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The Consumer Financial Protection Bureau's Appointment with Trouble

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THE CONSUMER FINANCIAL PROTECTION BUREAU'S APPOINTMENT WITH TROUBLE

KENT BARNETT*

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ABSTRACT

This article considers whether the Consumer Financial Protection Bureau Director's appointment of the Bureau's Deputy Director comports with the Appointments Clause. The Dodd-Frank Wall Street Reform and Consumer Protection Act established the Bureau in July 2010, as well as the offices of the Bureau's Director and Deputy Director, to coordinate the regulation and enforcement of federal consumer-financial-protection laws. Under that act, the

* Visiting Assistant Professor of Law, University of Kentucky College of Law. I deeply appreciate Todd Zywicki, Michael Healy, Tuan Samahon, Mark Kightlinger, Scott R. Bauries, Neomi Rao, and Erik Encarnación's valuable comments to this article. I also greatly appreciate the numerous helpful suggestions from other faculty members of the University of Kentucky College of Law and the editors of the *American University Law Review*.

Director appoints the Deputy Director.[1] The Appointments Clause permits "Heads of Departments" to appoint inferior officers like the Deputy Director. But it is unclear if the Bureau is a "department" and thus if the Director is a department head who can appoint the Deputy Director.[2] Although I argue that the Bureau should be deemed a department, I explain why the Supreme Court's recent decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*[3] and prior Appointments Clause jurisprudence suggest otherwise. Indeed, this article provides one of the first analyses and applications of the new definition of "department" announced in *Free Enterprise Fund*.

An inferior officer's appointment (that of a deputy, no less) may seem inconsequential. But an invalid appointment could, depending on the Deputy Director's duties, lead to unnecessary, time-consuming litigation and perhaps even the invalidation of agency actions for the newly established Bureau in its formative years. If so, the Bureau's opponents may have an additional, yet until now unnoticed, means of disrupting the new Bureau. Congress should, without delay, remedy the Deputy Director's potentially improper appointment.

INTRODUCTION

The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted in July 2010, established the controversial Bureau of Consumer Financial Protection.[4] Controversy continued when President Obama appointed Elizabeth Warren, Harvard Law School professor and former Chair of the Congressional Oversight Panel, as "Assistant to the President" to oversee the Bureau's creation.[5]

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1. Pub. L. No. 111-203, § 1011(b)(5), 124 Stat. 1376, 1964 (2010) (to be codified at 12 U.S.C. § 5491).

2. *See* U.S. CONST. art. II, § 2, cl. 2 ("[T]he 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.").

3. 130 S. Ct. 3138 (2010).

4. Dodd-Frank Act § 1011, 124 Stat. at 1964 (to be codified at 12 U.S.C. § 5491); Jesse Lee, *President Obama Signs Wall Street Reform: No Easy Task*, THE WHITE HOUSE BLOG (July 21, 2010, 2:22 PM), http://www.whitehouse.gov/blog/2010/07/21/president-obama-signs-wall-street-reform-no-easy-task; Jim Puzzanghera, *Consumer protection deal is near; Auto dealers are likely to be largely exempt from the proposed agency's oversight*, L.A. TIMES, June 23, 2010, at B1 (explaining that some groups opposed the agency because of concerns that it would unnecessarily expand government control over the economy).

5. Elizabeth Warren, *Fighting to Protect Consumers*, THE WHITE HOUSE BLOG (Sept. 17, 2010, 6:00 AM), http://www.whitehouse.gov/blog/2010/09/17/fighting-protect-consumers ("The President asked me, and I enthusiastically agreed, to serve as an Assistant to the President and Special Advisor to the Secretary of the Treasury on the Consumer Financial Protection Bureau. He has also asked me to take on the job to

Although the Senate would have had to consent for Warren to become the Bureau's Director,[6] its approval was unnecessary for her appointment as Assistant to the President.[7] Her appointment created significant debate as to whether the President made an improper end-run around the Appointments Clause in Article II of the U.S. Constitution.[8]

This debate has overshadowed perhaps a more consequential, yet easily ignored, officer-appointment question: Will the future appointment of the Bureau's *Deputy* Director—who under the Act can be assigned broad, undefined powers—comply with the Appointments Clause? If not, years of litigation could undermine (and even invalidate) the Bureau's work in which the Deputy Director participates.[9]

The key facts concerning the Bureau and the Deputy Director's appointment are as follows. The Bureau will "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[10] The Bureau is "established in the Federal Reserve System," an independent entity,[11] as "an independent bureau."[12] Although "established in" the Federal Reserve, the Bureau has nearly complete autonomy from the Governors of the Federal

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get the new CFPB started—right now."); Jim Puzzanghera & Peter Nichols, *Warren will mold finance watchdog; For now, Obama gives her an advisory role with the new agency, avoiding Senate fight*, L.A. TIMES, Sept. 16, 2010, at AA1 ("Republicans would strongly oppose her nomination as permanent director."); Alan Zibel & Maya Jackson Randall, *Bank Group's Chief Expects Warren's Nomination Soon*, WALL ST. J. (May 2, 2011, 3:00 PM), http://blogs.wsj.com/washwire/2011/05/02/bank-groups-chief-expects-warrens-nomination-soon/ (noting that the president and chief executive of the Independent Community Bankers of America said that President Obama is likely to nominate Warren as the Bureau's Director, despite likely opposition from Senate Republicans).

6. Dodd-Frank Act § 1011(b)(2), 124 Stat. at 1964 (to be codified at 12 U.S.C. § 5491).

7. *See* Douglas S. Onley, Note, *Treading on Sacred Ground: Congress's Power to Subject White House Advisers to Senate Confirmation*, 37 WM. & MARY L. REV. 1183, 1193–94 (1996) (discussing the status and history of White House advisors); *see also* 3 U.S.C. § 105(a)(1) (2006) ("[T]he President is authorized to appoint and fix the pay of employees in the White House Office . . . .").

8. *See, e.g.*, Bruce Ackerman, *Obama, Warren and the Imperial Presidency*, WALL ST. J., Sept. 22, 2010, at A21 ("During America's first 150 years, Ms. Warren's appointment as a special adviser to the White House would have been unthinkable. Today, it's par for the course.").

9. *See infra* Part IV.

10. Dodd-Frank Act § 1011, 124 Stat. at 1964 (to be codified at 12 U.S.C. § 5491).

11. *Id.* §§ 1011–1012, at 1964–65 (to be codified at 12 U.S.C. §§ 5491–92).

12. *Id.* § 1011(a), at 1964 (to be codified at 12 U.S.C. § 5491). The Bureau also has an independent source of funding. *See id.* § 1017, at 1975 (to be codified at 12 U.S.C. 5497).

Reserve.[13] Indeed, the Director of the Bureau heads the Bureau and has significant powers.[14] One of those powers includes appointing the Deputy Director,[15] an office that Dodd-Frank expressly establishes.[16] The Act does not specify the Deputy Director's duties, but it provides that he or she "shall . . . serve as acting Director in the absence or unavailability of the Director."[17]

Despite being logical and efficient, the Director's appointment of the Deputy Director may violate the Appointments Clause. That clause requires that, as relevant here and as considered in Part I, "Heads of Departments" appoint inferior officers like the Deputy Director.[18] As Part II discusses, the Deputy Director almost certainly qualifies as an inferior officer whom a department head may appoint. Part III argues that the Director should qualify as a department head and thus should be able to appoint the Deputy Director. Yet the Supreme Court's recent 5-4 decision in *Free Enterprise Fund*[19]—decided only weeks before Dodd-Frank's enactment—and the Court's prior Appointments Clause jurisprudence provide a reasonable, and even likely, basis for holding otherwise.[20] Part IV considers the ramifications of the Deputy Director's potentially unconstitutional appointment and provides possible solutions.

The Deputy Director's appointment may at first seem inconsequential. But she will likely be a powerful inferior officer,

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13. *Id.* § 1012(c)(2), at 1965 (to be codified at 12 U.S.C. § 5492) ("The Board of Governors may not—(A) intervene in any matter or proceeding before the Director, including examinations or enforcement actions, unless otherwise specifically provided by law; (B) appoint, direct, or remove any officer or employee of the Bureau; or (C) merge or consolidate the Bureau, or any of the functions or responsibilities of the Bureau, with any division or office of the Board or governors or the Federal reserve banks."); *id.* § 1012(c)(3), at 1964 (to be codified at 12 U.S.C. § 5492) ("No rule or order of the Bureau shall be subject to approval or review by the Board of Governors. The Board of Governors may not delay or prevent the issuance of any rule or order of the Bureau."). Dodd-Frank establishes a Consumer Advisory Board to advise the Bureau on emerging practices in the consumer-financial-services industries. *Id.* § 1014(a), at 1974 (to be codified at 12 U.S.C. § 5494). Dodd-Frank also permits the Financial Stability Oversight Council—comprised of the chairpersons, directors, and secretaries of various federal agencies, including the Director of the Bureau, *id.* § 111(b), at 1392 (to be codified at 12 U.S.C. § 5321)—to veto the Bureau's regulations in certain instances, Dodd-Frank Act § 1023, 124 Stat. at 1985 (to be codified at 12 U.S.C. § 5513).

14. *See, e.g.*, *id.* § 1012(a)–(b), at 1965 (to be codified at 12 U.S.C. § 5492) (listing Bureau's powers and permitting Director to delegate authority); *id.* § 1022(b), at 1980–81 (to be codified at 12 U.S.C. § 5512) (providing significant rulemaking power).

15. *Id.* § 1011(b)(5)(A), at 1964 (to be codified at 12 U.S.C. § 5491).

16. *Id.*

17. *Id.*

18. U.S. CONST. art. II, § 2, cl. 2.

19. 130 S. Ct. 3138 (2010).

20. *See infra* notes 140–159 and accompanying text.

responsible for numerous important Bureau activities, especially if she assumes the Director's duties.[21] Her improper appointment could undermine those activities and significantly weaken, or at least unnecessarily distract, the Bureau during its administrative adolescence.[22] To avoid unnecessary disruption, Congress should change how the Deputy Director is appointed when, as is likely, it reconsiders the Bureau's powers.[23]

I. THE APPOINTMENT OF OFFICERS

The Appointments Clause provides how "Officers of the United States" must be appointed.[24] The Appointments Clause's formal requirements are not mere "etiquette or protocol."[25] Instead, the Clause "prevent[s] the diffusion of the appointment power."[26] To that end, a principal officer may be appointed only if a majority of the Senate consents to the President's nominee.[27] Inferior officers may also be appointed in the same manner as principal officers.[28] Congress, however, in its discretion, can vest an inferior officer's appointment "in the President alone, in the Courts of Law, or in the Heads of Departments."[29] In contrast to federal "officers," the Appointments Clause does not regulate the hiring of mere federal employees.[30]

Two key issues surround the Deputy Director's appointment. First, is the Deputy Director a principal officer, an inferior officer, or merely an employee?[31] Second, if the Deputy Director is an inferior officer, is the Bureau a department, and is the Bureau's Director, accordingly, a department head?[32]

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21. *See* Dodd-Frank Act § 1012(a), 124 Stat. at 1965 (to be codified at 12 U.S.C. 5492) (detailing the powers of the Bureau).
22. *See infra* Part IV.
23. *See infra* Part IV.
24. U.S. CONST. art. II, § 2, cl. 2.
25. Ryder v. United States, 515 U.S. 177, 182 (1995) (quoting Buckley v. Valeo, 424 U.S. 1, 125 (1976) (per curiam)).
26. *Id.* (quoting Freytag v. Comm'r, 501 U.S. 868, 878 (1991)); *see also* Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 140 n.89 (2006) (citing The Federalist No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961)) (explaining that the Appointments Clause "provide[s] some practical security for each, against the invasion of the others").
27. U.S. CONST. art. II, § 2, cl. 2; Edmond v. United States, 520 U.S. 651, 659 (1997).
28. U.S. CONST. art. II, § 2, cl. 2.
29. *Id.*; *Edmond*, 520 U.S. at 660.
30. Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976) (per curiam) (citing Auffmordt v. Hedden, 137 U.S. 310, 327 (1890); United States v. Germaine, 99 U.S. 508, 510 (1878)).
31. *See infra* Part II.
32. *See infra* Part III.

II. THE DEPUTY DIRECTOR'S STATUS

The Deputy Director is very likely an inferior officer. Whether someone is an inferior officer depends on whether one's "'work is directed and supervised at some level' by other officers appointed by the President with the Senate's consent."[33] The Director almost certainly has the power to supervise her Deputy Director, instruct her on which policies to implement, oversee her job performance, and remove her.[34] Thus, the Director's supervisory power strongly suggests that the Deputy Director is an inferior officer.

Whether or not the Director may remove the Deputy Director at will, the Deputy Director is still an inferior officer.[35] The Supreme Court has indicated that an officer is very likely inferior if her supervising officer can remove her at will.[36] But at-will removal is not a necessary condition for inferior-officer status if sufficient oversight exists.[37] Indeed, the Supreme Court in *Morrison v. Olson*[38] held that the independent prosecutor was an inferior officer despite the Attorney General's ability to remove her only for good cause.[39]

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33. Free Enter. Fund v. PCAOB, 130 S. Ct. 3138, 3162 (2010) (quoting *Edmond*, 520 U.S. at 663).

34. The Director's ability to remove the Deputy Director—even if governed by a good-cause standard—is very likely incident to her power to appoint. *See* Myers v. United States, 272 U.S. 52, 119 (1926) ("This principle as a rule of constitutional statutory construction [that the power of removal is incident to the power of appointment], then generally conceded, has been recognized ever since. The reason for this principle is that those in charge of and responsible for administering functions of government who select their executive subordinates need in meeting their responsibility to have power to remove those whom they appoint." (citing In re Hennen, 38 U.S. (13 Pet.) 230, 259 (1839); Reagan v. United States, 182 U.S. 419 (1901); Shurtleff v. United States, 189 U.S. 311, 315 (1903))); Burnap v. United States, 252 U.S. 512, 515 (1920) ("The power to remove is, in the absence of statutory provision to the contrary, an incident of the power to appoint." (citing *Hennen*, 38 U.S. (13 Pet.) at 259; Blake v. United States, 103 U.S. 227, 231 (1880); United States v. Allred, 155 U.S. 591, 594 (1895); Keim v. United States, 177 U.S. 290, 293–94 (1900); *Reagan*, 182 U.S. at 426; *Shurtleff*, 189 U. S. at 316)); *accord* Carter v. Forrestal, 175 F.2d 364, 366 (D.C. Cir. 1949) (citing *Myers*, 272 U.S. at 47; Eberlein v. United States, 257 U.S. 82 (1921)).

35. Because whether the Director can remove the Deputy Director at will or only for cause does not affect the Deputy Director's inferior-officer status, it is not necessary to determine whether the Deputy Director enjoys tenure protection. I note, however, that 5 U.S.C. § 7513(a) (2006)—which provides certain civil servants tenure protection—may apply to the Deputy Director. Although at first blush the tenure-protection provision governing the civil service appears to reach only "employees," it also reaches certain inferior "officers." *See* §§ 2101(1), 2102(a)(1)(B), 2104, 7511(a).

36. *Free Enter. Fund*, 130 S. Ct. at 3162 (quoting *Edmond*, 520 U.S. at 664).

37. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 671–72 (1988).

38. 487 U.S. 654 (1988).

39. *See id.* at 671–72.

The Supreme Court has, at times, also considered the limited or expansive nature of an officer's duties.[40] For instance, in *Morrison*, the Court determined that an independent prosecutor was an inferior officer because she could be removed by a "higher Executive Branch official" and had limited, temporary jurisdiction and duties.[41] In considering the nature of the duties, the *Morrison* Court relied primarily upon early Supreme Court decisions that distinguished officers from employees, not principal officers from inferior officers.[42] In dissent, Justice Scalia argued that an officer's subordination (or lack thereof) to a principal officer, not the nature of her duties, should guide the Appointments Clause inquiry.[43]

In *Edmond v. United States*,[44] the Court, in an opinion written by Justice Scalia, adopted Justice Scalia's dissent in *Morrison*.[45] The *Edmond* Court held that the judges of the Coast Guard Court of Criminal Appeals were inferior officers.[46] In reaching its decision, the Court held that the significance of an individual's authority is relevant when determining whether the individual is either an officer or employee.[47] Likewise, the presence or absence of subordination is relevant to whether an individual is an inferior or principal officer.[48] The Court distinguished *Morrison* on the ground that the *Morrison* Court did "not attempt . . . to decide exactly where the line falls between the two types of officers."[49] But the Supreme Court never explicitly disapproved *Morrison's* Appointments Clause analysis.[50]

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40. *See id.* at 671–73; Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power"*, 80 B.U. L. REV. 967, 983–84 (2000) (describing the debate as to whether "inferior" refers to an officer's hierarchy or relative importance).

41. *See Morrison*, 487 U.S. at 671–72.

42. *See* Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J., 233, 256 & n.197 (2008) (noting the Court's reliance on United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1867), and United States v. Germaine, 99 U.S. 508, 512 (1878)). The *Morrison* Court also relied on *United States v. Eaton*, 169 U.S. 331 (1898). In *Eaton*, the Court determined that a vice-consul's temporary assumption of a consul's duties did not render the vice-consul a principal officer. *See id.* at 336, 344.

43. *Morrison*, 487 U.S. at 719–21 (Scalia, J., dissenting).

44. 520 U.S. 651 (1997).

45. *Id.* at 662–64.

46. *Id.* at 666.

47. *Id.* at 662.

48. *See id.* at 662–63. Justice Souter, in his concurring opinion, reiterated his view that the courts must consider both an officer's subordination (or lack thereof) and the importance of the officer's duties. *See id.* at 667 (Souter, J., concurring in part and concurring in the judgment) ("Having a superior officer is necessary for inferior officer status, but not sufficient to establish it.").

49. *Id.* at 661–62 (majority opinion).

50. *Id.*

The Supreme Court's recent decision in *Free Enterprise Fund* follows *Edmond*'s lead and ignores *Morrison*.[51] In *Free Enterprise Fund*, the Supreme Court held that the SEC Commissioners' appointment of the Public Company Accounting Oversight Board's ("PCAOB") members was constitutional.[52] The Court first determined that the SEC Commissioners, who are nominated by the President and confirmed by the Senate, had the ability to remove the PCAOB members at will.[53] Given this plenary removal power and the SEC Commissioners' other oversight powers, the Court had "no hesitation" in deeming the PCAOB members inferior officers.[54] Notably, the Court did not consider the extent of the PCAOB members' powers in the portion of its opinion concerning the appointment power. The Deputy Director's powers may thus be irrelevant in determining her status.

Yet, even if the Bureau's and the Deputy Director's powers over the financial industry are relevant to the Deputy Director's status, these powers are unlikely to alter her status as an inferior officer. The Court, in *Free Enterprise Fund*, had described PCAOB as having "expansive powers to govern an entire industry [i.e., auditors],"[55] but these powers did not render the PCAOB members principal officers. As for the Bureau's Deputy Director, she can expressly assume the Director's duties if the Director is unavailable.[56] And she can almost certainly assume other duties that the Director assigns.[57] But, as *Free Enterprise Fund* indicates, the Deputy Director's significant discretion over a large swath of the economy does not necessarily render her a principal officer.[58]

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51. *See* Samahon, *supra* note 42, at 258 (noting that *Morrison*'s precedential status was questionable after *Edmond*).

52. Free Enter. Fund v. PCAOB, 130 S. Ct. 3138, 3162–63 (2010).

53. *See id.* at 3162.

54. *Id.* ("Given that the Commission is properly viewed, under the Constitution, as possessing the power to remove Board members at will, and given the Commission's other oversight authority, we have no hesitation in concluding that under *Edmond* the Board members are inferior officers whose appointment Congress may permissibly vest in a 'Hea[d] of Departmen[t].'").

55. *Id.* at 3147.

56. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011(b)(5), 124 Stat. 1376, 1964 (2010) (to be codified at 12 U.S.C. § 5491).

57. *Id.* § 1012(b), at 1965 (to be codified at 12 U.S.C. § 5492) (permitting the Director to delegate authority to "duly authorized employee[s], representative[s], or agent[s]").

58. *See Free Enter. Fund*, 130 S. Ct. at 3147–48 (holding that despite their expansive power over the accounting industry, the board members of the PCAOB are inferior officers).

Likewise, the Deputy Director's ability to assume the full powers of the Director (a principal officer) does not render her a principal officer.[59] In *United States v. Eaton*,[60] the Court held that a vice-consul charged with assuming a consul's duties under "special and temporary conditions . . . is not thereby transformed into the superior and permanent official."[61] The Deputy's ability to fill the Director's shoes in certain scenarios, therefore, is not determinative.

But the Deputy Director's ability to assume the Director's powers demonstrates that she is not merely an employee. The Supreme Court has defined an "Officer of the United States" as "any appointee exercising significant authority pursuant to the laws of the United States"[62] and employees, in contrast, as "lesser functionaries subordinate to officers of the United States."[63] The significance of one's authority "marks . . . the line between officer and nonofficer."[64] Because district court clerks, thousands of clerks in the executive departments, an assistant surgeon, and even a cadet-engineer have all been deemed officers,[65] it is extremely unlikely that the Deputy Director, with broad, unspecified powers that can shape and implement policy governing a large segment of the national

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59. Dodd-Frank Act § 1011(b)(5)(B), 124 Stat. at 1964 (to be codified at 12 U.S.C. § 5491). The Director is likely a principal officer because she can be removed only by the President. *See supra* note 34 and accompanying text. Although the Bureau rests within the Federal Reserve, the Governors cannot remove the Director; cannot intervene in proceedings before the Director; cannot appoint, direct, or remove Bureau officers or employees; cannot merge the Bureau's functions; and cannot review or delay the Bureau's rules. *See* Dodd-Frank Act § 1012(c)(2)–(3), at 1965-66 (to be codified at 12 U.S.C. § 5492). The Financial Stability Oversight Council's power to veto the Bureau's rules by a two-thirds vote would not affect the Director's principal status. *Id.* § 1023(b)–(c), at 1985–86 (to be codified at 12 U.S.C. § 5513). The Council would limit only one of the Bureau's powers; the Council would not have the power to remove her.

60. 169 U.S. 331 (1898).

61. *Id.* at 343.

62. Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam). Moreover, the Deputy Director's office, along with her method of appointment and certain restrictions on her activities, is established by statute. *See* 12 U.S.C. § 5491(c)–(d); Landry v. F.D.I.C., 204 F.3d 1125, 1141 (D.C. Cir. 2000) (Randolph, J., concurring in part and concurring in the judgment) (arguing that administrative law judges are inferior officers, because among other reasons, their offices are "established by law").

63. *Id.* at 126 n.162.

64. Edmond v. United States, 520 U.S. 651, 662 (1997) (citing *Buckley*, 424 U.S. at 126).

65. Free Enter. Fund v. PCAOB, 130 S. Ct. 3138, 3179 (2010) (Breyer, J., dissenting) (citing In re Hennen, 38 U.S. (13 Pet.) 230, 258 (1839) (district court clerks); United States v. Germaine, 99 U.S. 508, 511 (1878) (thousands of clerks in executive departments); United States v. Moore, 95 U.S. 760, 762 (1878) (an assistant-surgeon); United States v. Perkins, 116 U.S. 483, 484 (1886) (a cadet-engineer)).

economy,[66] is an employee. Indeed, the Court has indicated that even if certain of an individual's duties are ministerial, the individual's discretionary duties will control.[67] In other words, an individual cannot be an employee when performing certain duties and an officer when performing other duties. Given the Deputy Director's ability to assume significant authority, including the Director's powers, she is almost certainly more than a "lesser functionary" even if she will perform some ministerial, nondiscretionary tasks.

III. THE BUREAU'S STATUS

Because the Deputy Director is very likely an inferior officer, she must be appointed in one of the four methods under the Appointments Clause.[68] Her appointment by the Director can only arguably constitute an appointment by the "Hea[d] of [a] Departmen[t]."[69] Two Supreme Court cases are especially relevant when determining whether the Director heads a department: *Freytag v. Commissioner*[70] and *Free Enterprise Fund*. But these two cases (with a total of three relevant opinions) send numerous contradictory signals as to when an independent entity, such as the Bureau, constitutes a department.

A. Freytag

In *Freytag*, the Supreme Court, in a 5-4 decision written by Justice Blackmun, ultimately held that the U.S. Tax Court was one of the "Courts of Law."[71] Thus, under the Appointments Clause, the Chief Judge of the Tax Court could appoint special trial judges, who were

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66. *See* Dodd-Frank Act § 1012(a), 124 Stat. at 1965 (to be codified at 12 U.S.C. § 5492) (listing the broad powers of the Bureau).

67. *See* Freytag v. Comm'r, 501 U.S. 868, 881–82 (1991) ("Special trial judges are not inferior officers for purposes of some of their duties . . . , but mere employees with respect to other responsibilities. The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution. If a special trial judge is an inferior officer for purposes of [certain statutory subsections], he is an inferior officer within the meaning of the Appointments Clause and he must be properly appointed.").

68. U.S. CONST. art. II, § 2, cl. 2; *cf. Freytag*, 501 U.S. at 881 (holding that special trial judges of the U.S. Tax Court are inferior officers and therefore must be appointed under the Appointments Clause).

69. *See Free Enter. Fund*, 130 S. Ct. at 3163–64 (discussing the definition of "Hea[d] of [a] Departmen[t]").

70. 501 U.S. 868 (1991).

71. *Id.* at 890–92.

inferior officers.[72] But before turning to the "Courts of Law" provision, the majority held that the U.S. Tax Court was not a department.[73]

The Court identified the purpose of the Appointments Clause: to mitigate the "manipulation of official appointments."[74] Treating each administrative organ as a department (as the government had argued), and thus distributing the appointment power to every organ within the executive branch, would have undermined the "Framers' conclusion that widely distributed appointment power subverts democratic government."[75] Accordingly, the Court reasoned that the Constitution intends only a limited set of executive entities to qualify as departments.[76]

To define "departments," the Court turned to its prior decisions.[77] Two of those decisions had limited departments to entities that Congress had "expressly creat[ed] and giv[en] . . . the name of a department."[78] In one of those prior decisions, *United States v. Germaine*,[79] the Supreme Court read the Appointments Clause in conjunction with the Opinion Clause of Article II.[80] That clause permits the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments."[81] In *Germaine*, the Court limited "Executive Departments" in the Opinion Clause (and thus "Departments" in the Appointments Clause) to those departments headed by cabinet members. Because "Departments" had to be headed by a cabinet member, "inferior commissioners and bureau officers" would not qualify as "Heads of Departments."[82] Although the *Freytag* majority expanded *Germaine*'s definition of "department" by including "executive divisions *like* the Cabinet-level departments,"[83] the majority otherwise accepted

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72. *Id.* at 882–83. The "Excepting Clause" to the Appointments Clause provides that "the Congress may by Law vest the Appointment of such inferior Officers, as they [i.e., Congress] think proper, . . . in the Courts of Law." U.S. CONST. art. II, § 2, cl. 2.

73. *Freytag*, 501 U.S. at 885–86.

74. *Id.* at 883 (quoting GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 79, 143 (1969)).

75. *Id.* at 885.

76. *Id.* at 886.

77. *See id.*; United States v. Germaine, 99 U.S. 508, 510–11 (1878).

78. *Freytag*, 501 U.S. at 886 (citing Burnap v. United States, 252 U.S. 512, 515 (1920); *Germaine*, 99 U.S. at 510–11).

79. 99 U.S. 508 (1878).

80. *Freytag*, 501 U.S. at 886 (citing *Burnap*, 252 U.S. at 515; *Germaine*, 99 U.S. at 510–11).

81. U.S. CONST. art. II, § 2, cl. 1.

82. *Freytag*, 501 U.S. at 886 (quoting *Germaine*, 99 U.S. at 511).

83. *Id.* (emphasis added).

Germaine's cabinet-level distinction because "Cabinet-level departments are limited in number and easily identified."[84] Despite rejecting the argument that the Tax Court was a department, the majority reserved the question of whether a "principal agency" that is not a cabinet-level department, such as the Securities and Exchange Commission ("SEC"), was a department.[85]

In an opinion by Justice Scalia, the four concurring justices in *Freytag* concluded that the U.S. Tax Court and the SEC—despite the latter's independent status—were departments.[86] These establishments were departments because they were "free-standing, self-contained entit[ies] in the Executive Branch."[87] Justice Scalia took issue with the majority's understanding that the Appointments Clause was meant to limit the Executive Branch's power.[88] He argued that the Appointments Clause deposited the appointment power in the executive branch as a reaction to the "division and faction" that legislative appointments of executive officers had caused in state governments.[89] Granting the legislature the power to appoint would have led less-accountable legislators to appoint, and even create offices for, friends and patrons.[90]

Not only did the majority misunderstand the purpose of the Appointments Clause in the concurring justices' view, but nothing limited departments to "cabinet-level" agencies. Neither Congress nor the Constitution, as a preliminary matter, decides whether certain officers are members of the cabinet.[91] Yet, putting this indefiniteness of "cabinet members" aside, limiting departments to cabinet-level agencies means that the appointment of many inferior

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84. *Id.*

85. *Id.* at 887 n.4.

86. The concurring justices rejected the majority's conclusion that the U.S. Tax Court was a "Court[] of law." They argued that the "Courts of law" referred only to Article III courts. *See id.* at 901–02 (Scalia, J., concurring in part and concurring in judgment).

87. *See id.* at 914–15 (arguing that the Chief Judge of the U.S. Tax Court is a department head).

88. *Id.* at 904 n.4.

89. *Id.* (quoting WOOD, *supra* note 74, at 407).

90. *Id.* The concurring justices stated that "[t]he Appointments Clause is, intentionally and self-evidently, a limitation on Congress." *Id.* Yet, it hardly seems self-evident that a Clause that limits the *President's* ability to appoint principal and, in most instances, inferior officers was meant to limit only *Congress*. Instead, by seeking to limit the power of any single branch to appoint officers, the Clause is best read to limit both Congress and the President. *Cf.* Henry Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 17 n.76 (1993) ("Justice Scalia's assertion that '[t]he Appointments Clause is, intentionally and self-evidently, a limitation on Congress' is misleading oversimplification.").

91. *See Freytag*, 501 U.S. at 917–18 (Scalia, J., concurring in part and concurring in judgment).

officers in independent agencies would be invalid because the heads of these independent agencies, not cabinet-level principal officers, typically appoint them.[92] The concurring justices argued that the Appointments Clause permitted principal officers—whether or not part of the cabinet—to appoint their subordinate officers.[93] It follows from this understanding that "the term 'Departments' means all independent executive establishments."[94]

B. Free Enterprise Fund

Almost twenty years later in *Free Enterprise Fund* the Court considered the reserved question of the SEC's status. The plaintiffs argued that the SEC was not a department and thus that the SEC Commissioners could not, as permitted by the Sarbanes-Oxley Act, appoint the members of PCAOB.[95] *Free Enterprise Fund* adopted the reasoning of the four concurring justices in *Freytag* and held that the SEC was a department.[96] The Court noted that the nation's Founders understood a department to be a "separate allotment or part of business; a distinct province, in which a class of duties are [sic] allotted to a particular person."[97] Indeed, Congress, in 1792, had permitted the Postmaster General to appoint inferior officers, even though he was not a "Secretary" or a cabinet-level official.[98] With Congress's early practice in mind, the Court held that the SEC was a department under the Appointments Clause because it is "a free-

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92. *See id.* at 918.

93. *See id.* at 919 ("If the Appointments Clause is read as I read it, all inferior officers can be made appointable by their ultimate (sub-Presidential) superiors . . . ."); *id.* at 918 ("A number of factors support the proposition that 'Heads of Departments' includes the heads of all agencies immediately below the President in the organizational structure of the Executive Branch."); *id.* at 920 ("[The Constitution's use of the word 'department' may seem strange] only because the Founders did not envision that an independent establishment of such small size and specialized function would be created."); *id.* ("Principal officers could be permitted by law to appoint their subordinates.").

94. *See* 26 U.S.C. § 7443(f) (2006) ("Judges of the Tax Court may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause."); *Freytag*, 501 U.S. at 919 (Scalia, J., concurring in part and concurring in judgment).

95. *See* Free Enter. Fund v. PCAOB, 130 S. Ct. 3138, 3162 (2010) ("But, petitioners argue, the Commission is not a 'Departmen[t]' like the 'Executive departments' (*e.g.*, State, Treasury, Defense) listed in 5 U.S.C. § 101."); *see also* 15 U.S.C. § 7211(e)(4) (permitting the SEC Commissioners to appoint PCAOB members).

96. *Id.*

97. *Id.* (quoting 1 N. WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (def. 2) (1995 facsimile ed.)).

98. *Id.* at 3163.

standing component of the Executive Branch, not subordinate to or contained within any other component."[99]

The Court's decision was not as clear as it may seem. The Court, perhaps importantly, did not simply state that the SEC qualified because it was a "free-standing, self-contained entity," as the *Freytag* concurring justices would have had it in one portion of their opinion.[100] Likewise, the Court did not say that the SEC was a department only because it was an "independent executive establishment[]," as the *Freytag* concurring justices would have had it in another portion of their opinion.[101] Instead, the Court considered both independence and noncontainment, without clarifying whether each characteristic was a necessary condition for an entity to constitute a department.[102] *Free Enterprise Fund* also failed to clarify exactly which reasoning in the *Freytag* concurring opinion it adopted and which portion, if any, of the majority opinion in *Freytag* remains good law.[103] These ambiguities affect the Bureau and other similarly situated entities.

C. Freytag, Free Enterprise Fund, *and the Consumer Bureau*

Congress created the Bureau's administrative structure while *Free Enterprise Fund* was submitted to the Supreme Court for decision.[104] The Bureau is an exotic, but not an entirely unique, administrative creature.[105] It is an independent establishment that rests within—yet is not accountable to—another independent establishment.[106]

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99. *Id.* *But see* Gary Lawson, *The "Principal" Reason Why the PCAOB Is Unconstitutional*, 62 VAND. L. REV. EN BANC 73, 82 (2009) ("I would state the ultimate test for departmental status as follows: a unit of the federal executive is a constitutional 'Department[]' under the Appointments Clause if it has sufficient organizational identity and decisional authority to be a constitutional 'Department[]' under the Appointments Clause. If that sounds absurdly circular to you, then you are half-right: it is circular, but not absurdly so."). Professor Lawson argued, prior to the Court's decision in *Free Enterprise Fund*, that PCAOB itself qualified as a "department" and that its members were principal officers. *See id.* at 75.

100. Freytag v. Comm'r, 501 U.S. 868, 915 (1991) (Scalia, J., concurring in part and concurring in the judgment).

101. *Id.* at 919.

102. *Free Enter. Fund*, 130 S. Ct. at 3163.

103. *See id.* at 3162–63 (discussing the *Freytag* opinion without clarifying upon which part the Court relies).

104. *Free Enterprise Fund* was argued on December 7, 2009, and the court issued its decision on June 28, 2010, only three weeks before the Dodd-Frank Act was enacted on July 21, 2010. *Free Enter. Fund*, 130 S. Ct. at 3138; *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010) (to be codified at 12 U.S.C. § 5301).

105. The Federal Energy Regulatory Commission is a similarly independent entity within the purview of the Department of Energy. *See infra* note 112 and accompanying text.

106. *See supra* notes 11–13 and accompanying text.

I have uncovered nothing in the legislative history directly revealing why Congress decided to house the Bureau within the Federal Reserve.[107] Perhaps Congress did so as an illusory concession to Republicans who opposed "the Obama administration's original aim of creating a *stand-alone* Consumer Financial Protection Agency . . . ."[108] Instead, Republicans sought to place "consumer protection powers with [bank] regulators."[109] Senate Democrats, by ultimately placing the Bureau within the Federal Reserve, may have desired to give the appearance that the Bureau was part of the federal bank-regulatory apparatus. But by giving the Federal Reserve essentially no powers over the Bureau,[110] Senate Democrats continued to propose an independent agency—albeit one that was not free-standing.[111] Another possibility is that the Senate sought to model the Bureau on the Federal Energy Regulatory Commission ("FERC"), an "independent regulatory commission" that is "established within" the Department of Energy.[112]

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107. The Senate's bill created the Bureau in its present form. *See* S. Rep. No. 111-176, at 11 (2010) (explaining the need for the Bureau to protect consumers by regulating bank practices, but failing to explain the rationale for housing it inside the Federal Reserve). Although dissenting senators complained that the Bureau was "a massive new entity whose power and autonomy have no current equivalent anywhere else in the Federal government," they did not appear to consider other structural alternatives for the Bureau. *See id.* at 246–47 (criticizing the Bureau's ineffectiveness at regulating failing banks, without proposing an alternative).

108. Silla Brush, *GOPs Oppose Proposal for Consumer Bureau at Treasury Department*, THE HILL (Feb. 27, 2010 9:30 PM), http://thehill.com/homenews/senate/84083-gops-oppose-proposal-for-consumer-agency-at-treasury-dept (emphasis added).

109. *Id.*

110. *See supra* note 13.

111. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 73 (2010) (citing Sewell Chan, *Dodd Proposes Giving Fed the Task of Consumer Protection*, N.Y. TIMES, Mar. 2, 2010, at B2 ("[A]dvocates, mindful of fierce Republican opposition to a stand-alone agency, have said that they are less concerned about where the entity is housed than the scope of its authority and the independence of its leadership and budget.")) (noting that the Mortgage Bankers Association, the Chairman of the FDIC, and congressional Republicans, among others, "ultimately pushed the Administration to give up on a free-standing agency").

112. 42 U.S.C. § 7171(a) (2006). FERC officials are similarly independent from the Department of Energy as the Bureau officials are from the Governors of the Federal Reserve. *Id.* § 7171(d) ("In the performance of their functions, the members, employees, or other personnel of the Commission shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent of any other part of the Department."). Unlike the Bureau, however, FERC is not led by a single director. Instead, it is led by a five-member commission. *Id.* § 7171(b)(1); *see* Jay S. Bybee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act*, 59 LA. L. REV. 431, 439 (1999) (referring to independent agencies led by a single individual as the "strangest [administrative] animals yet").

Regardless of why Congress structured the Bureau as it did, its placement within the Federal Reserve may deprive the Bureau of departmental status.[113] Assuming that the Bureau has a distinct province,[114] the Bureau may not satisfy the Court's other requirements, *viz.*, that the Bureau not be subordinate to or contained within any other free-standing component of the Executive Branch.[115] *Free Enterprise Fund* does not clarify whether both, or only one, of these criteria must exist for the Bureau to qualify as a department. The Bureau is not subordinate to the Federal Reserve System because the Governors cannot appoint, direct, or remove the Bureau's employees or officers, and the Governors cannot merge or consolidate the Bureau with the Federal Reverse divisions or banks.[116] But the Bureau is "contained within" the Federal Reserve System, itself an independent, free-standing component of the Executive Branch.[117] If, on one hand, a department must be both independent *and* self-contained, the Bureau is not a department.[118] But if, on the

113. The House of Representatives' proposal created a Consumer Financial Protection Commission that, much like the SEC, would have been a free-standing, independent agency led by five commissioners appointed by the President with the Senate's advice and consent. *See* Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. §§ 111–12 (2009) (establishing the Consumer Protection Agency). A Consumer Financial Protection Oversight Board, made of various federal officers, would have advised the Commission. *Id.* §§ 112–13. This administrative structure likely would not have posed an Appointments Clause question.

114. The Bureau's significant and independent role in regulating consumer-financial products likely provides the Bureau "a distinct province, in which a class of duties [is] allotted to a particular person." Free Enter. Fund v. PCAOB, 130 S. Ct. 3138, 3162–63 (2010). Nevertheless, as the statute creating the Bureau recognizes, the SEC, the Commodities Futures Trading Commission, the FTC, and other federal establishments also regulate consumer-financial products. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1015, 124 Stat. 1376, 1974 (2010) (to be codified at 12 U.S.C. § 5495). Thus, whether the Bureau has a "distinct province" with a particularized "class of duties" is not free from doubt. *Cf.* Barkow, *supra* note 111, at 55–56 (noting how, to prevent agency capture and to ensure enforcement of regulatory or statutory mandates, Congress often provides more than one agency power over regulated industries).

115. *Free Enter. Fund*, 130 S. Ct. at 3163.

116. Dodd-Frank Act § 1012(c)(2), 124 Stat. at 1965–66 (to be codified at 12 U.S.C. § 5492). The Financial Stability Oversight Council, however, can reject the Bureau's regulations by a two-thirds vote. *Id.* § 1023(c)(3), at 1985–86 (to be codified at 12 U.S.C. § 5513). Although this veto power limits one of the Bureau's powers, I doubt that this limitation alone would deprive the Bureau of its independent status. Not only is the Council's authority circumscribed, but it is far from certain that the Council would qualify as a "component of the Executive Branch" to which the Bureau would be subordinate. *Free Enter. Fund*, 130 S. Ct. at 3163.

117. *See* Federal Reserve Act of 1913, 12 U.S.C. § 222 (2006).

118. *Free Enter. Fund*, 130 S. Ct. at 3163.

other hand, a department may be either independent *or* self-contained, then the Bureau is more likely a department.[119]

1. The normative view

In my view, the Board's independence from other executive components alone should render it a department. The *Freytag* concurring opinion strongly suggests that a putative department head's independence from other principal officers should control her status.[120] That opinion proposed that "all inferior officers can be made appointable by their ultimate (sub-Presidential) superiors."[121] That proposal makes sense. The superior officer is the one who must supervise and rely upon the inferior officer. Permitting all superior officers to appoint their inferior officers prevents the anomalous result of requiring Congress, if it chooses a departmental appointment, to bestow the appointment power upon an unrelated department head.[122] In the Deputy Director's case, the Director is a properly appointed principal officer who is not subordinate to any other executive officer and, thus, should be able to appoint her deputy.[123] The executive entity's subordination, or the lack thereof, to another executive component should be the guidepost.[124]

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119. *Id.* There may be one additional permissible reading of *Free Enterprise Fund*. Perhaps the standard ("not subordinate to or contained within any other . . . component") merely seeks to use "contained within" as an appositive for "subordinate to." *Id.* If this were so, agency independence would be the guiding criterion and permit the Director to be a department head. But if this were the intended meaning, the Court's language created ambiguity where none even arguably existed. Such an interpretation would also likely be contrary to a portion of the *Freytag* concurrence, which conceded that the now-defunct Board of Tax Appeals (an independent agency) would not have qualified as a department because it was a subdivision of the Treasury Department. *See* Freytag v. Comm'r, 501 U.S. 868, 915 (1991) (Scalia, J., concurring in part and concurring in judgment); *see also infra* notes 144–151 and accompanying text.

120. *Freytag*, 501 U.S. at 919 (Scalia, J., concurring in part and concurring in judgment) ("This evident meaning—that the term 'Departments' means all independent executive establishments—is also the only construction that makes sense of [the] sharp distinction between principal officers and inferior officers.").

121. *Id.* This understanding is also consistent with *United States v. Germaine*. The *Germaine* Court stated that "heads of departments" were not "inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of the departments." 99 U.S. 508, 511 (1878). Even when the *Germaine* Court considered bureaus and commissions, its inquiry focused on those entities' subordination or lack thereof. *Id.*

122. *See Freytag*, 501 U.S. at 919 (Scalia, J., concurring in part and concurring in judgment) (explaining that an interpretation requiring all inferior officers whose superiors are not Cabinet members to be appointed by the President is an "implausible" result).

123. Scholars and the Supreme Court have reasoned that, at the very least, all principal officers are heads of departments, even if not all heads of departments are principal officers. *Compare* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 37 (1994) (arguing that principal executive

Refusing to treat the Bureau as a department merely because it is housed within another establishment (and thus not self-contained) is unjustifiable formalism.[125] The Bureau has a specific sphere of duties in which the encasing establishment (the Federal Reserve) cannot intervene.[126] In other words, Congress has provided the Bureau a

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officers may be merely a subset of department heads), *and* Kimberly N. Brown, *Presidential Control of the Elite "Non-Agency"*, 88 N.C. L. REV. 71, 90–91 n.128 (2009) (same), *with Germaine*, 99 U.S. at 511 (comparing the use of principal officers and departments in the Opinions Clause to their use in the Appointments Clause and stating that "the principal officer in the one case is the equivalent of the head of the department in the other"), *and* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 635 (1994) ("[T]he interchangeable use of numerous terms for officers we today call Secretaries indicates that 'principal officers in the Executive Departments' and 'Heads of Departments' are one and the same."). Yet, if the Director is a principal officer (because she is subordinate to only the President) but not a department head as *Free Enterprise Fund* suggests, then these scholars and the *Germaine* Court were incorrect. Some principal officers, such as the Director, would not be heads of departments. *Cf.* United States v. Eaton, 169 U.S. 331, 337–45 (1898) (referring to consuls as "principal officer[s]" and "principal officials," although consuls are not likely heads of departments because the Secretary of State would be the relevant head of department).

124. As an aside, the meaning of "independence" in the separation-of-powers context does not have a uniform meaning. The meaning changes as one addresses the Appointments Clause, the President's removal power, or practical administrative hegemony. Independence (or nonsubordination) in the context of the Appointments Clause and an officer's status likely refers to whether the appointing officer can be removed only by the President, as opposed to any other executive officers. *See supra* note 33 and accompanying text; *see also* Free Enter. Fund v. PCAOB, 130 S. Ct. 3138, 3162 (2010) ("'[I]nferior officers' are officers whose work is directed and supervised at some level' by other officers appointed by the President with the Senate's consent.") (quoting Edmond v. United States, 520 U.S. 651, 662–63 (1997)). But in the removal-power context, independence is likely tied to the ability of the President or other supervising officer to remove a subordinate officer for only certain causes. *See Free Enter. Fund*, 130 S. Ct. at 3157–58. This form of independence is what shapes the traditional understanding of "independent agency." *See* Free Enter. Fund v. PCAOB, 537 F.3d 667, 701 n.9 (D.C. Cir. 2009) (Kavanaugh, J., dissenting) ("[Independent agency] is the term that traditionally has been applied by the Supreme Court, the Congress, and the Executive Branch to agencies like the PCAOB whose heads are not removable at will."). But if these differences were not enough, Professor Barkow correctly argues that the indicia of true administrative independence is a function of, among other things, tenure protection, budgetary control, the ability to obtain politically useful information, and protection from interference and competition from other federal and state agencies. *See* Barkow, *supra* note 111, at 18; *cf. Free Enter. Fund*, 130 S. Ct. at 3156–57 (strongly implying that practical indicia of independence or control are not relevant to separation-of-powers concerns because it deemed the power to remove as necessary for the President to have sufficient control over executive officers).

125. Although a formal inquiry may be suitable when the Constitution's text compels it (e.g., according to the Appointments Clause, the House cannot appoint executive officers even if it makes sense for the House to do so in a particular instance, *see* U.S. CONST. art. II, § 2, cl. 2), nothing in the constitutional text compels a department to be both independent and self-contained. Requiring an independent entity to be self-contained creates an unnecessary, formal distinction devoid of meaning.

126. *See supra* note 13.

condominium within the Federal Reserve complex, but the Bureau is not beholden to the Federal Reserve merely because they share walls.[127] Requiring Congress to create stand-alone bureaus would be a purely formal gesture that lacks constitutional compulsion and does not change the substance of the Bureau's powers, affect any potential appointment-power dilution, or otherwise alter the Director's power, status, or appointment.[128]

Indeed, if self-containment were required, certain independent agencies would be denied departmental status merely because they are "established in" another executive component, despite their similarity to certain "departments."[129] For instance, both the Bureau and FERC would satisfy the nonsubordination criterion yet fail the self-containment criterion because they are "established in" another executive component.[130] But other independent agencies, such as the National Transportation Safety Board ("NTSB")[131] and the Social Security Administration ("SSA"),[132] with independent powers similar (if not more limited) in breadth to the Bureau and the FERC's, would be deemed departments merely because their organic acts do not expressly place them within another executive component[133] (such as the Departments of Transportation or Health and Human Services, respectively). It is hard to fathom why the *Free Enterprise Fund* Court would have sought to deny departmental status to powerful agencies like FERC, but grant it to the NTSB and the SSA.[134]

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127. *See supra* note 13; Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011(e), 124 Stat. 1376, 1964–65 (2010) (to be codified at 12 U.S.C. § 5491) (establishing the Bureau's offices inside the Federal Reserve in Washington, D.C.).

128. The constitutionality of other deputy appointments may be doubtful, especially deputies within nonindependent bureaus and offices. *See, e.g.*, 7 U.S.C. § 6704(b) (2006) (permitting Chief of the Forest Service to appoint Deputy Chief for International Forestry). For these deputies, the Court's precedents, as well as the opinions of individual justices, strongly suggest that these appointments are not constitutional if the deputies are "inferior officers." *See infra* notes 146–147. Notably, Congress often permits the President or a department head to appoint deputies. *See, e.g.*, 12 U.S.C. § 1462a(c)(5) (2006) (permitting Secretary of the Treasury, not Director of the Office of Thrift Supervision, to appoint Office's deputies); 6 U.S.C. § 321c(a) (permitting President, with Senate's advice and consent, to appoint FEMA deputies); 5 U.S.C. § 1102(b) (permitting President, with Senate's advice and consent, to appoint the Deputy Director of the Office of Personnel Management).

129. *See supra* notes 11, 112 and accompanying text.

130. *See supra* notes 11, 112 and accompanying text.

131. *See* 49 U.S.C. § 1111(a) ("The [NTSB] is an independent establishment of the United States Government.").

132. *See* 42 U.S.C. § 901(a) ("There is hereby established, as an independent agency in the executive branch of the Government, a [SSA] . . . .").

133. *See supra* notes 131–132 and accompanying text.

134. Justice Breyer's dissent in *Free Enterprise Fund*, joined by three other justices, suggests that the FERC (and thus the Bureau) would qualify as a "department." In

Moreover, even if the Court were to treat in the same manner express and implied statutory establishment of an agency within another executive component, many administrative establishments (such as the NTSB and the SSA) would likely lose departmental status—thereby creating even more difficulties for ensuring that principal officers can appoint their subordinates.

Finally, that Congress creates more principal officers by creating additional independent establishments does not, despite the *Freytag* majority's concern, dilute the appointment power.[135] The government's business—whether rightly or wrongly—is growing as more officers are needed to provide increased regulation and enforcement.[136] When creating the Bureau with its new regulatory and enforcement powers, Congress did not leave the size of government static while increasing the number of appointing officers.[137] Instead, the number of appointing officers grew with the government's business.[138] Ultimately, permitting the Director to appoint her Deputy Director merely allows a principal officer to be clearly responsible for the Deputy Director's actions without improper appointing-power diffusion.[139]

2. The contrary view

Despite the compelling reasons for deeming the independent Bureau a department, the *Freytag* and *Free Enterprise Fund* opinions can be read to require both independence and self-containment.[140]

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his appendix, he lists "24 stand-alone federal agencies (*i.e.*, 'departments') whose heads are, *by statute*, removable by the President only 'for cause.'" Free Enter. Fund v. PCAOB, 130 S. Ct. 3138, 3184 app. A (2010) (Breyer, J., dissenting). One of those "stand-alone federal agencies (i.e., 'departments')" is the FERC. *Id.* at 3186 app. A. He also lists the NTSB and the SSA. *See id.* at 3187–88 app. A. The dissent does not define "stand-alone" (i.e., does it refer to independence? self-containment? a combination of both? something else?).

135. *See* Freytag v. Comm'r, 501 U.S. 868, 885 (1991) ("The [Appointments] Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government.").

136. *See Free Enter. Fund*, 130 S. Ct. at 3155 ("No one doubts Congress's power to create a vast and varied federal bureaucracy,").

137. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1013(a)(1), 124 Stat. 1376, 1966–67 (2010) (to be codified at 12 U.S.C. § 5493) (giving the Director broad discretion to decide how many employees to employ and in what capacity).

138. *Id.*

139. John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, 77 GEO. WASH. L. REV. 904, 915 (2009) ("The Appointments Clause is designed to prevent the diffusion of appointment power precisely so that the individual with primary responsibility for a governmental department is both at a high level (subordinate only to the President) and readily identifiable.").

140. *See infra* notes 142–154 and accompanying text.

Those opinions suggest that "department" should have a circumscribed meaning and thus apply only to self-contained entities.[141] Moreover, reading *Free Enterprise Fund*'s two criteria in the disjunctive may lead to untenable results in other, albeit hypothetical, scenarios.

The majority in *Freytag* held that its limited understanding of department was consistent with the purpose of the Appointments Clause to "prevent[] Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint . . . [and thereby] subvert[] democratic government."[142] Perhaps regardless of whether federal business grows or remains static, the Court feared that "holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint."[143]

Even the concurring justices in *Freytag* suggested that a department must be self-contained.[144] They referred to the Tax Court as "a free-standing, self-contained entity" when deciding its departmental status[145] and noted that the Court had in other decisions held that bureaus within traditional executive agencies were not departments.[146] In fact, the concurring justices conceded that the former Board of Tax Appeals, as a former subdivision of the Treasury Department, could not qualify as a department.[147] The Board, like the Tax Court, was an "independent agency."[148] The distinguishing feature between the Tax Court and the Board of Tax Appeals was self-

141. *See supra* notes 74–76, 99 and accompanying text.
142. Freytag v. Comm'r, 501 U.S. 868, 885 (1991).
143. *Id.*
144. *Id.* at 915 (Scalia, J., concurring in part and concurring in judgment).
145. *Id.*
146. *Id.* at 917 (referring to *Germaine*'s holding that the Commissioner of Pensions, an official within the Interior Department, was not a head of a department); Burnap v. United States, 252 U.S. 512, 514–15 (1920) (indicating—although Justice Scalia says holding—that the Bureau of Public Buildings and Grounds, a bureau within the War Department, was not a department)).
147. *See Freytag*, 501 U.S. at 915 (Scalia, J., concurring in part and concurring in judgment) ("If, for instance, the Tax Court were a subdivision of the Department of the Treasury—as the Board of Tax Appeals used to be—it would not qualify [as a department]. In fact, however, the Tax Court is a free-standing, self-contained entity in the Executive Branch, whose Chief Judge is removable by the President (and, save impeachment, no one else).").
148. *See* Revenue Act of 1924, Pub. L. No. 68-176, 43 Stat. 253, 337 ("Any member of the Board may be removed by the President for inefficiency, neglect of duty, or malfeasance in office, but for no other reason."); *id.* at 338 ("The Board shall be an independent agency in the executive branch of the Government."); *Freytag*, 501 U.S. at 885, 891.

containment; the former was self-contained and thus a department,[149] while the latter was not.[150] And finally the *Free Enterprise Fund* Court did not simply conclude that all independent establishments or "agencies" were departments, despite the ease with which it could have done so.[151]

The *Freytag* concurring opinion, moreover, may ultimately reject the functional concerns that support my normative determination. The concurring justices suggested that the Court should not create distinct separation-of-powers jurisprudence for independent, as opposed to traditionally executive, agencies based on their independence alone.[152] My conclusion, however, requires that independent bureaus and offices be deemed departments when they rest within other establishments, although nonindependent executive offices and bureaus would not be deemed departments.[153] Formal notions of self-containment, accordingly, may trump functionalism and even common-sense concerns no matter which *Freytag* opinion governs.[154]

Finally, considering the two criteria in the disjunctive may lead to questionable results. For instance, assume that a hypothetical executive establishment, contrary to the Bureau, is subordinate to another executive establishment but self-contained. Under the disjunctive theory, the self-contained, subordinate executive establishment would be a department even though the department head would likely be an inferior officer since he is subordinate to another executive establishment.[155] The Court has never suggested that inferior officers can be department heads.[156] Indeed, such an

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149. *Freytag*, 501 U.S. at 915 (Scalia, J., concurring in part and concurring in judgment).

150. *Id.*

151. *See* Free Enter. Fund v. PCAOB, 130 S. Ct. 3138, 3162–63 (2010).

152. *See Free Enter. Fund*, 130 S. Ct. at 3176 (Breyer, J., dissenting) ("[T]he Court should not create a *separate* constitutional jurisprudence for the 'independent agencies.'"); *Freytag*, 501 U.S. at 921 (Scalia, J., concurring in part and concurring in judgment) ("[A]djusting the remainder of the Constitution to compensate for [this distinction] is a fruitless endeavor."); *see also id.* at 886 (majority opinion) ("[T]he term 'Heads of Departments' does not embrace 'inferior commissioners and bureau officers.'" (quoting United States v. Germaine, 99 U.S. 508, 511 (1878))); Burnap v. United States, 252 U.S. 512, 515 (1920) (stating the principle enunciated in *Germaine* more broadly because the Court failed to refer to inferiority or independence when stating that "department" "does not include heads of bureaus or lesser divisions").

153. *See supra* note 146 and accompanying text.

154. *See supra* notes 3–23, 127–128, 140–153 and accompanying text.

155. *See supra* note 33 and accompanying text (setting out the definition of an inferior officer as one who is subordinate to an officer appointed by the President).

156. *See* Lawson, *supra* note 99, at 80–81 ("There is nothing logically impossible about vesting the appointment of inferior officers in other inferior officers, but it certainly looks odd given the phrasing of the Appointments Clause.").

interpretation would permit Congress to expand the "Heads of Departments" significantly by relying on a nonsubstantive, formal criterion.[157] That interpretation would offend the *Freytag* majority opinion's concern over appointment-power dilution.[158] Treating both criteria as necessary conditions precludes this odd result.

Given the ambiguity in the Court's decisions and uncertainty as to which portions of *Freytag* are good law, a significant constitutional question exists as to whether the Bureau is a department, and thus whether the Director is a department head who can appoint the Deputy Director.[159]

IV. AVOIDING THE SUBSTANTIAL QUESTION

Depending upon the Deputy Director's duties and the judicial remedies for an unconstitutional appointment, a decision holding that the Deputy Director's appointment is unconstitutional could be debilitating to the Bureau.[160] Admittedly, we cannot know the consequences of an improper appointment until we learn which powers the Deputy Director will assume. Yet, most matters in which the Deputy Director may participate—such as rulemaking, adjudicatory matters, and enforcement proceedings—would likely be called into question and perhaps even invalidated.[161] Indeed, when

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157. *See supra* note 142–143 and accompanying text.

158. *See supra* note 135 and accompanying text.

159. If the Director is not a department head, the Bureau could not rely upon the "approbation rule," which permits a department head to approve a subordinate's appointment of an inferior officer. That rule applies to situations in which the statute expressly requires the department head to approve the appointment. *See* United States v. Smith, 124 U.S. 525, 532–33 (1888); United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393–94 (1868). First, the Bureau's situation would differ because it may not qualify as a "department" in the first instance and thus have no head to approbate the decision. Second, even if the President or another department head attempted to approbate the Deputy Director's appointment, that approbation would encounter statutory difficulties because Dodd-Frank gives the Director, not the President or another department head, the power to appoint the Deputy Director. The statute does not give the President or other department head the power to approbate the appointment. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011(b)(5)(A), 124 Stat. 1376, 1964 (2010) (to be codified at 12 U.S.C. § 5491); *Smith*, 124 U.S. at 533 (rejecting the argument that a head of department's approval is relevant if no law expressly gives the department head the power to approve); *see also* United States v. Mourat, 124 U.S. 303, 308 (1888) (noting that a certain clerk was not an officer because, among other reasons, there was no act that required a head of department to approve an appointment).

160. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 137–38 (1976) (per curiam) (invalidating several "executive" powers of the FEC after the commissioners' appointment was deemed unconstitutional).

161. *Id.* But the remedy for any violation is far from clear. Most (of the few) Appointments Clause challenges arise when an officer seeks a principal officer's salary or when courts must decide whether an individual was a federal "officer"

invalidating the appointment of the Federal Election Commissioners in *Buckley v. Valeo*,[162] the Court invalidated all of the agency's powers that were executive in nature.[163] Thus, the Deputy Director's unconstitutional appointment will, at the very least, likely deprive her of prospective executive power.[164]

Although the *Buckley* Court provided the FEC Commissioners' past executive actions "de facto" validity,[165] the Court later suggested that the remedy in *Buckley* had limited future application.[166] The Court's de-facto-validity remedy,[167] while avoiding disruption to improperly

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under a federal criminal statute. *See, e.g.*, *Smith*, 124 U.S. at 533 (holding that defendant was not an "officer" for purposes of conversion charge); United States v. Germaine, 99 U.S. 508, 509, 512 (1878) (holding that defendant-surgeon was not an "officer" and thus could not be tried under extortion statute that applied to "[e]very officer of the United States"); *Hartwell*, 73 U.S. (6 Wall.) at 393–94 (holding that defendant was an officer within the Treasury Department when the Court considered defendant's liability for embezzlement).

162. 424 U.S. 1 (1976) (per curiam).

163. *See id.* at 140–41 (stating that executive functions can be "discharged only by persons who are 'Officers of the United States' within the language of that section").

164. The *Buckley* Court permitted the FEC to continue its legislative functions, such as data collection and factual investigation, because Congress could delegate similar duties to congressional committees. *See id.* at 138–41. The Supreme Court may have permitted the FEC to continue its legislative functions because either (1) the entire agency was headed by inappropriately appointed commissioners and thus not a valid independent or executive agency, or (2) Congress was (too) involved in the selection of the FEC Commissioners' appointment. *Cf. id.* at 126–27 (noting that none of the commissioners' appointments complied with the Appointments Clause); *id.* at 140–41 (holding that "present Commission" cannot perform quasi-legislative and quasi-judicial duties). The Bureau, in contrast, is not threatened with wholesale invalidation, and the Director's appointment is not invalid. Thus, the Court may not permit the Deputy Director to exercise either legislative or executive functions.

165. *Id.* at 142.

166. *Id.* ("[T]he Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date . . . ." (citing City of Richmond v. United States, 422 U.S. 358, 379 (1975) (Brennan, J., dissenting); Connor v. Williams, 404 U.S. 549, 550–51 (1972) (per curiam); Ryan v. Tinsley, 316 F.2d 430, 431–432 (10th Cir. 1963); Schaefer v. Thomson, 251 F. Supp. 450, 453 (D. Wyo. 1965), *aff'd sub nom.* Harrison v. Schaeffer, 383 U.S. 269 (1966))); *see also* Ryder v. United States, 515 U.S. 177, 183–84 (1995) (distinguishing *Buckley* and narrowing its remedial provisions, refusing to "extend them beyond their facts," when rejecting the application of a "de facto officer" doctrine commonly applied to statutorily improper appointments).

167. The *Buckley* Court's de facto validation remedy "may be thought to have implicitly applied a form of the de facto officer doctrine." *Ryder*, 515 U.S. at 184. Although *Buckley* did not expressly rely upon the doctrine, the decision "validated the past acts of public officials." *Id.* at 183. The Court explained that:

> The *de facto* officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient. [It] springs from the fear of the chaos that would result from multiple . . . suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the

appointed agency officials, takes the wind out of an Appointments Clause challenge, as the Court later obliquely conceded.[168] In *Ryder v. United States*,[169] the Court explained that *Buckley* had relied upon apportionment decisions that had "held that legislative acts performed by legislators . . . elected in accordance with an unconstitutional apportionment were not therefore void."[170] The Court in *Ryder* narrowed the remedy in *Buckley* and the earlier apportionment cases by stating that those decisions concerned challenges to an entire legislative (or executive) body.[171] A challenge to the Deputy Director's appointment, unlike the apportionment and *Buckley* cases, challenges one office, not an entire agency. The de-facto doctrine, therefore, is unlikely to validate the Deputy Director's actions.[172]

Indeed, the better remedy in the context of an Appointments Clause challenge is to invalidate the actions of the improperly appointed officer. If the remedy is not invalidation, it is difficult to see what impetus Congress or the President has to establish proper

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> orderly functioning of the government despite technical defects in title to office.

Id. at 180 (quoting 63A AM. JUR. 2D *Public Officers & Employees* § 578, at 1080–81 (1984)).

168. *Cf. Ryder*, 515 U.S. at 182–83 ("We think that one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred. Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments.").

169. 515 U.S. 177 (1995).

170. *Id.* at 183; *see Buckley*, 424 U.S. at 142.

171. *Ryder*, 515 U.S. at 183–84. Besides pointing out that the "de facto officer" doctrine was limited to statutorily improper appointments, the Court also distinguished *Ryder* from *Buckley* on the ground that the former was a criminal case while the latter was civil. *Id.* This distinction lacks staying power. In both contexts the appointment is improper and violates the Constitution. Notably, the Court provided no reasoning for why this distinction was significant. *Cf.* Kevin Sholette, Note, *The American Czars*, 20 CORNELL J.L. & PUB. POL'Y 219, 240 n.172 (2010) ("[I]n Appointments Clause challenges, the Supreme Court has chosen formalism over functionalism by rejecting the '*de facto* officer doctrine' . . . . The Court's unwillingness to apply the *de facto* officer doctrine to Appointments Clause challenges jeopardizes the validity of any actions or decisions made by improper appointees." (citing *Ryder*, 515 U.S. at 183; Glidden Co. v. Zdanok, 370 U.S. 530, 536 (1962))).

172. *See* Jonathan M. Miller, *Courts and the Creation of a "Spirit of Moderation": Judicial Protection of Revolutionaries in Argentina*, 1863–1929, 20 HASTINGS INT'L & COMP. L. REV. 231, 247–48 n.64 (1997) ("[T]he U.S. Supreme Court, while not denying the existence of the [de facto] doctrine, appears inclined to interpret de facto doctrine narrowly, so as to avoid creating a disincentive to the challenge . . ."). *But see* Duffy, *supra* note 139, at 922 n.88 (noting that the de facto officer doctrine "contains a fundamental degree of flexibility that could make it attractive" for a court seeking to avoid difficult problems that arise from invalidation).

appointments—at least in the first instance.[173] Moreover, "[t]he de facto officer doctrine is designed to address technical defects in officeholding,"[174] such as clerical errors or statutory requirements.[175] But if the Deputy Director's actions, despite the unconstitutional appointment, are simply accorded de facto validity, the Appointments Clause will promptly devolve into "etiquette or protocol" for the garden party that will be the federal government.[176] Invalidation, a material possibility and a more suitable remedy, could leave the Bureau paralyzed, especially if the Deputy Director assumes the Director's duties during the Director's absence.[177]

The Director may not be able to mitigate the effect of the Deputy Director's unconstitutional appointment, whether or not a court would invalidate certain past agency actions. The Deputy Director's functions (before or after a court's invalidation of the appointment) could not simply be delegated to other employees.[178] Those employees, by assuming such duties while subject to the Director's oversight, would likely become inferior officers who must be appointed under the Appointments Clause.[179] Likewise, the Director could not ratify the decisions of the Deputy Director (or an employee to whom the inferior officer's duties were delegated) without rendering the Appointments Clause a dead letter as to inferior officers. If such ratification were permissible, the Executive Branch would have little reason to comply with the Appointments Clause for either principal or inferior officers.[180]

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173. *See Ryder*, 515 U.S. at 183. Although I concede that it is odd that the improper appointment of all of an agency's commissioners has a more limited remedy than the improper appointment of one inferior official, the problem lies in the Court's ineffectual remedy in *Buckley*—a remedy that the Court has indicated will be narrowly limited to its facts. *See id.* at 184 (refusing to apply "*de facto* officer" doctrine to improperly appointed military judges).

174. Gary Lawson & Guy Seidman, *The Hobbesian Constitution: Governing Without Authority*, 95 NW. U. L. REV. 581, 596 (2001); see *supra* note 167 for a brief discussion of the de facto officer doctrine.

175. Lawson & Seidman, *supra* note 174, at 595 ("The effect, and purpose, is to prevent technical defects in an officer's title, such as a clerical error or a failure to post a required bond, from having potentially disastrous effects on settled legal rights.").

176. *See* Ryder v. United States, 515 U.S. 177, 182 (1995) (quoting Buckley v. Valeo, 424 U.S. 1, 125 (1976) (per curiam)).

177. *See* Sholette, supra note 171, at 240 n.172 (stating that without the de facto doctrine any decisions made by an improperly appointed officer may be invalidated).

178. *See supra* notes 28, 38–40 and accompanying text (reasoning any employee who undertakes authority equal to an "Officer of the United States" becomes an "Officer of the United States").

179. *See supra* notes 28, 38–40 and accompanying text.

180. Perhaps the Executive Branch could argue that the Appointments Clause would remain important because the Deputy Director may not be able to be paid without a proper appointment. But the Executive Branch would likely be able to

Perhaps the Director could, however, assign an improperly appointed Deputy Director supervisory power over the Bureau's data-collection powers.[181] The Court in *Buckley* permitted an improperly appointed Federal Election Commission to perform investigative and data-collection functions because "those powers [are of the kind that] Congress might delegate to one of its own committees."[182] The Bureau's duties to collect data—even if only for rulemaking purposes[183]—should be similarly "legislative" or, at least, "quasi-legislative" in nature.[184] If so, the individual performing these duties may not need to be appointed under the Appointments Clause.[185] Yet, depending on how the Director sets up the Bureau, this putative solution may be impractical.

To preempt a quo warranto or other similar lawsuit by regulated entities,[186] Congress can amend 12 U.S.C. § 5491 to require another method of appointment.[187] But, in the context of an independent bureau within an independent agency, no perfect solution exists. Congress could, for instance, permit the Governors of the Federal Reserve to appoint the Deputy Director. In light of *Free Enterprise Fund*, the Governors almost certainly constitute the head of a

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create a position for the Deputy Director with other Executive Branch funds, either as an employee or, like Ms. Warren, as an Assistant to the President. *See* Press Release, President Barack Obama, Presidential Statement on Signing the Department of Defense and Full-Year Continuing Appropriations Act 2011 (Apr. 15, 2011), http://www.whitehouse.gov/the-press-office/2011/04/15/statement-president-hr-1473 (arguing that the legislature's attempt to limit the use of funds for several of the President's staff violates the separation of powers).

181. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1022(c), 124 Stat. 1376, 1981–84 (2010) (to be codified at 12 U.S.C. § 5512) (delegating the task of data collection to the Bureau).

182. Buckley v. Valeo, 424 U.S. 1, 137 (1976) (per curiam).

183. Dodd-Frank Act § 1022(c)(1), 124 Stat. at 1981–82 (to be codified at 12 U.S.C. § 5512).

184. *Cf. Buckley*, 424 U.S. at 137–38 (finding powers which are "essentially of an investigative and informative nature" powers that the Commission may still exercise (citing Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975); McGrain v. Daugherty, 273 U.S. 135 (1927); Kilbourn v. Thompson, 103 U.S. 168 (1881))).

185. *Id.* at 137–38. *But see supra* note 164 (explaining that the *Buckley* Court's allowing of FEC officials to continue legislative tasks may not apply to the Deputy Director).

186. A writ of quo warranto "inquire[s] into the authority by which a public office is held." BLACK'S LAW DICTIONARY 1285 (8th ed. 2004).

187. *See infra* notes 190, 192, 194 and accompanying text (providing three separate ways of changing the method of appointment). The suggestion that Congress alter the Deputy Director's method of appointment is not quixotic. When Professor John F. Duffy identified the unconstitutional appointment of administrative patent judges, Congress remedied the constitutional defect within approximately one year. *See* Duffy, *supra* note 139, at 904 n.*, 918 n.72 (citing 35 U.S.C. § 6 (2006) (as amended in August 2008)).

department.[188] Yet, by giving the Governors this prerogative, Congress must not only amend 12 U.S.C. § 5492, which currently denies the Federal Reserve power to appoint the Bureau's officers or employees,[189] but also render the Bureau less independent (and more prone to agency capture) than originally envisioned.[190] A similar problem would arise if Congress placed the appointment power in the President alone. The President could appoint a Deputy Director whose views are contrary to those of a Director appointed by a prior President[191] and thereby reduce the agency's independence. Congress may also be able to permit other heads of departments (or the courts of law) to choose the Deputy Director. Yet, even if such an interbranch appointment is permitted,[192] the independence of the Bureau is once again compromised.

Congress's final option requires that the President nominate the Deputy Director with the Senate's advice and consent.[193] This method of appointment, used for some deputies, may be the most palatable solution.[194] The President's choice would necessarily be approved by another branch of government, thereby limiting the President's ability to choose a Deputy Director who is incompatible with the Director.[195] The necessity for the Senate's consent will very likely slow the appointment process and perhaps render the Deputy Director's appointment more political and contentious than it would otherwise be. But, considering Congress' limited options, traditional confirmation is likely the best means of curing the Deputy Director's potentially defective appointment.

Even if the courts ultimately deem the appointment constitutional, as I suggest that they should, Congress should act now because of the stakes and timing. The Bureau has been controversial since its inception, and moneyed financial institutions will be motivated to

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188. *See* Free Enter. Fund v. PCAOB, 130 S. Ct. 3138, 3163–64 (2010) (holding that SEC Commissioners are, collectively, a department head).

189. Dodd-Frank Act § 1012(c)(2)(B), 124 Stat. at 1965–66 (to be codified at 12 U.S.C. § 5491) (denying the governors the authority to "appoint, direct, or remove any officer or employee of the Bureau").

190. *See supra* notes 11–17 and accompanying text (describing the statutory independence of the Bureau).

191. The Bureau's Director is appointed for a five-year term, allowing for the possibility that the Director's term will overlap the terms of two presidents. *See* Dodd-Frank Act § 1011(c)(1), 124 Stat. at 1964 (to be codified at 12 U.S.C. § 5491).

192. *See* Morrison v. Olson, 487 U.S. 654, 675, 677 (1988) (permitting interbranch appointments as long as they are not "incongruous").

193. U.S. CONST. art. II, § 2, cl. 2.

194. *See supra* note 78 (noting that the President, with the Senate's advice and consent, appoints the deputies for FEMA).

195. U.S. CONST. art. II, § 2, cl. 2.

limit the Bureau's power.[196] A determination that the Deputy Director's appointment is unconstitutional could undermine numerous Bureau proceedings and actions.[197] Changing the method of appointment removes one potential arrow from the Bureau's opponents' quiver. And amending the statute now makes sense. The Bureau is not scheduled to operate until the summer of 2011.[198] During this establishment period and the Bureau's first months of operation, Congress should ensure that the Deputy Director's appointment is unquestionably constitutional.[199]

Of course, amending the Bureau's organic act will lead opponents to seek other changes to the Bureau's powers. The Republicans, who gained control of the House of Representatives in January 2011, have already indicated that they plan to "revisit" the Bureau anyway.[200] If they "revisit" the Bureau, Congress and the President may as well ensure that the Bureau's powers are not later, and unnecessarily, called into doubt or invalidated. Moreover, congressional

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196. *See, e.g.*, Brush, *supra* note 108.

197. *See supra* note 173–179 and accompanying text.

198. *See* Fred Rivera, *Consumer Protection Bureau Set to Take Flight July 21, 2011*, FINANCIAL SERVICES LITIGATION MONITOR (Sept. 21, 2010), http://www.financialserviceslitigationmonitor.com/2010/09/articles/federal-agencies/consumer-financial-protection-bureau-set-to-take-flight-july-21-2011/ (noting that the Bureau's full regulatory powers do not commence until late July 2011).

199. *See supra* notes 194–195 and accompanying text.

200. Dave Clarke & Rachelle Younglai, *Republicans Want to Revisit Financial Regulation Reform Bill*, INS. J. (Sept. 21, 2010), http://www.insurancejournal.com/news/national/2010/09/21/113382.htm; *see also* Jennifer Liberto, *Wall Street Reform Stuck On Consumer Protection*, CNN MONEY (May 6, 2010 3:52 PM), http://money.cnn.com/2010/05/06/news/economy/consumer_protection/index.htm (referring to disputes over the Bureau and its powers that Senators sought to negotiate prior to Dodd-Frank's passage).

Senator Richard Shelby (R–Ala.) said not only that "[t]he consumer agency bothers me the most," but "I thought the creation of it and the way it was created was a mistake." Clark & Younglai, *supra*; *see also* Jon Prior, *Bachmann Introduces Repeal of Dodd-Frank, Fires Back At Critics*, HOUSING WIRE (Jan. 6, 2011 11:25 AM), http://www.housingwire.com/2011/01/06/bachmann-drops-dodd-frank-repeal-ahead-of-criticism (reporting that Representative Michelle Bachmann (R–Minn.) introduced a bill to repeal Dodd-Frank and the Bureau); David Weidner, *The Republican Eraser*, WALL ST. J. (Jan. 26, 2011 11:34 AM), http://online.wsj.com/article/SB10001424052748704721104576106620934547598.html ("If [the Republicans] can't close the Consumer Financial Protection Bureau, they want to make its chief accountable to Congress and its budget subject to the House Appropriations Committee.").

The White House has not ignored these potential threats to the Bureau. Warren met with critics of the agency—both inside and outside of Congress—who seek either to weaken or "kill the agency." *See* Maya Jackson Randall, *Warren Meets With Consumer-Bureau Critics*, WALL ST. J., Jan. 26, 2011, 1:04 PM), http://online.wsj.com/article/SB10001424052748703293204576106100404370190.html.

reconsideration of Dodd-Frank may not be as painful as Democrats fear. Although the public may have soured on Democrats generally, the public, as a whole, supports the Bureau,[201] and a handful of Republicans has endorsed the Bureau.[202] Ultimately, the Bureau may be better off taking its chances with Congress rather than the courts.

CONCLUSION

Although who or what, respectively, constitutes an "inferior officer" and a "department" may seem intuitive, these concepts suffer from ambiguity due to the Constitution's text and judicial decisions.[203] The relative rarity of appointment challenges provides few opportunities for courts to clarify these concepts, especially as to agency deputies.[204] Because of the indefinite contours of these terms, Congress must be exceedingly vigilant in ensuring that the agencies and offices that it creates comport with the Constitution.

The appointment of deputies may seem, to Congress and perhaps many others, the stuff of minutiae and abstract technicalities. But an unconstitutional appointment has practical consequences, even if the Supreme Court's prior decisions provide mere clues as to precisely what the consequences will be.[205] Whether the Deputy Director's appointment is constitutional is a significant question that Congress and the President should confront now. Permitting a controversial bureau to establish itself under a cloud of unconstitutionality is neither wise nor responsible.

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201. One survey indicates that 57% of Americans support the creation of a consumer-financial-protection bureau. *See Survey: Americans Want Consumer Agency for Financial Products and Services*, CONSUMER FED'N OF AM., 1–3 (Sept. 9, 2009), http://www.consumerfed.org/elements/www.consumerfed.org/file/CFPA_Poll_Release_3_Sep_09_2009_final.pdf.

202. David Dayen, *Dodd-Frank Passes House*, FIREDOGLAKE (July 30, 2010 4:02 PM), http://news.firedoglake.com/2010/06/30/dodd-frank-passes-house/ (noting that Republican House Representatives Joseph Cao, Mike Castle, and Walter Jones voted for Dodd-Frank); Brady Dennis, *Congress Passes Financial Reform Bill*, WASH. POST, July 16, 2010, at A01 (noting that Republican Senators Scott Brown, Susan Collins, and Olympia Snowe voted for Dodd-Frank).

203. *See* Bhagwat, *supra* note 40, at 983 ("The term 'inferior,' however, turns out to be somewhat more ambiguous than first appears . . . .").

204. *See supra* Parts II & III.

205. *See supra* note 161.