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The appointments clause of the United States Constitution designates the manner by which certain government officers shall be nominated and appointed. The substantive content of this provision received little attention until the adoption of the Federal Election Campaign Act Amendments of 1974, which created the Federal Election Commission (FEC) and prescribed the methods for the appointment of its members. Specifically, the statute provided that four of the six voting members of the FEC must be approved by designated congressional officers and that all six must be approved by Congress. In Buckley v. Valeo, which offered the first detailed

1. U.S. CONST. art. II, § 2, cl. 2. The clause is reprinted in text at note 15 infra.
2. The Supreme Court's interpretation of the clause in the past forty years has focused primarily on the implied authority to remove a person from federal office. See note 52 infra.
5. The provision was as follows:
There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House, ex officio and without the right to vote, and 6 members appointed as follows:
(A) 2 shall be appointed, with the confirmation of both Houses of the Congress, by the President pro tempore of the Senate upon the recommendations of the majority leader of the Senate and the minority leader of the Senate;
(B) 2 shall be appointed, with the confirmation of both Houses of the Congress, by the Speaker of the House of Representatives, upon the recommendations of the majority leader of the House and the minority leader of the House;
(C) 2 shall be appointed, with the confirmation of a majority of both Houses of Congress, by the President of the United States.
This procedure was designed to retain in Congress a certain degree of control over the FEC. See 120 CONG. REC. 24,472-73 (1974). The appointment of members of the Commission on Executive, Legislative and Judicial Salaries is quite similar, 2 U.S.C. § 352(a) (1970), and may raise the kinds of problems discussed in this Note.
6. 424 U.S. 1 (1976). Buckley was instituted in the United States District Court for the District of Columbia pursuant to the Federal Election Campaign Act of 1971 as amended in 1974. This statute permits an action, including a declaratory judgment, appropriate to construe the constitutionality of its provisions. The action may be brought by the Federal Election Commission, the national committee of any political party, or any individual eligible to vote in a presidential election. 2 U.S.C. 437h (Supp. V 1975). As required by the Act, the district court certified the constitutional
analysis of the content of the appointments clause, the Supreme Court found the statute's appointment procedure unconstitutional in a decision that severely limited congressional control over the appointment of government officers.

This Note examines the constitutional power of Congress to control the selection of government officers. It first discusses the article II grant itself and concludes that the Court in *Buckley* correctly interpreted that provision to prohibit direct appointment by Congress of officers who are found to possess "significant authority." The Note then explores possible means not explicitly foreclosed in *Buckley* by which Congress might influence such appointments and argues that these alternatives are restricted by the same constitutional principles that prohibit direct congressional appointments.

questions to the appropriate circuit court of appeals, which in this instance was the District of Columbia Circuit. The plaintiffs challenged diverse provisions of the Act, including the constitutionality of the appointment method used in selecting the members of the newly founded Federal Election Commission. On that issue, the court of appeals, sitting en banc, held that Congress could vest certain "legislative" powers in the Commission as appointed, and that as to the remaining powers, some of which raised serious constitutional questions, the issue of constitutionality was not yet ripe for review. 519 F.2d 817, 893 (D.C. Cir. 1975). The dissenters argued that the method of appointment violated the separation of powers doctrine embodied in article II. 519 F.2d at 920-21 (Tamm, J., dissenting) and 923-34 (MacKinnon, J., dissenting). The Supreme Court held that the method of appointment violated article II, with seven justices joining the per curiam decision and Justice White filing a separate concurrence.

7. The Court's only previous encounter with a congressional attempt to exercise the appointment power came in United States v. Cooper, 20 D.C. (9 Mackey) 104 (1891), affd. sub nom. Shoemaker v. United States, 147 U.S. 282 (1893). That case involved two people already holding offices in the military who were named to a new commission to select land for condemnation in Washington, D.C. The Supreme Court avoided a comprehensive discussion of article II by holding that, although the state required that specific officers be appointed to the commission, this kind of increase in powers and duties of an existing office was not an appointment so long as the new powers and duties could not "fairly be said to have been dissimilar to, or outside of the sphere of, [the officers' present] official duties." 147 U.S. at 301. The Court also raised sua sponte the problem of congressional appointments in United States v. Ferreira, 54 U.S. 40, 51 (1851), but failed to decide the issue. See also Springer v. Philippine Islands, 277 U.S. 189 (1928) (holding that the legislature of the Philippine Islands could not make appointments to executive agencies).

*Buckley* has generated new interest in the nature of the appointment power. For example, a leading casebook has added a new section on the appointment power in its most recent supplement. See W. Lockhart, Y. Kamisar & J. Choper, *Constitutional Law* 20-23 (4th ed. Supp. 1976). Most recent discussions of the *Buckley* decision, however, have focused on other aspects of the case and have ignored the appointment power holding. See, e.g., Comment, supra note 4, at 854 n.24; Comment, The Constitutionality of Limitations on Individual Political Campaign Contributions and Expenditures: The Supreme Court's Decision in *Buckley* v. Valeo, 25 Emory L.J. 400 (1976); The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 171-86 (1976).

8. The other provisions of the Act were challenged on first amendment and equal protection grounds. The Court struck down limits on individual expenditures, limits on total spending by a candidate, and limits on a candidate's expenditures from his own funds. It upheld ceilings on contributions to the campaigns of others, the public financing of presidential campaigns, and the provisions for disclosure. See The Supreme Court, 1975 Term, supra note 7, at 172.
I. THE CONTENT OF THE APPOINTMENTS CLAUSE

The constitutional principle underlying the federal appointment process is separation of powers,9 which embraces the idea that while a strict division of authority between the three branches of government is not required,10 a concentration of power in any single branch is unacceptable.11 Thus, any encroachment by one branch upon the domain of another must be avoided.12 This principle is manifested in the ineligibility and incompatibility clauses of article I, which explicitly proscribe members of Congress from holding other governmental offices.13 Such a prohibition prevents Congress from creating offices for self-serving purposes and from participating directly in the executive branch's law enforcement functions.14 As construed

9. As the Court in Buckley noted at the outset of its discussion of the appointments clause:

The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787. . . .

It is in the context of these cognate provisions of the document [providing for separation of powers] that we must examine the language of Art. II, § 2, cl. 2 . . . .

424 U.S. at 124.

10. In Buckley the Court noted that "it is also clear from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of each of [the] three essential branches of Government." 424 U.S. at 121. The Court pointed to the appointment power itself as an example of the commingling of authority in the Senate and the President. 424 U.S. at 121. But cf. O'Donoghue v. United States, 289 U.S. 516, 530 (1933) (holding that these very textual exceptions "emphasize the generally inviolate character of the [separation of powers] plan").

11. According to James Madison:

The reasons on which Montesquieu grounds his maxim [concerning the basis for separation of powers doctrine] are a farther demonstration of his meaning.

"When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor." (emphasis original).

THE FEDERALIST No. 47, at 302-03 (G. Putnam's Sons ed. 1908) (cited in Buckley, 424 U.S. at 120-21).

12. "The framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." 424 U.S. at 122. The Court cites historical sources for its position. See 424 U.S. at 129 n.166.

13. The Constitution provides as follows:

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.

U.S. CONSTITUTION art. 1, § 6, cl. 2.

by the Court in *Buckley*, the appointments clause complements the
ineligibility and incompatibility clauses by precluding Congress from
appointing those who will hold executive office thereby depriving
Congress of even indirect control over executive policymaking.

These separation of powers considerations are evident when the
content of the appointments clause is analyzed:

> [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.\(^{15}\)

The language of the clause raises three primary issues, all of which
were addressed by the Court in *Buckley*: the meaning of the phrase
“Officers of the United States”:\(^{16}\) the effect of the “otherwise pro­
vided for” textual exception, which is a direct limitation upon the
appointment power itself;\(^{17}\) and the scope of the “excepting clause,”
which permits an alternative method of appointment for inferior
officers.\(^{18}\)

By its terms, the appointments clause applies only to certain
specifically enumerated officials and to “Officers of the United
States.”\(^{19}\) Thus, the first question in any appointments clause
inquiry is whether the official in question, if not listed, is such an
“officer.” In *Buckley*, the Court, relying on an old series of cases
that established general guidelines for the term, held that a commis­sioner of the FEC is an officer of the United States.\(^{20}\) The Court
initially cited *United States v. Germaine*\(^ {21}\) as indicating “that the term

\[\text{References}\]

15. U.S. Const. art. II, § 2, cl. 2.
16. See notes 19-35 infra and accompanying text.
17. See notes 36-41 infra and accompanying text.
18. U.S. Const. art. II, § 2, cl. 2. See notes 42-51 infra and accompanying text.
19. Throughout this Note, the term “Officers of the United States” includes “In­ferior Officers” as specified in art. II, § 2, cl. 2.
20. 424 U.S. at 126.
21. 99 U.S. 508 (1879). In *Germaine* a civil surgeon appointed by the Com­missioner of Pensions had been indicted under a federal extortion statute that addressed
itself to “every officer of the United States who is guilty of extortion under the color
of his office.” 99 U.S. at 509. The Court initially noted:

> The Constitution for purposes of appointment very clearly divides all its
officers into two classes. The primary class requires a nomination by the Pres­
ident and confirmation by the Senate. But foreseeing that when offices became
numerous, and sudden removals necessary, this mode might be inconvenient, it
was provided that, in regard to officers inferior to those specially mentioned,
Congress might by law vest their appointment in the President alone, in the
courts of law, or in the heads of departments. That all persons who can be said
to hold an office under the government about to be established under the Con­
stitution were intended to be included within one or the other of these modes
of appointment there can be but little doubt.
‘Officers of the United States’ . . . is . . . intended to have substantive meaning.” 22 It then went on to hold, without further citation of authority, that “[the term's] fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an Officer of the United States, and must, therefore, be appointed in the manner prescribed by section 2, cl. 2, of [article II].” 23

Unfortunately, the Court did not further elaborate on the meaning of the “significant authority” standard. It instead intuitively compared the office of FEC commissioner with lower-level positions.

99 U.S. at 509-10. In testing Germaine’s civil surgeon position against the terms of the statute requiring that he be an “officer of the United States,” the Court held:

It is, therefore, not to be supposed that Congress, when enacting a criminal law for the punishment of officers of the United States, intended to punish any one not appointed in one of those modes. If the punishment were designed for others than officers as defined by the Constitution, words to that effect would be used, as servant, agent, person in the service or employment of the government; and this has been done where it was so intended.

22. 424 U.S. at 125-26. The Court carefully used the earlier case as an indication that the phrase “Officers of the United States” was not to be read as “merely dealing with etiquette or protocol . . . but [that] the drafters had a less frivolous purpose in mind.” 424 U.S. at 125. It thereby avoided the problems inherent in extending the Germaine reasoning beyond its narrow criminal setting to the broader constitutional situation in Buckley. The Germaine Court had accepted as given the constitutionality of the manner in which Germaine had been appointed, and merely applied the procedure mandated by article II to determine if he was an officer of the United States. See note 21 supra. This approach sheds no light on the question of how to determine who should be appointed according to article II. By a simple extension of the Germaine reasoning, the Court could have held that the FEC Commissioners were not officers of the United States because they were not appointed in conformity with the appointments clause, and that the method by which they were appointed was constitutional because it need not comport with the article II provisions. The circularity of the argument in the context of the FEC is clear. The problem is that the Germaine Court did not attempt to determine the content of the phrase “Officers of the United States.” It failed to explore the possibility that Germaine was, in fact, an officer of the United States, subject to the reach of the statute, who had been unconstitutionally appointed. The Buckley Court noted that the initial inquiry in the FEC situation must be to determine whether the appointee in question is an officer of the United States on the basis of a more substantive discussion of his duties and powers. Only after this question is resolved does it make sense to decide on the role of article II procedures.

It should be noted that the Court has, on occasion, addressed this more substantive question. In United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1867), the Court defined the term “office” as one that “embraces the ideas of tenure, duration of emolument, and duties.” This test, however, was established in a case requiring the definition of public office rather than officer of the United States. As a consequence the Court’s definition is insufficient to distinguish a secretary from a cabinet officer. The Court has, however, apparently used the Hartwell definition in other holdings involving statutory construction. See Auffmordt v. Hedden, 137 U.S. 327 (1890) (case involving appointment of merchant appraiser); United States v. Perkins, 116 U.S. 483, 484 (1886) (a cadet-engineer was an officer of the United States for pay purposes and his appointment was constitutionally vested in the Secretary of the Navy, a department head).

23. 424 U.S. at 126 (emphasis added).
found to be "inferior offices" in earlier cases, holding that the commissioners were "at the very least such 'inferior officers,'" and that, therefore, the method of their appointment must comply with article II. This intuitive comparison worked well in Buckley where the authority vested in the position to be evaluated was relatively great. However, it offers little guidance for more difficult cases, in particular, those situations where the Court must distinguish officers at the lower level of authority.

Justice White's concurring opinion was more helpful in delineating a boundary between those who wield "significant authority" and those who do not. He found the major criteria for inclusion within the article II category of "officers" to be the "breadth of [the officials'] assigned duties and the nature and importance of their assigned functions." After a brief discussion of the FEC's assigned duties and functions, Justice White concluded:

"It is plain that the FEC is the primary agency for the enforcement and administration of major parts of the election laws. . . . Within the wide zone of its authority the FEC is independent of executive as well as congressional control except insofar as certain of its regulations must be laid before and not be disapproved by Congress. . . . With duties and functions such as these, members of the FEC are plainly officers of the United States as that term is used in Art. II, § 2, cl. 2."  

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24. Myers v. United States, 272 U.S. 52 (1926) (postmaster first class); Ex parte Hennen, 38 U.S. (13 Pet.) 230 (1839) (judicial clerk). It should be noted that both of these cases involved the removal power rather than the appointment power.
25. 424 U.S. at 126.
26. 424 U.S. at 126. The Court has thus retained that part of Germaine that required all officers of the United States to be appointed in compliance with article II. See note 21 supra. This Germaine interpretation of article II may reasonably be invoked once an initial determination that an office meets the substantial authority test has been made. See note 22 supra.
27. See 424 U.S. at 126 n.162. The Court in Buckley implied that distinguishing federal employees from officers of the United States was a simple matter, noting that "[e]mployees are lesser functionaries subordinate to officers of the United States." 424 U.S. at 126 n.162 (citations omitted). However, if that standard were applied to either the postmaster first class in Myers or the judicial clerk in Hennen, both workers would appear to be employees—a result in direct conflict with the holdings of these cases.

It is worth noting that this employee-officer distinction has also served to distinguish other nonofficer groups such as agents and contractors. See United States v. Germaine, 99 U.S. 508, 510 (1879). Given the enormous growth of the federal administrative system and its complicated interrelationships, the Court's test seems inadequate. It is unfortunate that the Court did not clarify this issue in Buckley.
28. 424 U.S. at 269-70.
29. Justice White referred to the FEC's involvement in three aspects of the election laws: (1) the limitations on political contributions and expenditures; (2) the reporting and disclosure requirements for political contributions and expenditures; and (3) the public financing of presidential primary and general election campaigns. 424 U.S. at 270.
30. 424 U.S. at 270.
Although this reasoning is somewhat tautological, it does provide a more principled basis for future decisions than the intuitive comparisons suggested by the majority.\(^{31}\) It is, at least, meaningful to apply the “primary agency” and “independence” criteria described by Justice White to measure significant authority. On the other hand, it is impossible to order systematically, as the comparison technique requires, the significance of the authority exercised by, illustratively, a custom collector’s clerk,\(^{32}\) a United States assistant treasurer’s clerk,\(^{33}\) a navy paymaster’s clerk,\(^{34}\) and a judicial clerk.\(^{35}\) Regardless of where and how the lower line is drawn, at the very least those individuals who exercise sufficiently significant authority to pose a separation of powers problem are to be deemed, under Buckley, “officers” of the United States who must be appointed in accordance with the requirements of article II.

Once it is decided that a government official is such an officer, it then must be determined whether one of the appointments clause’s two textual exceptions applies to the officer in question. The first exception provides that any officer whose selection is governed by a constitutional provision other than the appointments clause will not be subject to the article II procedures.\(^{36}\) The Circuit Court of Appeals for the District of Columbia accepted the argument that the “otherwise provided for” exception could be invoked in Buckley by construing the FEC as a “legislative agency”—that is, an agency designed primarily to “carry out appropriate legislative functions.”\(^ {37}\) The court appeared to find the authority for the appointment by Congress of officers of such agencies in the necessary and proper clause.\(^ {38}\)

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31. The significant authority test is similar to the “reasonable man” standard in tort and the “fair play and substantial justice” standard in jurisdictional inquiries. All require elaboration, which Justice White’s concurrence attempts to supply in this case.

32. United States v. Smith, 124 U.S. 525 (1888) (held not to be an officer of the United States).

33. United States v. Hartwell, 73 U.S. (6 Wall.) 385 (1867) (held to be an officer of the United States).

34. United States v. Mouat, 124 U.S. 303 (1888) (held not to be an officer of the United States).

35. Ex parte Hennen, 38 U.S. (13 Pet.) 230 (1839) (held to be an officer of the United States). The holdings of these cases dealing with the importance of particular positions simply cannot be reconciled in a meaningful or consistent way on the basis of the authority vested in them.

36. See text at note 15 supra.

37. Buckley v. Valeo, 519 F.2d 817, 890 (D.C. Cir. 1975). It was on the basis of a “legislative agency” theory that the court of appeals held constitutional those powers of the FEC that were ripe for adjudication. The term “legislative agency” appears to have been coined by the court of appeals in deciding Buckley, since there is no statutory definition or prior case law use of the term. See Note, Federal Election Reform: An Examination of the Constitutionality of the Federal Election Commission, 51 Notre Dame Law. 451, 452-53 (1976).

However, this position was rejected by the Supreme Court, which, in holding that “there is no provision of the Constitution remotely providing any alternative means for the selection of the members of the Commission or for anybody like them,” removed the FEC from the scope of the “otherwise provided for” language of the appointments clause. By strictly construing this language, the Court closed a potentially enormous loophole that would have permitted Congress to circumvent the requirements of article II—including its carefully crafted checks and balances—through the use of the necessary and proper clause.

The second textual exception, which is referred to as the “excepting clause,” provides an alternative appointment method for “Inferior Officers.” Although the appointments clause stipulates that certain listed officers, such as judges and ambassadors, must be nominated by the President and approved by the Senate, inferior officers may instead, if Congress so chooses, be appointed by the President alone, the courts, or the heads of departments. The scope of this alternative, however, is uncertain. The Supreme Court has

39. 424 U.S. at 134-35.
40. 424 U.S. at 127. The Court noted that this holding did not impair “the 'inherent power of Congress' to appoint its own officers,” 424 U.S. at 127, because an alternative rationale could be found in art. I, § 2, cl. 5 (stating that “[t]he House of Representatives shall choose their Speaker and other Officers; . . .”) and in art. I, § 3, cl. 5 (stating that “[t]he Senate shall choose their other Officers, and also a President pro tempore . . .”). 424 U.S. at 127.

The claim that Congress could directly appoint FEC Commissioners was based on both the plenary authority of Congress to regulate elections (U.S. Const. art. I, § 4, discussed in 424 U.S. at 131), and, as mentioned above, its necessary and proper clause power to create offices (U.S. Const. art. I, § 8, cl. 18, discussed in 424 U.S. at 134-35). The Court noted, however, that “Congress has plenary authority in all areas in which it has substantive legislative jurisdiction . . . so long as the exercise of that authority does not offend some other constitutional restriction.” 424 U.S. at 132 (citation omitted). Therefore, according to the Court, any congressional authority of appointment based on these legislative powers would be circumscribed by the terms of the appointments clause. In the Court's view, article II requires that “[u]nless their selection is elsewhere provided for, all officers of the United States are to be appointed in accordance with the Clause.” 424 U.S. at 132 (emphasis original). Since congressional power to regulate elections or to create offices does not grant authority to exceed this express limitation of article II, Congress cannot “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.” 424 U.S. at 135.

41. It is interesting to note, however, that the ultimate holding of Buckley is not that the FEC is unconstitutionally appointed but rather that, as appointed, it cannot exercise the powers assigned to it. See 424 U.S. at 143. This holding actually appears to support the legislative agency concept. Instead of holding the method by which the Commissioners were appointed unconstitutional, the Court found that certain powers were not “sufficiently removed from the administration and enforcement of public law to allow [them] to be performed by the present Commission.” 424 U.S. at 141. Such an approach is not consistent with a decision based on article II. If the appointments clause is indeed the reason that the FEC is unconstitutional, it is the appointment method, not the power grants, that offends article II.

42. The clause is reprinted in text at note 12 supra.
never attempted to distinguish an "officer" from an "inferior officer." Consequently the question of which officers are subject to the excepting clause remains open.

In addition, the range of choices available to Congress requires comment. In *Buckley*, where the method by which the FEC was appointed clearly did not satisfy the article II procedures for "superior" officers, the question facing the Court was whether the excepting clause could "somehow be read to include Congress or its officers as among those in whom the appointment power may be vested." The two arguments advanced to support such a reading of the excepting clause were rejected by the Court. First, it dismissed on textual grounds the claim that the term "Heads of Departments" should be construed to include Congress or its officers:

The phrase "Heads of Departments," used as it is in conjunction with the phrase "Courts of Law," suggests that the Departments referred to are themselves in the Executive Branch or at least have some connection with that branch. While the Clause expressly authorizes Congress to vest the appointment of certain officers in the "Courts of Law," the absence of similar language to include Congress must mean that neither Congress nor its officers were included within the language "Heads of Departments" in this part of cl. 2.

Although the framers left virtually no indication of what they meant by the term, the Supreme Court's patently reasonable literal construction is supported by substantial judicial precedent.

More importantly, this construction is supported by the separation of powers considerations that underlie the appointments clause—considerations that were evident in the Court's response to the government's second, more general, argument that "because the Framers had no intention of relegating Congress to a position below that of the co-equal Judicial and Executive Branches of the National Government, the Appointments Clause must somehow be read to in-

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43. See E. Corwin, *The President: Office and Powers* 1787-1957, at 135 (1957). The line between inferior officers and employees is also unclear. See note 27 supra. The Court chose to proceed without determining if the FEC Commissioners were inferior officers. Because it found that the congressional officers in whom the FEC appointments had been vested were not included in the excepting clause and, therefore, that the appointment method could not be utilized in any event, if it had no reason to reach the question. 424 U.S. at 131-32. See notes 44-51 infra and accompanying text.

44. 424 U.S. at 128-29.

45. 424 U.S. at 127.

46. The excepting clause was added on September 25, 1787, a mere two days before adjournment. Having failed to pass the first time on a closely divided vote, it was approved because it was "too necessary" to be excluded. See M. Farrand, supra note 14, at 627-28. It is impossible to tell from the sketchy discussion relating almost exclusively to the need for the provision as a whole what the scope of the clause was intended to be.

47. Germaine supports this reading of the phrase. See 99 U.S. at 510-11.
clude the Congress or its officers as among those in whom the appointment power must be vested." In responding to this claim, the Court relied heavily upon the records of the Constitutional Convention. It compared interim drafts of the Constitution, which vested part of the appointment power in the Senate alone, with the final draft of article II, which contains no provision for congressional control of appointments. The Court believed this to be "a deliberate change made by the Framers with the intent to deny Congress any authority itself to appoint those who were 'Officers of the United States.'" This change, according to the Court, was motivated by separation of powers considerations—specifically, the "fear that [Congress] will aggrandize itself at the expense of the other two branches." In short, it appears that the list of alternative locations for vesting of the appointments power will be read literally and exclusively by the Court.

The Court's discussion of these three issues—the meaning of the phrase "Officers of the United States," the effect of the "otherwise provided for" textual exception, and the scope of the excepting clause—demonstrates that the appointments clause is an integral part of a broader constitutional scheme that implements basic principles thought by the Framers to be essential to just government. As Justice White explained in his concurrence:

> The language of the Appointments Clause is not mere inadvertence. . . . The appointment power was a major building block fitted into the constitutional structure designed to avoid the accumulation or exercise of arbitrary power by the Federal Government.

48. 424 U.S. at 128-29.

49. 424 U.S. at 129-31. The original draft submitted by the Committee of Detail in its August 6, 1787 report contained the following two appointment provisions:

> Article IX, Section 1. The Senate of the United States shall have the power . . . to appoint Ambassadors, and Judges of the supreme court.

> Article X, Section 2. [The President] shall commission all the officers of the United States; and shall appoint officers in all cases not otherwise provided for by this Constitution.

M. Farrand, supra note 14, at 183, 185. The version adopted as art. II, § 2, cl. 2 makes no provision for independent senatorial appointments, but instead requires the Senate's advice and consent. See text at note 15 supra.

50. 424 U.S. at 129. The Court appeared to read this change, coupled with a relaxation of the art. I, § 6 limitations on congressional eligibility for office, as evidence of a compromise. See 424 U.S. at 131. However, the Court viewed the meaning of "officers" as remaining the same in both versions, and as encompassing "all appointed officials exercising responsibility under the public laws of the Nation." 424 U.S. at 131. Yet the records of the Convention offer little support for this theory. The Framers, unable to reach an agreement on the appointment provisions suggested by the Committee of Detail, see note 49 supra, referred the problem to the Committee of Eleven for further discussion. See M. Farrand, supra note 14, at 493, 495. The Committee's report was not acted on until September 7, 1787, when it was passed in the closing days of the Convention with virtually no discussion. Id. at 538-40. It is very difficult to draw any accurate inferences from the sketchy history, particularly as to any consensus of the Framers.

51. 424 U.S. at 129.
separation-of-powers principle was implemented by a series of provisions, among which was the knowing decision that Congress was to have no power whatsoever to appoint federal officers . . . . . . . A fundamental tenet was that the same persons should not both legislate and administer the laws.52

II. ALTERNATIVE SOURCES OF CONGRESSIONAL POWER

As discussed in the previous section, the Supreme Court's decision in *Buckley* placed strict limitations upon the ability of Congress to control directly the appointment of government officers. Yet its decision did not foreclose all of the possible means by which Congress might attempt to exert influence. This section, therefore, will analyze alternative authorizations for congressional involvement derived from the appointments clause of article II and the necessary and proper clause of article I.

It is appropriate to return briefly to the language of the appointments clause to make two additional inquiries about Congress' ability to influence the appointment process. First, the appointments clause explicitly assigns the Senate special duties; it provides that, absent congressional invocation of the alternative appointment methods for inferior officers found in the excepting clause, all federal appointments not provided for elsewhere in the Constitution are to be made by the President "by and with the advice and consent of the Senate."53  Commentators54 and case law55 interpret this

52. 424 U.S. at 271-72 (footnote omitted). The consistency of the entire process of appointing and removing members of regulatory agencies is evidenced by the Court's treatment of the "removal power" cases, which have held that Congress can limit the power of the President to remove the officers of certain regulatory agencies. See Weiner v. United States, 357 U.S. 349 (1958); Humphrey's Ext. v. United States, 295 U.S. 602 (1935). These cases, while recognizing the executive's constitutional authority to appoint such officers, stressed the independent character of these agencies and emphasized the need for the agencies to be free from the influence of the executive. See 424 U.S. at 136. Similarly, *Buckley* can be viewed as imposing complementary controls on congressional influence of independent agencies. The basic constitutional scheme envisions the formulation of policy by Congress through enabling legislation, with the executive supplementing these policy choices by selecting those who will administer the law. Any other result in *Buckley* would have allowed Congress both to direct policy when establishing the independent agency and to control law enforcement by influencing the appointment of administrators.


55. The Supreme Court has held the the act of appointment is "the sole act of the President," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157 (1803), but that "the power of appointment by the Executive is restricted in its exercise by the provision that the Senate, a part of the legislative branch of the Government, may check the action of the Executive by rejecting the officers he selects." *Myers v. United
phrase to mean that the Senate possesses a "veto" power rather than the general authority to assist the president in the selection of nominees.

It is important, however, not to underestimate the potential significance of the Senate's advice and consent power. Theoretically, the Senate could veto all presidential appointments until the particular individual it most favored was nominated. As a practical matter, however, the veto is currently not as significant as it might be, for tradition and the well-entrenched reciprocal arrangement referred to as "senatorial courtesy" suggest that it will only be used in extreme cases.

The possibility still remains that the language providing for a senatorial "veto" might be construed as establishing only a minimum confirmation requirement that can be augmented by requiring some other body—such as the House of Representatives—also to approve the appointment. 

Buckley, however, implicitly rejected the use of such an augmented confirmation procedure. When discussing the method of selecting the FEC commissioners, the Court observed that, "although two members of the Commission are initially selected by the President, his nominations are subject to confirmation not merely by the Senate, but by the House of Representatives as well." With respect to these two commissioners, the only deviation from the procedural requirements of the appointments clause was the dual confirmation provision. Later in the opinion, the Court stated that "the ultimate question is which, if any, of those powers may be exercised by the present voting Commissioners, none of whom was appointed as provided by [the appointments] clause." It is apparent, therefore, that the Senate's confirmation authority was not viewed as authorizing supplemental confirmation procedures.

States, 272 U.S. 50, 119 (1926). Additionally, the Court in United States v. Ferreira, 54 U.S. 40, 51 (1851), stated that "the power of appointment is in the President, by and with the advice and consent of the Senate; and Congress could not by law, designate the persons to fill these offices." See 3 Op. ATTY. GEN. 188 (1837). Finally, in Buckley itself the Court stated: "The President is given, not the power to appoint public officers of the United States, but only the right to nominate them, and a provision is inserted by virtue of which Congress may require Senate confirmation of his nominees." 424 U.S. at 131 (emphasis original).


57. See APPOINTMENTS TO THE REGULATORY AGENCIES, supra note 56, at 400-02; E. Corwin, supra note 43, at 74. However, some degree of gamesmanship is involved, which sometimes results in a sacrifice of the merits of an appointment. As Corwin points out: "If the President in nominating to an office within a state fails to consult the preferences of the Senator or Senators of his own party from that state, he is very likely to see the appointment defeated on an appeal to the Senate by the slighted member or members." Id. at 73.

58. For the text of the statute, see note 5 supra.

59. 424 U.S. at 126.

60. 424 U.S. at 137 (emphasis added to "none of whom was").
Second, with the Court in *Buckley* refusing to read the excepting clause as allowing Congress to vest the appointment power in its own officers, Congress is limited to vesting the power in “the President alone, the Courts of Law, or the Heads of Departments.” Clearly Congress’ vesting appointment authority in one of the available alternatives would not enhance congressional influence. At best, placing the authority in the courts would deprive a hostile executive branch of substantial appointments power. However, whatever influence Congress might gain in depriving the President or his department heads of flexibility in choosing inferior officers would be outweighed by the loss of the Senate’s power to confirm appointees selected pursuant to the excepting clause.

It is apparent, therefore, that article II gives Congress little ability to influence significantly the appointment process. If Congress is to have a more important role, the authority for that activity must be found elsewhere. Thus, the remainder of this section will explore the extent to which Congress can utilize its necessary and proper powers to specify the qualifications an individual must possess to hold an office.

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61. See notes 44-51 *supra* and accompanying text.


63. There is evidence that this was Congress’ motivation in enacting the FEC appointment method. See 120 CONG. REC. 7907 (1974) (remarks of Representatives Mathis, Hayes, and Thompson). Of course, such narrowing of presidential power would be possible only in regard to “inferior officers”—a category that the Supreme Court has never clearly defined. See text at note 43 *supra*. Looking to the courts, however, raises further constitutional problems. First, the text of article II prohibits court appointments of superior officers, although the Court’s failure to distinguish between inferior and superior officers makes the reach of this prohibition unclear. See note 43 *supra*. In addition, even though the excepting clause appears to permit the court’s appointment of any inferior officer, separation of powers considerations might limit the court’s powers to only those inferior officers exercising significant judicial authority. This reading, which restricts congressional freedom further than seems to be suggested by article II, finds support in the Court’s ruling in *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839). In that case, the Court specifically found that the appointment power under the excepting clause “was no doubt intended to be exercised by the department of government to which the officer to be appointed most appropriately belonged.” 38 U.S. at 258. Finally, there are problems in having the courts, which ultimately decide the rights and duties of parties affected by legislative enactments, appoint the individuals who will enforce these enactments. This joinder of executive and judicial power would appear to be precluded by separation of powers considerations. Under article III, the judiciary is limited to the exercise of the “judicial power of the United States.” Under this same article, this power is to “extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties.” U.S. CONST. art. III, § 2. The Court has held that Congress cannot vest powers in the courts beyond those falling under this “case or controversy” requirement. See *Muskrat v. United States*, 219 U.S. 346 (1911). While many of the Court’s decisions are concerned with the question whether a court itself can exercise a nonjudicial function, there is no apparent reason why the prohibition would not extend to indirect influence obtained by appointing others to exercise these same functions.

64. The Court in *Buckley* expressly foreclosed the use of this power to permit direct appointments by Congress. See notes 36-41 and accompanying text *supra*. This holding imposes an outer limit on the use of this power in the appointment context.
The establishment of qualifications for holding federal offices is not one of the enumerated powers. It is, however, beyond dispute that the creation and management of federal offices is a concern of the federal government. The Court has consistently recognized that Congress possesses an implied power under the necessary and proper clause to create the offices needed to fulfill the purposes of duly enacted legislation. In addition, article II specifically gives the federal government the power to fill these offices. As a practical matter, criteria that narrow the range of candidates for a government office must be formulated if the filling of constitutionally authorized positions is not to be done arbitrarily and chaotically, and if programs enacted by the legislature are to be carried out effectively. Surely the power to specify qualifications for federal positions rests somewhere within the federal government itself. It would, after all, be incongruous to assert that the creation of and appointment to federal offices is a federal concern but that, because the power to specify the qualifications of such officers is not expressly delegated to the federal government, it is retained by the states.

Therefore, the next question is which branch or branches of the federal government should be allowed to exercise this power. It would be quite plausible to consider the power to set qualifications as a mere adjunct to the executive's article II appointment power. Such a proposition is not disproved by the fact that Congress has itself enacted many statutes that specify eligibility requirements be-

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65. In Myers v. United States, 272 U.S. 52, 264-65 (1926), the dissenting opinion of Justice Brandeis noted:

There is not a word in the Constitution which in terms authorizes Congress to limit the President's freedom of choice in making nominations for executive offices. It is to appointment as distinguished from nomination that the Constitution imposes in terms the requirement of Senatorial consent.

66. See, e.g., Buckley v. Valeo, 424 U.S. 1, 138 (1976); Shurtleff v. United States, 189 U.S. 311, 312 (1903); E. Corwin, supra note 43, at 70; C. Antieau, supra note 54, at 517.

67. See 13 Op. Att'y Gen. 516, 520 (1871). Of course, this applies only to offices created by act of Congress. In the case of constitutional offices, the Constitution may be read as specifically establishing the permissible range of fixed qualifications and leaving some informal discretion to the appointing authority. In this situation, there would be a strong implication against a power freely to modify or add qualifications for a particular office. State court decisions that have so held are collected in Annot., 34 A.L.R.2d 155, 168 (1954). This same limitation is evident in the federal debate over Congress' right to set substantive qualifications on its own membership. See Powell v. McCormack, 395 U.S. 486 (1969).

68. If this argument were accepted, then the article II grant would be merely a formality. The states would control appointments with only pro forma approval by the article II appointment authority. This interpretation of article II was rejected implicitly in Buckley. 424 U.S. at 125. See 13 Op. Att'y Gen. 516 (1871); note 22 supra.

69. For a collection of some of these statutes, see Myers v. United States, 272 U.S. 52, 265-74 nn.35-56 (1926) (Brandeis, J., dissenting). Perhaps the most notable additional statute is the Civil Service Act, 5 U.S.C. §§ 1101-1105 (1970). As Justice Brandeis noted:
cause the constitutionality of these statutes has never been tested.\textsuperscript{70}

Nevertheless, this Note argues that if Congress has the authority under the necessary and proper clause to create a federal office for the public good, then Congress should also be able, under the same clause, to require the appointment of qualified officers by placing limitations upon the appointing authority's freedom of choice. The rationale for recognizing this power is that it helps Congress ensure that the purposes of its enactments are fulfilled.\textsuperscript{71} This is precisely the rationale used by numerous courts in upholding the power of state legislatures to prescribe the qualifications necessary for holding state office.\textsuperscript{72}

It should not be presumed that the congressional power to specify qualifications is unlimited, for it cannot be exercised inconsistently

\textsuperscript{70} The exercise of the power to set qualifications has never been explicitly sanctioned by the Court. See C. Antieau, supra note 54, at 214. There is dicta, however, to the effect that Congress is empowered to do so. See Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866). In Ex parte Garland, 71 U.S. (4 Wall.) 333, 378 (1866), the Court distinguished Congress' power to set qualifications for office from the power to require an oath for admission to the federal bar:

'The profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution.'

\textsuperscript{71} This is in large part the basis for the Federal Civil Service Act, 5 U.S.C. §§ 1101-1105 (1970). It was passed and later amended to prevent wholesale patronage abuse of the federal appointment power. See D. Rosenbloom, Federal Service and the Constitution 77 (1971); Salmon, supra note 54, at 90.

\textsuperscript{72} See, e.g., State v. Von Baumbach, 12 Wis. 310, 313 (1860) (non-constitutional offices are 'subjected to the discretion of the Legislature which represents the sovereign power of the state, and can make such rules as it deems wholesome and proper for the maintenance of good government'); Rogers v. City of Buffalo, 123 N.Y. 173, 25 N.E. 274 (1890); Fristam v. City of Sheridan, 66 Wyo. 143, 206 P.2d 741 (1949). Other state cases are collected in Annot., 54 A.L.R.2d 155, 168 (1954).

It might be argued that state cases provide no authority for the federal context because state legislatures and Congress derive their powers from different sources. State constitutions initially grant plenary power to the legislature and then circumscribe that power by specific limitations. See, e.g., State ex rel. Workman v. Goldthait, 172 Ind. 210, 220, 87 N.E. 133, 136 (1909). In contrast, the United States Constitution delegates specific powers to Congress; in the absence of these grants, Congress has no power. C. Antieau, supra note 43, at 187. However, in the state cases, the courts must ultimately resort to a separation of powers analysis to resolve conflicts between executive appointment power and legislative control over offices. While the United States Congress' power over offices derives from the necessary and proper clause, and not from an enumerated power, the separation of powers considerations are essentially the same. It is thus useful for federal courts to draw upon state cases, where the state appointment process closely parallels the federal, as a model of the proper balance among governmental branches.
with other constitutional provisions—in particular, with article II. This conclusion is not dictated by the holding in Buckley, which circumscribed the power to specify how the appointment is to be made, not the power to place restrictions on whom the President may appoint. Nevertheless, the principle upon which the Court based its conclusion should not be read narrowly:

Congress may undoubtedly under the Necessary and Proper Clause create “offices” in the generic sense and provide such method of appointment to those “offices” as it chooses. But Congress' power under that Clause is inevitably bounded by the express language of Art. II, § 2, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be “Officers of the United States.”

This language appears to state that any use of the necessary and proper clause—not just an attempt to alter how the appointment is made—must comport with article II.

This language is consistent with the conclusion of United States Attorney General Akerman, who recognized in an 1871 opinion that the appointments clause may constrain any congressional efforts to influence the appointments process:

If to appoint is merely to do a formal act, that is to authenticate a selection not made by the appointing power, then there is no constitutional objection . . . . But if appointment implies an exercise of judgment and will, the officer must be selected according to the judgment and will of the person or body in whom the appointing power is vested by the Constitution, and a mode of selection which gives no room for the exercise of that judgment and will is inadmissible.

This Note has already demonstrated that exercise of the power of appointment is considerably more than “a formal act,” for it vests

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73. The Court stated:
Appellee Commission . . . contend[s] . . . that whatever shortcomings the provisions for the appointment of members of the Commission might have under Art. II, Congress had ample authority under the Necessary and Proper Clause of Art. I to effectuate this result. We do not agree. The proper inquiry when considering the Necessary and Proper Clause is not the authority of Congress to create an office or a commission, which is broad indeed, but rather its authority to provide that its own officers may make appointments to such office or commission.

So framed, the claim that Congress may provide for this manner of appointment under the Necessary and Proper Clause of Art. I is without merit . . . . 424 U.S. at 134-35 (emphasis added). Some draw a distinction between the nomination and appointment process. See note 65 supra. So viewed, Buckley, which dealt with appointment, should not necessarily be applied to the nomination aspect.

74. 424 U.S. at 138-39.

75. One commentator has observed that the permissive nature of the civil service system was probably a result of Akerman's conclusion that any restriction on the "judgment and will" of the President with respect to appointments would be unconstitutional. See Frug, Does the Constitution Prevent the Discharge of Civil Service Employees?, 124 U. Pa. L. Rev. 942, 954 n.59 (1976).

76. 13 OP. ATTY. GEN. 516, 518 (1871).

77. See Keim v. United States, 177 U.S. 290, 293 (1900); note 22 supra.
in the appointing authority the ability to influence policy in significant ways. It appears, therefore, that any authority possessed by Congress to prescribe the qualifications necessary to hold an office must be restricted 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." 78

The Akerman opinion, however, expressly declined to define the point at which a congressional attempt to influence the appointment process so significantly infringes upon the prerogative of the executive that it is rendered unconstitutional. 79 Indeed, any effort to draw such a line encounters considerable difficulty. On the one hand, imposition by Congress of criteria so specific as to narrow the "choice" to one particular individual would constitute indirect exercise of the appointment function—a result inconsistent with separation of powers. 80 On the other hand, as the Framers acknowledged when they provided for the Senate's veto power, the executive does not need complete, unfettered discretion. 81 The power to set qualifications, however, has a far greater potential for curtailing executive discretion than individual vetoes of each appointment. 82 Through these requirements, Congress can effectively foreclose any consideration of a wide range of individuals. 83

78. 13 OP. ATT. GEN. 516, 520 (1871).
79. Id. at 525.
80. See text at note 98 infra. Indirect usurpation was explicitly condemned in Springer v. Philippine Islands, 277 U.S. 189, 202 (1928), and certainly runs afoul of the Court's holding in Buckley concerning Congress' inability to appoint. See 424 U.S. at 135. There have, however, been occasions when Congress has seemed to usurp power to the point of naming a specific individual. See Note, Power of Appointment to Public Office Under the Federal Constitution, 42 HARV. L. REV. 426, 430 (1929). The Buckley Court provides an explanation for these instances in holding that Congress may provide a method of appointment outside of the provisions of article II when the officers "perform duties only in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit them being performed by persons not 'Officers of the United States.'" 424 U.S. at 139. Such direct congressional appointments as that of John Trumbull to paint a portrait, 3 Stat. 400 (1817), fit nicely into the latter category of the Court's exception.

This same type of super-qualification could be used to disqualify a particular individual. However, this would violate the provision against the passage of "bills of attainder" found in art. 1, § 9, cl. 3. See United States v. Lovett, 328 U.S. 303 (1946).

81. As explained by the Court in Myers:
    The rejection of a nominee of the President for a particular office does not greatly embarrass him in the conscientious discharge of his high duties in the selection of those who are to aid him, because the President usually has an ample field from which to select for office, according to his preference, competent and capable men. 272 U.S. at 121.

82. See notes 54-57 supra and accompanying text.

83. There is also a significant difference between the Senate's failure to approve all but the desired candidate and a statute that forecloses all but one "choice." In the latter case, the President's failure to appoint the specified individual could sub-
No federal cases have attempted to delineate the boundary between permissible qualification standards and impermissible preemption of the executive's ability to choose his nominees, but several state cases have addressed this issue. These courts have generally held that state legislatures may prescribe the characteristics an individual must possess "so long as the restrictions can be classed as qualification[s]"—that is, if the restrictions are general, are designed to ensure that the appointee possesses the skills or background necessary to perform adequately the duties of the office, and are intended to help the executive make an informed appointment, then the restrictions are permissible.

Applying this approach in the federal context effectively balances the appointment prerogatives of the executive with the proper responsibilities of Congress. The necessary and proper clause empowers Congress to create offices for certain public purposes and to specify the qualifications that individuals must possess to hold such offices. These qualifications, however, must be designed both to further valid legislative goals and to assist the executive in making an informed judgment. Congress may not, in effect, exercise its necessary and proper powers to usurp the executive's right under the appointments clause to make the final choice.

The authority to establish general qualifications for holding federal office has been used by Congress in a variety of contexts. It has, for example, occasionally established qualification requirements based on age, experience, educational background, or political affiliation. These standards are intended to ensure the comp-
tence of the appointee or the political neutrality of the particular agency—objectives that are consistent with the broader goals embodied in the necessary and proper clause and, thus, are not offensive to the appointments clause.

Congress has also used the technique of restricting the executive's choice to a list of eligible persons compiled either by Congress itself or by officials appointed by Congress. The task of delineating a boundary between permissible qualification standards and impermissible preemption of the executive's appointment power is especially difficult in this case. The most important example of the use of the list is the federal civil service system. This scheme utilizes an examination that evaluates the aptitude of the candidates. The Civil Service Commission then certifies a certain number of the top performers to the appointing authority as candidates eligible for selection.

The Supreme Court has never considered whether these "list provisions" of the Federal Civil Service Act comport with the appointments clause. However, the constitutionality of the list concept was discussed by Attorney General Akerman in his 1871 opinion. He first considered whether Congress could require the President to appoint to a vacant office the individual who had the best score on the civil service examination and concluded that such a requirement substituted the judgment of Congress for that of the President, thereby violating the appointments clause. He then considered whether Congress could require the executive to choose its nominee from a list of candidates who possessed certain qualifications, such as a minimum score on the examination, and decided as follows:

Congress could require that officers shall be of American citizenship or of a certain age, that judges should be of the legal profession and

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91. Whether this actually works is a question of some controversy. See APPOINTMENTS TO THE REGULATORY AGENCIES, supra note 56, at 386, 402.
92. See Myers v. United States, 272 U.S. 52, 274 n.56 (1926) (Brandeis, J., dissenting).
93. See notes 76-83 supra and accompanying text.
97. However, there is dictum to the effect that it is constitutional. See In re Miller, 5 Mackey 507 (D.C. 1887), error dismissed, 140 U.S. 690 (1891). Various specific provisions of the Act have been attacked and directly passed on by the Court. See Hampton v. Wong, 426 U.S. 88 (1976) (striking down provisions making aliens ineligible for civil service posts); Hilton v. Sullivan, 334 U.S. 323 (1948) (upholding preference of veterans over nonveterans in retention decisions during layoffs); Gianatasio v. Kaplan, 257 N.Y. 531, 178 N.E. 782 (1931), appeal dismissed, 284 U.S. 595 (1932) (veteran's preference challenge dismissed for want of a substantial federal question).
98. 13 Op. ATTY. GEN. 516, 523 (1871).
of a certain standing in the profession, and still leave room to the
appointing power for the exercise of its own judgment and will; and
I am not prepared to affirm that to go further, and require that the
selection shall be made from persons found by an examining board
to be qualified in such particulars as diligence, scholarship, integrity,
good manners, and attachment to the Government, would impose an
unconstitutional limitation on the appointing power . . . .

Although the Attorney General conceded the difficulty of determin­
ing precisely how much discretion must be left to the executive under
the appointments clause, he concluded that a selection procedure
similar to the certified list would not necessarily violate the require­
ments of the clause if the list had more than one candidate.

This opinion, of course, does not conclusively demonstrate the
constitutional validity of the certified list. It is useful, therefore, to
consider the manner by which states with similar civil service sys­
tems have dealt with this issue. Direct support for the legislative
use of the certified list can be found in the state civil service cases.
These holdings are grounded in the belief that the civil service tests
objectively assist the executive in ascertaining who is best prepared
to implement legislative programs and do not eliminate executive
discretion. They have recognized that the legislature has a legiti­
aire interest in having properly qualified officials administering the
programs it enacts and that the executive has no valid interest in ap­
pointing incompetent officers.

Although state courts have generally upheld the certified list
appointment procedure in the state civil service cases, they have
not been as sympathetic to the procedure in cases challenging the
method of appointment for directors of state regulatory agencies.
Such results are not surprising. The primary reason for the disparate
treatment is that, unlike civil service appointees, directors of regula­
tory agencies are explicitly vested with considerable discretion to for­
mulate enforcement policy. The decision of who will perform

99. Id. at 524-25.

100. "[T]he difficulty of drawing a line between such limitations as are, and such
as are not, allowed by the Constitution, is no proof that both classes do not exist." Id. at 525.

101. See, e.g., N.Y. CIV. SERV. LAW §§ 50, 60-61 (McKinney 1973); Wis.

102. See, e.g., In re O'Connor, 181 N.Y.S.2d 456, 470 (1958); Ricks v. Depart­
ment of State Civil Serv., 200 La. 341, 8 So. 2d 49 (1942); State ex rel. Buell v.
Frear, 146 Wis. 291, 131 N.W. 832 (1911).

103. The tests [on which the list is to be based] are to be practical in their nature
and appropriate to ascertain the fitness and skill of the applicant and impose
no unreasonable conditions or restrictions on the appointing officer in the exer­
cise of his power, and clearly serve to aid him in selecting competent servants.

104. See, e.g., Westlake v. Merrit, 95 So. 662 (1923); State ex rel. Childs v.
Griffin, 69 Minn. 311, 72 N.W. 117 (1897).

105. Regulatory agency enabling acts frequently provide for enforcement discre­
regulatory functions is, therefore, based primarily on the executive's subjective evaluation of the candidate's policy orientation. On the other hand, the decision as to who can best perform the civil service function need in general involve only a minimum of subjective considerations, since more or less quantitatively measurable aptitude, rather than a particular policy orientation, is most important. That the use of the certified list in the regulatory agency context has been resisted is thus not surprising; such a procedure might unjustifiably infringe upon the executive's enforcement policy-making discretion.

The distinction has equal validity in the federal context. With respect to officers who have no authority to make national policy, Congress, through the civil service framework, should be able to require the President to choose from a list of those individuals who have excelled on an objective examination. Such a procedure, however, would not be appropriate for selection of directors of regulatory agencies. Although Congress may require appointees to possess certain general qualifications regarding age, experience, or political affiliation deemed necessary for managing a regulatory agency or for ensuring nonpartisanship, it may not require the executive to choose from a list of candidates that presumably will adhere to the enforcement policies Congress considers most desirable. The subjective decisions inherent in regulatory agency administration require under separation of powers principles that the President be allowed to choose officers for these agencies, subject only to broad, general qualification restrictions and the Senate's article II confirmation power.

In short, the necessary and proper clause authorizes Congress to specify certain qualifications that must be met by officeholders. However, this power is limited by the same constitutional principles to be placed in an associated commission. See Federal Trade Commission Act, 15 U.S.C. §§ 45-46 (1970); Federal Election Campaign Act, 2 U.S.C. §§ 437c-437g (Supp. V 1975). Both the federal and state civil service statutes recognize exemptions for these types of officers. See, e.g., 5 U.S.C. § 2102(a)(1)(B) (1970) (excepting from civil service those officers appointed by the President with the advice and consent of the Senate); N.Y. Civ. Serv. Law § 35 (McKinney 1973). Some states provide for a special "exempt" class, which includes positions that by either the nature of their duties or relation to the appointing officer are of a confidential nature and therefore not amenable to objective testing for fitness. See, e.g., N.Y. Civ. Serv. Law § 41 (McKinney 1973). But see D. Rosenbloom, supra note 71, at 12-13 (pointing out the large amount of "unofficial" enforcement discretion lodged in civil service functionaries).

106. The elimination of suspect discretion in the appointing authority was the basis for the replacement of the spoils system with the merit system. See note 71 supra.

107. Of course, it is not legitimate, even in the civil service setting, for the legislature to usurp the executive's appointment discretion by requiring certification of a "list" of one. See notes 76-80 supra.

108. See note 52 supra.
articulated in article II that prohibit congressional appointments. Thus, Congress may not attempt to influence the process by which government officers are selected if the effect of such involvement is to impair the executive's appointment power.