# Presidential Control – The Appointments Clause

# Learning Objectives

## Learn the source of the President’s domestic powers.

## Learn the requirements of the Appointments Clause.

## Learn the difference between principal and inferior officers.

# Reading Assignments

## Chapter 2, Section III (B)(1) - Appointment.

# Issues to be addressed

## Source of domestic executive power

### Vesting and Take Care Clauses

#### “The executive Power shall be vested in a President of the United States of America.” U.S. Const. art. II, § 1.

#### Article II says that the President, specifically, “shall take Care that the Laws be faithfully executed.” Art. II, § 3.

#### Together, these define the source of the president's domestic powers

### The Unitary Executive

#### Do all of the executive branch powers belong to the president him/herself?

##### In Chadha, Congress gave the Attorney General the power to stay the deportation of an alien

##### Can the president tell the AG's how to rule?

##### Can he only fire the AG?

#### Why does it matter whether the president has the power or the secretary has the power?

##### How does the Appointments Clause fit into this analysis?

##### If it is the president's power, why should the Senate care who he appoints?

##### What if the Senate will not confirm a secretary?

###### Can the president act in the stead of the secretary?

## The Power to Appoint

### Art II, sec. 2, cl 2 - the Appointments Clause

#### "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint... all other [principal] Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law:

#### but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

### Recess Appointments

#### Article 2, Section 2:

##### The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

##### Why was this included?

#### What if the Senate wants to prevent recess appointments?

##### Can the Senate stay in session while the members are at home?

##### Does the vacancy have to occur during the recess or only be filled during the recess?

## Who is a principal officer?

### Why does this matter, i.e., why might a litigant want to fight the characterization of an officer as an inferior officer, rather than a principal officer?

### It is usually clear who is a principal officer, subject to confirmation by the Senate, in existing agencies.

### Congress can designate by law that a position is a principal officer.

### Controversies arise with new positions headed by inferior officers, such as the independent counsel in the Morrison v. Olson case, when the position does not appear to have a principal officer as a supervisor. If you can establish that the office should have senate confirmation, you can void its actions.

### Inferior officers are hard to tell from ordinary employees and there are a lot more of them, so there are more occasions for challenges.

## What is the traditional standard for an inferior officer?

### The Court quoted a prior opinion in which it had said that ‘‘whether one is an ‘inferior’ officer depends on whether he has a superior,’’ and that ‘‘ ‘inferior officers’ are officers whose work is directed and supervised at some level by other officers appointed by the President with the Senate’s consent.’

### This could be a problem if Congress designated someone as a principal officers needing confirmation who was really a subordinate who was clearly supervised by a principal or inferior officer.

## Free Enterprise Fund v. PCAOB, 130 S.Ct. 3138 (2010)

### Government agency that regulates accounting firms.

### Members appointed by the SEC commissioners, not the President

### The Board’s rules and its imposition of sanctions on accounting firms are subject to approval and alteration by the SEC.

### Members of the Board are removable ‘‘at will’’ by the SEC Commissioners.

### Is this sufficient control by a principal officer to establish the board members are inferior officers, thus appointable by the SEC rather than the president?

## President Nixon and the Independent Counsel

### Great crisis in presidential control of agencies - The Saturday night massacre

### Nixon orders the Attorney General to fire the independent counsel who was investigating Watergate.

### The attorney general refuses and resigns, as does the assistant AG.

### The third in command AAG Bork agrees to fire the independent counsel, probably in a deal already set up by the AG to avoid a constitutional crisis.

### Nixon's indirect firing of the independent prosecutor was the background for the new independent counsel law in Morrison v. Olson.

## Morrison v. Olson, 487 US 654 (1988)

### What did Olson hope to do with his suit?

### What triggers the appointment of an independent counsel?

### Who appoints the independent counsel?

#### What class of officer must this then be?

### Who can remove an independent counsel for cause?

### Who can remove that person, i.e., what is the chain of presidential control?

## How do we determine the core function (replacing the old control test) for an inferior officer?

### Does the independent counsel have a policy making role?

### Is this a critical area for the president to control the exercise of discretion?

#### Why would that be at odds with the independent counsel’s job?

### How does the president retain control of the independent counsel?

## What was the key issue in Olson?

### The independent counsel could only be removed for good cause, rather than at-will.

### Does this impermissibly interfere with the president's power to carry out the laws?

#### Majority says no, focusing on the preservation of separation of powers.

#### Scalia saw this as a stark limitation on the president's power to exclusively control the executive branch.

## Was Scalia Right?

### What was he worried about as regards the power of the office?

#### He stresses the broad powers of the IC

#### How did this play out in Whitewater, the Clinton investigation?

### What would it cost you to be investigated if you were a junior White House counsel?

## Congressional Determinations

### If the Congress establishes that the position is an inferior officer, the courts have not second-guessed it.

#### This might change if Congress created an inferior office that was clearly the job of a principal officer.

### Be careful of circular arguments

#### Just because an officer is not required to be appointed under the appointments clause, that does not prevent the court from finding that the position is covered by the Appointment's Clause.

### The real problem is that the court will not second guess Congress determining that an officer must be confirmed by the Senate.

## Example: Is the general counsel to a cabinet a principal officer?

### What is the classification of the Secretary of Veterans Affairs?

### What are the duties of the General Counsel to the Secretary?

#### Much more authority than just an employee

#### Does the general counsel make decisions that affect agency policy or enforcement?

#### What is the level and right of supervision by the Secretary?

### Is the general counsel an employee, inferior officer, or principal officer of the US?

# Evaluation Questions

## Presidential power

### How do the Vesting and Take Care Clauses create the core of the president's domestic powers?

### How are appointments used to control agencies?

### What was the appointments clause problem in *Buckley v. Valeo*?

## What is the unitary executive?

### How does this theory affect the relationship between the president and agency heads?

### Why does the advice and consent provision in the constitution argue against the unitary executive theory?

### Why would the unitary executive theory increase the gulf between cabinet level agencies and independent agencies?

## Who are principal officers of the U.S.?

### How are they appointed?

### How can they be removed?

### What is a recess appointment?

### How has the Senate tried to prevent recess appointments?

## Who is an inferior officer of the U.S., as opposed to an officer of the U.S.?

### Who may appoint inferior officers?

### What is the appointments process for inferior officers?

### What do the courts look for to tell the difference between principal and inferior officers?

### Have the courts second guessed congressional determinations about whether a position is an inferior officer?

## In *Morrison v. Olson, 487 US 654 (1988)*, what was the attack on the independent counsel law?

### Who appoints the independent counsel?

### How did the court argue that the president retained enough control to allow the independent counsel law to stand?

### Why is the independent counsel law inherently in conflict with the notion of presidential control?