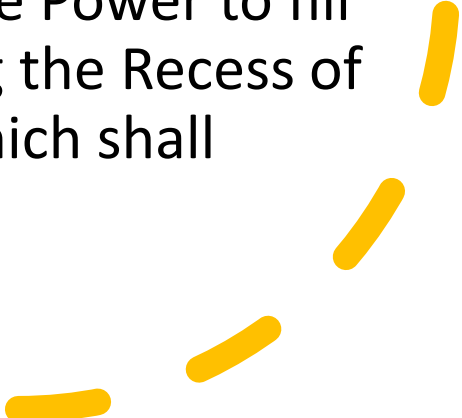


## Article II, sec. 2

“He shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. 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.”




# Questions

- Who is an inferior officer within the meaning of Article II?
- May Congress assign the appointment power in other ways than describe in Article II?
- Can Congress grant that power to itself or its officers?
- What are the boundaries of the President's power to make recess appointments?
- Even though the Constitution does not mention it, is the power to remove federal officers implicit in the power to appoint them, and if so how and when may a President do so?

# Ex Parte Siebold (1880)

- Congress could authorize federal circuit courts to appoint election supervisors.
- While the President generally made such appointments there is no constitutional requirement that he do so.
- Judiciary could only refuse to exercise the appointment power if it would be an “incongruity” with the judicial power.
- Justices offered no examples of when court appointments would be incongruous with judicial authority.

# United States v. Eaton (1898)

- Upheld a State Department regulation allowing executive officials to appoint a vice consul when a consul is temporarily absent.
  - Vice Consul was an inferior officer
  - Because it was performing the duty of a superior
  - For a limited time
- 

# Rice v. Ames (1901)

- Congress could have federal court judges appoint extradition commissioners
- Since Congress provided for the Commissioners
- Who were not judges in the constitutional sense
- There was nothing in Article II that prevented Congress from giving District of Appeals Court judges this power

## Morrison v. Olson (1988)

- Involved the appointment of an Independent Counsel to investigate possible violations by high-ranking federal officials
- Law allowed the A.G. to ask a panel of federal court judges to appoint an Independent Counsel and define that counsel's jurisdiction.
- Olson moved to quash subpoenas on the grounds that the independent counsel law was unconstitutional violation of ARTICLE II.
- Court ruled 7-1 to uphold the constitutionality of the law
- The Independent Counsel was an inferior officer, removable by the A.G. for sufficient cause

## Morrison v. Olson (cont.)

- Independent Counsel was appointed for a limited time
- With jurisdiction limited by instructions from the appointing court
- Given the desire for independence the most logical place to put the Independent Counsel was in the Judicial Branch
- Scalia's dissent – Article II says “The executive Power shall be vested in a President of the United States”
- That “does not mean *some* of the executive power, but *all* of the executive power.”
- Unconstitutional for Congress to vest prosecutorial power in an independent counsel appointed by federal judges.

Free  
Enterprise  
Fund v. Public  
Company  
Accounting  
Oversight  
Board (2010)

- Created by the Sarbanes-Oxley Act of 2002 to more tightly regulate the accounting industry
- Board composed of five members appointed by the SEC
- Was vesting the appointing power in the SEC constitutional?
- SCOTUS unanimously upheld constitutionality of the appointments
- Court ruled members of the Board were inferior officers and Congress could vest their appointment in the head of a department
- Court rejected the argument that multi-member organization like the SEC could not be the head of a department



## Buckley v. Valeo (1976)

- Court held that the portion of the law that allowed the Speaker of the House and the President Pro Tempore of the Senate to appoint four members of the FEC was unconstitutional under Article II
- FEC given enforcement as well as rule making and adjudicative powers
- Court held that such powers could only be exercised by “Officers of the United States” appointed in accordance with the Appointments Clause
- The Speaker and President Pro Tempore are not mentioned in that clause

# Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC (2020)

- Congress enacts PROMESA to deal with financial crisis in Puerto Rico
- Financial Oversight and management Board has seven voting members appointed by the President without Senate's advice and consent.
- Several of Puerto Rico's creditors challenge Oversight Boards authority as violating the Appointments Clause.
- Supreme Court rules that though P.R. is not a state the Appointments Clause still "constrains the appointments power as to all officers of the United States, even those who exercise power in or in relation to Puerto Rico."

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- Several creditors of Puerto Rico challenge Board's authority as violating the Appointments Clause
- Supreme Court rules that even though Puerto Rico is a territory and not a state the Appointments Clause "constrains the appointments power as to all officers of the United States, even those who exercise power in or in relation to Puerto Rico."

# Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC (cont.)

- The Appointments Clause did not restrict the appointment of Board members because the clause’s language “suggests a distinction between federal officers who exercise power of the National Government and non-federal officers who exercise power of some other government.”
- Congress long created local offices for the territories and D.C.
- This practice indicates that when local officials have local duties they are not Officers of the United States within the meaning of the Appointments Clause
- Board’s powers back by Puerto Rican not federal law

# United States v. Arthrex (2021)

- Patent Trial and Appeal Board (PTAB) hears challenges to existing U.S. patents adjudicated by Administrative Patent Judges (APJ)
- APJs are appointed to PTAB by the Secretary of Commerce but answered to the Director of the Patent Office
- APJ decisions were final word on validity of patents in Executive Branch
- APJs could only be removed “for such cause as will promote the efficiency of the service”, i.e., not at will

# United States v. Arthrex (cont.)

- “Here...Congress has assigned APJs ‘significant authority’ in adjudicating the public rights of private parties, while also insulating their decisions from review and their offices from removal.”
- APJs could not be removed by anyone who was elected or who answered to someone who was elected.
- APJs could not be seen as inferior officers of the United States who could be appointed without the Advice and Consent of the Senate without violating the Appointments Clause.





Article II, sec. 2

“The President shall have the 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 the next Session.”



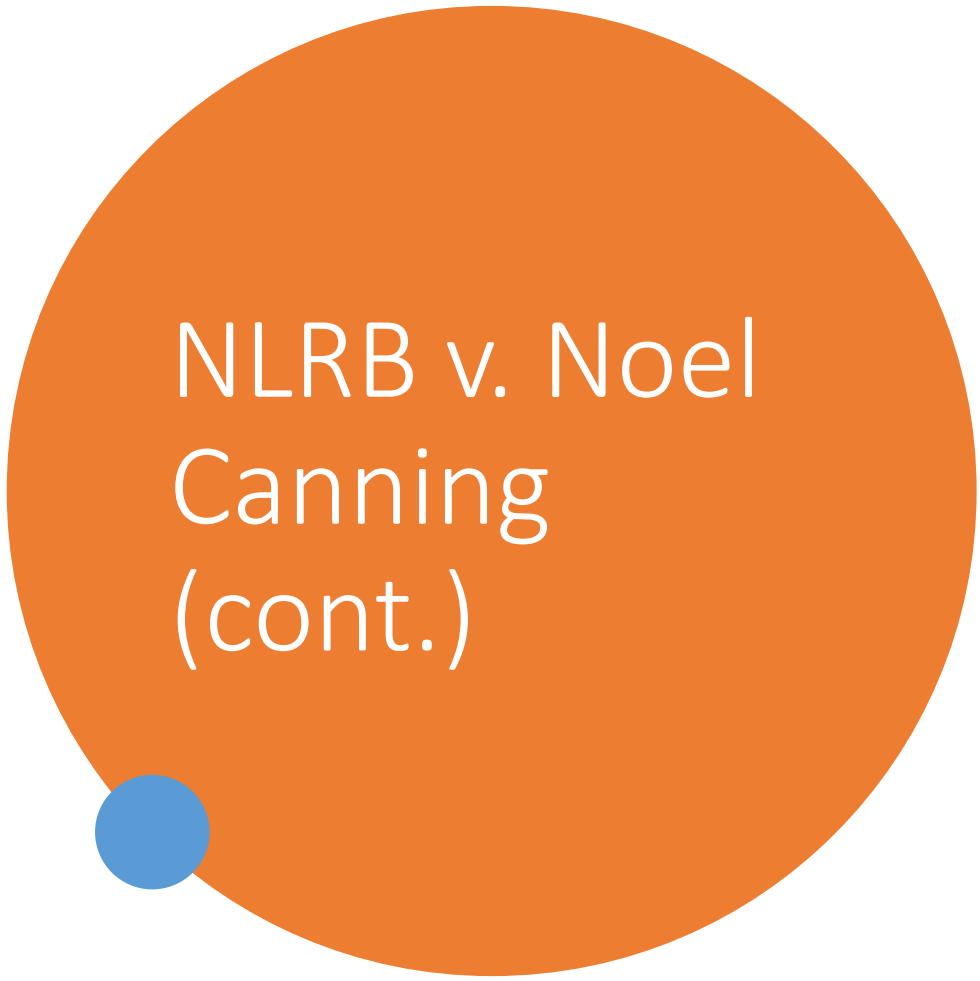
Vacancy  
Appointments



# National Labor Relations Board v. Noel Canning (2014)

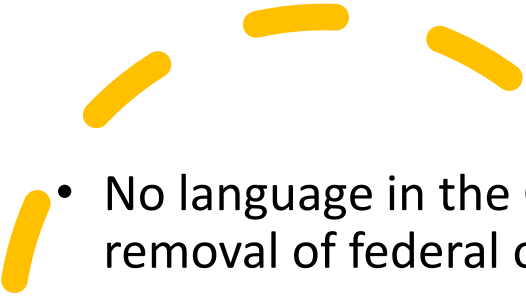
- NLRB has five members with three members needed to transact business
- Senate took a series of brief recesses during the holidays, but held pro forma sessions every Tuesday and Friday during that period
- President Obama used one of the three day periods between pro forma sessions to appoint three nominees to NLRB
- SCOTUS unanimously ruled the appointments were unconstitutional under the Appointments Clause, but did so narrowly





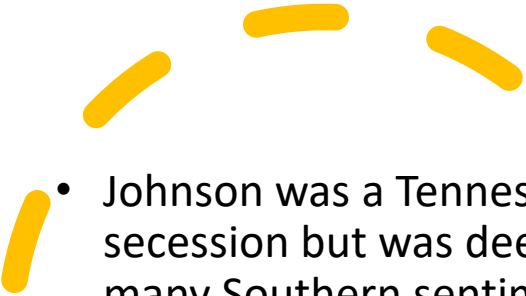
# NLRB v. Noel Canning (cont.)

- Court ruled the Senate was not really in recess when the President exercised his appointment power
- Court paid great deference to Senate's authority, but put "significant weight on historical practice."
- Court ruled the Clause applied to intra-session as well as inter-session recesses
- Vacancies being filled do not have to occur during recess
- Found appointment invalid because Senate was not in recess for greater than ten days
- For purposes of Recess Appointment Clause the Senate is in session when it says it is in session

- 
- No language in the Constitution addressing the removal of federal officers
  - Could the government function if there was no way to remove a federal officer doing a bad job, or not following the President's policy?
  - Should the Senate, which gave its advice and consent in appointing the officer have a say in their dismissal?
  - Or would that be a violation of the Separation of Powers Doctrine and give the Congress a hand in running the Executive Branch?



Removal  
Power

- 
- Johnson was a Tennessee Democrat who opposed secession but was deeply racist and sympathetic to many Southern sentiments
  - Congressional Republicans felt Johnson was obstructing Reconstruction
  - Passed the Tenure in Office Act to prevent him from removing remaining members of Lincoln's cabinet
  - Nevertheless Johnson fired Secretary of War Stanton
  - House Republicans voted to impeach Johnson for that action
  - Fell one vote short of conviction in the Senate



# Impeachment of Andrew Johnson

# Myers v. United States (1926)

- President had fired the Postmaster in Portland Oregon in violation of a federal law
- The law said postmasters could only be removed during their four-year term only “with the advice and consent of the Senate”
- Court held that “the power to remove...is incident to the power to appoint”
- President had *exclusive* right to remove officers of the United States who he had appointed with advice and consent of the Senate
- Myers opinion stands for the proposition that any congressional limits on the removal power are unconstitutional

# Humphrey's Executor v. United States (1935)

- Court unanimously upheld Congress' ability to limit the removal of a commissioner of the Federal Trade Commission
- Under the FTC Act President could fire a commissioner only for "inefficiency, neglect of duty or malfeasance in office"
- Court explained that under Article I Congress could create independent agencies and insulate members from removal by the President except for "good cause"
- Distinguished this decision from Myers saying that decision applied only to "purely executive officers", not members of independent quasi-judicial, quasi-legislative agencies

# Dicta

- The part of the opinion that does not speak directly to the resolution or determination of the specific case before the court
- Concerns the broader implications or some reasoning behind the decision
- Courts rarely dismiss part of a previous, inconvenient, decision as dicta
- It is almost always dismissed as *mere dicta*

# Weiner v. United States (1958)

- Court held that even without a statutory limit on removal the President could not remove executive officials where independence from the President is desirable
- Case involved the President firing a member of the War Claims Commission which did not have enabling legislation limiting the President's removal power
- Court decided that the need for the Commission to be independent limited the President's removal power
- Court wrote there was a "sharp differentiation" between "those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference."

## Bowsher v. Synar (1968)

- Court declared unconstitutional the Balanced Budget and Emergency Deficit Control Act of 1985
- If federal spending exceeded the allowable deficit ceiling the Comptroller General of the U.S., the head of the General Accounting Office, imposed automatic budget cuts
- GAO is a congressional agency
- Court held it was impermissible to delegate to a legislative official an executive power to implement the law



# Morrison v. Olson

- Upheld the constitutionality of limits on the President's ability to remove the Independent Counsel
- Court distinguished this case from its decision in Bowsher saying that here Congress had no role in removing the Independent Counsel
- Could only be done by the A.G. "for cause" and required A.G. to file a report with the appointing panel of judges and House and Senate Judiciary Committees
- Court said important thing was whether the restrictions on removal impeded the President's from performing his constitutional duty

# Free Enterprise Fund v. Public Company Accounting Oversight Board


- Court held SEC's power under the law to remove Board members unconstitutional
- Under Sarbanes-Oxley Board members could only be removed by the SEC for "good cause" and members of the SEC, an independent agency, could only be removed by the President for "good cause"
- Court held that such multi-level protection from removal was contrary to the Executive Power vested in Article II
- President could not "take care that the laws are faithfully executed" if he could not oversee the faithfulness of the officers executing them.

# Seila Law v. Consumer Financial Protection Bureau (2020)

- Seila claimed CFPB's structure violated Article II because its single Director could only be removed by the President for "inefficiency, neglect or malfeasance" not answerable to any elected official
- Court found for Seila, distinguishing this decisions from two others regarding the President's removal power
- Humphrey's Executor gave for-cause removal protection to a multi-member body of experts who were balanced along partisan lines, appointed to staggered terms, performing only quasi-legislative and quasi-judicial functions, exercising no executive power.

# Seila Law v. Consumer Financial Protection Bureau (cont.)

- In *Morrison v. Olson* the Court approved for-cause removal protection for an inferior officer, the independent counsel, who had limited duties and no policy making or administrative authority.
- Here the CFPB Director is the lone administrator of the agency, possessing significant administrative and enforcement authority; the kind of executive power not in question in *Humphrey's Executor*
- Unlike in *Morrison v. Olson* CFPB Director promulgates binding rules and can impose severe penalties
- Court refuses extending the exceptions in those prior decisions to what it saw as a fundamentally new situation.

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# Unitary Executive Theory

- The general thrust of the theory is widely accepted
- When the Framers wrote that “The executive power shall be vested in a President of the United States” they established an executive branch headed by a single individual
- Debates during the Constitutional Convention whether a plural executive would be better
- Argument here is that the Vesting Clause and the Take Care Clause created a Unitary Executive that is unified, hierarchical and under the control of the President.

# Unitary Executive Theory - Questions

- In what sense is the Executive unitary?
- To what degree and regarding what functions is that power not shared?
- The strongly Unitary Executive Theory posit almost absolute power
- The weaker Unitary Executive Theory raises questions about boundaries
- Article I, sec. 8 – “To make all laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”

# The Unitary Executive

- Congress has complete control on what courts other than the Supreme Court are established
- Congress has almost complete control over the Supreme Court's appellate jurisdiction
- Congress has legislative authority but the President can veto legislation
- The President cannot appoint a single cabinet member without the Advice and Consent of the Senate
- Congress can assign appointment of Inferior Officers to the judicial branch

# The Unitary Executive

- *Myers v. United States* held that Congress could not condition presidential removal of an Executive Officer on the consent of the Senate
- Congress can protect officials not appointed with Advice and Consent of the Senate by statutorily permitting for-cause removal
- Congress has the power to decide upon classification of officers



# Presidential Power of Removal

In general the President

1. Has the power to remove executive officials
2. But Congress may limit the removal power if it is an office where independence from the President is desirable
3. However, Congress cannot completely prohibit all removal, and it cannot give the removal power to itself, except through impeachment
4. Also Congress cannot set up multiple layers of protection from presidential removal where “inferior officers” can only be removed “for cause” by officers who may only be removed by the President “for cause”



# Some Remaining Questions

1. When is it desirable for an officer or an agency to be independent from the President?
2. When are removal distinctions the kind that prevent the President from performing his or her constitutional duty?