated and upheld by the courts. Guedes v. BATFE, 920 F.3d 1, 10 (D.C. Cir. 2019); *In re* Grand Jury Investigation, 916 F.3d at 1054–56. These controversies concerned statutory acting duties and thus did not directly implicate administrative delegations.

316. 5 U.S.C. § 3345.

317. *E.g.*, *id.* § 3345(a)(2), -(a)(3)(A)-(B) (limiting appointments to certain acting offices to persons already holding PAS positions or with specified tenure in senior positions); *id.* § 3345(b)(1) (prohibiting acting service by certain nominees in positions for which they were nominated); *id.* § 3346 (setting time limits on service in acting positions).

318. *E.g.*, O'Connell, *supra* note 18, at 634, 689 (citations omitted).

a Principal holds office often continue to rely on such delegations when the Principal's office is vacant.[319]

In this part, I argue that Congress' exclusive power over office creation renders such arrangements unconstitutional. I first argue on structuralist grounds that Delegees who purport to exercise administratively delegated authority after their Principal's office becomes vacant are no longer mere alter egos bearing only derivative responsibility. They thus occupy a distinct *de facto* office vested by administrative fiat with sole and direct responsibility for exercising the significant authority of an office, in violation of the mandate that offices "shall be established by Law." I then demonstrate that early court rulings adopted this view by treating acting positions as distinct offices that must be created by statute, and that *United States v. Eaton*,[320] the chief Appointments Clause case concerning acting service, similarly treated acting positions as distinct inferior offices subject to the Clause's requirements. I also review founding-era practice and longstanding historical practice that distinguished between Delegees, who generally lacked authority to act without an ongoing relationship to an accountable Principal, and those appointed in accordance with the Clause to distinct offices vested by statute with acting duties, who could temporarily perform these duties independently of an incumbent Principal. I discuss how this limitation narrows the type of acting service that *Congress* can authorize, and therefore largely moots a heavily-litigated controversy over the extent to which the FVRA tolerates use of administrative delegation to assign acting duties.[321] But I also explain that such limits do not leave the government unable to address vacancies in PAS roles, since Congress can create inferior offices with temporary acting duties and exempt them from the PAS process just like any other inferior office.

A. "Delegees" Lacking a Principal Occupy De Facto *Offices Not Established by Law*

Otherwise-constitutional administrative delegations cease to be valid when a Principal's office is vacant, so that a Delegee no longer acts in the name of a Principal occupying an office "established by Law."[322] As explained in Part III.E, *supra*, since a hallmark of offices is direct responsibility, administrative delegations may only assign *derivative* responsibility for statutory duties of existing offices, for which a Principal

319. *See, e.g.*, *supra* note 26.
320. 169 U.S. 331 (1898).
321. *See infra* notes 385–388 and accompanying text.
322. U.S. CONST. art. II, § 2, cl. 2.

retains direct responsibility vested "by Law."[323] But if Delegees continue to exercise authority when a Principal's office is vacant, the lack of an officer in whose name they act makes them solely and directly responsible for duties implicating the significant authority of an office, which were not vested in their position "by Law." And to the extent that the constitutionality of delegations rests in part on traditional agency principles,[324] such principles also confirm that delegated powers cease once a Principal's office is vacant. An agent's powers are no greater than "the principal's capacity to do the act in person,"[325] and when the principal's power to act terminates, so does the agent's authority *qua* agent.[326] If no Principal is present and able to wield the powers of an office, it follows that any putative Delegee continuing to exercise those powers no longer acts as a true Delegee.

Such a "Delegee" lacking a Principal instead occupies a distinct *de facto* office with direct responsibility for duties implicating the significant authority of an office, which was not "established by Law."[327] Even if supervised by another officer, due to the distinction for Appointments Clause purposes between responsibility for first-line and supervisory duties, the "Delegee" still occupies an improper *de facto* office.[328] Thus, in the same way that putative Delegees occupy a *de facto* office when a Principal lacks authority to personally take delegated action due to a defective appointment or limitations placed on the Principal's office,[329] they occupy a *de facto* office when they lack an incumbent Principal altogether. Since the *de facto* office is vested with significant authority by administrative fiat rather than by statute, the Delegee's continued exercise of authority violates the Clause.

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323. Such direct responsibility for performance of duties personally or by Delegee comports with the accountability interests furthered by Clause. *Cf. supra* notes 205–212 and accompanying text. When a responsible Principal is missing, accountability is attenuated because the duties of an office become the sole responsibility of a Delegee not officially appointed (1) to an office formally vested by Congress with these duties (2) by the official(s) formally charged with filling the office.

324. *See supra* notes 203–204 and accompanying text.

325. RESTATEMENT (THIRD) OF AGENCY § 3.04 cmt. b. (Am. L. Inst. 2006).

326. RESTATEMENT (FIRST) OF AGENCY § 122 (Am. L. Inst. 1933) (stating that an agent's powers terminate upon "an event which deprives the principal of capacity").

327. U.S. CONST. art. II, § 2, cl. 2.

328. *See* discussion *supra* Part III.E.3.

329. *See* discussion *supra* Part III.E.2.

B. The Relevant Jurisprudence Indicates That Statutes Must Assign Acting Duties

Few contemporary courts have considered whether administrative delegations can constitutionally assign acting duties. But multiple nineteenth century cases addressing acting service or the implication of vacancies treated acting roles as distinct inferior offices that must be created by statute, or otherwise indicated that administrative delegations cannot assign acting duties. This view was reflected in early rulings concerning the Appointments Clause and acting service, and permeated *Eaton*'s extensive analysis of the constitutionality of acting service.

1. Early Cases

Early court rulings reflected a judicial view that acting roles are distinct offices separate from the offices whose duties they temporarily fulfill, which are therefore subject to the Appointments Clause and its mandate that offices "shall be established by Law," and that in contrast to such acting offices, administrative delegations cannot confer acting responsibilities. For example, the Court of Claims explained that an acting Secretary role "is a distinct and independent office in itself. It is not the office of Secretary, *for it exists simultaneously* with that office."[330] Further implying that acting duties cannot be appended to a position administratively, the court added that an existing officeholder who assumes acting duties "is not . . . an officer to whose office *additional duties have been annexed*[,] but . . . an officer who, while holding one office, has *another distinct and separate from it* conferred on him."[331] The court made sure to note that the acting position was created by statute and filled pursuant to the Clause.[332]

Most telling were cases concerning deputy marshals, who were Delegees of marshals and were not appointed in accordance with the Clause's rules for officer appointments.[333] The courts held that their tenure could not extend past that of the marshal himself, specifically noting that as Delegees, they derived their authority from an incumbent marshal.[334] As one judge stated,

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330. Boyle v. United States, 3 U.S. Cong. Rep. C.C. 44 at 8 (Ct. Cl. 1857) (emphasis added).

331. *Id.* at 9 (emphases added).

332. *Id.* at 8 (citations omitted).

333. *See supra* notes 232–236 and accompanying text.

334. Dudley v. James, 83 F. 345, 346–47 (C.C.D. Ky. 1897); Taylor v. Kercheval, 82 F. 497, 501 (C.C.D. Ind. 1897).

> I think it too clear to admit of serious debate that . . . the tenure of office of the deputy marshal *was only co-extensive with that of the marshal, his principal*, *and expired when the term of the marshal expired*, unless continued or enlarged by special provision of law. Such has been the understanding and practice of all departments of the government since the adoption of the constitution . . . . The deputy was empowered to act for the marshal, and his authority and power were limited by those of his principal. . . . In the strictest sense, the deputy marshal was only authorized by the marshal to exercise the office or right possessed by him in his name, place, and stead.[335]

The Supreme Court appeared to adopt this view in *United States v. Hartwell*,[336] which held that a Treasury clerk was an officer, explaining that "[v]acating the office of his superior would not have affected the tenure of his place."[337] *Hartwell* thus distinguished officers, whose authority does not depend on continued service by another official, from Delegees, whose powers cease when their Principal's office is vacant.

2. United States v. Eaton

United States v. Eaton,[338] the only Supreme Court case directly applying the Appointments Clause to an acting position, held that such positions are inferior offices separate from the vacant noninferior PAS offices whose duties they temporarily perform, and implied that like other offices, they must be created "by Law" rather than by nonlegislative action. In *Eaton*, a consul general forced to leave his post due to illness "asked [the respondent] to take charge of the consulate" and "'designate[d] [him] vice-consul general.'"[339] *Eaton* held that as a result, the respondent occupied the distinct inferior office of *vice-consul*, created and vested with acting duties *by statute*.[340] It did not treat his acting service as an administrative delegation of the duties of a *consul general*, which the

335. *Taylor*, 82 F. at 501 (emphasis added). The "special provision of law" may refer to continued service when the marshal died, for which his bond remained accountable, or the limited ability of deputies, like the marshal himself, to execute precepts in their hands at the time of a marshal's removal, which the opinion referenced elsewhere. *Id.* at 502; *infra* text accompanying note 365. Such provisions are distinguishable from current administrative assignments of ongoing acting duties for which the delegating officer bears no formal accountability after leaving office. *See infra* text accompanying notes 365–370.

336. 73 U.S. 385 (1867).

337. *Id.* at 393.

338. 169 U.S. 331 (1898).

339. *Id*. at 331–332.

340. *Id.* at 336, 343–44 (citing 18 Rev. Stat. § 1674).

Clause expressly designates a noninferior office subject to the PAS process.[341] The Federal Circuit's recent reliance in *Arthrex II* on *Eaton* to uphold an assignment of acting duties via a purported administrative delegation[342] was therefore misplaced.

Eaton repeatedly emphasized that the respondent's acting service was valid *because he was appointed to a statutory office with acting duties*, distinct from the office of the consul general and thus exempt from the PAS process. As *Eaton* noted, Congress had created the position of vice-consul and provided for those appointed to this position to exercise acting duties by being "substituted, temporarily, to fill the places of consuls general . . . when they shall be temporarily absent or relieved from duty."[343] The Court held that "[t]he appointment of such an officer is within the grant of power [for Congress to] '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.'"[344] It thus indicated that the official held a distinct inferior office directly responsible for temporary acting duties, which, unlike the vacant noninferior office charged with regular performance of similar duties, did not require a PAS appointment.

Further emphasizing the nature of the acting position as a distinct office, the Court went to great lengths to show that it was created by statute and filled pursuant to the Clause. It extensively quoted from statutes "defin[ing]" the position's contours and acting duties.[345] And although a consul general rather than a head of department had "designate[d]" the respondent vice-consul,[346] *Eaton* held that in doing so, the consul general merely exercised redelegated authority vested by Congress *in the President* to appoint vice-consuls, pursuant to the Clause's rules for inferior offices.[347] It thus treated the acting official as an officer in his own right appointed to a distinct acting office created by statute in conformity with the Clause, rather than as the Delegee of an absent PAS officer. *Eaton* therefore indicates that officials temporarily performing the same duties as those of vacant PAS offices occupy distinct inferior offices with direct responsibility for such acting duties, which must be "established by

341. U.S. CONST. art. II, § 2, cl. 2 (providing that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Consuls").

342. Arthrex, Inc. v. Smith & Nephew, Inc., 35 F.4th 1328, 1334–35 (Fed. Cir. 2022), *cert. denied*, 143 S. Ct. 2493 (2023).

343. *Eaton*, 169 U.S. at 336 (quoting 18 Rev. Stat. § 1674).

344. *Id.* at 343 (quoting U.S. CONST. art. II, § 2, cl. 2) (emphasis added).

345. *Id.* at 336–337 (quoting 18 Rev. Stat. §§ 1674, 1695, 1703).

346. *Id.* at 332.

347. *See supra* notes 185–187 and accompanying text.

Law"[348] like other offices, implying that such acting duties cannot be assigned by administrative delegation.

Nonetheless, in *Arthrex II*, the Federal Circuit misapplied *Eaton* and consequently asserted that *Eaton* endorsed such use of administrative delegations. The decision followed the Supreme Court's holding that the Appointments Clause required U.S. Patent and Trademark Office adjudications to be reviewable by the Office's Director, a noninferior officer, and the resulting remand of an administrative adjudication for such review.[349] On remand, the Patent Commissioner, who occupied an inferior office in which Congress had declined to vest acting duties[350] but claimed to be "performing the functions and duties" of the Director's then-vacant office under an administrative delegation from a former Director,[351] denied further review.[352]

Arthrex II rejected a constitutional challenge to this delegation based on multiple misreadings of *Eaton*. The panel described the administrative delegation at issue as "indistinguishable" from the consul general's act of asking Eaton "to take charge of the consulate."[353] However, *Eaton* did not endorse such a purported *administrative delegation* by the consul general to perform the duties of his soon-to-be vacant *noninferior office*. Instead, it expressly rested its holding on the respondent's *appointment*, under authority vested in the President pursuant to the Appointments Clause, to the distinct *inferior office* of vice-consul, which was vested with its own acting duties *by statute*. But the *Arthrex II* panel erroneously asserted that *Eaton* did not involve appointment to such an office in conformity with the Clause. Specifically, it noted that the acting official in *Eaton* was selected by the consul general, in whom the Clause does not permit appointments to be vested, and claimed that the President was not even "authorized" to make the appointment at issue in *Eaton*, since he could only "promulgate regulations providing for such appointments."[354] But *Eaton* had expressly held that this rulemaking authority "vest[ed] *in the*

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348. U.S. CONST. art. II, § 2, cl. 2.

349. United States v. Arthrex, Inc., 141 S. Ct. 1970, 1986–87 (2021).

350. *Compare* 35 U.S.C. § 3(b)(1) (authorizing the *Deputy Director* "to act [as] Director in the event of the absence or incapacity of the Director") *with id.* § 3(b)(2)(A) (making no such provision for the Patent Commissioner).

351. U.S. Pat. & Trademark Off., Agency Organization Order 45-1 at II.D (Nov. 7, 2016).

352. Smith & Nephew, Inc. v. Arthrex, Inc., IPR2017-00275, Paper 40 at 2 (P.T.A.B. Oct. 15, 2021).

353. Arthrex, Inc. v. Smith & Nephew, Inc., 35 F.4th 1328, 1334 (Fed. Cir. 2022), *cert. denied*, 143 S. Ct. 2493 (2023) (quoting United States v. Eaton, 169 U.S. 331, 331–32 (1898)).

354. *Id*.

President" power to appoint vice-consuls,[355] and that the respondent was thus appointed to a distinct statutory office pursuant to *the President's* authority, as redelegated by regulation to the consul general.[356]

Unlike *Arthrex II*, most modern authorities construe *Eaton* as holding that acting officials temporarily performing duties of noninferior offices occupy inferior offices,[357] indicating that such "acting" positions are distinct from the noninferior offices whose duties they perform. As distinct offices, it follows that only Congress can create such positions directly responsible for acting duties, just as it created the acting positions at issue in *Eaton* and similar early cases concerning acting service, and that attempts to do so by administrative delegation are unconstitutional.

C. History Confirms that Delegees Lack Power When Their Principal's Office Is Vacant

Historical practice also confirms that administrative delegations cannot authorize continued performance of the duties of an office that subsequently becomes vacant. The manner in which early Congresses addressed vacancies indicates that appointments to offices vested with acting duties by statute and filled in accordance with the Appointments Clause are the only constitutionally sanctioned means of addressing vacancies. Similarly, longstanding practice by the political branches also reflects an understanding that Delegees cannot continue to act *qua* Delegees after their Principal's office becomes vacant.

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355. *Eaton,* 169 U.S. at 343 (emphasis added); *see also id.* at 339 ("It is plain that the [rulemaking provisions] confer upon the President full power . . . to appoint vice-consuls and [t]he regulations just quoted come clearly within the power thus delegated."); *supra* notes 185–187 and accompanying text.

356. *Eaton,* 169 U.S. at 339. As an alternate ground for its holding, *Arthrex II* attempted to analogize to *Eaton* by claiming that delegation provisions in contemporary patent acts similarly "empower[ed] the President, acting through the Patent Office Director," to "select" the Patent Commissioner for an acting role. *Arthrex II*, 35 F.4th at 1334–35. But the cited provisions only authorize *the Director*, who is not a head of department, to *delegate* duties, and make no reference to the *President* or *appointments*, as did the statute cited in *Eaton*. *Compare* 35 U.S.C. § 3(b)(3)(B); Patent and Trademark Office Efficiency Act, Pub. L. No. 106–113, § 4745, 113 Stat. 1501, 1501A-587 (1999) (codified at 35 U.S.C. § 1 note) *with* 18 Rev. Stat. § 1695.

357. Edmond v. United States, 520 U.S. 651, 661 (1997) ("[A]mong the offices that we have found to be inferior are . . . a vice consul charged temporarily with the duties of the consul." (citing *Eaton,* 169 U.S. at *343)*); Morrison v. Olson, 487 U.S. 654, 672–73 (1988) (citing *Eaton,* 169 U.S. at 343); United States v. Smith, 962 F.3d 755, 765 (4th Cir. 2020) ("[A]n acting [official] is . . . an inferior officer under *Eaton*."); Designation of Acting Dir. of the Off. of Mgmt. & Budget, 27 Op. O.L.C. 121, 123 (2003) (stating, in reliance on *Eaton*, that "[a]lthough the position of Director is a principal office, we believe that an Acting Director is only an inferior officer").

1. Early Practice

Early statutes permitting acting service under conditions corresponding to contemporary acting roles required appointment pursuant to the Appointments Clause to offices assigned acting duties by statute. In contrast, early laws generally did not authorize Delegees to continue acting when a Principal's office was vacant. Limited exceptions applied only when Delegees did not exercise the ongoing duties of an office or had a continuing legal relationship with a decedent Principal's bond or estate ensuring some degree of ongoing accountability in that officer's name.

Early organic and vacancy acts only assigned acting duties to officers appointed by a head of department or the President pursuant to the Clause's provisions for inferior officers. Thus, statutes creating the Departments of Foreign Affairs and of War provided that in case of removal or "any other case of vacancy" in the Secretary's office, a Chief Clerk, whom the acts expressly labeled an inferior officer to be appointed by the Secretary, "shall . . . have the charge and custody of all records, books and papers appertaining to the said department."[358] The statute creating the Treasury Department similarly provided for an Assistant to the Secretary, who was designated an "officer" and appointed by the Secretary,[359] to have "the charge and custody of the records, books, and papers appertaining to the [Secretary's] office" when it was vacant.[360] These acts made no reference to ongoing liability by former secretaries or their estates for the former subordinates' actions in the acting role, indicating that the subordinates bore direct responsibility for their execution of acting duties. Early vacancies acts also provided for the President, in whom Congress may vest appointments of inferior officers, to select acting officials not in any way treated as Delegees of a former officer or otherwise connected to such an officer by means of vicarious liability.[361] These statutes therefore reflect an understanding that acting officials occupy offices vested *by statute* with acting duties, bear direct responsibility for official acts, and must be appointed pursuant to the Clause's provisions for filling inferior offices; in turn, these officials' authority does not depend on continued service of a Principal in the vacant office.

358. Act of Aug. 7, 1789, ch. 7, § 2, 1 Stat. 49, 50; Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29.
359. Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65.
360. *Id.* § 7, 1 Stat. at 67.
361. Act of Feb. 13, 1795, ch. 21, 1 Stat. 415; Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281.

In contrast, the ability of nonofficer Delegees to act when their Principal's office was vacant was severely circumscribed. The 1789 Judiciary Act provided that deputy marshals could "execute all such precepts as may be in their hands" when a marshal's term expired.[362] But this provision appears to reference discrete tasks analogous to one-off contracts rather than the ongoing duties of an office,[363] as reflected by the fact that a marshal could himself "continue to execute all such precepts" assigned to him at the time he vacated his office.[364]

Some early statutes allowing officers to designate nonofficer deputies provided that if the officer died (rather than resigning or being removed), the deputy's service continued, and the deceased officer's estate or bond remained liable for his conduct.[365] As explained by Professor Mascott, such liability continued to link the Delegee and his Principal by imposing a form of ongoing formalized accountability on the (deceased) officer.[366] It was also not inconsistent with traditional agency principles like "power coupled with interest," which create an exception to the general rule that an agency terminates if a principal is incapacitated, specific to the case of a decedent principal whose estate is substituted as a type of principal accountable for the agent's actions.[367] The Executive Branch subsequently rationalized the permissibility of such continued service in early acts by referencing the ongoing relationship between the deputy and the officer's estate, and asserted that the deputy could not similarly continue to act if his Principal were removed from office, due, *inter alia*, to lack of continued accountability.[368] The courts likewise explained that in case of a vacancy, deputies "are only permitted to execute such office in the name of [a] deceased" officer, whose bond remained liable for their "default or misfeasances."[369] Such limited acting service, under which some formal ongoing link remained between Delegees and their Principals, hardly supports the current practice of purporting to perform delegated duties on behalf of Principals who, after vacating office, have no continuing formal

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362. Act of Sept. 24, 1789, ch. 20, § 28, 1 Stat. 73, 88.

363. *See supra* note 55 and accompanying text.

364. Act of Sept. 24, 1789, § 28, 1 Stat. at 88.

365. *E.g.*, *id.*; Act of July 31, 1789, ch. 5, § 7, 1 Stat. 29, 37.

366. Mascott, *supra* note 148, at 517–18, 519–20.

367. *See generally* Hunt v. Rousmnanier's Adm'rs, 21 (8 Wheat.) U.S. 174 (1823) (Marshall, C.J.).

368. Tenure of the Off. of Deputy Collector, 4 Op. Att'ys Gen. 26, 28 (1842). For further discussion of this opinion, *see infra* text accompanying notes 378–379.

369. Matthews v. United States, 32 Ct. Cl. 123, 134, 137–38 (1897), *aff'd on other grounds sub nom.* United States v. Matthews, 173 U.S. 381 (1899).

relationship with their former Delegees and are no longer accountable for their actions.[370]

2. Longstanding Historical Practice

Longstanding historical practice by the political branches, in the form of statutes and Attorney General opinions, also indicates that Delegees cannot exercise the powers of a vacant office; instead, a statute must vest a position with acting duties, and such a position must be filled in accordance with the Appointments Clause. The FVRA and its forerunners dating back to 1792 have thus provided for the President to designate acting officials,[371] consistent with appointment pursuant to the Clause to a distinct inferior office assigned acting duties by statute, as the earliest cases construing these acts held.[372]

Moreover, early Attorneys General distinguished Delegees from officers on the basis that Delegees' authority terminates when their Principal's tenure ends, while officers retain their authority even when their superior's office is vacant. Thus, in an 1831 opinion,[373] Attorney General Berrien contrasted a customs inspector, who held a distinct office filled pursuant to the Appointments Clause with the "approbation" of the Secretary of the Treasury,[374] with a deputy collector, who was a Delegee selected by the collector[375] and thus not an officer appointed pursuant to the Clause. Berrien explained that the deputy only exercised authority "in right of another" and was "the shadow of his principal – having no authority distinct from him, nor to act otherwise than in his name . . . ."[376]

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370. Moreover, apart from the fact that contemporary delegation statutes do not impose comparable legal liability on Delegators' bonds or estates, it is not clear that such liability would provide sufficient accountability in the present day, when both judicially-created and statutory grants of official immunity have reduced or eliminated the resulting legal exposure. *See supra* note 211 and accompanying text.

371. 5 U.S.C. § 3345(a)(2)(3) (2018); Act of Sept. 6, 1966, Pub. L. No. 89-554, §§ 3345-3346, 80 Stat. 378, 426 (codifying existing law); Act of July 23, 1868, ch. 227, § 3, 15 Stat. 168; Act of Feb. 20, 1863, ch. 45, § 1, 12 Stat. 656; Act of Feb. 13, 1795, ch. 21, 1 Stat. 415; Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281. Many of these acts also appended acting duties to some permanent offices. *E.g.*, 5 U.S.C. § 3345(a)(1); Act of July 23, 1868, § 1, 15 Stat. at 168.

372. *E.g.*, Boyle v. United States, 3 U.S. Cong. Rep. C.C. 44 at 7 (Ct. Cl. 1857) ("[W]hen the President, under the 8th section of the act of 1792, authorizes any person to perform the duties of Secretary of State, such person is thereby invested with an office."); *id.* at 8 (stating that designation under the 1792 act is an "appointment of the President"); Dickens v. United States, 1 U.S. Cong. Rep. C.C. 9 at 16 (Ct. Cl. 1856) (same).

373. Tenure of Off. of Inspectors of Customs &c., 2 Op. Att'ys Gen. 410 (1831).

374. Act of March 2, 1799, ch. 22, § 21, 1 Stat. 627, 642.

375. *Id.* § 22, 1 Stat. at 644.

376. *Tenure of Off. of Inspectors*, 2 Op. Att'ys Gen. at 413.

He contrasted him with the inspector, whose "duties. . . are emphatically his own, specified by law, performed by him in his own right, under the authority of the law," and who therefore could "*hold over until a successor* [*collector*] *is appointed*."[377] The clear implication was that an officer like the inspector vested with his own statutory duties continued to serve regardless of a vacancy in a superior's office, while an agent administratively delegated duties by an officer lost power when his Principal's office was vacant.

Later Attorneys General expressed similar views. Attorney General Legare advised "that, in the case of a removal of the collector from office, his deputy has no authority to act; on general principles it is clear the powers of the deputy expire with those of the principal."[378] He added that "it would be absurd to consider [the removed collector's] administration as continuing after he had been declared unworthy of trust, or that he should be held responsible to the government for the conduct of another, over whom the government itself had deprived him of all control."[379] He thus tied the derivative nature of a Delegee's responsibility to a loss of authority when a Principal's office was vacant and the Delegee lacked a directly accountable Principal. And in 1867, at argument in *United States v. Hartwell*,[380] Attorney General Stanbery asserted that unlike a Delegee, an officer exercises power in his own name and thus "does not stand in the relation of a deputy with *a tenure of office depending on the principal* who appointed him; but *he remains in office notwithstanding his principal may retire*."[381]

Accordingly, although the widespread contemporary use of administrative delegations to assign acting duties may make a claim of unconstitutionality appear radical, such was not the case historically. Rather, longstanding historical practice, like early judicial precedents, reflects an understanding that administrative delegations cannot be used to address vacancies in lieu of appointment to offices created and vested with acting duties by statute.

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377. *Id.* at 412 (emphasis added).
378. Tenure of the Off. of Deputy Collectors, 4 Op. Att'ys Gen. 26, 27 (1842).
379. *Id.* at 28.
380. 73 U.S. (6 Wall.) 385 (1867).
381. *Id.* at 389 (emphases added). As discussed above, the Court concurred with this reasoning, distinguishing officers from Delegees partly based on officers' ability to continue exercising authority when their superior's office is vacant. *See supra* notes 336–337 and accompanying text.

D. The Constitution Limits the Impact of the FVRA's "Delegable Function" Exemption

Because Congress cannot constitutionally delegate power to create offices, and the political branches cannot legislate around the Appointments Clause,[382] even if a statute purports to permit assignment of acting duties by administrative delegation, it should be of no effect. Thus, although some commentators imply that the Federal Vacancies Reform Act of 1998 ("FVRA") defines what is constitutionally permissible with respect to acting service,[383] the Clause serves as a backstop that limits what the FVRA or other statutes can allow. Since the Clause bars the use of administrative delegations to assign acting duties, it should largely moot the controversy surrounding an FVRA provision potentially implicating such delegations that has been heavily litigated in recent years.[384]

The FVRA contains an enforcement provision rendering "action taken by any person who is not acting under [the FVRA] in the performance of any function or duty of a vacant office" void and not ratifiable.[385] But it defines a "function or duty" for this purpose as one "required . . . to be performed by the applicable officer (*and only that officer*)."[386] As a result, many courts, as well as DOJ and the Comptroller General, read this enforcement provision as only applying to "non-delegable functions" and thus largely irrelevant due to the broad authority typically granted to agency heads in contemporary organic statutes to delegate nearly all of their duties.[387] Commentators and some courts have criticized this reading on statutory grounds,[388] but *constitutional* limits should largely moot the

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382. Freytag v. Comm'r, 501 U.S. 868, 880 (1991).

383. *Cf.* Stephen I. Vladeck, *Whitaker May Be a Bad Choice, but He's a Legal One*, N.Y. TIMES (Nov. 9, 2018), https://www.nytimes.com/2018/11/09/opinion/trump-attorney-general-constitutional.html [https://perma.cc/2JGG-G8GA] (suggesting that the FVRA's tenure limits define the temporal bounds of constitutionally permissible acting service falling within the scope of *Eaton*'s holding).

384. *See generally* O'Connell, *supra* note 18, at 617–23.

385. 5 U.S.C. § 3348(d)(1)–(2).

386. *Id.* § 3348(d)(2)(A)(ii) (emphasis added).

387. *E.g.*, Arthrex, Inc. v. Smith & Nephew, Inc., 35 F.4th 1328, 1337 (Fed. Cir. 2022), *cert. denied*, 143 S. Ct. 2493 (2023); *see also* VALERIE C. BRANNON, CONG. RSCH. SERV., R44997, THE VACANCIES ACT: A LEGAL OVERVIEW 6–7 (2022) (citing cases and agency opinions), https://fas.org/sgp/crs/misc/R44997.pdf [https://perma.cc/RS7S-QAW2]; *supra* note 165 and accompanying text (describing breadth and ubiquity of modern delegation statutes).

388. BRANNON, *supra* note 387, at 7–8 (discussing judicial rulings); *see also*, *e.g.*, Stephen Migala, *The Vacancies Act and an Acting Attorney General*, 36 GA. ST. U. L. REV. 699, 792–98 (2020) (arguing based on the FVRA's text and legislative history that the enforcement provision only exempts functions and duties expressly made delegable, or assigned to multiple offices or an entire department rather than to a specific officer).

issue, since the Appointments Clause itself precludes the use of administrative delegations to assign acting duties. The Clause implies a remedy rendering actions by officials who wield authority in violation of its provisions void,[389] so even if the FVRA's exception to its own remedy for improper delegations were to apply and render this *statutory* remedy toothless, the acts of putative Delegees claiming to exercise the duties of a vacant office would still be voidable as a matter of *constitutional* law.[390]

E. The Political Branches Can Use Statutory Acting Offices to Address Vacancies

Although Congress' exclusive and nondelegable power over office creation limits the manner by which responsibility for temporarily performing the duties of vacant offices can be assigned, the Constitution does not leave the government helpless to address the growing number of vacancies in PAS offices pending confirmation of permanent incumbents. Congress' power to establish offices allows it to create inferior offices authorized to temporarily perform the duties of these positions, and the Clause allows it to vest appointments to such offices "in the President alone, in the courts of law or in the heads of departments."[391] Congress can therefore create freestanding acting offices as it did in the FVRA, which vests appointments to such offices in the President,[392] or attach acting duties to offices charged with other ongoing duties, as it has done both in the FVRA and various organic statutes.[393] It can thus provide a mechanism for acting officials to perform the duties of a vacant office in compliance with Article II's requirement that all offices, including those responsible for acting duties, "shall be established by Law."[394]

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389. Ryder v. United States, 515 U.S. 177, 182–88 (1995).

390. However, because the FVRA's *statutory* bar on ratification might not apply, the Delegee's actions may still be ratifiable once the office in question is again occupied, since the constitutional jurisprudence generally indicates that such ratification is possible. *E.g.*, Ortiz v. United States, 138 S. Ct. 2165, 2181–82 (2018); Wilkes-Barre Hosp. Co., LLC v. NLRB, 857 F.3d 364, 371 (D.C. Cir. 2017) (citations omitted).

391. United States v. Eaton, 169 U.S. 331, 343 (1898) (quoting U.S. CONST. art. II, § 2, cl. 2).

392. 5 U.S.C. § 3345(a)(2)–(3).

393. *Id.* § 3345(a)(1) (providing for "first Assistants" to an office to exercise acting duties when it is vacant); *see also, e.g.*, 6 U.S.C. § 113(g) (allowing the Department of Homeland Security's Undersecretary for Management to serve as acting Secretary); 12 U.S.C. § 1812(b)(3) (allowing the FDIC's Vice-Chair to serve as acting Chair).

394. U.S. CONST. art. II, § 2, cl. 2.

V. CONCLUSION

Although the Appointments Clause's provision that offices "shall be established by Law" is rarely explored in contemporary jurisprudence or commentary, it imposes a substantive requirement vital to the separation of powers and no less mandatory than the Clause's appointments provisions. It also has important implications for the common agency practice of relying on administrative delegations to facilitate performance of important agency functions and enable officials to perform the duties of vacant offices.

The Clause precludes the Executive Branch from creating offices, and bars Congress from delegating its own power to do so. But it allows substantial flexibility by permitting Congress to authorize officers to administratively (re)delegate their statutory duties. Such arrangements must be true delegations of derivative responsibility for these duties, rather than *de facto* offices vested with direct responsibility for exercising significant authority, and Congress can determine whether to permit them and on what terms. However, the common practice of relying on such administrative delegations to perform the duties of vacant offices creates distinct *de facto* offices wielding direct responsibility that is vested by administrative fiat. Therefore, even if a statute such as the FVRA purportedly authorizes or tolerates this practice, it violates Article II's requirement that offices "shall be established by Law."

These restrictions do not leave the political branches unable to address the needs of modern government. Agencies may broadly delegate powers subject to the above constraints, as the Department of Justice has done with respect to the Special Counsel position. And although the Constitution precludes assignment of acting duties by delegation, the Clause provides an alternate course of action that comports with constitutional strictures, by allowing Congress to create inferior offices vested with such duties "by Law" and filled in accordance with the Clause.