
THE RUTGERS UNIVERSITY LAW REVIEW
VOLUME 74 | ISSUE 2 WINTER 2022

DISTINGUISHING BETWEEN INFERIOR AND NON-INFERIOR OFFICERS UNDER THE APPOINTMENTS CLAUSE—A QUESTION OF "SIGNIFICANCE"

Damien M. Schiff[*] *& Oliver J. Dunford*[†]

ABSTRACT

An important part of the constitutional design of the federal government is the separation of powers. A key aspect of that design is the Appointments Clause, which governs how officers of the United States are installed in their positions. The clause presumptively requires that all such officers must be appointed by the President with the advice and consent of the Senate. But it authorizes Congress to bypass that procedure and vest the appointment of "inferior Officers" exclusively in the President, the Courts of Law, or the Heads of Department.

How to distinguish between inferior and non-inferior officers, and thus how to determine who among federal officialdom must be appointed by the President with the Senate's approval, is a task that has bedeviled the Supreme Court for decades. In its 1997 decision, Edmond v. United States*, the Court held that the distinction turns on the degree to which an officer is "directed and supervised" by other, non-inferior officers. The Court articulated three factors to guide that assessment, including whether the officer is protected from removal and whether the officer has the power unilaterally to make a final decision. In its ruling this past Term in* United States v. Arthrex, Inc.*, the high court signaled a departure from* Edmond *and embarked on a different analytical path. Effectively eschewing the* Edmond *direction-and-supervision standard along with its multi-factor analysis, the Court appears to have adopted a straightforward "significance" standard, such that an officer is non-inferior if the officer wields significant power. The Court's shift in* Arthrex *is,*

* Senior Attorney, Pacific Legal Foundation.

† Attorney, Pacific Legal Foundation. The authors express their thanks for the very helpful comments provided on earlier drafts of this paper by current and former Pacific Legal Foundation colleagues.

however, more implicit than explicit, given the precedential constraints of Edmond *and other cases that have employed "significance" as the standard to distinguish officers from non-officers, rather than inferior from non-inferior officers. Consequently, the Court's analysis in* Arthrex *is set forth using the terms of* Edmond*. But* Arthrex*'s essentially exclusive reliance on the* Edmond *"final decision" factor—coupled with its emphasis on the importance of maintaining accountability for official action that, like the patent dispute at issue in* Arthrex*, can have tremendous impact on the property rights and other liberties of private parties—suggests that the Court's allegiance to* Edmond *is superficial and strategic.*

If, then, the Court is moving towards a plain significance standard—and our review of the Court's ruling concludes that it is—then this shift should be applauded. It makes the Court's Appointments Clause case law better cohere with that clause's original meaning, which does not use significance to distinguish officers from non-officers, but likely does so to distinguish inferior from non-inferior officers. It also better furthers the policy of democratic accountability, a policy that the Court's recent cases concerning the Appointments Clause—including Arthrex*—as well as those concerning the coordinate issue of the President's power to remove officers, have stressed, and which animates the Constitution's rules and checks governing the selection and control of the Executive officer corps.*

TABLE OF CONTENTS

I. INTRODUCTION

In their design of the federal government, the Founders ordained a separation of powers enhanced by carefully calibrated checks and balances.[1] An important part of their design is the Appointments Clause,[2] which directs how officers of the United States are to be installed in their positions.[3] The Appointments Clause provides:

> [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.[4]

The clause makes two distinctions that have attracted significant attention from courts, litigants, and commentators.

One important distinction is that which the clause impliedly makes between officers and non-officers (such as federal employees and contractors): the former require appointment, while the latter evidently do not. To distinguish these two types of functionaries, the Supreme

1. *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 117–18 (2015) (Thomas, J., concurring) ("When the Framers met for the Constitutional Convention, they understood the need for greater checks and balances to reinforce the separation of powers.").

2. U.S. CONST. art. II, § 2, cl. 2.

3. *See generally* Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointments Clause*, 37 SYRACUSE L. REV. 1037, 1061–70 (1987) ("The framers came to Philadelphia mindful of the colonial legacy of monarchical appointment abuses, yet equally fearful of legislative tyranny. . . . The compromise that the members of the Convention effected [through the Appointments Clause] was an effort to alleviate these . . . concerns . . . ."); *cf.* THE FEDERALIST No. 76, at 510–13 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The Appointments Clause recognizes that "one man of discernment is better fitted to [analyze] and estimate the peculiar qualities adapted to particular offices," but guards against "a spirit of favoritism in the President" by presumptively requiring Senate confirmation. *Id.*

4. U.S. CONST. art. II, § 2, cl. 2.

Court has, since at least the 1970s, employed a "significance" standard: if a federal official exercises "significant" authority, then he is an officer.[5]

A second noteworthy distinction—this one express—is made by the clause's Excepting Clause, according to which non-inferior officers must be appointed by the President with the advice and consent of the Senate.[6] In contrast, "inferior" officers may, if Congress so ordains, be appointed without the Senate's or even the President's involvement.[7]

How to distinguish between inferior and non-inferior officers was the central issue in the Supreme Court's 1997 decision in *Edmond v. United States*. In that case, the Court held that the key to determining whether an officer is inferior is the extent to which the officer is directed and supervised by other non-inferior officers.[8] In making that assessment, three factors are to be considered: the extent to which (1) the official is protected from removal, (2) the official's day-to-day work is overseen by others, and (3) the official has the power to issue a final decision without approval from the official's superiors.[9] Since *Edmond*, the removal factor has figured most prominently in the case law—that is, if an officer enjoys substantial protection against removal, the officer is very likely to be viewed as non-inferior, even if the officer's day-to-day work is supervised or guided by others.[10]

In its recent decision in *United States v. Arthrex, Inc.*,[11] the Supreme Court appeared to signal a shift in the *Edmond* analysis. As we shall see,

5. Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam).

6. An aside on nomenclature: although existing convention uses "principal" to denote those officers not subject to the Excepting Clause, we believe that the preferable term is "superior," given its strong historical provenance, as well as the fact that the term "principal officer" occurs in the Constitution but not in the Appointments Clause. *See* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1979 (2021) ("Only the President, with the advice and consent of the Senate, can appoint noninferior officers, called 'principal' officers as shorthand in our cases."); Steven G. Calabresi & Gary Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, 95 NOTRE DAME L. REV. 87, 135–38 (2019); U.S. CONST. art. II, § 2, cl. 2; *id.* amend. XXV, § 4. As a compromise, we usually use here the term "non-inferior officer."

7. As the Supreme Court has explained, the "prescribed manner of appointment for [non-inferior] officers"—Presidential appointment and Senate confirmation—"is also the default manner of appointment for inferior officers." Edmond v. United States, 520 U.S. 651, 660 (1997). Pursuant to its authority under the Excepting Clause, Congress may "by Law" allow inferior officers to be appointed in a different manner. *Id.* at 659–60.

8. *Id.* at 661–63.

9. *Id.* at 661–65.

10. *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 510 (2010); Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332, 1336–41 (D.C. Cir. 2012); *cf.* Arthrex, Inc. v. Smith & Nephew, Inc., 941 F.3d 1320, 1332–34 (Fed. Cir. 2019), *vacated and remanded sub nom.*, United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021).

11. 141 S. Ct. 1970 (2021).

neither the day-to-day supervision nor the removal factor played any meaningful role in the Court's analysis of whether the federal officials there were inferior,[12] despite the prominence of those factors in the Federal Circuit's decision below.[13] Instead, what the Supreme Court found decisive was that the officers at issue could render a final decision for the Executive Branch on important federal matters—in *Arthrex*, whether a patent worth billions of dollars should be canceled.[14] Very nearly on that basis alone, the Court concluded that the officers were non-inferior.[15] The third *Edmond* factor thus appears to have become a determinative consideration.

We endeavor in this article to show that, although *Arthrex* does mark an important development in the Court's Appointments Clause case law, it is not one that a casual follower of that jurisprudence would likely notice. Such an observer might well conclude that *Arthrex* merely indicates that, as is true of multi-factor tests in other areas of the law,[16] one or another of the *Edmond* factors may in any given case be determinative. But a closer analysis of the decision reveals that the ruling represents a deeper development, one that presages a general departure from *Edmond*'s focus on supervision—with a stress on removal protections—towards a focus on the *significance* of the authority wielded—which, as *Arthrex* itself demonstrates, does not exclude consideration of the *Edmond* factors. If we are right about the Court's thinking, then this development is desirable for at least two reasons.

First, it melds better with the original meaning of the Appointments Clause. That point is shown both negatively and positively. As for the *via negativa*: the historical evidence is fairly clear that, notwithstanding the Court's modern Appointments Clause rulings leading up to *Arthrex*,[17] "significance" ought *not* to mark the dividing line between officer and

12. *Id.* at 1985–87.

13. *See Arthrex, Inc.*, 941 F.3d at 1331–34.

14. *See Arthrex, Inc.*, 141 S. Ct. at 1976, 1981–82.

15. *See id.* at 1988.

16. *See, e.g.*, County of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1477 (2020) (stating as to whether an indirect discharge of a pollutant to regulated waters will itself be regulated under the Clean Water Act, "[t]ime and distance will be the most important factors in most cases, but not necessarily every case.").

17. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam) (establishing "significant authority" test to distinguish officer from non-officer); Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018) (applying *Buckley*'s "significant authority" test to determine whether the SEC's ALJs are "Officers of the United States" or simply employees of the federal government).

non-officer.[18] Positively, although the original public understanding of "inferior officer" is not, as we shall see, pellucid, to the extent that the history speaks at all, it suggests that significance was intended to mark the distinction between inferior and non-inferior officers.

Second, a significance-based test better coheres than *Edmond* with the Appointments Clause's purpose of preserving accountability for the actions of federal officers. That is a policy consideration that motivated the Framers.[19] It is also a policy that the Court has long emphasized, in both its Appointments Clause and removal-power cases,[20] and one which it again highlighted in *Arthrex*. *Edmond*'s focus on mere supervision and control does not fit well with that policy because the democratic relevance of accountability depends more on the importance of the power wielded than on the officer's removability or the number of supervisors the officer has. To be sure, a superficial reading of *Arthrex* and its emphasis on *Edmond*'s final-decision-making factor might lead one to conclude that the decision suffers, like *Edmond*, from a lack-of-fit defect between the factors to be considered and the accountability policy to be furthered. Indeed, just because a federal official has final-decision-making authority does not mean that the official wields significant power and thus ought to be democratically accountable.[21] But one must bear in mind that the Court in *Arthrex* was constrained by the precedential framework of *Edmond*. In light of that limitation, the Court had to express itself, at least nominally, through the *Edmond* factors.[22] Yet if one looks closely at how the Court actually employed—and largely ignored—those factors, it becomes clear that the finality factor was given a starring role precisely because it highlighted the significance of the authority under review, a significance that was the real driver in the Court's conclusion that the officials at issue were exercising powers reserved to non-inferior officers.[23]

18. *See, e.g.*, *Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring) ("The Founders likely understood the term 'Officers of the United States' to encompass all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty.").

19. *See infra* Part II.

20. *See infra* Part III. By "removal-power cases," we refer to those cases in which the Court, relying variously on the Constitution's Vesting or Take Care Clause, or both, has invalidated limitations on the President's power to remove officers from their posts. *See* U.S. CONST. art. II, § 1, cl. 1; *id.* art. II, § 3.

21. For example, a federal official may have the power to decide whether to purchase a pencil on behalf of the government, but that decision, despite its finality, is obviously not significant.

22. *See* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1981–82, 1985–87 (2021).

23. *See id.* at 1983.

Our article proceeds as follows. Given the Supreme Court's view that "the historical understanding of the [Appointments] Clause is key to its contemporary interpretation and application[,]"[24] we begin with a deep review of the Clause's origins.[25] We then move to a discussion of the Clause's occasional appearance in litigation during the nineteenth century, in which the distinction between officer and non-officer was paramount.[26] Next, we detail the Clause's prominent re-emergence in high-profile litigation in the latter half of the twentieth century to today, paying particular attention to the Court's decision in *Arthrex*.[27] Following this recounting of the case law, we explain how *Arthrex*, in conjunction with coordinate decisions dealing with the President's power to remove officers from their posts, signals that the Court is moving toward—but, to be sure, has not quite arrived at the point of—explicitly adopting significance as the criterion for distinguishing between inferior and non-inferior officers.[28] We then conclude with a few thoughts as to why that move—however embryonic it may be—should be welcomed.[29]

II. THE ORIGINS AND EARLY UNDERSTANDING OF THE APPOINTMENTS CLAUSE

A. English Precedent, the Articles of Confederation, Early State Practice, and the Convention of 1787

Although by no means the most politically significant matter for the delegates at Philadelphia, "there would prove to be few more difficult issues for the Convention to resolve than determining the proper locus of the appointing power."[30] As James Madison with characteristically trenchant adumbration put it, "[a]n *absolute* appointment [by the President] to all offices—to some offices—to no offices, formed the scale of opinions . . . ."[31] In this section we review the record of the Convention

24. *See* Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 450 (2018).
25. *See infra* Part II.
26. *See infra* Part III.
27. *See infra* Part IV.
28. *See infra* Part V.
29. *See infra* Part VI.
30. Blumoff, *supra* note 3, at 1057.
31. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 133 (Max Farrand ed., 1911) [hereinafter, 3 THE RECORDS OF THE FEDERAL CONVENTION].

debates,[32] to seek guidance on how the Framers intended to distinguish inferior from non-inferior officers.[33]

But before we arrive at Philadelphia, we must first visit Westminster, for English practice formed the backdrop for how the Framers chose to assign and check the appointing power.[34] In medieval England, the grant of an office had much the same effect as the grant of land: "it conferred on the grantee an estate in the office, and (usually more important) in its emoluments."[35] Although some offices within the king's *curia* were hereditary, as time went on and the desire for administrative efficiency and control increased, great powers were assigned to newly created, non-hereditary offices like those of the justiciar and chancellor.[36] These officials, who included nearly all who performed judicial functions, were selected by the king and served at his

32. These principally come from Madison's own notes of his attendance at the Convention, in which "[t]he whole of every thing said and done there was taken down . . . with a labor and exactness beyond comprehension." *Id.* at 421 (Letter of Thomas Jefferson to John Adams). We acknowledge that some weighty authorities have dismissed the exegetical value of Madison's notes, as well as of the records of the Convention generally. *See, e.g.*, John F. Manning, *The Role of the Philadelphia Convention in Constitutional Adjudication*, 80 GEO. WASH. L. REV. 1753, 1754 (2012) (contending that the Convention records "have relatively little to tell us about constitutional meaning[,]" given the challenges of deriving group intent from individual statements of purpose, and the fact that they were not publicly available until decades after the Constitution's ratification). We are of a different view, but even if we were not, we should still rely on those records, in light of the large role that they have played in how the Supreme Court has interpreted the Constitution, including the Appointments Clause. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 128–31 (1976) (per curiam); Morrison v. Olson, 487 U.S. 654, 674–75 (1988). Additionally, given that our main purpose is to demonstrate that the Court is altering—for the better, in our view—its inferior-officer jurisprudence, showing how the Convention records may or may not support that shift is pertinent to our larger endeavor.

33. For one—and certainly the most substantive—of the three discussions of the clause in the supplementary records of the Convention compiled in Farrand's Records, see John M. Burkoff, *Appointment and Removal Under the Federal Constitution: The Impact of* Buckley v. Valeo, 22 WAYNE L. REV. 1335, 1341 & n.28 (1976). We also direct the reader's attention to Luther Martin's remarks in *Genuine Information*, which was delivered to the Maryland Legislature. 3 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 31, at 218 ("It was said, that the person who *nominates* will always in reality *appoint*, and that this was giving the President a power and influence, which, together with the other powers bestowed upon him, would place him above all restraint or control."). During the Convention, Martin spoke strongly in favor of the Senate having sole power over the appointment of judges. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 41 (Max Farrand ed., 1911) [hereinafter, 2 THE RECORDS OF THE FEDERAL CONVENTION].

34. *See* Myers v. United States, 272 U.S. 52, 118 (1926) (relying upon the pre-revolutionary English practice to construe the President's power to remove officers).

35. C. H. McIlwain, *The Tenure of English Judges*, 7 AM. POL. SCI. REV. 217, 218 (1913).

36. *Id.* at 218–19.

pleasure.[37] The disputes between the Stuarts and Parliament during the seventeenth century eventually led, in the Act of Settlement of 1701, to a guarantee that, for judicial officers, their patents to hold office would still come from the king but they would be held during good behavior.[38] This tenure was not extended to curial officials generally, who still held their offices from the monarch at his pleasure.[39]

After independence, the thirteen former colonies were understandably not very keen to follow British governmental models that smacked of monarchy. Hence, early state constitutions almost without exception vested officer-appointing authority in the legislature.[40] This practice was incorporated into the Articles of Confederation of 1781.[41] The Articles dealt with officer appointments in two sections: Article VII provided that militia officers below the rank of colonel were to be appointed by their respective legislatures,[42] whereas Article IX assigned all federal civil officer-appointing power, including for judges, and most federal military officer-appointing power, to Congress and committees established by it.[43]

The appointment model of the Articles of Confederation was carried over to the fifteen resolutions that William Randolph of Virginia submitted to the Constitutional Convention at Philadelphia in May, 1787.[44] The first scheme for the federal government introduced at the

37. *Id.*; *see* Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 383 (1927) ("The power of the British Crown in the appointment and removal of officers is an historical outgrowth of and is still intimately involved with a much wider prerogative in the creation of offices.").

38. McIlwain, *supra* note 35, at 224. Removal could be effected in three ways: judicial process through a writ *scire facias* to prove that the conditions of the patent had not been met, impeachment and removal by the House of Lords, or by the crown following a request ("address") from both houses of Parliament. *Id.* at 225.

39. *See id.* at 219.

40. Burkoff, *supra* note 33, at 1338–39.

41. *Id.*

42. ARTICLES OF CONFEDERATION of 1777, art. VII, para. 1.

43. *Id.* art. IX, para. 5.

44. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20–22 (Max Farrand ed., 1911) [hereinafter, 1 THE RECORDS OF THE FEDERAL CONVENTION]. The same day that the Virginia Plan was introduced, Charles Pinckney of South Carolina offered his own, but nothing more substantive is recorded of its consideration by the Convention. 3 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 31, at 595. An original of the plan has not been found. 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 44, at xxi, but it has been reconstructed from the papers of the Convention's Committee of Detail and elsewhere. 3 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 31, at 604. Like the Virginia Plan, the Pinckney Plan gave Congress the exclusive appointing power for judges but, unlike the Virginia Plan (as amended), the Pinckney Plan gave Congress the power to appoint officers in all of the major executive departments. *Id.* at 608.

Convention, the Randolph Resolutions—also known as the Virginia Plan—proposed that the new federal government's Executive, as well as its judges, be appointed by Congress.[45] But the Virginia Plan also ceded to the Executive Branch "the Executive rights vested in the Congress by the Confederation[,]" which might be interpreted to include the power to appoint executive officers.[46]

The first discussion of the Plan's design for appointments occurred on June 1, 1787, when the Committee of the Whole took up consideration of Randolph's seventh resolution, concerning the Executive.[47] Most of the debate focused on whether the Executive should be single or plural and how the Executive should be chosen.[48] Shortly after the Committee had agreed to accept "that a national Executive . . . be instituted"—without, however, specifying the number—Madison moved to amend the resolution to specify the prerogatives of the Executive, *viz.*, "[(1)] to carry into effect[] the national laws[,] [(2)] to appoint to offices in cases not otherwise provided for, and [(3)] to execute such other powers . . . as may from time to time be delegated by the national Legislature."[49] In response to an objection to the final clause of his amendment, Madison appeared willing to forgo it, because in his view both it and clause two were fairly implied by clause one.[50] The Committee approved deleting clause three by a vote of seven to three, and then approved clauses one and two—including the residual executive-appointing power—with all states in favor except Connecticut, whose representation was divided.[51]

The next appearance of appointments in the Committee's work occurred on June 5, 1787.[52] The debate focused this time on judges.[53] James Wilson of Pennsylvania wanted federal judges to be appointed by

45. 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 44, at 21 (Resolution proposed by Mr. Randolph in Convention).

46. *Id.*

47. *See id.* at 62–64. Resolving into a Committee of the Whole was a "mechanism [that] had developed in the English Parliament to expedite business [and that] had been extensively used in early Congresses . . . ." John R. Vile, *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*, 48 AM. J. LEGAL HIST. 147, 153–54 (2006). Because a bill could not be passed when the legislative body was in such form, Randolph resubmitted his resolutions, as amended by the Committee and now numbering nineteen, when the Convention took up the Committee's work on June 13. *Id.* at 154.

48. 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 4431, at 65–66, 68–69.

49. *Id.* at 67.

50. *Id.*

51. *Id.* at 67, 226, 230 (listing resolutions approved by the Committee of the Whole through June 12). Voting at the Convention was, as with the Congress of the Articles of Confederation, by state. *Id.* at 8.

52. *Id.* at 119.

53. *Id.*

the Executive, because "[e]xperience shewed the impropriety of such [appointments] by numerous bodies."[54] John Rutledge of South Carolina was against Executive appointment, fearing that "[t]he people will think we are leaning too much towards Monarchy."[55] Charles Pinckney, also of South Carolina, favored legislative appointment,[56] whereas Alexander Hamilton expressed interest in Executive appointment with the Senate's consent.[57] Madison opposed general legislative appointment, but he was not keen on executive appointment either, and so tentatively suggested a compromise position: appointment by the Virginia Plan's proposed second branch of the federal legislature.[58] He then moved that the Plan's assignment of judicial appointing power to the Legislature be deleted, and a blank left for further discussion on how that should be filled.[59] The motion passed nine to two.[60] A little more than a week later, the Committee again took up judicial appointments.[61] Pinckney, joined by Roger Sherman of Connecticut, urged that the appointment power remain with the Legislature generally, but, following an evidently persuasive speech by Madison, the Committee unanimously approved appointment by the Senate.[62]

On June 15, William Paterson of New Jersey introduced his plan as a small-state alternative to the Randolph Resolutions.[63] With respect to appointments,[64] the Paterson Plan differed from the Randolph Resolutions in giving the judicial appointing power to the Executive,[65] but it followed the latter, as amended, in assigning to the Executive the

54. *Id.*
55. *Id.*
56. *Id.* at 121.
57. *Id.* at 128.
58. *Id.* at 120, 128, 260. This was an inchoate Senate, although one in which the members were to be selected by the lower House and representation was to be based on quotas of contribution or population. *See id.* at 20–21 (Resolution Nos. 2, 3, 5).
59. *Id.* at 120.
60. *Id.*
61. *Id.* at 232.
62. *Id.* at 232–33, 236–37.
63. *Id.* at 242.
64. Certainly the most significant difference between the plans was the manner of representation in the new Congress. *See* Wesberry v. Sanders, 376 U.S. 1, 10–11 (1964). The Virginia Plan envisioned representation in both Houses based on population whereas the Paterson Plan followed the Articles of Confederation by making state representation in Congress of equal voting weight. *Id.*
65. *Compare* 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 44, at 244 (Paterson Resolution No. 5), *with id.* at 236–37 (Randolph Resolution No. 11).

power "to appoint all federal officers not otherwise provided for."[66] The Plan was rejected a few days later.[67]

On June 18, Hamilton proposed his own plan, which gave the Executive "the sole appointment of the heads or chief officers of the departments of Finance, War and Foreign Affairs; to have the nomination of all other officers (Ambassadors to foreign Nations included) subject to the approbation or rejection of the Senate."[68] Although Hamilton's plan—with its strong monarchical and nationalistic tone—never received any serious consideration from the Committee, its conception of the appointing power is the closest of all the proposals, theretofore offered, to the final form of the Appointments Clause.

By June 20, the Convention had abandoned the device of the Committee of the Whole and began consideration of the Randolph Resolutions as reported out of the Committee.[69]

On July 17,[70] the Convention voted on a number of matters pertaining to the Executive—including approving unanimously, with apparently no discussion—Madison's Committee amendment to the Virginia Plan to assign to the Executive the power "to appoint to offices in cases not otherwise provided for."[71]

The following day, the Convention saw a lengthy debate on judicial appointments. Nathaniel Gorham of Massachusetts urged adoption of his state's model of appointment by the Executive with the concurrence of the Senate, a method that "was found to answer perfectly well."[72] Wilson, joined by Gouverneur Morris of Pennsylvania, renewed his desire for Executive appointment, whereas Luther Martin of Maryland and Sherman urged for appointment by the Senate.[73] Madison supported Gorham, arguing that Senatorial advice and consent "would unite the advantage of responsibility in the Executive with the security afforded in the [second] branch [against] any incautious or corrupt nomination by the Executive."[74] Randolph noted that when the Committee of the Whole had approved Senatorial appointment, the Senate was not expected to

66. *Id.* at 244 (Paterson Resolution No. 4).
67. *Id.* at 312.
68. *Id.* at 292.
69. *Id.* at 312, 334.
70. The day prior, the Convention had narrowly acceded to the Great Compromise, which assigned proportional representation to the first branch of Congress but equal state representation in its second branch. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 33, at 13–16.
71. *Id.* at 23.
72. *Id.* at 41.
73. *Id.*
74. *Id.* at 42–43.

operate according to an equality of votes, but even so he still preferred Senatorial appointment.[75] Gunning Bedford of Delaware objected to the idea that the Executive could really be held accountable for bad nominations, but Gorham replied that the Executive "would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone."[76] Gorham's motion was voted down two to six.[77] Gorham then followed up with a proposal for Executive appointment with Senatorial advice and consent, on which the Convention split four to four.[78]

The debate continued on the 21st, when Madison put forth a revised Gorham proposal whereby the Executive appointment of judges would take effect unless two-thirds of the Senate were to object.[79] He, like Randolph, excused his change of position on the Senate's role in judicial appointments in light of the Great Compromise:

> [T]hat as the [second branch] was very differently constituted when the appointment of the Judges was formerly referred to it, and was now to be composed of equal votes from all the States, the principle of compromise which had prevailed in other instances required in this that their [sic] [should] be a concurrence of two authorities, in one of which the people, in the other the states, should be represented.[80]

The delegates then rehashed their arguments from prior debates, positions based on which branch—the Executive or Legislative—would be more likely to succumb to jealousies or intrigue.[81] Although Madison amended his motion to allow for Senatorial veto on a majority vote,[82] the motion was defeated three to six, and the assignment of the judicial appointment power to the Senate was reaffirmed six to three.[83]

On July 26, the Convention approved six to three the amended Randolph resolution concerning the Executive, including the residual appointment power,[84] and then recessed for several days.[85] The recess

75. *Id.* at 43.
76. *Id.*
77. *Id.* at 44.
78. *Id.*
79. *Id.* at 80.
80. *Id.* at 80–81.
81. *Id.* at 81–82.
82. *Id.* at 82.
83. *Id.* at 83.
84. *Id.* at 116.
85. *Id.* at 118.

was to give the Committee of Detail, which had been appointed a few days earlier, the necessary time to set down in orderly fashion the various resolutions—including those pertaining to the appointment power[86]—that the Convention had adopted from the Committee of the Whole and other, smaller ad hoc committees.[87]

The Committee of Detail produced its written report, the first true draft constitution, on August 6.[88] It contained both the judicial and residual appointment powers already agreed to. Article IX, section 1 provided that the "[S]enate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the supreme Court."[89] Section 2 of Article X provided that the President "shall commission all the officers of the United States; and shall appoint officers in all cases not otherwise provided for by this Constitution."[90]

The Convention then commenced consideration of the draft, getting to Article IX on August 23.[91] Morris and Wilson renewed their objection to appointment by the Senate,[92] but the matter was tabled to allow for debate on the Senate's treaty-making role.[93] The following day the Convention took up consideration of Article X.[94] Sherman objected to giving the Executive so broad of a residual appointment power, being particularly concerned about the selection of high-ranking military officers, but his amendment to that effect was defeated one to nine.[95] Madison then successfully moved that "officers" be substituted by "to offices," so as to avoid the inference that the Executive "might appoint officers without a previous creation of the offices by the Legislature."[96] John Dickinson of Delaware then successfully moved to add language specifying that the Executive's residual appointing power extend to

86. *Id.* at 132.
87. 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 44, at xiii, xxii–xxiii.
88. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 33, at 176.
89. *Id.* at 183.
90. *Id.* at 185.
91. *Id.* at 389.
92. *Id.*
93. *Id.* The Convention did approve expanding the Senate's diplomat-appointing power to "other public ministers." *Id.* at 383.
94. *Id.* at 401.
95. *Id.* at 405.
96. *Id.* As we shall see, this change was not carried forward into the report of the Committee of Eleven on the appointing power, *see id.* at 495, despite Madison's being a member, *see* Vile, *supra* note 47, at 170.

offices created by law.[97] But Dickinson's effort to authorize Congress to vest some appointments in state bodies or officials was rejected 3-6-1.[98]

On August 31, the Convention appointed a Committee of Eleven—one representative from each state—for addressing "such parts of the Constitution as have been postponed, and such parts of reports as have not been acted on,"[99] including the President's appointing power. As we have seen, from the earliest days of the Convention, nearly all of the delegates appeared to be in general agreement that the Executive should retain a residual appointing power, and a majority of the states were in agreement to give the Senate sole control over judicial—and more lately—diplomatic appointments. Yet the Committee of Eleven's main report,[100] presented to the Convention on September 4, provided that the "[P]resident . . . shall nominate and by and with the advice and consent of the Senate shall appoint Ambassadors and other public Ministers, Judges of the supreme Court, and all other officers of the U. S. whose appointments are not otherwise herein provided for."[101] The proposal appears to be the Committee's attempt to broker a compromise between those who wanted appointing power vested in the President and those who wanted it somewhere in Congress. The former would be pleased by the President's role in the appointment of judges and diplomatic officials, the latter in the legislative check on all appointments, whereas the former would be disappointed by the President's loss of an absolute residual appointment power, the latter in the Senate's loss of the sole appointing power over judges and diplomats.

The Convention took up the Committee of Eleven's proposed appointing power on September 6.[102] Consistent with his earlier expressed antipathy toward legislative appointment, Wilson strongly criticized the draft's expanded Senatorial control over appointments:

> According to the plan as it now stands, the President will not be the man of the people as he ought to be, but the Minion of the Senate. He cannot even appoint a tide-waiter without the

97. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 33, at 405–06. This conformed the Committee of Detail's draft to the language previously approved by the Committee of the Whole. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 44, at 226, 230.

98. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 33, at 418–19.

99. *Id.* at 473.

100. The Committee made a partial prior report that successfully proposed what became the Incompatibility and Ineligibility Clauses. *See* Vile, *supra* note 47, at 170.

101. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 33, at 495.

102. *Id.* at 523–24.

> Senate—He had always thought the Senate too numerous a body for making appointments to office.[103]

Morris acknowledged that the Committee of Eleven's report departed from the Committee of Detail's report in giving a role to the President in the appointment of judges,[104] and George Clymer of Pennsylvania objected as too aristocratic the Committee of Detail's report giving the Senate the power to appoint.[105]

The following day the Convention resumed debate.[106] George Mason of Virginia offered the idiosyncratic proposal that the Senate as a whole should not have a role in appointment except for ambassadors, and that all other officers should be appointed by the President following approval of a council of state comprising six rotating senators.[107] He thought that this proposal was superior to outright appointment by the Senate because that body was "too unwieldy [and] expensive for appointing officers, especially the smallest, such as tide waiters[]."[108] Wilson repeated his objection to giving the Senate a role in all appointments, as "there can be no good Executive without a responsible appointment of officers to execute,"[109] and he agreed with Mason except that his proposed council should not be obligatory.[110] Pinckney wanted the appointing power only in the President, save for ambassadors.[111] Morris repeated his support for a blended appointment power: "[A]s the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security."[112] Interestingly, Rufus King of Massachusetts—who had served on the Committee of Detail—stated that, on his reading, the Committee's report did not give the Senate authority over "minute" appointments, which instead would be handled by "the higher officers of the departments to which they belong."[113]

103. *Id.* at 523. A "tide-waiter" oversaw the landing of goods at customs. Mascott, *supra* note 24, at 498.
104. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 33, at 523–24.
105. *Id.* at 524.
106. *Id.* at 532.
107. *Id.* at 537.
108. *Id.* at 537–38.
109. *Id.* at 538–39.
110. *Id.* at 539.
111. *Id.* This was a shift from his previous position in favor of senatorial control over judicial appointments. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 44, at 121.
112. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 33, at 539.
113. *Id.*

The Convention then proceeded to vote. As to the power of the President to appoint ambassadors, public ministers, consuls, and judges of the Supreme Court, with the Senate's advice and consent, the Convention unanimously approved.[114] As to the President's residual appointment power, with the Senate's advice and consent, the Convention approved nine to two.[115] Mason then moved for his privy council idea: "in rejecting a Council to the President we were about to try an experiment on which the most despotic Governments had never ventured—The Grand Signor himself had his Divan."[116] Benjamin Franklin seconded Mason's motion for a privy council.[117] Wilson, Dickinson, and Madison were in favor too, but the Convention rejected it three to eight.[118]

Having gone through the Committee of Eleven's report, the Convention on September 8 appointed a Committee of Style to finalize the document.[119] The Committee presented its draft to the Convention on September 12.[120]

On September 15, the last working day of the Convention,[121] the delegates assembled to vote on, among other things, the appointing power.[122] After the Convention approved the text of the Appointments Clause, sans Excepting Clause and without objection, Morris moved to annex "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."[123] Madison objected, observing that the amendment "does not go far enough if it be necessary at all—Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices."[124] Morris responded that Madison's concern about overworked heads of department was

114. *Id.*
115. *Id.* at 539–40.
116. *Id.* at 541–42.
117. *Id.* at 542.
118. *Id.*
119. *Id.* at 547. Also on that day, Elbridge Gerry of Massachusetts moved to amend the appointment power to state expressly that the office to which appointment is made must be "created by the Constitution or by law," but this was rejected six to five as being unnecessary. *Id.* at 550. Yet on September 15, shortly after approving the Excepting Clause, the Convention added without recorded debate the words "and which shall be established by law," effectively adopting Gerry's proposal. *Id.* at 621 n.1, 628.
120. *Id.* at 582.
121. *See id.* at 621. The next day was a Sunday, and the following Monday was set aside for the signing of the Constitution. *Id.*
122. *Id.* at 627.
123. *Id.* at 627–28.
124. *Id.* at 627.

misplaced, because they could sign "Blank Commissions" which then could be filled in by others—presumably superior, or non-inferior, officers.[125] The motion was apparently controversial, as it failed on a tied five to five vote, with Maryland divided.[126] It was then re-urged, "some such provision being too necessary, to be omitted."[127] The motion was then carried unanimously, and two days later the Constitution was adopted by all eleven states at the Convention.[128]

B. An Assessment of the Convention Evidence

The Convention records lead us to make three main conclusions about the Framers' attitude toward the appointment power.

First, a large group of delegates was happy to stay close to the early post-revolutionary default of keeping the appointing power lodged with the Legislature, at least for those offices considered to be particularly powerful—namely, diplomats and judges. The reasoning of this group had positive and negative aspects. The positive aspect was the belief that the new Congress, especially the Senate, would be better equipped to select the best appointees, because of their broad professional experience coming from all reaches of the nation. The negative aspect was a fear of tyranny from an Executive who could use the appointing power to surround himself with cronies. This attitude was well represented by Roger Sherman's remark that the Bloodless Revolution had succeeded because James II was stuck with generals whom his predecessor had appointed.[129]

Second, an initially rather small group of delegates wanted to follow British precedent and assign officer-appointing power generally to the Executive. The reasoning of this group was largely negative. Perhaps some of these delegates thought that the Executive would more likely select a high-quality candidate, but most in this camp held to the view that it would be easier to hold the Executive accountable for bad

125. *See id.*
126. *Id.*
127. *Id.* at 627–28.
128. *Id.* at 644. *Cf.* James E. Gauch, Comment, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 342 (1989) ("George Mason later complained to Thomas Jefferson about 'the precipitate, [and] intemperate, not to say indecent Manner, in which business was conducted, during the last Week of the Convention . . . .'") (quoting 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 346 (John P. Kaminski & Gaspare J. Saladino eds., 1981)). The same day the Convention also approved adding "and which shall be established by law." 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 33, at 621 n.1, 628.
129. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 33, at 405.

appointments than a diverse group of legislators. A very small group—perhaps just Hamilton—wanted the Executive to have powers similar to that of the British monarch, which would include a generally unfettered office-creating prerogative. After the Great Compromise, this group expanded with those delegates who disliked the idea of an equal-representation Senate wielding the appointing power,[130] and settled upon the advice-and-consent check likely to justify their switch and convince their Executive-fearing colleagues.

Third, all of the delegates recognized that, in light of their unanimous desire to establish a separate Executive Branch in the new government,[131] the Executive must have some officer-appointing power. Such was impliedly acknowledged in the original Randolph Resolutions, then made express through amendment shortly thereafter; it was also reflected in the Paterson Plan, was explicitly adopted in the Committee of Detail's draft, and was retained in the resolutions forwarded to the Committee of Eleven. True, the Committee of Eleven's report for the first time conditioned all exercises of the Executive appointment power on the Senate's advice-and-consent. But that change may well have been an oversight. For prior to that time, the Executive's residual appointment power had never been questioned. Moreover, influential delegates who were concerned about giving too much appointment power to Congress—such as Madison and Morris—were on the Committee of Eleven.[132] And it was Madison who successfully added an express residual appointing power to the Executive. As we suggested above, perhaps there was a compromise in committee: those who wanted Senate appointment for judges and diplomats agreed to Presidential appointment in exchange for a potential Senatorial negative on all appointments.[133]

Yet if this was the supposed compromise, it really was more of a gambit. For as was quickly pointed out by Wilson following submission of the Committee's report to the Convention, requiring Senate involvement in all appointments would pose a large burden on that body to weigh in on even trivial offices.[134] This objection may well have precipitated Morris's proposal for the Excepting Clause. That the proposal failed on the first vote and then passed unanimously on the

130. *See* Blumoff, *supra* note 3, at 1065–66.

131. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 44, at 63; 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 33, at 401.

132. *See* Vile, *supra* note 47, at 170.

133. *See supra* text accompanying notes 100–02.

134. *See supra* note 103 and accompanying text.

ground of necessity indicates that there may have been an initial misconception as to its scope. Those delegates wary of executive power or jealous for legislative oversight may have thought that Morris's proposal was a means for executive usurpation. We suspect that the proposal passed unanimously the second time because Morris clarified that its purpose was merely to address the Wilson objection that truly picayune offices ought not to be the concern of the Legislature. This is supported by Madison's initial concern with the proposal—that it did not go far enough to give high officers below the heads of department appointing authority. Morris's response was not to deny the concept of such non-inferior, *i.e.*, superior, officers. Rather, it was to engage Madison's necessity objection on its own terms: there was, according to Morris, no need for the sake of administrative efficiency to allow superior officers to appoint because, if their heads of department were so overwhelmed, they could give their superior officers blank commissions.[135] This interpretation is supported by the Convention's early and uncontested decision to give the Executive a residual appointing power.[136]

C. Post-Convention Congressional Evidence

Looking to the traditional sources of post-Convention evidence for construing the Constitution, one will find nothing dealing specifically with the Excepting Clause and hardly anything dealing with the appointing power generally. There is, for example, no express discussion of degrees of officer in the *Federalist Papers* or the *Anti-Federalist Papers*.[137]

There is some evidence, but not much more, on the appointing power in the state ratification debates recorded in *Elliott's Debates*.[138] In her corpus linguistics analysis[139] of "Officers of the United States," Professor

135. *See supra* notes 124–25 and accompanying text.

136. *See* JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 33 (Univ. of Cal. Press & Cambridge Univ. Press eds., 1953). That decision is especially noteworthy given "the limited appointing power enjoyed by the governors of the states at the time." *Id.*

137. *See* Mascott, *supra* note 24, at 468 n.131 ("Not one of these references [to office or officer] includes a statement directly defining the scope of the category of officer in contradistinction to a lesser category such as servant, attendant, or employee.").

138. HARRIS, *supra* note 136, at 25 ("The provisions dealing with the appointing power attracted relatively little attention in the several state conventions called to consider the ratification of the proposed federal Constitution.").

139. Mascott, *supra* note 24, at 467 ("[C]orpus linguistics is the study of language function and use by means of an electronic collection of naturally occurring language called a corpus. The idea is to more empirically examine a corpus of 'real-world' texts showing how words were actually used in written or spoken English during a particular time period.") (alteration in original) (internal quotation marks omitted).

Mascott found only two discussions of that phrase, one in North Carolina [140] and one in Virginia [141] during those states' convention debates. The Virginia record contains nothing relevant to our endeavor here, but in the North Carolina debate over the Constitution's Impeachment Clause, which extends to "all civil Officers of the United States," Mr. Maclaine argued "that the clause should not be interpreted to extend to 'inferior officers of the United States,' which he characterized as petty officers with 'trifling' duties."[142]

Little else can be gleaned either from the first Congress—traditionally considered a strong indication of constitutional meaning[143]—on distinguishing inferior from non-inferior officers. "Because the First Congress engaged in next to no debate about the officer status of particular officials, Congress did not specify that it felt *constitutionally* compelled to require Article II selection procedures when it chose to do so by statute." [144] Similarly, Congress was not presented with the opportunity to differentiate between inferior and non-inferior officers.[145] Although the first Congress authorized the creation of three executive departments, as well as the appointment of clerks by those department heads, these clerks did not have much power.[146] For example, in the case of a vacancy, the chief clerk would not assume the powers of the secretary but instead would merely have charge over the department's records.[147] And "many late eighteenth century clerks had duties involving little or no discretion." [148] If instead Congress had vested appointment of something like a modern-day, powerful Assistant Secretary in a department head, that would cut against an interpretation of "inferior officer" that is based upon the powers exercised. But again, there is no such evidence.[149]

140. *Id.* at 496–97.

141. *Id.* at 472.

142. *Id.* at 496–97 (quoting THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 43–44 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES] (statement of Mr. Maclaine)).

143. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1165–66 (2003).

144. Mascott, *supra* note 24, at 508 n.366.

145. *Id.* at 475.

146. *Id.* at 510–12.

147. *See id.* at 511.

148. *Id.* at 512.

149. *See id.* at 508 n.366, 510–12; United States v. Arthrex, Inc., 141 S. Ct. 1970, 2008 (2021) (Thomas, J., dissenting). Justice Thomas cites the designation of the Secretary of the Department of Foreign Affairs as a principal officer by the first Congress as evidence that Congress considered "principal officer" to be exhaustive of the set of non-inferior officers. *Id.* But the action of Congress does not necessarily raise the issue. That is, Congress could

There is, however, some evidence pertaining to officer status in the related context of the discussion over the President's power to remove officers.[150] Perhaps the most relevant material comes from a House debate of May, 1789.[151] One representative opined that the Impeachment Clause provides the only means for Presidential removal of civil officers.[152] Madison countered on the ground that this interpretation would result in life tenure for every officer, "not the heads of departments only, but all the inferior officers of those departments."[153] In his *Arthrex* dissent, Justice Thomas cites this statement as supporting the view that all officers below the heads of department are necessarily "inferior Officers."[154] But we think that this reads too much into the statement, especially considering the source. The force of Madison's objection would be the same were he to have excepted those few—if any—superior officers then existing within an executive department. That is, his point would remain the same that requiring impeachment for the removal of any civil

have considered principal officers of the departments necessarily to be non-inferior officers, without also concluding that such were the only non-inferior officers. That is especially plausible given that there existed an independent reason for specifying that the Secretary was the principal officer of his department—the Opinions Clause. Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 666–67 (1996). That clause first emerged from the Committee of Eleven's report and its rejection of a presidential privy council. *See supra* text accompanying notes 116–17; Amar, *supra* note 146, at 666. It had little to do with the Appointments Clause, which as we have seen was debated throughout the Convention and which, even in the same Committee of Eleven report, used different terminology. *See supra* Part III.A. Moreover, it is significant that Morris, who was responsible for the wording of the Excepting Clause, was also likely responsible for that of the Opinions Clause, yet he used different terms. *See supra* Part III.A; Amar, *supra* note 146, at 666. Caution is therefore in order when seeking to "harmonize" the two clauses too neatly.

150. The majority, concurring, and dissenting opinions in *Arthrex* all discuss this evidence. *See Arthrex, Inc.*, 141 S. Ct. 1970 *passim*.

151. 3 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 31, at 356.

152. *Id.*

153. *Id.*

154. *Arthrex, Inc.*, 141 S. Ct. at 2008 (Thomas, J., dissenting). Moreover, we think that Justice Thomas reads too much into the Congressional debate over whether the head of a department could be an "inferior Officer" despite being, ex officio, a "principal Officer" for purposes of the Opinions Clause. Justice Thomas believes that, when Congress concluded that the Secretary of the Department of Foreign Affairs could not be considered an "inferior Officer" because he was also a "principal Officer," Congress was at least suggesting an either-or proposition: either one is a principal officer, or one is an inferior officer. *Id.* But just as with Madison's objection, discussed in the text, we believe that Justice Thomas reads too much into the Congressional debate. Simply because a principal officer is, *eo ipso*, a non-inferior officer, does not mean that all other officers are inferior. One could quite plausibly have held, as Madison evidently did, that both principal and superior officers are non-inferior, and yet still have voted for the bill in question.

officer would result in very low-level officers enjoying life tenure. But more importantly, there is no reason why Madison in 1787 would have recognized the concept of superior officers within a department and then two years later abandon the idea.

D. A Relevant Digression—The Meaning of "Officers of the United States"

Although the traditional materials of original constitutional meaning may not have much to say about the Excepting Clause,[155] recent historical research has provided new insights into other aspects of the Appointments Clause. Without doubt the most prominent of such efforts is Professor Mascott's corpus linguistics analysis of the phrase "Officers of the United States."[156] In addition to the Convention and ratification records, her study encompasses materials from the Continental Congress, early American newspapers and dictionaries, the *Federalist* and *Anti-Federalist Papers*, correspondence and other writings from the Founding Fathers, and early Executive Branch documents, as well as practice from the First Congress.[157] She concludes "that the most likely original public meaning of 'officer' is one whom the government entrusts with ongoing responsibility to perform a statutory duty of any level of importance."[158]

Professor Mascott's research is significant for our article, and not simply because it logically delimits the outer bounds of the Excepting Clause—for an inferior officer is necessarily an officer.[159] Her findings are relevant to our task as well because they undercut a premise of modern Appointments Clause case law—namely, that only those federal officials who wield "significant authority" qualify as officers.[160] Because,

155. We are unaware of any corpus linguistics analysis of the Excepting Clause.

156. *See generally* Mascott, *supra* note 24. Professor Mascott's findings have been confirmed in part by another and broader corpus linguistics analysis. *See* James C. Phillips et al., *Corpus Linguistics and "Officers of the United States"*, 42 HARV. J.L. & PUB. POL'Y 871, 873 (2019) ("We find the linguistic landscape to be messy, but more in line with Professor Mascott's proffered definition than the Supreme Court's ahistorical one . . . .").

157. Mascott, *supra* note 24.

158. *Id.* at 454.

159. Mascott, *supra* note 24.

160. *See id.* at 443, 447, 450.

however, the Supreme Court has—erroneously—taken "significant authority" to be the standard for distinguishing officer from non-officer, it has been forced to look elsewhere for a way to distinguish inferior from non-inferior officers.[161] As Professor Mascott's research suggests, that effort necessarily will result in a rule that cannot be squared with the Appointments Clause's original meaning.[162] And as the following section shows, the Court's—perhaps unwitting—non-originalist interpretation has, as applied to the Excepting Clause, failed to further the Appointments Clause's role in protecting democratic accountability.

III. SUPREME COURT CASE LAW: FROM NINETEENTH-CENTURY EFFORTS TO DEFINE AN "OFFICE," TO RECENT ATTEMPTS TO RECONCILE THE MODERN ADMINISTRATIVE STATE WITH DEMOCRATIC ACCOUNTABILITY AND PRESIDENTIAL CONTROL OF EXECUTIVE OFFICIALS

A. The Early Appointments Clause Cases—Tenure, Duration, Emolument, and Duties

The first Appointments Clause cases concerned mainly (1) federal employees who claimed back-pay or challenged their dismissal, or (2) actions against those in the federal employ accused of defalcation.[163] A dispositive question in both was whether the individual was an officer—whether inferior or not—or mere employee.

Chief Justice Marshall considered the term "officer" in an 1823 opinion[164]—issued while riding circuit—that is worth discussing in some detail, as Marshall established the analysis that would guide the Supreme Court's nineteenth-century "officer" cases. At issue in *United States v. Maurice* was whether sureties of a bond were obligated to answer for the alleged misdeeds of an individual working for the government.[165] James Maurice had been "appointed agent for

161. *See id.* at 447–48.

162. *Id.* at 450.

163. *See, e.g.*, United States v. Maurice, 26 F. Cas. 1211 (C.C.D Va. 1823) (No. 15,747); United States v. Hartwell, 73 U.S. (6 Wall.) 385 (1867); United States v. Germaine, 99 U.S. 508 (1878); Auffmordt v. Hedden, 137 U.S. 310 (1890); United States v. Smith, 124 U.S. 525 (1888); United States v. Mouat, 124 U.S. 303 (1888).

164. *Maurice*, 26 F. Cas. 1211.

165. *Id.* at 1212 . This case is not, of course, a decision by the Supreme Court. *Id.* But it was authored by Chief Justice Marshall and was relied on in later Supreme Court Appointments Clause cases. *See, e.g.*, *Hartwell*, 73 U.S. at 393–94; *Auffmordt*, 137 U.S. at 327.

fortifications" on behalf of the United States.[166] In this capacity, he received large sums of money that he was obligated to, but did not, account for and disburse to the United States.[167] An action in debt upon a bond was filed against Maurice and the bond's sureties.[168] The bond was void, the sureties argued, because it was "taken for the performance of duties of an office," yet "no such office exist[ed]" because "Maurice was never an officer, and, of consequence, was never bound by this bond to the performance of any duty whatever."[169]

To resolve this argument, Marshall turned to the Appointments Clause.[170] It is, he observed, "a general provision," according to which "the president shall nominate, and by and with the consent of the senate, appoint to all offices of the United States, with such exceptions only as are made in the constitution; and that all offices (with the same exceptions) shall be established by law."[171] The clause, however, was ambiguous with respect to the creation of offices. As Marshall explained, the clause's text did not clearly state whether the Constitution requires "[1] that all offices of the United States shall be established by law, or [2] merely as limiting the previous general words to such offices as shall be established by law."[172]

Marshall ultimately sided with the first reading, that all offices must be established by law.[173] This reading is proper, he reasoned, because "it accords best with the general spirit of the constitution, which seems to have arranged the creation of office among legislative powers."[174] He found additional support for that interpretation in the clause's next sentence, which "forms an exception to the general provision which had been made, [and which] authorizes congress 'by law to vest the appointment of such inferior officers as they think proper, in the

166. *Maurice*, 26 F. Cas. at 1212.
167. *Id.*
168. *Id.*
169. *Id.* at 1212–13.
170. *Id.* at 1213.
171. *Id.*
172. *Id.*
173. *Id.* Under the alternative reading, the Appointments Clause would

> comprehend[] those offices only which might be established by law, leaving it in the power of the executive, or of those who might be entrusted with the execution of the laws, to create in all laws of legislative omission, such offices as might be deemed necessary for their execution, and afterwards to fill those offices.

Id.
174. *Id.*

president alone, in the courts of law, or in the heads of departments.'"[175] With this Excepting Clause, the Framers "indicate[d]" that "they had provided for all cases of offices."[176] Accordingly, under the Appointments Clause, "all officers of the United States, except in cases where the constitution itself may otherwise provide, shall be established by law."[177]

Marshall then turned to consider whether an agent of fortifications was an officer of the United States.[178] An office, Marshall asserted without citation, "is defined to be 'a public charge or employment,' and he who performs the duties of the office, is an officer."[179] Such a person, if "employed on the part of the United States," is an "officer of the United States."[180] Of course, not "every employment is an office."[181] An office exists when the employee's "duty" is a "continuing one, . . . defined by rules prescribed by the government, and not by contract"; when "an individual is appointed by government to perform," and the individual "enters on the duties appertaining to his station, without any contract defining them"; and when "those duties continue, though the person be changed."[182] Marshall concluded that the agent of fortifications was an office established by law.[183]

Marshall's analysis for distinguishing officers from non-officers was followed—without attribution, in some instances—throughout the nineteenth century. For example, in its 1867 decision in *United States v. Hartwell*, the Supreme Court explained that an office is "a public station, or employment, conferred by the appointment of government," and which "embraces the ideas of tenure, duration, emolument, and duties."[184] The Court determined that Mr. Hartwell's employment met these terms because he was in the public service of the United States, he had been "appointed pursuant to law, and his compensation was fixed by law," "[v]acating the office of his superior would not have affected the tenure of his place," and his "duties were continuing and permanent, not occasional or temporary."[185]

175. *Id.* (quoting U.S. CONST. art. II, § 2, cl. 2).
176. *Id.*
177. *Id.* at 1214.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 1214–15.
184. 73 U.S. 385, 393 (1867).
185. *Id.* at 393–94.

The Court applied the same analysis, although to reach a different result, in its 1878 ruling in *United States v. Germaine*, which held that a surgeon appointed by the Commissioner of Pensions was not an officer.[186] Consistent with earlier cases, the Court in *Germaine* observed that the term "officer" "embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary."[187] Germaine's duties, however, were "*not* continuing and permanent" but rather "occasional and intermittent."[188] A surgeon such as Germaine was "only to act when called on by the Commissioner of Pensions in some special case," he was "required to keep no place of business for the public," and he need carry no bond.[189] Further, "[n]o regular appropriation" was made to pay a surgeon's compensation, and no surgeon suffered a "penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case."[190] A surgeon like Germaine was, then, "but an agent of the commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties."[191]

To the same effect was the Court's 1890 ruling in *Auffmordt v. Hedden*.[192] Under the statute in question, a merchant appraiser was "selected [by the customs department] as an emergency arises, upon the request of the importer for a reappraisal."[193] He had "no general functions, nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case."[194] Citing, among other decisions, *Maurice*, *Hartwell*, and *Germaine*, the Court observed that the appraiser's position was "without tenure, duration, continuing emolument, or continuous duties, and he act[ed] only occasionally and temporarily."[195] Further, "[n]o regular appropriation [was] made to pay his compensation."[196] Therefore, the Court concluded that he was not an "officer" subject to the Appointments Clause.[197]

186. 99 U.S. 508, 508, 511–12 (1878).
187. *Id.* at 511–12.
188. *Id.* at 512.
189. *Id.*
190. *Id.*
191. *Id.*
192. 137 U.S. 310, 327 (1890).
193. *Id.* at 326.
194. *Id.* at 327.
195. *Id.*
196. *Id.* at 328.
197. *Id.* at 327 (citing United States v. Maurice, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747); United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1867); United States v.

B. Buckley v. Valeo*: The Re-Emergence of Appointments Clause Litigation in the Modern Era and the Birth of the "Significant Authority" Test*

After *Auffmordt*, the Supreme Court's interest in the Constitution's rules for federal officialdom shifted from the Appointments Clause to the President's removal power. In these cases, the Court, although concerned with aspects of the separation of powers, had no occasion to consider the distinctions between inferior and non-inferior officers.[198] It would not be until its 1976 decision in *Buckley v. Valeo* that the Court renewed its interest in the Appointments Clause.[199]

Buckley concerned challenges to the Federal Election Campaign Act of 1971 (as amended in 1974).[200] The Act established "an eight-member Federal Election Commission," nominally as a congressional agency, charged with primary responsibility for administering the Act.[201] In addition to its record-keeping, disclosure, and investigatory duties, the FEC was given extensive rule-making, enforcement, and adjudicatory powers.[202] Of the FEC's eight Commissioners, two were *ex officio* and unable to vote: "[t]he Secretary of the Senate and the Clerk of the House of Representatives."[203] Two Commissioners were "appointed by the President pro tempore of the Senate," upon recommendation of the Senate's majority and minority leaders.[204] Two Commissioners were "appointed by the Speaker of the House of Representatives," upon

Germaine, 99 U.S. 508, 511–12 (1878); Hall v. Wisconsin, 103 U.S. 5, 8–9 (1880); United States v. Mouat, 124 U.S. 303, 307 (1888); United States v. Smith, 124 U.S. 525, 532 (1888)). The decisions in *Smith* and *Mouat* did not address the nature of an "office." *See Smith*, 124 U.S. at 532; *Mouat*, 124 U.S. at 307. Rather, their analyses began and ended with the lack of an appointment: they held that a person who had not been appointed under the Appointments Clause could not be an officer. *Smith*, 124 U.S. at 533; *Mouat*, 124 U.S. at 308. For additional examples and discussion of "officers" in nineteenth-century cases, see Mascott, *supra* note 24, at 463–65; Bandimere v. SEC, 844 F.3d 1168, 1173–74 (10th Cir. 2016).

198. *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 625–30 (1935); Myers v. United States, 272 U.S. 52, 161, 192–94 (1926). Perhaps one reason for the paucity of attention to the Excepting Clause was that it was being used as intended, *viz*., for administrative convenience and not to minimize accountability. *See* Andrew Croner, Note, Morrison, Edmond, *and the Power of Appointments*, 77 GEO. WASH. L. REV. 1002, 1004–06 (2009).

199. 424 U.S. 1 (1976) (per curiam).

200. *Id.* at 6.

201. *Id.* at 109.

202. *Id.* at 110.

203. *Id.* at 113.

204. *Id.*

recommendations of "its . . . majority and minority leaders."[205] The last two Commissioners were "appointed by the President."[206] "Each of the six" voting Commissioners had to be confirmed by a "majority of both Houses of Congress."[207]

The challengers argued that Congress could not both vest the FEC with extensive "rulemaking and enforcement powers" *and* vest itself with the power to appoint any FEC members.[208] According to the challengers, if Congress wanted the FEC to exercise the powers granted under the Act, then the Commissioners had to be "Officers of the United States" subject to the requirements of the Appointments Clause.[209] The FEC and its defenders argued that Congress could appoint FEC members because the FEC was performing "appropriate legislative functions."[210]

The Court began its analysis by emphasizing the importance of the separation of powers and the Appointments Clause's role therein.[211] The "principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into" the Constitution.[212] Although the clause could be read "as merely dealing with etiquette or protocol in describing 'Officers of the United States,'" the Framers "had a less frivolous purpose in mind."[213] The Framers intended the Appointments Clause to serve as the universal procedure for lawfully vesting sovereign power in the nation's federal officers: "That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt."[214]

According to *Buckley*, the term "Officers of the United States," as used in the Appointments Clause, and as defined in *Germaine* as "all persons who can be said to hold an office under the government,"[215] "is a term intended to have substantive meaning."[216] The term's "fair import" is that "any appointee exercising *significant authority* pursuant to the laws of the United States is an 'Officer of the United States,' and must,

205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* at 118.
209. *Id.*
210. *Id.* at 119.
211. *Id.* at 120, 124.
212. *Id.* at 124.
213. *Id.* at 125.
214. *Id.* (quoting United States v. Germaine, 99 U.S. 508, 510 (1878)).
215. *Id.* at 125–26 (quoting *Germaine*, 99 U.S. at 510).
216. *Id.* at 126.

therefore, be appointed in the manner prescribed by" the Appointments Clause.[217]

If, therefore, "all persons who can be said to hold an office under the government . . . were intended to be included within one or the other of these modes of appointment,"[218] it is, the Court said, "difficult to see" how FEC Commissioners could "escape inclusion."[219] "If a postmaster first class" and a district court clerk are inferior officers under the Appointments Clause, then "surely" FEC Commissioners are "at the very least such 'inferior Officers.'"[220] According to the plain terms of the Appointments Clause, unless the Constitution provides for their appointment elsewhere, *all* officers of the United States must be appointed in accordance with the Appointments Clause.[221] The Commissioners' appointments were therefore unconstitutional.

C. Developing the Officer–Employee Distinction: Freytag *&* Lucia

1. *Freytag v. Commissioner of Internal Revenue* (1991)

In *Freytag*, the Supreme Court addressed whether Congress lawfully granted authority to the Chief Judge of the United States Tax Court to appoint "special trial judges" ("STJs").[222] These STJs were authorized to hear (1) certain prescribed proceedings, in which the STJs were allowed to resolve disputes,[223] and (2) "any other proceeding which the Chief Judge may designate," in which the STJs could prepare only proposed findings and a proposed opinion—referred to as a "subsection (b)(4)" proceeding.[224] Mr. Freytag and the other petitioners sought review in the Tax Court of tax-deficiency determinations.[225] The judge to whom their case was assigned fell ill, and the Tax Court's Chief Judge selected an

217. *Id.* (emphasis added). Note here the important qualification, "pursuant to the laws of the United States," which follows directly from Chief Justice Marshall's conclusion in *Maurice* that Congress must create federal offices. *See* United States v. Maurice, 26 F. Cas. 1211, 1213–14 (C.C.D. Va. 1823) (No. 15,747).

218. *Buckley*, 424 U.S. at 125 (quoting *Germaine*, 99 U.S. at 510).

219. *Id.* at 126.

220. *Id.*

221. *Id.* at 132. The Appointments Clause provides for Presidential appointment with Senate confirmation for "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." U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

222. Freytag v. Comm'r, 501 U.S. 868, 870 (1991).

223. *Id.* at 873.

224. *Id.* (quoting 26 U.S.C. § 7443A(b)(4) (amended 2006)).

225. *Id.* at 871.

STJ, who—per subsection (b)(4)—prepared findings and an opinion later adopted by the Chief Judge as the opinion of the Tax Court.[226]

On appeal, the petitioners claimed that the assignment of complex cases like theirs to STJs violated the Appointments Clause because these judges were inferior officers who had not been properly appointed.[227] The Commissioner countered that STJs were merely aides to a Tax Court judge, who was ultimately responsible for deciding cases, and, therefore, the STJs were employees rather than officers.[228] The Commissioner further argued that STJs were employees since they lacked authority to enter final decisions.[229]

The Supreme Court quoted *Buckley*'s rule that any "appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States'" who must be appointed conformably with the Appointments Clause.[230] The Court noted that two lower courts had addressed this question and had "considered the degree of authority exercised by the [STJs] to be so 'significant' that it was inconsistent with the classifications of 'lesser functionaries' or employees."[231] Agreeing with those rulings, the Supreme Court concluded that, even though the STJs could not enter final decisions in subsection-(b)(4) matters, they were inferior officers because of the significance of their duties.[232]

226. *Id.* at 871–72.
227. *Id.* at 872, 877–78.
228. *Id.* at 880–81.
229. *Id.* at 881.
230. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976)).
231. *Id.* (discussing First W. Gov't Sec., Inc. v. Comm'r, 94 T.C. 549, 557–59 (1990) and Samuels, Kramer & Co. v. Comm'r, 930 F.2d 975, 985 (2d Cir. 1991)). The Court also cited *Go-Bart Importing Co. v. United States* for the proposition that U.S. "commissioners are inferior officers." *Id.* (citing Go-Bart Importing Co. v. United States, 282 U.S. 344, 352–53 (1931)).
232. *Id.* The Court emphasized that STJs could make final decisions in many cases. *Id.* at 881–82. The Court concluded that one cannot be an inferior officer with respect to some duties and a mere employee with respect to other duties. *Id.* at 882 ("[T]hat an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution."). The Court here also considered the more traditional factors from the nineteenth-century cases. Thus, the Court noted, the office of special trial judge was "established by Law," as the Appointments Clause requires for officers, and "the duties, salary, and means of appointment for that office [were] specified by statute." *Id.* at 881 (citing Burnap v. United States, 252 U.S. 512, 516–17 (1920); United States v. Germaine, 99 U.S. 508, 511–12 (1878)). Further, the Court explained, the permanence of the position and a statutory basis for the office "distinguish [STJs] from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute." *Id.*

2. *Lucia v. SEC* (2018)

The Court addressed the same issue in a similar context in *Lucia*, where an investor appealed an adverse administrative ruling issued by an administrative law judge ("ALJ").[233] The investor, Raymond Lucia, "argued that the administrative proceeding was invalid because" the ALJ was an officer of the United States who had not been appointed.[234] The Court observed that *Germaine* and *Buckley* "set out this Court's basic framework for distinguishing between officers and employees."[235] *Germaine* stressed "ideas of tenure [and] duration," and "made clear that an individual must occupy a 'continuing' position established by law to qualify as an officer."[236] "*Buckley* . . . set out another requirement, central to this case."[237] That decision "determined that members of a federal commission were officers only after finding that they 'exercis[ed] significant authority pursuant to the laws of the United States.'"[238] The *Buckley* "inquiry thus focuse[s] on the extent of power an individual wields in carrying out his assigned functions."[239]

The Court concluded that *Freytag*'s application of the "significant authority" test controlled because STJs are "near-carbon copies" of the SEC's ALJs.[240] The SEC ALJs, who receive career appointments, "hold a continuing office established by law," and "exercise the same 'significant discretion' when carrying out the same 'important functions' as STJs do."[241]

D. Struggling to Distinguish Inferior Officer vs. Non-Inferior Officers: Morrison *and* Edmond

1. *Morrison v. Olson* (1988)

It was not until its 1988 decision in *Morrison v. Olson* that the Supreme Court squarely addressed the distinction made by the Excepting Clause between inferior and non-inferior officers.[242] *Morrison* considered the status of an "independent counsel" who was given

233. Lucia v. SEC, 138 S. Ct. 2044, 2049–50 (2018).
234. *Id.* at 2050.
235. *Id.* at 2051.
236. *Id.* (alteration in original) (quoting *Germaine*, 99 U.S. at 511).
237. *Id.*
238. *Id.* (alteration in original) (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976)).
239. *Id.*
240. *Id.* at 2052.
241. *Id.* at 2053 (quoting Freytag v. Comm'r, 501 U.S. 868, 882 (1991)).
242. 487 U.S. 654, 671–74 (1988).

authority to investigate and prosecute certain government officials for violations of federal law.[243] Under the Ethics in Government Act, the Attorney General, upon receipt of information that he deemed "sufficient to constitute grounds to investigate" whether certain government officials may have violated federal criminal law, was required to conduct "a preliminary investigation."[244] If the Attorney General found reasonable grounds to continue an investigation, he was required to apply to a newly created court, called the "Special Division," for the appointment of an independent counsel.[245] The Special Division then appointed the counsel and defined the counsel's prosecutorial jurisdiction.[246] Within this jurisdiction, the independent counsel was granted "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice."[247] She could, among other things, conduct "grand jury proceedings and other investigations, participat[e] in civil and criminal court proceedings and litigation, and" appeal decisions.[248]

An independent counsel could be removed "only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."[249] The office of independent counsel ended when she notified the Attorney General that she had "completed or substantially completed" the investigation or prosecution for which she was assigned, or when the Special Division found that the investigation had been "completed or so substantially completed" that the Department of Justice should complete the investigation and prosecution(s).[250]

In *Morrison*, the targets of an independent counsel investigation challenged subpoenas on the ground that the independent counsel statutes were unconstitutional and that, as a result, the independent counsel lacked authority to do anything.[251] The Court first addressed whether the independent counsel was an "inferior" or "principal"

243. *Id.* at 660.
244. *Id.* (citing 28 U.S.C. § 591(a)).
245. *Id.* at 661 (citing 28 U.S.C. §§ 592(c), 593(b)).
246. *Id.* (citing 28 U.S.C. § 593(b)).
247. *Id.* at 662 (citing 28 U.S.C. § 594(a)).
248. *Id.* (citing 28 U.S.C. § 594(a)(1)–(3)).
249. *Id.* at 663 (citing 28 U.S.C. § 596(a)(1), *amended by* Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, § 5, 108 Stat. 732).
250. *Id.* at 664 (citing 28 U.S.C. § 596(b)(1)–(2)).
251. *Id.* at 667–68.

officer.[252] In the Court's view, the line between the two "is far from clear," and "the Framers provided little guidance into where it should be drawn."[253] But the Court concluded that it "need not attempt . . . to decide exactly where the line falls," because the independent counsel "clearly falls on the 'inferior officer' side of that line."[254]

The Court based its conclusion on several factors: removability, scope of duties, scope of jurisdiction, and the office's duration.[255] First, the independent counsel was removable "by a higher Executive Branch official," the Attorney General.[256] Thus, although the independent counsel did enjoy a degree of independence from the Attorney General, the latter's removal power indicated that the independent counsel was "to some degree 'inferior' in rank and authority."[257] Further, the independent counsel was empowered to perform "only certain, limited duties."[258] The counsel's role was "restricted primarily to investigation and, if appropriate," to prosecution for federal crimes.[259] "Admittedly," the Court immediately acknowledged, the independent counsel had "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice," but, it continued, "this grant of authority [did] not include any authority to formulate policy for the Government or the Executive Branch, nor [did] it give [the independent counsel] any administrative duties outside of those necessary to operate her office."[260] Third, the independent counsel's office was of limited jurisdiction, as the Ethics in Government Act concerned only "certain federal officials suspected of certain serious federal crimes," and the Special Division's appointment established the scope of her jurisdiction.[261] Finally, the office was limited in duration, as the independent counsel was appointed to carry out one task, after which the office would terminate.[262] Therefore, the Court concluded, "these factors relating to the 'ideas of tenure, duration . . . and duties' of the

252. *Id.* at 670–71.
253. *Id.* at 671 (citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION 397–98 (3d ed. 1858)).
254. *Id.*
255. *Id.* at 671–72.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.* (quoting 28 U.S.C. § 594(a)).
261. *Id.* at 672.
262. *Id.*

independent counsel . . . are sufficient to establish that appellant [was] an 'inferior' officer in the constitutional sense."[263]

Justice Scalia dissented.[264] Although the independent counsel exercised broad authority during a not very limited tenure, these considerations were, in his view, irrelevant to distinguishing inferior from non-inferior officers.[265] The key distinction between an inferior and non-inferior officer is whether the officer is *subordinate* to any higher-level Executive Branch official.[266] Justice Scalia took issue with the majority's reasons for reaching a contrary result, *viz.*, the independent counsel was subject to removal by a higher Executive Branch official; she was authorized to perform only certain, limited duties; and the office was limited in jurisdiction and in tenure.[267] First, he argued, that the independent counsel was removable only for "good cause" or mental or physical incapacity did not support the conclusion that she was an inferior officer.[268] "[M]ost (if not all) principal officers in the Executive Branch [are removable] by the President at will."[269] Second, as the majority itself acknowledged, the independent counsel enjoyed a wide scope of power.[270] Although the independent counsel lacked authority to formulate policy for the government or the Executive Branch, "the same could be said for all officers of the Government, with the single exception of the President."[271] Third, the current independent

263. *Id.* (quoting United States v. Germaine, 99 U.S. 508, 511 (1878)). The Court further held that the Ethics in Government Act did not violate the separation of powers for two reasons. *Id.* at 691–93. First, the for-cause removal protection, standing alone, did not "unduly trammel[] on executive authority," because the for-cause removal protection did not "sufficiently deprive[] the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws." *Id.* at 691, 693. Second, the Court concluded that the Act, taken as a whole, did not "unduly interfer[e] with the role of the Executive Branch" since the Act did not "'impermissibly undermine[]' the powers of the Executive Branch or 'disrupt[] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.'" *Id.* at 693, 695 (first quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856–57 (1986); and then quoting Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977)).

264. *Id.* at 697 (Scalia, J., dissenting).

265. *Id.* at 719.

266. *Id.*

267. *Id.* at 715–16.

268. *Id.* at 716 (citing 28 U.S.C. § 596(a)(1), *amended by* Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, § 5, 108 Stat. 732).

269. *Id.* (emphasis omitted).

270. *Id.* at 716–17 ("Admittedly, the Act delegates to [the independent counsel] [the] 'full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice.'") (second alteration in original).

271. *Id.* at 718.

counsel had then served for more than two years—hardly an office of "limited . . . tenure."[272] And while the scope of her jurisdiction perhaps was small, within that scope "she exercise[d] more than the full power of the Attorney General."[273]

"More fundamentally," Justice Scalia questioned the pertinence of the factors on which the majority relied to conclude that the independent counsel was an inferior officer.[274] He argued that the factors of "tenure, duration, emolument, and duties" from *Germaine* were dicta because that case concerned the difference between officers and employees, not inferior from non-inferior officers.[275] According to the Constitution's text and the "division of power[s] that it establishes," the independent counsel was not an inferior officer because "she [was] not *subordinate* to any officer in the Executive Branch (indeed, not even to the President)."[276] Pointing to contemporaneous dictionaries, Justice Scalia noted that the "inferiour" had two meanings still used: (1) "'[l]ower in place, . . . station, . . . rank of life, . . . value or excellency,' and (2) '[s]ubordinate.'"[277] He concluded that the Framers intended to adopt the second-cited definition for, if they had meant the first, to the effect of "lower in station or rank," they would have used a phrase like "lesser officers."[278] Ultimately, because the independent counsel was "not subordinate to another officer, she" was not inferior and thus "her appointment other than by the President with the advice and consent of the Senate [was] unconstitutional."[279]

2. *Edmond* Effectively Replaces *Morrison* with Justice Scalia's *Morrison* Dissent and Turns the Focus to a "Subordinating" Supervision-and-Control Standard

Less than ten years after *Morrison*, the Supreme Court—with Justice Scalia now writing for the majority—retreated from *Morrison* and focused on the degree of an officer's "subordination" to other officials as the key distinction between non-inferior and inferior officers. In *Edmond v. United States*, the Court considered whether the Secretary of

272. *Id.*
273. *Id.*
274. *Id.* at 719.
275. *Id.* (quoting United States v. Germaine, 99 U.S. 508, 511 (1878)).
276. *Id.*
277. *Id.* (alterations in original) (quoting SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 1037 (6th ed. 1785)).
278. *Id.*
279. *Id.* at 723.

Transportation could lawfully "appoint civilian members of the Coast Guard Court of Criminal Appeals," a question that turned on whether members of that court are principal or inferior officers.[280] *Morrison*, the Court noted, "did not purport to set forth a definitive test," as it concluded that the independent counsel was "clearly" an inferior officer.[281] The *Edmond* petitioners, arguing that judges of the Court of Criminal Appeals are principal officers, stressed the importance of those judges' responsibilities—which include the power to dishonorably discharge individuals and issue death sentences.[282] But, the Court explained, the special trial judges in *Freytag* also had significant duties and discretion, yet they were held to be inferior officers.[283] And, under *Buckley*, the "exercise of 'significant authority pursuant to the laws of the United States' marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather . . . the line between officer and nonofficer."[284]

Justice Scalia thus returned to the analysis from his dissenting opinion in *Morrison*. Generally, he said, the term "'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior."[285] "It is not enough," he continued, "that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude,"[286] for if that were so, "the Constitution might have used the phrase 'lesser officer.'"[287] Instead, "in the context of a Clause designed to preserve political accountability relative to important Government assignments," inferior officers are those officials "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice

280. 520 U.S. 651, 653, 655–56 (1997).
281. *Id.* at 661–62 (citing *Morrison*, 487 U.S. at 671).
282. *Id.* at 662.
283. *Id.* (quoting Freytag v. Comm'r, 501 U.S. 868, 881–82 (1991)).
284. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam)).
285. *Id.*
286. *Id.* at 662–63. This proviso appears to imply that an officer may have the power to supervise and direct even though that officer's power is not as great as that of the officer being supervised. The better reading of this part of Justice Scalia's opinion is that, although a supervising officer will necessarily exercise greater power than the officer being supervised, there may be instances where an officer exercises greater power but simply has no direct supervisory authority over the "lesser" officer, *e.g.*, the relationship between a Secretary and a Deputy Assistant Secretary. In such circumstances it might well be that, under the *Edmond* standard, the Deputy Assistant Secretary's superior-officer status could not be defeated merely by pointing to the existence of the office of Secretary.
287. *Id.* at 663.

and consent of the Senate."[288] The Judge Advocate General has "administrative oversight over the Court of Criminal Appeals," including the authority to determine procedural rules and remove judges without cause.[289] Additionally, the Judge Advocate General may remove the judges without cause—an important point, since the "power to remove officers, we have recognized, is a powerful tool for control."[290] Finally, while the Judge Advocate General does not have complete control over Court of Criminal Appeal judges, another entity within the executive branch—the Court of Appeals for the Armed Forces—has the power to review and reverse the court's decisions.[291] Members of the Court of Criminal Appeals are, the Court concluded, inferior officers.[292]

E. Free Enterprise Fund *Emphasizes the Accountability of Powerful Executive-Branch Officials*

The removability of officers was the dispositive factor in the Court's decision in *Free Enterprise Fund.*[293] Primarily at issue were the removal protections for the members of the Public Accounting Company Oversight Board. These officials are appointed by the SEC to staggered five-year terms.[294] The Board itself is subject to the SEC's oversight, but Congress, through the Dodd-Frank Act, attempted to make the individual members of the Board "substantially insulated" from the SEC's control[295] by conditioning their removal on a showing of "good cause."[296] That limitation on Board member removal in itself might be unexceptionable, but the Board's overseer—the SEC—is staffed by officials who themselves enjoy substantial protection against Presidential removal.[297] As the Court explained, this dual for-cause protection "withdraws from the President any decision on whether . . . good cause exists" with respect to members of the Board, and that decision in turn is left to the SEC, whose Commissioners are protected from at-will removal.[298] "The result is a Board that is not accountable to

288. *Id.*
289. *Id.* at 664.
290. *Id.* (citing Bowsher v. Synar, 478 U.S. 714, 727 (1986) and Myers v. United States, 272 U.S. 52 (1926)).
291. *Id.* at 664–65.
292. *Id.*
293. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483–84 (2010).
294. *Id.* at 484.
295. *Id.* at 486.
296. *Id.* (citing 15 U.S.C. § 7211(e)(6), *invalidated by Free Enter. Fund*, 561 U.S. 477).
297. *Id.* at 486–87.
298. *See id.* at 487, 495.

the President, and a President who is not responsible for the Board."[299] Such an "arrangement is contrary to Article II's vesting of the executive power in the President."[300]

Having invalidated the Board members' removal protections, the Court then made short work of the challengers' *Edmond* claim. Although reciting *Edmond*'s three-factored direction-and-supervision standards, the Court emphasized removability as the salient consideration.[301] The Court therefore concluded, with "no hesitation," that the Board members were inferior officers given the SEC's "power to remove Board members at will, [as well as its] other oversight authority."[302]

F. Arthrex *Reveals that Final Decision-Making Authority is a Strong—and in Some Cases—Decisive Factor Indicating Non-Inferior-Officer Status*

In *Arthrex*, the Court considered whether members of the Patent Trial and Appeal Board are inferior or non-inferior officers.[303] The Board is an entity within the Department of Commerce's Patent and Trademark Office.[304] At the head of the Office is a Director and Deputy Director.[305] They, along with the Commissioner for Patents, the Commissioner for Trademarks, and administrative patent judges ("APJs"), compose the Board.[306] The Director is "appointed by the President . . . with the advice and consent of the Senate."[307] The Deputy Director, the two Commissioners, and APJs are appointed by the Secretary of Commerce who, like the Director, is appointed by the President with Senate confirmation.[308]

The Board hears patent disputes, including what are called *inter partes* reviews.[309] These reviews may be initiated by the Director upon petition if, among other requirements, he determines that the petitioner is reasonably likely to prevail on at least one challenged patent claim.[310] If the Director initiates an *inter partes* review, he assigns a panel of at

299. *Id.* at 495.
300. *Id.* at 496.
301. *Id.* at 510.
302. *Id.*
303. *See* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1978 (2021).
304. 35 U.S.C. §§ 1(a), 6(a).
305. *Id.* § 3(a)(1), (b)(1).
306. *Id.* § 6(a).
307. *Id.* § 3(a)(1).
308. *Id.* §§ 3(a)(1), (b)(1), (b)(2)(A), 6(a); 15 U.S.C. § 1501.
309. 35 U.S.C. § 6(b)(4).
310. *Id.* § 314(a).

least three Board members to hear the matter.[311] *Arthrex* involved a challenge to a decision by a Board composed of APJs who, it was alleged, were not properly appointed as non-inferior officers.[312]

The Court commenced its analysis recounting the basics. The Constitution vests "[t]he executive Power" in the President, "who has the responsibility to 'take Care that the Laws be faithfully executed.'"[313] Although the President "may be assisted in carrying out that responsibility by officers," such must either be "nominated by him and confirmed by the Senate," or "must be directed and supervised by an officer who has been."[314] The Court then turned to the central question of "whether the authority of the [Patent Trial and Appeal] Board to issue decisions on behalf of the Executive Branch is consistent with these constitutional provisions."[315]

It began, and essentially ended, its answer by emphasizing the Board's power to make final decisions: the Board "is the last stop for review within the Executive Branch."[316] In contrast to the judges of the Court of Criminal Appeals who, as *Edmond* noted, had "no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers,"[317] APJs are subject to "only half" of that degree of supervision.[318] For although the Director exercises substantial oversight over the Board, he is impotent "when it comes to the one thing that makes the APJs officers exercising 'significant authority' in the first place—their power to issue decisions on patentability."[319] Therefore, as the Court explains, the decision in *Edmond* goes

> a long way toward resolving this dispute. What was "significant" to the outcome there—review by a superior executive officer—is absent here: APJs have the "power to render a final decision on behalf of the United States" without any such review by their nominal superior or any other principal officer in the Executive Branch.[320]

311. *Id.* § 6(b)(4), (c).
312. United States v. Arthrex, Inc., 141 S. Ct. 1970, 1978 (2021).
313. *Id.* at 1976 (quoting U.S. CONST. art. II, § 1, cl. 1, § 3).
314. *Id.* (citing U.S. CONST. art. II, § 2, cl. 2).
315. *Id.*
316. *Id.* at 1977.
317. *Id.* at 1980 (quoting Edmond v. Unites States, 520 U.S. 651, 665 (1997)).
318. *Id.* (citing *Edmond*, 520 U.S. at 664).
319. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam)).
320. *Id.* at 1981 (quoting *Edmond*, 520 U.S. at 665).

This lack of review, the Court concluded, runs afoul of the accountability principle, a corollary of the Presidential obligation to "take Care that the Laws be faithfully executed."[321] As the Court explained, the "diffusion of power carries with it a diffusion of accountability." [322] Because the Director cannot review the Board's decisions, the "chain of command runs not from the Director to his subordinates, but from the APJs to the Director."[323] While the Director may try to manipulate the results of an individual *inter partes* review—by stacking a Director-friendly panel—these "machinations blur the lines of accountability demanded by the Appointments Clause" and leave the parties "with neither an impartial decision by a panel of experts nor a transparent decision for which a politically accountable officer must take responsibility."[324] Thus, "the public can only wonder 'on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'"[325] In short, "[i]n all the ways that matter to the parties who appear before the [Board], the buck stops with the APJs, not with the Secretary or Director." [326] Therefore, while acknowledging that the *Edmond* supervision factor weighed in favor of inferior status, and without giving any attention to APJs' removal protections, the Court concluded that APJs are non-inferior officers, and thus their inferior-officer appointments unconstitutionally "conflict[]with the design of the Appointments Clause 'to preserve political accountability.'"[327]

IV. SIGNIFICANCE AS THE KEY DISTINCTION BETWEEN NON-INFERIOR AND INFERIOR OFFICERS

A. Arthrex *Signals a Shift from* Edmond *by a Re-Conceptualization of* Buckley*'s "Significance" Standard*

By capitalizing on a series of cases emphasizing the importance of preserving accountability for the appointment of federal officers, the Supreme Court in *Arthrex* effectively shifted the relevance of "significance" from its *Buckley* role of distinguishing between officers and

321. *Id.* at 1976, 1982 (citing U.S. CONST. art. II, § 3).
322. *Id.* at 1981 (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497 (2010)).
323. *Id.*
324. *Id.* at 1982.
325. *Id.* (quoting THE FEDERALIST NO. 70, at 476 (Alexander Hamilton)).
326. *Id.*
327. *Id.* (quoting Edmond v. United States, 520 U.S. 651, 663 (1997)).

non-officers, to a new role of separating inferior from non-inferior officers. The Court has thereby initiated the likely inexorable supplanting of the *Edmond* direction-and-supervision standard—although the substitution is implicit and inchoate—having been started through emphasis on the *Edmond* final decision-making authority factor.

As we have seen, an "office" was originally understood as "a public charge or employment," created by law,[328] embracing "the ideas of tenure, duration, emolument, and duties."[329] That interpretation—developed in a series of Supreme Court decisions culminating in *Germaine* and *Auffmordt*—is by and large consistent with what is known of the original understanding of the Appointments Clause.[330] As Professor Mascott's work shows, this understanding did not condition officer status on a qualitative assessment of the officer's authority.[331] But, beginning with *Buckley* in 1976, the Supreme Court strayed from the tenure-duration-emolument-duty factors to hold that officers differ from employees because only the former can exercise "significant authority pursuant to the laws of the United States."[332]

Absent, however, from *Buckley* and cases that have relied on *Buckley* is any definition of "significant authority."[333] But several post-*Buckley*

328. United States v. Maurice, 26 F. Cas. 1211, 1213–14 (C.C.D. Va. 1823) (No. 15,747).

329. United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1867); *see also Maurice*, 26 F. Cas. at 1214 (explaining that an office exists when the employee's "duty" is a "continuing one . . . defined by rules prescribed by the government, and not by contract," when "an individual is appointed by government to perform," and the individual "enters on the duties appertaining to his station, without any contract defining them," and when "those duties continue, though the person be changed").

330. *See* Mascott, *supra* note 24, at 454, 463.

331. *See id.*

332. Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam).

333. *Edmond* and *Freytag* quoted *Buckley* but did not define "significant." *See* Edmond v. United States, 520 U.S. 651, 662 (1997) (quoting *Buckley*, 424 U.S. at 126); Freytag v. Comm'r, 501 U.S. 868, 881 (1991) (quoting *Buckley*, 424 U.S. at 126). In *Buckley*, the Court also stated that the phrase "Officers of the United States"

> does not include all employees of the United States, but there is no claim made that the [FEC] Commissioners are employees of the United States rather than officers. Employees are lesser functionaries subordinate to officers of the United States . . . whereas the Commissioners, appointed for a statutory term, are not subject to the control or direction of any other executive, judicial, or legislative authority.

Buckley, 424 U.S. at 126 n.162 (citing Auffmordt v. Hedden, 137 U.S. 310, 327 (1890); United States v. Germaine, 99 U.S. 508 (1878)). Here, *Buckley* did not define "lesser functionary"; nor did *Lucia* or *Freytag*, despite quoting the term from *Buckley*. *See* Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018) (quoting *Buckley*, 424 U.S. at 126 n.162); *Freytag*, 501 U.S. at 880 (quoting *Buckley*, 424 U.S. at 126 n.162).

cases offered guidance that may have informed the Court's later emphasis in *Arthrex* on the importance of an official's authority. For example, in *Freytag* the Court supported its conclusion that the Tax Court's special trial judges were officers, not employees, because those STJs perform "more than ministerial tasks," and in so doing "exercise significant discretion."[334] Similarly, the Court in *Lucia* noted that SEC ALJs have the power to issue decisions like those in *Freytag*, but "with potentially more independent effect."[335]

But the real turn may have begun in *Edmond* itself. Recall that the petitioners there had argued that judges on the Coast Guard Court of Criminal Appeals are non-inferior officers owing to the importance of their duties.[336] Writing for the Court, Justice Scalia rejected that argument, explaining that the special trial judges in *Freytag* were held to be inferior officers despite their exercise of significant discretion.[337] Yet, in articulating a direction-and-supervision standard, Justice Scalia's majority opinion also emphasized the relevance of accountability to construing the Appointments Clause.[338]

The accountability theme was then taken up and given pride of place in *Free Enterprise Fund*.[339] As recounted above, the Court there held that the dual-layer protections against removal for members of the Public Company Accounting Oversight Board run afoul of the separation of powers because double limitations on removal would "withdraw[] from the President any decision on whether . . . good cause exists" to remove members of the Board and prevent the President from taking full responsibility for the Board's actions.[340] Such an "arrangement is contrary to Article II's vesting of the executive power in the President."[341] The President "can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith."[342] That

334. *Freytag*, 501 U.S. at 881–82.

335. *Lucia*, 138 S. Ct. at 2053.

336. *Edmond*, 520 U.S. at 662.

337. *Id.* (quoting *Freytag*, 501 U.S. at 881–82).

338. *Id.* at 663. The turn begun in Justice Scalia's majority opinion in *Edmond* should not be surprising given that Justice Scalia's dissent in *Morrison* acknowledged that subordination was a necessary but not sufficient condition to inferior officer status. Morrison v. Olson, 487 U.S. 654, 722 (1988) (Scalia, J., dissenting).

339. The Court's emphasis on the importance of accountability in government decision-making has become prominent recently in non-constitutional adjudication as well. *See generally* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748 (2021).

340. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492, 495 (2010).

341. *Id.* at 496.

342. *Id.*

obligation is especially important, the Court underlined, for officers who serve in entities like the Board, to which are assigned "expansive powers to govern an entire industry."[343]

In highlighting the role of accountability in construing the Constitution's rules governing the federal officer corps, *Free Enterprise Fund* brought to the fore an arguable tension in the Court's case law that dated from at least *Edmond*. In one line of cases, the Court had underscored the importance of accountability by rejecting significant limitations on the President's power to remove officers. In another line, the Court had similarly emphasized the importance of accountability by preserving the Appointments Clause's framework for investing officials with sovereign power. Now, it should go without saying that accountability becomes more, not less important, the higher one ascends in federal officialdom. Accordingly, per *Free Enterprise Fund* and the cases it built upon, the nearer an officer gets to the President, the more critical it is for the President to have the power to remove that officer at will. But, under *Edmond*, the fewer removal protections an officer has, the more likely the officer would be considered inferior and thus subject to the less democratically accountable appointing method of the Excepting Clause.

This tension was resolved in *Arthrex*, where the Supreme Court employed an accountability-and-significant-authority principle under the veneer of *Edmond*'s supervision-and-control rule to hold that administrative patent judges serving on the Patent Trial and Appeal Board are principal officers.[344] Under *Edmond*, an official is an inferior officer so long as his work is directed and supervised "at some level" by a non-inferior officer.[345] As we have seen, in *Arthrex* the Court inquired as to "whether the authority of the [Patent and Trademark Appeals Board] to issue decisions *on behalf of the Executive Branch* is consistent with" the President's removal power as well as the Appointments Clause.[346] Now, per *Arthrex*, even when a higher-ranking officer has substantial direction and supervision over other officers (like that held by the PTO Director over APJs), the latter are *not* inferior officers if they exercise significant authority—most prominently, final decision-making authority—on behalf of the Executive Branch.[347] As the Court emphasized in *Arthrex*, "[i]n all the ways that matter to the parties who

343. *Id.* at 485.
344. United States v. Arthrex, Inc., 141 S. Ct. 1970, 1980–82 (2021).
345. Edmond v. United States, 520 U.S. 651, 663 (1997).
346. *Arthrex, Inc.*, 141 S. Ct. at 1976 (emphasis added).
347. *Id.* at 1979–80.

appear before the [Board], the buck stops with the APJs, not with the Secretary or Director."[348]

We concede that the foregoing analysis is at best implicit in *Arthrex*. Naturally, the Court is reluctant simply to overrule a precedent outright, and thus nowhere will one find in the majority opinion a statement to the effect of, "we are hereby adopting significance as the criterion separating inferior from non-inferior officers." One could therefore quite defensibly argue that the law of the Excepting Clause, immediately post-*Arthrex*, is merely that final decision-making authority will be a sufficient condition to non-inferior-officer status in at least some cases, particularly where the final decision is weighty.[349] Such an interpretation of *Arthrex* is bolstered by the remedy that the Court ordered. Rather than erasing the *inter partes* review process altogether, the Court simply deleted that part of the law that precludes the PTO Director from reviewing APJ decisions.[350] The Court even emphasized that the Director's review authority is discretionary, and that he is not constitutionally compelled to review any particular APJ decision.[351] Thus, if the Court were really focused principally on the significance of an officer's authority, then the remedy the Court chose is not well-tailored to the constitutional violation. After all, even after *Arthrex*, APJs will still be able to issue tremendously important decisions, which in many instances will become final without further review. Hence, it seems that APJs post-*Arthrex* still, as a practical matter, exercise significant authority.[352]

In response, the best we can say is to repeat that the Court labors under the *Buckley* line of precedents. According to those cases, even the lowest of federal officers will by definition exercise "significant

348. *Id.* at 1982.

349. *See, e.g.*, Thomas A. Berry, *The Appointments Clause After* Arthrex, CATO INST. (June 22, 2021, 3:52 PM), https://www.cato.org/blog/appointments-clause-after-arthrex (arguing that *Arthrex* "goes a long way toward suggesting that reviewability of an officer's decision holds primary position among the three *Edmond* factors").

350. *See Arthrex, Inc.*, 141 S. Ct. at 1987.

351. *Id.* at 1988 ("To be clear, the Director need not review every decision of the [Patent and Trademark Appeals Board]. What matters is that the Director have the discretion to review decisions rendered by APJs.").

352. A recent decision from the Federal Circuit underscores the point. *See* Mobility Workx, LLC v. Unified Patents, LLC, 15 F.4th 1146 (Fed. Cir. 2021). In an opinion dissenting in part in *Mobility Workx*, Judge Newman noted that, pursuant to a PTO regulation, the Board has the sole power to decide whether to institute *inter partes* proceedings, a decision that is not appealable to anyone within the Executive Branch. *Id.* at 1159–60 (Newman, J., concurring in part and dissenting in part). In Judge Newman's view, such significant and final decision-making authority suggests, in light of *Arthrex*, that APJs serving on the Board may still qualify as unconstitutional non-inferior officers. *See id.* at 1161.

authority." Hence, the fact that the Court's "remedy" for an Excepting Clause violation still leaves the officers in question wielding, from a practical standpoint, significant authority is unfortunate but for now to be expected. If, however, the Court in *Arthrex* had fully adopted the "significance standard" test, the constitutionally adequate remedy—setting aside questions of whether courts can "strike" provisions of a law as opposed to simply declining to enforce the law in its entirety[353]—would have been the complete elimination of APJs' final-decision-making authority. Put another way, the Constitution in our view requires that the PTO Director review every APJ ruling—thereby bolstering accountability by requiring the Director to put his name to, and to stake his professional reputation on, every decision. Such an arrangement would permit APJs to function much like magistrate judges, the classic inferior officers.[354] Of course, Congress could always change the manner of appointment for APJs, thus allowing them to function as they were—much like district court judges, whose decisions can become final without appellate review and which obviously can have tremendous impact on private parties.[355]

What, precisely, the standard for distinguishing significant from insignificant power should be, we are not prepared to decide. Preliminarily, though, we offer the following rule: the exercise of discretionary governmental power that either directly results in the deprivation of a person's liberty or property, or establishes a legal framework by which such a deprivation may be authorized, is significant.[356] This rule conforms to what the average person would likely

353. *See Arthrex, Inc.*, 141 S. Ct. at 1990–92 (Gorsuch, J., concurring in part and dissenting in part).

354. *See* Landry v. FDIC, 204 F.3d 1125, 1143 (D.C. Cir. 2000) (Randolph, J., concurring in part and concurring in the judgment) (citing Rice v. Ames, 180 U.S. 371, 378 (1901); Go–Bart Importing Co. v. United States, 282 U.S. 344, 352–54 (1931); Pacemaker Diagnostic Clinic v. Instromedix, 725 F.2d 537, 545 (9th Cir. 1984) (en banc))("[I]t has long been settled that federal magistrates are 'inferior Officers' under Article II . . . ."). Magistrate judges can, with the consent of the parties, issue final decisions, and certainly such decisions can be "significant." *See* 28 U.S.C. § 636(c)(1). But the significance of such rulings is a function of the power that *the parties*, not the government, may allow magistrates, *see id.*, and thus that power does not convert them into non-inferior officers.

355. And, as noted above, *see supra* note 21, not all unreviewable decisions (*e.g.*, purchasing pencils) are *significant* enough such that the official is a non-inferior officer of the United States.

356. In contrast, the Office of Legal Counsel ("OLC") has proposed that, to be an officer, a person must possess "delegated sovereign authority," which OLC defines as "power lawfully conferred by the government to bind third parties, or the government itself, for the public benefit . . . primarily involv[ing] the authority to administer, execute, or interpret the law." Officers of the United States Within the Meaning of the Appointments Clause, 31

consider to be significant government activity—namely, the type of action that can have a direct and substantial effect on one's quotidian existence. Moreover, such a rule would meld well with the Court's emphasis on preserving accountability in Executive Branch decision-making—for bringing officials to account matters most when citizens are subject to government coercion or penalty.[357]

Such a rule would also operate fairly well within existing officer-appointing practice. To be sure, many federal officials who are not very high up the executive ladder, and thus who likely have not been appointed by the President following the Senate's confirmation, can still have a significant impact on private parties and private conduct—for example, clerks who process benefits or visa applications, biologists and other technical staff who review and recommend decisions on applications for resource development, and enforcement personnel who conduct informal administrative or other civil investigations. Such officials undoubtedly would qualify as "officers of the United States" as that phrase was originally understood, and might, even without final decision-making authority, qualify as officers under the *Buckley* standard.[358] But that few, if any, of these functionaries are appointed as non-inferior officers does not promise the upturning of the federal civil service system,[359] because under our tentatively formulated rule, none

Op. O.L.C. 73, 78, 87 (2007). This standard is somewhat broader than what we propose because it would include essentially binding legal actions, not just those that would result in a deprivation of life, liberty, or property.

357. Our tentative rule should be understood as a baseline. There undoubtedly are many exercises of political power that are "significant" that nevertheless may not qualify as such under our due-process-oriented proposal. For example, members of the Foreign Service undoubtedly exercise significant discretion in executing their diplomatic duties oversees, yet it is unlikely, given the extra-territorial nature of their work, much of it with respect to non-citizens, that their work could cause a cognizable deprivation of liberty or property. We could also envision the Court adopting a test analogous to the "major questions" limitation on *Chevron* deference. *Cf.* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"). Accordingly, action that could have a broad impact on the economy—such as resolution of the patent cancellation dispute at issue in *Arthrex*—is likely to be "significant" power regardless of how, or even whether, its exercise might result in a cognizable due process deprivation.

358. For example, even if the special trial judges in *Freytag* had lacked the ability to issue a final decision on anything, they still would have qualified as officers because of the "important functions" they carried out using "significant discretion." Lucia v. SEC, 138 S. Ct. 2044, 2052 n.4, 2053 (2018) (quoting Freytag v. Comm'r, 501 U.S. 868, 878, 881 (1991)).

359. The same would be true even if the original understanding of officer were adopted. *See* Mascott, *supra* note 24, at 564 ("While this change would be far-reaching, it is achievable.").

would likely be deemed to exercise "significant" power. That is because very few federal executive officials—outside of U.S. attorneys' offices—have the power to directly deprive persons of liberty or property,[360] and we suspect that the number of those who could create deprivation-authorizing regimes would be similarly small.[361]

*****

In sum, the Supreme Court is moving towards adopting a rule that the significance of an official's duties is what distinguishes non-inferior from inferior officers. Although *Edmond*'s direction-and-supervision test and factors superficially remain in place after *Arthrex*, they at most serve as a floor: to be inferior, it is necessary but not sufficient that one be directed and supervised by others. Following *Arthrex*, a "subordinate" officer—even if subject to substantial oversight by a more senior officer—may qualify as a non-inferior officer if he wields significant power on behalf of the Executive Branch. Such a determination may often, as in *Arthrex*, turn on whether the officer has final-decision-making authority. That it will rarely if ever turn on an officer's removability—an *Edmond* factor which played nearly no role in *Arthrex*—is demonstrated by the Court's case law governing when the President may remove executive officers from their positions, to which we now turn.

B. Additional Considerations—How the Court's Invigoration of the President's Removal Power Supports the Court's Shift to a

360. We also suspect that there are similarly few officials who possess a power the exercise of which could produce significant political or economic effect. *See supra* note 354 and accompanying text. But it also bears noting that, even under the current appointment practice, over 1,100 federal officials require Presidential appointment with Senate confirmation. *See* COMM. ON OVERSIGHT & REFORM, U.S. HOUSE OF REPRESENTATIVES, 116TH CONG., POL'Y & SUPPORTING POSITIONS app. 212 (Comm. Print 2020).

361. The practice of giving such rulemaking authority to civil servants is, save for a short period during the waning days of the Trump administration, common in the Department of Health and Human Services. *See* ANGELA C. ERICKSON & THOMAS BERRY, BUT WHO RULES THE RULEMAKERS? 2–3, 35 tbl.C1 (2019) (finding that between 2001 and 2018, 98% of regulations promulgated by the FDA, totaling some 1,860 rulemakings, were unconstitutionally issued by non-officer career employees); FDA Delegation of Authority, 86 Fed. Reg. 49,337 (Sept. 2, 2021) (re-delegating to the FDA Commissioner and subordinates the power to issue rules).

"Significance" Standard for the Excepting Clause

The Supreme Court's emphasis in *Arthrex* on the significance of an official's authority—at least when a function of that authority's finality—to distinguish inferior from non-inferior status suggests a de-emphasis of the relevance of removal protections. That decreasing relevance coincides with a parallel development in the Court's removal-power case law. These latter decisions show that, rather than serve to establish an officer's inferior or non-inferior status, removal protections *follow from* the officer's status. In other words, removal protections do not make the officer; rather, the officer's type determines the constitutionality of any limitation on removal.

Such an approach to interpreting the President's removal power has a significant historical warrant. As we have noted, the very first Congress concluded that the President has the power to remove the heads of the "great executive departments" of the government.[362] Madison thought it "absolutely necessary that the President should have the power of removing from office," as that power "will make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses."[363] Indeed, the "view that 'prevailed [in 1789], as most consonant to the text of the Constitution' and 'to the requisite responsibility and harmony in the Executive Department,' was that the executive power included a power to oversee executive officers through removal.'"[364]

These "removable" officers—the heads of the great executive departments—were, and remain, the quintessential non-inferior, "principal" officers. As the Court's more recent removal-power cases demonstrate, the constitutionality of removal protections, especially for powerful executive-branch officers, depends on whether the officer is non-inferior.

For example, in *Seila Law, LLC v. Consumer Financial Protection Bureau*, the Court considered whether Congress's "arrangement" of the Bureau—establishing as its head a single director who serves for five years and who cannot be removed except for cause, and who is granted

362. 1 ANNALS OF CONG. 383, 387–88 (1789) (Gales & Seaton eds., 1834).

363. *Id.* at 387.

364. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010) (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 893 (2004)).

"vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy"—violates the Constitution's separation of powers.[365] In concluding that it does, the Court emphasized the director's power, underlining his authority "to promulgate binding rules . . . prohibit[ing] . . . unfair and deceptive practices in a major segment of the U.S. economy," to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications," and "to seek daunting monetary penalties." [366] Although the Court acknowledged that it has sometimes upheld limits on the President's removal power, it declined to uphold the removal protections for "principal officers," like the Bureau's director, who "wield significant executive power."[367] Given, however, that all federal officers by definition wield "significant power," as *Buckley* and its progeny appear to teach, and given that the Court is not prone to tautology, then it must follow that "significant executive power" is a type of power that is qualitatively greater than that afforded other officers.[368]

To the same effect is the Court's most recent removal-power case, *Collins v. Yellen*, a decision issued shortly after *Arthrex*.[369] The dispute in *Collins* centered on the removal protections of the sole head of the Federal Housing Finance Agency.[370] Appointed to a five-year term, the Agency's director "is tasked with supervising nearly every aspect of" Fannie Mae and Freddie Mac's "management and operations." [371] Through the Agency, the director "act[s] as the companies' conservator or receiver for the purposes of reorganizing the companies, rehabilitating them, or winding down their affairs."[372] The Court concluded that the removal protections for the Agency's director are impermissible, *Seila Law* being "all but dispositive."[373] Although the Court acknowledged a

365. 140 S. Ct. 2183, 2191, 2193 (2020).
366. *Id.* at 2200.
367. *Id.* at 2211.
368. We very much doubt that the Court is on the precipice of adopting a significant/super-significant distinction for federal officers. The most likely development is as we describe in the text—namely, the Court will acknowledge that significant authority is reserved to non-inferior officers, whereas insignificant authority may be wielded by anyone in the federal government's employ. For the latter, those who do so with tenure and duration under federal law are inferior officers of the United States. We acknowledge, however, that the Court's use of "significant executive power" rather than "significant executive authority" cuts somewhat against our argument in the text that *Seila Law* impliedly conflicts with the *Buckley* standard for distinguishing officers from non-officers.
369. 141 S. Ct. 1761 (2021).
370. *Id.* at 1770.
371. *Id.* at 1770–71.
372. *Id.* at 1772.
373. *Id.* at 1783.

few differences between the Agency and the Consumer Finance Protection Bureau, including that the head of the former may have enjoyed fewer protections against removal than the head of the latter,[374] these differences were unavailing, for "the Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer."[375] Notably, the Court rejected the argument that *Seila Law* was distinguishable because, unlike the Bureau, the Agency directly regulates only government-sponsored enterprises, not individual citizens.[376] "This argument fails," the Court concluded, "because the President's removal power serves important purposes regardless of whether the agency in question affects ordinary Americans by directly regulating them or by taking actions that have a profound but indirect effect on their lives."[377] In any event, there could "be no question that the [Agency's] control over Fannie Mae and Freddie Mac can deeply impact the lives of millions of Americans by affecting their ability to buy and keep their homes."[378]

As *Seila Law* and *Collins* ably demonstrate, it is the *significance* of the agency's authority—and thus the significance of the authority of the officer who leads the agency—that is the key consideration when adjudging the constitutionality of removal protections enjoyed by that agency head. The Court's recent removal-power case law thus fittingly supports the Court's parallel development in Appointments Clause case law, as witnessed in *Arthrex*. Just as the significance of an officer's power determines whether he must be removable at will, so too the significance of his power—articulated for now as a function of the *Edmond* factors—determines whether his appointment must be made by the President following Senate confirmation.[379]

374. *Id.* at 1784–86.
375. *Id.* at 1787.
376. *See id.* at 1784, 1786.
377. *Id.* at 1786.
378. *Id.*
379. We are not the first to draw a parallel between supervision within the context of the President's removal power and supervision within the context of the Appointments Clause. *See* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1245 (2014) ("If by definition an inferior officer is under the principal officer's direction and supervision and lacks the discretion to make autonomous policy choices, then removal at will by the President would not be necessary for control.").

V. CONCLUSION

For the last several decades, the Supreme Court has struggled to articulate a clear, sensible, and historically authentic test for distinguishing inferior from non-inferior officers. But its recent decision in *Arthrex* signals a step in the right direction, by suggesting that the decisive criterion for distinguishing inferior from non-inferior officers is the significance of the power wielded.

Such a significance standard better conforms than the *Edmond* multi-factor test to the original meaning of the Appointments Clause. It better harmonizes the Supreme Court's Appointments Clause and removal-power case law. And, perhaps most importantly, it better strengthens that clause's role in the separation of powers. The Founders wanted to ensure political accountability for appointees and to impose a check on the accumulation of power.[380] As Hamilton explained in the *Federalist Papers*, the Appointments Clause recognizes "that one man of discernment is better fitted to analise [sic] and estimate the peculiar qualities adapted to particular offices," but guards against "a spirit of favoritism in the President" by presumptively requiring Senate confirmation.[381] Or, as Madison put it at the Convention, giving the appointment power to the Executive but checked by Senatorial advice and consent "unite[s] the advantage of responsibility in the Executive with the security afforded in the [second] branch [against] any incautious or corrupt nomination by the Executive."[382]

The interpretation of the Appointments Clause, and especially its subordinate Excepting Clause, that *Arthrex* points to, however tentatively, furthers these twin aims of accountability and quality-control in the appointing power. By requiring that non-inferior officers—that is, those federal officials who wield truly "significant" power—must be nominated by the President and appointed with the advice and consent of the Senate, a significance standard helps to ensure that the only federal official (other than the Vice President) chosen by all of the people will take direct responsibility for the selection of persons

380. Note, *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914, 1917 (2007); *see also* Blumoff, *supra* note 3, at 1066 ("Rather, the debate focused largely on two questions: Was the Executive or the Legislature more likely to abuse its power? And which entity, the Executive or the Legislature, was more likely to be jealous and create discord if it was not given a role in the process?").

381. THE FEDERALIST NO. 76, at 510, 513 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

382. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 33, at 42–43.

who will make significant federal decisions.[383] The public therefore will not need to wonder "on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall."[384] And apart from concerns about accountability, by requiring that such powerful officials may be appointed only with the Senate's advice and consent, a significance standard makes it less likely that the federal officer corps will be filled with incompetent or corrupt functionaries.[385]

At the same time, the significance standard ensures that the Excepting Clause will continue to serve its housekeeping purpose.[386] As the delegates to the Convention recognized,[387] the requirements of the federal bureaucracy would overwhelm the President, were he required to appoint all persons—even tide waiters[388]—who wielded sovereign power. The Excepting Clause therefore allows Congress to relieve the Chief Magistrate of that drudgery by vesting the appointing power for inferior officers in persons other than the President, and thereby also dispenses with the potentially time-consuming process of Senate confirmation.[389] This tool of administrative convenience, made all the more important given that, as a matter of original understanding, nearly all federal employees are "Officers of the United States,"[390] in no way undercuts the main purposes of the Appointments Clause. For it stands to reason that the citizenry will care little about what truly inferior officers do, given that by *our* definition they can do nothing significant.

383. *Cf*. Seila Law, LLC v. CFPB, 140 S. Ct. 2183, 2203 (2020) ("[T]he Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation."). Accountability has properly become an important consideration of the Supreme Court. *See, e.g.*, Weiss v. United States, 510 U.S. 163, 186 (1994) (Souter, J., concurring) ("In the Framers' thinking, the process on which they settled for selecting principal officers would ensure 'judicious' appointments not only by empowering the President and the Senate to check each other, but also by allowing the public to hold the President and Senators accountable for injudicious appointments.").

384. United States v. Arthrex, Inc., 141 S. Ct. 1970, 1982 (2021) (quoting THE FEDERALIST NO. 70, at 476 (Alexander Hamilton)).

385. The Senate's quality-control role also gives it a share of responsibility "for both the making of a bad appointment and the rejection of a good one." Edmond v. United States, 520 U.S. 651, 660 (1997).

386. *Arthrex, Inc.*, 141 S. Ct. at 1979 (quoting *Edmond*, 520 U.S. at 660) ("Reflecting this concern for 'administrative convenience,' the Appointments Clause permits Congress to dispense with joint appointment, but only for inferior officers.").

387. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 33, at 628.

388. *See supra* note 103 and accompanying text.

389. More than a potential—even a minority party in the Senate can dramatically slow down appointments. *See* Heather Ba & Terry Sullivan, *Why Does It Take so Long to Confirm Trump's Appointments?*, WASH. POST (Apr. 24, 2019), https://wapo.st/3jO8V6O.

390. *See* Mascott, *supra* note 24, at 546, 564.

But for those officials who wield significant power, the Founders intended, our democracy requires, and the Supreme Court appears belatedly to have affirmed, that their appointments should come from the President following the Senate's advice and consent.