THE DEPUTY "TO[O]" PROBLEM: AN OFFICER, AN EMPLOYEE SUPERVISOR, AND THE APPOINTMENTS CLAUSE

MAJOR JUSTIN C. BARNES*

Both the Oath and Commission Clauses confirm an important point: Those who exercise the power of Government are set apart from ordinary citizens. Because they exercise greater power, they are subject to special restraints. There should never be a question whether someone is an officer of the United States because, to be an officer, the person should have sworn an oath and possess a commission.[1]

I. Introduction

In the armed forces, officers command.[2] As a consequence—or, perhaps, by necessity—officers are entrusted with tremendous, even terrible, authority.[3] It perhaps should be unsurprising, therefore, that the

* Judge Advocate, United States Army. Presently assigned as the Strategic Plan Officer, Office of the Judge Advocate General, The Pentagon, Washington, D.C. LL.M., 2017, The Judge Advocate General's School, Charlottesville, VA; J.D., 2006, University of St. Thomas, Minneapolis, Minnesota; B.A., 2003, Indiana University, Bloomington, Indiana. Previous assignments include Chief, Military Justice, 2d Infantry Division, Camp Red Cloud, Republic of Korea, 2017-2018; Military Fellow, Strategic Studies Group, Office of the Chief of Staff of the Army, Arlington, Virginia, 2015-2016; Assistant Professor and Editor, *Military Law Review*, Administrative & Civil Law Department, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, 2014-2015; Senior Defense Counsel, Great Plains Region, U.S. Army Trial Defense Service, Ft. Leonard Wood, Missouri, 2012-2014; Operations Officer, Legal Operations Directorate, later Joint Legal Center, Combined Joint Interagency Task Force 435, Bagram, Afghanistan, 2011-2012; Brigade Judge Advocate, 41st Fires Brigade, 1st Cavalry Division, Ft. Hood, Texas, 2010-2011; and Administrative Law Attorney, U.S. Army Combined Arms Center, Ft. Leavenworth, Kansas, 2008-2010. This article was submitted in partial completion of the Master of Laws requirements of the 65th Judge Advocate Officer Graduate Course.

[1] U.S. Dep't of Transp. v. Ass'n of Am. R.R.s, 135 S. Ct. 1225, 1235 (2015) (Alito, J., concurring).

[2] Importantly, officers in general–not just commanders–command. *See infra* notes 130-133 and accompanying text (noting who may issue a lawful command, which includes officers who are in superior in rank to the recipient, not just officers who have been designated as commanders).

[3] *See infra* note 118 (discussing the maximum punishment for the disobedience of a lawful command).

Constitution restricts those who may wield such power.[4] Further, for military officers, authority is balanced by accountability: if their authority is abused, they can be called to account, administratively *and* criminally.[5] But are officers really the only "commanders" in the armed forces? Are there others who are able to exercise that sort of power? The short answer is "yes." They are the civilian employees who supervise officers.

Take this hypothetical unit's headquarters. An active-duty Army brigadier general commands this headquarters. A civilian who is employed in a General-Schedule (GS) 15 position serves as the deputy to the commander.[6] The previous commander's predecessor's predecessor—importantly, who was also an active-duty brigadier general—appointed the civilian employee into the civil service. Below the civilian deputy, there are two staff sections. An Army officer in the grade of lieutenant colonel leads the first staff section; the other is led by a civilian employee. The lieutenant colonel has three subordinates: one is a civilian employee and the other two are officers, including a Captain (CPT) Robert J. Snuffy.[7] The deputy to the commander is the rater for each of the staff-section heads, while the commander serves as the lieutenant colonel's senior rater.

At a morning meeting, the deputy to the commander instructs CPT Snuffy's staff-section head to have CPT Snuffy prepare a short briefing for the deputy on a pending contract action. The briefing is due the following morning at 0800. The staff-section head dutifully instructs CPT Snuffy accordingly. But alas, CPT Snuffy fails to comply. (The reason why does not really matter, but for the sake of the story, the reason was no good reason at all: the good captain just did not want to do it, as unlikely as that may be.) At 0800 the next morning, there is no briefing.

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[4] *See infra* Section II.A. (discussing the Appointment Clause's significant-authority test).
[5] *See infra* notes 257-265 and accompanying text (discussing accountability measures).
[6] The general-schedule system is a "classification and pay system [that] covers the majority of civilian white-collar Federal employees (about 1.5 million worldwide) in professional, technical, administrative, and clerical positions." *Pay & Leave: Pay Systems*, OFFICE OF PERS. MGMT., https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/ (last visited Feb. 6, 2019) [hereinafter OPM GS]; *see also infra* note 42 (noting other categories of people who work for the U.S. government). An agency "establishes (classifies)" each position based on that position's "level of difficulty, responsibility, and qualifications required," which, in turn, determines pay. OPM GS, *supra* note 6.
[7] *See infra* appendix.

To be sure, the deputy's instruction was arguably the definition of mundane. Across the Army, countless supervisors instruct an even greater number of staff officers to present innumerable briefings to what must be a lengthy list of leaders. Some of those harried officers fail. It happens. Indeed, had the deputy given the instruction himself, this would be an aptly named leadership challenge—something to be addressed but not, like the instruction itself, that big of a deal.

But the deputy to the commander did not give CPT Snuffy the instruction himself. Instead, he had CPT Snuffy's superior commissioned officer do that. That instruction, therefore, became a superior commissioned officer's command.[8] As a result, CPT Snuffy's disobedience was something more than just a leadership challenge; it was a felony.[9]

The difference here is a result of an important distinction: the deputy is a civilian employee, but the staff-section head, a lieutenant colonel, is an officer of the United States. Moreover, this distinction reflects a very real difference. In short, an officer of the United States may wield a remarkable authority—"the power of [the] Government" of the United States.[10] Indeed, that remarkable authority takes on a different character in the armed forces. This is because the lieutenant colonel is not just any old officer of the United States, but rather, CPT Snuffy's "superior commissioned officer."[11] Thus, their authority is the power to issue a command, and a command, if disobeyed, carries with it a criminal penalty that can be quite severe.[12]

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[8] *See* 10 U.S.C. § 890 (2018). This punitive article was amended by the *Military Justice Act of 2016*. The changes are not substantive: the amendment splits the offense of assaulting a superior commissioned officer from this article and adds it to the article that prohibits disrespecting such an officer. Military Justice Act of 2016, Pub. L. No. 114-328, §§ 5408, 5409, 130 Stat. 2000, 2941-42 (2016). This change was effective on January 2019. For simplicity purposes, the current U.S. Code version is referred to throughout this article.

[9] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 16d(1)-(2) (2019) [hereinafter MCM] (defining maximum punishment for disobedience of a lawful command as, among other things, five years' confinement or, in time of war, death).

[10] U.S. Dep't of Transp. v. Ass'n of Am. R.R.s, 135 S. Ct. 1225, 1235 (2015) (Alito, J., concurring).

[11] 10 U.S.C. § 801(5) (2018) (defining a superior commissioned officer as "a commissioned officer superior in rank or command"); 10 U.S.C. § 101(b)(1), (2), (8) (2018) (defining the terms "officer," "commissioned officer," and "rank").

[12] 10 U.S.C § 890(2); MCM, *supra* note 9, pt. IV, ¶ 16(d)(1)-(2) (defining maximum punishment).

The Constitution identifies a specific process to appoint officers. Its Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all . . . officers of the United States."[13] The clause is not merely a matter of "etiquette or protocol"; rather, "it is among the significant structural safeguards of the constitutional scheme."[14] The clause is "designed to preserve political accountability relative to important government assignments,"[15] and it reflects the framers' concern regarding "who should be permitted to exercise the awesome and coercive power of the government."[16] In short, the clause is about ensuring that those who exercise "significant authority pursuant to the laws of the United States"[17] are "accountable to political force and the will of the people."[18]

At the same time, the Court's chosen qualifier, *significant*, suggests that non-officers may be given some level of authority; the question is how much. Indeed, the Supreme Court has long recognized that a person may be "an agent or employé [sic] working for the government and paid by it, as nine-tenths of the persons rendering service to the government undoubtedly are, without thereby becoming its officers."[19] These are "employees of the United States," who are "lesser functionaries subordinate to officers."[20] Yet, despite the rather lengthy history of these categories, the line separating one from the other has been, and remains, "not altogether clear."[21]

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[13] U.S. CONST. art. II, § 2.
[14] Edmond v. United States, 520 U.S. 651, 659 (1997) (internal quotation omitted).
[15] *Id*. at 663 (discussing Appointment Clause's distinction between principal and inferior officers).
[16] Ass'n of Am. R.R.s v. U.S. Dep't of Transp., 821 F.3d 19, 36 (D.C. Cir. 2016) (discussing history of Appointments Clause) (original emphasis omitted), *reh'g en banc denied*, No. 12-5204 (D.C. Cir. Sept. 9, 2016).
[17] Buckley v. Valeo, 424 U.S. 1, 126-27 (1976); *see also infra* text accompany notes 74-115 (discussing development of the significant-authority test).
[18] Freytag v. Comm'r, 501 U.S. 868, 884 (1991).
[19] United States v. Germaine, 99 U.S. 508, 509 (1878).
[20] Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976).
[21] Tucker v. Comm'r, 676 F.3d 1129, 1133 (D.C. Cir. 2012) (discussing cases dealing with the line between officers and employees); *see also* Lucia v. Sec. & Exch. Comm., 138 S. Ct. 2044, 2052 (2018) ("And maybe one day we will see a need to refine or enhance the test *Buckley* set out so concisely. But that day is not this one . . . .")

Despite that haziness—and ongoing disputes over who is, or must be, an officer[22]—a point has emerged in case law in which a person's authority becomes significant. That point occurs when that authority is, among other things, the power to create or determine a legal obligation.[23] For the armed forces, this occurs rather regularly in a very common practice: it is called, colloquially, giving orders. Of course, that is precisely what the lieutenant colonel's request to CPT Snuffy was: it was an order—really, a command[24]—which is nothing more, or less, than a binding, criminally-enforceable legal obligation.[25]

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[22] *See, e.g.*, Raymond J. Lucia Cos. Inc. v. Sec. & Exch. Comm., 832 F.3d 277 (D.C. Cir. 2016) (evaluating the constitutionality of the Security and Exchange Commission's use of administrative law judges and concluding that such judges are not officers), *rev'd*, 138 S. Ct. 2044 (2018) (holding that administrative law judges are inferior officers but declining to further define the significant-authority test). As pure speculation, it is not necessarily surprising that these issues continually surface. It is simply easier to hire employees than to appoint officers. U.S. CONST. art. II, § 2 (the Appointments Clause); *see also* Edmond v. United States, 520 U.S. 651, 660 (1997) (stating that "[t]he prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers"). Even for non-principal officers, Congress "may" by law allow the President, the heads of the departments, or the courts to appoint such "inferior officers." U.S. CONST. art. II, § 2. That is a circumscribed list of people compared to who can hire an employee, which includes, among other people, another employee or by a member of the uniformed services. *See* 5 U.S.C. § 2105(a)(1) (2018).

[23] *See infra* Section II.A.2 (discussing when authority is significant under the Appointments Clause).

[24] The term "order" versus "command" is often misunderstood. In short, a "superior commissioned officer" gives commands, while noncommissioned officers and other officers who do not otherwise qualify as a superior commissioned officer give orders. *Compare* 10 U.S.C. § 890 (2018) (prohibiting the disobedience of the "lawful command" of a "superior commissioned officer"), *with* 10 U.S.C. §§ 891(2), 892(2) (2018) (prohibiting the disobedience of the "lawful order" of a warrant officer, noncommissioned officer, or petty officer or "any other lawful order issued by a member of the armed forces"); *see also* MCM, *supra* note 9, pt. IV, ¶¶ 15c(1), 18c(2)(c)(i) (defining "superior commissioned officer" and stating that "[a] member of one armed force who is senior in rank to a member of another armed force is the superior of that member with authority to issue orders . . . .") Of course, the penalty for disobeying an order is far less severe than that for disobeying a command. *Compare id*. pt IV, ¶¶ 17d(4)-(5), 18d(2) (providing a penalty of bad-conduct discharge, total forfeitures, and one-year confinement for disobeying a noncommissioned officer, or dishonorable discharge, total forfeitures, two years' confinement if a warrant officer, and a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months for disobeying another lawful order), *with id.* pt. IV, ¶ 16d(2) (providing for a dishonorable discharge, total forfeitures, and five-years' confinement for disobeying a superior commissioned officer).

[25] 10 U.S.C. § 890 (2018); *see also* MCM, *supra* note 9, pt. IV, ¶ 16d(1)-(2) (defining the maximum punishment).

Yet, the true source of that command was not the lieutenant colonel; it was really the deputy to the commander. There is no reason to think that had the deputy not asked for that unfortunate briefing, the lieutenant colonel would have issued this command. Indeed, it was the deputy to the commander who decided CPT Snuffy would brief, the briefing's content, and its deadline. Still, that detailed, if routine, "request" became a legal obligation only because the lieutenant colonel issued it as a command. In effect—importantly, even if it not in intent—the deputy to the commander commandeered the lieutenant colonel's authority.

There is a problem with that, though. The deputy to the commander is not an officer of the United States. He was not appointed in accordance with the Appointments Clause. He was hired. Despite that fact, because he was the lieutenant colonel's supervisor, the deputy was able to exercise his subordinate officer's authority, an authority that the Appointments Clause reserves to officers. Simply put, this contravenes the Constitution.

To establish that conclusion, this article proceeds in three parts. Naturally enough, it begins with the Appointments Clause. Drawing on Supreme Court and lower-court opinions, the article will argue that significant authority is, among other things, the power to create or determine a legal obligation. It will then apply this test to an officer's power to issue commands under the Uniform Code of Military of Justice (UCMJ), and will argue that that power is the power to create just such a legal obligation and that, consequently, it is the exercise of significant authority. Ultimately, this section will conclude that only an officer of the United States, who has been appointed in accordance with the Appointments Clause, may issue a command.[26]

In the second section, this article applies that conclusion to an organizational structure like that presented in the hypothetical, namely, a civilian employee who supervises a military officer who, in turn, supervises military subordinates. Essentially, this structure inserts a civilian employee into a military organization's supervisory chain. This section begins by identifying those tools that are available to a

[26] That military officers are, well, officers and are, consequently, subject to the Appointments Clause are not particularly controversial conclusions although their reasoning has rarely been articulated. For instance, in *Weiss v. United States*, a case about military judges, the Court stated simply as a matter of fact and without further elaboration that military judges are officers and "that the Appointments Clause applies to military officers." 510 U.S. 163, 169-70 (1994).

civilian employee to control military subordinates. Among these tools is a supervisor's authority to "direct[] and assess[]"—rate—a subordinate military officer.[27] Those tools gives the civilian supervisor the ability to fire—that is, relieve—the officer from that officer's current assignment.[28] Together, they allow the supervisor to essentially, albeit generally not immediately, end an officer's career—likely resulting in the officer's discharge.[29]

The courts have long recognized the principle that one who can remove an officer is one who can control that officer.[30] Applying that principle, the second part of this section will argue that, in some circumstances, those tools give the civilian supervisor the ability to effectively exercise a subordinate officer's authority. The supervisor does so by instructing the officer to create a legal obligation for a subordinate service member—that is, to issue a command. This section will argue in its second part that the exercise of this supervisory authority violates the Appointments Clause.

In the third and final section, this article will identify potential resolutions. These include appointing civilian employees as civil officers; restricting the authority of civilian employees such that they can no longer require subordinate officers to issue commands; or restructuring organizations to prevent this issue from emerging at all. Although each solution carries real costs, this article will argue that the latter solution is the better solution—in part based on a policy preference that significant authority should come with substantial accountability.

Two important caveats are in order. First, this article addresses only the specific organizational relationship in which a civilian *employee* supervises a military officer who, in turn, supervises military subordinates.

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[27] *See* U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM para. 2-5(a) (4 Nov. 2015).

[28] As discussed further below, a civilian supervisor who serves as a rater or a senior rater may relieve a Soldier. *See id*., para. 3-54 (defining relief for cause as an "early release of an officer from a specific duty or assignment directed by superior authority and based on a decision that the officer has failed in his or her performance of duty"), para. 3-54(d) (providing that the identity of the authority that relieved the officer will be identified in the evaluation and that "the rating official directing the relief will clearly explain the reason for the relief in his or her portion of the OER").

[29] *See infra* notes 208-209 and accompanying text (discussing practical effect of a relief for cause on an officer's continued service).

[30] *See infra* text accompanying notes 215-222 (discussing power to remove an officer as power to control that officer).

It does not address any other circumstance in which a civilian—including a civil *officer*, e.g., the Secretary of Defense—supervises an officer.[31]

Further, as a matter of constitutional law, an officer may perform all the functions of an employee.[32] When a civilian employee supervises an officer in a circumstance in which the officer acts only as an employee—and specifically, when the officer has no directly reporting military subordinates—the Appointment Clause issue discussed here *may* not arise.[33] In any event, such a supervisory arrangement is not the subject of this article.

Second, this article focuses only on the authority of a civilian employee over a military officer and not any other grade of service member. To be sure, other service members give orders, namely, warrant officers, noncommissioned officers, and petty officers.[34] As these

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[31] To be clear, this article says *nothing* about civilian control of the military. Constitutionally civilian control of the military is effectuated by the exercise of authority over military officers by the *civil* officer, namely, the President. *See* U.S. CONST. art. II, § 2 (commander-in-chief clause). More specifically, the Appointments Clause does not prohibit a *civil* officer from supervising a military officer, i.e., the Secretary of Defense, the service secretaries, or the veritable legion of deputy, under, and assistant secretaries that make up the Defense Department or the service secretariats. *See also infra* note 176 (discussing types of officers that are described in the Constitution). Indeed, the list of such civil-officer supervisors is lengthy. For instance, in just the Office of the Secretary of Defense alone, the list includes: the secretary of defense, the deputy secretary of defense, the undersecretaries of defense, the principal deputy undersecretaries of defense, and the assistant secretaries of defense, among many, many others. 10 U.S.C. §§ 113(a), 132, 133(a-b), 134, 135, 136, 137, 137a, 138. This article is solely concerned with the supervision of military officers by civilian *employees*. *See supra* note 6 and *infra* notes 42-43 and accompanying text (discussing employees).

[32] *See, e.g.*, Freytag v. Comm'r, 501 U.S. 868, 882 (1991) (stating that "[t]he fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution").

[33] That said, even when an officer has no subordinates, that officer still has authority over junior service members. *See* Section II.B.1 (discussing officer's authority to issue commands).

[34] 10 U.S.C. § 891(2) (2018) (providing for the punishment of any person subject to the code who "willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer"); *see also* 10 U.S.C. 892(2) (prohibiting a person who is subject to the code from disobeying "any other lawful order" that was "issued by a member of the armed forces" to which the person has a "duty to obey"). Of note, warrant officers in the grade of warrant officer, W-1 are appointed by warrant, that is, they are not commissioned officers, unless the secretary of the armed force provides otherwise by regulation. 10 U.S.C. § 571(b) (2018) (providing that the President issues both the

titles aptly suggest, such orders are issued by persons not appointed as officers. But, the penalty for disobeying these orders is considerably less than the penalty for disobeying a superior commissioned officer's command.[35] It could be argued, consequently, that such orders do not reflect the exercise of significant authority. Regardless, this is not the article's subject.

Who decides is the basic question at the core of the United States'—and really any—constitutional scheme.[36] The Constitution establishes a process for appointing those who will decide, that is, those who will exercise the "sovereign authority" of the United States.[37] The power to create a legal obligation is the exercise of such authority, and that is just what a military officer's command is—a binding legal obligation, one that carries a substantial criminal penalty if disobeyed. In short, to exercise such a tremendous, even awesome, power under the Constitution, one must be appointed in accordance with it, and a deputy to a commander is not.

II. The Appointments Clause and the Military Officer

A. U.S. Officers and the Exercise of Significant Authority

In its entirety, the Appointments Clause reads:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint

warrant and the commission). In any event, warrant officers are commissioned when promoted to the grade of chief warrant officer, W-2. *Id*.

[35] *Compare* MCM, *supra* note 9, pt. IV, ¶ 17d(4), (5) (providing in addition to a punitive discharge and total forfeiture of all pay and allowances, a maximum penalty of two years' or one year confinement for disobeying a warrant officer's or non-commissioned officer's order, respectively), ¶ 18d(2) (providing a maximum term of confinement for the disobedience of "other lawful order" of six months' confinement), *with id.* pt. IV, ¶ 16d(1), (2) (providing that in addition to a dishonorable discharge and total forfeitures of all pay or allowances, a maximum term of confinement of five years for disobeying a lawful command or, in time of war, "[d]eath or such other punishment as a court-martial may direct").

[36] *See, e.g.*, Ass'n of Am. R.R.s v. U.S. Dep't of Transp., 821 F.3d 19, 36 (D.C. 2016) (noting that "among the Framers' chief concerns at the constitutional convention were questions of who should be permitted to exercise the awesome and coercive power of the government"), *reh'g en banc denied*, 12-5204 (D.C. Cir. Sept. 9, 2016).

[37] *See* Raymond J. Lucia Cos. Inc. v Sec. & Exch. Comm., 832 F.3d 277, 285 (2016) (discussing the Appointments Clause), *rev'd on other grounds*, 138 S. Ct. 2044 (2018).

> Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[38]

It is a relatively short clause, measuring all of eighty-one words, but it has generated a fair share of confusion. For example, sitting as a circuit justice, Chief Justice Marshall wrote of the clause: "I feel no diminution of reverence for the framers of this sacred instrument, when I say that some ambiguity of expression has found its way into this clause."[39] Indeed, the third Chief Justice's lament regarding the clause's ambiguity has continued to the present day.[40]

Despite that ambiguity, the clause clearly has one built-in limitation: it applies only to officers of the United States.[41] Yet, not everyone who works for the United States is an officer. One category of such persons[42] is employees, who the Supreme Court has described as "lesser functionaries subordinate to officers of the United States."[43]

The fact that the clause applies to only some persons, but not others, also implies that the two categories are constitutionally distinct. Unfortunately, the "line between 'mere' employees and . . .

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[38] U.S. CONST. art. II, § 2.

[39] United States v. Maurice, 2 Brock 96, 26 F.Cas. 1211, 1213 (Marshall, Circuit Justice, C.C.D. Va. 1823).

[40] *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 671 (1988) (noting that "[t]he line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn").

[41] U.S. CONST. art II., § 2.

[42] There are many other categories of persons who perform work for the United States: enlisted persons; contractors, and even occasionally volunteers. 10 U.S.C. §§ 505 (authorizing a service secretary to accept persons for enlistment), 1588 (authorizing volunteers in specific circumstances) (2018); FAR 1.104, 2.101 (2017) (stating that the regulation applies to "all acquisitions" and defining acquisitions as the "acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government"). *But see* 31 U.S.C. § 1342 (2018) (prohibiting the use of volunteers generally).

[43] Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976).

officers is anything, but bright."[44] In part, that ambiguity arises from the simple fact that "[i]t is relatively rare for a case to raise an issue involving the fundamental structural provisions devised by the Framers in allocating power within the government they constructed."[45] More importantly, in its earliest cases, the Supreme Court did not really attempt to draw that line at all. Instead, it essentially concluded that so long as one of the three constitutional appointment authorities—namely, the President, the courts, or the heads of the departments—appointed a person to an office "established by Law," the person was an officer.[46] It was, in the words of one circuit court, "circular logic."[47]

That changed in 1976. In the case of *Buckley v. Valeo*, the Supreme Court decided that the Appointments Clause was not just concerned with titles, but rather contained a "substantive meaning"—really a limitation.[48] In essence, the Court read the clause to restrict the exercise of some government powers to officers.[49] Specifically, only an officer appointed to an office that was established by law[50] could exercise

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[44] Landry v. Fed. Deposit Ins. Corp., 204 F.3d 1125, 1132 (D.C. Cir. 2000), *overruled on other grounds*, Lucia v. Sec. & Exch. Comm., 138 S. Ct. 2044 (2018).

[45] United States v. Janssen, 73 M.J. 221, 222 (C.A.A.F. 2014). Anecdotally it seems to be happening with greater frequency. The U.S. Court of Appeals for the Armed Forces (C.A.A.F) and the Supreme Court has recently wrestled with the issue of appellate military judges who have been cross-appointed to the U.S. Court of Military Commission Review (CMCR). *See* United States v. Dalmazzi, 76 M.J. 1 (C.A.A.F. 2016) (affirming case based on fact that the participating judge had not been commissioned a CMCR judge when the case was decided); *see also* United States v. Ortiz, 76 M.J. 189, 190 (C.A.A.F. 2017) (determining that appellate military judges who hold CMCR commissions could sit as courts of criminal appeals judges), *affirmed*, 138 S. Ct. 2165 (2018). That said, these cases are not about whether a person has exercised an officer's authority, but whether a principal officer may sit on an armed force's court of criminal appeals. *See, e.g.*, *Ortiz*, 76 M.J. at 190 (describing petition for review as whether a court of criminal appeals judge may serve simultaneously on both that court and the CMCR under the Appointments Clause and statute).

[46] *See* United States v. Mouat, 124 U.S. 303, 307 (1888) (stating that "[u]nless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment," the person is not an officer); *see also infra* text note 77 and accompanying text (discussing earlier cases regarding established by law requirement).

[47] *Landry*, 204 F.3d at 1132-33 (noting that "[i]n fact, the earliest Appointments Clause cases often employed circular logic, granting officer status to an official based in part upon his appointment by the head of a department").

[48] Buckley v. Valeo, 424 U.S. 1, 126 (1976).

[49] *Id.*

[50] U.S. CONST. art. II, § 2; *see also* Freytag v. Comm'r, 501 U.S. 868, 881 (1991) (noting that the "office of special trial judge is 'established by Law'").

"significant authority pursuant to the laws of the United States."[51] Despite that conclusion, however, the nature of those two requirements remains the subject of debate; it is to their meanings to which this article turns next.

1. "Established by Law"

To begin with, the Appointments Clause states that the President shall nominate and appoint "all other Officers of the United States . . . which shall be *established by Law*."[52] Since relatively early in the Constitution's history, the meaning of the qualifier clause—established by law—has been the subject of debate. In an 1823 case, *Maurice v. United States*, Chief Justice Marshall, sitting as a circuit justice, wrote that the clause was subject to two interpretations: first, "that all offices of the United States shall be established by law" or, second, that the Appointments Clause only applied "to such offices."[53] In the latter interpretation, the clause would "leav[e] it to the power of the executive . . . [to] create in all laws of legislative omission, such offices as might be deemed necessary for their execution, and afterwards to fill those offices."[54] Put another way, the President could unilaterally create, and fill, an office.

In *Maurice*, the Chief Justice rejected that latter interpretation.[55] Later, the Supreme Court itself required that before a person could be an officer, that person must be appointed to an office that had been established by law.[56] Since *Buckley v. Valeo*, consistent with *Maurice*, and as recently as 2018, the Supreme Court has never suggested that a person may exercise significant authority even though the person holds no office established by law.[57]

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[51] *Buckley*, 424 U.S. at 126-27.
[52] U.S. CONST. art. II, § 2 (emphasis added).
[53] United States v. Maurice, 2 Brock 96, 26 F.Cas. 1211, 1213 (Marshall, J., Circuit Justice, C.C.D. Va. 1823).
[54] *Id.*
[55] *Id.* (noting that the requirement that the Congress establish all offices, among other things, "accords best with the general spirit of the constitution, which seems to have arranged the creation of office among legislative powers").
[56] *See* United States v. Smith, 124 U.S. 525, 533 (1888) (noting that "[t]here must be, therefore, a law authorizing the head of a department to appoint clerks" and that because there was no such law, the clerk was not an officer).
[57] *See* Freytag v. Comm'r, 501 U.S. 868, 881 (1991) (concluding that special trial judges held an office established by law); *see also* Lucia v. Sec. & Exch. Comm., 138 S. Ct.

Despite that fact, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has at least suggested that that may not be the case. Specifically, and literally parenthetically, the D.C. Circuit has called the established-by-law requirement "the threshold trigger for the Appointments Clause."[58] By calling it a "threshold trigger,"[59] the court could be suggesting that the Clause, in its entirety, applies only to those positions that are established by statute. But if the clause does not apply *at all*, that necessarily implies that the

2044, 2051 (2018) (noting that "an individual must occupy a 'continuing' position established by law to qualify as an officer"). As discussed below, an agency's general authority to hire may be sufficient to establish an employee's "office." *See infra* note 59. Perhaps so. But even then, employees are not generally appointed in accordance with the Clause, which is the very issue. *See* 5 U.S.C. § 2105(a)(1) (2018) (describing who may appoint an employee).

[58] Landry v. Fed. Deposit Ins. Corp., 204 F.3d 1125, 1133 (D.C. Cir. 2012), *overruled on other grounds*, *Lucia*, 138 S. Ct. at 2044. The Supreme Court recently overruled the D.C. Circuit's previous holding that administrative law judges (ALJs) were employees, not officers. *Compare Lucia*, 138 S. Ct. at 2044 (holding that SEC ALJs were officers), *with* Raymond J. Lucia Cos. Inc. v Sec. & Exch. Comm., 832 F.3d 277, 285-86 (2016) (concluding that SEC ALJs were employees), *rev'd*, 138 S. Ct. at 2044; *Landry*, 204 F.3d at 1134 (concluding same for FDIC ALJs), *overruled*, *Lucia*, 138 S. Ct. at 2044. In do so, it (rather mechanically) applied an earlier case, *Freytag*. *Lucia*, 138 S. Ct. at 2052. Indeed, the majority expressly disclaimed providing any "more detailed legal criteria" despite some interesting arguments in the concurrence and dissents. *Id. But see id*. at 2057 (Thomas, J., concurring) ("The Founders likely understood the term 'Officers of the United States' to encompass all federal civil officials who perform an ongoing, statutory duty—no matter who important or significant that duty."), 2065-66 (Sotomayor, J., dissenting) (stating that "I would hold that one requisite component of 'significant authority' is the ability to make final, binding decisions on behalf of the Government" and concluding that ALJs are not officers because their decisions lack finality). As a consequence of this narrow and, probably, compromise holding, the Court's decision in *Lucia* itself is of little help in defining the difference between an officer and an employee.

[59] *Landry*, 204 F.3d at 1133. That said, if it is a threshold trigger, it seems to be a pretty easy one to pull. Specifically, the D.C. Circuit has suggested, albeit in dicta, that even an agency's general statutory authority to hire a person may be sufficient to establish an office. *See* Tucker v. Comm'r, 676 F.3d 1129, 1133 (D.C. Cir. 2012) (noting that IRS employees at issue appear to be hired "by the Commissioner pursuant to his general hiring power"). This is not an irrational conclusion. For instance, it could be argued that the existence of that statutory authority means that the agency is not acting unilaterally to bring an office into existence. *See, e.g*., 5 U.S.C. § 3101 (2018) (providing general authority to hire). Further, that grant of authority could, and probably should, be read in light of the agency's general authority to prescribe regulations to carry out—and, therefore, delegate—its functions. *See, e.g.*, 10 U.S.C. § 3013(g)(3) (2018) (providing that the Secretary of the Army shall have the authority to "prescribe regulations to carry out his functions, powers, and duties under this title").

clause's restriction on the exercise of significant authority does not apply either.[60]

It is, at best, difficult to square the D.C. Circuit's approach with Chief Justice Marshall's construction of the Appointments Clause in *Maurice*.[61] Moreover, such a threshold is even harder to square with *Buckley*'s overall holding that the clause contains a substantive limitation on the exercise of authority.[62] Indeed, if the established-by-law qualifier was really a threshold that must be satisfied before the clause, including its limitation on the exercise of significant authority, was applicable, the limitation would be simple to avoid:[63] delegate

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[60] In fairness, it is possible to read the D.C. Circuit's "threshold trigger" consistent with the construction advanced below, namely, that it is really another prerequisite that must be met before a person may exercise significant authority. *See infra* notes 65-66 and accompanying text. The threshold-trigger language is literally a parenthetical in the part of the opinion comparing the ALJs at issue in that case to the Tax Court's special trial judges, who the Supreme Court concluded were officers. *Landry*, 204 F.3d at 1133; *see also Freytag*, 501 U.S. at 882. Because the D.C. Circuit ultimately concluded that the ALJs held a position established by law, it did not address whether the Supreme Court's significant-authority test would have even applied to positions that were not so established. *Landry*, 204 F.3d at 1133. Ultimately, the D.C. Circuit decided that the ALJs did not exercise significant authority. *Id*.; *see also Tucker*, 676 F.3d at 1133 ("In any event, because we conclude below that Appeals employees do not exercise significant authority within the meaning of the Appointments Clause cases, we need not resolve whether their positions were "established by Law" for purposes of that clause."). The Supreme Court concluded that ALJs were officers, but the majority did not further elaborate on whether the "established by Law" was a "threshold" to the clause's application at all or whether holding such an office was a pre-requisite to the exercise of "significant authority." *See Lucia*, 138 S. Ct. at 2052 (noting the established-by-law requirement but not further elaborating on it).

[61] *See* notes 53-55 and accompanying text (discussing *Maurice*).

[62] Buckley v. Valeo, 424 U.S. 1, 126 (1976); *see also* Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 118 (2007) (internal quotation omitted) ("Any position that is an office in the constitutional sense under the two elements we have described, and has not been created ultra vires, will have been created by law in some fashion, regardless of how labeled.") [hereinafter OLC Opinion].

[63] As the D.C. Circuit itself has noted, "it would seem anomalous if the Appointments Clause were inapplicable to positions extant in the bureaucratic hierarchy" to which were "assigned 'significant authority,' merely because neither Congress nor the executive branch had formally created the positions." *Tucker*, 676 F.3d at 1133. To illustrate this, assume for the sake of argument that the established-by-law requirement is actually a *threshold* determination to the Appointment Clause's limitation on who may exercise significant authority is even applicable and that statutory authority to hire is insufficient to establish an office. An employee may hired another employee. 5 U.S.C. §§ 2105(a)(1)(d), 3101 (2018) (providing a general authority to hire and noting that an employee includes a person appointed into the civil service by "an individual who is an employee"). Such persons cannot be officers, as the Constitution permits only certain

significant authority to someone holding a position not established by law.[64]

Consequently, the better construction of the clause is that a person must hold an office established by law *before* that person may exercise significant authority. An appointment to an office is, in other words, a prerequisite to the exercise of significant authority,[65] and consistent with *Maurice*, a person can only be appointed to an office established by law. Thus, that *additional* requirement does not void the clause's *overall* limitation.

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persons to appoint officers, which does not include employees. *See* U.S. CONST. art. II, § 2. Consequently, if the Clause's limitation on who may exercise authority does not even apply to those employees because they hold no office established by law, those persons could exercise significant authority despite not being officers. The Clause is flanked into irrelevancy. *See also* OLC Opinion, *supra* note 62, at 117 ("But the rule for which sorts of positions have been 'established by Law' such that they amount to offices subject to the Appointments Clause cannot be whether a position was formally and directly created as an 'office' by law. Such a view would conflict with the substantive requirements of the Appointments Clause.").

[64] The U.S. Court of Appeals for the Armed Forces case of *United States v. Janssen* illustrates, albeit indirectly, why this cannot work. In *Janssen*, the Air Force Judge Advocate General and, later, the Secretary of Defense purported to appoint a civilian employee to the Air Force Court of Criminal Appeals. 73 M.J. 221, 222 (C.A.A.F. 2014). It was undisputed that the Appointments Clause required a military judge to be an officer. Weiss v. United States, 510 U.S. 163, 169 (1994) ("We begin our analysis on common ground. The parties do not dispute that military judges, because of the authority and responsibilities they possess, act as 'Officers' of the United States."). The issue in *Janssen* was whether the Secretary of Defense had the statutory right to appoint inferior officers. *Janssen*, 73 M.J. at 224; *see also* U.S. Const. art. II, § 2 (providing that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, . . . in the Heads of Departments"). Ultimately, the court concluded that the Secretary lacked that right. *Jansenn*, 73 M.J. at 225 (noting that "[o]ne searches the sections of Title 10 in vain for any provision conferring a general appointment power for officers"). Yet, like all cabinet secretaries, the Secretary also had general statutory authority to run his department, and in any event, that civilian employee had been originally assigned to the court by the very officer who created the court. *See id*. at 222 (noting the assignment by the service judge advocate general); 5 U.S.C. § 301 (2018) (authorizing a head of a department to "prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property"); 10 U.S.C. § 866(a) (requiring the service judge advocates general to create the courts of criminal appeals and authorizing those officers to "assign" appellate military judges to them, including civilians). As a consequence, if significant authority *could* be delegated to a non-officer employee, that delegation must have occurred, even if by implication, when either the Secretary appointed or the Judge Advocate General assigned the civilian employee to the court. If that is so, *Janssen*'s result was wrong.

[65] *See infra* Section II.A.2 (discussing the Supreme Court's significant-authority test).

Assuming that is the case, the inquiry of whether an office is established by law is holistic, taking into account a number of authorities. For instance, how a statute defines an office's "duties, salary, and means of appointment" is relevant.[66] Thus, a statute need not specifically authorize the appointment of an officer to a particular position in a particular agency.

For instance, in *Landry v. Federal Deposit Insurance Corporation*, the D.C. Circuit considered whether a Federal Deposit Insurance Corporation (FDIC) administrative law judge (ALJ) must be appointed as an officer.[67] The FDIC appointed this particular ALJ pursuant to an executive branch-wide authority to appoint ALJs; that is, the statutory authority to hire an ALJ was not specific to this ALJ or even to all of the FDIC's ALJs.[68] The D.C. Circuit found that the ALJ's position was established by law despite the agency-agnostic statutory authority.[69] Indeed, outside of certain designated positions that require a dual appointment, military officers hold an office described by grade, not position.[70]

In sum, a person can only be appointed to an office established by law and only such a person, if otherwise properly appointed, may exercise "significant authority pursuant to the laws of the United States."[71] It is to that type of authority to which this article turns to next.

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[66] Landry v. Fed. Deposit Ins. Corp., 204 F.3d 1125, 1133 (D.C. Cir. 2000) (quoting Freytag v. Comm'r, 501 U.S. 868, 881 (1991)); *see also* Lucia v. Sec. & Exch. Comm., 138 S. Ct. 2044, 2051 (2018) ("Stressing 'ideas of tenure [and] duration,' the Court . . . made clear that an individual must occupy a 'continuing' position established by law to qualify as an officer.").

[67] *Landry*, 204 F.3d at 1130, *overruled on other grounds*, *Lucia*, 138 S. Ct. at 2044.

[68] In support, the court cited to a general statutory authority to appoint ALJs. *Id*. at 1133; *see* 5 U.S.C. § 3105 (2018) (general appointment authority); *see also* 5 U.S.C. §§ 5372, 556-57 (2018) (defining rates of pay for administrative law judges appointed under section 3105, and functions and duties of such judges generally).

[69] *Landry*, 204 F.3d at 1133 (concluding that "[t]he ALJ position here is also 'established by Law,' as are its specific duties, salary, and means of appointment").

[70] 10 U.S.C §§ 531(a), 624(c) (2018) (providing for original appointments and appointments based on promotion for regular officers in all of the armed forces); *see also* 10 U.S.C. § 741 (2018) (establishing officer ranks). *But see, e.g.*, 10 U.S.C §§ 3037(a), 5148(b), 8037(a) (2018) (providing for the appointment of the Army, Navy, and Air Force judge advocates general).

[71] Buckley v. Valeo, 424 U.S. 1, 126 (1976).

2. Significant Authority

Only an officer may exercise "significant authority pursuant to the laws of the United States" consistent with the Appointments Clause.[72] But what amount of authority is significant? To be sure, the cases concerning this standard have not been, in the words of the D.C. Circuit, "altogether clear."[73] At its core, however, a person exercises significant authority when that person employs the "sovereign authority" of the United States.[74] That occurs, generally, when the person has the power to create or determine a binding legal obligation.[75]

As an initial matter, the "significant authority" test is of a somewhat more recent vintage. It emerged in 1976 from the Supreme Court's decision of *Buckley v. Valeo*—a seminal case concerning federal election law.[76] Before *Buckley*, whether a person was an officer—or not—largely turned on who appointed the person,[77] not on the powers that the person exercised. Thus, an officer was an officer if appointed by one of the constitutional appointment authorities, namely, the President with the advice and consent of the Senate or, if authorized by statute, the President alone, the heads of the departments, or the courts.[78]

That changed in 1976. In *Buckley v. Valeo*, the Supreme Court addressed the constitutionality of the appointment of the commissioners

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[72] Edmond v. United States, 520 U.S. 651, 662 (1997) ("The exercise of 'significant authority pursuant to the laws of the United States' marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather, as we said in *Buckley*, the line between officer and non-officer.").

[73] Tucker v. Comm'r, 676 F.3d 1129, 1133 (D.C. Cir. 2012); *see also Landry*, 204 F.3d at 1132 ("The line between 'mere' employees and inferior officers is anything but bright.").

[74] Raymond J. Lucia Cos. Inc. v. Sec. & Exch. Comm., 832 F.3d 277, 285 (D.C. Cir. 2016), *rev'd*, 138 S. Ct. 2044 (2018).

[75] *See* notes 96-100 and accompanying text (discussing test).

[76] Buckley v. Valeo, 424 U.S. 1, 6 (1976).

[77] For example, in an 1888 case in which the Court determined that a Navy paymaster was not an officer of the United States, it noted that unless a person is appointed "by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States." United States v. Mouat, 124 U.S. 303, 307 (1888); *see also* Burnap v. United States, 252 U.S. 512, 516 (1920) (noting that "[w]hether the incumbent is an officer or an employé [*sic*] is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto").

[78] Landry v. Fed. Deposit Ins. Corp., 204 F.3d 1125, 1132-33 (D.C. Cir. 2000) (noting that "[i]n fact, the earliest Appointments Clause cases often employed circular logic, granting officer status to an official based in part upon his appointment by the head of a department").

of the Federal Elections Commission. This was a body that, the Court said, possessed both "extensive rulemaking and adjudicative powers," and it had an "enforcement power that was direct and wide-ranging."[79] Perhaps because of that wide-ranging authority, three separate authorities appointed the six voting commissioners: the President pro tempore of the Senate appointed two (after receiving the majority and minority leaders' recommendations); the Speaker of the House appointed two ("likewise upon the recommendations of [the House's] respective majority and minority leaders"); and the President appointed the remaining two.[80] Further, *both* houses of Congress had to "confirm[]" those members—the President's appointees along with everyone else.[81]

In determining that this unusual appointment scheme violated the Appointments Clause, the Court stated first that the clause had a "substantive meaning" [82] although, in effect, it meant limitation. Specifically, the Court held, it was "fair import" of the clause that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer'" and that such an officer must be appointed in accordance with the clause.[83] Citing earlier cases in which the Court had determined that a postmaster general and a district-court clerk were officers, the Court concluded that "the Commissioners before [it] are at the very least such 'inferior Officers' within the meaning of that Clause."[84]

Unfortunately, beyond drawing that analogy, the Court did not expressly articulate a standard for how much authority it took before that authority became significant. It did, however, identify a number "of those powers . . . exercised by the present voting Commissioners," that must be reserved to officers.[85] Those identified powers, in turn, shed light on the significant-authority threshold. Thus, the Court noted both the Commission's "broad administrative powers"—namely its ability to make rules, issue advisory opinions, and determine a candidate's eligibility for funds—and its "enforcement

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[79] *Buckley*, 424 U.S. at 109-11.
[80] *Id*. at 113.
[81] *Id*.
[82] *Id*. at 126.
[83] *Id*.
[84] *Id*.
[85] Buckley v. Valeo, 424 U.S. 1, 137 (1976).

power," including its authority to seek judicial relief.[86] It concluded that these powers "represent[ed] the performance of a significant governmental duty exercised pursuant to a public law" and held that, therefore, they must be exercised by properly-appointed officers.[87]

The Supreme Court revisited the substance of the significant-authority test in *Freytag v. Commissioner Internal Revenue*. In that case, the Court considered whether the U.S. Tax Court's special trial judges (STJs) were inferior officers.[88] Similar to district-court magistrate judges,[89] the Tax Court's chief judge could assign a STJ to a case for the purpose of preparing recommended findings and conclusions, and importantly, the STJ could also actually decide declaratory judgment and small-dollar cases.[90]

The Supreme Court ultimately held that STJs were inferior officers because of the "significance of the[ir] duties and discretion."[91] To reach this conclusion, the Court relied on two specific factors: the STJs' discretion and the finality of some their decisions. Regarding discretion, the Court noted that the judges performed "more than ministerial tasks," including taking testimony, conducting trials, ruling on motions, and enforcing discovery orders.[92] Similarly, the STJs issued the Tax Court's final decision in certain cases.[93]

Interestingly, the Court specifically rejected the argument that a person could be an officer for some duties, but a "mere employee[] with respect to other responsibilities."[94] Thus, if some of a position's authority could only be exercised by an officer, the person who holds that position

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[86] *Id*. at 138-40 ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'").
[87] *Id*. at 141.
[88] 501 U.S. 868, 870-71 (1991).
[89] Magistrate judges are officers. *See Rice v. Ames*, 180 U.S. 371, 378 (1901) (determining that the Congress could vest the appointment of a commissioner in the courts); *see also History of the Federal Judiciary: Magistrate Judgeships*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/judges_magistrate.html (last visited Feb. 7, 2019) (noting that magistrate judges replaced commissioners).
[90] *Freytag*, 501 U.S. at 873.
[91] *Id*. at 881.
[92] *Id*. at 881-82. The term *ministerial* is defined as, inter alia, "[o]f, relating to, or involving an act that involves obedience to instructions or laws instead of discretion, judgment, or skill." *Ministerial*, BLACK'S LAW DICTIONARY (10th Ed. 2014).
[93] *Freytag*, 501 U.S. at 882.
[94] *Id*.

must be an officer regardless of whether that person "on occasion performs duties that may be performed by an employee not subject to the Appointments Clause."[95] In other words, an officer can do anything an employee can do, but an employee cannot do what only an officer can do.

Taken together, in both *Buckley* and *Freytag*, whether a person exercised significant authority turned on whether that person had the power to create or determine, or decide to judicially enforce, a specific legal obligation.[96] Thus in *Buckley*, among the commission's "broad

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[95] *Id*.

[96] In her dissent in *Lucia*, which was joined by Justice Ginsburg, Justice Sotomayor incorporates at least part of this test into her construction of the Clause, arguing that "one requisite component of 'significant authority' is the ability to make final, binding decisions on behalf of the Government." Lucia v. SEC, 138 S. Ct. 2044, 2065 (2018) (Sotomayor, J., dissenting). Of course, Justice Sotomayor does not say what *type* of decisions need to be final: a decision to hire an employee, for instance, is "final" when the employee is hired. Regardless, to create an *actual* legal obligation one must be able to make a final decision: by definition, a recommendation does not a legal obligation make. Of note, some of the parties' arguments in *Lucia* majority also describe a test along these lines. *Id*. at 2051-52 (noting argument that a person "wields 'significant authority' when he has," among other things, "the power to bind the government or private parties.") Although the majority does not adopt these standards, it also does not reject them. *Id.* at 2051-52. In addition, this test is similar, but not identical to, the standard proposed by the Office of Legal Counsel (OLC). The OLC argues that an officer is a person appointed to an office under the Appointments Clause, which exists when that position "is invested by legal authority with a portion of the sovereign power of the federal government" if that position is "continuing," which means, essentially, "not personal, transient, or incidental." OLC Opinion, *supra* note 62, at 73. In the OLC's view, "one could define delegated sovereign authority as power lawfully conferred by the Government to bind third parties, or the Government itself, for the public benefit." *Id.* at 87. That could be another way of saying the power to create a legal obligation. But, it seems insufficient to suggest that the exercise of "a portion of sovereign power" is enough to create an office. *Id.* at 73 (articulating standard). It is difficult to imagine what type of authority that government employees' exercise other than sovereign authority—and they can exercise a *portion* of government authority, just not a *significant portion*. *Cf.* Edmond v. United States, 520 U.S. 651, 662 (1997) (noting that the significant-authority test "marks . . . the line between officer and nonofficer"). Further, relying on historical cases, the OLC argues that a broad range of positions—some of which arguably create no legal obligation—exercise such power. *See id*. at 88, 91 (arguing that "public authority to arrest criminals" and "delegated sovereign authority to speak . . . on behalf of the United States toward or in other nations" is sovereign power). To be sure, even under the legal-obligation standard discussed in this paper, not all legal obligations are created equal—or, to put it another way, not all legal obligations are significant. *See* notes 34-35 and accompanying text (discussing authority of non-commissioned service members to issue orders but noting the reduced penalty for such orders). In any event, under essentially any test, the question remains, at its core, how much authority is *too* much

administrative powers"[97] was the power to issue rules and adjudicated cases—that is, to *create* (rule-making) and *determine* (adjudicating) legal obligations.[98] The commission was also given primary jurisdiction for the civil enforcement—namely, it decided whether to seek judicial enforcement—of several statutes.[99] Similarly, in *Freytag*, an STJ, among other things, decided "declaratory judgment proceedings and limited-amount tax cases."[100] Thus, there too the STJ was *determining* a legal obligation, namely, a person's tax liability.

The D.C. Circuit has identified three factors it uses, if inconsistently, to determine what degree of authority amounts to significant authority.[101] Regardless, they are consistent with the view that significant authority is the power to create or determine a legal

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authority? *See* OLC Opinion, *supra* note 62, at 87 (noting that "the particulars of what constitutes 'delegated sovereign authority' will not always be beyond debate"). Further, and more importantly, whatever significant authority is, there is little debate that a military officer exercises it and is, therefore, subject to the clause. *See id*. at 91 (noting that "there are military offices[,]" which are "primarily characterized by the authority to command in the Armed Forces – commanding both people and the force of government"); *see also* Weiss v. United States, 510 U.S. 163, 170 (1994) ("The parties are also in agreement, and rightly so, that the Appointments Clause applies to military officers."). Thus, if a military officer exercises significant authority, the civilian supervisor's authority over that military officer creates the Appointment Clause issue. *See infra* Section III (discussing civilian-supervisor control).

[97] Buckley v. Valeo, 424 U.S. 1, 140 (1976).

[98] The Court termed this "extensive rulemaking and adjudicative power." *Id*. at 110. Specifically, the Commission was authorized to issue regulations to carry out its statutory mandate, and it had the power to issue advisory opinions, which amounted to a safe-harbor if followed in good faith. *Id*. at 110-11.

[99] *Id*. at 111-13.

[100] *Freytag*, 501 U.S. at 882; *see also* Lucia v. Sec. & Exch. Comm., 138 S. Ct. 2044, 2054 (2018) ("And at the close of . . . proceedings, ALJs issue decisions much like that in *Freytag*—except with potentially more independent effect" because "when the SEC declines review . . . , the ALJ's decision itself 'becomes final' and is 'deemed the action of the Commission.").

[101] Tucker v. Comm'r, 676 F.3d 1129, 1133 (D.C. Cir. 2012). To be sure, the D.C. Circuit has not universally applied its three-factor significant-authority test. *See* Ass'n of Am. R.R.s v. U.S. Dep't of Trans., 821 F.3d 19, 36-39 (D.C. Cir. 2016) (concluding that an arbitrator exercised significant authority but not applying, or even citing, the *Tucker* test). That may be a consequence of the fact that there have been arguments raised that at least some of the test's factors do not reflect Supreme Court precedent. *See* Raymond J. Lucia Cos v. Sec. & Exch. Comm., 832 F.3d 277, 285 (D.C. Cir. 2016) (noting that "the court must reject petitioners' view, relying on *Edmond*, that the ability to 'render a final decision on behalf of the United States,' while having a bearing on the dividing line between principal and inferior Officers, is irrelevant to the distinction between . . . Officers and employees"), *overruled on other grounds*, 138 S. Ct. 2044 (2018).

obligation.[102] Specifically, under these factors, a court considers "the significance of the matters resolved by the official[]"; the "discretion" exercised by that person in reaching that decision; and the "finality" of the decision.[103] All three factors must be met for there to be an exercise of significant authority.[104]

First, as applied by the D.C. Circuit, a matter is significant if it actually creates or determines a legal obligation. Thus, in one case, the D.C. Circuit called an IRS determination of a person's tax liability "substantively significant enough."[105] In another case, the court treated an arbitrator's decision to establish metrics that would "immediately impact the freight railroads [legal] obligations" to Amtrak—essentially creating a new legal requirement—as significant.[106]

What both cases share is that the consequence of the would-be officer's decision was the determination or creation of a legal obligation. In the former case, the IRS determined the person's tax liability.[107] In the latter case, the arbitrator essentially created an

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[102] Outside of certain specialized contexts, military officers do not generally decide whether to seek judicial enforcement of a legal obligation. *But see* 10 U.S.C. § 806(d)(1)(2018) (permitting judge advocates to, among other things, represent the United States in civilian courts in both civil and criminal cases). As a consequence, this aspect of significant authority is not discussed further in the article. But it is noteworthy that in several cases, the courts held or noted that a person who could make the final decision to seek judicial involvement was an officer. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 661, 670 (1988) (stating that in a case involving the independent counsel, who could exercise the Justice Department's authority to prosecute an individual, "[t]he initial question is, accordingly, whether appellant is an 'inferior' or a 'principal' officer"); United States v. Gantt, 194 F.3d 987 (9th Cir. 1999) (concluding that U.S. Attorneys were inferior officers), *overruled on other grounds* United States v. Grace, 526 F.3d 499 (9th Cir. 2008); *see also* United States v. Hilario, 218 F.3d 19 (1st Cir. 2000) (accord).

[103] Tucker v. Comm'r, 676 F.3d 1129, 1133 (D.C. Cir. 2012). As noted above, the finality of an individual's decision to bind the government is part of the "requisite component" of significant authority in Justice Sotomayor's construction of the test. *Lucia*, 138 S. Ct. at 2065.

[104] *See Tucker*, 676 F.3d at 1134 (noting that in an earlier case, "the absence of any authority to render final decisions [was] fatal to the claim that the administrative law judges at issue there were Officers rather than employees").

[105] *Id.* at 1133.

[106] Ass'n of Am. R.R.s v. U.S. Dep't of Trans., 821 F.3d 19, 37 (D.C. Cir. 2016).

[107] *Tucker*, 676 F.3d at 1131; *see also* 26 U.S.C. §§ 6320, 6330 (2018) (establishing framework for appeals).

obligation to amend statutorily-mandated agreements between Amtrak and freight railroad operators.[108]

Second, the discretion and the finality prongs of the D.C. Circuit's test recognize that it matters *what* or *who* is really creating or determining the legal obligation. For instance, if constraints on an employee's decision making allow for no discretion, that particular employee really makes no decision.[109] In that case, the person is performing a ministerial action, not exercising any authority.[110] In short, when external constraints allow for no discretion, it is those constraints—really, and importantly, the person who imposed those constraints in the first place—that actually create the legal obligation, not the employee.[111]

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[108] *Ass'n of Am. R.R.s*, 821 F.3d at 24, 37. The statutory mechanism at issue in *Association of American Railroads* is somewhat complex. But essentially, Amtrak uses freight railroads' tracks and facilities and has a statutory preference in that use. U.S. Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct 1225, 1229 (2015). In 2008, the Congress required the Federal Railroad Administration and Amtrak to develop metrics and standards governing inter-city train performance. *Id*. If the parties do not reach agreement on those metrics and standards, an arbitrator is appointed, who decides upon the metrics and standards through arbitration. *Id.* As a general matter, these metrics and standards are incorporated into agreements between Amtrak and the railroads. *Id*. Further, if the requirements of the metrics and standards are not met, that can prompt enforcement action by federal authorities in which the railroads could be fined or made to pay damages to Amtrak. *Id*. at 1229-30.

[109] For instance, in *Tucker v. Commissioner Internal Revenue*, in concluding that an IRS appeals office employees were not officers, the court went to some pains to describe just how constrained they really were in making a decision. 676 F.3d at 1134-35.

[110] *See* Raymond J. Lucia Cos. Inc. v. Sec. & Exch. Comm., 832 F.3d 277, 287 (D.C. Cir. 2016) ("[P]etitioners have not substantiated that a finality order is just like a clerk automatically issuing a mandate, . . . and, in so asserting, have ignored that clerks have no authority to review orders or decline to issue mandates."), *overruled*, 138 S. Ct. 2044 (2018).

[111] In its opinion, OLC downplays the importance of discretion, arguing that "'independent discretion' is not a necessary attribute of delegated sovereign authority." OLC Opinion, *supra* note 62, at 93. Of course, the OLC opinion pre-dates *Tucker*. In any event, the OLC opinion relies on an historical understanding of the term "office" to support its conclusion discretion is not a necessary attribute. *Id*. at 94. Given the relatively recent birth of the significant-authority standard, it is not clear to what degree much of that historical authority is useful. *See supra* notes 76-78 and accompanying text (discussing date of the test). In his *Lucia* concurrence, Justice Thomas also downplays discretion's role, again based on historical authority. *See Lucia*, 134 S. Ct. at 2057 (noting that the "Founders considered individuals to be officers even if they performed only ministerial statutory duties—including recordkeepers, clerks, and tidewaiters (individuals who watched goods land at a customhouse)"). Importantly under either OLC's interpretation or Justice Thomas's concurrence, the diminishment of the requirement for independent discretion actually expands the universe of employees who must be officers.

Similarly, if an employee's decision must be ratified by a higher authority, the employee's decision is actually a recommendation. A recommendation—even one generally followed—does not create or determine anything at all;[112] and if the higher-level official rejects the recommendation, there is no legal obligation. Rather, it is that higher authority's decision to accept the recommendation that turns the recommendation into a legal obligation[113]

In sum, a person must be appointed an officer if that person holds an office "established by Law"[114] in which the person exercises "significant authority pursuant to the laws of the United States."[115] Such authority is the power to create or determine a legal obligation,[116] which is precisely the scope of an officer's authority over military subordinates.

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[112] OLC Opinion, *supra* note 62, at 98 ("Even at the time of its broadest prior reading of the Appointments Clause, this Office recognized that "advisory, investigative, informative, or ceremonial functions" are not subject to the Clause.")

[113] This was a significant part of the circuit court's holding in *Landry v. Federal Deposit Insurance Corporation*. In that case, the court held that an administrative law judge employed by the FDIC was not an inferior officer in part, because, "the ALJs . . . can never render the decision of the FDIC." 204 F.3d 1125, 1133 (D.C. Cir. 2000); *see also id*. at 1133-34 (noting also that although it was "uncertain just what role the STJs' power to make final decisions played in Freytag," the Supreme Court had emphasized finality in other aspects of its decision). *But see supra* note 58 (discussing the Supreme Court's recent decision that overruled the D.C. Circuit's conclusion that ALJs were not officers). Justice Sotomayor's dissent in *Lucia* also argues that the authority to recommend was not significant enough to make one into an officer. Lucia v. Sec. & Exch. Comm., 138 S. Ct. 2044, 2066 (2018) (Sotomayor, J., dissenting).

[114] U.S. CONST. art. II, § 2; *see also supra* Section II.A.1.

[115] Buckley v. Valeo, 424 U.S. 1, 126-27 (1976).

[116] *See supra* text accompanying notes 72-113. This standard is also similar to the standard for when an agency's action is "final" and, therefore, reviewable under the Administrative Procedures Act (APA). *See* 5 U.S.C. § 704 (2012) (APA judicial review). An agency action is final if it, first, "mark[s] the consummation of the agency's decisionmaking process." Bennett v. Spear, 520 U.S. 154, 177 (1997) (internal quotation omitted). Second, "action must be one by which rights or obligations have been determined" or "from which legal consequences will flow." *Id.* (internal quotation omitted). In other words, an agency action is reviewable if it actually creates or determines a legal obligation. To be sure, it is hard to imagine when a person could decide a final agency action and not exercise significant authority.

B. Significant Authority and the Military Officer

An officer of the armed forces exercises authority over subordinate members of the armed forces by creating legal obligations. Those legal obligations are simply called "command[s]."[117] Their significance is reflected in the maximum penalty for disobeying them, which is quite harsh: among other things, five years' confinement or, in time of war, even death.[118]

This section proceeds in two parts. First, it discusses the UCMJ article that enforces compliance with a superior officer's commands. It will argue that under that article, the enforceability of a command does not turn on the command's but-for cause. Thus, an otherwise lawful command that is issued at a civilian employee's request is an enforceable command under the statute. Second, the section applies the Appointment Clause to that authority, and it ultimately concludes that only a properly-appointed officer may, consistent with the Constitution, issue, or be the source of, a command.

1. Article 90, UCMJ: Statutory Authority to Issue Commands

"It is the primary business of armies and navies to fight or [be] ready to fight wars should the occasion arise."[119] "To prepare for and perform [this] vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life."[120] Indeed, "to accomplish its mission, the military must foster instinctive obedience, unity, commitment, and esprit de corps."[121] "There must be a first instinct to obey orders if the military is to function,"[122] and this instinct must be honed in peacetime and wartime, as "conduct in combat inevitably reflects the training that precedes combat."[123]

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[117] 10 U.S.C. § 890(2) (2012).
[118] MCM, *supra* note 9, pt. IV, ¶ 16d(1)-(2) (defining maximum punishment for disobeying lawful command of a superior commissioned officer as dishonorable discharge, forfeiture of all pay and allowances, and five years confinement or, in time of war, death).
[119] Parker v. Levy, 417 U.S. 733, 743 (1974) (quoting United States ex rel. Toth v. Quarles, 350 U.S.11, 17 (1955)).
[120] Schlesinger v. Councilman, 420 U.S. 738, 757 (1975).
[121] Goldman v. Weinberger, 475 U.S. 503, 507 (1986).
[122] United States v. McDaniels, 50 M.J. 407, 408 (C.A.A.F. 1999).
[123] Chappell v. Wallace, 462 U.S. 296, 300 (1983).

"[C]enturies of experience," so says the Supreme Court, has "developed [this] hierarchical structure of discipline and obedience to command."[124] It is, therefore, perhaps not surprising that much of the UCMJ is concerned with ensuring just such discipline. Indeed, there are punitive articles in the Code that prohibit just about everything from contemptuous words to malingering to disrespect and dereliction.[125]

Of primary concern here are those articles that prohibit the disobedience of orders. There are three relevant articles that concern disobedience.[126] Of those three, the one at issue here specifically is Article 90, which provides that any person subject to the UCMJ:

> who willfully disobeys a lawful command of that person's superior commissioned officer; shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.[127]

The penalty for disobeying a lawful command is significant: in a time other than war, it carries a maximum penalty of dishonorable discharge, forfeiture of all pay and allowances, and five years' confinement;[128] in a time of war, the penalty borders on draconian: "Death or such other punishment as a court-martial may direct."[129]

The "essential attributes" of a lawful command are the "communication of words that express a specific mandate to do or not

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[124] *Id*.

[125] 10 U.S.C. §§ 888, 889, 890, 891(2-3), 892, 883 (2018) (prohibiting, respectively, contemptuous words, disrespect and disobedience of a superior commissioned officer, disobedience and disrespect of a warrant officer, noncommissioned officer, or petty officer, disobedience of any other lawful order, and malingering).

[126] First, Article 90 concerns disobedience of the "lawful command" of a "superior commissioned officer." 10 U.S.C. § 890. This is the subject of much of this article and will be discussed, in great detail *infra*. In addition to Article 90, Article 91 prohibits the disobedience of the "lawful order" of a "warrant officer, noncommissioned officer, or petty officer," while Article 92 extends such prohibition to "any lawful general order or regulation" or "any other lawful order [that is] issued by a member of the armed forces which it is [the person's] duty to obey." 10 U.S.C. §§ 891(2), 892(1)-(2).

[127] 10 U.S.C. § 890.

[128] MCM, *supra* note 9, pt. IV, ¶ 16d(2).

[129] MCM, *supra* note 9, pt. IV, ¶ 16d(1).

to do a specific act" that is "issu[ed] by competent authority" when there is a "relationship [between] the mandate [and] a military duty."[130] For the purpose of Article 90, that competent authority is a "superior commissioned officer," who may be a commissioned officer or a commissioned warrant officer.[131] That officer is superior when senior "in rank or command"[132] to the command's recipient. Rank is the "order of precedence among members of the armed forces" and is, for the commissioned officer corps, established by statute: General is at the top, second lieutenant is on the bottom, and the rest of the ranks are ordered sequentially between the two.[133] Command is the "authority to direct and control the conduct and duties of a person subject to the Code,"[134] and a commander is a "commissioned or [warrant officer] who, by virtue of grade and assignment, exercises primary command authority over a military organization . . . that under pertinent official directives is recognized as a 'command.'"[135]

Even if issued by a competent authority, only a lawful command may be enforced.[136] That truism, however, comes with an important caveat: a

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[130] United States v. Kisala, 64 M.J. 50, 52 (C.A.A.F. 2006) (discussing case in which accused violated Article 90, UCMJ, by refusing anthrax vaccine after being commanded to take the vaccine by battalion commander). The *Manual for Courts-Martial* identifies the elements of an Article 90(2), UCMJ, offense as: "That the accused received a lawful command from a superior commissioned officer; . . . [t]hat this officer was the superior commissioned officer of the accused; . . . [t]hat the accused then knew that this officer was the accused's superior commissioned officer; and . . . [t]hat the accused willfully disobeyed the lawful command." MCM, *supra* note 9, pt. IV, ¶ 16b. Despite the inclusion of the word "lawful" in the statute and, of course, in the *Manual*'s recitation of that statute's elements, a command's purported lawfulness is not an element to be determined by the panel, but rather is a question of law to be decided by the judge. United States v. New, 55 M.J. 95, 96, 105 (C.A.A.F. 2001) (discussing a charge of violating lawful general regulation under Article 90(2), UCMJ).

[131] 10 U.S.C. § 101(b)(2) (2018) (providing that the definition of commissioned officer includes a commissioned warrant officer); *see also supra* note 34 (describing difference between commissioned and noncommissioned warrant officers).

[132] 10 U.S.C. § 801(5) (2018).

[133] 10 U.S.C. § 101(b)(8); *see also* 10 U.S.C. § 741 (2018) (establishing the order of precedence among the officer ranks of the armed forces, providing that "[r]ank among officers of the same grade or equivalent grades is determined by comparing dates of ranks," with the earlier date of rank as senior, and allowing the Secretary of Defense to prescribe regulations to determine the relative rank among officers with the same date of rank).

[134] United States v. Nelson, 33 C.M.R. 305, 308 (C.M.A. 1963).

[135] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 1-5(a) (6 Nov. 2014) [hereinafter AR 600-20] (providing further that "a civilian, other than the President as Commander-in-Chief (or National Command Authority), may not exercise command").

[136] United States v. Washington, 57 M.J. 394, 398 (C.A.A.F. 2002) (describing some of the circumstances in which an accused "may challenge the lawfulness of [an] order").

command carries the presumption of lawfulness.[137] As the U.S. Court of Appeals for the Armed Forces (CAAF) has noted, it "[l]ong ago . . . recognized the foundational principle of military discipline: Fundamental to an effective armed force is the obligation of obedience to lawful orders."[138] "Reflecting the authority of this principle,"[139] a service member who challenges the lawfulness of a command "bears the burden of rebutting that presumption."[140] In short, any command "is disobeyed at the peril of the subordinate" service member.[141]

Further, that peril is heightened by the broad array of potential areas that are subject to military control. A command is lawful if it has "a valid military purpose" (and is "clear, specific, and narrowly drawn").[142] A valid military purpose is one that "relate[s] to military duty."[143] And military duty is a broad term. The *Manual for Courts-Martial* states that it includes "all activities" that are "reasonably necessary to accomplish a military mission . . . ."[144] In some circumstances, that could be quite the list.

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[137] United States v. Deisher, 61 M.J. 313, 317 (C.A.A.F. 2005) (discussing a charge of disobeying a lawful order).

[138] United States v. Kisala, 64 M.J. 50, 51 (C.A.A.F. 2006) (internal quotation omitted).

[139] *Id*. at 52.

[140] United States v. Sterling, 75 M.J. 407, 414 (C.A.A.F. 2016); *see also Kisala*, 64 M.J. at 52 (stating that "long-standing principles of military justice place the burden of rebutting this presumption on the accused").

[141] MCM, *supra* note 9, pt. IV, ¶ 16c(2)(A)(i) (noting also that the presumption does not apply to a " . . . patently illegal order, such as one that directs the commission of a crime.").

[142] United States v. Moore, 58 M.J. 466, 468 (C.A.A.F. 2003). Of note, in *Moore*, the CAAF was evaluating an order against a First Amendment and a due-process void-for-vagueness challenges. *Id.* (noting that the accused did not challenge "the validity of the order's purpose" but rather argues that the order was "unconstitutionally broad and vague"). Although it is possible that the constitutional nature of the challenge led the court to look to the narrowness of the order, the court later applied this "clear, specific, and narrowly drawn" language to a general lawfulness challenge to an order, albeit in the context of a lawfulness challenge based on the Religious Freedom Restoration Act (RFRA), which also has a First Amendment context. *See* United States v. Sterling, 75 M.J. 407, 414 (C.A.A.F. 2016); *see also* City of Boerne v. Flores, 521 U.S. 507, 515 (1997) (noting that a purpose of the RFRA was to restore an overruled First Amendment test).

[143] *Sterling*, 75 M.J. at 414 (C.A.A.F. 2016) (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 14c(2)(A)(iv) (2012) [hereinafter MCM 2012]).

[144] MCM, *supra* note 9, pt. IV, ¶ 16c(2)(a)(iv); *see* United States v. McDaniels, 50 M.J. 407, 408 (C.A.A.F. 1999) (accord); *see also* United States v. Washington, 57 M.J. 394, 398 (C.A.A.F. 2002) ("When a commander gives an order that is reasonably necessary to accomplish the mission[,] . . . the servicemember is obligated to obey or face punishment under Articles 90, 91, or 92, UCMJ.") In addition to those actions that are reasonably

To be sure, despite the broadness of the term, it is also not without limits. First, a command cannot mandate an act that is prohibited by law[145]—arguably the very essence of unlawfulness. Second, a command cannot conflict with the recipient's constitutional and statutory rights[146] although such rights may apply differently to that service member—that is, to a lesser extent—than to a civilian.[147] Third, "its sole object [cannot be] the attainment of some private end . . . ."[148] Fourth, a command cannot be issued "for the sole purpose of increasing the penalty . . . " for the disobedience of some other duty.[149] Finally, the command must be clear, that is, it "must be worded so as to make it specific, definite, and certain,"[150] or to put it another way, it cannot be void for vagueness.[151]

2. Commands Issued for Another are Still Commands under Article 90

But what if an officer issued a command because his civilian-employee supervisor told him to do so? Is that still a command under Article 90? The short answer is also "yes." To establish this, recall the hypothetical: the deputy to the commander, a civilian employee in a GS-15 position, asked a lieutenant colonel staff section head to have a captain present the deputy with a briefing on one of the captain's projects the following morning. The captain failed to comply. In this case, the captain violated Article 90, UCMJ.

First, a competent authority issued the command. The lieutenant colonel was superior to the captain, who is not a commander, in rank, and

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necessary to accomplish a military mission, military duty also includes those orders that "safeguard or promote" a unit's good order and discipline or the "usefulness" of unit members. MCM, *supra* note 9, pt. IV, ¶ 16c(2)(a)(iv).

[145] United States v. Deisher, 61 M.J. 313, 317 (C.A.A.F. 2005).

[146] *Washington*, 57 M.J. at 398; *see also* MCM, *supra* note 9, pt. IV, ¶ 16c(2)(a)(v) (accord).

[147] *See, e.g.*, United States v. Moore, 58 M.J. 466, 468 (C.A.A.F. 2003) (discussing the applicability of the First Amendment in the context of a challenge to an order).

[148] United States v. Washington, 57 M.J. 394, 398 (C.A.A.F. 2002); *see* MCM, *supra* note 9, pt. IV, ¶ 16c(2)(a)(iv) (accord).

[149] United States v. Phillips, 74 M.J. 20, 23 (C.A.A.F. 2015); *see also* MCM, *supra* note 9, pt. IV, ¶ 16c(2)(a)(iv) (accord); *infra* notes 165-167 and accompanying text (discussing the demise of the preexisting duty doctrine).

[150] United States v. Womack, 29 M.J. 88, 90 (C.M.A. 1989) (discussing a safe-sex order).

[151] *Moore*, 58 M.J. at 469 (evaluating an order in light of the void-for-vagueness challenge).

therefore, the captain's superior commissioned officer.[152] When the command was received, the captain also knew that his supervisor was such an officer because he knew that the lieutenant colonel was, in fact, a lieutenant colonel.[153]

Second, the command was lawful. As an initial matter, it is difficult to imagine a more routine military duty than to give a status briefing on an official tasking. Setting that aside, regular briefings on an ongoing mission is a key requirement for coordination within and across organizations, which is necessary for mission accomplishment.[154] Further, the order required the commission of no crime, and it is neither designed to achieve a purely personal purpose nor does it conflict within the recipient's constitutional or statutory rights.[155] Finally, a command to present a briefing at a specific time and specific place on a specific subject is about as clear as a command can get.[156] The captain's reason why he disobeyed—what one could call his motive—does not really matter, but remember, it was for as poor of reason as the command was mundane: he just did not want to give the briefing. As a consequence, by not complying with the command, the captain "willfully disobeyed" it and, therefore, violated Article 90.[157]

A command's ultimate source is—and generally cannot be—a barrier to enforcing that command. To borrow an example from mythology, there is nothing in Article 90, UCMJ, that requires commands to, like Athena from Zeus, spring wholly formed from the head of the issuing officer. Indeed, it is difficult to imagine how that could be a requirement. Military officers must coordinate with and among each other and with other agencies and organizations. As a

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[152] *See* 10 U.S.C. § 741(a) (2012) (establishing precedence among officer ranks); *see also* MCM, *supra* note 9, pt. IV, ¶ 16c(b)(2) (defining as an element that the issuing officer was, in fact, a superior commissioned officer).

[153] *See* MCM, *supra* note 9, pt. IV, ¶ 15b(3) (defining as an element that when the command was issued by the officer, the recipient knew that that officer was his superior commissioned officer).

[154] *See supra* notes 145-144 and accompanying text (discussing requirement that an order relate to a military duty).

[155] *See supra* notes 145-149 and accompanying text (discussing aspects of a lawful order).

[156] *See supra* notes 150-151 and accompanying text (discussing void-for-vagueness arguments).

[157] *See* MCM, *supra* note 9, pt. IV, ¶ 16b(4) (defining as an element that the recipient willfully disobeyed the command).

consequence, the officer's decision to issue the command may not be that command's but-for cause.

Two examples from case law illustrate this point. First, in *United States v. Kisala*, the CAAF affirmed a Fort Bragg-assigned Soldier's conviction for disobeying his battalion commander's August 2000 command to receive the anthrax vaccine.[158] Although these facts are not specifically addressed in the court's opinion, a Defense Department-wide vaccine effort began in March 1998, with "early deploying forces" receiving their vaccines between January 2000 and January 2004.[159] As a consequence, it was probably not the battalion commander's idea to mandate the vaccine;[160] it was likely the Secretary of Defense's.[161] In other words, but-for the Secretary's vaccination program, it is unlikely that the command in *Kisala* would have been issued; yet, the command was enforced just the same.

Similarly, in *United States v. Womack*, the accused was convicted under Article 90, UCMJ, for violating his commander's "safe sex" command despite the fact that the command was issued "[i]n accordance with Air Force policy."[162] There is no indication that without the policy, the command would otherwise have been given. Thus, the command's but-for cause was that Air Force policy, but it too was enforced.

But did the captain not have a pre-existing duty—arising from somewhere—to obey the civilian supervisor? It is true that until relatively recently, an order to perform a preexisting duty was unenforceable under Article 90 because the "ultimate offense" was really the breach of that duty.[163] That said, this doctrine did not apply to a command to perform that duty if the issuing officer used "the full authority of his office" to "lift

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158 *Kisala*, 64 M.J. at 51.

159 H.R. REP. NO. 106-556, at 5-6 (2000), *available at* https://www.congress.gov/106/crpt/hrpt556/CRPT-106hrpt556.pdf.

160 64 M.J. 50, 50 (C.A.A.F. 2006).

161 H.R. REP. NO. 106-556, at 6 ("On May 18, 1998, Secretary Cohen pronounced the four conditions fulfilled and approved the total force program."). To be sure, the secretary of defense is an officer of the United States. *See* 10 U.S.C. § 113(a) (2018) (establishing the position of secretary of defense). Whether the secretary can issue a command is not the point, however; the point is that the ultimate source of a command does not, by itself, render the command unenforceable.

162 29 M.J. 88, 88-89 (C.A.A.F. 1989).

163 *See, e.g.*, United States v. Phillips, 74 M.J. 20, 22 (C.A.A.F. 2015) (stating that "[t]he ultimate offense doctrine has a lengthy military history"); *see also* United States v. Ranney, 67 M.J. 297, 299 (C.A.A.F. 2009), *overruled Phillips*, 74 M.J. at 20.

[it] above the common ruck."[164] Unless the officer did so, however, the Soldier committed no violation of Article 90, UCMJ.[165] This doctrine has been narrowed, however. It now applies only to those circumstances in which a command is given "solely to improperly escalate the punishment" for "an offense which it is expected the accused may commit."[166]

Yet, this now-narrowed doctrine is also no bar to the enforcement of an otherwise lawful command issued by a military officer at the behest of that officer's civilian supervisor. Assume for argument's sake that such a duty exists and that, therefore, the disobedience of a civilian employee's instruction is by itself some sort of an offense.[167] Even so, in the hypothetical, the lieutenant colonel did not give the command solely to escalate any punishment the captain may have faced for disobeying the deputy to the commander. Indeed, there was no reason for the lieutenant colonel to even consider punishment—escalating it or otherwise—because the captain simply gave no indication that he was going to disobey the command. Instead, the lieutenant colonel gave the command for a far more simple, if common, reason: namely, to ensure that the boss—the civilian deputy—received the briefing that the deputy wanted.

In sum, a superior commissioned officer's command—provided that it is otherwise lawful—is enforceable under Article 90, UCMJ,

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[164] United States v. Loos, 16 C.M.R. 52, 54 (C.M.A. 1954), *overruled Phillips*, 74 M.J. at 20.

[165] *Id*. at 54-55 (reversing conviction on disobedience because the ultimate offense was a violation of Article 86, UCMJ, and there was no evidence that the issuing Soldier intended to lift a failure to obey order above "the common ruck")

[166] *Phillips*, 74 M.J. at 23; MCM, *supra* note 9, pt. IV, ¶ 16c(2)(a)(iv).

[167] That said, the Air Force seems to think that a service members' failure to follow "a directive" issued by a civilian employee is dereliction of duty in violation of Article 92(3), UCMJ. U.S. DEP'T OF AIR FORCE, INST. 51-604, APPOINTMENT TO AND ASSUMPTION OF COMMAND attachment 2, fig. A.2.1 (11 Feb. 2016) [hereinafter AFI 51-604]. The instruction relies on the fact that a duty under Article 91(3), UCMJ, can be imposed by custom of the service. *Id*.; *see also* MCM, *supra* note 9, pt. IV, ¶ 18c(3)(a) (discussing duty). Apparently, the Air Force has a custom of obeying civilian directors. Even so, if the Air Force is right, that too raises the Appointments Clause issue because, in this case, the civilian employee is creating the legal obligation *directly* even if the penalty for failing in that "duty" is substantially less than disobeying a superior commissioned officer. *See supra* note 34-35 and accompanying text (noting other service members who are not commissioned, but yet have the power to issue orders, and noting the fact such orders carry a reduced penalty).

even if the command's but-for cause was that officer's civilian supervisor's instruction.[168]

C. Commands Create Legal Obligations—and Reflect Significant Authority

Put together, the issuance of a lawful command creates a legal obligation. Specifically, the obligation is to do or not to do whatever it is that the command requires. The legal nature of that obligation is evidenced by the substantial legal penalty for disobeying it. Thus, the power to issue a command under Article 90 is the exercise of significant authority.

This is true under the D.C. Circuit's three-factor analysis.[169] The very nature of the term military duty allows the issuing officer substantial discretion in crafting a command, which is, by its penalty, significant.[170] Second, the command is effective, and the legal obligation is created, upon issuance. An officer generally needs no one's permission to issue a command, [171] and a command is binding when given even if the command's deadline may be in the future.[172] An officer's decision to create the legal obligation is, therefore, final.

Thus, an officer who issues a command under Article 90, UCMJ, creates a legal obligation for the subordinate service member who receives that command. The creation of a legal obligation is the exercise of significant authority, which is reserved to officers. Consequently, under the Appointments Clause, only officers may issue commands under Article 90, UCMJ.[173]

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[168] *See supra* note 130 and accompanying text (discussing the essential attributes of a lawful command).

[169] *See supra* notes 101-104 and accompanying text (discussing test).

[170] *See supra* notes 142-144 and accompanying text (discussing term military duty); *see* also MCM, *supra* note 9, pt. IV, ¶ 16d(1)-(2) (maximum punishment). It is worth noting that OLC argues that the existence of "independent discretion" is not necessary for a person to exercise significant authority under the Appointments Clause. OLC Opinion, *supra* note 62, at 93.

[171] *Cf. supra* note 112 and accompanying text (arguing that making a recommendation is not exercising authority).

[172] *See* MCM, *supra* note 9, pt. IV, ¶ 16c(2)(g) (discussing time for compliance).

[173] S*ee also infra* notes 174-177 (discussing fact that a civilian employee cannot issue a command under Article 90).

But in the hypothetical, it was the civilian supervisor who decided the command's content and instructed the lieutenant colonel to issue it. Essentially, the officer was a conduit of the supervisor's decision, or to use another term, the civilian supervisor effectively (even if not intentionally) commandeered the officer's authority. The Appointment Clause implications of that fact are the issues to which this article turns to next.

III. Constitutionality of Civilian Supervisors Exercise of Officers' Authority

An officer who issues a command under Article 90, UCMJ, creates a legal obligation—a power reserved to officers of the United States. As a matter of statutory construction, a command's but-for cause is essentially irrelevant to the command's enforceability under Article 90, UCMJ. But when the officer has effectively no choice whether to issue a command, that cause is relevant to determining who *actually* created the legal obligation. This section applies those principles to the deputy to the commander and concludes that the deputy's supervision of the lieutenant colonel allows that deputy to exercise the officer's authority in violation of the Constitution.

First, this section identifies those tools that a civilian supervisor has to ensure that a subordinate officer will obey the supervisor's instructions generally. These tools include a general supervisory authority; the right to evaluate the officer, which includes an ability to substantially reduce the likelihood that the officer can remain in the service; and the power to relieve an officer from that officer's current position. Second, it considers whether these tools allow the civilian supervisor sufficient control over the officer that it is the civilian—not the officer—who really creates the legal obligation. Finding that such tools do allow the civilian supervisor sufficient control, this section concludes that, as a consequence, this organizational arrangement violates the Appointments Clause.

A. A Supervisor's Tools

A civilian supervisor has a number of tools that allow her to exercise authority over her military subordinates. These tools can be divided into three broad categories: the power to supervise, the power

to evaluate, and the power to relieve. Together, these tools allow a supervisor a substantial degree of control.

As an initial matter, it is important to note that missing among those tools is a significant one that is available to the supervisor's military counterparts. Under Article 90, the civilian supervisor cannot issue, in the supervisor's own name, a lawful command. Specifically, a "superior commissioned officer" must be, at the least, "a commissioned officer."[174] A civilian employee who has not been "[c]ommission[ed] [an] Officer[] of the United States"[175] is not, and cannot be, such an officer.[176] In addition, even if the employee's status as a non-officer is ignored, the employee lacks both rank and command—the two qualifications that make a commissioned officer a "superior" commissioned officer.[177] Thus, a civilian employee cannot satisfy the statutory definition of superior commissioned officer.

That said, even most civilians who have been commissioned civil officers of the United States—and are, therefore, not employees in the constitutional sense—also probably do not meet that definition. A superior commissioned officer may be superior in "rank" or "command."[178] For the purpose of Title 10 of the United States Code, which includes the UCMJ, rank is "the order of precedence among members of the armed forces."[179] In turn, section 741 establishes that

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[174] 10 U.S.C. §§ 101(b)(2), 801(5) (2018) (defining terms "commissioned officer" and "superior commissioned officer").

[175] U.S. CONST. art. II, § 3 (providing that the President "shall Commission all Officers of the United States").

[176] The Constitution draws an apparent distinction among types of officers. First, Article II provides that only "civil Officers"— along with the President and vice President—are liable for impeachment. U.S. Const. art. II, § 4. The specific modifier *civil* implies that non-civil officers—presumably, military officers—are not subject to impeachment. Second, the two houses of Congress are empowered to select their own "Officers," among these are the Speaker of the House and the President pro Tempore of the Senate. U.S. CONST. art. I, § 2, cl. 5, § 3, cl. 5. Third, the states retain the right to select the "Officers" for their militias. U.S. CONST. art. I, § 8, cl. 16. Since these latter two categories of officers are appointed by a mechanism other than the Appointments Clause—i.e., the houses of Congress and the states, not the President, heads of the departments, or the courts—presumably such officers are not officers of the United States. *See* U.S. CONST. art. II, § 2 (providing for the nomination and appointment of "all other Officers of the United States"), § 3 (providing that the President "shall Commission all the Officers of the United States").

[177] *See* 10 U.S.C. § 801(5) (defining superior commissioned officers).

[178] 10 U.S.C. § 801(5).

[179] 10 U.S.C. § 101(b)(8).

order among the officer corps.[180] Even assuming for argument's sake that a civilian officer is a member of the armed forces, there is no mention of a civil officer in that section.[181] In short, a civil officer—like a civilian employee—has no rank.[182]

The issue of command is more complicated. A civilian officer—again, not a civilian employee—may meet the UCMJ's somewhat restrictive definition of a commander.[183] But an Army regulation states bluntly that: "A civilian, other than the President as Commander-in-Chief (or National Command Authority), may not exercise command."[184] Thus, other than the President and, perhaps, a few other high-level positions,[185] a civilian officer, who has no rank,

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[180] 10 U.S.C. § 741(a) (2018).

[181] *Id*. (providing that "[a]mong the grades listed below, the grades of general and admiral are equivalent and are senior to other grades and the grades of second lieutenant and ensign are equivalent and are junior to other grades"), (b) (providing that officers with the same rank are placed in order of seniority by their dates of rank), (c) (allowing the Secretary of Defense to further delineate seniority)(*Id.*).

[182] This fact has not prevented the Defense Department from creating equivalency charts between them, not all of which are consistent. *See, e.g.*, U.S. DEP'T OF DEF., INST. 1000.01, Identification (ID) Cards Required by the Geneva Conventions encl. 3, tbl. 2 (16 Apr. 2012) (C1, 9 Jun. 2014) [hereinafter DODD 1000.01], *available at* https://www.cac.mil/Portals/53/Documents/DODI-1000.01.pdf (providing that an O-4's, that is, a Major's, equivalent civilian grade is a GS-12); U.S. DEP'T OF DEF. DIR. 7000.14-R, DOD Financial Management Regulation, vol. 11A, ch. 6, app. B (Feb. 1998) [hereinafter DOD FMR], *available at* http://comptroller.defense.gov/Portals/45/documents/fmr/archive/11aarch/11a_06_appendix_b_Feb98.pdf (providing that the civilian equivalent of an O-4 is a GS-13).

[183] 10 U.S.C. § 801(3) (2018) (noting that the term "'commanding officer' includes only commissioned officers"). *But see* AR 600-20, *supra* note 135, para. 1-5(a) ("A commander is . . . a commissioned or [warrant officer] who, by virtue of grade and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a 'command.'").

[184] AR 600-20, *supra* note 135, para. 1-5(a). Interestingly, even the Air Force shares this restrictive definition of commander, albeit without warrant officers, and its policy also states expressly "civilian employees cannot command AF units or AF personnel in any duty states." *See* AFI 51-604, *supra* note 167, para. 3.8, attachment 1. That said, the Army does permit a civilian to "be designated to exercise general supervision over an Army installation or activity (for example, Dugway Proving Ground)." AR 600-20, *supra* note 135; *see also* AFI 51-604, *supra* note 167, para. 3.8 (providing that civilian employees "may lead certain units . . . hold supervisory positions, supervise, and provide work direction to military members and civilian personnel within their unit or defined sphere of supervision").

[185] Although beyond the scope of this article, Army Regulation 600-20 seems to exclude from command both the secretary of defense and the service secretaries. By statute, the secretary of defense is in the chain of command, at least for forces assigned to a

also cannot exercise command—and cannot meet Article 90's definition of superior commissioned officer. Yet, even without this (admittedly quite) substantial tool, the civilian supervisor has other tools to enforce compliance.[186]

1. The General Supervisory Power

The general supervisory power may be the least impressive legally, but in practice, it probably carries the greatest weight. A civilian supervisor is just that, the supervisor. The day-to-day practical authority to direct subordinate officers is a significant source of that civilian supervisor's control. Put simply, if an officer's designated boss tells the officer to do something and that something is not illegal or inappropriate—like tell your subordinate to give the boss a briefing—the common, everyday expectation is that the officer will do it.

In addition, there may be no Army regulation that states expressly the authority of an employee supervisor over an officer.[187] Yet, there are

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combatant command. 10 U.S.C. § 162(b) (2018). Further, the service secretaries, as well as the president and the secretary of defense, are general courts-martial convening authorities, suggesting that they do exercise a degree of command. 10 U.S.C. § 822(a)(1), (2), (4) (2018).

[186] To be sure, Article 90 is not the only method of punishing disobedience of a directive: Article 91 and 92 do the same in other circumstances. 10 U.S.C. §§ 891(2), 892(2) (2018); *see also* Washington v. United States 57 M.J. 394, 398 (C.A.A.F. 2002) ("Congress has expressly provided criminal sanctions in Article 90, UCMJ, as well as Articles 91 and 92, UCMJ, . . . for failure to obey a lawful order."). But Article 91(2), UCMJ, provides no basis for punishing the disobedience of a civilian employee's instruction, as it is limited to orders that are issued by "a warrant officer, non-commissioned officer, or petty officer." 10 U.S.C. § 891(2). Although Article 92(2) applies to "any other lawful order . . . which it is [the person's] duty to obey," such an order must be issued by a member of the armed forces. 10 U.S.C. § 892(2) (2018). One appellate court has concluded that a civilian employee is not such a member. United States v. Parisi, No. 20020970, 2005 WL 6519936 (A. Ct. Crim. App. Dec. 8, 2005) (concluding that a Department of the Army Civilian Police officer was not a member of the Armed Forces for the purpose of Article 92(2)).

[187] In the Air Force, that is not so. *See supra* note 167 (discussing the Air Force instruction that provides that a civilian director may issue directives to military members). That said, even in the Army, its evaluation regulation states that among the responsibilities of the rated officer—that is, the officer who "is the subject of the evaluation"—is to "[p]erform each assigned or implied duty to the best of [that officer's] ability." U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM para. 2-10(a)(1), (b)(1) (4 Nov. 2015) [hereinafter AR 623-3]. That certainly seems to suggest

a number of publications, including regulations that imply that authority. Those regulations shape the practical scope of the civilian employee's authority over his subordinates.

First, as discussed in greater length below, a civilian supervisor may rate—that is, serve as the evaluator of—an officer.[188] But just like when one Soldier serves as another Soldier's rater, a civilian employee may only serve as the officer's rater if that civilian employee is responsible for "directing and assessing"—that is, supervising—the officer's performance.[189] By authorizing a civilian employee to rate an officer only when that employee can direct that officer, the Army implicitly recognizes the existence of such authority—and in the regulation, it communicates that recognition to its officers.

Moreover, in a number of contexts, the Defense Department has promulgated equivalency charts between officer and civilian pay grades.[190] To be sure, these regulations do not purport to—if for no other reason than because, as discussed, they cannot—grant civilian employees equal authority to the equivalent officer grades.[191] Regardless, the existence of the equivalency charts implies at least a degree of authority associated with the civilian grades—an

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that the rater, who is, after all, responsible for "directing" that officer has the authority to assign tasks. *Id.* para. 2-5(a).

[188] A rater is "[f]irst-line supervisor of the rated Soldier who is designated as the rater on the rating scheme." AR 623-3, *supra* note 187, glossary. By contrast, a senior rater is "the second-line rating official who is in the direct line of supervision of the rated Soldier and senior to the rater by either pay grade or date of rank . . . [whose p]rimary role is evaluating and focusing on the potential of the rated Soldier." *Id.*

[189] AR 623-5, *supra* note 187, para. 2-5(a).

[190] *See supra* note 182 (discussing Defense Department equivalency charts).

[191] Specifically, any attempt to do so would be futile, as a civilian employee cannot be a superior commissioned officer for the purpose of Article 90, UCMJ. *See supra* notes 174-186 and accompanying text. Indeed, many of these equivalency charts are for the purpose of protocol or allocating costs, not necessarily for the purpose of establishing claim to authority. *See, e.g.*, DODI 1000.01, *supra* note 182, encl. 2, para. 4 (establishing military and civilian equivalent grades for the purpose of POW stipends under the Geneva Convention IV); DOD FMR, *supra* note 182, vol. 11A, ch. 6, app. B (providing that the military personnel costs for activities financed by the Defense Working Capital Fund will be "costed" consistent with the table of equivalent pay grades); *see also* U.S. DEP'T OF DEF., 4165.3-M, DOD HOUSING MANAGEMENT encl. 3, tbl. 1 (28 Oct. 2010) (providing for rank equivalents for housing); U.S. DEP'T NAVY, CHIEF, NAVAL OPERATIONS INSTR. 1710.7A, SOCIAL USAGE AND PROTOCOL annex D (15 Jun. 2001). The Army has an equivalency chart to show the minimum requirements to serve as a Soldier's senior rater. AR 623-3, *supra* note 187, tbl. 2-1.

implication that is strengthened when such an employee is assigned as an officer's supervisor.

2. Rating

A civilian employee may serve as an Army officer's rater or the senior rater.[192] A rater and senior rater are nothing more than evaluators.[193] Although the two roles are similar in purpose, they are different in function: The rater is the officer's "immediate supervisor," who is, as noted above, "responsible for directing and assessing the rated Soldier's performance."[194] As a rater, the supervisor provides "an objective and comprehensive evaluation of the rated Soldier's performance . . . on the evaluation report."[195] The senior rater is generally the "immediate supervisor of the rater."[196] Based on the senior rater's "position[] and experience[]," a senior rater "evaluate[s] the rated Soldier's performance and/or potential within a broad organizational framework."[197] The senior rater's evaluation has a particular impact on the rated officer's career, as that "evaluation is the link between the day-to-day observation" of the officer "and the longer-term evaluation of the rated Soldier's potential by [promotion] selection boards."[198]

Civilian employees may serve as an officer's rater or senior rater or both. Specifically, any civilian employee—no matter that employee's grade—may rate an officer provided that the employee is the officer's "immediate supervisor" for at least 90 days before issuing the evaluation.[199] There is a pay-grade requirement for a civilian employee to be an officer's senior rater, and the senior rater must also be "a designated supervisor."[200]

The evaluations process plays a key role in determining whether an officer's career advances, slows, or even ends. Evaluations are placed in

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[192] AR 623-3, *supra* note 187, paras. 2-5(a), 2-7(a)(2), tbl. 2-1.
[193] *See supra* note 188 and accompanying text (defining raters).
[194] AR 623-3, *supra* note 187, para. 2-5(a).
[195] *Id.* para. 2-12(i).
[196] *Id.* para. 2-7(a)(3).
[197] *Id.* para. 2-14(a).
[198] *Id.*
[199] *Id.* para. 2-5(a)(1), (b)(4).
[200] *Id.* para. 2-7(a)(2), tbl. 2-1.

an officer's official record,[201] and they are subsequently reviewed by selection boards that are considering whether to recommend the officer for promotion or retention.[202] Of course, an officer in the grade of major or below who fails to be selected for promotion is subject to a mandatory discharge unless specifically continued on active duty.[203]

3. Relief

Finally, a civilian supervisor who is an officer's rater or senior rater has the authority to relieve that officer from the officer's current assignment.[204] A relief is an "early release" from "a specific duty or assignment" that is "based on a decision that the officer has failed in his or her performance of duty."[205] It is, in short, the military's version of being fired from a specific assignment. For that fairly obvious reason, a relief for cause is an adverse act.[206]

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[201] *Id.* para. 1-12(b); *see also id*. para. 1-8(b)(1) (stating that the evaluation system "assesses the quality of Soldiers and determines the selection of future Army leaders and the course of their individual careers").

[202] 10 U.S.C. §§ 611(a), (b) (2018) (providing for the convening of selection boards to select officers for promotion, continuation on active duty or early retirement). Active duty selection boards are composed of five officers of the same armed force as the officers under consideration. 10 U.S.C. § 612(a)(1) (2018). Those boards consider the contents of an officer's official record. 10 U.S.C. § 615(a)(2)(A) (2018); *see also* U.S. DEP'T OF DEF., INSTR. 1320.14, COMMISSIONED OFFICER PROMOTION PROGRAM PROCEDURES encl. 3, para. 2(c)(2)(a) (11 Dec. 2013).

[203] The actual type of discharge depends on the grade held by the officer. In general, for officers holding a grade below that of lieutenant colonel and who twice fail to be selected for promotion are subject to a mandatory discharge. 10 U.S.C. § 631(a) (first lieutenants); 10 U.S.C. § 632(a) (captains and majors). *But see id*. (a)(3) (allowing an officer in the grade of captain or major who is within two years of retirement eligibility to remain on active duty until retirement eligible). For officers above the grade of major, the statute imposes a retirement after a certain number of years of service unless the officer is on a list of officers who are recommended for promotion. 10 U.S.C. § 633(a) (2018) (providing a maximum of 28 years of service for officers in the grade of lieutenant colonel); 10 U.S.C. § 634(a) (2018) (providing a maximum of 30 years of service for officers in the grade of colonel).

[204] AR 623-3, *supra* note 187, para. 3-54(d), (g).

[205] *Id.* para. 3-54; *see also id*. glossary (defining relief as "[t]he removal of a rated Soldier from an assigned position . . . by a member of the Soldier's chain of command/supervisory chain" because of the officer's "personal or professional characteristics, conduct, behavior, or performance of duty warrant his or her removal from the position in the best interests of the U.S. Army").

[206] *See id.* para. 3-26(b) (defining types of evaluations that must be referred to the officer for comment).

To be sure, a relief does not automatically, or even immediately, result in an officer's discharge.[207] That said, by regulation, any officer who is relieved must be considered for discharge from the service.[208] Regardless, because of its impact on the officer's potential for promotion—namely, it generally nullifies that potential—it effectively ends the officer's career.[209]

B. These Tools Allow a Supervisor to Exercise a Subordinate's Authority

Standing alone, these tools are not unusual—a civilian supervisor has similar tools for her civilian employees. The Appointments Clause implications arise from the fact that these tools—by design—give the supervisor actual authority over, and the consequent ability to control, the officer. Specifically, because of that authority, when a civilian supervisor instructs a subordinate officer to issue a command, the officer lacks any real choice in whether to give it;[210] the supervisor's decision is effectively final.[211] Indeed, much like when a court's clerk issues the court's judgment, the officer is essentially memorializing the supervisor's decision as a command. As such, the officer's issuance of the command amounts to a ministerial act.[212] It is the employee who really creates the recipient's legal obligation.

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[207] Officer discharges are handled under a separate set of procedures, and as a consequence, a discharge is not the automatic consequence of a relief. *See* U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006) (RAR, 13 Sept. 2011) [hereinafter AR 600-8-24]. That said, the failure to perform assigned duties is also a ground for discharge. *Id*. para. 4-2(b)(7).

[208] *See id.* 4-2(c)(4) (providing that a relief for cause evaluation report "require[s] an officer's to be reviewed for consideration of terminating [the officer's] appointment").

[209] This assertion is based on the author's professional experiences as a judge advocate, including a tour as a Senior Defense Counsel for the U.S. Army Trial Defense Service from October 2012 to June 2014.

[210] *Cf.* Tucker v. Comm'r, 676 F.3d 1129, 1134 (D.C. Cir. 2012) ("If the tasks assigned a position allowed the holder no choice, obviously, it would be pointless to classify him as an 'Officer' even though the consequences of his ministerial decisions were both vital and final."). *But see* OLC Opinion, *supra* note 62, at 93 (arguing discretion is not necessary to a determination that a person is an officer).

[211] *See* notes 103-104 and accompanying text (discussing the D.C. Circuit's factors of discretion and finality in determining whether a person exercised significant authority).

[212] *See* Raymond J. Lucia Cos., Inc. v. Sec. & Exch. Comm., 832 F.3d 277, 287 (D.C. Cir. 2016) ("That is, petitioners have not substantiated that a finality order is just like a clerk automatically issuing a mandate, . . . and, in so asserting, have ignored that clerks have no authority to review orders or decline to issue mandates."), *rev'd*, 138 S. Ct. 2044 (2018).

To illustrate this, consider what would happen if, in the hypothetical, the lieutenant colonel refused to issue the command. As noted, the command itself is not illegal, and there is nothing immoral or unethical about it.[213] There is no apparent reason why the officer would be justified in refusing, and if the officer did so without a reason, the officer failed to perform an assigned task. That failure could be reflected in a worse evaluation—jeopardizing the officer's chances for promotion—or the officer could, at least in theory, be relieved.[214]

Put another way, what can the civilian employee do if the officer refuses to issue the supervisor's command? Nearly exactly what a judge can do to a clerk who refuses to issue a judgment[215] or even a president can do to a cabinet officer who will not put into effect the president's decision;[216] namely, that supervisor can fire the officer.

Fundamentally, "[t]he power to remove is the power to control."[217] As the Supreme Court put it, "[i]t is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."[218] Indeed, "[o]nce an officer is appointed, it is only the authority that can remove him, and not the authority that appointed

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[213] On a side note, the phrase "illegal, immoral, or unethical" is well known in the Army. *See, e.g.*, LTC Clark C. Barrett, *The Right Way: A Proposal for an Army Ethic*, MIL. REV., Nov./Dec. 2012, at 3 (asserting that "[f]or loyal soldiers, disobeying even an illegal, immoral, or unethical order is difficult but nonetheless required). Yet, the latter nouns—immoral or unethical—are simply not grounds to disobey an order. Thus, "[i]f the command was lawful, the dictates of the accused's conscience, religion, or personal philosophy could not justify or excuse disobedience." United States v. Wilson, 41 C.M.R. 100, 101 (C.M.A. 1969); *see also* MCM, *supra* note 9, pt. IV, ¶ 14c(2)(A)(iv) (noting that "the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order").

[214] *See* notes 204-208 and accompanying text (discussing the standard for relief). To be sure, it may well be that it is highly unlikely that the officer would be relieved. The question is not what actual decision any given decision maker would make. Decisions are subject to a number of considerations. The question is rather what the supervisor can do in response.

[215] In re Hennen, 38 U.S. 230 (1839) (concluding that a district court clerk is subject to removal by the district court judge).

[216] *See* Myers v. United States, 272 U.S. 52 (1926) (concluding that the president generally has the power to fire executive officers).

[217] Silver v. United States Postal Serv., 951 F.2d 1033, 1039 (9th Cir. 1991) (evaluating the Appointments Clause implications of the postal service's board of governors).

[218] Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935).

him, that he must fear and, in the performance of his functions, obey."[219]

As a consequence, the civilian supervisor's power to relieve the officer is, in the Supreme Court's words, "a powerful tool for control of that officer."[220] The power is so poignant that it need not be actually exercised to be effective: as one court put it, "the mere existence of removal authority is likely to influence behavior."[221] Indeed, if federal judges must be constitutionally protected from removal to protect their independence,[222] it makes sense that officers subject to removal would not be independent—at least not independent enough—of the person who can do the removing.

The fact that an officer who violates a civilian supervisor's instruction, including an instruction to issue a subordinate a command, faces no criminal liability[223]—unlike a subordinate service member's disobedience of the officer's command—does not change this analysis. Article 90, UCMJ, is unique to the armed forces.[224] No other executive-branch officer has that particular authority, and the potential for criminal liability cannot, therefore, be a requirement for one officer to effectively control another officer's actions. If it were, few civil officers would be under a superior officer's control, and thus, few would qualify as an inferior officer within the meaning of the Appointments Clause.[225]

An illustrative, and relatively recent, example arising from another executive-branch agency helps illuminate this point. As an initial matter, executive-branch authorities are often vested in executive-branch officers

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[219] Bowsher v. Synar, 478 U.S. 714, 726 (1986) (internal quotation omitted).

[220] *See* Edmond v. United States, 520 U.S. 651, 664 (1997) (discussing whether appellate military judges were principal or inferior officers).

[221] *Silver*, 951 F.3d at 1039.

[222] U.S. CONST. art. III, § 1.

[223] *See* notes 174-186 and accompanying text (discussing why a civilian supervisor's direction is not enforceable under Article 90, UCMJ).

[224] 10 U.S.C. § 890 (2018) (subjecting to prohibition on the disobedience of a lawful command only "[a]ny person subject to this chapter"); *see also id*. § 802 (defining those persons who are subject to the UMCJ).

[225] Indeed, the very definition of an inferior officer is an officer "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." Edmond v. United States, 520 U.S. 651, 662-63 (1997) (stating also that "[w]hether one is an "inferior" officer depends on whether he has a superior").

below the President, including authorities related to immigration;[226] and yet, the President exercises those officer's authorities. For instance, in November 2014, President Obama announced an immigration policy in which certain categories of immigrants would be permitted to "apply to stay in this country temporarily without fear of deportation."[227] That same day, the Secretary of Homeland Security issued a memorandum implementing that decision.[228] In other words, it was the Secretary who actually put into effect the President's decision.[229]

But had the Secretary failed to obey the President, the Secretary would have likely committed no crime. Indeed, cabinet officers do, occasionally, decline presidential directives.[230] In that case, the President's recourse is simple: fire the secretary.[231]

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[226] *See, e.g.*, 8 U.S.C. §§ 1103(a)(1) (2018) (providing that "[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State"), 1227(a) (providing that "[a]ny alien . . . in and admitted to the United States shall, upon order of the Attorney General, be removed if the alien is within one or more of the following classes"), 1229b (allowing the attorney general to cancel certain removals).

[227] In full, the President's policy was: "If you've been in America for more than five years; if you have children who are American citizens or legal residents; if you register, pass a criminal background check, and you're willing to pay your fair share of taxes -- you'll be able to apply to stay in this country temporarily without fear of deportation." President Barack Obama, Remarks by the President in an Address to the Nation on Immigration (Nov. 20, 2014), *available at* https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.

[228] Memorandum from Jeh Johnson, Sec'ty, Homeland Sec'y, to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., et. al (Nov. 20, 2014).

[229] As the U.S. District Court that imposed an injunction against the program put it "both sides agree that the President in his official capacity has not directly instituted any program at issue in this case. Regardless of the fact that the Executive Branch has made public statements to the contrary, there are no executive orders or other presidential proclamations or communique that exist regarding [the program]"; rather "[t]he DAPA Memorandum issued by Secretary Johnson is the focus in this suit." Texas v. United States, 86 F.Supp. 3d 591, 607 (S.D. Tex. 2015).

[230] *See, e.g.*, Evans Andrews, *What was the Saturday Night Massacre*, HISTORY, http://www.history.com/news/ask-history/what-was-the-saturday-night-massacre (Dec. 4, 2013) (describing President Nixon's decision to fire his attorney general and deputy attorney general when both refused to fire the independent counsel who was investigating the President).

[231] *See, e.g.*, Michael D. Shear et. al, *Trump Fires Acting Attorney General Who Defied Him*, N.Y. TIMES (Jan. 30, 2017), https://www.nytimes.com/2017/01/30/us/politics/trump-immigration-ban-memo.html?_r=0; *see also* Jack Goldsmith, *Quick Thoughts on Sally Yates' Unpersuasive Statement*, LAWFARE (Jan. 30, 2017, at 9:32 p.m.),

To be sure, the President and a cabinet officer are at a higher level than the civilian supervisor and a military officer, but the underlying rationale holds true even for less lofty positions. The civilian supervisor of a military officer is empowered to direct the officer in the performance of her duties, evaluate the officer, and even remove that officer from her current assignment, effectively ending her career. This is not "*practical* authority";[232] it is *actual* authority over the officer. Thus, if the civilian employee tells a subordinate officer to give a command, the officer has no real choice, but to do so.

To be sure, it may well be that a Soldier who disobeys an officer's command that was issued at the direction of a civilian supervisor will never be criminally punished for that offense. The civilian supervisor may not even want the Soldier to be punished. It may be that, in most circumstances, this is treated as simply a leadership challenge, which is what it would have been had the Soldier disobeyed the civilian supervisor directly. It could be argued, consequently, that the Article 90 authority here is really illusory.

That argument, however, misses the point. As an initial matter, while a civilian supervisor's opinion on punishment may be given great weight, the decision rests with the Soldier's commander.[233] More importantly, a decision not to prosecute does not mean that there was no crime. A crime is complete "[w]hen it is committed" at which point "the party is guilty," and is, therefore, "subject to criminal prosecution."[234] In the hypothetical, the crime was complete when CPT Snuffy disobeyed his superior officer's command.

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https://www.lawfareblog.com/quick-thoughts-sally-yates-unpersuasive-statement (concluding that Acting Attorney General Sally Yate's decision not to enforce the President's executive order "seems like an act of insubordination that invites the President to fire her. Which he did.")

[232] *Cf.* OLC Opinion, *supra* note 62, at 98 (arguing "that the President may, without creating any issue under the Appointments Clause, . . . grant [advisors] substantial *practical* authority to . . . coordinate policy among federal agencies . . . so long as he does not purport to grant such advisers any 'legal power' over an agency") (emphasis added). Further, it is authority exercised by the supervisor under that supervisor's own name.

[233] *See* MCM, *supra* note 9, R.C.M. 401(a) (providing who may dispose of charges and limiting such persons to those who are authorized to convene courts-martial or administer non-judicial punishment).

[234] *See, e.g.*, United States v. Irvine, 98 U.S. 450, 452 (1878) (discussing statutes of limitations).

As a consequence, even if not by intent, the hypothetical's civilian deputy commandeered the lieutenant colonel's authority. Specifically, the civilian deputy's instruction was transformed into a legal obligation because that officer issued it, and that officer had no effective choice, but to give the command. Indeed, the command's specific content was determined by the civilian supervisor's instruction. Other than the deputy's instruction, there was no reason for the lieutenant colonel to issue this command; after all, he did not want the briefing. Put another way, the legal obligation at issue here was decided finally not by the commissioned officer, but by the civilian employee. Thus, the civilian employee exercised significant authority pursuant to the laws of the United States—in violation of its Constitution.

IV. Options

The exercise of significant authority on behalf of the United States is reserved to officers of the United States. Civilian employee supervisors of military officers are able to exercise that authority by directing their subordinate officers to issue commands to more junior Soldiers. As a consequence, it is the civilian employee's authority to require a subordinate officer to exercise her statutory power that creates the Appointments Clause violation.

Setting aside the possibility that the Constitution could be amended to remove the Appointments Clause, this raises three potential solutions. First, transform the employee into an officer by appointing that employee consistent with the clause, something that would likely require legislation. Second, restrict the employee's power to issue such a direction. That restriction, however, likely turns the supervisor into a supervisor in name only.

That leaves the third potential solution: remove civilian employees from chains of supervision in circumstances in which the officers that they lead supervise other more junior Soldiers. This third option is likely disruptive over the near and mid-terms; it also restricts how an armed force is organized. But it can be implemented locally—no need for Congress to act—and it solves entirely the Appointments Clause issue. Most importantly, from a policy perspective and unlike the other two options, this option aligns authority with accountability, and it is more consistent with the statutory duties and responsibilities of the officer corps.

There is one additional potential resolution that should be discussed before addressing the other three—specifically, do nothing at all. In this case, *if* a Soldier disobeys an officer's command and *if* that command was issued at the behest of that officer's civilian supervisor and *if* the Soldier is punished for that disobedience—a substantial number of contingencies—the Soldier is free to argue that the command was unconstitutional.[235]

This solution should fail for a simple reason: the constitutional violation remains uncured. But if that is not enough of a justification, it fails for three other reasons too. First, a command is presumed lawful and disobeyed at the "peril" of the subordinate service member, who bears the burden of rebutting that presumption.[236] This wait-and-see-if-this-is-really-an-issue solution requires the service member to bear that burden, and practically, the service member would require evidence of the ultimate source of the command—something that may well be hard to come by—to even try and make the case that the supervisory arrangement giving rise to the command made the command unlawful. Second, the service member needs a forum to hear the challenge, and that requires the service member to disobey the command, court punishment, and then hope that the punishment will be imposed before a forum that can act on the constitutional challenge. Those are no small risks. Third, this solution threatens good order and discipline. Commands that otherwise seek the same (lawful) objects and are issued by the same officer are sometimes enforceable and sometimes not based on the degree of a civilian supervisor's involvement. Discipline requires a culture of obedience,[237] and this fluidity of enforceability threatens that culture.

A. Appoint as Officers

As an initial matter, civilian supervisors could be appointed as officers of the United States. This would likely require a statutory change to specifically provide for such appointments.[238] Much like their military

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[235] Using the framework identified above, the person could argue that the command was unlawful or that no competent authority issued the command. *See* note 130 and accompanying text (discussing essential attributes of a lawful command).

[236] *See* notes 137-141 and accompany text (discussing presumption of lawfulness).

[237] United States v. McDaniels, 50 M.J. 407, 408 (C.A.A.F. 1999).

[238] *See* Section II.A.1 (discussing the established-by-law requirement); *see also* 5 U.S.C. § 2104(a)(1) (2018) (defining an officer for the purpose of title 5, which covers

counterparts,[239] such civilian-employees-turned-officers would likely be inferior officers under the Appointments Clause. Consequently, if the Congress approved, the appointment power could be vested in the President or the Secretary of Defense.

This would likely solve the Appointments Clause issue, but it creates additional issues.[240] First it is not clear that the Congress will so approve.[241] Without statutory authorization, "[t]he prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers,"[242] that is, Senate confirmation. Second, a civilian employee may generally be hired by a member of

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government organizations and employees, as a person who is "required by law" to be appointed by the president, a court, the head of an executive agency, or the secretary of a military department); *see also* United States v. Janssen, 73 M.J. 221 (C.A.A.F. 2014) (concluding that the Secretary of Defense lacked the statutory authority to appoint a civilian employee an appellate military judge even though such a judge is an inferior officer).

[239] *See* Weiss v. United States, 510 U.S. 163, 182 (1994) (Souter, J., concurring) ("Military officers performing ordinary military duties are inferior officers, and none of the parties to this case contends otherwise. Though military officers are appointed in the manner of principal officers, no analysis permits the conclusion that each of the more than 240,000 active military officers . . . is a principal officer.").

[240] The existence of civil-service protections poses an especially interesting issue. As noted below, non-probationary civil service employees generally have a right to appeal their termination from the civil service to the Merit Systems Protection Board (MSPB), whose members serve seven-year terms and may be removed by the President before the expiration of those terms only for "for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(a), (d) (2018); *see also infra* notes 263-264 and accompanying text (discussing MSPB). In 2010, the Supreme Court held that a law permitting the Securities and Exchange Commission (SEC), whose members the President also may remove only for "inefficiency, neglect of duty, or malfeasance in office," to fire members of a subordinate board for only good cause violated the President's executive power. Free Enter. Fund v. Pub. Accounting Oversight Bd., 561 U.S. 477, 484, 486-87 (2010). The Court noted that it was not deciding on the constitutionality of employees' civil-service protections because, among other things, many of those employees "would not qualify as officers." *Id*. at 506. But if those employees were turned into officers, MSPB's "multilevel protection," in the Court's words, could create a constitutional issue. *Id*. at 484. This is also part of the concern animating the dissents in *Lucia*. Lucia v. Sec. & Exch. Comm., 138 S. Ct. 2044, 2060 (2018) (Breyer, J., dissenting) ("Similarly, to apply *Free Enterprise Fund*'s holding to high-level civil servants threatens to change the nature of our merit-based civil service . . . .")

[241] For instance, in the regular forces, the Congress permits the President alone to only appoint such officers to grades below O-4, i.e., Majors in the Army; for grades at or above O-4, those officers must be nominated and confirmed. *See* 10 U.S.C § 531(a), 624(c) (original appointments and appointments as a result of promotions, respectively).

[242] Edmond v. United States, 520 U.S. 651, 660 (1997).

the uniformed service or by another employee,[243] but an inferior officer may only be appointed by a constitutional appointment authority.[244] In other words, this option takes a relatively straightforward process to hire a civilian employee and makes it more complicated and, consequently, resource consuming.[245]

B. Restrict the Power of Civilian Employee Supervisors

If appointing civilian supervisors as officers is impracticable, a second option is to restrict by regulation the authority of those supervisors. The Secretary of the Army likely has the authority to enact such a regulation.[246] Further, the D.C. Circuit has relied on, in the past, regulatory restrictions on an employee's authority to conclude that the employee did not exercise significant authority, at least where the restrictions were real.[247] The greater the restrictions on a civilian supervisor's exercise of the tools identified above, the greater the likelihood that they do not exercise significant authority.

These restrictions could take two forms. First, in principle, a regulation could prevent the supervisor from issuing an authoritative direction to a subordinate officer that requires that officer to issue a command to other service members. In practice, though, it would strip the civilian supervisor of the ability to supervise subordinate elements

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[243] 5 U.S.C. § 2105(a)(1)(c)-(d) (2018).

[244] U.S. CONST. art. II, § 2.

[245] *See* U.S. CONST. art. II, § 2 (permitting the Congress to vest the appointment of inferior officers in the President alone, heads of the departments, and the courts).

[246] *See* 10 U.S.C. § 3013(g)(3) (2018) (providing that the Secretary may "prescribe regulations to carry out his functions, powers, duties"). Indeed, as discussed above, much of the authority of civilian supervisors is derived from regulations. *See* discussion *infra* Section III.A. (supervisor's tools).

[247] *See, e.g.*, Raymond J. Lucia Cos. Inc. v. Sec. & Exch. Comm'n, 832 F.3d 277, 286 (D.C. Cir. 2016) (noting that "[f]or the purposes of the Appointments Clause, the Commission's regulations on the scope of its ALJ's authority are no less controlling than the FDIC regulations to which this court looked in *Landry")*, *rev'd*, 138 S. Ct. 2044, 2053 (2018) (concluding that administrative-law judges exercise more "independent effect" than the Tax Court's special trial judges, who had been held to be officers). *See also* 15 U.S.C. § 78d-1(c) (2018) (providing that if review of an ALJ's decision, among others, is not sought within the time period established for review, the decision of the ALJ "shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission").

headed by an officer.[248] At the very least, it would make it difficult for that deputy to coordinate all the sections.

Second, a civilian employee could be prohibited from rating and relieving a military officer. Such a role could be assigned to another officer, much like the current requirement for a supplementary review if there is no military officer in a rating chain.[249] This is relatively easy to implement, as it does not require defining a standard by which some of a supervisor's directions are relayed, but not others. Further, it preserves a degree of control, as the supervisor could recommend an evaluation to the actual rater or senior rater even though the civilian supervisor would not be the one who issues that evaluation.

Of course, a supervisor who does not evaluate an officer is not *really* that officer's supervisor—at least not the officer's *only* supervisor because to be the officer's rater, the person must be a supervisor of the officer.[250] Under Army regulations, an officer is also entitled to meet with her actual rater and senior rater,[251] and even if the civilian supervisor is allowed input on the evaluation, it is likely that the officer will be more responsive to her actual rater and senior rater than to her civilian supervisor. As a consequence, this is not an ideal solution either.

C. Remove Civilian Employees as Supervisors

As a final option, the Appointment Clause issue can be eliminated by ending the practice of assigning civilian employees as the supervisors of military officers in circumstances in which those officers supervise other service members. This would resolve the Appointments Clause issue entirely.

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[248] Essentially, the regulation would have to state: "A civilian supervisor of an officer will not direct that officer to issue any command to any Soldier who is junior to the officer." In practice, this would mean that the civilian supervisor would either have to bypass the chain of supervision and issue instructions directly to those junior Soldiers, or the supervisor would have to give all taskings to the officer. In the hypothetical, this could take the form of an instruction that the lieutenant colonel, not the captain, present the briefing.

[249] *See* AR 623-3, *supra* note 187, para. 2-8(a)(2).

[250] *See* note 189 and accompanying text (discussing when a person can be another person's rater).

[251] *See* AR 623-3, *supra* note 187, paras. 2-12(b),(c), 2-14(c)(2).

It bears repeating that this option does not eliminate all civilian-supervisor positions. As discussed at length, the Appointment Clause issue arises when a civilian supervisor can commandeer a military officer's authority. For instance, a civilian supervisor of a military officer who has *no* military subordinates likely cannot commandeer that officer's authority.[252] It is also undoubtedly true that an officer in certain assignments may perform only duties that also could be performed by an employee.[253] In these cases, a civilian employee likely may supervise the officer.

Further, this solution better aligns authority with accountability. When a civilian employee acts in the role of deputy to the commander, there is a mismatch between that supervisor's authority and the supervisor's accountability that simply is not present when one civilian employee supervises another civilian employee. This mismatch arises from the fact that the rights and obligations of supervising military officers and their subordinate Soldiers differ from that of supervising civilian employees and their subordinate civilian employees.

From the perspective of the rights of a subordinate, a civilian employee has a considerably larger array of options to respond to bad leadership than a Soldier does. Two of those options illustrate the point. First, a civilian employee has a rather basic option that a Soldier lacks: the civilian employee can quit; the Soldier cannot.[254] Second, a civilian

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[252] Although beyond the scope of this article, there remains an interesting question whether it is ever appropriate for a civilian employee—as opposed to a civil officer—to supervise a military officer. The Supreme Court has stated that employees are "subordinate to officers of the United States." Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976). Put simply, employees work for officers. It seems strange that officers can work for employees who work for other officers.

[253] Consider, for instance, the role of an administrative-law attorney in a garrison environment. It is unlikely that in reviewing investigations and advising on ethics, this officer ever exercises his authority under Article 90, UCMJ. This is not inconsistent with the officer's status as an officer. Freytag v. Comm'r, 501 U.S. 868, 882 (1991) (noting that officers may perform, on occasion, the duties of an employee).

[254] 10 U.S.C. § 885(a)(1) (2018) (prohibiting desertion); *see also* MCM, *supra* note 9, pt. IV, ¶ 9d(2)(b) (providing a maximum term of confinement for desertion not terminated by apprehension of two years' confinement). Interestingly, even an employee who quits a position can sometimes obtain review of that resignation if the resignation was caused by deception or misinformation from the agency or the employee was coerced into resigning by the agency. *See* Terbin v. Dep't of Energy, 216 F.3d 1021, 1024 (Fed. Cir. 2000) (discussing when the Merit Systems Protection Board has jurisdiction over resignations and retirements); *see also* 5 C.F.R. § 1201.3(a)(1) (2019) (defining "an involuntary resignation or retirement" as a "removal").

employee can, in certain circumstances, sue the government for tort and discrimination-related claims.[255] A Soldier is generally barred from suing the government under the *Feres* doctrine.[256]

From the perspective of supervisor accountability, officers face an equally large array of accountability measures that civilian supervisors do not, including criminal liability. The list of potential criminal violations arising from an abuse of authority is impressive. An officer can be tried by court-martial for, among other things, dereliction of duty,[257] cruelty and maltreatment, [258] conduct unbecoming an officer and a gentlemen, [259] and, of course, acts or omission that are either

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[255] *See Overview of Federal Sector EEO Complaint Process*, EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm (last visited Feb. 8, 2019) (describing administrative and legal processes for complaints of discrimination based upon an employee's "race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information" and identifying when the employee may sue in court); *see also* 28 U.S.C. § 2674 (tort claims). To be sure, litigating with the federal government is no easy matter in light of sovereign immunity, but if the necessary procedural steps are met, it can be done.

[256] *See* Feres v. United States, 340 U.S. 135, 146 (1950) (holding that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service"). The *Feres* decision has been the subject of significant criticism, but it remains the law. United States v. Johnson, 481 U.S. 681, 688 (1987) (stating that the Court "decline[s] to modify the [*Feres*] doctrine at this late date"); *but see id.* at 700 (Scalia, J., dissenting) ("*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received.") (internal quotation omitted).

[257] 10 U.S.C. § 892(3) (2012); *see also* MCM, *supra* note 9, pt. IV, ¶¶ 18d(3) (defining the maximum punishment for dereliction of duty, depending on the specific type of dereliction, as forfeiture of two-thirds pay for three months and confinement for three months to a dishonorable discharge, total forfeitures, and two years' confinement). A duty "may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the Service," and the officer "is derelict in the performance of duties when that [officer] willfully or negligently fails to perform that person's duties or when that [officer] performs them in a culpably inefficient manner." MCM, *supra* note 9, pt. IV, ¶ 18c(3)(a), (c).

[258] 10 U.S.C. § 893 (2018) (criminalizing acts that amount to "cruelty toward, or oppression or maltreatment, of any person subject to [the officer's] orders"); *see also* MCM, *supra* note 9, pt. IV, ¶ 19d (establishing the maximum punishment as dishonorable discharge, total forfeitures, and confinement for three years). Of note, a person is protected by this article if the person, "subject to the UCMJ or not, . . . by reason of some duty are required to obey the lawful orders of the" officer; this would, consequently, include civilian employees. MCM, *supra* note 9, pt. IV, ¶ 19c(1).

[259] 10 U.S.C. § 933 (2012); *see also* MCM, *supra* note 9, pt. IV, ¶ 90d (providing for a maximum punishment of "[d]ismissal, forfeiture of all pay and allowances, and confinement for a period not in excess of that authorized for the most analogous offense

prejudicial to good order and discipline or service discrediting.[260] Yet absent an unusual set of circumstance, a civilian supervisor cannot be tried by court-martial at all.[261] Further, an attempt to create a civilian equivalent for some of these offenses that could be tried before a civilian court may well be found to be unconstitutional.[262]

To be sure, both the military officer and the civilian supervisor face the possibility of being fired for the same bad acts. For the supervisor, this is likely the harshest sanction that can be levied in most circumstances. But here, too, there are significant differences. A non-probationary employee is entitled to appeal that employee's termination to the Merit Systems Protection Board,[263] which is, as noted by the Supreme Court, "an independent adjudicator of federal employment disputes."[264] An officer facing elimination has no such recourse: the decision to eliminate the officer is, for the most part, made internal to the service.[265]

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for which a punishment is prescribed in this Manual, or, if none is prescribed, for 1 year.") Conduct is unbecoming if it "seriously compromises" the officer's character or "standing as an officer." MCM, *supra* note 9, pt. IV, ¶ 90c(2).

[260] 10 U.S.C. § 934 (2018).

[261] *See* 10 U.S.C. § 802 (2018) (defining those people who are subject to the Code); *see also* Solorio v. United States, 483 U.S. 435 (1987) (holding that the military status of the accused is the constitutional basis to try that person by court-martial).

[262] *See, e.g.*, Parker v. Levy, 417 U.S. 733, 754 (1974) ("[W]e think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the [military] shall be governed than it is when prescribing rules for the [civil society].").

[263] In general, an employee must have a certain amount of time in the civil service—generally, one or two years—before appealing an adverse action. *See* 5 U.S.C. § 7511(a) (2018) (defining term "employee" for purpose of determining who can appeal to MSPB). Of course, an officer also serves a probationary period, which determines what procedural rights the officer possesses if facing elimination. *See* AR 600-8-24, *supra* note 208, para. 4-20(b), (e) (defining a probationary officer as an officer with fewer than five years of commissioned service and providing that such an officer may be eliminated without a board of inquiry unless the officer is recommended for an other than honorable discharge). In fairness, the Army's definition of probationary is more favorable to the officer than the Congress's, but both are less favorable than that applicable to civilian employees. *Compare id*. para. 4-20(b) (establishing a five-year probationary period), 10 U.S.C. § 630(1)(a) (2018) (allowing a service secretary to discharge an officer with fewer than six years of commissioned service), *with* 5 U.S.C. § 7511(a) (establishing probationary periods between one and two years of service for most employees).

[264] Kloeckner v. Solis, 568 U.S. 41, 133 S. Ct. 596, 600, 184 L.Ed. 2d 433 (2012).

[265] AR 600-8-24, *supra* note 208, ch. 4 (governing officer eliminations). Although beyond the scope of this article, there is a narrow avenue by which the process that led to an officer's discharge—not the substantive decision to discharge itself—may be reviewed by the courts. *See* Kreis v. Sec'y of Air Force, 866 F.2d 1508, 1511 (D.C. Cir. 1989) (rejecting as nonjusticiable a claim for retroactive promotion, but providing for review

In short, there is a difference between Soldiers and employees, and between officers and civilian-employee supervisors. That difference is manifest in each party's respective rights and obligations. Removing the position of civilian deputy to the commander resolves the Appointments Clause issue, and it also recognizes those real differences in both authority and accountability.

V. Conclusion

The Appointments Clause is "among the significant structural safeguards" of the Constitution.[266] Fundamental to the clause—and the Constitution itself—is the issue of who decides. As one court put it, "among the framer's chief concerns . . . were questions of *who* should be permitted to exercise the awesome and coercive power of the government."[267] An officer's command under Article 90, UCMJ, is the exercise of just such an "awesome and coercive power of the government."[268] Indeed, as the Court of Military Appeals noted, "The force of an order by a superior officer can hardly be equated to a moral sanction. On the contrary, it is a tremendously powerful force in military law. In time of war, a willful refusal to obey is punishable by death."[269] Yet, in some circumstances—such as when an officer has a civilian supervisor and military subordinates—someone who is not appointed in accordance with the clause has that authority. That transgresses the Constitution.

Ultimately, every officer and employee swears an oath to support and defend the Constitution.[270] The fact that an organizational structure violates the Constitution should be enough reason to change that structure. But if it is not, this should be: authority and accountability are really two parts of the same concept. An officer has substantial authority,

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under the Administrative Procedures Act of a board for correction of military records' decision in circumstances in which "[a]djudication of th[o]se claims requires the district court to determine only whether the Secretary's decision making process was deficient, not whether his decision was correct"); *see also* Lindsay v. United States, 295 F.3d 1252, 1257-58 (Fed. Cir. 2002) (permitting review in U.S. Court of Federal Claims of violation of officer-evaluation regulation in the Air Force).

[266] Edmond v. United States, 520 U.S. 651, 659 (1997).

[267] Ass'n of American Railroads v. Dep't of Trans., 821 F.3d 19, 36 (D.C. Cir. 2016) (emphasis original).

[268] *Id.*

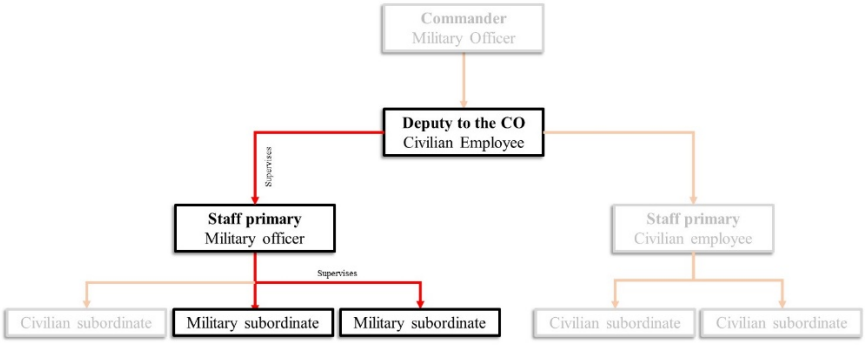
[269] United States v. Jordan, 22 C.M.R. 242, 244 (C.M.A. 1957).

[270] 5 U.S.C. § 3331 (2018).

but can be held accountable for the misuse of that authority in equal measure, including by criminal sanction. If there is an axiom here, it is this: one should not exercise power if one is not held commensurately accountable for it. As a consequence, the solution to the "Deputy To[o] problem" is simple in description, yet complex in execution: elimination.

Appendix A: Organizational Structure

Organizational Structure: Deputy to the Commander



NB: Organizational relationship that raises the Appointments Clause issue is in bold.