DISTINGUISHING ADMINISTRATIVE DELEGATIONS FROM CONSTITUTIONAL OFFICES

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INTRODUCTION

Although the use of administrative delegations to assign caretaking duties at federal agencies in the vacancies context has attracted the attention of courts and commentators,[1] the routine reliance by political appointees on delegations to career civil servants of broad authority over rulemaking, adjudication, and enforcement has drawn less attention. The few contemporary appellate courts and commentators to have touched on the constitutional implications of this practice usually proceed from an assumption that administrative delegations of significant authority by officers create constitutional "Offices" subject to the Appointments Clause.[2] In *Submerged Independent Agencies*,[3] which recently appeared in the University of Pennsylvania Law Review, Professors Feinstein and Nou provide a wide-ranging and original empirical and policy analysis of this practice, paired with a legal discussion that proceeds from the usual premise that such delegations create constitutional "Offices." The article's comprehensive empirical approach, particularly its analysis of characteristics of thousands of delegations,[4] is innovative and helpful to informing debate about the desirability of this practice. Apart from this detailed empirical discussion, the article assesses advantages and downsides of this practice, and suggests policy options for increasing political awareness of and accountability for delegated action.[5] In this response, I focus on the article's constitutional arguments concerning appointment and removal of career civil servants to whom officers delegate power.

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[1] *See, e.g.*, VALERIE C. BRANNON, CONG. RSCH. SERV., R44997, THE VACANCIES ACT: A LEGAL OVERVIEW 6–7 (2022) (citing cases); Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 633–34 (2020) (discussing use of delegations in lieu of statutory acting positions); Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN L. REV. 533, 559–63 (2020) (discussing reliance on "unsupervised delegation[s]" to address vacancies).

[2] *See, e.g.*, *In re* Grand Jury Investigation, 916 F.3d 1047, 1049, 1051, 1052 (D.C. Cir. 2019) (holding that a Special Counsel delegated authority by the Attorney General was an "inferior officer"); Willy v. Admin. Review Bd., 423 F.3d 483, 491–92 (5th Cir. 2005) (describing statutes allowing a department head to administratively delegate duties as authorizing "creat[ion]" of offices); *see also, e.g.*, O'Connell, *supra* note 1, at 683 ("[P]rofessionals who exercise delegated authority may be considered officers for Appointments Clause Purposes."); E. Garrett West, Note, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 226 (2018) ("[D]elegated responsibilities . . . can trigger officer status.").

[3] Brian D. Feinstein & Jennifer Nou, *Submerged Independent Agencies*, 171 U. PA. L. REV. 945 (2023).

[4] *Id.* at 971–72.

[5] *Id.* at 1009–16.

In Part I, I address the article's assertion that delegations to career civil servants violate the Appointments Clause,[6] because the delegatees wield the significant authority of constitutional "Officers" but are hired through a merits-based process regulated by the Office of Personnel Management.[7] I first argue, based on judicial precedents and longstanding historical practice, that *if* the Appointments Clause applied to such officials, the requirement that they be hired in accordance with the civil service laws would not necessarily violate the Clause. Because they are supervised by an officer, delegatees are not principal officers who require presidential nomination and Senate confirmation, and as long as a head of department vested with appointment authority assents to their appointment, no violation of the Appointments Clause would occur, notwithstanding the constraints placed on that official's choice by the civil service laws.

More broadly, though, I argue that administrative delegations generally do not create offices subject to the Appointments Clause in the first place, even when delegatees exercise significant authority. Rather, originalist and related textualist considerations, as well as longstanding historical practice and early jurisprudence, indicate that delegatees acting as mere agents of properly-appointed incumbent officers authorized by statute to take the same actions are not constitutional "Officers" subject to the Appointments Clause's rules for appointments. It is only when putative "delegatees" do not act as true agents of another officer, such as when they perform the duties of a vacant office, that they come to occupy *de facto* offices in violation of the Appointments Clause's rules on office creation and, potentially, appointments.

In Part II, I address the article's assertion that administrative delegations to tenured career staff raise the same constitutional concerns as statutory offices at independent agencies vested by statute with removal protections.[8] I first argue on formalist grounds that because the removal jurisprudence only limits Congress's ability to restrict removal of constitutional "Officers," it is as inapplicable as the Appointments Clause is to administrative delegatees. I also argue on functionalist grounds that because these delegations vest authority that is not tied by statute to the delegatee's position, this authority is readily revokable even when the delegatee cannot be fired from federal service. Consequently, presidential control of delegated action is comparable to control over the acts of officers subject to at-will removal. I therefore conclude that administrative delegations do not raise the constitutional concerns suggested by the article.

I. ADMINISTRATIVE DELEGATIONS TO CAREER CIVIL SERVANTS DO NOT VIOLATE THE APPOINTMENTS CLAUSE

The article asserts that because administrative delegations may confer authority to engage in tasks implicating the "significant authority" of a constitutional "Office," they violate the Appointments Clause when delegatees are civil servants who must be hired through the competitive merit-based civil service process.[9] But statutes such as the civil service laws may constitutionally limit the discretion that heads of department vested with appointment authority

[6] U.S. CONST. art. II, § 2, cl. 2.
[7] Feinstein & Nou, *supra* note 3, at 999–1001.
[8] *Id.* at 1003–06.
[9] *Id.* at 999–1001.

would otherwise have over whom to appoint to office. More fundamentally, when delegatees are mere agents of a properly appointed incumbent officer, the delegation does not implicate, much less violate, the Appointments Clause in the first place. It is only when putative "delegatees" do not act as agents of a responsible officer—a scenario that courts have frequently encountered in recent years in the context of statutory challenges under the Federal Vacancies Reform Act to the official acts of "delegatees" performing the duties of vacant offices[10]—that they occupy *de facto* offices in violation of the Appointments Clause.

As an initial matter, *if* the Appointments Clause applied to delegations, the relevant jurisprudence and longstanding historical practice indicate that no constitutional violation would result from hiring limitations like those in the civil service laws, as long as a head of department with appointment authority ultimately approves a delegatee's selection made pursuant to these laws.[11] Professors Feinstein and Nou argue that delegatees subject to civil service tenure protections are principal officers requiring presidential nomination and Senate confirmation.[12] But the courts have held that an ability to withdraw administratively vested power, including a delegating official's inherent authority to revoke regulations purporting to limit such withdrawals, effectively subjects officials vested with such power to supervision by another officer, and they therefore are not principal officers.[13]

More fundamentally, the Appointments Clause simply does not apply to administrative delegations because they are not constitutional "Offices" as long as delegatees act as mere agents of properly appointed incumbent officers. An administrative delegation is not an appointment to a constitutional "Office" because executive branch action cannot create an office in the first place, rather than because of a defect in the delegatee's appointment. As I have argued elsewhere on textualist, originalist, and structuralist grounds, the Appointments Clause's mandate that offices "shall be established by Law" bars Congress from delegating its power to create offices.[14] So if executive branch delegations created "Offices" in the constitutional sense, these delegations would be categorically unconstitutional, regardless of how the delegatees' positions were filled.

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[10] BRANNON, *supra* note 1, at 6–7 (citations omitted).

[11] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 512 n.13 (2010) (citing United States v. Smith, 124 U.S. 525, 532 (1888); United States v. Germane, 99 U.S. 508, 511 (1879); United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393–94 (1867)) (department head approval of another official's hiring decision satisfies the Appointments Clause); Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 526, 551, 560–61 (2018) (citations omitted) (discussing longstanding acceptance by the political branches of statutes requiring appointing officials to select from candidates nominated by others or having specified qualifications).

[12] Feinstein & Nou, *supra* note 3, at 1001 (citing U.S. CONST. art. II, § 2, cl. 2).

[13] *See, e.g.*, Edmond v. United States, 520 U.S. 651, 664, 666 (1997) (ability to "remov[e]" administrative assignments to military judgeships was a factor that supported holding that military judges were inferior officers); *In re* Palo Alto Networks, 44 F.4th 1369, 1375 (Fed. Cir. 2022) (revocability of agency head's delegation to tenure-protected officials rendered them inferior officers); *In re* Grand Jury Investigation, 916 F.3d 1047, 1052–53 (D.C. Cir. 2019) (even regulations requiring "cause" to terminate delegations are rescindable at will and thus do not render delegatees principal officers).

[14] Yonatan Gelblum, *Why Congress Cannot Delegate Authority to Create Offices, but Can Authorize Administrative Delegations from Offices*, 69 WAYNE L. REV. 385, 399–407 (2024); *accord* Steven G. Calabresi & Gary Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, 95 NOTRE DAME L. REV. 87, 101–02 (2019) (citations omitted) ("[A] regulation . . . does not constitute the kind of 'law' that can create an office . . . ."); Seth B. Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL'Y 107, 140 n.48 (2009) (summarizing authorities).

However, such administrative delegations generally do not create offices implicating the Appointments Clause. Rather, originalist, textual, historical, and early judicial authorities treat them differently from offices, indicating that they can be filled without conforming to the Appointments Clause, even when officers delegate "significant authority." At the time of the Founding, "deputies" acting in the name of an officer formally accountable for their actions were viewed as the officer's alter egos rather than officers in their own right formally charged with official duties.[15] Gouverneur Morris' assertion at the Constitutional Convention that heads of department could delegate authority to appoint inferior officers[16] reflects this understanding that agents can wield authority on behalf of a delegating officer that they could not exercise in their own name. This view also shaped First Congress statutes allowing officers to "depute" duties to others or appoint "deputies" to fulfill official duties in the officer's name with binding effect, without referring to these agents as officers or providing for their appointment in conformity with the Appointments Clause.[17]

Constitutional text, read in light of this original understanding that administrative delegations do not create "offices," provides ready support for such delegations. Congress's power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"[18] should logically allow statutes to authorize officers to delegate to agents.[19] This reading does not conflict with Appointments Clause restrictions on how "Officers" can be appointed and their offices established, because that term was understood to refer to officials directly responsible for fulfilling official duties, as opposed to deputies acting in such officers' names whose responsibilities derived from the officers' own official duties.

Longstanding historical practice also reflects an understanding that agents to whom officers delegate authority do not themselves become officers as a result. Various nineteenth century statutes, like earlier First Congress acts, allowed officers to broadly delegate to agents not referred to as officers or appointed pursuant to the Appointments Clause, who could act in the delegating officer's name with binding effect.[20] For example, statutes allowed tax collectors and shipping commissioners who were not heads of department to appoint "deput[ies]" who acted as their

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[15] *See, e.g.*, Mascott, *supra* note 11, at 542–45 (citations omitted) (discussing enactments by the Continental Congress, which allowed officers to directly appoint "deputies" for whose acts they were accountable, although the Articles of Confederation only permitted the Congress to appoint officers). *Compare also, e.g.*, 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington et al. 6th ed. 1785) (defining "deputy" as "[In law.] One that exercises any office . . . in another man's right, whose forfeiture or misdemeanour shall cause the officer . . . to lose his office"), *with* 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington et al. 6th ed. 1785) (defining "office" as "[a] publick charge").

[16] During debate on inferior officer appointments, James Madison suggested that "Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices," to which Morris responded "[t]here is no necessity. Blank Commissions can be sent." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 627–28 (Max Farrand ed., 1911).

[17] *See, e.g.*, Act of July 31, 1789, ch. 5, §§ 5, 6, 9, 27, 1 Stat. 29, 36–38, 44 (allowing a customs collector, who was not a head of department, to appoint deputies not referred to as "officers" to "execute and perform on his behalf, all and singular the powers, functions and duties of collector"); Mascott, *supra* note 11, at 515–20 (citations omitted) (giving additional examples); Gelblum, *supra* note 14, at 416–18 (citations omitted) (same).

[18] U.S. CONST. art. I, § 8, cl. 18.

[19] *Accord* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 500 (2010) (citation omitted) ("Congress has plenary control over . . . executive offices.").

[20] Gelblum, *supra* note 14, at 419–20, *id.* nn. 245–250 (citations omitted).

alter egos, or to "depute" duties to others, for whose conduct the delegating officer remained "responsible."[21] Another statute allowed the Secretary of War to "delegate" authority to remove or destroy vessels blocking waterways to an "agent of the United States," who was termed "an officer or agent,"[22] implying that delegation to a nonofficer "agent" did not effect an appointment to office. Nineteenth-century Attorney General opinions deemed such persons performing a delegating officer's duties nonofficers and indicated that the Appointments Clause did not govern their appointments.[23]

Nineteenth-century jurisprudence similarly distinguished officers responsible for performing duties directly vested in their positions by statute from agents delegated comparable authority by a responsible officer, and indicated that this difference mattered for constitutional purposes.[24] Thus, for example, *United States v. Smith*[25] held that a clerk was not an officer requiring appointment by a head of department because he was not "charged by some act of congress with duties," but instead performed tasks "assigned to him by [an officer]."[26] And *United States v. Eaton*[27] similarly indicated that officers can delegate responsibilities to others acting on their behalf, even when the delegatees could not constitutionally exercise the same authority in their own name. Specifically, it held that Congress had properly authorized the President to delegate authority to appoint an inferior officer to subordinates who were not themselves heads of department in whom Congress could directly vest such power.[28]

This judicial distinction between officers subject to the Appointments Clause and non-officer delegatees carried into the early twentieth century and has not been repudiated by the Supreme Court. Just under a century ago, in its last opinion discussing delegatees' constitutional status, the Court explained that an officer's deputy "is not in the constitutional sense an officer of the United States" despite being "called upon to exercise great responsibility and discretion . . . ."[29] It thus implied that delegation of even significant authority does not render a delegatee an officer. And since the Court adopted its "significant authority" test for constitutional "Officer" status fifty years later,[30] all cases in which it has applied this test concerned positions assigned official duties by statute, rather than positions assigned significant authority solely by means of administrative delegations from officers.[31] The Court has thus not repudiated earlier jurisprudence differentiating between administrative delegations of derivative responsibility for an officer's

[21] Act of June 7, 1872, ch. 322, § 3, 17 Stat. 262; Act of July 22, 1813, ch. 16, § 20, 3 Stat. 22, 30.

[22] Act of March 3, 1899, ch. 425, § 20, 30 Stat. 1121, 1154–55.

[23] Gelblum, *supra* note 14, at 420 (citations omitted); Aditya Bamzai, Symposium, *The Attorney General and Early Appointments Clause Practice*, 93 NOTRE DAME L. REV. 1501, 1510–14 (2018) (citations omitted).

[24] Gelblum, *supra* note 14, at 410–11, *id.* at 410 n.175.

[25] 124 U.S. 525 (1888).

[26] *Id.* at 532.

[27] 169 U.S. 331 (1898).

[28] *Id.* at 336–37 (quoting 18 Rev. Stat. § 1695, which authorized the President to issue regulations governing vice-consul appointments), 339 ("It is plain that the [rulemaking provisions] confer upon the President full power, in his discretion, to appoint vice-consuls and [t]he regulations [authorizing appointment by consuls] come clearly within the power thus delegated."), 343; Gelblum, *supra* note 14, at 411 (analyzing *Eaton*'s holding).

[29] Steele v. United States, 267 U.S. 505, 508 (1926).

[30] Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam); *superseded in part by statute on other grounds*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

[31] Gelblum, *supra* note 14, at 397–99, 411 n.189 (citations omitted).

statutory duties, which do not create offices, from offices to which statutes assign direct responsibility for such duties. This jurisprudence therefore remains good law,[32] and adds an additional gloss to the "significant authority" test for officer status.

Such delegations do raise constitutional concerns when "delegatees" do not act as mere agents, but instead act as officers in their own right by exercising significant authority not derivative of the authority of a properly-appointed incumbent officer in whose name the delegatee acts. And given Congress's exclusive power to establish offices, delegations by officers also raise concerns if Congress has not "by Law" permitted the delegation.[33] Early authorities indicated that a delegatee's ability to act was coextensive with the statutory authority of the delegating officer[34] and thus, for example, terminated if the officer's position was vacant.[35] It follows that to avoid being subject to the Appointments Clause, delegatees may only exercise authority (1) vested by statute in an existing office that is (2) presently occupied (3) by a properly-appointed officer.[36] Consequently, practices such as multimember agencies' reliance on staff purportedly acting under delegated authority to take action that the agency heads cannot themselves take due to statutory quorum requirements,[37] or having "delegatees" exercise the powers of an office that is vacant,[38] which the article's empirical findings suggest is a common occurrence,[39] *do* violate the Appointments Clause. Apart from any potential defects in the delegatee's appointment, they administratively create *de facto* offices, violating the mandate that offices "shall be established by Law."[40] Moreover, Congress's control over the establishment of offices allows it to determine whether and on what terms officers may delegate, rendering administrative delegations *ultra vires* if not authorized by statute.[41] But setting aside such scenarios, when administrative delegatees act on behalf of properly appointed incumbent officers authorized by statute to take the same actions and delegate to others, they are not constitutional

[32] *Cf.* Hohn v. United States, 524 U.S. 236, 252–53 (1998) (citation omitted) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.").

[33] Gelblum, *supra* note 14, at 420–24.

[34] The article notes that under the *Accardi* doctrine, delegation regulations bind delegating officers, Feinstein & Nou, *supra* note 3, at 962 (citing United States *ex rel.* Accardi v. Saughnessy, 347 U.S. 260, 268 (1954)); Thomas W. Merrill, *The* Accardi *Principle*, 74 GEO. WASH. L. REV. 569 (2006)), and such delegations may therefore appear to diminish these officers' power. But the doctrine does not preclude these officers from freely reclaiming full authority by simply revoking these regulations, *see* United States v. Nixon, 418 U.S. 683, 696 (1974), and thus does not grant delegatees more power than the delegating officers can wield.

[35] *See, e.g.*, Dudley v. James, 83 F. 345, 346–47 (C.C.D. Ky. 1897); Taylor v. Kercheval, 82 F. 497, 501 (C.C.D. Ind. 1897); *accord* United States v. Hartwell, 73 U.S. (6 Wall.) 385, 389 (1867) (referencing the Government's argument that an officer "does not stand in the relation of a deputy with a tenure of office depending on the principal who appointed him; but he remains in office notwithstanding his principal may retire"); *id.* at 393 (where official was an officer, "[v]acating the office of his superior would not have affected the tenure of his place"); Tenure of the Off. of Deputy Collectors, 4 Op. Att'ys Gen. 26, 27 (1842) ("[I]n the case of a removal of the collector from office, his deputy has no authority to act; . . . the powers of the deputy expire with those of the principal.").

[36] *See* Gelblum, *supra* note 14, at 424–26, 430–32; *accord* Bamzai, *supra* note 23, at 1510–11.

[37] Gelblum, *supra* note 14, at 425–26.

[38] *See*, *e.g.*, Mendelson, *supra* note 1, at 559–63 (giving examples).

[39] Feinstein & Nou, *supra* note 3, at 988–91 (noting numerous "midnight delegations" by outgoing administrations).

[40] U.S. CONST. art. II, § 2, cl. 2; Gelblum, *supra* note 14, at 424–26, 431–32.

[41] Gelblum, *supra* note 14, at 420–22; Stephen Migala, *Delegation Inside the Executive Branch*, 24 NEV. L.J. 147, 220–21 (2023); *see also* United States v. Giordano, 416 U.S. 505, 513–14 (1974).

"Officers," and their appointment need not conform to the Appointments Clause, as the article argues.

Consequently, the article's assertion that executive branch delegations to career civil servants violate the Appointments Clause's rules for filling offices errs in light of clear precedent and well vetted history. Indeed, the question of internal executive branch delegation touches not so much on the Appointments Clause's rules for filling offices as on its rules for creating offices, because the Constitution only vests in Congress the power to establish "Offices." Thus, although administrative delegations raise Article II concerns in specific circumstances, such as during a vacancy in the principal's office or when a statute does not authorize the delegation, no such concerns arise when statutorily authorized delegations permit career civil servants to exercise authority vested by statute in a properly appointed incumbent officer.

II. ADMINISTRATIVE DELEGATIONS DO NOT RAISE THE CONSTITUTIONAL CONCERNS ASSOCIATED WITH OFFICES VESTED WITH STATUTORY REMOVAL PROTECTIONS

Professors Feinstein and Nou also assert that administrative delegations to career staff with tenure protections create "submerged independent agencies," analogous to independent agencies whose heads are protected from removal by statutory for-cause removal restrictions.[42] They argue that these arrangements may raise the same constitutional concerns implicated by single-headed independent agencies and by statutes conferring dual for-cause removal protection, which preclude independent agency heads who themselves enjoy for-cause removal protection from freely removing subordinate officers.[43] But because administrative delegations are formally and functionally distinguishable from offices assigned duties and for-cause removal protections by statute, they do not raise the same constitutional concerns.

As a formal matter, the Supreme Court has expressly limited its holding that at least some dual "for-cause" removal protections are unconstitutional to officials who are constitutional "Officers,"[44] and has similarly indicated that its holding prohibiting removal protections for single-member agency heads concerned "principal officers."[45] As previously explained in Part I, administrative delegatees do not ordinarily become officers by virtue of the powers delegated to them and thus do not fall within the express scope of these holdings.

From a functional perspective, because administrative delegatees are assigned duties administratively rather than by statute, and because statutes do not impose for-cause restrictions on terminating these delegations, these arrangements are legally distinct from offices that Congress has vested with removal protections. Independent agency heads and other officers enjoying removal protection hold offices that are assigned authority by a statute that also limits the reasons for which the President or a superior officer can remove them from office and thereby

[42] Feinstein & Nou, *supra* note 3, at 953.

[43] *Id.* at 1003–07. *But see id.* at 1005–06 (noting that the ubiquity of delegations may lend them constitutional legitimacy).

[44] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 506 (2010).

[45] Seila Law LLC v. CFPB, 591 U.S. 197, 238 (2020).

deprive them of this authority.[46] Because statutes tie these officers' authority to their positions, depriving these officers of their authority typically requires firing them from these positions based on the specific grounds that Congress has permitted for removal.

In contrast, administrative delegatees wield authority because executive branch officers chose to delegate it to them. And the same officers can freely withdraw this authority,[47] even when they cannot separate the delegatee from federal service, thereby making a delegatee's status as a career-tenured employee largely immaterial. The Supreme Court has treated such administrative withdrawal of authority that may fall short of complete separation from federal service as a form of removal in the constitutional sense that helps ensure control of subordinates.[48] Given the absence of statutory for-cause limitations on such removal of authority from delegatees, and the delegating officer's power to revoke even those regulations purporting to restrict discretion to deprive an administrative delegatee of authority,[49] courts deem delegatees to be serving *qua* delegatees at the will of the delegating officer for constitutional purposes.[50]

In fact, it may be easier in one respect to remove tenure-protected civil servants serving as delegatees from their role *qua* delegatees than to remove officers holding at-will positions that require Senate confirmation. The executive branch can unilaterally reassign the delegatee's responsibilities without obtaining Senate confirmation of a successor delegatee, and thus does not face a potential disincentive to exercise its removal power due to uncertainty over whether a more desirable replacement would win Senate approval. In contrast, since the Founding Era, the requirement of Senate confirmation of a successor has been viewed as a powerful *political* constraint on the President's power to remove officers enjoying no *legal* removal protections.[51] This constraint does not apply to the withdrawal or reassignment of administrative delegations.

These differences make administrative delegations readily distinguishable from offices with statutory for-cause removal protections that the Supreme Court has struck down. The Court held that these statutes interfered with presidential accountability and control over subordinates,[52] and were thus an improper congressional encroachment on presidential power.[53] In contrast, Professors Feinstein and Nou acknowledge that in the context of administrative delegations, "the potential removal issue arises in this context only because of an executive branch actor's decision

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[46] *See, e.g.*, 38 U.S.C. § 7306(a)(5)–(10), (d)(3) (establishing authority and tenure protections of Veterans Health Administration officers); *see also, e.g.*, 49 U.S.C. §§ 1111(c), 1131 (establishing authority and tenure protections of National Transportation Safety Board members).

[47] Although the article notes that under the *Accardi* doctrine, regulations delegating authority bind delegating officers, Feinstein & Nou, *supra* note 3, at 962, the doctrine does not preclude them from simply revoking these regulations. United States v. Nixon, 418 U.S. 683, 696 (1974); *see also In re* Grand Jury Investigation, 916 F.3d 1047, 1052–53 (D.C. Cir. 2019) (officer could freely revoke regulations requiring cause to remove a delegatee and thereby dismiss the incumbent at will).

[48] Edmond v. United States, 520 U.S. 651, 664 (1997) (a superior's ability to withdraw an administrative assignment to serve as a military judge was a form of "remov[al]" serving as "a powerful tool for control").

[49] *In re Grand Jury Investigation*, 916 F.3d at 1052.

[50] *Id.* at 1052–53; *accord In re* Palo Alto Networks, 44 F.4th 1369, 1375 (Fed. Cir. 2022).

[51] Aaron L. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1, 5 (2023) (citing THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (C. Rossiter ed., 1961)); *accord* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1516 n.81 (2005) (restricting the President's ability to appoint acting officials to Senate-confirmed positions limits presidential removal powers).

[52] *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496 (2010).

[53] *Id.* at 502 ("Congress cannot reduce the Chief Magistrate to a cajoler-in-chief.").

to subdelegate authority. The President, through control over that actor, could always revoke the subdelegation if exercised in an undesirable way."[54] The absence of any cause requirement to terminate the delegation makes the arrangement at-will, ensuring the continued accountability of the delegating officer and ultimately the President for a delegatee's actions.[55] And since statutes do not impose the arrangement or limit its termination, it does not raise the same concerns about congressional encroachment on presidential power.[56]

The article does flag a possible procedural hurdle to terminating delegations: the potential requirement to give notice in the Federal Register when revoking delegations that had been effected by published rule.[57] But courts treat such minor procedural requirements applicable to nonsubstantive rulemaking[58] as negligible,[59] and agencies can in any event immediately revoke a delegatee's authority through actual notice to the delegatee regardless of whether and when publication occurs.[60] Moreover, the Supreme Court has distinguished such minor procedural hurdles from the for-cause removal protections that it has held unconstitutional.[61] Congress therefore can—and does—make removal of officers serving at will more difficult as a practical matter,[62] and even when it does not expressly restrict removal, firing an officer may still be associated with residual legal hazards because of the risk that courts will read an implied removal protection into a statute.[63] Minor procedural burdens on revoking administrative delegations therefore do not make these arrangements comparable to independent agencies.

Lastly, the article asserts that the *Accardi* doctrine, by barring delegating officers from denying legal effect to the prior acts of delegatees after revoking a delegation,[64] makes delegatees comparable to officers enjoying for-cause removal protections.[65] But the same limitation applies

[54] Feinstein & Nou, *supra* note 3, at 1007.

[55] Gelblum, *supra* note 14, at 414; *see also In re Grand Jury Investigation*, 916 F.3d at 1052–53; *accord Free Enter. Fund*, 561 U.S. at 483 (citation omitted).

[56] *Cf.* Decker Coal Co. v. Pehringer, 8 F.4th 1123, 1133–34 (9th Cir. 2021) (when an agency could elect not to use tenure-protected adjudicators, their tenure protections did not unconstitutionally diminish the President's authority).

[57] Feinstein & Nou, *supra* note 3, at 986 (citing 5 U.S.C. §§ 551(5), 552, 552(a)(3)).

[58] The Administrative Procedure Act exempts "matter[s] relating to agency management" and "rules of agency organization, procedure, or practice" from its elaborate notice-and-comment mandates for substantive rules. 5 U.S.C. § 553(a)(2), (b)(A).

[59] *See, e.g.*, Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 167 (7th Cir. 1996) ("There are no formalities attendant upon the promulgation of an interpretive rule" exempted from notice-and-comment by 5 U.S.C. § 553(b)(A)); *accord In re Grand Jury Investigation*, 916 F.3d at 1052–53 (a delegatee purportedly granted tenure protections by agency regulations "effectively serves at the pleasure of an Executive Branch officer" due to the delegating officer's ability to revoke the regulation).

[60] 5 U.S.C. § 552(a), (a)(1)(B)–(C) (agency's "statements of the general course and method by which its functions are channeled" and "rules of procedure" bind persons with "actual and timely notice" regardless of publication in the Federal Register).

[61] Collins v. Yellen, 141 S. Ct. 1761, 1785 n.19 (2021) (describing the Comptroller of the Currency as "removable at will" despite a requirement that the President "communicate the reasons for" removal to Congress).

[62] *See* Nielson & Walker, *supra* note 51, at 52–54.

[63] *See* Severino v. Biden, 71 F.4th 1038, 1047–48 (D.C. Cir. 2023).

[64] *Cf.* United States *ex. rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266–67 (1954) (holding that an agency must comply with its delegation regulations).

[65] Feinstein & Nou, *supra* note 3, at 1007.

to the acts of officials removeable at will. When such officers lose their position, their prior acts remain valid, and continue to bind their successors and the Government as a whole.[66]

Thus, from a constitutional perspective, administrative delegations to tenured career staff are not analogous to independent agencies. They do not raise the same constitutional concerns as statutory assignments of duties to officers whom Congress has protected from at-will removal.

CONCLUSION

The practice by political appointees of delegating broad authority to career civil servants has become pervasive in the modern administrative state and has drawn significant scholarly attention when used to assign "acting" duties in the vacancies context, but has otherwise not been examined in depth. The few contemporary courts and scholars to have touched on the constitutional implications of the practice have usually assumed that such delegations create constitutional "Offices" subject to the constitutional strictures applicable to offices created by statute. Professors Feinstein and Nou's *Submerged Independent Agencies* offers an unprecedented and innovative empirical analysis of this practice and raises important policy questions about its desirability. It also includes a legal discussion that proceeds from the usual premise that administrative delegations of significant authority create constitutional "Offices."

The article's resulting claim that the practice violates the Appointments Clause, due to the manner in which the civil service laws regulate hiring, overlooks contemporary and historical authorities indicating that similar laws regulating appointments to comparable positions do not violate the Clause. More fundamentally, this assertion does not account for originalist and textual authorities, as well as longstanding historical practice and early jurisprudence, which indicate that agents administratively delegated power to act in the name of properly appointed incumbent officers do not hold an office subject to the Appointments Clause in the first place.

The article's assertions about removal protections also overlook this formal distinction between officers and delegatees. And they overlook important functional differences between administrative delegations created and revokable at will by the executive branch, and offices vested with official duties and removal protections by statute. Contrary to the article's assertions, these distinctions make administrative delegatees constitutionally distinct from independent agency heads or others who hold offices vested with for-cause removal protections, and therefore do not raise the same constitutional concerns as these statutory arrangements. In the absence of such constitutional concerns, the propriety of administrative delegations is a policy issue that should be assessed based on the valid policy concerns identified by the authors.

[66] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 167–68 (1803) (act of prior President's Secretary of State bound the subsequent administration); *see also* Gary Lawson, *Command and Control: Operationalizing the Unitary Executive*, 91 FORDHAM L. REV. 441 (2023) ("[U]nlimitable presidential removal power . . . would not actually result in full presidential control . . . as the actions of now-fired subordinates would still exist as law . . . .").