AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers/Appointment and Removal Power

*Steven G. Bradbury*, **Officers of the United States Within the Meaning of the Appointments Clause** (2007)[[1]](#footnote-1)

*The U.S. Constitution distinguishes between officers who must be appointed through the Senate confirmation process and “inferior” officers who do not require Senate confirmation, but the Constitution does not detail what distinguishes offices from inferior officers. It has also long been recognized that there is an additional class of mere government employees, who are not officers of any kind and thus do not trigger any of the constitutional provisions relating to officers. Determining which government positions are properly filled by “officers” and which are properly filled by “employees” has been a subject of frequent confusion, and it has often fallen to the attorney general or his subordinates to provide guidance to the executive branch on how positions in the executive branch are to be filled. In 2007, the Office of Legal Counsel produced a memorandum to provide general legal guidance of the general counsels in the various government agencies and departments on who counted as a constitutional officer. The OLC emphasized two key features of a position, that it involved exercising the sovereign authority of the federal government and that it involved a continuing appointment, and provided an explanation of each of these two essential elements.*

. . . .

The requirements of the Appointments Clause are “among the significant structural safeguards of the constitutional scheme” and are “designed to preserve political accountability relative to important government assignments.” *Edmond v. United States* (1997). . . . By vesting the selection of principal officers in the President and of inferior officers in the President or certain other officers of the Executive or Judicial Branches, the Clause “prevents congressional encroachment upon” those branches, and supports the President’s authority and duty to see to the execution of the laws. But the Appointments Clause “is more: it preserves another aspect of the Constitution’s structural integrity by preventing the diffusion of the appointment power.” . . . By preventing diffusion, the Appointments Clause helps to ensure accountability for the quality of appointments and the operation of the government—through a limited number of publicly known and readily discernible sources of appointing authority, and also, ultimately, through the threat of impeachment, by which Congress may both remove a person from any civil “Office” and disqualify him “to hold and enjoy any Office.”

. . . .

The first essential element of an office under the United States is the delegation by legal authority of a portion of the sovereign powers of the federal government. A position must have the authority to exercise such power before the Appointments Clause will require that the occupant of the position be made an “Officer[] of the United States.” . . .

The text and structure of the Constitution reveal that officers are persons to whom the powers “delegated to the United States by the Constitution,” are in turn delegated in order to be carried out. . . . The Constitution recognizes that the President would need to delegate authority to others in, among other places, the clauses empowering him to “*take Care* that the Laws *be* faithfully executed,” and then, immediately following, providing that the President “shall Commission all the Officers of the United States.” . . .

. . . .

. . . . The Supreme Judicial Court of Maine provided the fullest early explication in 1822, addressing a question under Maine’s equivalent of the Ineligibility Clause, which bars members of the Legislative Branch in certain cases from being appointed to a “civil Office under the Authority of the United States”:

[T]he term “office” implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office;—and the exercise of such power within legal limits, constitutes the correct discharge of the duties of such office. The power thus delegated and possessed, may be a portion belonging sometimes to one of the three great departments, and sometimes to another; still it is a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others . . . .

The court added that “[a]n office [is] a grant and possession of a portion of the sovereign power” and that “every ‘office,’ in the constitutional meaning of the term, implies an authority to exercise some portion of the sovereign power, either in making, executing or administering the laws.” Applying this understanding, the court concluded that an agent for the preservation of timber on public lands was not a public officer because he “is to be clothed with no powers, but those of superintending the public lands, and performing certain acts in relation to them under the discretionary regulations of the governor.” *Id.* His duties were “not essentially different from” those of the “state printer, or a contractor to build a state house, or a state prison.” . . .

. . . .

Reflecting the understanding from the first hundred years of American law, including pre-Founding English law, a leading treatise summarized and defined a public office as follows:

A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.

Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* (Chicago: Callaghan and Company, 1890). Mechem added that the “delegation . . . of some of the sovereign functions of government” was the “most important characteristic which distinguishes an office,” such that “[u]nless the powers conferred are of this nature, the individual is not a public officer.” The “‘nature of th[e] duty,’” as “‘concerning the public,’” was the key factor.

. . . .

Although the particulars of what constitutes “delegated sovereign authority” will not always be beyond debate, early authorities as well as more recent court decisions and opinions of this Office provide extensive guidance illuminating the term. As a general matter, based on these authorities, one could define delegated sovereign authority as power lawfully conferred by the government to bind third parties, or the government itself, for the public benefit. As indicated from much of the discussion above, such authority primarily involves the authority to administer, execute, or interpret the law. . . .

. . . .

Similarly included in delegated sovereign authority is power to issue regulations and authoritative legal opinions on behalf of the government, and other powers to execute the law whether considered “executive” or merely “administrative.” Thus, *Buckley v. Valeo* (1976)concluded that both the Federal Election Commission’s “primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights” and its “rulemaking, advisory opinions, and determinations of eligibility for . . . federal elective office” were authorities that rendered the members of the Commission subject to the Appointments Clause. . . .

Apart from matters commonly considered law enforcement or execution, delegated sovereign authority also includes other domestic matters authorized by law that could bind or otherwise affect the government or third parties for the public benefit. Such matters include legal authority over the contracts and “supplies . . . of the nation,” and “the preparatory plans of finance,” authority over the granting of governmental licenses, or to determine the rules for public access to or privileges regarding governmental property, and the authority to appoint to or remove from other governmental offices. To take one example, a leading early case, *Shelby v. Alcorn* (MS 1858), concluded that a levee commissioner held an office, where the position included authority to set terms for and enter into contracts on behalf of the government for construction of levees, authority to sue to enforce those contracts, “the duties of treasurer, in which position he is entitled to receive large sums of public money,” and the ability essentially to levy taxes to fund construction. His powers were “extensive and important, and *such as no one could claim to exercise, except in virtue of a legislative enactment*,” and “in the discharge of his proper functions, [he] exercises as clearly *sovereign power* as the governor, or a sheriff, or any other executive officer.” . . .

At the same time, the 1822 Maine decision indicates that some functions simply involving the management of governmental property may be considered not “sovereign” but rather proprietary. *Opinion of the Justices* (ME 1822). . . .

As the *Shelby* case indicates, delegated sovereign authority further includes, on the one hand, authority on behalf of the government to receive and oversee the public’s funds. . . . Correspondingly, it also includes authority over the disbursement of those public funds. . . .

Finally, delegated sovereign authority of the federal government also encompasses functions that are not necessarily domestic and may not precisely involve the execution of the laws, but that nevertheless are within the “executive Power” that Article II of the Constitution confers, functions in which no mere private party would be authorized to engage. The most notable examples are “[t]he actual conduct of foreign negotiations, . . . the arrangement of the army and navy, [and] the direction of the operations of war.” The positions with authority to do these things have authority lawfully granted by the government to bind or control in some fashion the government or third parties for the public benefit.

. . . .

Having shown that the first element of an “office” for purposes of the Appointments Clause is a delegation of the sovereign authority of the federal government, and having given examples of what such sovereign authority involves, we will touch on three characteristics arguably relevant to the delegation of federal sovereign authority. We conclude that the first of these characteristics (having discretion) is not necessary to the existence of such authority, and that the other two (being a contractor and being a state officer) ordinarily do not involve the exercise of such authority.

First, “independent discretion” is not a necessary attribute of delegated sovereign authority. *Buckley* is sometimes read to hold that persons who “do not wield independent discretion and [who] act only at the direction of officers” cannot themselves be considered officers. Neither *Buckley* nor early authority supports this restriction on the scope of an “office.”

*Buckley* did rightly indicate that discretion in administering the laws typically will constitute the exercise of delegated sovereign authority, and therefore is of course relevant. . . . But *Buckley* did not say, nor does it follow, that such discretion is *necessary*. Indeed, as already indicated, *Buckley* reaffirmed prior decisions that had concluded that “a postmaster first class” and “the clerk of a district court” were officers of the United States. . . .

. . . .

. . . . Thus, it was generally accepted that the “officers of the United States” included many particular officers who had authority but little if any discretion in administering the laws; these included officers such as registers of the land offices, masters and mates of revenue cutters, inspectors of customs, deputy collectors of customs, deputy postmasters, and district court clerks. . . .

. . . . The question for purposes of this first element is simply whether a position possesses delegated sovereign authority to act in the first instance, whether or not that act may be subject to direction or review by superior officers: “[A] delegation of a portion of the sovereign power” involves “a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the State,” in contrast with a person whose acts have no “authority and power of a public act or law” absent the “subsequent sanction” of an officer or the legislature. . . . Again, early practice reinforces this understanding: Inferior revenue officers, for example, had the delegated sovereign authority to make classification decisions, but those decisions could be subjected to two layers of appeal, the second being the Treasury Secretary himself. A revenue officer’s decision could, without any “subsequent sanction,” by law “bind the rights of others,” even though by law readily “subject to revision and correction” on the initiative of the taxpayer.

Second, although it is true as a general matter that contractors do not hold an office under the United States, the reason for that (in most cases) is that they do not exercise any delegated sovereign authority. A person’s status as an independent contractor does not per se provide an exemption from the Appointments Clause; rather, a typical contractor provides goods or services instead of possessing any executive or judicial authority. . . .

. . . .

A related reason that contractors in most cases do not hold an office is that, to the extent they do assist the government in carrying out its sovereign functions, their actions (unlike those of the subordinate officers just discussed with regard to discretion) have no legal effect on third parties or the government absent subsequent sanction. They do not actually have delegated sovereign authority, even if they assist those who do or must comply with applicable law in carrying out the contract; rather, their advisory and other assisting actions are a kind of service. . . .

. . . . As the Attorney General explained nearly ninety years ago, “the inquiry must always be into the nature of the service to be rendered. If the appointee himself performs any of the functions of government, he is an officer. If he merely renders assistance to another in the performance of those functions, he is an employee.”

Finally, state officers ordinarily do not possess delegated sovereign authority of the federal government, even when they assist in the administration of federal law. Thus, the Appointments Clause ordinarily does not apply to them. State officers, even when enforcing federal law, generally exercise the sovereign law enforcement authority of their state, ultimately delegated by the people of that state; if they hold any office, they are officers of their state or locality, not of the United States. They hold authority independently of a delegation from the federal government, and they and those who appoint them are accountable for their actions to the people of the state.

. . . .

The second element of a federal “office,” necessary to make a position subject to the Appointments Clause, is that the position be “continuing.” . . .

The Constitution refers to an office as something that one “holds” and “enjoys” and in which one “continues,” and these descriptions suggest that an office has some duration and ongoing duties. . . . Similarly, the Recess Appointments Clause suggests that an office is a position that may be vacant (thus not held only by a single person) and will continue beyond a single session of Congress. . . . And the Appointments Clause itself indicates that most offices are “*established* by Law.” . . .

. . . .

. . . . From the beginning, Presidents repeatedly have “dispatched ‘secret’ agents on diplomatic or semidiplomatic missions without nominating them to the Senate.” Edward S. Corwin, *The President*, 5th ed. (New York: New York University Press, 1984). One of President Washington’s first acts was unilaterally to name Gouverneur Morris (a fellow delegate to the Constitutional Convention) as a special agent to explore a commercial treaty with Britain. Washington also unilaterally named “commissioners” to deal with a rebellion in Pennsylvania in 1794 without appointing them officers. So too have Presidents as far back as Washington “designated members of . . . [Congress] to represent the United States on international commissions and at diplomatic conferences,” notwithstanding that the Constitution’s Ineligibility Clause may have barred the members’ appointment to a “civil Office under the Authority of the United States” and that the Incompatibility Clause would have required them to vacate their seats in Congress if they took “any Office under the United States.” . . . In a striking early illustration, President Jefferson appointed Senator Daniel Smith as a commissioner to negotiate and execute treaties with the Cherokee Indians, yet Jefferson did not submit the nomination to the Senate, and Smith did not vacate his seat in the Senate. . . .

. . . .

The Attorneys General as well held the same understanding in the domestic context from an early date. An 1828 opinion concluded that a statute granting the Commandant of the Marine Corps authority to appoint officers when “it shall become necessary” did not violate the Appointments Clause so long as it was interpreted to permit only “an occasional and transitory appointment” in emergency circumstances “should [the Marines] be detached from the ships to which they belonged.” . . . In 1843, Attorney General Legare determined that “permanent inspectors” of customs were “officers of the government of the United States,” required to be appointed consistent with the Appointments Clause, while “occasional inspectors whose services were demanded in extraordinary exigencies in the service” were not. . . .

. . . .

At the same time, the element of continuance, properly understood, also ex-plains why an “independent counsel” under the Ethics in Government Act of 1978, undoubtedly *was* an officer, even though the position was, by the nature of its duties, temporary and largely case-specific. . . . Although the position of a particular independent counsel was temporary, the position was non-personal; it was not “transient,” but rather indefinite and expected to last for multiple years, with ongoing duties, the hiring of a staff, and termination only by an affirmative determination that all matters within the counsel’s jurisdiction were at least substantially complete; and it was not “incidental,” but rather possessed core and largely unchecked federal prosecutorial powers, effectively displacing the Attorney General and the Justice Department within the counsel’s court-defined jurisdiction, which was not necessarily limited to the specific matter that had prompted his appointment.

. . . .

For all of these reasons, we conclude that an individual who will occupy a position to which has been delegated by legal authority a portion of the sovereign powers of the federal government, and which is “continuing,” must be appointed pursuant to the Appointments clause. Conversely, a position that does not satisfy one of these two elements need not be filled pursuant to that Clause.

1. Excerpt taken from Steven G. Bradbury, “Officers of the United States Within the Meaning of the Appointments Clause,” 31 Op. O.L.C. 73 (April 16, 2007). [↑](#footnote-ref-1)