
NOTES

LEGISLATING AROUND THE APPOINTMENTS CLAUSE

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INTRODUCTION

On October 3, 2008, in the wake of the subprime mortgage crisis, President George W. Bush signed the Troubled Asset Relief Program, or TARP, into law.¹ Most significantly, TARP authorized Secretary of the Treasury Henry

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¹ Press Release, Office of the Press Secretary, President Bush Signs H.R. 1424 Into Law (Oct. 3, 2008), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2008/10/20081003-17.html>; *see also* Emergency Economic Stabilization Act of 2008, Pub.

Paulson to purchase and insure up to \$700 billion of “troubled assets.”² While much energy has been spent analyzing the long-term economic impact of injecting so much capital into the economy and criticizing the misuse of the federal aid,³ TARP also raises an interesting question regarding a little-discussed facet of Appointments Clause jurisprudence. The Appointments Clause specifies the proper way to appoint “Officers of the United States;”⁴ whenever Congress significantly changes the nature of an officer’s duties and effectively creates a new office, reappointment in accordance with the Constitution is likely required.⁵ Because the authority to purchase troubled assets is arguably dissimilar to the Treasury Secretary’s former duties, there is a valid concern that Congress did not merely augment existing duties but rather significantly expanded the authority, thereby creating a new office. Therefore, the question is whether TARP expanded the authority of Treasury Secretary Henry Paulson to such an extent that he required reappointment under the Appointments Clause.⁶

Since the Constitution was ratified in 1789, the Supreme Court has only directly addressed this issue twice: first in 1893 in *Shoemaker v. United States*,⁷ and then almost exactly 100 years later in *Weiss v. United States*.⁸ Since that time virtually no other lower court has substantively tackled the issue.⁹ Additionally, the only in-depth scholarly treatment of the limits the

L. No. 110-343, §§ 101-136, 122 Stat. 3765, 3767-3800 (codified at 12 U.S.C. §§ 5211-5241 (2006 & Supp. III 2009)).

² Emergency Economic Stabilization Act §§ 101, 115, 122 Stat. at 3767, 3780 (codified at 12 U.S.C. §§ 5211, 5225 (2006 & Supp. III 2009)).

³ While federal aid was intended to increase bank lending, commentators have criticized banks for instead using the aid for, among other things, making investments, paying-off their own debts, and even for paying bonuses to their employees. See, e.g., Binyamin Appelbaum, *Bailout Overseer Says Banks Misused TARP Funds*, WASH. POST, July 20, 2009, at A6; Liam Plevin et al., *AIG Faces Growing Wrath Over Payouts*, WALL ST. J., Mar. 16, 2009, at A1.

⁴ U.S. CONST. art. II, § 2, cl. 2.

⁵ See discussion *infra* Part III.A; see also *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (holding that all officers must be appointed in accordance with the Appointments Clause); *Shoemaker v. United States*, 147 U.S. 282, 300 (1893) (“[W]hile Congress may create an office, it cannot appoint the officer.”).

⁶ This issue was initially raised by Gary Lawson in *Burying the Constitution Under a TARP*, 33 HARV. J.L. & PUB. POL’Y 55, 67-70 (2010) (“[T]he most intellectually intriguing constitutional question surrounding TARP . . . is whether Secretary . . . is whether Secretary Henry Paulson was constitutionally authorized to administer the program during the Bush Administration.”).

⁷ 147 U.S. at 300-01 (analyzing whether members of a commission had to be reappointed as a result of the new duties assigned to them by an act of Congress).

⁸ 510 U.S. 163, 165 (1994) (“[Deciding] whether the current method of appointing military judges violates the Appointments Clause of the Constitution . . .”).

⁹ In the years immediately following *Weiss* there were a few cases that raised the germaneness issue, however, they did not add any significant substance to the *Weiss*-

Appointments Clause places on Congress's ability to expand the authority of a currently serving officer is about ten pages of a 2007 law review article by Professor David R. Stras and Ryan W. Scott.¹⁰ This sparse background forms a basic framework with which to approach the problem, but one in which the contours of the analysis are largely undefined.

As one would expect, the extreme limits on Congress's power are not in dispute. If, for example, in addition to giving Secretary Paulson the authority to buy troubled assets, TARP granted the Secretary the authority to administer the war in Afghanistan or a new health care program, then that would certainly be the type of expansion of authority that creates a new constitutional office and requires reappointment.¹¹ TARP, however, is not that extreme; it does, after all, fit within the general notion of the Treasury Secretary working to ensure a healthy economy. The problem is one of line drawing and this Note seeks to identify where the Constitution (or if that is not clear, the Supreme Court) draws that line, while exploring and developing the contours of the existing doctrine.

Shoemaker framework. Several military appeals courts use almost identical language to cite *Weiss* in support of the proposition that military judges are inferior officers, each holding that "[t]he power to convene courts-martial is clearly germane to the position of commander." *United States v. Grindstaff*, 45 M.J. 634, 636 (N-M. Ct. Crim. App. 1997); *United States v. Vasquez*, No. NMCM 96 00439, 1996 WL 927640, at *2-3 (N-M. Ct. Crim. App. Sep. 25, 1996); *United States v. Barraza*, No. NMCM 96 00305, 1996 WL 927754, at *2 (N-M. Ct. Crim. App. Sept. 10, 1996); *United States v. Hinson*, No. NMCM 95 02212, 1996 WL 927752, at *2-3 (N-M. Ct. Crim. App. Sept. 10, 1996); *United States v. Miller*, No. NMCM 95 02100, 1996 WL 927884, at *2 (N-M. Ct. Crim. App. Aug. 19, 1996). Most significantly, the Second Circuit held in *Lo Duca v. United States*, 93 F.3d 1100 (2d Cir. 1996), that judicial officers did not require reappointment in order to preside over extradition proceedings because the duties performed by extradition officers were "virtually identical," and therefore germane, to judges' normal duties despite the fact that the duties were not judicial in nature. *Id.* at 1110-11; *see also* discussion *infra* notes 181-187 and accompanying text.

¹⁰ David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 494-507 (2007) (discussing the constitutionality of senior judges in light of the Appointments Clause). The topic was touched on generally in John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 103-05 (1998) (providing an overview of the majority and concurring opinions in *Weiss*), and was mentioned in a footnote in Gary Lawson & Guy Seidmann, *Taking Notes: Subpoenas and Just Compensation*, 66 U. CHI. L. REV. 1081, 1102 n.80 (1999) (citing *Weiss* as an example of how germaneness is "a slippery concept that is likely to cause problems wherever it appears"). However, other than a student casenote examining *Weiss*, the specific issue of when changing an officer's duties requires reappointment has not been given more than a passing mention. *See* P. Dean Brinkley, Note, *Military Judges, One Appointment or Two: Weiss v. United States*, 30 TULSA L.J. 157, 159-62, 166 (1994) (providing an overview of the *Weiss* opinion and concluding that the majority erred in not applying the germaneness standard).

¹¹ *See* Lawson, *supra* note 6, at 67.

A definitive answer to this question could have sweeping implications. The Appointments Clause provides potentially fertile ground to mount challenges to government programs and agency decisions that are predicated on the authority of an officer who may have required reappointment. In the context of TARP and the still-brewing economic crisis, the limitations of the Appointments Clause could have massive implications on the way in which the government does business. If the standard to determine whether Congress had effectively created a new office were sufficiently clear to practically allow for such a constitutional challenge, then that standard would serve as a significant limit on the power of Congress, or at least on the speed at which it could act. Reform to any major program, from health care to social security, would be susceptible to a constitutional challenge if it resulted in a major expansion of an officer's duties. This is especially relevant when the political parties are especially polarized. Congress may wish to deny a President the opportunity to appoint the head of a new department, or a President, ever fearful of a Senate filibuster, may come up with creative ways to place heads of new agencies while avoiding the requisite "advice and consent."¹² Furthermore, any massive reform would be subject to additional public scrutiny since the new duties would not only have to survive a public debate before the new law took effect, but would also be examined as the affected officers were being reappointed.

Before delving too far into this issue, it is worth observing that the issue of constitutionally required reappointment relies largely on a formalist interpretation of the Appointments Clause. A formalist approach begins by drawing distinctions between categories – in the case of the Appointments

¹² In fact, similar Appointments Clause issues arise in two interesting ways due to passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Among other things, the statute creates a new agency, the Consumer Financial Protection Bureau, requiring the appointment of a director with the advice and consent of the Senate. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 1964 (2010) (to be codified at 12 U.S.C. § 5491). Related to the TARP inquiry of this Note, the Secretary of the Treasury "is authorized to perform the functions of the Bureau" until a director is appointed. § 1066(a) (to be codified at 12 U.S.C. § 5586). Like TARP, the Consumer Protection Act involves an increase in the Treasury Secretary's authority, albeit for a limited time. More interesting is the politics that have surrounded the creation of this new agency. Fearing a Republican filibuster, President Obama has not appointed a director of the agency, choosing instead to appoint Elizabeth Warren as a "special advisor" who functionally heads the agency subject to oversight by the President and Secretary of the Treasury. Sewell Chan, *Consumer Advocate to Lead New Watchdog Agency as Assistant to Obama*, N.Y. TIMES, Sept. 16, 2010, at B3; Sewell Chan, *Interim Plan for Warren Raises Even Supporters' Eyebrows*, N.Y. TIMES, Sept. 17, 2010, at B2. While this does not raise identical legal issues (and may in fact be distinguishable by the fact that Warren is very likely not a principal officer, and therefore validly appointed regardless), it is an illustration that with increased political polarization it is ever more likely that the technical mechanisms of otherwise mundane appointments will come under greater scrutiny.

Clause, between principal and inferior officers – and then strictly applying the text of the Constitution to those categories.¹³ However, the Court has not been consistently formalist in interpreting the structural provisions of the Constitution, occasionally focusing on the function of those provisions instead.¹⁴ A functionalist approach is more flexible as it is not tied to categories within the constitutional text, but rather seeks to uphold the underlying policies and relationships within the Constitution.¹⁵

From the functionalist perspective, the President is charged with the appointment of officers because he has a comparative advantage over Congress. For example, he is better able to identify and vet suitable individuals. Therefore, the argument goes, since the President appointed Henry Paulson and could veto any expansion of his authority, even if Congress did effectively create a new office, it did not disrupt the comparative advantage of the Executive regarding appointments because the President maintained his constitutional control over that office. Under this view, TARP does not violate the separation of powers because, absent a violation of an express constitutional provision, it does not unduly impinge on the Executive's appointment function.¹⁶

However, this argument may prove too much. While it may be that the President technically has appointed the officer, this does not necessarily mean that Congress does not violate the Appointments Clause when it *functionally*

¹³ Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987); see, e.g., *INS v. Chadha*, 462 U.S. 919, 944-51 (1983).

¹⁴ Strauss, *supra* note 13, at 489.

¹⁵ See, e.g., *Chadha*, 462 U.S. at 978 (White, J., dissenting) (“The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.” (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952))); Nick Bravin, Note, *Is Morrison v. Olsen Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1116 (1998) (discussing a “functionalist trend in Appointments Clause jurisprudence”); Andrew Owen, Note, *Toward a New Functional Methodology in Appointments Clause Analysis*, 60 GEO. WASH. L. REV. 536, 554-59 (1992) (arguing that classification as an officer versus an employee should depend on whether that person's duties functionally impinge on individual rights).

¹⁶ See *Chadha*, 462 U.S. at 1000 (White, J., dissenting) (“[T]he proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.” (citations and internal quotation marks omitted)). Justice White's underlying argument in *Chadha* was that the legislative veto was functionally necessary to *preserve* the separation of powers between the branches after the delegation of legislative authority to administrative agencies, something lost in the majority's formal categorical approach. *Id.* at 972-73.

exercises the appointment power by creating a new office. In fact, one could make a functionalist counterargument that Congress violates the Appointments Clause when it effectively, though not explicitly, exercises an appointment power precisely because the Executive is better equipped to exercise such a power and the President's veto power is not specific enough to cure the separation-of-powers issue.¹⁷

A second and related functionalist argument against the formalist approach is that because the President has the power to remove an officer after Congress changes that officer's duties, Congress's interference does not "unduly trammel[] on executive authority," or "impede the President's ability to perform his constitutional duty."¹⁸ Under this view there is no constitutional violation because the functional relationship between the branches is preserved.

One obvious retort is that the President's power to fix Congress's constitutional overreach does not make the overreach constitutional. Furthermore, Congress has a limited ability to restrict the President's removal power – for example, it may require the President to show good cause for the removal.¹⁹ Therefore, one could imagine a situation in which Congress significantly expanded the duties of an existing officer in addition to exercising its power to effectively prevent the President from removing that officer; the result would be a circumvention of the alleged removal-power protection of the executive authority to appoint.²⁰ The significance of this issue is clearer when considering the inverse situation in which the President changes or expands the duties of an existing officer. Logically, the same analysis should apply²¹ because the President arguably would be usurping the legislative role in contravention of the separation-of-powers function underlying the

¹⁷ Similarly, in *Chadha*, the Court held that, while Congress may delegate some of its legislative function to the Executive Branch, "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." *Id.* at 955 (majority opinion). Statutes, signed by the President, providing a legislative veto were not enough to alter this delegation.

¹⁸ *Morrison v. Olson*, 487 U.S. 654, 691 (1988). In *Morrison*, the Court explicitly rejected a formalist approach to the President's removal power. The functionalist arguments made by the Court in *Morrison*, could, though currently do not, apply in the appointments context. See Note, *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914, 1922 (2007) ("[The Court has] seemed to reject a 'functionalist' account of the Appointments Clause (unlike, for example, its treatment of the President's removal power).").

¹⁹ See *Morrison*, 487 U.S. at 691-92 (finding that a provision requiring the President to show good cause for a termination did not unconstitutionally interfere with his discretion or authority).

²⁰ This of course would depend on how broadly the President's "executive power," as mentioned in *Morrison*, 487 U.S. at 690, is interpreted.

²¹ See *infra* Part III.

Appointments Clause.²² However, Congress does not have a removal power absent impeachment. Therefore, while removal *may* protect the integrity of the Appointments Clause when Congress is aggrandizing its power at the expense of the Executive, the same protection does not exist when the roles are reversed.²³

Ultimately much of this discussion depends on whether, as a theoretical matter, the Constitution should be interpreted functionally or formally – a topic well outside the subject matter of this Note. Nonetheless, as discussed below, the Appointments Clause is one of the rare instances in which the Supreme Court has fairly consistently applied a formalist analysis.²⁴ Therefore, while the functionalist/formalist distinction is important, this Note confines the discussion to the relevant cases and will not directly address the debate over methods of constitutional interpretation.

With these caveats in mind, Part I proceeds to supply context to the practical aspects of this discussion by providing a brief overview of the history of the Treasury Department and the events that gave rise to TARP. Part II will summarize the history and basic mechanics of the Appointments Clause. It will also provide an outline of the existing germaneness standard used to evaluate a challenge under the Appointments Clause and discuss some of the difficulties in applying this analysis. Part III applies the existing Appointments Clause doctrine to TARP and explores some of the contours of the germaneness standard. This Note concludes that Secretary Paulson likely did not require reappointment.²⁵

I. THE TREASURY DEPARTMENT AND THE TROUBLED ASSET RELIEF PROGRAM

To analyze the constitutionality of TARP under the Appointments Clause, it is necessary to have a basic understanding of the role of the Secretary of the Treasury, the function of TARP, and the reasons for its passage – namely the subprime mortgage crisis.

²² See *infra* Part II.A.1.

²³ While Congress might be able to cut funding to the office or the agency, this seems to be too weak a method of protecting the integrity of the Appointments Clause.

²⁴ See *infra* Part II.B; see also *Edmond v. United States*, 520 U.S. 651, 658-66 (1997) (elaborating on the text of the Appointments Clause to determine whether the appointment at issue was proper); *Buckley v. Valeo*, 424 U.S. 1, 124-34 (1976) (relying on an interpretation of the text and the Framers' intent). *But see* *Bowsher v. Synar*, 478 U.S. 714, 766 (1986) (White, J., dissenting) (arguing that while *Buckley* reflected “the principle that ‘the Legislative Branch may not exercise executive authority,’” it did not preclude “other means by which Congress might exercise authority over those who execute its laws” (quoting *Buckley*, 424 U.S. at 119)); *INS v. Chadha*, 462 U.S. 919, 1000 (1983) (White, J., dissenting) (distinguishing *Buckley* as a case where a specific constitutional provision was violated rather than a general adoption of a formalist methodology).

²⁵ Sorry to ruin the conclusion. You can stop reading now if you wish.

A. *The Treasury Department*

The Department of the Treasury is the second oldest department in the Federal Government. Congress established the Department during its first session in 1789,²⁶ formalizing and expanding the duties of Treasury Office of Accounts, which had been established under the Articles of Confederation.²⁷ The establishing Act contained one paragraph that delineated fairly sparse and vague duties of the Secretary of the Treasury.²⁸ The Treasury Secretary's current duties are now found in Title 31 of the United States Code. Generally, the Secretary's duties and authority range from improving the management of the receipt of public money,²⁹ minting currency,³⁰ and prescribing regulations that will "promote the public convenience and security" and protect against "fraud and loss,"³¹ to investing operating funds³² and issuing a variety of bonds.³³ Broadly stated, the Treasury Department is "responsible for promoting economic prosperity and ensuring the financial security of the United States."³⁴

²⁶ Act of Sept. 2, 1789, ch. 12, 1 Stat. 65, 65-67 (current version at 31 U.S.C. § 301 (2006)).

²⁷ See Office of the Curator, *Treasury History Overview*, U.S. DEPARTMENT OF THE TREASURY, 3 (2006), [http://www.treasury.gov/about/education/Documents/brochure%20\(1\).pdf](http://www.treasury.gov/about/education/Documents/brochure%20(1).pdf).

²⁸ Act of Sept. 2, 1789, 1 Stat. at 65-66.

Chap. XII. An Act to establish the Treasury Department. . . .

Sec. 2. *And be it further enacted*, That it shall be the duty of the Secretary of the Treasury to digest and prepare plans for the improvement and management of the revenue, and for the support of public credit; to prepare and report estimates of the public revenue, and the public expenditures; to superintend the collection of revenue; to decide on the forms of keeping and stating accounts and making returns, and to grant under the limitations herein established, or to be hereafter provided, all warrants for monies to be issued from the Treasury, in pursuance of appropriations by law; to execute such services relative to the sale of the lands belonging to the United States, as may be by law required of him; to make report, and give information to either branch of the legislature, in person or in writing (as he may be required), respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office; and generally to perform all such services relative to the finances, as he shall be directed to perform.

Id. (footnote omitted).

²⁹ 31 U.S.C. §§ 321(a)(1), 3301(a) (2006).

³⁰ *Id.* § 321(a)(4).

³¹ *Id.* § 321(a)(5).

³² *Id.* § 323(a).

³³ *Id.* §§ 3102-3113.

³⁴ *Duties & Functions of the U.S. Department of the Treasury*, U.S. DEPARTMENT OF THE TREASURY, <http://www.treasury.gov/about/role-of-treasury/Pages/default.aspx> (last updated Dec. 7, 2010).

B. *The Subprime Mortgage Crisis and TARP*

In 2008, TARP was passed in response to the now infamous subprime mortgage crisis. Although a detailed analysis of the subprime mortgage crisis is beyond the scope of this Note, a brief review is helpful to put TARP in context. The subprime mortgage crisis refers to the ongoing financial crisis that resulted from a massive increase in mortgage foreclosures in the United States.³⁵ Although the causes of the crisis remain debated, arguably one leading cause was the increase of subprime lending in the United States that allowed borrowers with poor credit scores to easily obtain loans.³⁶ Such high-risk lending was facilitated by the practice of mortgage securitization by which financial institutions packaged mortgages and sold them to investors as mortgage-backed securities.³⁷ The risks associated with these new securities were difficult for the market to evaluate.³⁸

As housing prices continued to rise, the United States was widely recognized as experiencing a housing bubble. The bubble burst in late 2006 – interest rates increased as home values plummeted, resulting in a dramatic rise of mortgage defaults and foreclosures.³⁹ Perhaps the most significant result was a loss of investor confidence, making it more difficult for lenders to sell their mortgages on the secondary market.⁴⁰ As the number of foreclosures reached their peak in late 2007 and 2008, investors that purchased mortgage-backed securities found themselves holding financial assets with rapidly declining values.⁴¹ As a result of this toxic debt, banks were not lending, bringing the economy to a virtual standstill.⁴²

TARP was designed to address the problem by authorizing the Secretary of the Treasury to purchase “troubled assets,” such as “residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages,”⁴³ and any other financial instrument the

³⁵ See Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 *FORDHAM L. REV.* 1607, 1624-26 (2010) (describing the origins and possible causes of the “Great Recession”).

³⁶ *Id.* at 1625 (tracing the increase in available credit to government policies, economic conditions, and “innovations within the housing and mortgage industry”).

³⁷ *Id.* at 1625-26.

³⁸ *Id.* at 1626 (“In contrast to its long experience with the traditional loan terms that still largely characterize prime lending, the industry had no experience in valuing the risks associated with the exotic loan terms underlying subprime-mortgage-backed securities.”).

³⁹ *Id.* at 1627.

⁴⁰ *Id.*

⁴¹ See, e.g., Vikas Bajaj et al., *Broader Losses From Mortgages*, *N.Y. TIMES*, Oct. 25, 2007, at A1 (“Merrill Lynch said yesterday that it would take a charge for mortgage-related securities on its books that is \$3 billion more than the \$5 billion it expected just two weeks ago.”).

⁴² Davidson & Dyal-Chand, *supra* note 35, at 1630.

⁴³ Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 3(9), 122 Stat.

Secretary believes is necessary “to promote financial market stability.”⁴⁴ In essence, TARP, as originally conceived,⁴⁵ authorized the Treasury Secretary to purchase these troubled assets to stabilize financial institutions and enable them to again provide credit to the economy.⁴⁶ Part III will address in greater detail portions of TARP relevant to the Appointments Clause.

II. THE APPOINTMENTS CLAUSE

To understand why congressional expansion of an officer’s duties may pose a constitutional problem, it is necessary to understand the relevant constitutional foundation. The Appointments Clause states:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.⁴⁷

Broadly stated, there are three general issues that arise in analyzing a challenge under the Appointments Clause.⁴⁸ First, it is evident that the Appointments Clause only applies to appointing “Officers of the United States,”⁴⁹ and not to mere employees of the government. Next, the Appointments Clause draws a distinction between “Officers”⁵⁰ (i.e. principal officers) – which include ambassadors, public ministers, and judges⁵¹ – and “inferior Officers,”⁵² and delineates different potential modes of appointment for the inferior officers. Finally, after an officer is appointed, it is necessary to determine whether any additional duties or authority granted to the officer

3765, 3767 (codified at 12 U.S.C. § 5202 (2006 & Supp. III 2009)).

⁴⁴ *Id.*

⁴⁵ Although Congress granted Secretary Paulson the power to purchase troubled assets, he ultimately never did so, opting instead to infuse the capital directly into the financial institutions through the purchase of preferred stock. See Deborah Solomon, *Treasury Considers Private Role in TARP*, WALL ST. J., Nov. 12, 2008, at A4.

⁴⁶ Davidson & Dyal-Chand, *supra* note 35, at 1630 (“The concept behind this plan [to buy troubled assets] was stanching the uncertainty created out of fear of the inability to value assets backed by this so-called ‘toxic’ debt, which in turn was blocking lending.”).

⁴⁷ U.S. CONST. art. II, § 2, cl. 2.

⁴⁸ The basic structure of this analysis is adapted from GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 122-24 (4th ed. 2007).

⁴⁹ U.S. CONST. art. II, § 2, cl. 2.

⁵⁰ *Id.*

⁵¹ See *id.*

⁵² *Id.*

effectively create a new constitutional office, requiring that the officeholder be reappointed.⁵³ This third issue will be the primary focus of this Note.

A. *Purposes of the Appointments Clause*

Before delving into the contours of the Appointments Clause analysis, it is helpful to understand the functions and purposes served by the Appointments Clause. There are essentially three underlying principles: the anti-aggrandizement principle, the accountability principle, and the “formalist principle.”⁵⁴ The first two principles seek to *directly* protect the purposes of the Appointments Clause by protecting separation of powers and ensuring political accountability.⁵⁵ The “formalist principle” is not an explicitly articulated principle; rather it is an illustration of an interpretive method that seeks to *indirectly* protect the purposes of the Appointments Clause through strict adherence to its text.⁵⁶ While these principles operate in the background, they play a prominent role in determining when Congress has expanded the authority of an officer to the extent that necessitates reappointment.

1. Separation of Powers: The Anti-Aggrandizement Principle

The anti-aggrandizement principle is essentially concerned with protecting the separation of powers. In the context of the Appointments Clause, this means preventing one branch of government from aggrandizing its appointment power at the expense of another or from abdicating its duties under the Appointments Clause.⁵⁷ For example, the Appointments Clause, by referring to principal officers “established by Law,” and referencing Congress’s sole authority to change the mode of appointment of inferior officers,⁵⁸ ensures that the President cannot “unilaterally . . . create and fill federal offices.”⁵⁹ The anti-aggrandizement principle is thus served by vesting the authority to create an office in Congress and the authority to fill that office,

⁵³ *Weiss v. United States*, 510 U.S. 163, 173-74 (1994); *Shoemaker v. United States*, 147 U.S. 282, 301 (1893); *see also infra* Part II.B.2.

⁵⁴ I use the term “formalist principle” as shorthand for the textualist rationale adopted by Justice Scalia in *Weiss*, as explained *infra* text accompanying notes 70-72.

⁵⁵ *Weiss*, 510 U.S. at 183-87 (Souter, J., concurring); *see also* Stras & Scott, *supra* note 10, at 495-96 (explaining that the anti-aggrandizement and accountability principles “animate the corollary to the Appointments Clause that Congress may not fundamentally change an existing office’s duties”). While these two principles underlying the Appointments Clause were most clearly stated in Justice Souter’s concurrence in *Weiss*, as one would expect the Court slowly recognized and developed the principles as they explored the contours of the Appointments Clause. For an overview of the case law that led to the articulation of these two principles, *see* Yoo, *supra* note 10, at 97-105.

⁵⁶ *Weiss*, 510 U.S. at 196 (Scalia, J., concurring).

⁵⁷ *Id.* at 187-88 (Souter, J., concurring).

⁵⁸ U.S. CONST. art. II, § 2, cl. 2.

⁵⁹ *Weiss*, 510 U.S. at 187 n.2 (Souter, J., concurring).

subject to the consent of the Senate, in the President.⁶⁰ Furthermore, Congress is limited in whom it can vest the power to appoint inferior officers.⁶¹

Separation of powers also requires that the branches of government do not abdicate their constitutional duties – a practice that might lead to political gamesmanship. For example, it is not difficult to imagine the President finding some political advantage in vesting the power to appoint certain principal officers in Congress (perhaps it would incentivize Congress to pass the President’s desired legislation).⁶² This is technically not an example of self-aggrandizement because Congress is accepting authority from another branch rather than usurping it.⁶³ The danger to the separation of powers, however, is the same.

2. Informing the Voters: The Accountability Principle

The Appointments Clause also serves to ensure political accountability. By dictating who can create offices and who can appoint officeholders, the Appointments Clause ensures that the public knows exactly whom to hold accountable if it disapproves of an appointment, or whom to lobby for an appointment that it finds favorable.⁶⁴ There is some overlap of accountability within the structure of the Appointments Clause; for example, the President’s appointment of principal officers requires the Senate’s advice and consent.⁶⁵ This provides a structural check on political accountability. However, the Appointments Clause balances this diffusion of accountability by making the separation of authority clear and limited to a finite set of actors to enable the

⁶⁰ *Id.* at 184 (“Just as the Appointments Clause’s grant to the President of the power to nominate principal officers would avert legislative despotism, its requirement of Senate confirmation would serve as an ‘excellent check’ against Presidential missteps or wrongdoing.”); Stras & Scott, *supra* note 10, at 495 (“By altering the duties of an existing office, however, Congress can not only effectively create a new office, but also hand-pick the officer from among the ranks of current officeholders – a power that would intrude on the exclusive province of the Executive branch.”).

⁶¹ U.S. CONST. art. II, § 2, cl. 2 (“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.”); *see also* Buckley v. Valeo, 424 U.S. 1, 138-39 (1976) (stating that while Congress may create an office, it is bound by the Appointments Clause when vesting the authority to appoint).

⁶² This hypothetical is adapted from an example posed by Justice Souter in *Weiss*, 510 U.S. at 187-88 (Souter, J., concurring).

⁶³ *See id.* at 188 n.3 (explaining that the situation in which the President allows Congress to appoint a principal officer violates the bar on abdication, not aggrandizement); Yoo, *supra* note 10, at 104.

⁶⁴ *Weiss*, 510 U.S. at 186 (Souter, J., concurring).

⁶⁵ U.S. CONST. art. II, § 2, cl. 2; *Weiss*, 510 U.S. at 186 (Souter, J., concurring) (“[T]he Appointments Clause separates the Government’s power but also provides for a degree of intermingling, all to ensure accountability and ‘preclude the exercise of arbitrary power.’” (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting))).

public to hold the President and Senators accountable for “injurious appointments.”⁶⁶

Furthermore, a prohibition against abdication can also be interpreted as promoting political accountability.⁶⁷ For example, if the President, instead of vesting appointment authority in Congress, vested the power to appoint certain principal officers in a lower-level executive officer, then there is no aggrandizement or separation-of-powers issue because no other branch is gaining the appointment power – it remains within the Executive Branch.⁶⁸ But by abdicating his duty to appoint in this way, the President is nonetheless diffusing the appointment authority and making it more difficult for the public to hold any official accountable for selecting ineffective government officers.⁶⁹

3. Determining the Method of Appointment: The “Formalist Principle”

The Appointments Clause also serves the more straightforward purpose of simply dictating the procedure for the appointment of officers. In so doing, the Clause not only serves the functions outlined above, but through strict application it also protects more subtle purposes that judges and lawyers may overlook.⁷⁰ Although this “formalist principle” has never expressly been recognized by the Court as an underlying purpose or function of the Appointments Clause specifically, this is the idea that animates Justice Scalia and Justice Thomas’s concurrence in *Weiss*, so it deserves at least a passing mention.

The logic is very straightforward: “Violation of the Appointments Clause occurs . . . when Congress, *without* aggrandizing itself, effectively lodges appointment power in any person other than those whom the Constitution specifies.”⁷¹ Therefore, *whenever* Congress gives power to confer duties upon an officer to someone not mentioned in the Appointments Clause, there is the

⁶⁶ *Weiss*, 510 U.S. at 186 (Souter, J., concurring).

⁶⁷ *Id.* at 188 n.3.

⁶⁸ This hypothetical is adapted from one in Justice Souter’s concurrence in *Weiss* which contemplated a situation in which *Congress* authorized a lower-level executive official to make the appointment. *Id.* While the President delegating appointment power to a lower-level executive official mitigates the separation-of-powers concern, the hypothetical raises other Appointments Clause issues as the appointment power is not necessarily vested in the office of the Executive, but is arguably vested in the person of the President. *See* U.S. CONST. art. II, § 1, cl. 1 (“The executive Power *shall be vested in a President* of the United States of America.” (emphasis added)).

⁶⁹ *See Weiss*, 510 U.S. at 188 n.3 (Souter, J., concurring) (“[I]f Congress, with the President’s approval, authorizes a lower level Executive Branch official to appoint a principal officer, it again has adopted a more diffuse and less accountable mode of appointment . . .”).

⁷⁰ Stras & Scott, *supra* note 10, at 499 (“Fidelity to the text of the Constitution, rather than its purported underlying purposes, avoids the risk of improperly focusing on but one of the overlapping or even competing purposes animating a particular provision.”).

⁷¹ *Weiss*, 510 U.S. at 196 (Scalia, J., concurring).

potential for a constitutional violation. From a formalist perspective, this is all that matters – there is no need to determine which values are promoted by the text or what functions are served by the Appointments Clause because the only way to ensure that *all* the purposes of the text are protected is to follow the text.⁷²

B. *Overview of the Appointments Clause Doctrine*

1. Identifying an Officer of the United States

Essential to understanding an Appointments Clause challenge to TARP is an understanding of the basic doctrine. As may be apparent from the text of the Clause, the first analytical step requires determining who is an officer of the United States and who is a mere employee. The Court addressed this question in *Buckley v. Valeo*.⁷³ *Buckley* involved a federal law that empowered the Speaker of the House and President *pro tempore* of the Senate to appoint four of the six members of the Federal Election Commission (FEC).⁷⁴ The Court, employing a formalist analysis, concluded that the text of the Appointments Clause requires that principal officers be appointed by the President with the advice and consent of the Senate and that inferior officers be appointed directly by the President, courts, or the heads of departments.⁷⁵ Because Article II does not authorize Congress to appoint either type of officer, if the members of the FEC were officers for Appointments Clause purposes, then their appointment was unconstitutional. The Court concluded that an officer is defined by the nature of his duties and that “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States.’”⁷⁶ Ultimately the Court found that members of the FEC exercised “significant authority” and that therefore their appointment was unconstitutional.⁷⁷

Of course no one is arguing that the Secretary of the Treasury is not an officer of the United States; members of the Cabinet exercise significant authority pursuant to the laws of the United States.⁷⁸ What is perhaps most interesting about *Buckley*’s definition of officer, and most important for the purposes of this Note, is not that an officer must exercise “significant

⁷² Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 (2010) (“Textualism . . . maintains that the statutory text is the only reliable indication of congressional intent.”).

⁷³ 424 U.S. 1 (1976).

⁷⁴ *Id.* at 113.

⁷⁵ *Id.* at 118-19 (holding that the Appointments Clause “is the exclusive method by which those charged with executing the laws of the United States may be chosen”).

⁷⁶ *Id.* at 126 (quoting U.S. CONST. art. II, § 2, cl. 2).

⁷⁷ *Id.* at 139-40 (holding that the functions of the commission “may be discharged only by persons who are ‘Officers of the United States’” (quoting U.S. CONST. art. II, § 2, cl. 2)).

⁷⁸ *See id.* at 127 (stating that the phrase “Heads of Departments” in the Appointments Clause likely refers to departments within the Executive Branch).

authority” but that the term “‘Officer of the United States’ . . . is a term intended to have substantive meaning.”⁷⁹ If the term “officer” for purposes of the Appointments Clause referred only to the title, without regard to the accompanying substantive duties, then the constitutional requirement would be satisfied so long as principal officers were appointed by the President with the advice and consent of the Senate and inferior officers were appointed by a constitutionally authorized superior.⁸⁰ Any subsequent additions of authority would be irrelevant as the Appointments Clause would not pertain to the substance of the office, only the process of appointment. While this may not be an implausible interpretation of the constitutional text, it is not the holding in *Buckley*.⁸¹ Therefore, any changes to an officer’s substantive duties – if significant enough – could create a new office for constitutional purposes and require reappointment.⁸²

After determining that the appointed individual in question is an officer of the United States, the Appointments Clause then distinguishes between the mode of appointment of principal and inferior officers. Although this step is not directly relevant in discussing the Secretary of the Treasury – who is clearly a principal officer⁸³ – Justice Souter thought the distinction between principal and inferior officers highly relevant in determining when an officer requires reappointment, arguing that the Appointments Clause forbids an officer from having the duties of both a principal and an inferior officer.⁸⁴ This distinction may well be relevant in other related contexts that raise issues similar to those discussed in this Note.⁸⁵

⁷⁹ *Id.* at 125-26 (quoting U.S. CONST. art. II, § 2, cl. 2); *see also* LAWSON, *supra* note 48, at 130 (positing that *Buckley* defines “an officer of the United States for purposes of the appointments clause as any federal official who is important enough to be considered an officer of the United States for purposes of the appointments clause”).

⁸⁰ Specifically “the President alone, . . . the Courts of Law, or . . . the Heads of Departments.” U.S. CONST. art. II, § 2, cl. 2.

⁸¹ *Buckley*, 424 U.S. at 125 (“The Appointments Clause could, of course, be read as merely dealing with etiquette or protocol in describing ‘Officers of the United States,’ but the drafters had a less frivolous purpose in mind.”); Stras & Scott, *supra* note 10, at 495-96 (arguing that the text of the Appointments Clause and the anti-aggrandizement and accountability principles indicate that the term “officer” has substantive meaning).

⁸² *Shoemaker v. United States*, 147 U.S. 282, 300 (1893) (“[W]hile Congress may create an office, it cannot appoint the officer.”).

⁸³ *See infra* text accompanying notes 96-98.

⁸⁴ *Weiss v. United States*, 510 U.S. 163, 191 (1994) (Souter, J., concurring) (“[T]he Appointments Clause forbids the creation of [] a single office that combines inferior- and principal-officer roles, thereby disregarding the special treatment the Constitution requires for the appointment of principal officers.”).

⁸⁵ For example, when analyzing the issues surrounding President Obama’s appointment of Elizabeth Warren, one would likely have to account for the fact that while she has the formal appearances of an inferior officer (or perhaps merely an employee) in that she has been appointed directly by the President to act as an advisor, she is exercising the authority

The Supreme Court has articulated two possible methods of distinguishing between a principal and an inferior officer. In *Morrison v. Olson*,⁸⁶ the Court held that the Independent Counsel Act was constitutional, finding that the Independent Counsel (IC) was an inferior officer and therefore could be appointed by the Special Division, a court of law.⁸⁷ The IC was created to investigate the Executive Branch and, as such, the President could not remove her from office.⁸⁸ The Court used a modified version of the *Buckley* test to examine the nature and extent of the IC's duties. Ultimately, the Court found that the IC's duties were not substantial enough to classify the IC as a principal officer because the Attorney General could remove the IC (even though the President could not) and because the IC's office was of limited scope, jurisdiction, and tenure.⁸⁹ Justice Scalia vigorously dissented, arguing that "one is not an 'inferior officer' . . . unless one is subject to supervision by a 'superior officer,'" and because the IC had no superior – not even the President – then any appointment other than by the President with the advice and consent of the Senate is unconstitutional.⁹⁰ Nine years later in *Edmond v. United States*,⁹¹ the Court reexamined the issue, holding that judges of the Coast Guard Court of Criminal Appeals were inferior officers for purposes of the Appointments Clause.⁹² Although the Court did not overturn *Olson*, it seemed to adopt the position of Justice Scalia's dissent, holding that "[w]hether one is an 'inferior' officer depends on whether he has a superior."⁹³ Thus, the Supreme Court has articulated two potential frameworks to determine whether an officer is principal or inferior: the *Morrison* factors examining the nature and extent of the office and the *Edmond* requirement of having a superior in order to be classified as an inferior officer.

of a principal officer by effectively running the new agency. See discussion *supra* note 12.

⁸⁶ 487 U.S. 654 (1988).

⁸⁷ *Id.* at 655.

⁸⁸ *Id.* at 671.

⁸⁹ *Id.* at 671-73. Specifically the Court found several factors that led it to the conclusion that the IC was an inferior officer: "First, appellant is subject to removal by a higher Executive Branch official Second, appellant is empowered by the Act to perform only certain, limited duties Third, appellant's office is limited in jurisdiction Finally, appellant's office is limited in tenure." *Id.*

⁹⁰ *Id.* at 720-21 (Scalia, J., dissenting).

⁹¹ 520 U.S. 651 (1996).

⁹² *Id.* at 666.

⁹³ *Id.* at 662-63; see also *id.* at 667 (Souter, J., concurring) (disagreeing with the majority's opinion that simply "[b]ecause the term 'inferior officer' implies an official superior, one who has no superior is not an inferior officer."). Recently, the Court quoted *Edmond* to distinguish between a principal and inferior officer in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3162 (2010). While the Court did cite *Morrison* with respect to the President's removal power, it did not discuss the *Morrison* factors in determining whether members of the Public Company Accounting Oversight Board were inferior officers. *Id.* at 3153-58, 3162.

The fact that the Appointments Clause distinguishes between principal and inferior officers also raises a more conceptual problem. Suppose, for example, that an officer began her career as an inferior officer and Congress elevated her duties and authority to the level of a principal officer. Presumably, under *Buckley* she would then have to be reappointed by the President with the advice and consent of the Senate.⁹⁴ Similarly, suppose someone started out as a mere employee and Congress vested the position with “significant authority.”⁹⁵ Suddenly this person, who may have been hired through any number of processes, none of which likely conform to the requirements of the Appointments Clause, would constitutionally be an officer of the United States for Appointments Clause purposes. Certainly this type of change illustrates the necessity of reappointment and could serve as an outer-limit on the extent to which Congress can expand an officer’s authority.

Of course the Secretary of the Treasury is clearly a principal officer as he easily passes both the *Edmond* and *Morrison* tests.⁹⁶ The position satisfies the

⁹⁴ See *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (“We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed by [the Appointments Clause].”).

⁹⁵ *Id.*

⁹⁶ See 31 U.S.C. § 301(b) (2006) (“The head of the Department is the Secretary of the Treasury. The Secretary is appointed by the President, by and with the advice and consent of the Senate.”); *United States v. Germaine*, 99 U.S. 508, 511 (1878) (“[T]he principal officer in the one case is the equivalent of the head of department in the other.”). While theoretically it may be possible to be the head of a department and an inferior officer (the IC might be an example), it seems very unlikely. One might point to *Freytag v. Commissioner*, 501 U.S. 868 (1991), where the majority found that the Tax Court was a court of law and therefore the Chief Judge had validly appointed inferior trial judges. *Id.* at 890-92. One could interpret the majority opinion to allow for the possibility that the Chief Judge is an inferior officer yet still be authorized to appoint inferior trial judges. However, the majority did not find that the Chief Judge was a head of the department but that the Tax Court was a court of law. *Id.* Justice Scalia concurred but argued that the majority erred in not finding the Chief Judge of the Tax Court to be a “head of a department” because “the Tax Court is a free-standing, self-contained entity in the Executive Branch, whose Chief Judge is removable by the President (and, save impeachment, no one else).” *Id.* at 915 (Scalia, J., concurring). While this formulation of what constitutes a head of a department is very similar to Justice Scalia’s formulation of a principal officer as one with no superior, it is not identical and might still satisfy the *Morrison* factors. *Edmond*, 520 U.S. at 662; *Morrison v. Olson*, 487 U.S. 654, 719 (1988) (Scalia, J., dissenting). Regardless, even if this is a possibility it would not affect the status of the Treasury Secretary. The majority in *Freytag* mentioned the Treasury Secretary’s non-inferior status when it held that the term “Department” refers only to “‘a part or division of the executive government, as the Department of State, or of the Treasury,’” and “does not embrace ‘inferior commissioners and bureau officers.’” *Freytag*, 501 U.S. at 886 (emphasis added) (quoting *Germaine*, 99 U.S. at 511).

Edmond test because as the “head of the Department,”⁹⁷ the Secretary has no superior other than the President. The Secretary of the Treasury also easily satisfies the *Morrison* factors. While the Secretary is “subject to removal by a higher Executive Branch official,”⁹⁸ his duties are broadly defined and he has broad jurisdiction.⁹⁹ Furthermore, there is no built-in limit on his tenure in office. Therefore, unless Congress’s ability to expand an officer’s duties is limited only by the minimal outer limit discussed above,¹⁰⁰ the distinction between principal and inferior officers does little analytic work for purposes of determining the constitutionality of TARP under the Appointments Clause.

2. The Germaneness Standard

Having established that the Secretary of the Treasury is a principal officer of the United States, we are now squarely faced with the primary issue of this Note: how to determine when an expansion of an officer’s authority has created a new office for constitutional purposes requiring reappointment. The Court touched on this issue in *Shoemaker v. United States*,¹⁰¹ when it evaluated the germaneness of additional congressionally-granted authority to the existing duties of previously appointed officers.¹⁰² In *Shoemaker*, Congress enacted a statute establishing a five-person commission to supervise development of the Rock Creek Park in the District of Columbia.¹⁰³ While three members of the commission were properly appointed by the President and approved by the Senate, two members were appointed by the statute because of their positions as the Chief of Engineers of the Army and the Engineer Commissioner of the District of Columbia, both otherwise properly appointed officers of the United States.¹⁰⁴ In a challenge to the commission’s taking of land for the park, one argument raised was that these latter two commissioners required reappointment because “while Congress may create an office, it cannot appoint the officer.”¹⁰⁵ The Court agreed but found that while the commissioners were officers for the purposes of the Appointments Clause, they did not require reappointment because Congress had not created a new

⁹⁷ 31 U.S.C. § 301(b).

⁹⁸ *Morrison*, 487 U.S. at 671.

⁹⁹ See *infra* Part III.C.1.

¹⁰⁰ While attractive in its simplicity, requiring reappointment only when a position is elevated to a higher rank would only serve the purposes of the Appointments Clause with respect to inferior officers, as there would be no limit on Congress with respect to expanding the duties of principal officers. Furthermore, determining when a principal officer’s duties are sufficiently enhanced to require reappointment seems to be no more than a different articulation of the existing germaneness standard.

¹⁰¹ 147 U.S. 282 (1893).

¹⁰² *Id.* at 301.

¹⁰³ *Id.* at 284.

¹⁰⁴ *Id.* at 284, 301.

¹⁰⁵ *Id.* at 300.

office.¹⁰⁶ The Court held that when dealing with existing officers of the United States, “because additional duties, *germane to the offices already held by them*, were devolved upon them by the act, it was [not] necessary that they should be again appointed by the President and confirmed by the Senate.”¹⁰⁷ The Court found it unnecessary to precisely define germaneness, as the additional duties in question “could not fairly be said to [be] dissimilar to, or outside the sphere of,” the officers’ original duties.¹⁰⁸ Therefore, under *Shoemaker*’s germaneness standard, if the new duties vested in Secretary Paulson under TARP are similar to, or within the sphere of, his preexisting duties, then there is no constitutional violation.

The Supreme Court did not address this issue again for over 100 years, when the issue arose in *Weiss v. United States*¹⁰⁹ in the context of military judges.¹¹⁰ Weiss, a U.S. Marine, challenged his conviction for larceny arguing that the military judges presiding over his case did not have authority to convict because they were not properly appointed under the Appointments Clause.¹¹¹ Weiss argued that because of the special duties involved in serving as a military judge, commissioned officers of the United States Marine Corps required a second appointment to serve in that position.¹¹²

The Court decided to distinguish *Shoemaker* rather than apply the germaneness standard.¹¹³ The majority stated that unlike *Shoemaker*, this case did not involve Congress “unilaterally appointing an incumbent to a new and distinct office.”¹¹⁴ Rather, Congress had authorized an “indefinite number of military judges” to be selected from hundreds or thousands of qualified officers.¹¹⁵ The Court reasoned that a germaneness inquiry was unnecessary because there was no danger that Congress was aggrandizing its power in contravention of the Appointments Clause, the underlying purpose the germaneness standard intends to protect.¹¹⁶ In this case “there is no ground for suspicion . . . that Congress was trying to both create an office and also select a particular individual to fill the office.”¹¹⁷

The majority went on to apply the germaneness analysis in dicta, concluding that even if germaneness was the standard, the duties of a military judge were

¹⁰⁶ *Id.* at 301.

¹⁰⁷ *Id.* (emphasis added).

¹⁰⁸ *Id.*

¹⁰⁹ 510 U.S. 163 (1994).

¹¹⁰ *Id.* at 174.

¹¹¹ *Id.* at 165.

¹¹² *Id.* at 169-70.

¹¹³ *Id.* at 174-75.

¹¹⁴ *Id.* at 174.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

germane to those of a regular commissioned officer.¹¹⁸ In determining that the new duties were germane to the established ones, the majority compared the statutory duties of commissioned officers of the United States Marine Corps to those of a military judge.¹¹⁹ The entirety of the Court's germaneness analysis in *Weiss* consist of 422 words, specifically reviewing a total of five statutory provisions.¹²⁰ Four provisions relate to the duties of a commissioned officer: 10 U.S.C. § 807(c), which grants officers the power to "quell quarrels, frays, and disorders" and to "apprehend [such] persons;" 10 U.S.C. § 815, which allows Commanding officers to punish minor offenses; 10 U.S.C. § 851, which allows a military officer to resolve issues normally handled by a military judge during proceedings with no judge; and 10 U.S.C. § 860, which provides convening authorities "the authority to review and modify the sentence imposed by courts-martial."¹²¹ The remaining analysis dealt with the duties of a military judge: the Court cited both the military tribunal's legal analysis concluding that military judges have no more authority than other officers until they have been detailed to a court-martial,¹²² and 10 U.S.C. § 826(c), which allows an officer serving as a military judge to perform nonjudicial duties.¹²³ After outlining the duties and authority granted by the statutory provisions, the Court concluded: "Whatever might be the case in civilian society, we think that the role of military judge is 'germane' to that of military officer."¹²⁴ The Court did not explain *why* these similarities were adequate, except to say that "the position of military judge is less distinct from other military positions than the office of full-time civilian judge is from other offices in civilian society."¹²⁵

Concurring, Justice Souter argued that the majority erred in considering only the anti-aggrandizement principle of the Appointments Clause while ignoring the accountability principle.¹²⁶ Justice Souter stated that the requirement of presidential appointment and Senate confirmation is necessary not only to preserve checks and balances, but also to allow the public to "hold the President and Senators accountable for injudicious appointments," a principle undercut when any branch abdicates its responsibility to appoint.¹²⁷

¹¹⁸ *Id.* at 174-75.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 175-76.

¹²¹ *Id.* at 175.

¹²² *Id.* (citing *United States v. Weiss*, 36 M.J. 224, 228 (C.M.A. 1992) (interpreting the duties of military judges as defined by statute and executive order)).

¹²³ *Id.* at 175-76.

¹²⁴ *Id.* at 176.

¹²⁵ *Id.* at 175. Arguably, the germaneness standard is very similar to the *Morrison* test for inferior officers. While *Morrison* requires that an officer's duties be sufficiently important to be a principal officer, the germaneness standard requires that the new duties be sufficiently different to require reappointment. See LAWSON, *supra* note 48, at 146-48.

¹²⁶ *Weiss*, 510 U.S. at 188-89 (Souter, J., concurring).

¹²⁷ *Id.* at 186.

Most interesting, and seemingly most influential, was Justice Scalia's concurrence, joined by Justice Thomas.¹²⁸ Justice Scalia argued that the majority erred in not applying *Shoemaker's* germaneness analysis, stating that the "[g]ermaneness analysis must be conducted . . . whenever that is necessary to assure that the conferring of new duties does not violate the Appointments Clause."¹²⁹ Justice Scalia argued that the Appointments Clause is violated not only when Congress seeks to aggrandize itself, but also whenever it gives an officer duties that amount to assuming a new office.¹³⁰ Justice Scalia and Justice Thomas agreed with the majority's germaneness analysis, also concluding that the duties of a military judge were germane to those of a commissioned officer.¹³¹

Therefore, the standard for determining when the Appointments Clause requires reappointment remains unclear in two respects. First, it is unclear when the germaneness standard applies, that is, it is unclear when a germaneness analysis is unnecessary because "there is no ground for suspicion"¹³² that Congress is trying to circumvent the Appointments Clause. Second, assuming that the germaneness standard must be applied, it is unclear what degree of similarity is necessary in order for the officer's new duties to be constitutionally germane.

III. THE CONSTITUTIONALITY OF TARP UNDER THE APPOINTMENTS CLAUSE

A. *Determining the Right Standard*

If, as *Weiss* indicates, the Court may not apply a germaneness analysis in every instance, then to determine whether TARP required Secretary Paulson to be reappointed requires a finding that Congress either acted in the interest of self-aggrandizement or abdicated its role in a manner that diffuses accountability.¹³³ The *Weiss* majority distinguished the facts of *Shoemaker* by placing special significance on the fact that *Shoemaker* involved the expansion

¹²⁸ With so little written on the topic, it is difficult to predict how influential Justice Scalia and Justice Thomas' view will be. However, in the fifteen years since *Weiss* the lone law review article and single student casenote that discuss *Weiss* have concluded that the majority erred in failing to apply the germaneness standard. See Stras & Scott, *supra* note 10, at 498 ("We share these scholars' general agreement with the germaneness standard, and we doubt that we could formulate a more textually satisfying method of determining whether added duties change an office so fundamentally that the President must reappoint the officeholder."); Brinkley, *supra* note 10, at 166 ("In *Weiss*, the majority mistakenly declined to apply a 'germaneness' analysis.").

¹²⁹ *Weiss*, 510 U.S. at 196 (Scalia, J., concurring).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 174 (majority opinion).

¹³³ See *id.* at 189 (Souter, J., concurring) ("The Appointments Clause forbids both aggrandizement and abdication.").

of authority of a single officer, whereas *Weiss* involved “an indefinite number of military judges, who could be designated from among hundreds . . . of qualified officers.”¹³⁴

The *Weiss* majority reasoned that a germaneness inquiry is only appropriate when there is a “ground for suspicion” that Congress is trying to circumvent the principles of the Appointments Clause.¹³⁵ This might be interpreted to require an examination of the legislative history to determine Congress’s subjective intent. However, a careful reading of *Weiss* reveals that only an examination of the face of the statute is required. The *Weiss* Court did not delve into an analysis of the legislative history; instead it looked at the text of applicable statutes to determine that there was no basis for suspecting Congress of bad intent.¹³⁶ This standard is not only much easier to apply, but it also practically limits *Weiss* to its facts. The situation in *Weiss* was unique in that there were thousands of officers who could have been appointed to the higher position. TARP, like the statute examined in *Shoemaker*, involved expanding the duties and authority of a single officer by an act of Congress and therefore must withstand a germaneness analysis even under the majority in *Weiss*.

A germaneness analysis is also required if, as Justice Scalia and Justice Thomas argue, germaneness is relevant whenever it “is necessary to assure that the conferring of new duties does not violate the Appointments Clause” or whenever “Congress gives power to confer new duties to anyone other than the few potential recipients of the appointment power.”¹³⁷ Justice Scalia argues that only through this analysis will all of the purposes of the Appointments Clause be protected.¹³⁸ Stras and Scott also disagree with the majority in *Weiss* that a germaneness analysis was not necessary because Congress had not technically appointed a *particular* individual to a newly created office.¹³⁹ They argue that there are other constitutional values implicated by the Appointments Clause and fidelity to the text is necessary to realize those values.¹⁴⁰ A germaneness analysis, they argue, is required by the text and it ensures that courts will not selectively choose from the several constitutional values served by the Appointments Clause.¹⁴¹ Furthermore, the *Weiss*

¹³⁴ *Id.* at 174 (majority opinion).

¹³⁵ *Id.* (arguing that the distinction from *Shoemaker* is significant because “there is no ground for suspicion here that Congress was trying to both create an office and also select a particular individual to fill the office”).

¹³⁶ *Id.* (declining to apply a germaneness analysis in the absence of any indication of congressional impropriety).

¹³⁷ *Id.* at 196 (Scalia, J., concurring).

¹³⁸ *Id.*

¹³⁹ Stras & Scott, *supra* note 10, at 498-99.

¹⁴⁰ *Id.* at 499.

¹⁴¹ *Id.*

majority's approach leaves open the possibility of congressional gamesmanship.¹⁴²

In the unlikely event that the *Weiss* majority position applies to TARP, there would be reasonable grounds to suspect that Congress was attempting to circumvent the Appointments Clause as this is a straightforward case of expanding the duties of a single, specific officer of the United States.¹⁴³ Therefore, regardless of how one views the problem, it must be determined whether the expanded authority given to Secretary Paulson on October 3, 2008 was sufficiently germane to the duties he had on October 2, 2008 in order to pass constitutional muster. As will become apparent in the following pages, this is no small task. The complicated nature of the inquiry may be one reason why there have only been two Supreme Court cases that have addressed this issue in the last 200 years.

B. *Defining Germaneness*

At its most basic level, a germaneness analysis requires three steps: first, determining the existing statutory duties of the officer; second, determining the new or expanded duties of the officer; and finally, determining whether or not they are close enough to be considered germane. While the first two steps involve a meticulous inquiry into the relevant statutes, the last step is the most analytically ambiguous. As mentioned above, it is unclear to what degree an officer's new duties must be similar to the former duties in order to be considered germane for purposes of the Appointments Clause. As Justice Scalia mentioned in a different context, germaneness is a loose standard that "involves a substantial judgment call."¹⁴⁴

Making the germaneness analysis more difficult is that the result can depend entirely on how generally one defines an officer's original duties. The higher the level of generality at which one defines an officer's original duties, the

¹⁴² Specifically, if Congress wanted to avoid a germaneness inquiry and circumvent the anti-aggrandizement principle of the Appointments Clause, it appears that under the *Weiss* majority, Congress would need only to create a situation where there are many appropriately appointed officers. Congress could then create special duties to which only those officers could be later assigned. In effect, Congress would simply be creating an office knowing that an officer would be picked from a limited pool of acceptable officers. This may be reading too much into *Weiss*, as the majority does go out of its way to point out that "the military is a 'specialized society separate from civilian society.'" *Weiss*, 510 U.S. at 174 (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)). Moreover, creating such a pool of officers might be impractical outside of the military context.

¹⁴³ See *id.* (distinguishing *Shoemaker* as a case in which Congress was expanding the duties of two specific incumbent officers, rather than passing a statute that "authorized an indefinite number of military judges, who could be designated from among hundreds or perhaps thousands of qualified commissioned officers").

¹⁴⁴ *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 551 (1991) (Scalia, J., concurring and dissenting).

more likely the new duties will be germane.¹⁴⁵ For example, if one defines the existing duties of the Secretary of the Treasury as all activities pertaining to money in the United States (a plausible, if unreasonably broad, definition), then it is difficult to see how any additional duties under TARP would not be germane. The level of generality at which statutorily-defined duties are interpreted has proven to be a significant determinant in other Supreme Court decisions. For example, when considering compelled speech with respect to labor unions, both Justice Marshall and Justice Scalia disagreed with the majority regarding the level of generality at which the duties of a labor union should be defined, and therefore whether the union's activities were germane to those duties. While Justice Marshall thought the majority erred in defining the union's duties too narrowly (resulting in a holding against the union),¹⁴⁶ Justice Scalia argued that the majority erred in defining the union's duties more broadly than warranted by the statute.¹⁴⁷ This illustrates that even in the labor context, where there is a larger body of case law (albeit with cases which are more ideologically charged), the Supreme Court can still split on the basic issue of the level of generality at which to conduct a germaneness analysis.

C. *Applying the Germaneness Standard to TARP*

It seems clear that if TARP were challenged under the Appointments Clause, the court would apply the germaneness standard. It is worth noting that given the inherent messiness involved in a germaneness inquiry, it is possible to reach differing conclusions under this standard.¹⁴⁸ With this caveat in mind, this Part first analyzes the pre-TARP authority of the Secretary of the Treasury and examines the new TARP duties before finally comparing the two to determine whether the new duties are sufficiently germane to satisfy the standards set forth in *Shoemaker* and *Weiss*.

1. Pre-TARP Authority of the Secretary of the Treasury

The first step of the germaneness analysis is to determine the duties and authority of the Treasury Secretary before TARP was signed into law. This

¹⁴⁵ The significance of levels of generality is better developed in the literature on fundamental constitutional rights. *E.g.*, ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 148-49 (1997); RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 269-72 (1997); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 61 (1980); LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 73-74 (1991). Conceptually, the analysis and consequences are similar and are therefore informative in the germaneness context.

¹⁴⁶ *Lehnert*, 500 U.S. at 537 (Marshall, J., concurring and dissenting).

¹⁴⁷ *Id.* at 557 (Scalia, J., concurring and dissenting).

¹⁴⁸ For example, one could construe the relevant statutes to confer upon the Secretary of Treasury different existing or additional duties than those discussed in this Note. Alternatively, one could define germaneness at a different level of generality. Both of these variations may change the analysis and conclusion.

inquiry requires focusing on the duties of the original office that are authorized by the statute rather than the duties that the officer actually exercises.¹⁴⁹ This distinction is analytically important because it broadens the germaneness inquiry to include every statutorily-defined duty. Additionally, the principles underlying the Appointments Clause uphold separation of powers and political accountability by clearly delineating how Congress and the Executive can create and appoint an individual to an office based on the substance of the office,¹⁵⁰ not how the officer may exercise the authority of that office.¹⁵¹ For example, suppose that the Treasury Secretary were already authorized to purchase derivative securities (which would most likely satisfy a germaneness analysis), but Secretary Paulson never exercised that authority. If the analysis did not take into consideration all statutorily-defined duties, Congress and the President, in passing TARP, would be limited not only by the statute but also by how the Secretary chose to exercise his existing authority. Such an arbitrary standard would either require a (practically impossible) historical examination of every action that an officer executed or result in differing outcomes depending on *when* the analysis was conducted. Such a standard could also create perverse incentives in how an officer exercises his discretionary duties. Therefore, the inquiry must involve an examination of all of the *potential* activity of the officer *at the time of appointment* to determine whether the President and Senate contemplated the possibility of the Treasury Secretary buying toxic assets.¹⁵²

The Treasury Secretary's authority, duties, and limitations are delineated in several provisions in Title 31 of the United States Code. Beginning in § 301, the Secretary is established as the head of the Treasury Department, to be appointed by the President with the advice and consent of the Senate.¹⁵³ Title 31 then outlines the administrative aspects of the Department of the Treasury.¹⁵⁴ The general authority of the Secretary is divided into mandatory

¹⁴⁹ See Stras & Scott, *supra* note 10, at 498 (“[T]he Court correctly focused on the statutory definition of the original office, rather than the duties typically carried out by the officeholders.”); see also *Weiss v. United States*, 510 U.S. 163, 175 (1994) (comparing the statutory duties of a commissioned officer with the statutory duties of a military judge); *United States v. Grindstaff*, 45 M.J. 634, 636 (N-M. Ct. Crim. App. 1997) (examining the statutory duties of commanders to convene courts-martial in order to determine germaneness).

¹⁵⁰ *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (“[A]ny appointee exercising significant authority . . . [must] be appointed in the manner prescribed by [the Appointments Clause].”).

¹⁵¹ Stras & Scott, *supra* note 10, at 498 (“Appointments Clause challenges are aimed at the act of appointment, not the execution of the office.”).

¹⁵² See *id.* (“A court determining whether the President and Senate contemplated some new set of duties for a given office at the time of appointment must examine the full universe of duties associated with that office at that time, not just the work typically performed by the officeholder.”).

¹⁵³ 31 U.S.C. § 301 (2006).

¹⁵⁴ *Id.* §§ 321-333.

and optional duties.¹⁵⁵ The Secretary's mandatory duties include carrying out services "related to finances," collecting revenue, managing the public debt, printing currency and minting coins, promoting public convenience and security, and protecting the government and public against fraud and loss related to government debt.¹⁵⁶ The Secretary's optional duties include promulgating regulations necessary to carry out enumerated duties and delegating duties to others within the Department.¹⁵⁷

After establishing the Treasury Secretary's general duties, § 323 permits the Secretary to invest the operating cash of the Treasury, subject to various restrictions.¹⁵⁸ The obligations purchased with operating cash may then be sold or exchanged "for cash, obligations, property, or a combination [of the three]."¹⁵⁹ Title 31 also establishes limitations on the Secretary's outside activities, prohibiting, for example, involvement in "trade or commerce,"¹⁶⁰ mandating various procedural and administrative requirements,¹⁶¹ and outlining miscellaneous administrative authority of the Secretary, including the authority to acquire and insure foreign land.¹⁶²

As is becoming apparent, the comparison required by the germaneness inquiry is no small task. While many specific duties are detailed, this is all in the context of the vague general duty of the Treasury Secretary to "promote the public convenience and security."¹⁶³ Given the lack of guidance on a precise germaneness standard, any of these duties may be the key to determining whether TARP unconstitutionally expands the Secretary's authority. This Note will go into greater detail of the Treasury Secretary's duties in determining whether the new duties under TARP are sufficiently germane.¹⁶⁴

2. Post-TARP Authority of the Secretary of the Treasury

Though determining the Treasury Secretary's post-TARP authority is an easier task, the result is just as unhelpful. On October 3, 2008, Congress granted Treasury Secretary Henry Paulson the authority to "purchase, and to make and fund the commitments to purchase, troubled assets from any financial institution," and to determine the terms and conditions of those

¹⁵⁵ *Id.* § 321.

¹⁵⁶ *Id.* § 321(a).

¹⁵⁷ *Id.* § 321(b).

¹⁵⁸ *Id.* § 323 ("The Secretary may invest the operating cash of the Treasury in – (1) obligations of depositories maintaining Treasury tax and loan accounts secured by pledged collateral acceptable to the Secretary; (2) obligations of the United States Government; and (3) repurchase agreements with parties acceptable to the Secretary.").

¹⁵⁹ *Id.* § 324(a)-(b).

¹⁶⁰ *Id.* § 329.

¹⁶¹ *Id.* § 331.

¹⁶² *Id.* § 332.

¹⁶³ *Id.* § 321(a)(5).

¹⁶⁴ *See infra* text accompanying notes 196-220.

purchases.¹⁶⁵ As is typical of statutes establishing or expanding administrative authority, the Secretary is given broad authority to “take such actions as the Secretary deems necessary to carry out the authorities in this Act.”¹⁶⁶

The Act goes on to list a non-exhaustive set of actions the Secretary is authorized to take to administer TARP, including hiring employees,¹⁶⁷ “entering into contracts,”¹⁶⁸ “designating financial institutions as financial agents of the Federal government,”¹⁶⁹ and “[i]ssuing such regulations and other guidance as may be necessary or appropriate to define terms or carry out the authorities or purposes of this Act.”¹⁷⁰ The purposes of the Act are to provide the Secretary with the “authority and facilities” necessary to “restore liquidity and stability to the financial system of the United States”¹⁷¹ in a manner that, to summarize, helps citizens and the economy.¹⁷²

If the Secretary chooses to establish a program to buy troubled assets, he is required to insure the assets and to collect premiums from the companies participating in the program.¹⁷³ Section 103 of the Act lays out various “considerations” the Secretary must take into account when exercising his authority to purchase troubled assets.¹⁷⁴ In sum, the Secretary is granted the authority to purchase troubled assets and can take any actions he deems necessary, so long as it helps the nation’s economy.

If the constitutionality of TARP were to be litigated, the second portion of the germaneness analysis would be simpler as it is likely that a plaintiff would challenge a specific provision or expansion of authority.¹⁷⁵ This Note will focus on the Secretary’s broad authority to purchase troubled assets.

¹⁶⁵ Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 101(a)(1), 122 Stat. 3765, 3767 (codified at 12 U.S.C. § 5211 (2006 & Supp. III 2009)).

¹⁶⁶ *Id.* § 101(c).

¹⁶⁷ *Id.* § 101(c)(1).

¹⁶⁸ *Id.* § 101(c)(2).

¹⁶⁹ *Id.* § 101(c)(4).

¹⁷⁰ *Id.* § 101(c)(5).

¹⁷¹ *Id.* § 2(1) (codified at 12 U.S.C. § 5201 (2006 & Supp. III 2009)).

¹⁷² Specifically, section 2 of the Act provides that the purpose of the Act is to ensure that the authorities and facilities granted to the Secretary are used in a manner that “(A) protects home values, college funds, retirement accounts, and life savings; (B) preserves homeownership and promotes jobs and economic growth; (C) maximizes overall returns to the taxpayers of the United States; and (D) provides accountability for the exercise of such authority.” *Id.* § 2(2).

¹⁷³ *Id.* § 102 (codified at 12 U.S.C. § 5212 (2006 & Supp. III 2009)).

¹⁷⁴ *Id.* § 103 (codified at 12 U.S.C. § 5213 (2006 & Supp. III 2009)) (listing, for example, the interests of taxpayers, stability and eligibility of financial institutions, and retirement security). While this is more specific than the vague purposes in section 2, the considerations are drafted broadly and provide the Secretary with considerable discretion in exercising his power.

¹⁷⁵ This has certainly been the case where this issue has arisen. *See Weiss v. United States*, 510 U.S. 163, 170-71 (1994) (challenging the authority of military officers to serve

3. Are the New Duties Germane?

The final step in the analysis is to determine whether the new broad and vague authority granted to Secretary Paulson by TARP is germane to his former broad and vague authority. As discussed above, the ultimate inquiry requires examining specific statutory provisions to determine whether Congress effectively created a new office by delegating the new duties to Secretary Paulson.¹⁷⁶

In evaluating germaneness, the Court in *Shoemaker* explained that the new duties were not “dissimilar to, or outside the sphere of,” the original duties.¹⁷⁷ This simple analysis seems to indicate that the Court defined the officer’s original duties at a relatively high level of generality. The *Weiss* majority reasoned that the duties of military judges are germane to those of ordinary military officers and emphasized that military officers could settle disputes and impose discipline for minor infractions.¹⁷⁸ The slew of military appeals court decisions that followed *Weiss* provide little guidance in that they cite the statutory duties of the officer and find the additional duties “clearly germane” but provide no analysis for that conclusion.¹⁷⁹ However, these cases are helpful in that they place some weight on the fact that “[t]he administration of military justice is just one of the additional responsibilities for which the

as military judges without reappointment); *Shoemaker v. United States*, 147 U.S. 282, 300-01 (1893) (challenging additional authority granted to the Chief of Engineers of the Army and the Engineer Commissioner of the District of Columbia); *Lo Duca v. United States*, 93 F.3d 1100, 1110-11 (2d Cir. 1996) (challenging a judge’s duties as an “extradition officer”).

¹⁷⁶ See *supra* notes 149-152 and accompanying text.

¹⁷⁷ *Shoemaker*, 147 U.S. at 301.

¹⁷⁸ *Weiss*, 510 U.S. at 174-75 (“Although military judges obviously perform certain unique and important functions, all military officers, consistent with a long tradition, play a role in the operation of the military justice system.”). Though not relevant to the specific issue discussed here, the majority in *Weiss* also found it significant that the military judges were not *appointed* to their positions, but were *assigned* or *detailed* to those positions. *Id.* at 175-76. The Court points out that until detailed, an officer assigned to be a military judge has no more authority than any other officer. *Id.* Justice Scalia further emphasized this distinction when writing for the majority in *Edmond v. United States*, stating that “[t]he difference between the power to ‘assign’ officers . . . and the power to ‘appoint’ those officers is not merely stylistic.” 520 U.S. 651, 657 (1997). He further solidified the importance of this distinction by stating that the Court in *Weiss* upheld the assignment of officers as military judges because they had already been appointed and Congress had not “designated the position of a military judge as one requiring reappointment.” *Id.* (citing *Weiss*, 510 U.S. at 176). However, unlike the military judges in *Weiss*, the Secretary of the Treasury was not assigned or detailed to a new position with additional authority, rather he was specifically granted new authority. Therefore, this distinction cannot be used to circumvent or modify the germaneness analysis. See discussion *supra* note 142 and accompanying text.

¹⁷⁹ See, e.g., *United States v. Grindstaff*, 45 M.J. 634, 636 (N-M. Ct. Crim. App. 1997) (citing the Uniform Code of Military Justice which lists the authority to convene special court-martial as a duty of a commander); cases cited *supra* note 9.

officer now has *greater* responsibility.”¹⁸⁰ This may indicate that the *expansion* of existing duties may be less suspicious than the *creation* of new duties that are similar to the officer’s current authority. Of course, we must not put too much emphasis on boilerplate language from an intermediate appellate court.

The only other case that provides any useful guidance is *Lo Duca v. United States*¹⁸¹ from the Second Circuit. In *Lo Duca*, the petitioner argued, among other things, that a U.S. extradition statute was unconstitutional because the judges serving as extradition officers required a second appointment.¹⁸² In holding that the additional duties were germane and therefore that the judges did not require a second appointment, the court stated that the “duties performed by an extradition officer are *virtually identical* to those performed every day by judges and magistrate judges.”¹⁸³ These new extradition duties were considered germane to the judges’ original duties despite the fact that the court did not view the extradition duties as judicial.¹⁸⁴ The court recognized the potential violation of separation of powers¹⁸⁵ but noted that it was dealing with a unique circumstance in which the extradition duties, though not judicial in nature, were sufficiently similar to the functions of judicial duties.¹⁸⁶ While the *Lo Duca* court differentiated between the nature and function of the duties, it nonetheless held that in some circumstances a new duty can have a different nature but still have a sufficiently similar function to be considered germane.¹⁸⁷ The germaneness standard thus has developed very little since *Shoemaker* as the ultimate inquiry still seems to be whether the new duties are “dissimilar to, or outside the sphere of,”¹⁸⁸ the original duties, with the additional caveat that the constitutional nature of the duties (i.e., legislative, executive, or judicial) is not necessarily dispositive.¹⁸⁹

Even a cursory comparison of the Secretary’s duties in Title 31 to the duties in the Emergency Economic Stabilization Act of 2008 makes it clear that

¹⁸⁰ *Grindstaff*, 45 M.J. at 636 (emphasis added). Each of the other cited military appeals court cases use nearly identical language. See cases cited *supra* note 9.

¹⁸¹ 93 F.3d 1100 (2d Cir. 1996).

¹⁸² *Id.* at 1110.

¹⁸³ *Id.* (emphasis added).

¹⁸⁴ *Id.* at 1107 (“[S]ince the decisions of extradition officers are subject to revision by the Secretary of State, those officers do not exercise judicial power within the meaning of Article III.”).

¹⁸⁵ *Id.* at 1108 (“[Petitioner argues the statute] violates the doctrine of separation of powers insofar as it seeks to require Article III courts to conduct non-Article III extradition proceedings.”).

¹⁸⁶ *Id.* at 1111 n.11 (“We think that this situation falls within a narrow (perhaps unique) set of circumstances where the function is technically non-judicial in nature, but sufficiently similar to judicial functions so as to satisfy the ‘germaneness’ requirement.”).

¹⁸⁷ *Id.*

¹⁸⁸ *Shoemaker v. United States*, 147 U.S. 282, 301 (1893).

¹⁸⁹ See *Lo Duca*, 93 F.3d at 1111 n.11.

TARP would fail *Lo Duca*'s "virtually identical" example of germaneness.¹⁹⁰ There are no duties in Title 31 that approach the novel authority granted in TARP to allow the Treasury Secretary to purchase troubled assets. However, while the *Lo Duca* court stated that the new duties examined in that case were virtually identical, it did not require such a high standard in every case.¹⁹¹ Furthermore, by finding non-judicial duties germane to judicial duties,¹⁹² the court seemed to define the functions of those duties at a relatively high level of generality, resulting in a looser standard. Additionally, the concept of a constitutional "nature" of duties is even less relevant in the context of the Treasury Department. Unlike the magistrate judge in *Lo Duca*, whose original duties were exclusively judicial in nature, the Treasury Secretary is not limited to adjudicative duties¹⁹³ but also enjoys executive and quasi-legislative authority as well.¹⁹⁴ Furthermore, it is important to keep in mind that *Lo Duca* was not a Supreme Court opinion and its law is not controlling outside of the Second Circuit.

This brings us back to the *Shoemaker* germaneness standard which requires only that the new duties granted by TARP not be "dissimilar to, or outside the sphere of," the former ones.¹⁹⁵ Given the novelty of TARP, one could argue that the new authority granted to the Secretary is by definition dissimilar and outside the scope of any old duties, which almost exclusively focused on authority *within* the Treasury Department. However, while the nature of the inquiry makes it impossible to reach a definitive conclusion, this Note will demonstrate that the new duties granted by TARP were most likely germane to the Treasury Secretary's former duties and that when considered in conjunction with the seemingly loose standard for germaneness, there is a persuasive argument that reappointment was not required by the Appointments Clause of the Constitution.

Section 323 authorizes the Secretary to "invest any part of the operating cash of the Treasury for not more than 90 days" in government bonds or other low-risk debt securities.¹⁹⁶ The Secretary also has the authority to sell those debt securities "for cash, obligations, property, or a combination [of the

¹⁹⁰ *Id.* at 1110.

¹⁹¹ *Id.* (stating only that the fact that the duties were "virtually identical" "fully met" the standard set forth in *Shoemaker*).

¹⁹² *Id.* at 1111 n.11.

¹⁹³ While many of the adjudicative duties of the Treasury Department are vested in the administrative law judges employed by the Treasury Secretary, 31 U.S.C. § 321(c) (2006), the Secretary does retain some adjudicative functions. *See, e.g.*, § 330 (allowing the Secretary, "[a]fter notice and opportunity for a proceeding," to punish representatives before the Treasury Department who are incompetent, disreputable, violate regulations, or mislead a represented person).

¹⁹⁴ *See, e.g., id.* § 321(b) ("The Secretary may . . . prescribe regulations to carry out the duties and powers of the Secretary.").

¹⁹⁵ *Shoemaker v. United States*, 147 U.S. 282, 301 (1893).

¹⁹⁶ 31 U.S.C. § 323.

three].”¹⁹⁷ At first blush these duties do not appear to be similar to an authority to purchase toxic assets. However, while TARP is traditionally referred to as part of the “bailout,” it could also be characterized as an investment, albeit one of a different sort than the investment contemplated in § 323.¹⁹⁸ The Treasury Department would essentially be buying derivative securities,¹⁹⁹ which are an investment vehicle. Additionally, § 323 requires that the Secretary’s investment in bonds essentially be secured by “collateral acceptable to the Secretary;”²⁰⁰ similarly, TARP requires that the Secretary secure any purchase of troubled assets with an insurance policy.²⁰¹

Alternatively, TARP could be conceptualized as not dissimilar to exchanging an obligation for property (the toxic assets). Section 324 allows the Secretary to obtain property in exchange for “bonds, notes, [and] other securities.”²⁰² While this gives the Secretary the authority to *purchase* property, exchanging property for bonds and other securities looks quite similar to exchanging cash for troubled assets – a type of security. Conceptualized at this level of generality, the Treasury could be said to have a history of purchasing securities with property, making the situation look more like *Weiss* where the court found germaneness in light of military officers’ long history of participating in the military justice system.²⁰³ Of course, the specific duties at issue in *Weiss* were more similar than those at issue here.

¹⁹⁷ *Id.* § 324(b).

¹⁹⁸ While we do not know whether troubled assets would have proven to be good investments for the Treasury, some inferences can be drawn from the Treasury’s purchase of banks’ preferred stock, known as the Capital Purchase Program, which many argue was a success. Karl Rove, in an interview with *Politico*, stated that TARP worked because “we will end up making a profit on that . . . \$247 billion.” Mike Allen, *POLITICO Interview: Karl Rove*, *POLITICO* (Mar. 11, 2010), http://www.politico.com/news/stories/0310/34248_Page2.html; see also Peter Cohan, *Good Investment? U.S. Makes \$4 Billion Profit on \$700 Billion TARP*, *DAILYFINANCE* (Aug. 31, 2009), <http://www.dailyfinance.com/story/good-investment-u-s-makes-4-billion-profit-on-700-billion-ta/19145673/> (arguing that “TARP was a great idea – but not for its original purpose of buying toxic waste,” instead because “TARP’s yield so far is about 15 percent annualized – roughly triple the five percent expected last October”); Sharon Hayes, *TARP is Investment in Bank Stocks*, *TIMESNEWS.NET* (Mar. 14, 2009), <http://www.timesnews.net/article.php?id=9012440> (“While it’s often called a bailout on the national news, under its Capital Purchase Program, TARP is actually an investment by the government in preferred stock of participating banks, and those banks are expected to buy their shares back, plus interest.”).

¹⁹⁹ See Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 101(a)(1), 122 Stat. 3765, 3767 (codified at 12 U.S.C. § 5211 (2006 & Supp. III 2009)).

²⁰⁰ 31 U.S.C. § 323(a)(1).

²⁰¹ Emergency Economic Stabilization Act § 102, 122 Stat. at 3768-70 (codified at 12 U.S.C. § 5212 (2006 & Supp. III 2009)).

²⁰² 31 U.S.C. § 324(b), historical and revision notes (“The word ‘obligations’ is substituted for ‘bonds, notes, or other securities’ for the consistency in the revised title.”).

²⁰³ *United States v. Weiss*, 510 U.S. 163, 174-75 (1994).

Notably, § 323 limits the Secretary's investment to no more than ninety days and arguably requires lower-risk securities than those contemplated by TARP.²⁰⁴ However, germaneness only requires that the duties not be "dissimilar to, or outside of the sphere of,"²⁰⁵ existing duties and TARP appears to satisfy this requirement.

The Treasury Secretary also has the authority, when necessary for the performance of official business, to "acquire in foreign countries real property by lease for periods not greater than 10 years and personal property for use in foreign countries by purchase, lease, or otherwise"²⁰⁶ and to purchase commercial insurance to protect the property acquired.²⁰⁷ This authority is limited in that it applies only to leasing property in foreign countries, has a ten-year limit, and is administrative in nature.²⁰⁸ However, the Secretary can exercise this authority whenever it is needed for the "performance of official business,"²⁰⁹ which would include the broad mandates in § 321 of regulating to promote "public convenience and security" and protecting against fraud.²¹⁰ This broad purpose maps fairly well with the rather open-ended purpose of TARP to "restore liquidity and stability to the financial system of the United States" in a manner that helps the national economy.²¹¹

²⁰⁴ See 31 U.S.C. § 323(a)(1).

²⁰⁵ *Shoemaker v. United States*, 147 U.S. 282, 301 (1893). In fact, the germaneness requirement may be even less demanding. The Court in *Shoemaker* reasoned that they had no need to define germaneness because the officers' new duties "could not fairly be said to [be] dissimilar to, or outside the sphere of," their original duties, *id.*, which would allow for the possibility of an even lower standard. Of course it would not be wise to rest an argument solely on an inference from ambiguous language in a nearly 120-year-old opinion.

²⁰⁶ 31 U.S.C. § 332(10)(A)(i). The section provides that:

The Secretary of the Treasury may to the extent provided in advance by appropriation Acts . . .

(A) when necessary for the performance of official business –

(i) acquire in foreign countries real property by lease for periods not greater than 10 years and personal property for use in foreign countries by purchase, lease, or otherwise, and

(ii) manage, maintain, repair, improve, and insure by purchase of commercial insurance policies properties referred to in clause (i), and

(B) when appropriate, dispose of (by sale, rent, transfer, or otherwise) properties referred to in subparagraph (A)(i).

Id. § 332(10).

²⁰⁷ *Id.* § 332(10)(A)(ii).

²⁰⁸ *Id.* § 332(10)(A)(i).

²⁰⁹ *Id.* § 332(10)(A).

²¹⁰ *Id.* § 321(a)(5).

²¹¹ Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 2, 122 Stat. 3765, 3766 (codified at 12 U.S.C. § 5201 (2006 & Supp. III 2009)); see also discussion *supra* note 172 and accompanying text.

The Treasury Secretary is also authorized to “issue bonds . . . to the public,” and to set an interest rate and prescribe conditions.²¹² The Secretary must first offer the bonds as “a popular loan,”²¹³ and can then issue bonds in any other form, with broad discretion in the administration of the bonds so long as it is in “the public interest.”²¹⁴ This provision seems very different from TARP. The underlying purpose is to raise money for authorized expenditures, not to stabilize the economy.²¹⁵ Moreover, the Secretary is *selling* bonds, an obligation to the public, rather than *purchasing* troubled assets, an obligation that will be owed the Treasury. However, while purchasing troubled assets may not be “within the scope” of selling bonds, it may not be *entirely* dissimilar. Buying and selling securities can be viewed as two sides of the same coin. One could analogize this to *Weiss*, where the Court found military officers’ authority to “quell quarrels”²¹⁶ germane to a military judge’s ability to adjudicate a court-martial.²¹⁷ While these are different activities – breaking up ongoing fights versus imposing backward-looking relief – they are both part of an overarching effort to maintain law and order. Likewise, while *issuing*

²¹² 31 U.S.C. § 3102(a). The section provides that:

With the approval of the President, the Secretary of the Treasury may borrow on the credit of the United States Government amounts necessary for expenditures authorized by law and may issue bonds of the Government for the amounts borrowed and may buy, redeem, and make refunds under section 3111 of this title. The Secretary may issue bonds authorized by this section to the public and to Government accounts at any annual interest rate and prescribe conditions under section 3121 of this title.

Id.

²¹³ *Id.* § 3102(b). The section provides that:

The Secretary shall offer the bonds authorized under this section first as a popular loan under regulations of the Secretary that allow the people of the United States as nearly as possible an equal opportunity to participate in subscribing to the offered bonds. However, the bonds may be offered in a way other than as a popular loan when the Secretary decides the other way is in the public interest.

Id.

²¹⁴ *Id.* § 3102(c)(1). Specifically, the statute discusses the public interest in the following terms:

- (1) When the Secretary decides it is in the public interest in making a bond offering under this section, the Secretary may –
- (A) make full allotments on receiving applications for smaller amounts of bonds to subscribers applying before the closing date the Secretary sets for filing applications;
 - (B) reject or reduce allotments on receiving applications filed after the closing date or for larger amounts;
 - (C) reject or reduce allotments on receiving applications from incorporated banks and trust companies for their own account and make full allotments or increase allotments to other subscribers; and
 - (D) prescribe a graduated scale of allotments.

Id.

²¹⁵ *Id.* § 3102(a).

²¹⁶ *Weiss v. United States*, 510 U.S. 163, 175 (1994).

²¹⁷ *Id.* at 174-75.

bonds is not the same as *buying* troubled assets, both involve debt-related securities and both activities seem to fall within the broadly stated general authority of the Secretary to “prepare plans for improving and managing receipts of the United States Government and managing the public debt.”²¹⁸ While this may appear to be a fragile argument, the nature of these duties are not as dissimilar as the executive and judicial duties in *Lo Duca*,²¹⁹ and, given the high level of generality at which the functions of the duties have been defined,²²⁰ it seems likely that these duties would be germane. This argument illustrates the importance of the level of generality at which the germaneness analysis takes place.

Although a court would most likely define the Secretary’s duties at a high level of generality, there is an argument based on the structure of Title 31 that the specificity of the Treasury Secretary’s initial duties indicates Congress’s intent to limit those duties – an interpretation that would require a germaneness analysis at a very low level of generality. While not implausible, this argument results in two related conceptual problems. First, unlike constitutional matters, Congress is not bound by its previous intent and can always change its mind by passing another statute. Even if Congress initially intended to limit the duties of the Secretary, Congress clearly intended to expand those duties by passing TARP. Additionally, if giving an officer specific duties limits the officer to those exact duties, then any additional duties necessarily would not be germane, making every germaneness analysis self-defeating. Second, even if Congress does intend to limit or expand an officer’s authority, the fundamental issue is whether Congress can *constitutionally* act on that intent without reappointment. The underlying principles served by the Appointments Clause, both the “formalist principle” argued by Justice Scalia and the more functionalist considerations articulated by Justice Souter, are concerned with the separation of powers and political accountability. If Congress’s original intent to limit an officer’s duties were dispositive of the outcome of a germaneness analysis, it would fail to consider the interests of the other branches and the constitutional values underlying those interests, allowing Congress to effectively legislate a constitutional issue. Rather than trying to define germaneness by determining whether a past congress intended to limit an officer’s duties, the germaneness analysis must primarily consider the closeness of the relationship between the statutorily-defined duties.

All things considered, it is likely that TARP satisfies the *Shoemaker-Weiss* germaneness standard and was therefore constitutional under the Appointments Clause.

²¹⁸ 31 U.S.C. § 321(a)(1).

²¹⁹ *Lo Duca v. United States*, 93 F.3d 1100, 1107-11 (2d Cir. 1996).

²²⁰ *See supra* text accompanying notes 177 and 192.

CONCLUSION

Based on the limited guidance from the Supreme Court, it appears that except in very limited circumstances, such as *Weiss* where there was no indication of congressional intent to circumvent the Appointments Clause, a germaneness inquiry is required. Whether TARP expanded the duties of Secretary Paulson to an extent requiring reappointment may, in the end, be indeterminate. The germaneness standard is messy and undefined – a good lawyer could make a strong case either way. However, there are some guideposts that can aid in its application. *Weiss* indicates that the analysis must be confined to specific statutory language, and *Shoemaker* and *Lo Duca* imply that analysis of those statutory provisions should take place at a fairly high level of generality. Therefore, although the Secretary’s new duties are not “virtually identical”²²¹ to his former duties, they are certainly not “dissimilar to, or outside the sphere of,”²²² his former duties, especially when defined generally. It is therefore very likely that TARP would pass constitutional muster under the Appointments Clause.²²³

The inquiry into the constitutionality of TARP only underscores the broader underlying problem – that the germaneness analysis is not only vague, but also convoluted and impractical. Clarification of the analysis through the iterative process of successive litigation does not appear promising. The convoluted nature of the analysis may very well dissuade potential plaintiffs from raising the issue, thus denying courts the opportunity to explore and fill the contours of the existing skeletal framework. While this Note did not attempt to resolve all of the uncertainties of the germaneness standard, it hopefully fleshed out some of its contours to aid in its development. Perhaps in another 100 years,

²²¹ *Lo Duca*, 93 F.3d at 1109.

²²² *Shoemaker v. United States*, 147 U.S. 282, 301 (1893).

²²³ Another argument against TARP may be that it involves an unconstitutional delegation of Article I legislative power to the President because it does not provide the Secretary with an “intelligible principle” by which to guide his discretion while rulemaking. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States”); *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“So long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.” (internal quotation marks omitted)); Lawson, *supra* note 6, at 58 (“Congress violated the nondelegation doctrine when enacting [TARP]”); Jeffrey Rosen, *Big Business and the Roberts Court*, 49 SANTA CLARA L. REV. 929, 931 (2009) (describing the libertarian argument that in enacting TARP, Congress “unconstitutionally delegated lawmaking power to the president”). Although outside the scope of this Note, given the Court’s non-delegation precedent, it is virtually certain that such a challenge would also fail. See *Mistretta*, 488 U.S. at 372 (“[T]he separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches.”); Lawson, *supra* note 6, at 66 (arguing that but for the “demise of the nondelegation doctrine” TARP would violate it as a matter of constitutional principle).

there will be sufficient clarity on this aspect of Appointments Clause jurisprudence to make it a more vibrant part of our constitutional landscape.