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Political Party-Association Restrictions on Officers of the United States are Unconstitutional

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I. Introduction ........................................................................................................................................2
   A. Analysis Methodology ..................................................................................................................4
   B. Examples of Statutory Restrictions .............................................................................................6

II. Constitutionality of Congressionally-Mandated Restrictions on the Pool of Eligible Presidential Nominees for Officers of the United States .........................................................................10
   A. Relevant Constitutional Texts .......................................................................................................10
   B. Detailed Analysis of the Scope of Congressional Necessary and Proper Clause Power to Create Offices ...........................................................................................................................................15
      1. Carrying Into Execution a Federal Power .................................................................................16
      2. Necessary ..................................................................................................................................18
      3. Proper .....................................................................................................................................20
      4. Necessary and Proper Clause Conclusions ...............................................................................24
   C. Textual Conclusions .....................................................................................................................25
   D. History, Practice, and Policy .........................................................................................................28
      1. Constitutional Drafting Generation .........................................................................................28
      2. Longstanding practice ..............................................................................................................31
      3. Policy ......................................................................................................................................35
   E. Conclusion .....................................................................................................................................37

III. Constitutionality of Restrictions Based on the Potential Nominee’s Connection to a Political Party .........................................................................................................................................39
   A. Description of “Independent Agency” Concept...........................................................................40
      1. What Makes Commissions or Boards “Independent” ...............................................................40
      2. History of Judicial and Executive Approval of Independent Agencies .................................45
      3. Commissioners of Independent Agencies are non-inferior Officers of the United States ..............51
   B. Germane and Appropriateness Requirements of the Necessary and Proper Clause ...........................................................................................................................................52
   C. First Amendment ..........................................................................................................................56
   D. History and Practice .....................................................................................................................60
   E. Policy ..........................................................................................................................................62
   F. Conclusion .....................................................................................................................................64

Table 1: Selection of Statutes with Political Party-Based Restrictions on the Pool of Eligible Nominees from which a President May Choose a Non-Inferior Officer of the United States ...........................................................................................................68
I. Introduction

Since leaving office, President Bill Clinton’s popularity with foreign audiences has become more and more apparent. He has the power to draw large favorable crowds at engagements around the world. Some believe that the next President could help repair America’s image abroad by appointing Bill Clinton to be the next Secretary of State. A President Barak Obama or a President John McCain could make Bill Clinton Secretary of State. However, the anti-nepotism statute purports to prevent a President Hillary Clinton from appointing Bill Clinton as Secretary of State or any government post:

A public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position...over which he exercises jurisdiction or control any individual who is a relative of the public official. An individual may not be appointed, employed, promoted, or advanced in or to a civilian position in an agency if such appointment, employment, promotion, or advancement has been advocated by a public official, serving in or exercising jurisdiction or control over the agency, who is a relative of the individual.¹

Can a statute constitutionally prevent President Hillary Clinton from choosing Bill Clinton as her Secretary of State? Does Congress have the authority to impose restrictions on the pool of eligible office-holders from which the President can choose his or her nominee for that office? Or are these statutory restrictions an unconstitutional encroachment by Congress on executive power?

There has been much recent scholarship on whether any congressional restriction on the President’s appointment power is constitutional. The vast majority has focused almost exclusively on the text of the Appointments Clause and has hastily concluded that Congress has no power whatsoever to impose any statutory restrictions on the President’s choice of

¹ 5 U.S.C. §3110(b)
nominees for any officer of the United States. This result would render unconstitutional numerous statutes. This article takes a different, more nuanced and comprehensive, approach, looking not only at the Appointments Clause, but also at the source of congressional power to create offices, the Necessary and Proper Clause, to see if restricting the pool of eligible office-holders falls within the scope of office-creation. No one has previously explored the extent and nature of congressional power under the Necessary and Proper Clause as it relates to congressional creation of offices in this context.

The Necessary and Proper Clause gives Congress the power to enact laws that are necessary and proper for carrying into execution powers granted to Congress or another branch of the federal government. Thus, Congress has the power to create the Offices of Attorney General and Secretary of Defense, for example, to execute the federal powers of law enforcement and national defense, respectively. This article explores Supreme Court jurisprudence, the meaning of the Necessary and Proper Clause, and the academic literature to determine what limitations the terms “necessary,” “proper,” and “carry into execution” place on Congress’ authority to impose restrictions on who may hold the Offices it creates. The result of this inquiry is that Congress does possess some limited authority to restrict the pool of eligible nominees from which the President may choose an officer of the United States. Specifically, Congress may impose restrictions that are reasonable and are germane to the duties of the Office.

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Many constitutional scholars closely allied with recent Republican administrations have urged for a more powerful executive and tried to end what they see as congressional encroachments into the executive purview. See Julian Zelizer, *The Conservative Embrace of Presidential Power*, publication upcoming, B.U. L. Rev., explaining that George W. Bush staffed the White House with conservative veterans of the 1970’s and 1980’s who championed executive power as a means of combating the wave of liberalism that gained momentum in the 1960’s. So, ironically, those who would most like to avoid the possibility of a President Hillary Clinton are the most likely to argue that as President she could constitutionally ignore the anti-nepotism statute and appoint her husband to be Secretary of State.
The second part of this article explores the constitutionality of a certain type of now common statutory restrictions: those focused on the connection between the potential nominee and a political party. For example, the statute creating the Securities and Exchange Commission (SEC) specifies that the Commission is...

to be composed of five Commissioners to be appointed by the President by and with the advice and consent of the Senate. Not more than three of such Commissioners shall be members of the same political party...⁴

The “reasonable and germane” test is applied to determine if political party restrictions are within congressional Necessary and Proper Clause authority. Given the unique nature of political party restrictions, which affecting core political speech and activity, this article also explores First Amendment implications of statutory political party restrictions. The conclusion is that statutory political party restrictions on the pool of eligible nominees from which the President may choose a non-inferior officer of the United States⁴ exceed congressional power under the Necessary and Proper Clause, cannot be squared with First Amendment jurisprudence on politically-motivated appointments, and are therefore unconstitutional.

A. Analysis Methodology

Scholarship on congressional power to restrict the President’s appointment power can vary greatly depending on the author’s approach to separation of powers problems generally. Those that employ a functional analysis⁵ look to see whether congressional action

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⁴ This paper will analyze the constitutionality of restrictions in statutes creating non-inferior officers of the United States. The author expresses no view as to whether the analysis laid out in this paper would also apply to the inferior Offices of the United States for which the President is given nominating powers.
⁵ Functionalists do not prohibit Congress, the Executive, or the Judiciary from taking action which may fall outside their branch’s primary responsibilities. Functionalists to seek to protect the constitutional separation of powers concept by permitting one branch of government to act within another branch’s realm, so long as the
unduly disrupts the functioning of the other branches of government. The answer in the present context will depend on things such as the character and extent of the restrictions and on the importance of the office in question. Those that employ a formalist analysis treat the Constitution as a set of directives to be construed through textual, structural, and historical analysis with less emphasis placed on the kinds of empirical judgments relied upon by functionalism. The most important questions to a formalist involve the language, implications, and origins of the relevant constitutional provisions.

This paper focuses on a formalist analysis of congressional restrictions on presidential nominations, with the qualification that where the Supreme Court has clearly spoken on an issue, that reasoning is followed. This is not because the author necessarily endorses formalism as always being the favored approach to separation of powers questions, but because there are several good reasons to concentrate on, or at least begin with, formalism in this particular context. First, the courts have said almost nothing on the constitutionality of congressional restrictions on Presidential appointment powers, making the formalist approach less controversial. Second, the Supreme Court’s recent Appointments Clause jurisprudence (regarding issues other than statutory restrictions) tends to follow the formalist approach.

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7 Formalism views the Constitution as an “instruction manual” prescribing certain allocations of power. In separation of powers questions, a formalist is not concerned with the goals of, or policies advanced via, separation of powers, but only with the grants of powers delineated in the constitution. See McCutchen, 80 Cornell L. Rev. 1, 9 (1994)

8 Strict formalism is controversial in that it tends to ignore case law on constitutional issues which conflicts with the formalist analysis of the text.

9 In Edmond v. United States the Supreme Court said: The Appointments Clause of Article II is more than a matter of etiquette or protocol; it is among the significant structural safeguards of the constitutional scheme. By
(even though the Court has taken a functionalist approach with regard to other separation of powers questions). Third, the Appointments Clause, as a relatively specific constitutional provision, is well suited to the traditional formalist analysis. Fourth, because a functionalist analysis of statutory restrictions on Presidential nominating power would require case-specific inquiries that could vary from one statute to another, it is not an appropriate tool for a general analysis. Finally, as luck would have it for the functionalists, a formalist analysis of the Necessary and Proper Clause, the key text for a formalist understanding of the scope of congressional power to prescribe qualifications for federal office-holding, leads to a relatively functionalist-type analysis of the necessity and reasonableness of the restrictions imposed. Thus, by starting from formalism the author hopes to encourage apologists of both methodologies to endorse her conclusions.

B. Examples of Statutory Restrictions

The 1884 congressional “Act for the Relief of Fitz John Porter” created an office to be filled by

...a person... not less than 45 nor more than 50 years of age, who shall have been for ten years a Judge of the Supreme Court of the Philippine Islands, shall have served for 2 years as a captain in the army...

Upon vetoing the act, President Arthur said that because there was only one person in the world who met the qualifications for the office, the act was an unconstitutional

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10 The Supreme Court tends to rely on formalist approaches in cases involving questions of government structure and procedure. See e.g., Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) (regarding the Article I, §7 lawmaking procedures). See also Buckley, 424 U.S. 1, Bowsher v. Synar, 478 U.S. 714 (1986), and Edmond, 520 U.S. 651 (regarding the Appointments Clause).

11 July 2, 1884
“encroachment by the legislative branch of the government upon the authority of the executive.”12

Most statutory restrictions on Presidential appointments that become law are much less limiting. This section will provide illustrations of statutory restrictions currently in existence for officers of the United States and explain how the restrictions may affect presidential decision-making.

Some restrictions seem so obviously sensible that they do not really seem like restrictions at all. For example,

The President shall appoint in the Department of Justice, by and with the advice and consent of the Senate, a Solicitor General, learned in the law, to assist the Attorney General in the performance of his duties.13

Who could disagree with the requirement that the solicitor general be “learned in the law”? Why would a President want to nominate a law-novice to represent himself and his administration in disputes before the Supreme Court? If a President did, however, want to make this seemingly foolish nominating choice, this statute purports to prevent the President from even nominating the law-novice, thereby saving the President from his or her own poor judgment.

Seemingly more controversial are the statutes that describe the qualities of an individual that Congress believes would perform well in the job. For example, statutes restrict appointment to the Commodity Futures Trading Commission (CFTC) to those knowledgeable in commodities markets,14 and require that the director of the Federal Emergency Management Agency (FEMA) have “demonstrated ability in... emergency management and

12 Corwin, supra, at 409-410 note 20.
13 28 U.S.C. § 505
homeland security; and not less than 5 years of executive leadership and management experience...”\textsuperscript{15}

Other statutory restrictions specifically exclude a certain class of people from eligibility, because those people are thought to be more likely to behave contrary to congressional intent for the office or contrary to public policy in general. For example, there is a statutory requirement that the Director of the Department of Labor’s Women’s Bureau be a female.\textsuperscript{16} The anti-nepotism statute, which prohibits all public officials (including the President) from nominating or appointing any relative, is meant to offer some protection against cronyism and some types of conflict-of-interest.\textsuperscript{17} The National Credit Union Administration Board is protected from domination by “individuals who, at the time of the appointment, are, or have recently been, involved with any insured credit union as a committee member, director, officer, employee, or other institution-affiliated party.”\textsuperscript{18}

Ever since constitutional ratification, congressional practice has been to enact statutes creating offices and specifying characteristics that a nominee for that office must possess. By 1926, there were so many statutes restricting the pool of eligible Presidential nominees for various offices that it took Justice Brandeis more than nine United States Reports pages to recite them all.\textsuperscript{19} Some statutes require the appointee to be learned in the law, versed in certain foreign languages, or have certain engineering qualifications.\textsuperscript{20} Other statutes have

\textsuperscript{16} 29 U.S.C. § 12
\textsuperscript{17} 5 U.S.C. § 3110(b)
\textsuperscript{18} 12 U.S.C. § 1752a(b)(2)(B)
\textsuperscript{19} Myers, 272 U.S. at 265-274, Brandeis dissenting. It does not appear that anyone has taken the time to update the list since 1926. Such a task is beyond the scope of this paper.
\textsuperscript{20} Myers, 272 U.S. at 267-269 note 43, Brandeis dissenting.
contained age requirements, gender restrictions, race restrictions, residency restrictions, and other requirements. Restrictions in the form of qualifications are now quite prevalent.

Although some of these restrictions may seem reasonable at first blush, they do restrict the President’s choice of nominees and sometimes prevent the President from nominating the person who the President believes is most qualified. In 1996, President Clinton wanted to nominate Charlene Barshefsky to be U.S. Trade Representative. However, by statute, only those who have never represented a foreign entity in a trade negotiation with the United States are eligible to be the U.S. Trade Representative, and Ms. Barshefsky had previously worked for the government of Canada. Congress, at President Clinton’s request, passed a statute exempting Ms. Barshefsky (by name) from the restriction in the Trade Representative statute. President Clinton then nominated, the Senate confirmed, and President Clinton appointed Ms. Barshefsky as Trade Representative. Statutory restrictions may, in some cases, hamper Presidential policy choices as well. For example, what if the President wanted to reform the commodities markets to make them more like securities markets and planned to effectuate this policy by appointing a securities expert, with only moderate knowledge of commodities, to the CFTC?

One type of restriction – the political party restriction – is specifically designed to limit Presidential policy and to prevent the President from nominating his or her top choice

\[21\] Myers, 272 U.S. at 269-270 note 46, Brandeis dissenting.

\[22\] Myers, 272 U.S. at 269-270 note 47, Brandeis dissenting (both cited statutes require appointee to be a woman).

\[23\] Myers, 272 U.S. at 269-270 note 48, Brandeis dissenting (“Act of July 1, 1902, c. 1362, § 59, 32 Stat. 641, 654, Commission to sell coal and asphalt deposits in Indian lands to include two Indians”).

\[24\] Myers, 272 U.S. at 267-269 notes 36-42, Brandeis dissenting.

\[25\] 19 U.S.C. § 2171(b)(3)

for the Office. These statutes require that a certain number of Commissioners or Board Members be from other than the controlling political party. For example, the statute creating the National Transportation Safety Board (NTSB) specifies that the Board is to be composed of five members appointed by the President, by and with the advice and consent of the Senate. Not more than three members may be appointed from the same political party.\(^\text{27}\)

Thus, if there is a vacancy on the NTSB, and three of the remaining four Commissioners are Republicans, then President George W. Bush must appoint a non-Republican to the NTSB.

Statutes that purport to restrict presidential nominating choice are quite diverse in the types of restrictions they impose. Notwithstanding that diversity, the common constitutional issue posed by all of them is whether Congress is empowered to impose any such restrictions at all. If Congress does have the authority to impose restrictions, is that power unlimited, or must each of the statutes in the current universe of statutory restrictions be analyzed to determine whether its particular restrictions exceed Congressional power?

II. Constitutionality of Congressionally-Mandated Restrictions on the Pool of Eligible Presidential Nominees for Officers of the United States

A. Relevant Constitutional Texts

There are three portions of the Constitution that speak to whether Congress may impose statutory restrictions on presidential appointment power: the Appointments Clause, the Incompatibility and Ineligibility Clause, and the Necessary and Proper Clause.\(^\text{28}\) These

\(^\text{27}\) 49 U.S.C. §1111

\(^\text{28}\) There is a fourth clause of the Constitution which restricts presidential appointment power: Article I, § 3, cl. 7 which states that an impeached official is disqualified from holding “any Office of honor, Trust, or Profit under the United States.” However, this is not a congressionally-imposed restriction, and the purpose of this restriction is fairly obvious, so it does not affect the analysis in this article.
clauses need to be read together, in a holistic fashion, to get a complete view of presidential and congressional power with respect to the appointments process.

The text of the Appointments Clause gives the President the power to nominate non-inferior officers of the United States:

[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.\(^{29}\)

The Appointments Clause describes the process by which an officer of the United States gets his or her job. First, the President must nominate someone to fill that office. Second, the Senate must give its consent to the President’s nominee (often called “confirmation”). Finally, once the Senate has approved the nominee, the President officially appoints the new officer to his or her post. This paper focuses on the first part of the appointments process (i.e. the President’s choice of nominee).\(^{30}\)

It is understandable that some people read the Appointments Clause and conclude that no statutory restrictions on the President’s choice of nominee are permissible. When applied to the appointments clause, *unius est exclusio alterius*, a principle of statutory and constitutional construction meaning ‘the expression of one is the exclusion of the others,’ may mean that by expressly giving the President the power to choose the nominee, the drafters

\(^{29}\) U.S. Const. Art. II, §2, cl. 2

\(^{30}\) Although most statutory restrictions formally restrict the final appointment of an officer (after nomination and confirmation), these statutes effectively restrict the President’s nominating power as much as the Senate’s confirmation power and the President’s later appointment power. If the President nominates someone whose appointment would violate one of these statutes, the Senate confirms the nominee, and the President appoints the officer, the appointment will be voided as unlawful. These statutes therefore restrict the President’s nominating power by making any Presidential nomination in violation of their restrictions an exercise in futility. There is no reason for the President to nominate a potential officer in step 1 of the appointments process if there is no hope that completion of steps 2 and 3 (Senate confirmation and Presidential appointment) will actually result in the individual serving in that office.
definitively excluded others, including Congress, from any role in choosing a nominee.\textsuperscript{31}

Most of the recent scholarship on the constitutionality of congressional restrictions argues that because the Appointments Clause gives \textit{Congress} no role in the appointment of non-inferior officers of the United States,\textsuperscript{32} Congress may not, by statute restrict the pool of eligible appointees, and thus affect the appointment process.\textsuperscript{33} So, the argument goes, even if the qualifications specified by Congress in a particular case seem reasonable or useful, the prophylactic separation of powers must be strictly observed to prevent any one branch of government from accumulating extra powers bit-by-bit over time.\textsuperscript{34} Proponents of this argument explain that the Senate’s advice and consent, because expressly provided for in the Appointments Clause, is the only permissible check on the President’s exercise of his executive discretion to fill offices as he or she chooses.\textsuperscript{35}


Some do not find this \textit{unius est exclusio alterius} argument persuasive or relevant. Prescribing a qualification for an office is not the same as nominating or appointing. The President and the Senate can still exert their Appointment Clause powers despite the existence of statutory restrictions.

\textsuperscript{32} The Clause does give the Senate alone a very specifically delineated “advice and consent” role. Some point out that if the whole congress enacts a law specifying the characteristics of a person eligible for appointment to a certain office, the Senate obviously concurred in that statute. Therefore, the argument goes, since the Appointments Clause gives the Senate a role in the appointments process, statutory restrictions on eligibility for certain Offices are constitutional. This argument fails for two primary reasons. First, the Supreme Court has held and reaffirmed that procedural mandates in the constitution are to be strictly observed. See \textit{Chadha}, 462 U.S. 919, and \textit{Clinton v City of New York}, 524 U.S. 417 (1998). Second, the Senate that is given an “advice and consent” role in the appointments process is the Senate in session at the time the President identifies the nominee. A statute restricting the pool of eligible nominees was likely enacted by a different (prior) congress, comprised of at least some senators that are not members of the Senate at the time the President makes a nomination.

\textsuperscript{33} When the Constitution wants to permit an entity to set qualifications for a relevant position, it knows how to do so. Article I, §2, clause 1 empowers the states to set qualifications for electors. In \textit{Tashjian v. Rep Party of Connecticut}, 479 U.S. 208 (1986), the Supreme Court held that a state may set more stringent qualifications for state electors than for federal electors, but not the other way around. Discrimination (in the form of more stringent qualifications) against federal electors is forbidden.

\textsuperscript{34} Kochan, \textit{supra}, 37 Loy. U. Chi. L.J. at 57.

\textsuperscript{35} Gerhardt, \textit{supra}, 21 Harv. J.L. & Pub. Pol’y at 534. See also Volokh, \textit{supra}, at 3 who argues that unlike for primary officers of the United States, statutory restrictions on qualifications for inferior office are constitutional because inferior officers don’t have to undergo a “check” by the Senate (no advice and consent) the way primary officers do. So, the congressional “check” is in the form of pre-set restrictions and qualifications in the statute.
The constitutional text does not leave the President’s and Senate’s appointment powers completely unrestricted. The Incompatibility Clause prohibits the appointment of a Congress-person to any U.S. Office for which the salary has been increased during that Congress-person’s time in Congress, and the Ineligibility Clause (which is really part of the same textual clause as the Incompatibility Clause) prohibits Congress-people from serving concurrently in Congress and as an officer of the United States:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.\(^\text{36}\)

Neither of these provisions discusses whether Congress may, when it creates offices, impose its own restrictions on the characteristics of the person that the President may appoint to fill those offices.\(^\text{37}\) These provisions could, however, be used to support arguments against any congressional authority to restrict the President’s nominating power. For example, when applied to the Ineligibility and Incompatibility Clauses, *unius est exclusio alterius*, may mean that since the constitutional text expressly limits the President’s nominating power in these two ways, it definitively excludes the possibility of any other restrictions on the President’s nominating power.\(^\text{38}\) On the other hand, perhaps the drafters intended the Ineligibility Clause and the Incompatibility Clause to be the only two restrictions on what congress-people could

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\(^{38}\) See Volokh, *supra*, at 39, citing *U.S. Term Limits v. Bobbie E. Hill*, 514 U.S. 779, 793 (1995) (indicating that framers included restrictions on offices in the constitution and intended for those to be the only applicable restrictions). However, at issue in *US Term Limits* is whether it is constitutional for a state to establish term limits for its own delegation to federal congress (the court finds it is not). The case is about qualifications for congress-people and whether congress can alter them. This case is not about presidential nominations.
do after, and during, (respectively) holding a congressional seat; not as restrictions on President’s nomination power.

If one starts with the Appointments Clause, the text may well make out a prima facie case for the proposition that statutory restrictions on Presidential nominating choice are unconstitutional. However, before hastily reaching that conclusion, it is essential to analyze the source of Congressional power in this area. The Constitution itself does not create any federal offices other than the President and Vice President. The Appointments Clause indicates the offices to which the appointment process applies are to be “established by law.”

The Necessary and Proper Clause empowers Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any Department or Officer thereof. 39

Thus, it is the Necessary and Proper Clause that gives Congress the authority to create executive Offices of the United States.

The first Congress “established by law” several non-inferior Offices of the United States, such as the Secretary of War and the Attorney General. Subsequent congresses have consistently enacted statutes creating officers of the United States and imposing restrictions on the types of people eligible to hold those offices. 41

To determine if these restrictions are constitutional, all three textual clauses that speak to the appointments process must be fully

39 U.S. Const. Art I, §8, cl. 18

40 This paper will analyze the constitutionality of restrictions in statutes creating non-inferior officers of the United States. The author expresses no view as to whether the analysis laid out in this paper would also apply to the inferior Offices of the United States for which the President is given nominating powers.

41 “Restriction upon the power to nominate has been exercised by Congress continuously since the foundation of the Government. Every President has approved one or more of such acts.” See Myers v. United States, 272 U.S. 52, 265 (1926), Brandeis dissenting. In Myers, the Court held that the President’s power to remove (fire) a Post-Master could not be restricted or limited because the Post-Master has purely executive duties. In order to fulfill his constitutional mandate to see that the laws are faithfully executed, the President must have the unabridged ability to remove him at will.
examined. The contributions of the Ineligibility and Incompatibility Clauses is covered above. The Appointments Clause is introduced above, and will be taken-up again in Subsection C (“Textual Conclusions”). But first, a more detailed analysis of congressional power (to restrict Presidential nominating choice) under the Necessary and Proper Clause is necessary.

B. Detailed Analysis of the Scope of Congressional Necessary and Proper Clause Power to Create Offices

It is uncontested that the Necessary and Proper Clause gives Congress the power to create Offices of the United States to which Presidential nominating power (under the Appointments Clause) applies. There is broad agreement (in fact, even the executive branch agrees) that the Necessary and Proper clause gives Congress the power to specify the duties of officer-positions it creates and the salaries to be paid to those holding the offices.\(^{42}\) Congress may prescribe that the Secretary of Labor shall promulgate workplace safety standards, and if it does, the President cannot designate the Secretary of Defense to promulgate those standards.\(^{43}\) If Congress can specify features of the office such as salary and duties, it is not illogical to argue that Congress may also have the authority to specify the qualifications necessary in the office-holder.\(^{44}\)

Qualifications for office-holding are as much part of the definition of the office as the statutorily-established duties associated with that office. Therefore, if the Necessary and

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\(^{42}\) See Limitations on Presidential Power to Create a New Executive Branch Entity to Receive and Administer Funds Under Foreign Aid Legislation, 9 Op. Off. Legal Counsel 76 (1985) (hereinafter “Foreign Aid Legislation, 9 Op. O.L.C.”) (“Congress clearly has the power to create federal offices and to define the powers and duties of those offices. . .”).


\(^{44}\) Some say it is pointless to argue that Congress has the power to specify the duties and salary of an office, but lacks the power to restrict the pool of eligible appointees by specifying qualification restrictions. If that were so, Congress could simply evade its inability to expressly set qualifications for an office by specifying the duties and salary of the office to make it unattractive to those without certain qualifications (e.g. by saying that director of FEMA shall earn $15,000 per year, unless the director is someone with at least five years of emergency management experience, in which case the salary shall be $200,000 per year). Volokh, supra note 18, at 24.
Proper Clause authorizes Congress to specify the duties, it may also authorize Congress to 
specify the qualifications for office-holding. The question then becomes, not whether 
Congress has any power to prescribe restrictions on presidential nominating choice, but 
whether something in the Appointments Clause over-rides Congressional Necessary and 
Proper Clause power to impose restrictions.

This assumes of course that the Necessary and Proper Clause actually gives Congress 
prima facie power to impose at least some qualifications for office-holders. For a 
congressional statute restricting the President’s nominating choice for an officer of the United 
States, enacted pursuant to Necessary and Proper Clause authority, to be valid, the statute 
must be i) necessary, ii) proper; and iii) for the purpose of executing some power enumerated 
to the federal government. This sub-section will address the meaning of each of the three 
components of the Clause, starting with the third.

1. **Carrying Into Execution a Federal Power**

Congress cannot create any office it wishes. Congress can only create offices to 
effectuate some power constitutionally enumerated to any branch, department, or officer of 
the federal government. When Congress imposes restrictions on the President’s nominating 
power (in statutes creating the offices to which the restrictions apply) the restrictions must 
also be for “carrying into execution” some power granted to the federal government.

Statutory restrictions cannot be validated as for “carrying into execution” the 
Appointment powers, because the restrictions serve to limit those powers. Limiting a power is 
not a means of carrying it into execution. The President and the Senate have the appointment 
powers via the Constitution, without congressional carrying into execution. Thus, the federal
power giving Congress authority to act under the Necessary and Proper Clause to restrict Presidential nominating choice cannot be the Appointments Clause powers.

Furthermore, when Congress enacts statutes under Necessary and Proper Clause, to carry into execution a power of another branch of the national government, whatever discretion is inherent in that power belongs to that other branch, not to Congress. In these instances, “the Necessary and Proper Clause only empowers Congress to help effectuate the discretion confided to that other branch. ... For example, the Constitution empowers the President to pardon. By virtue of the Necessary and Proper Clause, Congress might enact laws to help effectuate that power, perhaps creating offices to conduct investigations or screen clemency requests. However, no law inhibiting the President’s discretion--as by prohibiting pardons of impeached chief executives, or conditioning pardons on specified terms--could find colorable support in the Necessary and Proper Clause.”

The opponents of congressional power to impose qualification-type restrictions are correct in saying that Congress cannot justify these restrictions as a means of carrying into execution the President’s nomination or appointment powers. However, Congress could justify restrictions as necessary and proper for carrying into execution one of its own Article I enumerated powers. For example, Congress could, carry into execution Congress’ patent power or postal power, by imposing restrictions on those eligible to head the United States Patent Office or be the Post-Master General.\footnote{Any restrictions imposed pursuant to Congress’ enumerated powers would still have to be “necessary” and “proper” with respect to those powers.}

\footnote{David E. Engdahl, Intrinsic Limits of Congress’ Power Regarding the Judicial Branch, 1999 B.Y.U. L. Rev. 75, 102 (1999).}
\footnote{Id.}
What about when Congress creates an office, such as that of Attorney General, to carry into execution a purely executive power – federal law enforcement? Specifying that only those who have cut their toe-nails weekly for the past year are eligible to be Attorney General, is not a valid exercise of congressional power. The potential AG nominee’s toe-nail clipping habits have nothing to do with federal law enforcement and therefore do nothing to carry into execution any federal power. Thus, the third prong of the Necessary and Proper Clause does limit the types of restrictions Congress can impose on Presidential nominating choice. Only restrictions that are germane, or reasonably related, to the power Congress is carrying into execution by creating the office are potentially permissible. In creating the Office of Attorney General, Congress was carrying into execution the federal power to enforce federal laws. The statutory restriction requiring that the Attorney General, the nation’s top prosecutor, be learned in the law is germane to law enforcement, and therefore is not invalidated by the third prong of the Necessary and Proper Clause.

However, even restrictions that are germane to the purpose of the office are only permissible if they are both necessary and proper. Due to the nature of the text as understood by formalists, and the manner in which the Supreme Court has interpreted the terms “necessary” and “proper,” the formalist and functionalist analysis tend to merge when addressing this question.

2. **Necessary**

The first major battle over the Necessary and Proper Clause arose over the establishment of the national bank. Thomas Jefferson, Secretary of State at the time, thought “necessary” required that valid congressional statutes under the Clause had to be the only
possible means of furthering the relevant federal power.\footnote{Robert G. Natelson, The Agency Law Origins of the Necessary and Proper Clause, 55 Case W. Res. 243, 253 (2004) ("Jefferson and other [national] bank opponents maintained that Congress may adopt a measure only if there is no other way of executing one of the powers expressly granted"). See also Gary Lawson, Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine, 73 George Wash. L. Rev. 235, 242 (2005), citing Jefferson’s Opinion on the Constitutionality of the Bill for Establishing a National Bank, in 19 The Papers of Thomas Jefferson 275, 278 (Julian P. Boyd ed., 1974).} Alexander Hamilton thought “necessary” meant any law that might be vaguely conducive to executing a granted power.\footnote{Lawson, supra, 73 George Wash. L. Rev. at 243, citing 2 Annals of Cong. 1948 (1791).} James Madison held a position somewhere between Jefferson’s and Hamilton’s, saying “necessary” meant laws with “obvious and precise affinity” with the federal power the law seeks to further.\footnote{Lawson, supra, 73 George Wash. L. Rev. at 237, citing Letter from James Madison to Spencer Roane (9/2/1819), in 8 The Writings of James Madison 447, 448 (Gaillard Hunt ed., 1908).}

Several years later, the controversy over the validity of congressional establishment of the national bank under the Necessary and Proper Clause came before the Supreme Court in \textit{McCulloch v. Maryland}.\footnote{McCulloch v. Maryland, 17 U.S. 316 (1819).} The Court adopted a position somewhere between Hamilton’s and Madison’s, holding that “necessary” restricted congressional discretion under the Necessary and Proper Clause by requiring that there be a logical fit between a permissible congressional goal and the means chosen to fulfill that objective.\footnote{In reaching that conclusion, Chief Justice Marshall pointed out that the Imposts Clause forbids states from levying import or export duties unless “absolutely necessary.” Id at 414. If the Jeffersonian definition of “necessary” was correct, then “absolutely” in the Imposts Clause is unnecessary and nonsensical. This would violate the general rule that where possible, legal documents should be construed so as to give meaning to each word, and not assume any word is redundant or superfluous. This concept was respected by the generation of lawyers from whom the constitutional drafters were drawn. See Lawson, supra, 73 George Wash. L. Rev. at 252. Therefore, Marshall concluded that “necessary” must require something less than that congress must employ the only possible means of accomplishing the task. McCulloch, 17 U.S. at 415. Marshall seems to have ignored the} McCulloch is still seen as the definitive
case on the definition of “necessary,” which is understood as requiring a means-ends relationship. In the modern lingo of the Supreme Court, a law is “necessary” if it employs “rational means” to accomplish a valid congressional end.

Requiring that Commissioners on the Commodities Future Trading Commission (CFTC) be experts in Commodities markets is germane to the duties of the office and is also a rational means to accomplish a congressional end (smooth operation and regulation of commodities markets). This CFTC statutory restriction seems to be permissible under at least two prongs of the Necessary and Proper Clause.

3. Proper

McCulloch is often understood as having focused the Necessary and Proper Clause analysis solely on “necessary” and virtually ignoring “proper.” This has caused many to conclude that “proper” means the same thing as “necessary;” and that the Necessary and Proper Clause is just an example of a redundant phrase. However, this interpretation violates the general rule that where possible, documents should be construed so as to give meaning to each word, and not assume any word is redundant or superfluous. Therefore, it is important to give some content to the concept of propriety.

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54 Sabri v. United States, 541 U.S. 600, 605 (2004). Some commenters see this case as endorsing Hamilton’s definition of “necessary.”
One prominent position is that to be “proper,” a law must not conflict with i) the federal scheme (limited federal jurisdiction, leaving sovereignty to the states), or ii) separation of powers and three-co-equal branches principles of the federal government, or iii) the limits on the federal government with respect to people’s individual rights.\textsuperscript{56}

There is a robust scholarly debate regarding whether “proper” incorporates ideas of individual rights. However, it is not necessary to resolve that debate in this article, because it is hard to see how individual rights factor into whether Congress can limit Presidential nominating choice for officers of the United States.\textsuperscript{57} Similarly, if “proper” does involves


\textsuperscript{57} In support of finding, in the word “proper,” a protection of individual rights, commenters point out that the principle that government is obliged to exercise its authority reasonably was highly regarded in 18\textsuperscript{th} century English law. “Proper” simply incorporates the concept of reasonableness into the Clause. See Lawson, supra, 73 George Wash. L. Rev. at 257-258, noting that the principle of reasonableness in 18\textsuperscript{th} century English law applied to administrative action, not to Parliament. The distinction is that Parliament exercised inherent authority, while administrative bodies exercised delegated authority. All powers of the US national congress are delegated from the sovereign states. To emphasize that point, the drafters incorporated reasonableness, via the word “proper” into the Necessary and Proper Clause.

The principle of reasonableness, the argument goes, demands that in exercising its Necessary and Proper Clause powers Congress respect the natural law rights and interests of the people, beyond the specific rights reserved to them by the constitutional text. Id at 262.

However, if drafting era contemporaries understood “proper” as incorporating individual natural rights, then, arguably, there would have been no need for the Bill of Rights. See Beck, supra, 2002 U. Ill. L. Rev. at 638. Proponents of “proper” as protective of individual rights would argue that there was indeed no need for the Bill of Rights; that the Bill of Rights is a mere truism. Because the federal government has only certain enumerated powers, the argument goes, it never had the authority to conduct unreasonable searches, issue general warrants, or enact statutes establishing a national religion, even without the Fourth and First Amendments. See Gary Lawson, \textit{A Truism with Attitude: The Tenth Amendment in Constitutional Context}, publication expected mid-2008.

Mr. Lawson argues that because the Copyright Clause in Article I gives Congress the specific power to regulate speech (and press) that violate copyright laws, it implicitly withholds from Congress broader authority to regulate speech in general. However, Mr. Lawson explains that with respect to Congressional legislation for Washington, DC or a United States territory, it has general (not limited) legislative power per Article I, §8, cl. 17. Thus, absent the Bill of Rights, Congress could prohibit any kind of speech or press, provide for the issuances of general warrants, and establish an official religion in Washington, DC. Thus, the argument goes, the Bill of Rights does have some independent value for people living in non-state territories, but not for residents of U.S. states.

However, people in the U.S. states must have seen some value for themselves in the Bill of Rights. The Constitution cannot be amended by people living in the non-state territories. Per Article V of the Constitution,
some concept of federalism, it seems unlikely that those concerns would play a significant role in the question of statutory restrictions on Presidential nominating choice. No one seriously argues that states’ rights are strongly implicated by these congressionally-imposed restrictions.\(^{58}\)

However, if “proper” incorporates notions of separation of powers within the federal government, that this is highly relevant to the inquiry about statutory restrictions on Presidential nominating choice. The application of this theory of “proper” would mean that under the Necessary and Proper Clause, congressional restrictions must not interfere with the complete separation of powers intended by the drafters. Under a strict view of separation of powers, because officers of the United States serve the President and exercise executive functions, it is the executive branch that must control appointment of officers.\(^{59}\) Congressional legislation of qualifications for certain offices, the argument goes, unconstitutionally impedes amendments can only be initiated by the states or by Congress (whose voting members come only from states). There is no evidence that Congress and the states ratified the Bill of Rights out of concern for the liberties of their countrymen living in non-state territories.

\(^{58}\) Nonetheless, there is a debate in the literature about this aspect of “proper” as well. If “proper” incorporates notions of federalism then one might conclude that Congress would only be constrained by these notions when it exercised power via the Necessary and Proper Clause, but not when it acted pursuant to another expressly granted power. See J. Randy Beck, The New Jurisprudence of the Necessary and Proper Clause, 2002 U. Ill. L. Rev. 581, 639 (2002). Thus, to protect their sovereignty and the federalist system, the states drafted and ratified the Tenth Amendment.

The counter-argument is that whenever Congress acts, it is clearly constrained by Article I, §1, giving it only the powers enumerated in the Constitution. See Gary Lawson, A Truism with Attitude: The Tenth Amendment in Constitutional Context, publication expected mid-2008. Thus, the argument goes, the Tenth Amendment is just a truism, because Congress was only given certain enumerated powers (and not complete legislative authority), and because the Necessary and Proper Clause includes the word “proper,” the un-amended Constitution already protected the federalist concept.

Some in the founding generation thought that the un-amended constitution adequately protected state sovereignty and concepts of federalism, while others thought that it did not do so clearly enough. Those who wanted the extra security proposed and ratified the Tenth Amendment.

\(^{59}\) Not surprisingly, many past Presidents and executive branch officials have taken a formalist view of the Appointments Clause. Upon signing the Lobbying Disclosure Act of 1995, which placed restrictions on who he could appoint to the office of United States Trade Representative, President Clinton stated that “Congress may not, of course, impose broad restrictions on the President’s constitutional prerogative to nominate persons of his choosing to the highest executive branch positions, and this is especially so in the area of foreign relations.” See Appointment of U.S. Trade Rep., supra, 20 Op. O.L.C. at 2.
the President’s executive power to nominate whomever he or she wants, and is therefore not “proper.”

Another popular interpretation of “proper” is to adopt Hamilton and Madison’s understanding that the purpose of “proper” in the Necessary and Proper Clause is to ensure that congressional means are appropriate to the nature of the constitutional power which is being carried into execution pursuant to the Clause. Chief Justice Marshall’s McCulloch opinion seems to agree. Although the opinion seemed to focus on “necessary,” the opinion did address the meanings of both necessary and proper, if not expressly explaining the subtle different between the two. Marshall defined proper as “appropriate.” This is slightly different than his definition of “necessary” which merely requires that the means amount to one conducive way of achieving the constitutionally valid ends. Necessary requires that the means must be capable of achieving the ends and proper requires that the means be appropriate for achieving the ends. Constitutional contemporaries used “proper” or “appropriate” to mean “fair” or “suitable.”

Because the intermediate position from McCulloch seems most consistent with current doctrine, that is the posture adopted by this author. On that understanding, a statute that imposes significant restrictions on presidential nominating choice might be problematic. A statute that limits presidential choice to just one person would likely be “improper” by this

62 Id at 644, citing John Marshall, A Friend of the Constitution No. 5 190 (1819).
63 McCulloch, 17 U.S. at 418.
64 Beck, supra, 2002 U. Ill. L. Rev. at 645 citing Chief Justice Marshall in McCulloch, 17 U.S. at 423: “But were [the bank's] necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place.”
65 Natelson, supra, 55 Case W. Res. at 264.
standard. On the other hand, a statute that leaves the President with significant choices probably would survive.

4. Necessary and Proper Clause Conclusions

As discussed above, requiring that the Attorney General be learned in the law is a restriction that is germane to the duties of the office and to the federal power (law enforcement) being “carr[ied] into execution.” It is also an appropriate way (“proper”) and a rational means (“necessary”) to accomplish a valid congressional end (effective federal law enforcement). Thus, the statutory restriction on the President’s nominating power for the office of Attorney General appears to be constitutional under the Necessary and Proper Clause.

However, if the statute required that the AG have thirty-five years of experience litigating contract claims, this restriction would be germane to the duties of the office, but maybe not a rational means, and almost definitely not an appropriate way to accomplish the valid congressional end (federal law enforcement). Contract litigation experience is germane to the AG’s duties, because the United States government has thousands of contracts and when there is a dispute with another party to one of those contracts, someone from the Department of Justice has to represent the United States in the matter. However, given the broad range of federal laws that the AG has authority to enforce, and recognizing that to get thirty-five years of contract litigation experience would effectively preclude experience in any other field of law, this restriction is not appropriate for ensuring effective federal law enforcement (in general).

The drafters thought of the federal Congress as an agent of the people and the states and therefore adopted the “necessary and proper” phraseology from the 18th century law of
agency, specifically from language commonly used in documents granting an agent the power of attorney. In 1787, the law of agency recognized that an agent had implied incidental powers and could exercise considerable discretion. The Necessary and Proper Clause gives the agent (Congress) implied incidental (“necessary”) powers “for carrying into Execution” the principal’s (the people’s) written instructions (the Constitution), subject to appropriate contemporary fiduciary norms (“proper”).

C. Textual Conclusions

The Appointments Clause gives Congress no role in the appointments process. Thus, via the principle of *unius est exclusio alterius*, Congress cannot itself appoint officers of the United States.

Congress could not, merely because it concluded that such a measure was “necessary and proper” to the discharge of its substantive legislative authority, pass a bill of attainder or *ex post facto* law contrary to the prohibitions contained in §9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.

Similarly, the D.C. Circuit has held that Congress violates the Constitution even when the officers it appoints are non-voting, *ex officio*, members of an independent Commission possessing legislative as well as executive powers.

In a statute abolishing the Federal Home Loan Bank Board (FHLBB) and reorganizing its duties into the Office of Thrift Supervision (OTS), Congress provided that future Directors of OTS would be appointed by the President with advice and consent of the Senate, but indicated

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66 Id at 276.
67 Id at 282.
68 Id at 286-287. Proper could also refer to the agency law requirement of impartiality when an agent acts for more than one principal.
69 *Buckley*, 424 U.S. at 135. The *Buckley* Court held that it is unconstitutional for Congress itself to appoint officers of the United States.
70 NRA Political Victory Fund, 6 F.3d. at 822.
that the first OTS Director was to be the current Chairman of the FHLBB. The district court held that the OTS Director was a non-inferior officer of the United States, and therefore appointment to that office must be via Presidential nomination with advice and consent of the Senate.

The constitutional problem is presented by the fact that Congress decided who would take over as OTS’ Director and, whether it named that person by job title or by function, Congress [unconstitutionally] named that person.

By the same reasoning, it is unconstitutional for Congress to impose so many restrictions on the eligible nominees for an office that the result is congressional hand-picking of the officer, as it did in the 1884 Act for the Relief of Fitz John Porter. However, no federal court has ever indicated that Congress has no power to restrict the pool of eligible nominees for an officer of the United States. Nor has a federal court laid out a standard for determining the scope of Congressional power to restrict Presidential nominating choice.

Therefore, to determine whether Congressional power to create Offices of the United States includes the power to impose restrictions Presidential nominating choice (and if so, the extent of such authority), one must look to the source of Congressional power to create the Offices: the Necessary and Proper Clause. Although the Necessary and Proper Clause certainly imposes limits on congressional authority to impose restrictions on the President’s nominating power, there is broad agreement that the Necessary and Proper clause gives Congress the power to specify the duties of officer-positions it creates and the salaries to be

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73 Id at 1193.
paid to those holding the offices. If Congress can set the duties, salaries, and benefits of an office, it is not a large leap to conclude that it can also set some restrictions on the qualities of the officeholders.

The constitutional limit on permissible statutory restrictions on Presidential nominating powers seems to lie somewhere between absolutely no congressional power to impose any nominating restrictions, on the one hand, and de facto congressional appointment of the officer, on the other. Numerous commenters argue that the Necessary and Proper clause empowers Congress not only to specify duties and salary, but also to specify that eligible appointees must be qualified to fulfill the duties of that office in certain delineated ways.

As explained above, the Necessary and Proper Clause gives Congress enough latitude in creating offices to include qualification-type restrictions on the pool of eligible nominees for that Office. The Necessary and Proper Clause limits the types of restrictions that Congress may impose to those that are germane to the duties of the Office, and that are both a

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74 See Foreign Aid Legislation, supra, 9 Op. O.L.C. 76 (“Congress clearly has the power to create federal offices and to define the powers and duties of those offices. . .”).


76 Construing the Necessary and Proper Clause to include congressional authority to specify appointee qualifications would not stretch the clause too far. The Supreme Court has recognized and upheld congressional authority that stretch much further from the constitutional text than this does. See Perez v. United States, 402 U.S. 146, 156-57 (1971): intrastate law against loan-sharking has an effect on interstate commercial crime; therefore congressional regulation of loan-sharking is constitutional exercise of commerce clause power. See also Wickard v. Filburn, 317 U.S. 111, 128-29 (1942): intrastate consumption of homegrown wheat has effect on interstate commerce, and therefore congressional imposition of quotas to which home grown and consumed wheat is constitutional.

These New Deal era Supreme Court cases upholding congressional legislation under the Commerce Clause are directly relevant to the Necessary and Proper Clause. These cases mistakenly applied the Necessary and Proper Clause rationale of McCulloch v. Maryland to the Commerce Clause itself. See Engdahl, supra note 32, 1999 B.Y.U. L. Rev. at 99. It was not the commerce clause that empowered congress to regulate locally consumed wheat in Wickard; the wheat was not in interstate commerce. Congress had the authority to regulate the price of that wheat only because the quantity of wheat consumed locally affects national wheat prices. So, regulating the locally consumed wheat is necessary and proper for carrying into execution the commerce clause power. These so called “commerce clause cases,” and much of the scholarship about them, ignore the work that the Necessary and Proper Clause does in validating these statutes.
reasonable (or rational) means and an appropriate way to accomplish the valid congressional objective.

Requiring that the Attorney General be learned in the law does help carry federal powers into execution. Similarly, requiring that only those with engineering experience serve on the District of Columbia Board of Public Works\textsuperscript{77} carries into execution the federal power of government in non-state territories. These restrictions are germane to the duties of the office and closely related to the power being given effect. These restrictions also allow for a reasonable amount of discretion to be exercised by the President pursuant to his nominating powers, which should satisfy those who believe “proper” incorporates notions of separation of powers. There are plenty of people learned in the law from which to choose an Attorney General nominee, and plenty of engineers from which to choose members of the DC Board of Public Works.

**D. History, Practice, and Policy**

Although not as important as the meaning of the constitutional text, the history of the constitutional convention debates, as well as the history of implementation of a constitutional provision since ratification, are secondary sources of information on the intended meaning of a clause. Similarly, although formalists do not view policy considerations as controlling, arguments based on policy cannot be completely ignored.

1. **Constitutional Drafting Generation**

Records of constitutional convention debates show that the drafters disagreed strongly about who (the President or the Congress) should have the power to appoint officers of the

\textsuperscript{77} Act of Feb. 21, 1871, c. 62, § 37, 16 Stat. 419, 426.
The Appointments Clause also reflects an attempt by the members of the constitutional convention to ensure that 1) the appointment process not be used to increase the power of the appointer, 2) that the appointment process be efficient enough such that the government did not grind to a halt due to excessive procedure, and 3) that a single person be accountable to the public if an appointee did not perform well.

Alexander Hamilton discussed the appointments process in his Federalist Paper #76. Hamilton explained that the Constitution provided that the President have complete discretion to pick a nominee, and that the Senate’s only role was approval or disapproval. He assured his readers that because the President would suffer a diminution of reputational status if his nominee was rejected by the Senate, the President would be motivated to nominate a highly qualified individual.

There was no discussion during the convention as to whether Congress could impose restrictions on the pool of eligible office-holders. However, statutory restrictions can reduce accountability. If the President’s nominee performs poorly in office, the President can deflect responsibility by showing his nominee met Congress’ statutory qualifications. Or, the President can blame Congress for the poor performer, arguing that the President was prevented from appointing a competent person, because the statute was too restrictive.

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78 See Rappaport, supra, 68 U. Chi. L. Rev. at 1449-50. Some delegates were afraid of a legislature with too much power, while others were primarily concerned with avoiding a pseudo-monarchy. See also Gerhardt, supra, 21 Harv. J.L. & Pub. Pol’y at 474-75.


80 Alexander Hamilton, Federalist #76 in The Federalist and Other Constitutional Papers 416, (E.H. Scott, ed., 1898) (The President’s “responsibility would be as complete as if he were to make the final appointment”).

81 Id at 417.

82 Volokh, supra, at 36. For example, President Bush objected in his signing statement to the 2006 amendment to FEMA act, saying that it unconstitutionally ruled out “a large portion of those persons best qualified by experience and knowledge to fill the office.” See Peter L. Strauss, Overseer, or “The Decider”? The President in Administrative Law, 75 George Wash. L. Rev. 696, 721 (2007), citing 42 Weekly Comp. Pres. Doc. 1742, 1743 (Oct. 4, 2006).
When the drafting history does not resolve the meaning of a constitutional provision, or help harmonize seemingly inconsistent constitutional provisions, it is customary to look to how the drafters (and their contemporaries) acted pursuant to that provision. A Statute enacted by the first Congress, many of whose members had taken part in drafting the Constitution is “weighty evidence” of the Constitution’s true meaning.\(^83\)

Proponents of congressional power to restrict Presidential discretion in selecting nominees often point out that the first Congress enacted the Judiciary Act of 1789 which specified that the Attorney General must be “learned in the law.” Thus, statutory restrictions were understood to be permissible by the drafting generation. The Department of Justice’s Office of Legal Counsel, in a strongly worded 1989 opinion arguing that Congress has no authority to impose any type of restrictions, responds that the there is no record of any debate in the first Congress over the constitutionality of this provision of the Judiciary Act.\(^84\)

Another office created by the first Congress was the Superintendent of Indian Affairs. An early draft of that bill would have required that the appointee be a military officer. Some in the House argued that the restriction was an unconstitutional infringement on Presidential powers that might prevent him from picking the best person for the job.\(^85\) Those defending the provision did not address its constitutionality, instead arguing that a military officer would be better suited for the job than any other.\(^86\) Because the provision was removed from the bill


\(^84\) See Qui Tam, supra, 13 Op. O.L.C. 249. The strong 1989 stance against any constitutional authority to restrict Presidential nominating powers, is not entirely consistent with other OLC and Attorney General opinions on the subject. See Appointment of U.S. Trade Rep., supra, 20 Op. O.L.C. at 6 (1996). Furthermore, presidents have continued to sign statutes with restrictions on nominating powers and have refrained from nominated candidates that fail to comply with the restrictions in statutes signed by them or previous Presidents.

\(^85\) Volokh, supra, at 30, citing 2 Annals of Cong. 1522 (1790) (Joseph Gales, ed.).

\(^86\) Volokh, supra, at 30, citing 2 Annals of Cong. 1522 (1790) (Joseph Gales, ed.).
later for unrelated reasons, Congress never debated or decided on the constitutionality of statutory restrictions on the appointment powers.\footnote{Volokh, \textit{supra}, at 35. See also Fisher, \textit{supra}, at 121 (pointing out that a Connecticut Representative to the first congress, Roger Sherman, said on 6/17/1789 that because it creates an office, Congress may attach any conditions to it).}

OLC stresses that Supreme Court has suggested that much less weight is given to practices of early congresses, if the act was “taken thoughtlessly” and without debate.\footnote{Marsh \textit{v.} Chambers, 463 U.S. 783, 791 (1983). However, in \textit{Marsh}, the court upheld the longstanding practice of paying a legislative Chaplin with public funds, despite the fact that the first congress initiated this tradition while failing (some would say thoughtlessly) to consider whether having a legislative Chaplin would violate the First Amendment, which congress was concurrently proposing to the states.} Further, the separation of powers concept was relatively new in 1789, so it is not too surprising that early congresses enacted certain laws that modern understanding views as clearly unconstitutional.\footnote{Qui Tam, \textit{supra}, 13 Op. O.L.C. at 75.}

2. **Longstanding practice**

In the absence of clear textual direction or evidence of drafters’ specific intent on a question, it is often useful to look to historical practice over the more than 200 years since constitutional ratification. What has the practice of Congress, the executive, and the courts been on this issue? Has each branch’s practice been internally consistent? Have the practices of all three branches of the government been consistent with each other? If the practices of all three branches have been relatively consistent, that is fairly persuasive evidence of constitutionality. Much more so than if Congress thinks it has unlimited power, the executive thinks Congress has no power, and the courts think something else entirely.

Those who believe Congress has no power to restrict Presidential nominating choice point out that although Congress has enacted statutory restrictions throughout our nation’s history, the executive branch has occasionally objected to the restrictions, and the Supreme
Court has not ruled on the issue. They would also argue that the longstanding theory of constitutionality, the argument that past usage alone is enough to establish a practice’s constitutionality, is “untenable both as a matter of history and of law.”\(^{90}\) The Supreme Court has repeatedly said that history alone does not validate a custom that is contrary to the Constitution, even when the history of the practice “covers our entire national existence and indeed predates it.”\(^{91}\) The Court “has recognized that longstanding practice does not insulate even its own errors from correction.”\(^{92}\)

On the other hand, the court has occasionally relied on a longstanding-practice method of determining the constitutionality of certain actions.\(^{93}\)

The Supreme Court has indicated that close cases will be resolved in favor of the constitutionality of certain strong historical traditions. The Court weighs several factors in determining the authority of a tradition, including (1) whether there is evidence that the Framers actually considered the constitutional implications of their

\(^{90}\) Id at 74.

\(^{91}\) See Walz v. Tax Commission, 397 U.S. 664, 678 (1970). However, in the next breath, the court says that an unbroken practice, followed by consent for 200 years “is not something to be lightly cast aside.” In this case, the court decided in favor of the constitutionality of a long-standing practice: states affording tax-exempt status to houses of worship.


\(^{93}\) The Court has not been explicit as to whose longstanding practice it was considering, or whether the interaction of the practices of the three branches of the federal government is relevant. In Walz v. Tax Commission the court says that an unbroken practice, consensually followed for 200 years “is not something to be lightly cast aside.” See 397 U.S. 664, 678 (1970). In that case the court decided in favor of the constitutionality of a longstanding state practice of affording tax-exempt status to houses of worship. In Marsh v. Chambers the court upheld the longstanding practice of a state legislature paying the legislative Chaplin with public funds by pointing to the longstanding federal legislative practice of doing the same for their own Chaplin. See 463 U.S. 783, 791 (1983). Because Congress had a longstanding practice of doing so, the constitutionality was presumed. These cases address primarily First Amendment issues, and do not have anything to do with longstanding practice as it relates to the Necessary and Proper Clause or separation of powers among the branches of the federal government.
actions; (2) whether the practice is so longstanding and pervasive that it has become “part of the fabric of our society;” and (3) whether the practice can be accommodated within the constitutional framework in a way that does not undermine settled principles.\textsuperscript{94}

As mentioned above, Congress’ practice has been to continue to enact statutes with restrictions on the pool of eligible office-holders. The executive branch’s practice has been generally to accept, and operate within, the congressionally imposed restrictions. No president has mounted a serious challenge to any statutory restrictions, but some have spoken out against them.

President Monroe said that “Congress [has] no right under the Constitution to impose any restraint by law on the power granted to the President so as to prevent his making a free selection of proper persons for [newly created] offices from the whole body of his fellow citizens.”\textsuperscript{95}

Attorney General Akerman opined in 1871 that Congress could, by direct legislation, prescribe qualifications such as that officers be of a certain age or be a citizen of the United States, and that judges should be of certain standing in the legal profession.\textsuperscript{96} As he understood it Congress’ right to restrict eligible appointees to those with certain qualifications is limited by the necessity of leaving some room for the judgment of the person in whom the Constitution vests the appointment power.\textsuperscript{97} Some room, but not unrestricted discretion.


\textsuperscript{97} Id. Emphasis added.
In 1926, Justice Brandeis observed that there was general agreement on congressional power to impose restrictions on the President’s nominating choice between the legislative and executive branches:

Restriction upon the power to nominate has been exercised by Congress continuously since the foundation of the Government. Every President has approved one or more of such acts. Every President has consistently observed them. This is true of those offices to which he makes appointments without the advice and consent of the Senate as well as of those for which its consent is required.98

A 1989 OLC opinion argued strongly against any congressional authority to restrict Presidential nominating power, but seven years later, another OLC memo reaffirmed the 1871 opinion stating that Congress had a limited right to impose statutory restrictions. 99

Executive branch practice has been inconsistent on the issue. However, even when the executive branch has urged against the constitutionality of statutory restrictions it has done no more than argue its point. The executive branch has not disobeyed or challenged by deed any congressional restrictions. Furthermore, Presidents have continued to sign statutes with restrictions on nominating powers and have not nominated candidates that fail to comply with the statutory restrictions.

The Judicial branch has never ruled on the question of congressional power to impose restrictions on the pool of eligible nominees for an officer of the United States. However, the Supreme Court, in Myers, seems to have assumed the constitutionality this longstanding practice, at least for restrictions in the form of qualifications for office:

To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees.100

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98 Myers, 272 U.S. at 265, Brandeis dissenting
100 Myers, 272 U.S. at 129.
However, more recently, in strong dicta, the D.C. Circuit has proclaimed that “congressional limitations... on the President’s appointment power may raise serious constitutional questions.”\(^{101}\)

To sum up the longstanding practice, Congress has continued to enact statutes containing restrictions on Presidential nominating choice. The executive and judicial branches have occasionally argued that these statutes unconstitutionally infringe on Presidential powers, but neither has confronted Congress directly. The executive branch has ever taken any action that violates this type of congressional restriction, and Presidents have continued to sign statutes that include these restrictions. Similarly, the judiciary has never struck down a statute because that statute unconstitutionally restricts Presidential nominating choice. The longstanding practice theory of constitutionality is a theory of longstanding \textit{practice}, not a theory of occasional OLC memos or Circuit Court dicta. Thus, it seems the \textit{practice} of all three branches of the federal government has been to accept congressional restrictions on Presidential nominating choice as constitutional.

3. Policy

The functionalist approach considers policy justifications when weighing the constitutionality of an encroachment by one branch of government into another branch’s domain.\(^{102}\) Under functionalism, if there is a strong public policy justification for the encroaching action, and the encroachment is small, the action is constitutional.\(^{103}\) Thus, some formalists, who view “proper” in the Necessary and Proper Clause as incorporating concepts of separation of powers, would end their initially formalist exploration of this issue with a

\(^{101}\) FEC v. NRA Political Victory Fund, 6 F.3d. 821, 824 (D.C. Cir. 1993)

\(^{102}\) Wulwick and Macchiarola, \textit{supra}, 24 Stetson L. Rev. at 642.

functionalist analysis. Functionalists argue that Congress has the authority to specify the duties of an office and the eligibility criteria for that office so long as Congress does not unduly interfere with the basic functioning of the executive branch. Many commenters conclude that the basic functioning of the executive is not hampered by these restrictions and therefore, that Congress may, when it creates an office, stipulate the qualifications of eligible appointees.

The executive branch’s functioning will not be adversely affected because the President is statutorily required to choose his nominee for Attorney General (for example) from among those with law degrees (instead of the population at large). So long as the restrictions imposed by statute still afford the President a wide range of potential nominees from which to choose, Congress has not encroached too far.

Many U.S. State Constitutions have a separation of power structure modeled on the federal Constitution. Numerous state courts have used the functionalist rationale in upholding (as compliant with the state Constitution) the power of the state legislature to enumerate qualifications for specific state offices. These cases have generally held that legislatures may dictate the characteristics required for certain state officers so long as the restrictions are general qualifications designed to ensure that officer possesses the skills needed to adequately perform the duties of the office.

105 Corwin, supra, at 89 (1984). See also Fisher, supra, at 118-119 (“In creating an office Congress may stipulate in considerable detail the qualifications for appointees”).
106 And if you believe that there aren’t enough lawyers in the United States, you’ve obviously never heard a joke told by someone who isn’t one.
109 Id at 644.
Others functionalist argue that where an officer will have broad responsibility for advising the President and for making policy, restrictions do hamper executive functioning, and the President “must have expansive authority” to choose that aid.\textsuperscript{110}

However, what about the functioning of the legislative branch? Congressional functioning would not be unduly hampered if it was not able to impose statutory restrictions on the pool of eligible office-holders, but it is still important to consider Congressional interest in the statutory restrictions it imposes. Congress has the constitutional duty to create certain Offices to carry into execution a federal power. In most statutes with restrictions on the President’s nominating power, the restrictions are in the form of qualifications that the officeholder should have in order to adequately fulfill the duties of the office. Without the power to impose restrictions on the pool of eligible appointees to the offices it creates, Congress cannot ensure that its constitutional duties, and its intentions for the office, are fulfilled.

E. Conclusion

The Necessary and Proper Clause limits the types of restrictions that Congress may impose to those that are germane to the duties of the Office, and that are both a reasonable (or rational) means and an appropriate way to accomplish the valid congressional objective. The Supreme Court has clearly stated that it sees no conflict between Presidential appointment and removal power and congressional power to prescribe qualifications for office, “provided of course that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation.”\textsuperscript{111}


\textsuperscript{111} Myers, 272 U.S. at 128. The validity of congressional restrictions was not the issue at bar in Myers, and this statement was dicta, not the holding. However, it is worth noting that the majority opinion in Myers, written by a
Many restrictions in the form of qualifications are germane to the duties of the Office, and are both reasonable and appropriate, and therefore are constitutional. However, it is very difficult to draw the line between permissible and impermissible congressional restrictions on the President’s appointment power.\textsuperscript{112} The Office of Legal Counsel has admitted that Congress has the power to prescribe statutory qualifications for office, but insists that Congress is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment. Congress may not dictate qualifications unattainable by a sufficient number to afford ample room for choice.\textsuperscript{113}

There is no settled constitutional rule that determines how the power of the Congress to prescribe qualifications and the power of the President to appoint are to be reconciled, [but] there must be some constitutionally prescribed balance [which] may shift depending on the nature of the office in question.\textsuperscript{114}

Statutory restrictions, in the form of qualifications an appointee must have in order to fulfill the duties of the office, are constitutional when they are reasonably broad, appropriate, and germane to the office being created and the federal power being carried into execution by that office. This is a somewhat fuzzy standard, not amenable to a bright line rule. However, most separation of power questions, such as the non-delegation doctrine, do not have bright line standards.\textsuperscript{115} That the non-delegation doctrine standard is a bit fuzzy does not render unconstitutional all congressional delegations of legislative authority to administrative

\begin{footnotes}
\footnote{former President (C.J. Taft) and thought to be one of the Supreme Court’s most pro-Presidential power opinions, does clearly indicate that congress can prescribe qualifications for Offices of the United States.}
\footnote{Note, \textit{supra}, 75 Mich. L. Rev. at 643.}
\footnote{For example, the non-delegation doctrine expressed in \textit{Yakus}, 321 U.S. 414 (1944) indicates that so long as congress specifies an intelligible principle to guide agency action it is not an unconstitutional delegation of legislative power. See also \textit{Morrison v Olson} (487 U.S. 654 (1988)) for the debate over the standard that should be employed to differentiate between an inferior officer and a non-inferior officer of the United States.}
\end{footnotes}
agencies. Similarly, the inability to articulate a one-size-fits all rule for determining whether statutorily-mandated restrictions on the pool of eligible appointees to an office is constitutional does not invalidate those restrictions that are in the form of appropriate, reasonable and germane qualifications an appointee must have in order to successfully fulfill the duties of the office.

III. Constitutionality of Restrictions Based on the Potential Nominee’s Connection to a Political Party

Justice Brandeis, in his Myers dissent, pointed out that as of 1926, every past Congress had enacted at least one statute including some restriction on the President’s nominating power for a non-inferior officer of the United States. Congress has continued to enact such statutes. One type of restriction, frequently included since the 1880’s involves the political party affiliation or membership of the potential nominee. Most statutes with political party restrictions require that the Commission / Board that heads the agency have significant representation from other than the controlling political party. Usually the statutes require that the controlling political party may have no more than a one-vote majority. For example, the statute creating the Securities and Exchange Commission specifies that the Commission is to be composed of five Commissioners to be appointed by the President by and with the advice and consent of the Senate. Not more than three of such Commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable.

The statutes that create offices with political party restrictions are generally those creating independent agencies, often called “Commissions” or “Boards.” This part of the

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116 Myers, 272 U.S. at 265.
paper will describe the history and practice of the independent agency concept for which the political party restrictions are applied, and analyze the arguments against and in favor of the constitutionality of political party restrictions. The analysis will focus on application of the Necessary and Proper Clause test derived in Part I, First Amendment concerns, history, and practice. Policy considerations will be discussed briefly at the end. The result is that political party restrictions cannot be justified as constitutional.

A. Description of “Independent Agency” Concept

Department and other agency heads in the executive branch are not in charge of “independent agencies.” Rather, cabinet Secretaries and some other Administrators head agencies beholden to the President’s administration. The Attorney General, the Secretary of Labor, and the Administrator of the Environmental Protection Agency (for example) are non-inferior officers of the United States, nominated and appointed by the President, with advice and consent of the Senate. The statutes creating these offices do not specify a term of office, but the officers can be fired at any time by the President for any reason the President chooses. It has become customary for all such officers to offer their resignation when the President who appointed them exits office. Because the officers are completely beholden to the President for their jobs, they must execute the laws within their agency’s jurisdiction according to the President’s instructions. If they refuse, the President will fire them and nominate someone who will.

1. What Makes Commissions or Boards “Independent”

In creating some offices and agencies Congress has desired that the officers running the agencies not be beholden to the President in the same manner as Cabinet officers.\textsuperscript{118}

\textsuperscript{118} There is a constitutional debate, beyond the scope of this paper, as to whether independent agencies are constitutional, because they seem not to fall within any of the three branches of government delineated in the
Independent agency statutes have three key provisions that help insure some degree of agency independence: (1) a multi-member decision-making body (a “Commission”) heads the agency, (2) the President cannot easily fire a Commissioner, and (3) the multi-member Commission must be multi-partisan.

First, these statutes tend to specify that the agency is headed by a multi-member Commission or Board, rather than by a single Administrator or Director. Agency decisions must, in most cases, be made by majority vote of the Commission members. The Federal Information Policy Act provides an explanation of an independent agency:

An independent regulatory agency, which is administered by 2 or more members of a commission, board, or similar body, may by majority vote...

The second key feature of an independent agency is that the Commissioners serve for a term of years and (unlike the Attorney General or the Secretary of Labor) are not removable by the President because of a policy disagreement or on Presidential whim.

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119 The Federal Information Policy Act defines the term “independent regulatory agency” as “the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Board, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, and any other similar agency designated by statute as a Federal independent regulatory agency or commission;” 44 U.S.C. § 3502(5). The Interstate Commerce Commission was disbanded in 1996 and no longer exists, but §3502 has not yet been amended to reflect that change.

120 This paper will henceforth refer to Commissions or Boards as “Commissions” for simplicity’s sake.


122 For example, “[e]ach Commissioner shall hold office for a term of five years” 7 U.S.C. § 2(a)(2)(A) (Commodities Future Trading Commission). See also 49 U.S.C. § 1111, specifying that National Transportation Safety Board members serve five year terms.
Commissioners can be removed by the President only “for inefficiency, neglect of duty, or malfeasance in office.”

In some independent agency statutes, Congress further solidifies the agency’s independence from the President by specifying that upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified.

These terms prevent the President from never nominating anyone to fill a vacancy, thereby rendering a Commission devoid of members other than those from his own party. For example, in the absence of these statutory conditions, if during a Republican Presidential Administration the term of one of the two Democratic Commissioners on the Securities and Exchange Commission expires, the President could increase the Republican majority’s margin on the Commission from 3-2 to 3-1 simply by never nominating anyone to fill the vacancy.

Third, the statutes creating independent agencies usually require that the composition of the agency Commission be multi-partisan. The National Transportation Safety Board statute states that “[t]he Board is composed of 5 members” and, “[n]ot more than 3 members may be appointed from the same political party.” Similarly, the statute creating the Commodity Futures Trading Commission states that

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123 See 42 U.S.C. § 5841(e) (Nuclear Regulatory Commission); see also Ch. 104, 24 Stat 379, 383, Feb. 4, 1887), §11:5 (Interstate Commerce Commission).

124 15 U.S.C. § 41 (Federal Trade Commission). For similar provisions, see, e.g. 12 U.S.C. § 2242 (Farm Credit Administration Board), and 49 U.S.C. § 701(b) (Surface Transportation Board).

125 This may not seem very significant, however, consider that single Commissions may occasionally have to recuse themselves from consideration of an issue due to a conflict of interest. For example, Commissioner Cox of the Securities and Exchange Commission recused himself from a Commission enforcement matter against a company in which his mother-in-law used to own stock. Additionally, an individual Commissioner may occasionally miss a meeting.


The Commission shall be composed of five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate. ... Not more than three of the members of the Commission shall be members of the same political party.\textsuperscript{128}

In practice, on a five member Commission, three of the members are from the same political party as the President, and the other two members are from the main opposition party (either Republicans or Democrats). The President could theoretically nominate members of other parties (such as the Green Party or the Libertarian Party) or nominate Independents. This has never happened; game theory and political realities indicate that it never will.\textsuperscript{129} In practice, senior congressional staffers often become Commissioners of independent agencies upon unofficial recommendation by a Congress-person to the President.\textsuperscript{130}

Statues with nomination eligibility restrictions based on political party are vague about what level of connection a permissible nominee may have with one political party or another. The common language of these statutes is something like

\begin{quote}
The Commission shall be comprised of [X] members, no more than \([1 + \frac{1}{2^*}(X-1)]\) of whom may be ______ the same political party.\textsuperscript{131}
\end{quote}

In different statues, Congress has used at least four different words to fill in the blank. The Merit System Protection Board Statute (formerly the Civil Service Commission) requires that no more than two of the three Board members “be adherents of the same political party.”\textsuperscript{132}

The Federal Election Commission (FEC) and Consumer Product Safety Commission (CPSC) statutes specify that no more than three or five Commissioners, respectively, “be affiliated

\begin{footnotes}
\item[130] Fisher, supra, at 157-159.
\item[131] See Table 1, infra at 47.
\item[132] 5 U.S.C. § 1201, emphasis added.
\end{footnotes}
with the same political party.” At least four statutes specify that no more than a certain number of Commissioners be “from the same political party.”

At least eleven statutes require that no more than a certain number of Commissioners “be members of the same political party.”

What does it mean to be an “adherent of” a political party? Both the Democratic and Republican parties have official positions on a wide range of issues, from the death penalty and abortion to health care and social security, from environmental protection to affirmative action, from corporate taxes to gay rights. Must an “adherent” agree with the political party on all of these issues? Most of these issues? Where is the line?

What does it mean to be “affiliated with,” “from,” or “a member of” a certain political party? The Constitution does not mention the concept of political parties. There is no procedure in federal law for personal political party registration, and many states do not have party registration at all. The reality is that the Congress-people who enacted these statutes were overwhelmingly registered and elected as either Democrats or Republicans. Whether consciously or subconsciously, these Congress-people probably incorporated their understanding of the Democratic National Committee (DNC) and the Republican National Committee (RNC) into their understanding of the political party restrictions they were enacting.

The DNC Charter says its purpose is to “afford all members of the Democratic Party” the opportunity to participate in decisions about the party. But the charter does not define

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134 See, e.g. 49 U.S.C. § 1111 (National Transportation Safety Board), emphasis added. For others, see Table 1, infra at 47.
135 See, e.g. 42 U.S.C. § 5841 (Nuclear Regulatory Commission), emphasis added. For others, see Table 1, infra at 47.
136 Raskin, infra, 52 Admin. L. Rev. at 624-25.
what it means by “members.” 137 However, the Charter does say that the party is “open to all who desire... to be known as Democrats.” 138 The DNC Bylaws use the term “member” only in reference to members of the Democratic National Committee itself, or in reference to other standing committees reporting to the DNC. 139

Defining membership in the Republican Party may be a bit easier. If you were to type www.rnc.org into a web browser, you would be redirected to https://www.gop.com/Secure/Splash.aspx, which asks you to “join” the Republican Party. However, the Republican Party rules use the term “member” only in reference to members of the RNC itself, or in reference to standing committees reporting to the RNC. 140

The legislative histories of the political party restriction statutes do not indicate why Congress chose one term or the other to describe a potential nominee’s connection to a political party, or what they thought the terms meant. However, if this issue ever were to be litigated, the courts may have a hard time determining whether a certain nominee has an impermissible connection to a certain political party. Thus, throughout this paper, the phrases from a political party, affiliated with a political party, and member of a political party are used interchangeably, assuming that whatever these phrases mean, they all mean the same thing.

2. History of Judicial and Executive Approval of Independent Agencies
Independent agencies, with political party diversity requirements, have a long history. They were first established in the 1880’s and continued in 1890, when Congress created the Board of Appraisers, and in 1914 with the Federal Trade Commission Act. At present, there are dozens of independent agencies, headed by Board Members or Commissioners whose offices were created by statutes with political party restrictions. Several are detailed in Table 1.

Congress believes that creating an agency headed by a Commission with political party diversity requirements and where Commissioners are removable only for limited reasons, will insulate the agency from partisan politics and result in better, unbiased agency decisions. In Humphrey’s Executor, the Supreme Court gave its approval to the independent agency concept. Although the case focused on the limited nature of the President’s removal power with respect to an independent agency Commissioner, it did mention, somewhat approvingly, the political party restrictions. In that case, President Roosevelt asked a Federal Trade Commissioner appointed by President Hoover to resign before the expiration of the Commissioner’s seven year term because, Roosevelt explained, “the aims and purposes of the Administration with respect to the work of the Commission can

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141 See, e.g. Ch. 47, 22 Stat. 30, 32, March 22, 1882, creating the five-member Board of Electors of Utah Territory “not more than three of whom shall be members of one political party...” (§9). See also Ch. 104, 24 Stat. 379, 383, Feb. 4, 1887, creating the five-member Interstate Commerce Commission, and specifying that “[n]ot more than three of the Commissioners shall be appointed from the same political party.” (§11). See also Ch. 27, 22 Stat. 403, January 16, 1883 creating the Civil Service Commission, which later became the Merit System Protection Board.

142 See Ch. 407, 26 Stat. 131, 136, June 10, 1890, §12: nine appraisers appointed by President w/advice and consent of Senate. “Not more than five of such general appraisers shall be appointed from the same political party.” Appraisers “may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office.”

143 Commission “shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party.” 15 U.S.C. § 41, originally enacted by Ch. 311, 38 Stat. 717, Sept. 26, 1914.

144 295 U.S. 602 (1935).
be carried out most effectively with personnel of my own selection."\(^\text{145}\) The portion of the statute creating the Federal Trade Commission (FTC) states

> A commission is created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. ... [U]pon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified. ... Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.\(^\text{146}\)

President Roosevelt did not hint that his reason for wanting Commissioner Humphrey to resign was related to inefficiency, neglect of duty, or malfeasance in office. When Humphrey refused to resign, Roosevelt fired him.\(^\text{147}\) When Humphrey died shortly thereafter, the executor of his estate sued to recover his FTC wages between the time of his firing and his death, claiming that Roosevelt did not have the authority to remove Humphrey. The executive branch argued that the statute limiting the President’s ability to fire an FTC Commissioner was an unconstitutional encroachment by Congress on the President’s executive power.

The Supreme Court reviewed the legislative history of the FTC-creating statute, noting that Congress felt it important that the Commission be non-partisan and impartial,\(^\text{148}\) not be open to the suspicion of partisan direction,\(^\text{149}\) beholden to no one in the government, only the people of the United States.\(^\text{150}\) The Court held that because the FTC’s duties were more

\(^{145}\) *Humphrey’s Executor v. United States*, 295 U.S. 602, 618 (1935), citing a 1933 letter from FDR to Commissioner Humphrey.

\(^{146}\) 15 U.S.C. § 41. See also *Humphrey’s Executor*, 295 U.S. at 619. Several other independent agency statutes include the same language restricting the President’s removal power. See e.g., 42 U.S.C. § 7171(b)(1) (Federal Energy Regulatory Commission), 49 U.S.C. § 701(b) (Surface Transportation Board).

\(^{147}\) *Humphrey’s Executor*, 295 U.S. at 619.

\(^{148}\) Id at 624.

\(^{149}\) Id at 625.

\(^{150}\) Id.
legislative and judicial than executive, and because the statute specified a term of years for a Commissioner’s service, the statute was a constitutional exercise of congressional authority to restrict the President from removing an independent agency Commissioner.\footnote{The Court noted that the FTC’s duties are quasi-legislative and quasi-judicial, and that the FTC executes the law (the constitutional domain of the executive branch) only in “the discharge and effectuation of its quasi-legislative or quasi-judicial powers” as granted by statute. Id at 628. Like most other independent agencies, the FTC exercises quasi-legislative powers by using agency expertise to promulgate regulations within the domain of the agency’s specialty, pursuant to the directions laid out in the statute. Similarly, the FTC and other independent agencies exercise quasi-judicial power by serving as the initial finders of fact and law in administrative trials for alleged violations of statutes or regulations under the agency’s purview. A party disagreeing with the agency’s quasi-judicial decision may generally appeal to federal court.}

Despite the acknowledgment by the \textit{Humphrey’s Executor} Court of the political party restrictions in the FTC statute, the court has never decided the constitutionality of political party restrictions in statutes creating officers of the United States. The Ninth Circuit and the D.C. Circuit have both heard challenges to the political party restrictions in the Federal Election Commission (FEC) statute, and held the issue to be non-justiciable.\footnote{Id at 632-633. In 1988, \textit{Morrison v Olson}, 487 U.S. 654 announced a different test for determining under what circumstances Congress may restrict the President’s removal power. \textit{Morrison} did not involve an independent agency with political party restrictions so the details of the removal test announced there-in are not relevant to the focus of this paper.} In the Ninth Circuit case, the court held that the National Reform Party lacked standing to challenge the constitutionality of the political party restriction in the FEC statute, because the Reform party could not show that, absent the political party restrictions, the President would have nominated (and the Senate confirmed) an FEC Commissioner that would be more receptive to the Reform Party’s claims.\footnote{See National Committee of the Reform Party of the USA v. Democratic National Committee, 168 F.3d 360, 365 (9th Cir. 1999) and NRA Political Victory Fund, 6 F.3d. at 824.}

In the D.C. Circuit case, the National Rifle Association (NRA) was challenging an FEC decision by arguing that because the political party restrictions were unconstitutional, the FEC was an invalidly comprised body not capable of issuing binding decisions. The court said that

\footnote{\textit{Reform Party}, 168 F.3d at 365.}
the NRA could not win unless it showed that the appointment of each of the six FEC Commissioners was “infected by the statute.”\textsuperscript{155} But, the court found it impossible to determine whether the statute actually limited the President’s appointment power, or whether he would have chosen one or more the current Commissioners even without the restrictions.\textsuperscript{156} The court focused on harm to the President, not to the NRA, and held that

> It may well be that only if the President appoints and the Senate confirms a fourth same-party member to the Commission could the unconstitutionality of the bipartisanship requirement be regarded as justiciable, when the government raises it as a defense to the charge that the member’s participation violates [the FEC statute].\textsuperscript{157}

So, according to the D.C. Circuit, only the executive branch can mount a successful challenge to a political party restriction. Nonetheless, no President has ever seriously challenged political party restrictions in an independent agency statute, either by attempting to appoint more Commissioners of one party than permissible, or otherwise.\textsuperscript{158} In fact, some Presidents have endorsed political party restrictions. In a message to Congress, President Hoover recommended alterations in the statute for the Board of Directors of the Reconstruction Finance Corporation, which was a seven member Board of which no more than four could be members of any one political party. Hoover thought that the Board members were too busy, so he suggested adding an eighth member, and specifically suggested retaining the restriction that no more than four be members of any one political party.\textsuperscript{159}

\textsuperscript{155} NRA Political Victory Fund, 6 F.3d. at 825.
\textsuperscript{156} NRA Political Victory Fund, 6 F.3d. at 824.
\textsuperscript{157} NRA Political Victory Fund, 6 F.3d. at 825. Some commenters believe that these circuit courts got it wrong; that the unconstitutionality of political party affiliation requirements for appointment to office is ripe for adjudication; and that anyone who has been affected by the action of an agency headed by someone appointed pursuant to a statute with a political party affiliation restriction has standing to challenge. See e.g. Raskin, \textit{supra}, 52 Admin. L. Rev. at 611 and 626.
\textsuperscript{158} Note, \textit{supra} at 1926-27.
\textsuperscript{159} Pres Hoover’s 7/11/1932 Message to the Congress Recommending Alterations in the Board of Directors of the Reconstruction Finance Corporation.
Both Presidents Carter and George Herbert Walker Bush objected, in signing statements, to what the Presidents called “unconstitutional” restrictions on Presidential appointment power in statutes containing political party restrictions. When President Carter signed the U.S. International Trade Commission Appropriations Bill, he objected to the requirements that the Chairman be chosen from among the four most senior members of the Commission and that the Chairman and Vice-Chairman be from different political parties. However, President Carter did not object to the political party restrictions affecting the non-Chairman and Vice-Chairman posts on the Commission.

Upon signing the National and Community Service Act of 1990, President Bush objected to §190 of the Act which required that the Board be balanced according to the race, ethnicity, age and gender of its members, contain not more than eleven members of the same political party, and include seven members chosen from among persons nominated by the Speaker of the House of Representatives, and seven from among persons nominated by the Majority Leader of the Senate. President Bush said that these restrictions were unconstitutional, but did not elaborate on which he found most objectionable or what he felt made them unconstitutional. The Bush Administration’s Department of Justice later wrote a legal opinion concurring in the President’s judgment that these restrictions were unconstitutional, citing and focusing on Buckley v. Valeo. The Buckley Court held that it is unconstitutional for Congress to appoint officers of the United States. Thus, it seems President Bush’s true

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163 Buckley, 424 U.S. at 126.
objection to the restrictions in the National Community Service Act was to the requirement that the President choose Board members from among those nominated by certain members of Congress, and not to the political party restrictions.

3. **Commissioners of Independent Agencies are non-inferior Officers of the United States**

As discussed by the court in *Humphrey’s Executor*, the Commissioners of independent agencies are charged with significant authority under the laws of the United States. For example, Securities and Exchange Commission (SEC) Commissioners, who by majority vote act on behalf of the Commission, promulgate regulations binding on anyone who deals in securities or derivatives in the United States. SEC Commissioners also determine whether a judicial enforcement action should be brought by the Commission against an individual, company, or other entity alleged to have violated securities laws or regulations. When the SEC staff brings an administrative enforcement action against an alleged violator, the SEC Commissioners sit as an appeals court to the decision rendered by an Administrative Law Judge.

The Supreme Court has held that

> Any appointee exercising significant authority pursuant to the laws of the United States is [a non-inferior] ‘Officer of the United States.’

Thus, it would seem clear that Commissioners are non-inferior officers of the United States. However, in *Morrison v Olson*, the Court held that the Independent Counsel was an inferior officer, despite the fact that she exercised considerable discretion and authority under the laws of the United States, because she 1) could be removed by a non-inferior officer of the United States (the Attorney General), 2) did not formulate government policy, and 3) held an office

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164 Id.

that was temporary and would vanish when limited duties assigned to the officer were complete.\(^\text{166}\)

Independent Agency Commissioners, by comparison, are not removable by anyone other than the President, and even then only in very limited circumstances. Commissioners do formulate government policy when they write regulations and policy statements or issue adjudicatory orders within their agency’s purview. Although Commissioner’s serve only for a term of years, the office in which they serve is not temporary in nature. There is no automatic sun-set clause in the SEC or FTC statutes (for example) indicating that once everything is copasetic with securities or federal trade, these Commissions will cease to exist. Therefore, the Commissioners of independent agencies are non-inferior officers of the United States. This point is made not because the author wishes to express an opinion as to whether the analysis on the constitutionality of political party restrictions would be different for inferior officers verses non-inferior officers, but to make clear that this paper focuses on the constitutionality of political party restrictions in statutes creating non-inferior officers of the United States.

\textbf{B. Germane and Appropriateness Requirements of the Necessary and Proper Clause}

As discussed in Part I, both the Supreme Court and the executive branch have recognized that Congress may prescribe “reasonable and relevant qualifications and rules of eligibility of appointees.”\(^\text{167}\) The Necessary and Proper Clause requires, in addition to reasonableness, that any statutory restrictions on the appointment powers be appropriate and

\(^\text{166}\) See also \textit{Edmond}, 520 U.S. at 663 which announces a slightly different test for determining whether an officer is inferior or not. Inferiority is determined not by who can remove the officer, but by whether the officer’s work is directly supervised at some level by one or more other officers of the United States. Under this test as well, Commissioners are non-inferior officers of the United States.

be germane to the duties of the office and the federal power being carried into execution. This section will apply the Necessary and Proper Clause test to political party restrictions, laying out arguments for and against their constitutionality under this Clause, and determine that they are unconstitutional because they cannot be justified as germane to the duties of the Commissioners’ Offices.

A reasonable restriction within the meaning of the Necessary and Proper Clause, is one that specifies a widely held quality, permitting the President a wide range of nominees from which to choose.\(^\text{168}\) A political party affiliation restriction requires only that the President not nominate someone from the same party as a majority of the still-serving Commissioners. This permits the President to choose from more than half of the population: members of the main opposition party, members of smaller “third parties,” and independents.

For certain regulatory functions, Congress feels it is essential that the implementing agency be independent and “not be open to the suspicion of partisan direction.”\(^\text{169}\) Congress creates independent agencies so that they are “not subject to anybody in the government... not subject to the orders of the President, subject only to the people of the United States.”\(^\text{170}\) Political party restrictions, the argument goes, are essential (and therefore relevant and germane) to ensuring the agency’s independence;\(^\text{171}\) restricting the President’s removal power alone will not ensure agency independence.

\(^{168}\) Strauss, supra, 75 George Wash. L. Rev. at 723.

\(^{169}\) Humphrey’s Executor, 295 U.S. at 625, citing the legislative history behind the creation of the Federal Trade Commission (FTC) as an independent agency.

\(^{170}\) Id.

\(^{171}\) The Civil Service Commission “is to stand independent as between the parties, so as to exercise its authority irrespective of political influences...” See 22 Stat. 403 (Civil Service Commission) legislative history, comments of Dorman B. Eaton, February 4, 1882.
For example, the term of office for most Commissioners is between five and seven years, and the expiration of the terms of the several Commissioners are staggered so no two terms expire in the same year.\textsuperscript{172} Thus, for an average-sized Commission with five members, a President will have the opportunity to nominate two or three of the five Commissioners within his or her first four-year term in office. A one-term President would be able to nominate a majority of the Commissioners on approximately half of the independent Commissions. With political party restrictions in place, it is likely that one or two of President’s first-term nominees for each Commission will be from other than the President’s own political party.

Even though the restrictions on removal of Commissioners would prevent the President from immediately replacing the preceding President’s nominees, if political party restrictions were absent, the President could still dominate the Commission by nominating only members of his or her own political party to a majority of the Commissioner posts within his or her first term. A two-term President would be able to nominate all the Commissioners on any Commission from his or her own political party. Because the \textit{Humphrey’s Executor} court recognized the importance of having some regulatory functions fulfilled by an independent agency,\textsuperscript{173} restrictions that help ensure and maintain independence are germane to the agency’s task.

The counter argument points out that a vast majority of the statutes with political party restrictions create Commissions or Boards with an odd number of Commissioners. The only exceptions are the Federal Election Commission (FEC) and the International Trade

\textsuperscript{172} See the statutory citations in Table 1, \textit{infra} at 47.

\textsuperscript{173} \textit{Humphrey’s Executor}, 295 U.S. at 624.
Commission (ITC), each comprised of six Commissioners.\textsuperscript{174} The statutes creating Commissions comprised of five Commissioners, for example, permit three of the Commissioners to be from the same political party. Thus, other than the FEC and the ITC, the statutes permit the President to nominate like-minded Commissioners from his party to a majority of the seats on the Commission. Assuming that the President is from one of the two dominant political parties, at least two Commissioners on a five member Commission will be from the President’s party before the President takes office. Therefore, within the President’s first one to two years in office, the President will be able to ensure that his political party dominates the Commission. Thus, there is no real hamper on President’s control over those agencies.\textsuperscript{175}

The only permissible statutory restrictions on the President’s nominating power are those that are reasonable restrictions germane to the duties of the office. However, the President still maintains sufficient control over these so-called independent agencies, even when the political party restrictions are in place. Therefore, the need for independence, which is not effectively realized by political party restrictions, cannot be the appropriate or germane justification for the political party restrictions.

As one commenter noted, “[p]olitical party restrictions appear unconstitutional... they cannot be understood as simply qualifications for the job.”\textsuperscript{176} It is hard to argue that in order to adequately fulfill his or her duties as Commissioner of the Securities and Exchange Commission (or Nuclear Regulatory Commission or National

\textsuperscript{174} See Table 1, infra at 47.
\textsuperscript{175} Note, supra at 1926.
\textsuperscript{176} Note, supra at 1926.
Transportation Safety Board) it is essential that Commissioner #1 not be a republican, and essential that Commissioner #2 not be a democrat.

C. First Amendment

By making potential nominee Joe Shmo, a life-long registered Republican, ineligible for appointment to a five-member Commission which already has three Republican Commissioners, Congress is imposing a penalty on Mr. Shmo based on his belief in the tenets of the Republican Party and based on Mr. Shmo’s affiliation with the Republican Party. One of the primary principals of the First Amendment is that the government may not discriminate on the basis of religion, belief, or association.\(^{177}\) Even assuming, arguendo, that political party restrictions pass the Necessary and Proper Clause’s germane and appropriateness tests, there is still the question of whether, as restrictions on thoughts, believes, and association, political party restrictions violate the First Amendment. Many commenters have proclaimed statutory political party restrictions are unconstitutional with a simple citation to the First Amendment or the Equal Protection Clause, but with no real analysis.\(^{178}\) They are correct, for the following reasons.

The Court has repeatedly held that government employees cannot be hired or fired based on their political affiliation, leanings, or monetary contribution to political parties. In Rutan v. Republican Party of Ill., the Court said

\(^{177}\) In Torcaso v. Watkins (367 U.S. 488 (1961)) the Supreme Court invalidated the Maryland Declaration of Rights’ provision requiring all public office-holders to declare a belief in God. The Government may not favor one religion over another or aid all religions against non-believers. Id at 495. “Whether or not an abstract right to public employment exists, Congress could not pass a law providing that no federal employee” must or may not participate in various religious activities. Id at 496.

\(^{178}\) See, e.g. Wulwick and Macchiarola, 24 supra, L. Rev. at 626. See also Raskin, supra, 52 Admin. L. Rev. at 610-611. Because this paper focuses on political party restrictions in federal statutes, it focuses on the First Amendment. The Equal Protection Clause makes the First Amendment’s prohibitions on government discrimination binding against state governments, and would therefore be relevant in an analysis of political party restrictions in state statutes.
Political belief and association constitute the core of those activities protected by the First Amendment... conditioning public employment on the provision of support for the favored political party unquestionably inhibits protected belief and association.\textsuperscript{179}

There are exceptions, however. In \textit{Branti v. Finkel}\textsuperscript{180} the court held that it does not violate the First Amendment to consider political viewpoint as a hiring criteria for policy-making positions where it is important to have someone of like mind implementing the administration’s agenda.\textsuperscript{181} In \textit{Branti}, two assistant public defenders who happened to be Republicans were fired when Democrats took control of the county government. The Court stated that government must demonstrate “an overriding interest of vital importance,” before it may use the person’s beliefs as the sole basis for depriving him of continued public employment.\textsuperscript{182} Government demonstrates such a compelling interest only when it can show that “party affiliation is an appropriate requirement for the effective performance of the public office involved.”\textsuperscript{183}

Although the assistant public defenders had broad responsibilities with respect to particular cases that were assigned to them, they did not make decisions about the orientation and operation of the public defender office.\textsuperscript{184} Therefore, the court found no vitally important interest in aligning the public defenders’ political views with that of the county government,


\textsuperscript{180} \textit{Branti v. Finkel}, 445 U.S. 507 (1980).

\textsuperscript{181} Id at 518.

\textsuperscript{182} Id at 515-16. The court also said that lack of a contractual or tenure right to employment or continued employment is immaterial to a free speech claim. Id at 515.

\textsuperscript{183} Id at 518.

\textsuperscript{184} Id at 511.
and thus held that their removals violated the First Amendment and the Equal Protection Clause.\textsuperscript{185}

Because political party affiliation can be used as a hiring criteria for confidential or policy-making positions in the executive branch where it is important to have someone of like-mind in the office implementing the administration’s agenda, it is perfectly okay for the President to refuse to nominate an Attorney General or Environmental Protection Agency Administrator that does not share his or her political views.

However, this cannot validate or justify political party restrictions for independent agency Commissioners. The cases hold that political party restrictions for officers of the United States pass First Amendment muster only when the offices are policy-making positions for which the President requires someone of like-mind to best implement his policies. However, the independent agency statutes’ legislative history indicates that Congress intended for these agencies to be independent of the President. The independent agencies were made independent specifically so they would implement the best policies, not necessarily the President’s policies. Therefore, political party restrictions for independent agency Commissioners do not fit into the narrow exception on the First Amendment bar to conditioning public employment on support for, or association with, a certain political party or ideology.

Congress clearly believes that for certain government functions, it is important that decisions are made independently of the President’s administration and the constant sway of political winds. As the \textit{Humphrey’s Executor} court recognized:

\textsuperscript{185} Id at 519.
The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law.\textsuperscript{186}

The \textit{Branti} Court specifically recognized the importance of political party restrictions for certain offices where independence is important, and held that these political party restrictions did not violate the First Amendment:

Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character. As one obvious example, if a State’s election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration. That conclusion would not depend on any finding that the job involved participation in policy decisions or access to confidential information. Rather, it would simply rest on the fact that party membership was essential to the discharge of the employee’s governmental responsibilities.\textsuperscript{187}

The \textit{Branti} Court seems to explicitly condone political party restrictions for the Federal Election Commission, but cannot be used to support political party restrictions in other statutes. In this apparent approval of political party restrictions in \textit{Branti}, the Court states that these restrictions are constitutional only where party membership is “essential to the discharge of the employee’s governmental responsibilities.”\textsuperscript{188} This is a similar, but higher, standard than the Necessary and Proper Clause requirement that statutory restrictions be germane to the duties of the office and the federal power being carried out by the statute. Because of the haphazard way (explained below) Congress has employed political party restrictions, these restrictions cannot meet the \textit{Branti} standard.

There does not appear to be any consistent scheme by which Congress determines which subject matters should be regulated by an independent agency with Commissioners subject to political party restrictions instead of one under the control of the President. The National

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{186} \textit{Humphrey’s Executor}, 295 U.S. at 624.
\item \textsuperscript{187} \textit{Branti v. Finkel}, 445 U.S. at 518.
\item \textsuperscript{188} Id.
\end{itemize}
\end{footnotesize}
Transportation Safety Board is an independent agency, but the Occupational Safety and Health Administration is within the executive branch. An independent agency regulates the safety of the bridge that the worker drives over on his way to work, while a non-independent agency regulates the worker’s safety while he is at work. Does independence serve the safety of the United States transportation system in some manner that it would not serve the safety of working Americans?

The Nuclear Regulatory Commission (NRC) is an independent agency, but the Food and Drug Administration (FDA) is within the executive branch. If the NRC must be independent in order to strike an unbiased balance between the benefits of nuclear energy and the health and environmental problems the use of nuclear energy can create, should not the FDA also be independent? Is it not necessary to strike an unbiased balance between the benefits of modern pharmaceuticals and the dangerous side effects of many new drugs? Given the haphazardness with which Congress has assigned seemingly similar duties to agencies with and without political party restrictions, these restrictions cannot be essential to the discharge of the duties as required by the First Amendment.

D. History and Practice

Part II explains how longstanding practice may be considered by the Supreme Court in determining the validity of statutory restrictions on the President’s nominating power with respect to the Appointments Clause and the Necessary and Proper Clause. The analysis for political party restrictions is similar, but also requires analysis of the First Amendment implications. The analysis laid out in Part II will not be repeated here with respect to the Appointments Clause and Necessary and Proper Clause. This section will demonstrate that longstanding practice implications in First Amendment jurisprudence are essentially the same
as for the Necessary and Proper Clause or the Appointments Clause. In other words, the
Supreme Court has often pronounced the importance of longstanding practice, but has also
warned that it will not insulate patently unconstitutional practices.

In First Amendment cases, the Court often looks to the practices of the first
Congress (and other contemporaries to the Bill of Rights proposal and ratification) to see
how they understood its limits. There is no direct evidence from that time period to support or
oppose political party restrictions. The first Congresses did not enact any statutes with
political party restrictions. In fact, the Constitution does not mention political parties. Absent
any drafting-era evidence, the court will often look to longstanding practice since ratification
to determine the common understanding of the First Amendment’s provisions.\footnote{For example, in \textit{Marsh v. Chambers}, 463 U.S. at 791, the court upheld the longstanding practice of a state legislature paying the legislative Chaplin with public funds by pointing to the longstanding federal legislative practice of doing the same for their own Chaplin. Because congress had a longstanding practice of doing so, the constitutionality was presumed. In \textit{Walz v. Tax Commission} the court says that an unbroken practice, consensually followed for 200 years “is not something to be lightly cast aside.” See 397 U.S. at 678. In that case the court decided in favor of the constitutionality of a longstanding state practice of affording tax-exempt status to houses of worship.}

Congress has been routinely enacting statutes with political party restrictions since the
1880’s. In his 1926 dissent in Myers, Justice Brandeis listed several already-existing statutes
with political party restrictions.\footnote{Act of Sept. 26, 1914, ch. 311, 38 Stat. 717 (Federal Trade Commission); the Act of June 10, 1890, ch. 407, 26 Stat. 131 (Board of General Appraisers); the Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 (Interstate Commerce Commission); the Act of Jan. 16, 1883, ch. 27, 22 Stat. 403 (Civil Service Commission); and the Act of Mar. 22, 1882, ch. 47, 22 Stat. 30 (Board of elections in Utah Territory). See \textit{Myers}, 272 U.S. at 271 n.51 (Brandeis, J., dissenting).} At least a dozen more have been enacted since then.\footnote{See Table 1, \textit{infra} at 47.} No
President has ever seriously challenged a political party restriction.

In fact, most Presidents have just gone along with the system.\footnote{But see discussion, \textit{supra}, of both Presidents Carter’s and George Herbert Walker Bush’s objections, in signing statements. See also 14 Op. O.L.C. 157, \textit{supra}.} It is common for
senior congressional staffers from the party not in the White House to become Commissioners
of independent agencies upon recommendation of their congressional bosses.\textsuperscript{193} The President often accepts these suggestions and nominates the senior staffer to ensure a speedy confirmation.\textsuperscript{194}

The Supreme Court has never heard a case on the specific issue of political party restrictions, but has, in a few cases, acknowledged and supported the use of political party restrictions to maintain agency independence.\textsuperscript{195} Therefore, there is a strong argument that political party restrictions have been constitutionally validated by consistent longstanding practice of all three branches of government. However, as noted in Part II, the Supreme Court has frequently cautioned that history alone does not validate a custom that is contrary to the Constitution, even when the history of the practice “covers our entire national existence.”\textsuperscript{196}

\textbf{E. Policy}

Does it really matter? As written, political party restrictions do not really inhibit Presidential choice or control of the so-called independent agencies. So if it makes Congress feel better to include them, what is the big deal? This section will explain how Presidents can and have maintained control of independent agencies despite the political party restrictions,

\begin{itemize}
\item \textsuperscript{193} Fisher, supra, at 157-159.
\item \textsuperscript{194} The Federal Election Commission (FEC) statute requires that two Commissioners from different parties be appointed at the same time. In practice, the majority and minority party leaders in both chambers of Congress send the President the names of candidates that they want appointed to the FEC and the President accepts these names and submits them to the Senate as his nominees. See Raskin, supra, 52 Admin. L. Rev. at 615, citing \textit{Federal Election Commission Panel Discussion: Problems and Possibilities}, 8 Admin. L.J. Am. U. 223, 239 (1994) (remarks of Elizabeth Hedlund, director, FEC Watch at the Center for Responsive Politics) and \textit{Oversight of the Federal Election Commission: Hearing Before the Subcomm. on Gov't Management, Info., and Tech. of the Comm. of Gov't Reform and Oversight}, 105th Cong. 72, 75 (1998) (statement of Frank P. Reiche, former FEC Commissioner).
\item \textsuperscript{195} See \textit{Myers}, 272 U.S. at 271 n.51 (Brandeis, J., dissenting), \textit{Branti}, 445 U.S. at 518, and \textit{Humphrey's Executor}, 295 U.S. at 625.
\item \textsuperscript{196} See \textit{Walz}, 397 U.S. at 678. However, in the next breath, the court says that an unbroken practice, followed by consent for 200 years “is not something to be lightly cast aside.” In this case, the court decided in favor of the constitutionality of a long-standing practice: states affording tax-exempt status to houses of worship.
\end{itemize}
and addresses some of the dangers in just ignoring this encroachment by Congress on the President’s Appointment Clause powers.

The Securities and Exchange Commission (SEC) Statute creates a Commission to be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate. Not more than three of such commissioners shall be members of the same political party...\textsuperscript{197}

If a democratic Commissioner’s term has just ended, leaving three republicans and one democrat on the SEC, a republican President would not violate the statute if he or she

i. nominated a typical democrat (perhaps recommended by a member of the democratic congressional delegation),

ii. nominated an independent, a libertarian (or member of some other traditionally conservative third party),

iii. nominated a very conservative democrat,\textsuperscript{198}

iv. nominated a democrat who was a republican until yesterday when she switched her party registration.

Options ii, iii, and iv permit the President to choose a like-minded nominee for the open position on the SEC. Some of these tricks have been employed by past Presidents. For example, when a democratic SEC Commissioner’s term ended, President Nixon nominated a conservative Democrat, strongly identified with the business community.\textsuperscript{199}

Assuming that the President is from one of the two dominant political parties, at least two Commissioners on a five member Commission will be from the President’s party even before he or she takes office. Even if the President does exactly what Congress intended, with the President’s first or second nomination to each Commission (which almost always comes

\textsuperscript{197} 15 U.S.C. § 78d(a).

\textsuperscript{198} For example, former Senator Zell Miller, a southern democrat, was sometimes referred to by liberal democrats as “the Zelephant.”

\textsuperscript{199} Fisher, \textit{supra}, at 156.
in the first or second year of the President’s first term), the President will be able to ensure that his political party dominates the Commission (if it did not already).

Some argue that statutory political party restrictions on the appointment powers should not be allowed to stand just because they have done no harm yet. Proponents of this view believe the prevalence of these haphazardly implemented restrictions is a dangerous practice which should be invalidated by the courts before Congress takes it too far. If it is constitutional for Congress to create independent agencies for any regulatory purpose, and restrict the political party affiliations of the agency heads, then

Why couldn’t Congress also require the President to appoint no more than half of the President’s Cabinet from any political party, or no more than half of all foreign ambassadors and consuls from the same political party? Why couldn’t Congress also require the President to appoint no more than half of the Justices of the Supreme Court from any political party or no more than half of all federal judges from any political party?\(^{200}\)

Indeed, why couldn’t Congress do all these things? More importantly, perhaps, would it matter if Congress did? Presidents would use the old (or invent new) methods of evading the purpose of these restrictions.

F. Conclusion

Political party restrictions are not an effective means of ensuring agency independence. As written, these restrictions still permit the President to control the independent agencies, either via appointing a majority of the members from his/her political party as the statutes envision, or by circumventing congressional intent – something made easier by the lack of clear definition of political party affiliation, adherence, and membership. Despite the somewhat muted real-world effect political party restrictions have had on

\(^{200}\) Raskin, *supra*, 52 Admin. L. Rev. at 622.
Presidential control of independent agencies, these restrictions violate the Necessary and Proper Clause and the First Amendment.

Statutory political party restrictions on the President’s nominating power are not necessary and proper for carrying into execution a power granted to the federal government. There are serious constitutional questions as to whether Congress has full discretion under the Necessary and Proper Clause when the power it is carrying into execution is, like the Appointment power, not a legislative power. Furthermore, there is a constitutional debate about the validity of independent agencies in general. Although upheld by the Supreme Court, many commenters still question whether establishment of an independent agency is a power constitutionally granted to the federal government, and/or whether it violates the constitutional separation of powers structure. A detailed analysis of the constitutionality of independent agencies is beyond the scope of this paper. However, even assuming that independent agencies are constitutional, political party restrictions fail to satisfy the requirements of the Necessary and Proper Clause.

Political party restrictions fail the reasonable and appropriate test because the concepts of political party affiliation, adherence, and membership are quite vague, making it hard to know who exactly is disqualified by political party restrictions. A restriction cannot be proper or appropriate if it is too vague to be meaningful. Because the political party restrictions are so vague, their intent can be easily circumvented by the President.

The ineffectiveness of the political party restrictions means these restrictions fail the germaneness requirement of the Necessary and Proper Clause. Political party restrictions are ‘necessary and proper for carrying into execution a power of the federal government’ only if they are appropriate, reasonable, and germane to the duties of the office. Because the political
party restrictions require only political viewpoint diversity and do not require that a certain office be held by a republican and that a certain other office be held by a democrat, it cannot be that holding certain specific political views is germane to the duties of the office. The only way political party restrictions would pass the Necessary and Proper Clause test requiring that they be germane to the duties of the office, is if agency independence were itself important and germane to the duties of the office.

Although the justification for independent agency concept, bolstered by political party restrictions, is persuasive in the abstract, the argument is undermined by the reality that these restrictions do not actually ensure independence. A statutory requirement that no more than three of five Commissioners eat the same breakfast cereal each morning would not serve to ensure unbiased, good governance Securities and Exchange Commission decisions. Therefore, the breakfast cereal rule would violate the Necessary and Proper Clause’s requirement that congressional action under that Clause be germane to the duties of the office and the federal power being carried into execution. Because political party restrictions do not effectively maintain agency independence anymore than breakfast cereal diversity means better securities regulations, political party restrictions are not effectively germane to the duties of the Office.

With the possible exception of the Federal Election Commission, statutory political party restrictions also violate the First Amendment. Although potential nominees for policy-making officers of the US may be chosen by the President based on their political views without violating the First Amendment, there is no holding (only dicta) indicating that it is okay for Congress to use political views or affiliations to restrict the pool of eligible nominees for a policy-making office outside Congress’ control. Furthermore, the rational for the narrow
exception to the First Amendment (that it is necessary to have a like-minded person in a policy-making position to implement a certain agenda) does not make sense when applied to a supposedly independent agency that is intended to be outside Presidential and congressional control.

First Amendment jurisprudence requires that, to be valid, political party-based restrictions for political office be essential to the duties of the Office. The lack of justification for assigning some duties to an independent agency and other seemingly similar tasks to an agency within the direct control of the President demonstrates that there is no set of duties for which it can be said that agency independence (achieved through political party restrictions) is essential.

Why is independence necessary for the Consumer Product Safety Commission or the Nuclear Regulatory Commission, but not for the Environmental Protection Agency or the Food and Drug Administration? All four of these agencies are charged with balancing the benefits of modern technologies and increased standard of living with the potential harmful side-effects these benefits sometimes generate. Without some standard that could be used to determine whether a subject matter suggests a need for agency independence, it is hard to justify as essential political party restrictions in any particular agency’s statute.

In conclusion, with the possible exception of the Federal Election Commission, statutory political party restrictions on the pool of eligible nominees from which the President may choose a non-inferior officer of the United States violate the Necessary and Proper Clause and the First Amendment, and are therefore unconstitutional.
Table 1: Selection of Statutes with Political Party-Based Restrictions on the Pool of Eligible Nominees from which a President May Choose a Non-Inferior Officer of the United States.

<table>
<thead>
<tr>
<th>Agency Name</th>
<th>Creating Statute</th>
<th>Number of Board Members / Commissioners and Political Party Restriction Language</th>
</tr>
</thead>
<tbody>
<tr>
<td>Merit Systems Protection Board</td>
<td>5 USC § 1201</td>
<td>“The Merit Systems Protection Board is composed of 3 members appointed by the President, by and with the advice and consent of the Senate, not more than 2 of whom may be adherents of the same political party.”</td>
</tr>
<tr>
<td>Federal Trade Commission</td>
<td>15 U.S.C. § 41</td>
<td>Commission “shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party.”</td>
</tr>
<tr>
<td>Board of General Appraisers</td>
<td>Ch. 407, 26 State 131, 136, June 10, 1890</td>
<td>Board is comprised of nine appraisers “[n]ot more than five of such general appraisers shall be appointed from the same political party.”</td>
</tr>
<tr>
<td>Federal Communications Commission</td>
<td>47 USC § 154(b)(5)</td>
<td>“The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission.”</td>
</tr>
<tr>
<td>Securities and Exchange Commission</td>
<td>15 U.S.C. § 78d(a)</td>
<td>Commission is “to be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate. Not more than three of such commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable.”</td>
</tr>
<tr>
<td>Nuclear Regulatory Commission</td>
<td>42 USC § 5841</td>
<td>“Appointments of members pursuant to this subsection shall be made in such a manner that not more than three members of the [five-member] Commission shall be members of the same political party.”</td>
</tr>
<tr>
<td>United States Court of Appeals for the Armed Forces</td>
<td>10 USC § 942</td>
<td>“Not more than three of the [five] judges of the court may be appointed from the same political party.”</td>
</tr>
<tr>
<td>National Transportation Safety Board</td>
<td>49 USC § 1111</td>
<td>“The Board is composed of 5 members appointed by the President, by and with the advice and consent of the Senate. Not more than 3 members may be appointed from the same political party.”</td>
</tr>
<tr>
<td>Federal Election Commission</td>
<td>2 U.S.C. § 437c</td>
<td>“...six members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.”</td>
</tr>
<tr>
<td>International Trade Commission</td>
<td>19 U.S.C. § 1330</td>
<td>Commission is to be “composed of six commissioners who shall be appointed by the President, by and with the advice and consent of the Senate. ... Not more than three of the commissioners shall be members of the same political party.”</td>
</tr>
<tr>
<td>Commodity Futures Trading Commission</td>
<td>7 U.S.C. § 2(a)(2)(A)</td>
<td>“The Commission shall be composed of five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate. ... Not more than three of the members of the Commission shall be members of the same political party.”</td>
</tr>
<tr>
<td>Federal Housing Finance Board</td>
<td>12 U.S.C. § 1422a</td>
<td>“Not more than 3 [of the 5] directors shall be members of the same political party.”</td>
</tr>
<tr>
<td>Consumer Product Safety Commission</td>
<td>15 U.S.C. § 2053</td>
<td>“An independent regulatory commission is hereby established, to be known as the Consumer Product Safety Commission, consisting of five Commissioners... not more than three of the Commissioners shall be affiliated with the same political party.”</td>
</tr>
<tr>
<td>Federal Energy Regulatory Commission</td>
<td>42 U.S.C. § 7171(b)(1)</td>
<td>“The Commission shall be composed of five members appointed by the President, by and with the advice and consent of the Senate... Not more than three members of the Commission shall be members of the same political party.”</td>
</tr>
<tr>
<td>Farm Credit Administration Board</td>
<td>12 U.S.C. § 2242</td>
<td>“The Board shall consist of three members, who shall be citizens of the United States and broadly representative of the public interest. ... Not more than two members of the Board shall be members of the same political party.”</td>
</tr>
<tr>
<td>Surface Transportation Board</td>
<td>49 U.S.C. § 701(b)</td>
<td>“The Board shall consist of 3 members, to be appointed by the President, by and with the advice and consent of the Senate. Not more than 2 members may be appointed from the same political party.”</td>
</tr>
<tr>
<td>Federal Deposit Insurance Corporation</td>
<td>12 U.S.C. § 1812</td>
<td>“[N]ot more than 3 of the members of the [5-member] Board of Directors may be members of the same political party.”</td>
</tr>
<tr>
<td>National Credit Union Administration Board</td>
<td>12 USC 1752a(b)(1)</td>
<td>“The Board shall consist of three members, who are broadly representative of the public interest, appointed by the President, by and with the advice and consent of the Senate. ... Not more than two members of the Board shall be members of the same political party.”</td>
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