

# THE SENATE VS. THE LAW: CHALLENGING QUALIFICATION STATUTES THROUGH SENATE CONFIRMATION

## INTRODUCTION

Although the Constitution vests in the President the power to nominate executive branch officials,<sup>1</sup> Congress has time and again imposed qualifications on whom the President is able to ultimately appoint and, therefore, nominate in the first place. Throughout American history, the constitutionality of these qualifications has been called into question, given the Appointments Clause's insistence that the President nominate and the Senate confirm, with no role for the House, whose participation is necessarily required to make a qualification into law. This Note takes the position that those arguing against constitutionality, like Hanah Volokh, have it right: As pertains to positions subject to Senate confirmation, qualification statutes are inconsistent with the Appointments Clause and are an exercise of authority past the office-creation power vested in the Congress as a whole. Proceeding from that premise, the qualifications represent only a nonbinding expression of an earlier Senate's sentiment about an ideal officeholder. As such, if the President was to nominate and the Senate were to confirm an individual in contravention of a qualification statute,<sup>2</sup> this Note argues that the confirmation should stand.

Further, if a post-confirmation lawsuit challenges the individual's status as an officeholder, courts should decline to review the officeholder's legitimacy. This Note also cautions the executive branch and the Senate against contravening, just to make a point, the qualifications statutes currently on the books. Some qualifications have the effect of protecting constitutional norms, and although norms are not incontrovertible, they can

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1. U.S. CONST. art. II, § 2, cl. 2.

2. This assumes no passage of a "waiver" for the nominee in question by both the House of Representatives and the Senate, as has been the custom practice in these kinds of situations.

serve an important purpose of “[c]onstitutional maintenance.”<sup>3</sup> That being said, as a matter of prudence, in some instances it continues to make sense for the President and the Senate to abide by a qualification statute, despite its unconstitutionality. In addition, the relevant actors should consider other factors—such as the ambiguity or specificity of the qualification, and the extent to which the qualification excludes competent people willing to serve—when considering whether to disregard a statute. If recent history is any guide, the President and the Senate should work together to confirm capable nominees, even if not formally “qualified,” sooner rather than later, lest some of these laws continue to bar competent individuals from important public service roles.

A particularly egregious example of a qualification statute excluding such an individual occurred recently. In August of 2018, Interior Department official Greg Sheehan left the Trump Administration.<sup>4</sup> His fourteen-month tenure as Principal Deputy Director of the U.S. Fish and Wildlife Service (FWS) is perhaps most famous for the agency’s proposals to modify the government’s interpretation of the Endangered Species Act.<sup>5</sup> Another aspect of Sheehan’s time in Washington, D.C., however, is more important for the purposes of this Note. The executive branch believed, despite Sheehan’s impressive resume and deep understanding of the issues with which the FWS deals, that he was unable to be appointed as FWS Director. The reason? His undergraduate major. When Congress established the FWS in 1974, it mandated, “No individual may be appointed as the Director unless he is, by reason of scientific education and experience, knowledgeable in the principles of fisheries and wildlife management.”<sup>6</sup> By use of the word “and,” Congress

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3. Keith Whittington, *Constitutional Norms Matter*, L. & LIBERTY (Feb. 16, 2017), <https://www.lawliberty.org/2017/02/16/constitutional-norms-matter/> [https://perma.cc/RW5Q-2CPD].

4. Miranda Green, *Head of wildlife agency departing Trump administration*, HILL (Aug. 8, 2018, 4:57 PM), <https://thehill.com/policy/energy-environment/401163-fws-head-associated-with-endangered-species-act-rollbacks-departing> [https://perma.cc/W9ND-VYQQ].

5. Nichola Groom, *Trump administration proposes stripping some endangered species protections*, REUTERS (July 19, 2018, 4:40 PM), <https://www.reuters.com/article/us-usa-trump-wildlife/trump-administration-proposes-stripping-some-endangered-species-protections-idUSKBN1K92YY> [https://perma.cc/Y964-U5FF].

6. 16 U.S.C. § 742b(b) (2018).

created a two-part test for appointment to the office: the prospective Director must be knowledgeable in the principles of fisheries and wildlife management by reason of both (1) scientific education, and (2) experience. Sheehan, who did not have a formal college education in biology, wildlife management, or a related topic, did not meet the first condition.<sup>7</sup> As a result, he was found ineligible to be FWS Director.<sup>8</sup> No matter that Sheehan was Director of the Utah Division of Wildlife Resources for five years, or that he boasted “more than 25 years of experience with the State of Utah working in wildlife and natural resource management.”<sup>9</sup> As picks for FWS Director went, arguably few were more qualified than was Sheehan, but his lack of a formal scientific education barred him from the role.

This Note examines the nature and legal effect of qualification statutes, arguing that the President and Senate can disregard them, and should do so in certain circumstances. Part I of this Note discusses whether it is constitutional for Congress to impose prequalifications on executive appointments, considering the history of the practice and various views on the back-and-forth between Congress and the President as it relates to the Appointments Clause. Part II explores some of the ways in which qualification statutes have affected the Trump Administration, highlighting the more recent implications of these restrictions in practice with a special focus on the education requirement for the FWS Director. It also illustrates some of the ways in which Congress could abuse, and has abused, qualification statutes, and considers the question of judicial review. Part III turns to future nominations and recommends a framework for executive and congressional review of qualification statutes, through which relevant parties can decide how to proceed in the nomination process and which laws to directly challenge,

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7. Matthew Brown, *U.S. Fish and Wildlife boss departs after stirring fears on species law*, DENVER POST (Aug. 9, 2018, 8:02 PM), <https://www.denverpost.com/2018/08/09/u-s-wildlife-boss-steps-down/> [<https://perma.cc/FYT9-YTHA>].

8. Upon Sheehan’s departure in August 2018, FWS spokesman Gavin Shire told the press that Sheehan was “barred from [the acting director] role because he did not have the science degree required for the position under federal law.” *Id.*

9. Press Release, U.S. Dep’t of the Interior, Secretary Ryan Zinke Appoints Utah’s Greg Sheehan as the Deputy Director of the U.S. Fish and Wildlife Service (June 5, 2017), <https://www.doi.gov/pressreleases/secretary-ryan-zinke-appoints-utahs-greg-sheehan-deputy-director-us-fish-and-wildlife> [<https://perma.cc/SVX7-PE7T>].

as opposed to seeking a formal waiver with the cooperation of the House of Representatives.

### I. EXAMINING THE POWER TO APPOINT

The constitutionality of qualification statutes is a hotly debated question of law. Article II of the U.S. Constitution provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”<sup>10</sup> The text sets out a well-defined sequence of events for principal officers of the United States, beginning with nomination. First, the President—and the President alone—“shall nominate” a candidate. After this action comes the requirement for the “Advice and Consent of the Senate,” which the President must receive before he can make the appointment. In Article II, therefore, the Framers set forth a three-step process for the President: (1) nominate the officer; (2) receive the advice and consent of the Senate; and (3) appoint the officer. Although the education and experience requirements for the FWS Director, for example, purport to apply to whether or not an individual “may be appointed,”<sup>11</sup> the statute operates in practice as a diversion from the established sequence. If someone may not be appointed, a White House personnel official would reasonably conclude that there would be no point in recommending nomination to the President in the first place. Congress is therefore effectively prescreening candidates for nomination, when nomination is a responsibility vested in the President alone under the Appointments Clause. Such prescreening is unconstitutional. As Justice Kennedy wrote in *Public Citizen v. Department of Justice*:<sup>12</sup>

By its terms, the [Appointments] Clause divides the appointment power into two separate spheres: the President’s power to “nominate,” and the Senate’s power to give or withhold its “Advice and Consent.” No role whatsoever is given either to the Senate or to Congress as a whole in the

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10. U.S. CONST. art. II, § 2, cl. 2.

11. 16 U.S.C. § 742b(b).

12. 491 U.S. 440 (1989).

process of choosing the person who will be nominated for appointment.<sup>13</sup>

As this Part will show, Justice Kennedy's view reflects that of generations of Presidents, executive branch lawyers, and some members of the academic community. To be sure, early congressional practice offers a worthy counterweight to the argument that qualification statutes are necessarily impermissible. But in the end, the question boils down to the clear text of the Appointments Clause. And based on that text, Congress setting qualifications on executive branch appointments of principal officers is unconstitutional. As the following shows, the debate about congressional qualifications dates back to the Founding.

A. *Hamilton, Madison, and Jackson Argued for Executive Power*

The meaning of the Appointments Clause has been in question since our country's earliest days. In *Federalist No. 77*, Alexander Hamilton posited: "In [the plan for the appointment of the officers of the proposed government] the power of nomination is unequivocally vested in the executive."<sup>14</sup> He went on to define that sequence:

And as there would be a necessity for submitting each nomination to the judgment of an entire branch of the legislature . . . [t]he blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate . . .<sup>15</sup>

Drawing from Hamilton's writing, the expectation was that the judgment of the Senate could, in general, not occur until the submission of the nomination. The rejection of Hamilton's hypothetical "good one" is certainly not the same as the pre-rejection of an entire class of prospective officials who do not possess a specific résumé line or two. In *Federalist No. 76*, Hamilton answered a key question about the advice-and-consent function when the President sends a name to the Senate:

But his nomination may be overruled: this it certainly may, yet it can only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is

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13. *Id.* at 483 (Kennedy, J., concurring in the judgment).

14. THE FEDERALIST NO. 77, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

15. *Id.*

also not very probable that his nomination would often be overruled. The Senate could not be tempted by the preference they might feel to another to reject the one proposed; because they could not assure themselves that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain that a future nomination would present a candidate in any degree more acceptable to them . . .<sup>16</sup>

Here, Hamilton's arguments again challenge the validity of the Senate attempting to involve itself in the actual selection of the nominee, particularly in a way that would make a candidate more "acceptable" to the Senate, such as screening by educational background. Notably, Hamilton did not even mention the House of Representatives. The message was clear—two entities are involved in confirmation: the President and the Senate.

James Madison similarly offered his views on the matter before the House in discussing the power of the President to remove officers. He argued:

If there is any point in which the separation of the legislative and executive powers ought to be maintained with greater caution, it is that which relates to officers and offices. The powers relative to offices are partly legislative and partly executive. The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the legislative power ceases. They ought to have *nothing* to do with designating the man to fill the office. That I conceive to be of an executive nature.<sup>17</sup>

Although Congress has the power to create a principal *office*, any requirement imposed on such an office would necessarily narrow down the number of candidates whom the President may choose. This is some measure of legislative designation—Congress telling the President he may nominate *this* individual, but not *that* individual. Based on his explication, Madison would likely have been skeptical of such a scheme.

A few decades later, President Andrew Jackson advocated for the strength of the presidential appointment power. In an 1834 Protest to the Senate, President Jackson asserted his belief that "[t]he executive power vested in the Senate, is neither that

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16. THE FEDERALIST NO. 76, *supra* note 14, at 455–56 (Alexander Hamilton).

17. 1 ANNALS OF CONG. 604 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison) (emphasis added).

of ‘nominating’ nor ‘appointing.’”<sup>18</sup> President Jackson went on to say that “[s]elections are still made by the President,” and then laid out the solution for what the Senate should do about the problem of those unqualified individuals “proposed for appointment” by the President as principal officers: “withhold their consent” such that “the appointment cannot be made.”<sup>19</sup> This mechanism is the extent of the power vested in the Senate in this area. Exercising said power stands in stark contrast to requiring, before a nominee is even named, certain kinds of education and experience for eligibility for appointment.

The common thread in the arguments of Hamilton, Madison, and President Jackson is that the Constitution has already built in a mechanism for congressional influence over the appointment of executive officers. That mechanism is the Senate confirmation process. The creation of statutory qualifications is an addition on top of that mechanism and should therefore be regarded with serious skepticism in a system of established checks and balances.

*B. Modern Presidents Have Also Decried Qualification Setting*

On numerous occasions in the modern day, the executive branch has weighed in on congressionally mandated qualifications for appointed offices. The Department of Justice’s Office of Legal Counsel (OLC) has issued multiple opinions on the constitutionality of Congress imposing qualifications on certain offices.<sup>20</sup> One of those opinions, from 1989, took the following position:

Congress . . . imposes impermissible qualifications requirements on principal officers. For instance, Congress will require that a fixed number of members of certain commissions be from a particular political party. These requirements . . . violate the Appointments Clause. The only congressional check that the Constitution places on the President’s power to appoint “principal officers” is the advice and consent of the Senate.<sup>21</sup>

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18. 10 REG. DEB. 1324 (1834) (President Jackson’s protest to Senate).

19. *Id.*

20. HENRY B. HOGUE, CONG. RESEARCH SERV., RL33886, STATUTORY QUALIFICATIONS FOR EXECUTIVE BRANCH POSITIONS 5–7 (2015).

21. Common Legislative Encroachments on Executive Branch Authority, 13 Op. O.L.C. 248, 250 (1989). “This memorandum was superceded [sic] by a 1996 OLC

A 1996 OLC opinion, in response to Congress mandating certain requirements for the U.S. Trade Representative and Deputy Trade Representative, focused more on the nature of the office in concluding whether such requirements are unconstitutional.<sup>22</sup> The opinion viewed Congress as having less power to set qualifications for offices that are “close to the President” and represent the United States to foreign governments.<sup>23</sup> Multiple Presidents have, in signing statements, argued against the constitutionality of at least some of these restrictions. Presidents George H.W. Bush,<sup>24</sup> William Clinton,<sup>25</sup> and George W. Bush<sup>26</sup> each issued such statements in response to bills that purported to set certain requirements on prospective appointees. Each statement, to varying degrees, asserted the power of the executive in appointments, evincing clear presidential concern about the future implications of qualification laws.

Perhaps the most major controversy in the modern qualifications debate was the subject of the George W. Bush signing statement—the passage of the Department of Homeland Security Appropriations Act, 2007.<sup>27</sup> After Hurricane Katrina exposed issues with FEMA’s leadership, Congress passed a law requiring that from then on, “[t]he [FEMA] Administrator shall be appointed from among individuals who have—(A) a demonstrated ability in and knowledge of emergency management and homeland security; and (B) not less than 5 years of executive leadership and management experience in the public or private sector.”<sup>28</sup> In President Bush’s signing statement, he “appeared to take issue with the extent to which the qualifications might limit the pool of potential nominees to the posi-

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memorandum, which did not address the issue of qualifications (20 Op. O.L.C. 120).” HOGUE, *supra* note 20, at 6 n.24.

22. Constitutionality of Statute Governing Appointment of United States Trade Representative, 20 Op. O.L.C. 279, 279 (1996).

23. *Id.* at 280.

24. Presidential Statement on Signing the Morris K. Udall Scholarship and Excellence in National Environmental and Native American Public Policy Act of 1992, 28 WEEKLY COMP. PRES. DOC. 507 (Mar. 19, 1992).

25. Presidential Statement on Signing the Lobbying Disclosure Act of 1995, 31 WEEKLY COMP. PRES. DOC. 2205 (Dec. 19, 1995).

26. Presidential Statement on Signing the Department of Homeland Security Appropriations Act, 2007, 42 WEEKLY COMP. PRES. DOC. 1742 (Oct. 4, 2006).

27. See HOGUE, *supra* note 20, at 1–2.

28. Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, sec. 611, § 503(c)(2), 120 Stat. 1355, 1397 (2006).



tion.”<sup>29</sup> These requirements were similar in specificity to the FWS Director qualifications, which mandate “education” in a particular field of study.<sup>30</sup>

The FEMA requirement absolutely limits the pool of potential nominees. And although the statute seems reasonable—experience is desirable in a FEMA Administrator—it is also a venture by Congress beyond its constitutionally prescribed role in the nomination process. The failure of a less-experienced FEMA Administrator should inspire the President to find better candidates for the role (the person would, after all, be reported about as the “Bush FEMA Head”) rather than charge Congress with writing the “Qualifications” section of the “Help Wanted” ad for the job.

### C. Academic Debate Features Multiple Viewpoints

In the academic arena, the issue of statutory qualifications has inspired a range of views. Hanah Volokh has taken the position that “statutory requirements are unconstitutional for all appointments that require the advice and consent of the Senate.”<sup>31</sup> Volokh concludes, “from a straightforward reading of the text of the Appointments Clause,” that “Congress as a whole has no role in” setting qualifications for confirmation appointments.<sup>32</sup> This conclusion most closely echoes the absolutist position of early thinkers like Hamilton, Madison, and President Jackson, but still comes from the same basic school of thought as the more recent OLC opinions and signing statements.

But Volokh’s argument has its detractors. A Note in the *Harvard Law Review* presented the “office qualifications” view, putting forward some evidence “from the early Congresses that the Founding generation believed that some qualifications on presidential appointees were permissible.”<sup>33</sup> This evidence includes qualifications that the early Congresses imposed on certain offices, from the Attorney General and district attorneys being

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29. HOGUE, *supra* note 20, at 1.

30. 16 U.S.C. § 742b(b) (2018).

31. Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 746 (2008).

32. *Id.* at 789.

33. Note, *Congressional Restrictions on the President’s Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914, 1919–20 (2007).

“learned in the law”<sup>34</sup> to “the presidentially appointed legislative council of Louisiana consist[ing] of land-holding residents of the Louisiana Territory.”<sup>35</sup>

E. Garrett West took the opposite view of Volokh’s.<sup>36</sup> West wrote that “Congress’s exclusive power over office creation explains why Congress may impose qualifications,” relying on the congressional power to “‘establish[] by Law’ ‘all other Officers of the United States[]’” as justification.<sup>37</sup> Establishing an office and wading into the question of who may *hold* that office are, however, two separate issues. This has been true since the presidency of George Washington. The first Congress established a handful of offices—the Secretary for the Department of Foreign Affairs,<sup>38</sup> the Secretary for the Department of War,<sup>39</sup> the Secretary of the Treasury,<sup>40</sup> the Postmaster General,<sup>41</sup> and the Attorney General<sup>42</sup>—the lattermost containing the “learned in the law” stipulation. The Senate, however, attempted to take a step further and involve itself in the selection of nominees. It rejected a customs officer nominee of President Washington’s (Benjamin Fishbourne of Georgia), “adopted a resolution seeking face-to-face meetings with the President for every open office,” and “appointed a committee to meet with Washington to work out the procedures.”<sup>43</sup> As John Yoo describes, however:

Washington would have none of it. . . . Washington promptly nominated another candidate and rebuffed the idea of formally meeting with the Senate to choose executive officers.

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34. An Act to establish the Judicial Courts of the United States, ch. 20, § 35, 1 Stat. 73, 92–93 (1789).

35. Note, *supra* note 33, at 1920 (citing Act of Mar. 26, 1804, ch. 38, § 4, 2 Stat. 283, 284).

36. See E. Garrett West, Note, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 166 (2018).

37. *Id.* at 201, 203 (alterations in original) (quoting U.S. CONST. art. II, § 2, cl. 2).

38. An Act for establishing an Executive Department, to be denominated the Department of Foreign Affairs, ch. 4, § 1, 1 Stat. 28, 28–29 (1789).

39. An Act to establish an Executive Department, to be denominated the Department of War, ch. 7, § 1, 1 Stat. 49, 49–50 (1789).

40. An Act to establish the Treasury Department, ch. 12, § 1, 1 Stat. 65, 65 (1789).

41. An Act for the temporary establishment of the Post-Office, ch. 16, § 1, 1 Stat. 70, 70 (1789).

42. An Act to establish the Judicial Courts of the United States, ch. 20, § 35, 1 Stat. 73, 93 (1789).

43. John Yoo, *George Washington and the Executive Power*, U. ST. THOMAS J.L. & PUB. POL’Y, Fall 2010, at 1, 8.

He wanted to make clear that he was the Chief Executive, and that members of the executive branch were his assistants. While Presidents, including Washington, have always informally consulted with members of Congress in selecting federal officers and judges, they have ever since relegated the Senate's constitutional function to the approval of *their* nominees.<sup>44</sup>

That the First Congress passed a certain kind of law "provide[s] contemporaneous and weighty evidence of the Constitution's meaning."<sup>45</sup> Indeed, the addition of a "learned in the law" requirement for Attorneys General is a compelling fact in favor of constitutionality. But it is not dispositive. As Volokh noted, "The First Congress did impose statutory qualifications, but . . . it did so without any significant constitutional analysis. The First Congress was certainly not infallible in its interpretation of the Constitution. Its practices can add weight to an argument about constitutionality, but they cannot be decisive."<sup>46</sup> And given the lack of constitutional support for congressional imposition of qualifications on executive branch appointments, Volokh's argument is ultimately stronger. The qualifications are unconstitutional.

*D. The Framers Clearly Delineated House and Senate Responsibilities*

Congress consists of both the House and the Senate. The Constitution sets out some specific functions for each body. The Senate is tasked with approving treaties with other countries and presidential nominations for "Officers of the United States."<sup>47</sup> The House has grand powers of its own, including "the sole Power of Impeachment"<sup>48</sup> and introducing "Bills for raising Revenue."<sup>49</sup> Intuitively, many of these distinctions make sense. Being in theory closer to the people, the House is the body more competent to spend the people's money, as Elbridge

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44. *Id.*

45. *Printz v. United States*, 521 U.S. 898, 905 (1997) (quoting *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986)) (internal quotation marks omitted).

46. Volokh, *supra* note 31, at 775 (footnote omitted).

47. U.S. CONST. art. II, § 2, cl. 2.

48. U.S. CONST. art. I, § 2, cl. 5.

49. U.S. CONST. art. I, § 7, cl. 1.

Gerry opined in 1787.<sup>50</sup> At the same time, Alexander Hamilton expressed concern that allowing the House to consider foreign treaties could lead to damaging leaks of information during the treaty-making process.<sup>51</sup> That the House and Senate are different bodies, to which different responsibilities are given, is no novel concept. Confirmation is just another one of these responsibilities. But to become law, qualification statutes, which are intimately intertwined with confirmation, must pass through the House of Representatives; by passing such statutes, the House exerts an influence on confirmation that unbalances the carefully considered constitutional delineation.

For this reason, the simple occurrence of House participation in the passage of qualification statutes is, on its own, the constitutional landmine. The West view can be correct insofar as it allows the Senate to openly refuse consideration of a certain nominee because she does not live up to a prescribed qualification, but it is wrong to the extent that it grants the House of Representatives powers beyond those that the Constitution vests in the body. As a way forward, the Senate is free in the future to pass nonbinding resolutions expressing a sentiment about the qualifications a certain nominee should have. One can think of these as qualification “guidelines,” signaling to the executive branch which kinds of nominees the Senate would like to see. But House passage—and, as a result, presentment—of these provisions as laws specifically in each existing case has been, as such, improper and void.<sup>52</sup> Ultimately, these qualifications should only be seen as a reflection of the view of the Senate at the time of enactment. But Senates change; the Senate today need not consult the House and formally overturn these invalid qualification laws, nor even obtain a waiver from the law, to confirm “unqualified” nominees.<sup>53</sup>

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50. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 233 (Max Farrand ed., 1911).

51. Howard R. Sklamberg, *The Meaning of “Advice and Consent”: The Senate’s Constitutional Role in Treaty-making*, 18 MICH. J. INT’L L. 445, 472 (1997) (citing THE FEDERALIST NO. 75, at 452 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

52. Volokh persuasively argues that because of the House’s lack of power in this area, “[a]ny qualifications for officeholders that come out of the concerns of the House of Representatives cannot be binding.” Volokh, *supra* note 31, at 759.

53. In certain cases, Presidents have gotten around qualification statutes through the use of waivers for individual nominees. See, e.g., Volokh, *supra* note 31, at 746 & nn.5–6. A waiver might have solved the individual Sheehan quandary

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All of this is not to say that guidelines are meaningless. Individual senators can use a departure from the guidelines to denounce the impending confirmation of a nominee, noting that the President and Senate are advancing an individual whom, as a senator might say, “this body has agreed, for many years, is not qualified to hold the position in question.” Presidential candidates could vow to only nominate individuals who meet these high standards. As the operation of the bureaucracy continues to be an important aspect of the political ecosystem, the makeup of the President’s appointees will likely persist as a relevant campaign issue. And the Chairman of the Senate Committee with relevant jurisdiction could decide to continue using the qualifications as a baseline for considering nominees.

As an example of what a Senate committee chairman considering a qualification statute might look like, look to the 1993 nomination of Mollie Beattie. Beattie, once a nominee for FWS Director, had received her undergraduate degree in Philosophy.<sup>54</sup> She went on to obtain her master’s in Forestry, but some apparently charged that Beattie’s educational background did not speak specifically to knowledge “in the principles of fisheries and wildlife management.”<sup>55</sup> In Beattie’s confirmation hearing, Senate Environment and Public Works Chairman Max Baucus took great care to address this controversy at length in his opening statement.<sup>56</sup> After welcoming Beattie to the Committee, Chairman Baucus jumped right into arguing that she met the qualification requirement.<sup>57</sup> It was a telling start to the hearing. In beginning with whether or not Beattie was qualified, the im-

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in practice but it would not have resolved the fundamental question of Senate-House responsibility delineation—a far more consequential issue. Further, requiring the executive branch to expend the political capital necessary for such a waiver—on top of simply the shepherding of the nominee through confirmation—is quite an ask for the appointment of a bureau head, as opposed to the appointment of the Defense Secretary. Given the setup of the Constitution, the President and the Senate need not ask the House whether it is okay to appoint a nominee.

54. William Dicke, *Mollie Beattie, 49; Headed Wildlife Service*, N.Y. TIMES (June 29, 1996), <https://www.nytimes.com/1996/06/29/us/mollie-beattie-49-headed-wildlife-service.html> [<https://perma.cc/8BRJ-JAFZ>].

55. 16 U.S.C. § 742b(b) (2018).

56. *The Nomination of Mollie H. Beattie to be Director of the Fish and Wildlife Service: Hearing Before the S. Comm. on Env’t & Pub. Works*, 103rd Cong. 1–2 (1993) (opening statement of Sen. Max Baucus, Chairman, S. Comm. on Env’t & Pub. Works).

57. *Id.*

plication was that meeting the qualifications *was* a prerequisite to even the questioning of the nominee. The Chairman called attention to Beattie's graduate studies—in particular, the nature of the degree received, the name of the school from which she received the degree at the university in question, and the coursework associated with the degree.<sup>58</sup> Chairman Baucus clearly construed the education requirement to be separate from the experience requirement, as he immediately proceeded to a recitation of Beattie's résumé to make the point that “Ms. Beattie *also* has substantial *experience* in applying the principles of fisheries and wildlife management.”<sup>59</sup> He finished discussing qualifications by saying, “I am fully satisfied that Ms. Beattie not only satisfies the legal requirements to be Director, but that she has the education and experience to excel in that position.”<sup>60</sup>

Senator Baucus was well within his rights to consider Beattie's education when deciding if she was fit to serve in the role. But if the Senator did not find the “legal requirements” to be persuasive, the proper response would have been to advance Beattie's confirmation anyway. As discussed, the requirements fall outside of the constitutionally prescribed sequence—nomination, Senate advice and consent, appointment—and grant the House a role in the confirmation process which the Constitution does not provide. The Senate had then, and has now, an incentive to challenge the laws and reassert that, as between the two houses of Congress, confirmation is within the Senate's exclusive domain. As such, the nomination by the President and confirmation by the Senate of an officer who does not meet said qualifications should, on its own, insulate the administrative official from legal jeopardy related to contravention of the invalid qualification law.

## II. THE IMPACT OF QUALIFICATIONS AND THE QUESTION OF LEGAL JEOPARDY

Speaking practically, presidential administrations have had good reason to tread lightly with qualification laws. If these statutes are enforced by the courts, an agency could be sued to void the actions of an officeholder who does not meet the re-

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58. *Id.* at 2.

59. *Id.* (emphasis added).

60. *Id.*

quirements.<sup>61</sup> To some in the executive branch, leaving positions vacant, or finding a less desirable nominee, is preferable to risking the possible consequences of a well-timed qualification statute lawsuit that seeks to invalidate an official's, and an agency's, work to execute the President's agenda. But such a lawsuit would most likely fail under the political question doctrine.

A. *Qualification Statutes Can Complicate Staffing the Executive Branch*

Instead of being nominated as Director of the FWS, "senior political official" Sheehan occupied a "newly-created deputy director position" at the Fish and Wildlife Service from June 2017 until his resignation in August 2018.<sup>62</sup> As mentioned, Sheehan's degree from Utah State University was not in science<sup>63</sup>—no matter that the sum total of Sheehan's working experience made him an excellent candidate for the position.<sup>64</sup> As the executive branch construed the statutory qualifications placed on the FWS Director's office (under a presumption of constitutionality), 16 U.S.C. § 742b(b) knocked Sheehan out of the running for Director entirely. When Sheehan's appointment as Deputy Director of the FWS was announced, the Department added in its press release that he would "serve as the Acting Director of the [FWS] until a Director is nominated by the President and confirmed by the Senate."<sup>65</sup>

Even this move came under fire. A conservation advocacy group, Public Employees for Environmental Responsibility (PEER), submitted a complaint to the Interior Department's Inspector General about Sheehan and two other senior political officials who had been appointed to deputy director positions not subject to Senate confirmation, at the National Park Service (NPS) and the U.S. Bureau of Land Management (BLM), respectively.<sup>66</sup> PEER noted that Interior referring to Sheehan and

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61. See *Lucia v. SEC*, 138 S. Ct. 2044, 2050 (2018).

62. Brown, *supra* note 7.

63. *Id.*

64. See Press Release, *supra* note 9.

65. *Id.*

66. Letter from Jeff Ruch, Exec. Dir., Pub. Empls. for Env't Responsibility, to Mary L. Kendall, Deputy Inspector Gen., U.S. Dep't of the Interior (Feb. 12, 2018), [https://www.peer.org/wp-content/uploads/attachments/2\\_12\\_18\\_IG\\_Complaint.pdf](https://www.peer.org/wp-content/uploads/attachments/2_12_18_IG_Complaint.pdf) [<https://perma.cc/2B6X-NM7S>] [hereinafter PEER Letter].

the two others—Paul Daniel Smith of NPS and Brian Steed of BLM—as “acting directors” in Department press releases presented issues under the Federal Vacancies Reform Act (FVRA).<sup>67</sup> FVRA provides that if an officer whose appointment is made by the President subject to the advice and consent of the Senate—conditions which the director of each of the three aforementioned bureaus would meet—“dies, resigns, or is otherwise unable to perform the functions and duties of the office,”<sup>68</sup> the President may direct someone else to fill the office as an acting director for 210 days.<sup>69</sup> This provision comes with some restrictions. Among other requirements, the individual to be made acting director had to have served as the first assistant to the office of the officer for at least 90 days.<sup>70</sup>

PEER’s complaint challenged the legitimacy of Sheehan, Smith, and Steed as acting directors on two counts. First, the Department’s press releases indicated that it was Interior Secretary Ryan Zinke, not President Donald J. Trump, who appointed these individuals to their acting roles.<sup>71</sup> FVRA mandates that it is “the President (and only the President)” who makes the appointment.<sup>72</sup> Second, none of the three had served the 90 days required under FVRA before their appointment as acting director.<sup>73</sup> The Inspector General’s office responded to PEER, noting that it “conducted a preliminary inquiry” into the matter.<sup>74</sup> The Inspector General’s office found that although Department press releases may have indicated that these officials were acting directors, “all three of them [had] been formally given the title of Deputy Director.”<sup>75</sup> It was, instead of presidential action under FVRA, “[p]ursuant to a delegation order issued by Secretary Zinke on January 24, 2018, [that] Steed and Smith [were] delegated the functions, duties, and

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67. *See id.* at 1–5.

68. 5 U.S.C. § 3345(a) (2018).

69. *Id.* § 3346(a)(1).

70. *Id.* § 3345(a)(3)(A), (b)(1)(A)(ii).

71. PEER Letter, *supra* note 66, at 3.

72. 5 U.S.C. § 3345(a)(2).

73. PEER Letter, *supra* note 66, at 3–5.

74. Letter from Bruce Delaplaine, Gen. Counsel, Office of the Inspector Gen., U.S. Dep’t of the Interior, to Jeff Ruch, Exec. Dir., Pub. Emps. for Env’t Responsibility 1 (Feb. 23, 2018), [https://www.peer.org/wp-content/uploads/attachments/3\\_5\\_18\\_IG\\_ltr.pdf](https://www.peer.org/wp-content/uploads/attachments/3_5_18_IG_ltr.pdf) [<https://perma.cc/4LRX-JE5N>].

75. *Id.*



responsibilities of the Director of their respective bureaus.”<sup>76</sup> Instead of being the acting directors, they would each be a deputy director, exercising the authority of the director.<sup>77</sup> As for Sheehan, however, Secretary Zinke delegated the FWS Director’s responsibilities to James Kurth, a career official serving as the FWS’s Deputy Director for Operations.<sup>78</sup> Whereas Steed and Smith could each be considered to meet the qualifications necessary to be acting directors of their respective bureaus,<sup>79</sup> Sheehan could not. It took almost ten months for Secretary Zinke to replace Kurth with a political appointee; in November 2018, an updated delegation order gave Margaret Everson, a new Trump Administration hire who possessed a degree in biology,<sup>80</sup> the authority of the Director.<sup>81</sup> Aurelia Skipwith finally earned actual Senate confirmation to the FWS Director position in December 2019,<sup>82</sup> over a full year after her nomination was initially announced in October 2018.<sup>83</sup>

In March 2018, congressional leaders from both parties expressed concerns about how the Interior vacancies were affecting government operations. Republican Senator Lindsey Graham

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76. *Id.*

77. *Id.* (noting that the delegation order “only covers ‘those functions or duties that are not required by statute or regulation to be performed only by the Senate-confirmed official occupying the position’”).

78. *Id.*

79. For the NPS Director, Congress stipulated that an appointee have “substantial experience and demonstrated competence in land management and natural or cultural resource conservation.” 54 U.S.C. § 100302(a)(2) (2018). And Congress mandated that the BLM Director “have a broad background and substantial experience in public land and natural resource management.” 43 U.S.C. § 1731(a) (2018).

80. Laura Bies, *New leadership named for U.S. Fish and Wildlife Service*, WILDLIFE SOC’Y (Nov. 1, 2018), <http://wildlife.org/new-leadership-named-for-u-s-fish-and-wildlife-service/> [<https://perma.cc/33RF-KVRH>].

81. SEC’Y OF THE INTERIOR, ORDER NO. 3345, AMEND. NO. 23: TEMPORARY REDELEGATION OF AUTHORITY FOR CERTAIN VACANT NON-CAREER SENATE-CONFIRMED POSITIONS § 3(h) (2018), [https://www.doi.gov/sites/doi.gov/files/elips/documents/3345a23\\_temporary\\_redelegation\\_of\\_authority\\_for\\_certain\\_vacant\\_non-career\\_senate-confirmed\\_positions\\_0.pdf](https://www.doi.gov/sites/doi.gov/files/elips/documents/3345a23_temporary_redelegation_of_authority_for_certain_vacant_non-career_senate-confirmed_positions_0.pdf) [<https://perma.cc/GY7V-SZF3>].

82. Press Release, U.S. Dep’t of the Interior, U.S. Senate Confirms Aurelia Skipwith as Director of U.S. Fish and Wildlife Service (Dec. 12, 2019), <https://www.doi.gov/pressreleases/us-senate-confirms-aurelia-skipwith-director-us-fish-and-wildlife-service> [<https://perma.cc/VW4K-USQT>].

83. Timothy Cama & Michael Burke, *Trump to nominate former Monsanto exec to top Interior position*, HILL (Oct. 22, 2018, 10:23 PM), <https://thehill.com/homenews/administration/412660-trump-to-nominate-former-monsanto-exec-to-top-interior-position> [<https://perma.cc/FJH4-NCP2>].

was quoted as saying he believed “holdovers from the other administration” could be leading to “lockdown” at agencies in the Trump Administration without Senate-confirmed leaders.<sup>84</sup> Democratic Senator Tom Udall commented that agency decisions are “not good” if unconfirmed “political people”—as opposed to “Senate-confirmed people . . . that have been through a vetting process”—were running the show.<sup>85</sup> Senator Udall also lent credence to an argument that PEER made, questioning whether the acting director controversies would leave agencies open to legal challenges, and noted that towns near BLM land were “finding agencies frozen without leadership.”<sup>86</sup> As the cause of the Administration’s issues in nominating individuals for these positions, “Democratic senators point[ed] to the lack of *qualified nominees* in the pipeline and to individuals who have had to pull their names after facing blistering criticism.”<sup>87</sup> On the other hand, “Republican lawmakers [blamed] a stalled vetting process and partisan politics.”<sup>88</sup> Partly because of qualifications, “filling top positions in executive agencies is a complex enterprise [in practice].”<sup>89</sup> It is not entirely clear how urgently the Administration sought to fill the vacancies.<sup>90</sup> In the case of the FWS Director, however, there is at least some evidence that the Administration made a good faith effort to comply with the qualification requirements.<sup>91</sup>

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84. Hannah Northey, *‘Where is everybody?’ senators ask of missing Trump picks*, E&E NEWS (Mar. 6, 2018), <https://www.eenews.net/stories/1060075443> [<https://perma.cc/5V4F-AFKL>] (internal quotation marks omitted).

85. *Id.* (internal quotation marks omitted).

86. *Id.* (paraphrasing Senator Udall).

87. *Id.* (emphasis added).

88. *Id.*

89. Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 929 (2009).

90. See Kyle Feldscher, *Trump won’t fill hundreds of administration jobs*, WASH. EXAMINER (Feb. 28, 2017, 7:15 AM), <https://www.washingtonexaminer.com/trump-wont-fill-hundreds-of-administration-jobs> [<https://perma.cc/4HFF-AQLD>] (“A lot of those jobs, I don’t want to appoint someone because they’re unnecessary to have . . . . In government, we have too many people.” (quoting President Trump) (internal quotation marks omitted)).

91. *Cf.* Brown, *supra* note 7.

B. *Upon Senate Confirmation, Courts Would Likely Decline to Review Qualifications Statute Cases*

Of course, as a general matter, one would like for one's doctor to be trained in medicine. If someone is installing a wiring system into your home, you would be wise to make sure that the person in question is a certified electrician. But Sheehan was not some vagrant who wandered in from the streets, scalpel in hand, asking to operate on the American wildlife refuge system. He was an experienced conservationist, denied an opportunity to lead the FWS because Congress could not conceive of someone with his background coming along. Besides, if such a weapon-wielding troll did saunter onto the national stage, the chances of him earning confirmation for office would be next to zero. On its own, the Senate's advice-and-consent role should be a guardrail against those unfit to hold office. If it is not, then what is the purpose of the whole ordeal? Further, equating education with competence may preclude some prospective appointees who would do a fine job in the offices for which Congress deemed them to be "unqualified." Whether Sheehan could have earned confirmation took a backseat to the question of whether the statutory requirements of "education" and "experience" were being met.

Conceivably, if a President nominates and the Senate confirms an individual who does not meet the "qualifications," PEER or another group could file suit against that administration official when she carries out certain actions under the authority of the office occupied. A PEER-type suit seems to be the most straightforward way for a party to get standing and find its way into court, unless one wants to wade into the hairy question of whether the House may and should sue here. The PEER complaint would seek to invalidate the official's actions, challenging the official's legitimacy as an officeholder given the statute's stipulations. Such a plaintiff, however, would likely run into the buzz saw of the political question doctrine. In the recent *Rucho v. Common Cause*<sup>92</sup> decision, the Supreme Court reinforced this judicial principle, refusing to review the constitutionality of partisan gerrymandering as a nonjusticiable political question.<sup>93</sup> Appointment of an unqualified officer is similarly a

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92. 139 S. Ct. 2484 (2019).

93. *Id.* at 2506–07.

political question, if not more so. Calling this an interbranch spat is generous—in this case, both the President *and* the Senate would have agreed on the nominee, as the Appointments Clause demands. A court would likely defer to the entities with dominion over this area of law—the President through nomination and the Senate through confirmation—which it would probably deem to have spoken at that point.

C. *Congress Can Use Qualifications as a Means to Questionable Ends*

Courts would be wise to adopt a hands-off approach. It may not be readily apparent, but enforcement of qualification laws can quickly devolve into a political enterprise. A more pro-worker Congress, presumed to have broad power to set qualifications for office, might be able to mandate that all future Secretaries of Labor have experience running a union. This would likely limit the number of potential appointees whom a management-friendly President would feel comfortable having serve in this position in her or his Cabinet, and could have an ultimate effect on the policy coming out of the Labor Department. Likewise, an energy-development-friendly Congress could see fit to require that all future Secretaries of the Interior have experience as an oil and gas executive, potential conflicts of interest be damned. Certain qualifications are highly correlated with policy preferences, to the point where the imposition of a qualification could basically amount to a designation of a principal officer with a certain kind of worldview. In these kinds of cases, Congress may not be sending the exact name of the officeholder to the President, but through expertise-based qualifications, it *can* tie the President's hands in the nominating process.

Perhaps these examples seem a bit ridiculous and unlikely to ever occur, but actually, such naked power plays by Congress would be tame compared to the politicking of the Sixty-Fourth Congress in the text of the National Defense Act of 1916,<sup>94</sup> which stipulated the following:

[O]f the vacancies created in the Judge Advocate's Department by this Act, one such vacancy, not below the grade of major, shall be filled by the appointment of a person from civil life, not less than forty-five nor more than fifty years of age, who

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94. Ch. 134, 39 Stat. 166 (1916).

shall have been for ten years a judge of the Supreme Court of the Philippine Islands, shall have served for two years as a Captain in the Regular or Volunteer Army, and shall be proficient in the Spanish language and laws . . . .<sup>95</sup>

House Committee on Military Affairs Chairman James Hay wrote the provision into the law.<sup>96</sup> The *New York Times* noted at the time that “[t]he one man in the world that this description seems to fit is Judge Adam C. Carson of the Supreme Court of the Philippine Islands.”<sup>97</sup> Judge Carson’s home in Riverton, Virginia was in Chairman Hay’s district.<sup>98</sup> “The reader will be gratified to know that Judge Carson got the job.”<sup>99</sup> “When asked if this provision . . . was designed to take care of Judge Carson, of Virginia, [Congressman James] Hay replied: ‘I am responsible for that being put in the bill, if that is any satisfaction to the gentleman.’”<sup>100</sup> The *World-News*, a Virginia newspaper, derided the provision as a “joker,” concluding that Congressman Hay’s effort to game Judge Carson’s appointment “[t]hrough a base and treacherous subterfuge . . . [was] a discredit to him and a disgrace to Virginia.”<sup>101</sup>

But if a House committee chairman can use qualification statutes to get jobs in the executive branch for specific constituents (and Judge Carson, as we saw, *did* get the job after all), one could envision a scenario in which members of Congress can dictate the views of certain officers by qualifying only specific people for the positions. The President’s hands would be tied for no reason other than Congress wanting to nominate its own candidates for offices. “[T]he more appointees [are] beholden to members of Congress, the less they [are] beholden to presidents.”<sup>102</sup> As such, if the Senate and the President *do* agree about a nominee’s fitness for office in spite of a qualification

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95. *Id.* § 8, at 169.

96. *Hay’s Remarkable Joker*, WORLD-NEWS, May 24, 1916, at 4 (on file with the Library of Virginia).

97. EDWARD S. CORWIN, *PRESIDENTIAL POWER AND THE CONSTITUTION: ESSAYS* 76 n.13 (Richard Loss ed., 1976) (quoting *Army Bill Joker Aims to Rob Wood of Honor Medal*, N.Y. TIMES, May 20, 1916, at 1).

98. *Id.* at 77 n.13.

99. *Id.*

100. *Hay’s Remarkable Joker*, *supra* note 96, at 4.

101. *Id.*

102. DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 65 (2008).

requirement, litigants should not be able to use the courts as a tool to second guess a carefully considered, political confirmation process that determined such qualifications to be unnecessary.

### III. FACTORS FOR THE EXECUTIVE BRANCH AND THE SENATE TO CONSIDER IN LODGING A QUALIFICATIONS CHALLENGE

“According to William Howell and David Lewis, over 40 percent of agencies created by legislation between 1946 and 1995 (seventy-four agencies) have restrictions placed on the qualifications of agency officials . . .”<sup>103</sup> Even if qualification statutes can be overturned, the President and Senate should not flout all of them just to prove a point. A sober framework for executive review of these statutes is then, at this juncture, necessary. Post-Sheehan, there will come a time again when a qualification statute is worthy of a challenge, and the considerations to be articulated in this part of the Note can serve as guideposts for the President and the Senate in determining whether the moment to challenge has arrived. Although Greg Sheehan simply served fourteen months as a deputy director before quietly leaving the Trump Administration, it is reasonable to predict that—as vacancies continue to plague the administrative state<sup>104</sup>—it will soon be necessary for the President and the Senate to challenge a qualification statute if the President is to get her or his preferred choice in a role. The challenge should come on the basis that the statute in question generally intrudes upon the prescribed sequence of appointment and achieves the opposite aim of Congress in practice, deeming a certain qualified individual “unqualified” before the Senate even has an opportunity to review her credentials. From *Myers v. United States*<sup>105</sup> and *Humphrey’s Executor v. United States*<sup>106</sup> to *Morrison v. Olson*,<sup>107</sup> the Supreme Court has issued numerous landmark decisions on presidential removal power, in the context of the general balance of powers between the political

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103. O’Connell, *supra* note 89, at 929 (citing William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1098–99 & tbl.1 (2002)).

104. *See id.* at 914.

105. 272 U.S. 52 (1926).

106. 295 U.S. 602 (1935).

107. 487 U.S. 654 (1988).

branches.<sup>108</sup> This jurisprudence should light the way toward clarity on the limits of the argument in this Note. “Those concerned with th[e] balance [of power between the political branches] at the back end (that is, at the removal stage) would do well also to consider implications from the front end.”<sup>109</sup>

In general, principal officers go through a prescribed life cycle in the executive branch: (1) nomination, (2) confirmation, (3) appointment, (4) service, and (5) exit (removal in some cases). The Court in *Humphrey’s Executor* held that the President’s removal power for those officials whose “duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative” is limited.<sup>110</sup> The Court essentially created two categories of executive branch officials: those whom the President may easily remove—“an executive officer restricted to the performance of executive functions,”<sup>111</sup> such as the postmaster who was the subject of the *Myers* case<sup>112</sup>—and those whom she or he may not remove as easily. To draw this conclusion, the Court looked to the Federal Trade Commission Act (FTCA),<sup>113</sup> which provided only certain reasons for which an FTC Commissioner could be removed: “inefficiency, neglect of duty, or malfeasance in office.”<sup>114</sup> At the front end of the FTCA was a restriction on the appointment power of the President: “Not more than three of the commissioners shall be members of the same political party.”<sup>115</sup>

Later in *Morrison v. Olson*, the Court’s majority opinion disavowed these “rigid categories” in stating that its removal jurisprudence is “designed . . . to ensure that Congress does not interfere with the President’s exercise of the ‘executive power’ and his constitutionally appointed duty to ‘take care that the

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108. Although the Supreme Court has taken on removal in numerous contexts, the jurisprudence is inconsistent and, in some instances, contradictory. See Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 *YALE L.J.* 346, 349 (2016).

109. O’Connell, *supra* note 89, at 978.

110. *Humphrey’s Ex’r*, 295 U.S. at 624.

111. *Id.* at 627.

112. 272 U.S. at 107.

113. Ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58 (2018)).

114. *Id.* § 1, at 718.

115. *Id.*

laws be faithfully executed' under Article II."<sup>116</sup> Still, even if the categories are not to be seen as rigid in terms of removal power, they certainly help narrow down—at least to start—offices to which this Note's conclusions are easily applicable. As such, for those officers fully accountable to the President through unrestricted executive removal power, the President and Senate should consider three factors in determining whether to try overturning statutes that impose certain qualifications or restrictions on the eventual appointee: (1) whether the qualification codifies a constitutional principle, (2) to what degree, if any, the restriction excludes objectively qualified individuals from holding the office, and (3) the statute's ambiguity or specificity.

A. *Look to the Constitutional Principle in Question*

First, certain restrictions advance constitutional principles. At least one congressional requirement for an office in particular is steeped in the principles of the Constitution itself: "A person may not be appointed as Secretary of Defense within seven years after relief from active duty as a commissioned officer of a regular component of an armed force."<sup>117</sup> This provision, to which some refer as a "cooling off period,"<sup>118</sup> enforces a doctrine of civilian control of the American military. In the Constitution itself, the clauses establishing this doctrine "begin in Article I," and "continue in Article II."<sup>119</sup> Creating what would become the Department of Defense in 1947, Congress mandated a ten-year cooling-off period (the requirement was shortened to seven years in 2007) for prospective appointees to the position of Secretary of Defense.<sup>120</sup> "Congress sought to create greater unity

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116. 487 U.S. 654, 689–90 (1988) (quoting U.S. CONST. art. II, § 3).

117. 10 U.S.C. § 113(a) (2018).

118. Jeremy Herb, *James Mattis: What to watch*, POLITICO (Jan. 12, 2017, 5:19 AM), <https://www.politico.com/story/2017/01/mattis-what-to-watch-233508> [https://perma.cc/YR6U-EPTE].

119. Justin Walker, *FBI Independence as a Threat to Civil Liberties: An Analogy to Civilian Control of the Military*, 86 GEO. WASH. L. REV. 1011, 1018–19 (2018). Civilian control of the military as a constitutional concern is "firmly grounded in our Constitution," reflecting "concern . . . over the threat that a standing military could pose." *Civilian Control of the Armed Forces: Hearing Before the S. Comm. on Armed Servs.*, 115th Cong. 8 (2017) (statement of Kathleen H. Hicks, Senior Vice President; Henry A. Kissinger Chair; and Director, International Security Program, Center for Strategic and International Studies) [hereinafter *Civilian Control Hearing*].

120. Congress's assent to the statutory scheme it devised for the Defense Secretary office rested on the assumption of constitutionality, given the cooling-off re-



of command while at the same time ensuring that the institution they were creating—and the individuals they would be empowering to lead it—would not threaten the principle of civilian control of the military.”<sup>121</sup> The constitutional concern—civilian control of the military—is the compelling reason to adhere to the qualification, as opposed to the legislative concern—unity of command. Sometimes Congress will waive this requirement, but waivers are uncommon; over the course of the Department of Defense’s existence, Congress has granted only two individuals a waiver: General George Marshall in 1950 and General James Mattis in 2017.<sup>122</sup> Those waivers, of course, have gone through both the House and the Senate.<sup>123</sup>

Examples of qualifications on the books that would survive the to-be-proposed analysis are few and far between. Still, they exist. And although many qualifications advance legislative aims, some, like the Defense Secretary requirement, work to ensure that constitutional values are preserved. Creating a framework for review of these statutes also acknowledges that a court may be more inclined to step in and rescue a qualification statute (1) if, from a legal perspective, the qualification is seen as having been enacted pursuant to power granted under

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quirement. “The Defense Secretary position is unique in our system. Other than the President acting as Commander in Chief, the Secretary of Defense is the only civilian official in the operational chain of command to the Armed Forces. Unlike the President, however, he or she is not an elected official.” *Civilian Control Hearing*, *supra* note 119, at 8.

121. KATHLEEN J. MCINNIS, CONG. RESEARCH SERV., R44725, STATUTORY RESTRICTIONS ON THE POSITION OF SECRETARY OF DEFENSE: ISSUES FOR CONGRESS 8 (2017). One might ask if part of Congress’s motivation in creating the cooling-off period was jealousy of the popularity of the military figures they were restricting from becoming Secretary of Defense. In the cited report, McInnis writes that after World War II in 1947:

[Five-star officers] enjoyed a heroic reputation and were treated to ticker tape parades, addressed joint sessions of Congress, and some were even considered as presidential contenders. By contrast, outside Presidents Roosevelt and Truman, few if any senior Administration officials or Members of Congress enjoyed a similar status among the American people, during or after the war.

*Id.* at 6–7. In the 1952 presidential election, war hero Dwight D. Eisenhower would himself go on to win the presidency.

122. Gabrielle Levy, *Senate Approves Waiver to Allow James Mattis as Pentagon Chief*, U.S. NEWS (Jan. 12, 2017, 4:25 PM), <https://www.usnews.com/news/politics/articles/2017-01-12/senate-approves-waiver-to-allow-james-mattis-as-pentagon-chief> [<https://perma.cc/YGZ2-5M9N>].

123. *See id.*

the Necessary and Proper Clause<sup>124</sup> to ensure that a created office is consistent with constitutional principles, and (2) if, from an institutional perspective, public confidence in a basic constitutional norm is at stake.

The President and Senate should be more willing to challenge qualification requirements that do not reinforce any sort of constitutional principle. Congress imposing certain kinds of education and experience requirements on the FWS Director, for example, would fail to pass muster here. The Constitution mentions nothing about expertise or education. In fact, the Constitution itself mandates only certain age, citizenship, and residency requirements for the members of Congress it vests with lawmaking powers.<sup>125</sup> If the Framers did not believe members of Congress needed applicable knowledge in areas ranging from the establishment of post offices to the regulation of commerce, expertise-related qualifications for executive branch officials are at least not furthering a core constitutional value.<sup>126</sup> At the same time, although qualification statutes concerning constitutional values are no more legally binding than any other type of qualification statutes, Presidents and Senates should generally treat them as legally binding, seeking a waiver from the House or simply finding another candidate for the job. Such treatment would achieve the important end of protecting constitutional norms.

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124. U.S. CONST. art. I, § 8, cl. 18. One might argue that the Necessary and Proper Clause covers the imposition of any qualification, but such a broad interpretation would likely impermissibly infringe upon the powers granted in the Appointments Clause. The stronger argument is that some qualifications are necessary to ensure that a created office does not run afoul of the Constitution. This Note finds that argument to remain inconsistent with the Appointments Clause, but acknowledging the diversity of views in the judiciary, from an executive branch risk-mitigation standpoint it is a worthwhile consideration.

125. U.S. CONST. art. I, § 2, cl. 2; *id.* § 3, cl. 3.

126. This assertion speaks to a broader debate about the administrative state, which is tangentially related to the topic of this Note: whether it is appropriate for a generalist Congress to delegate rulemaking authority to experts in the executive branch. Compare David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J. L. & PUB. POL'Y 213 (2020), with Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

B. *Challenge the Square Holes when a Round Peg is  
Nevertheless a Particularly Good Fit*

Second, some statutory restrictions keep otherwise-qualified individuals out of the running. In the case of a statute that speaks to expertise or experience, the President should ask: “Is it plausible for an individual who does not meet these qualifications to be qualified for the job?” Often times, Congress imposes qualifications on certain offices that are unnecessary for competent performance of the job, such as formal education or an exact amount of experience. These instances are the most unfortunate, because they keep capable, willing-to-serve individuals on the sidelines.

There is even evidence to suggest that were it applied to them, then-House Natural Resources Committee Chairman Rob Bishop and other members of his Committee might have bristled at the very requirement that barred Sheehan from serving as the Director of an agency over which their committee had jurisdiction. In a 2016 House Natural Resources Committee oversight hearing,<sup>127</sup> Representative Bruce Westerman, a Republican from Arkansas, and the Obama Administration’s Managing Director of the White House Council on Environmental Quality Christy Goldfuss went back and forth about wildfires. In response to a question about her educational background, Director Goldfuss told Congressman Westerman that she studied political science as an undergraduate at Brown University, to which Congressman Westerman responded, “So you studied political science, which really is not a science at all, but you are making scientific judgments on what causes wildfires.”<sup>128</sup> At the conclusion of Congressman Westerman’s questioning, Chairman Bishop chided him, saying, “Be careful, I am a poli-sci graduate too. . . . And you are right, it qualifies me to sell shoes at Penney’s.”<sup>129</sup> As the hearing progressed, the majority of the other present committee members started their questioning by mentioning their own college majors, relating what they studied in school to the subject matter at hand.<sup>130</sup>

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127. *The Impacts of the Obama CEQ’s Final Guidance for GHG Emissions and the Effects of Climate Change: Oversight Hearing Before the H. Comm. on Nat. Res.*, 114th Cong. 12–13 (2016).

128. *Id.* at 13.

129. *Id.* at 14.

130. *See id.* at 19, 30.

It is eye opening how defensive the majority of the questioners on the panel—from both sides of the aisle—became about their own educational backgrounds as soon as one of their colleagues mentioned his skepticism about an executive branch official's ability to do a certain job with an educational background that was, in the Congressman's judgment, inapplicable. An education requirement is but one of a number of qualification stipulations that may turn away individuals who can adequately perform the job in question; analyzing whether this is the case should be part of the evaluation.

If the statute does not codify a constitutional principle and does prevent capable individuals from serving, the President and Senate would be wise and well within their power to challenge the law. The appropriate forum for any other objections to a nominee is that individual's confirmation process, not a blanket law with unintended consequences.

C. *Ambiguity and Specificity Can Each Be Enemies of Good Government*

Third, the President and the Senate should be willing to challenge those statutes that say too much or say, essentially, nothing at all. Ambiguity in qualification statutes leads to uncertainty about whom the President can and cannot appoint; specificity upsets the balance of government power. Returning to the example of the qualifications that Congress imposed upon the office of FWS Director, what exactly constitutes "experience . . . in the principles of fisheries and wildlife management"? Reasonable people could disagree about whether, say, two years working in conservation policy would satisfy the requirement. What about six months as an interim head of a state wildlife agency? Is that enough? The statute is vague in this regard, opening the door to the kind of interpretation that courts should want to leave to the Senate. At the other end of the spectrum, more specific statutes can amount to the "legislative designation" Chief Justice Taft deemed unacceptable in *Myers*. In that case, the Chief Justice wrote:

It is argued that the denial of the legislative power to regulate removals in some way involves the denial of power to prescribe qualifications for office, or reasonable classification for promotion, and yet that has been often exercised. We see no conflict between the latter power and that of appoint-

ment and removal, provided of course that the qualifications do not so limit selection and so trench upon executive choice as to be, in effect, *legislative designation*.<sup>131</sup>

Consider Congressman Hay's inclusion of the above referenced provision of the National Defense Act of 1916;<sup>132</sup> there, Congress did more than come "close to specifying the individual who must be appointed."<sup>133</sup> It actually specified the person. When Congress places restrictions "on whom the President can choose," it "gains power," as Anne Joseph O'Connell argues.<sup>134</sup> Qualification statutes should be clear enough to delineate exactly who is and is not qualified, but must not be so specific that the President is—in effect—picking from Congress's list.

The relevant factors outlined in this section flow from Article II, which provides that the President "shall nominate."<sup>135</sup> The approach, then, is designed to frame clearly those instances in which a qualification law has limited, or extraordinary, utility. The analysis here focuses on the President and the Senate asserting constitutionally vested powers through recognition of the modern day confirmation process, an appreciation for the value of public confidence in constitutional norms, and a desire to allow the best possible people to serve in government. In due course, Presidents and Senates should be most willing to challenge restrictions if they (1) impose requirements beyond reinforcement of the principles set forth in the Constitution, and either (2) prevent objectively qualified individuals from holding office or (3) are either so vague as to invite inconsistent application, or so specific as to constitute legislative designation.

#### CONCLUSION

Even in the face of qualification laws, the President and the Senate can still act to get their preferred candidates into office, notwithstanding opposition from the House. After all, the House has no formal role in confirmation of appointees, making qualification statutes unconstitutional. As such, qualifications on executive branch offices are not binding laws that

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131. *Myers v. United States*, 272 U.S. 52, 128 (1926) (emphasis added).

132. See *supra* Part II.C.

133. HOGUE, *supra* note 20, at 3.

134. O'Connell, *supra* note 89, at 977.

135. U.S. CONST. art. II, § 2, cl. 2.

would put an administration into jeopardy if the Senate confirmed an “unqualified” nominee. Courts should then decline to review the legitimacy of such officials’ actions in office.

Utah conservationist Greg Sheehan was about as good as any Republican administration could have appointed as FWS Director in 2017. But despite a twenty-five-year career in management of fish and wildlife, Sheehan majored in the wrong subject as an undergraduate, and so he was ineligible to lead the FWS because of a stipulation in the law that established the FWS Director position. Qualification statutes can have a deleterious effect on the separation of powers in America and, as the Sheehan example illustrates, the ability of a President to staff the government with the right people. In the appointment process, the Constitution prescribes a specific role for the Senate, and only the Senate: Advice and Consent—full stop. In our checks-and-balances system of power, allowing Congress as a whole to freely build upon “Advice and Consent” and impose any sort of qualification restrictions it so chooses on all future Presidents’ appointees would necessarily and unacceptably enhance the legislative branch’s power overall, with a particularly objectionable grant of power to the House of Representatives. And, when a qualification statute prevents an expert from joining an administration because that expert’s lived experience does not fit neatly into the statutory box that Congress drew for the position, it is to the detriment of the nation.

For future nominations, Presidents and Senates may find that, in the face of an uncooperative House of Representatives, contravening a qualification statute is the only way to get a preferred, capable nominee into office. In so doing, the two should look to different factors in considering whether confirmation would and should void the law: (1) whether a qualification reinforces a constitutional principle, (2) whether it accommodates the entire universe of potential appointees, and (3) whether it is neither too broad as to be unintelligible nor too narrow as to create a congressional shortlist from which the President is to choose.

*Eli Nachmany*