

## DELEGATION INSIDE THE EXECUTIVE BRANCH

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*For nearly 200 years, legal authorities from the Supreme Court to the Re-statements to several attorneys general, have relied on a legal maxim to consistently conclude that duties requiring judgment assigned to one officer by Congress cannot be redelegated to another without express statutory authority. As a result of this black-letter-law maxim, hundreds of statutes have been enacted to carefully grant express, targeted delegation authority to specific officers.*

*But particularly in the last twenty years, this once-solid maxim been flipped on its head. Now, instead of looking for an officer's express authority to redelegate to a subordinate, also known as "subdelegation," a growing number of recent courts blanketly assume the ability of any federal officer to subdelegate and solely look for express authority to prohibit it. However, inverting this legal inquiry only came about due to misreadings of case law and a fading familiarity with key principles—not any intentional legal shift.*

*Following these contemporary courts, many modern scholars now presume the same. But amid numerous commentaries reviewing the practical implications of delegation, no known work has reviewed or challenged recent courts' legal shift of the once-stalwart principle. This Article is the first to address that topic with sorely needed scholarship.*

*By tracing the legal history underpinning delegation, including by highlighting differences between public and private agency, shedding light on early practices, identifying statutes written precisely because of the delegation maxim, and tracing how the recent court split occurred, and then grew, this Article aims to recover and defend a view counter to this recent trend.*

*This topic has significant practical importance. It goes to the core of how government functions and who has the authority to do what. Moreover, it implicates constitutional concerns in both Appointments Clause questions and separation of powers safeguards, particularly since unbounded delegation risks the legislative branch losing two of its vital structural checks on the executive branch.*

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## INTRODUCTION

The President does not personally execute the laws Congress enacts. Nor is the President able to personally perform most functions authorized by law.<sup>1</sup> Rather, one of the President’s constitutional duties is to ensure that laws are faithfully executed by other officials.<sup>2</sup> Most federal powers rest in these subordinate offices, within what are literally called federal “agencies”—an agent being one who acts for another, typically through a type of authority granted by delegation.<sup>3</sup>

Put another way, our entire federal government is built on delegation.<sup>4</sup> Indeed, it must be; otherwise too few would hold too much power, and they would paradoxically be able to use too little of it. But while the delegation chain of People to Constitution to Congress to public law and public office is easy to follow and understand, whether that delegation chain may be extended further is not. That is the main focus of this Article. When can one public officer vested with a statutory authority redelegate it to another?

Today, there is a concerning misconception that redelegation of statutory authority from one public official to another—often called subdelegation—is allowed absent an express statutory prohibition against it.<sup>5</sup> That view is very much mistaken. It is also just somewhat recent. Only in the last twenty-some years has this divergent view of unrestricted subdelegation gained prominence among courts.<sup>6</sup> But, as will be shown, that view only ascended as a result of several fundamental misunderstandings and misreadings of key case law, congressionally enacted law, and common-law principles. This Article is the first to fulsomely analyze this split from long-standing principles, views, and practices. Indeed, the little scholarship there is on delegation mostly focuses on its practical and normative implications, and consequently not much

<sup>1</sup> *E.g.*, *Myers v. United States*, 272 U.S. 52, 117 (1926) (“[T]he President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.”); *The President & Accounting Offices*, 1 Op. Att’y Gen. 624, 625 (1823) (“If the laws . . . require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself.”).

<sup>2</sup> U.S. CONST. art. II, § 3.

<sup>3</sup> *Delegation*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>4</sup> *E.g.*, *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 81 (2007) (“The earliest commentators shared and perpetuated the *Federalist’s* understanding of a federal office as involving the wielding of delegated sovereign authority.”).

<sup>5</sup> *E.g.*, *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (“When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent.”).

<sup>6</sup> *See infra* Part V.

attention has been devoted to its legal underpinnings or history.<sup>7</sup> This lack of significant study has contributed to the current court confusion and provided no counterweight to the ascendance of an errant view of delegation, necessitating this deeper analysis and reevaluation of whether and when it is lawful.

To be clear, the type of delegation discussed here is not when one public officer exercises their own power with assistance from another but still has the final say, nor is it when one acts in the name of another vested with the authority.<sup>8</sup> Rather, the delegation discussed here is one of the most common and pervasive types used by the federal government today: when a public officer-agent subdelegates powers vested in them to a subagent who can then act independently and in their own name.<sup>9</sup> Put more simply, the type of delegation discussed here is in effect a substitution;<sup>10</sup> one that sometimes skips the Appointments Clause as well as the careful system of offices with specific authorities that various congresses have set up and built upon for over 200 years.<sup>11</sup>

For most of our country's history, except for the last twenty-some years, the answer to whether a public officer could delegate duties vested in them was clear. It was also embedded in a well-known maxim: "*delegata potestas non potest delegari*," which means if a delegated duty requires any kind of judgment or discretion, it cannot be further delegated without express authorization.<sup>12</sup> Restatements, treatises, congresses, presidents, attorneys general, and learned commentators all agreed.<sup>13</sup> Even early historical practice

<sup>7</sup> See, e.g., sources cited *infra* notes 50–54.

<sup>8</sup> E.g., *NLRB v. Duval Jewelry Co. of Miami*, 357 U.S. 1, 7 (1958) (calling these kinds of delegations limited as opposed to complete).

<sup>9</sup> See JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 6 (1st ed. 1839) [hereinafter STORY ON AGENCY]; see also *id.* § 302 (stating different rules of agency “prevails in regard to public agents”); RESTATEMENT (SECOND) OF AGENCY § 5 (AM. L. INST. 1958) (regarding subagents, noting that often, “the person called a subagent was not a subagent, but an agent appointed by another agent of the same principal”); Note, *Subdelegation by Federal Administrative Agencies*, 12 STAN. L. REV. 808, 808 (1960) (“Subdelegation . . . is issued in the name of the subordinates, *i.e.*, the action is issued without prior review and approval of the agency heads.”). There are different subtypes of subdelegation, some with the ability of an agency head to later overrule a delegatee’s issued action and some without. These variations do not affect this Article. What is analyzed here is when a delegatee’s action can be made independently and be immediately effective. *Cf.* *Lucia v. SEC*, 138 S. Ct. 2044, 2053 (2018) (focusing on the ability of the official to have an “autonomous role” regardless of whether the SEC chose to review the official’s action).

<sup>10</sup> STORY ON AGENCY, *supra* note 9, §§ 13–15 (referring to a subagent as the substitute of an agent, and noting delegated power “should be given to him by express terms”).

<sup>11</sup> E.g., Anne Joseph O’Connell, *Actings*, 120 COLUM. L. REV. 613, 683 (2020) (“[F]actors suggest that professionals who exercise delegated authority may be considered officers for Appointments Clause purposes.”).

<sup>12</sup> This is the shortened version of the maxim. It is explained more in Section I.A.

<sup>13</sup> See *infra* Part I & Sections III.A–B.

showed that the well-settled maxim was well followed and in fact drove how our nation's federal office structure was built.<sup>14</sup>

Likewise, the Supreme Court and most other courts properly analyzed delegation questions that required judgment or discretion by (1) initially looking for an express delegation authority in statute, and then, (2) as a subsequent step, looking to see if any specific statutory provision limited that authority.<sup>15</sup> The two-step sequence was necessary because an express authority to delegate is often broad and found in a separate statute generally pertaining to an office.<sup>16</sup> But the underlying authority being delegated is usually from a different, more subject-specific statute that has assigned the function to a particular office.<sup>17</sup> Combine the two, and you have general authority to delegate a specific function—unless the specific statute limits or conflicts with the general one.

More recently, however, despite seemingly supportive Supreme Court case law and clear legal delegation principles, some circuit and district court decisions have diverged and developed a different view. By overlooking critical circumstances in older cases, many recent decisions have simply skipped the first step of identifying a general-authority statute authorizing delegation in order to focus on the second step of analyzing a subject-specific statute, effectively flipping the required analysis on its head.<sup>18</sup> In other words, instead of properly first looking for express authority to delegate and then looking to see if it is somehow limited by another specific statute, the divergent view currently assumes that there is always an inherent and presumptive ability to delegate, and only looks for a specific statute that might limit the ability to delegate. Never was the long-standing approach expressly refuted, distinguished, or even always accounted for by these recent decisions. It simply seemed to fade over time, as courts began to only passingly mention the express delegation authority requirement as the first step, and increasingly focused the on the second step, until it eclipsed the first altogether. Consequently, jurisprudence on delegation has now become topsy-turvy mess.<sup>19</sup>

This Article aims to offer a counterbalance to clean up the recent court shift by using history to highlight Congress's and courts' consistent fidelity to the *delegata* maxim and to underscore its impact on our federal office structure across centuries. This Article's historical focus then turns to chronicle

<sup>14</sup> See *infra* Sections III.A–C.

<sup>15</sup> *E.g.*, *United States v. Giordano*, 416 U.S. 505, 512–13 (1974); *infra* Part V.

<sup>16</sup> *E.g.*, *infra* Sections IV.A–C and notes 340–41.

<sup>17</sup> *E.g.*, *infra* Part V (discussing cases where a specific authority vested in an office and whether it could be delegated was at issue).

<sup>18</sup> See *infra* Part V.

<sup>19</sup> *E.g.*, Matthew C. Stephenson, *When and Why Agencies Must Decide for Themselves: Judge Williams's Restrictive Approach to Administrative Subdelegation*, 38 YALE J. ON REG. 752, 752–53 (2021) (a clerk for *U.S. Telecom's* authoring judge later writing, “[t]he law in this area [delegations] seemed . . . to be a confusing mess” and that there was “doctrinal chaos”).

how the recent legal shift surrounding delegation started and grew—and subsequently explains why it is mistaken. With this historiographic and first-principles focus, several intertwined issues must reluctantly be left for another day, including the normative implications of this counterbalance and theories on what other influences might have contributed to the confusion.<sup>20</sup>

A return to regular readings of delegation would not, however, upend most current agency practices, because agency heads often have express authority to delegate (though they should be better about expressly citing to those authorities). Where this Article's history raises significant concerns is mostly when a sub-agency official subdelegates, because they usually lack the requisite express authority to do so. It is in those instances where the inverted court split stands to expand the power of the executive branch by presuming delegation is allowed, unless an exceedingly rare statute limiting it is found.

Briefly summarized, there are four main reasons courts have developed the unfortunate split. First, recent courts have misread older case law, not understanding that often the delegation at issue was not made by any express authority granted to the delegating officer, but rather by express authority vested by statute in the office of the delegee (i.e. one who received the final authority).<sup>21</sup> In other words, the very reason that Congress first created offices like those of assistant secretary was not to perform any specific function. Instead, the statutory duties of such offices were literally written to be an expressly authorized delegee for a secretary, the agency's principal officer. Without understanding that key fact, it was easy to simply focus on the delegator and their lack of express authority to delegate, see that the delegation was common and usually upheld in earlier court cases, and consequently assume that express authority was not required. But the very fact that Congress needed to, and often did, establish such delegation-receiving offices shows that the ability to delegate was not historically presumed.

Second, many recent courts failed to consider a major development in the late 1940s: the enactment of scores of express delegation statutes, sometimes known as “housekeeping” statutes, giving certain officers (usually an agency head) broad and general authority to subdelegate any function from a separate specific statute.<sup>22</sup> Those many agency housekeeping statutes were enacted

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<sup>20</sup> For example, the consequences of re delegating to others who are not subordinates are not explored here. Neither are the many questions raised by sub delegating to civil servants. Nor is the impact of modern administrative law practices or case law on the divergent view. Similarly, some parallel legal issues are left unexamined, including if a civil-service subdelegee effectively becomes an inferior officer, *see infra* Section II.C, whether that official exercising certain kinds of final authority is subject to adequate constitutional supervision, accountability, and removal provisions. *Cf.* *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1986 (2021).

<sup>21</sup> *See infra* Sections III.A–B.

<sup>22</sup> *See infra* Section IV.B. These agency-specific housekeeping statutes are not to be confused with 5 U.S.C. § 301, which is known as a general housekeeping statute, and permits

precisely because all three branches of government knew that delegation in public office required express authority. Rather than painstakingly amend each existing specific source-authority statute to authorize delegation or keep adding more assistant secretaries to lawfully receive delegations, Congress's solution was to, for the first time, expressly vest a broad, general authority for an agency head to delegate nearly any function assigned to them. In this way, a statute conferring a specific function upon an agency head could be used in tandem with a general housekeeping statute to expressly authorize the sub-delegation of that function within the same agency.

Third, these recent errant courts have failed to apply, or even consider, the long-standing legal *delegata* maxim that says duties requiring the exercise of discretion or judgment may not be delegated without express statutory authority.<sup>23</sup>

Fourth, these modern courts have not considered that private agency (i.e., for commercial transactions) is different than public agency (i.e., for government public officers), and have conflated their distinct principles. Private agency is based on common law and requires a fiduciary relationship. As a result, in private agency most any person can be a principal and have authority to delegate something to someone else, who can serve as a general agent.<sup>24</sup> But public agency is different in kind. It has different principles, allowing only specific agents who operate based on actual and not apparent authority.<sup>25</sup> Public agency is also materially altered or informed by statutory law,<sup>26</sup> including the 1940s-era housekeeping statutes just mentioned. And, unlike private agency, public agency has no independent fiduciary relationship between public officers who cannot hire or fire (i.e., appoint or remove) one another.

The concerns raised here are not just formalistic, they also have significant implications for functionalists. Related delegation issues continue to arise often in practice and in courts. In lieu of Senate confirmation or using the Federal Vacancies Reform Act (“FVRA”)<sup>27</sup> to fill vacant offices with “acting” officials, an increasingly common practice in recent decades has been for agency heads to use agency housekeeping statutes to absorb and redelegate the functions and duties of the vacant office, either in part or in whole, to another official.<sup>28</sup> In this way, time and eligibility limitations on acting

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any department head to issue certain regulations that only affect their department. See *infra* notes 295–96.

<sup>23</sup> See *infra* Section I.A.

<sup>24</sup> See *infra* notes 72 and 118 and accompanying text.

<sup>25</sup> See *infra* note 118.

<sup>26</sup> RESTATEMENT (SECOND) OF AGENCY § 17 cmt. b (AM. L. INST. 1958).

<sup>27</sup> 5 U.S.C. §§ 3345–3349d.

<sup>28</sup> *E.g.*, S. REP. NO. 105-250, at 5 (1998) (finding 43 out of 320 top officials audited in 1998 were serving under internal delegations of authority, albethey made under express delegation authorities).

officials authorized under the FVRA could be skipped altogether, and a person could be effectively installed into office via delegation indefinitely.<sup>29</sup> As a result, delegation inside of the executive branch occurs rampantly.<sup>30</sup> Even when acting authorities expire for a PAS (presidentially appointed, Senate confirmed) office, those same officials can keep effectively acting in the same office via delegation to “perform the functions and duties” of the vacant office without using the “acting” title.<sup>31</sup> It is, however, a distinction without a difference. Both actings and delegees usually have the full statutory powers of an office as if confirmed and appointed to it.<sup>32</sup>

Only in recent years have some viewed the FVRA as only prohibiting the delegation of so-called “non-delegable duties,” which partly as a result of the divergent case law and misunderstandings addressed here, is often now interpreted to apply when a statute affirmatively prohibits delegation.<sup>33</sup> And so, with that questionable interpretation, a common work around is to have delegees claim they only “perform the *delegable* functions and duties” of an office, again not understanding what “delegable” means and what non-delegable duties are.<sup>34</sup> By the government’s admission, officials who perform the delegable duties of another office often perform all of an office’s duties because they view no specific duty as non-delegable.<sup>35</sup> This practice only

<sup>29</sup> See, e.g., Stephen Migala, *The Vacancies Act and an Acting Attorney General*, 36 GA. ST. U. L. REV. 699, 726 (2020).

<sup>30</sup> E.g., United States’ Response in Opposition to Defendant’s Motion to Dismiss, at 5, *United States v. Village of Tinley Park*, No. 16-cv-10848 (N.D. Ill. July 17, 2017), ECF No. 16 (citing *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) to argue that the duties of PAS officers are delegable absent other “express contrary language or unmistakable implication”).

<sup>31</sup> E.g., *Procedures for Considering Environmental Impacts*, 85 Fed. Reg. 83881, 83882 (Dec. 23, 2020) (DHS General Counsel also performing functions and duties of the Deputy Secretary).

<sup>32</sup> E.g., *Acting Officers*, 6 Op. O.L.C. 119, 120 (1982); S. REP. NO. 105-250, at 3. *But cf. infra* Section IV.D (OLC arguing that duties delegated by the President via 3 U.S.C. § 301 cannot be subdelegated to non-PAS officers). Also, it is doubtful that an inferior officer acting as an agency head could appoint other inferior officers.

<sup>33</sup> Thomas A. Berry, *Closing the Vacancies Act’s Biggest Loophole*, 131 CATO BRIEFING PAPER (Jan. 25, 2022), <https://www.cato.org/sites/cato.org/files/2022-01/BP-131.pdf> [<https://perma.cc/28NM-RXLF>].

<sup>34</sup> E.g., *Order of Succession*, 87 Fed. Reg. 10392, 10393 (Feb. 24, 2022) (Labor Department’s delegations so stating). Indeed, there is much to suggest that the FVRA’s enforcement mechanism in 5 U.S.C. § 3348 meant to prohibit delegations of functions and duties that are assigned to one office, which is vacant, and which involve discretion (i.e. non-delegable). See Stephen Migala, *The Vacancies Act and Its Anti-Ratification Provision* (Nov. 11, 2019) (unpublished manuscript) [<https://perma.cc/EQM3-HJ2Z>].

<sup>35</sup> E.g., *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1337 & n.3 (Fed. Cir. 2022) (recounting the government’s position). Notably, the Federal Circuit found it “disquieting” that either none or a “vanishingly small” subset of duties are non-delegable, according to its interpretation of the FVRA provision, and worried that finding certain duties non-delegable for purposes of the FVRA would cause impacts that would “reverberate” across executive agencies. *Id.* at 1337–38.



further the confusion regarding delegation inside the executive branch. This Article's analysis thus not only aims to help elucidate lawful delegation for practical and operational reasons, but it also helps explain what duties are delegable and non-delegable, which could have implications for the FVRA and common executive branch practice.

Some courts do, however, occasionally find delegations to be unlawful. For instance, a 2020 federal district court took a rare position by holding that a delegation to an official to effectively act as Director of the Bureau of Land Management violated both the Appointments Clause and the FVRA.<sup>36</sup> Similarly, a 2019 dispute over delegation led to public confusion and later litigation over who was actually the Director of the U.S. Citizenship and Immigration Service.<sup>37</sup> The court in that dispute looked at scores of statutes specifically allowing delegation and found that the FVRA's so-called non-delegation provision in fact applied.<sup>38</sup> These cases took differing views on the effects of delegation on the Appointments Clause and on the FVRA's enforcement mechanism, showing that confusion and splits still exist.

The prevalent practice of delegation is not just evident through these court cases, but in numerous other instances that did not reach courts for various reasons, including Article III standing. For instance, the Department of Justice ("DOJ") has repeatedly used delegation as a way to effectively install assistant attorneys general while avoiding both the Senate confirmation process and laws regarding acting officials.<sup>39</sup> And the Government Accountability Office ("GAO") consistently reviews the legality of persons purporting to hold an office via delegations, even in positions as vital as the Deputy Secretary of Homeland Security, various inspectors general, and many more.<sup>40</sup> Other instances of delegation to effectively fill PAS offices exist going back to and before 1973.<sup>41</sup>

Apart from these and other related controversies, the express delegation debate has other significant legal implications for the executive branch. If officials are undertaking rulemaking or other administrative actions under

<sup>36</sup> *Bullock v. U. S. Bureau of Land Mgmt.*, 489 F. Supp. 3d 1112, 1126–29 (D. Mont. 2020).

<sup>37</sup> *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 31 & n.11 (D.D.C. 2020).

<sup>38</sup> *Id.* at 32–34.

<sup>39</sup> Migala, *supra* note 29, at 726; Thomas A. Berry, *The Illegal Tenure of Civil Rights Head Vanita Gupta*, CATO INST. (Jan. 19, 2017), <https://www.cato.org/legal-policy-bulletin/illegal-tenure-civil-rights-head-vanita-gupta> [<https://perma.cc/76FF-C4GK>]; Fed. Vacancies Reform Act of 1998 - Assistant Attorney Gen. for the Office of Legal Counsel, U.S. Dep't of Justice, B-310780, 2008 U.S. Comp. Gen. LEXIS 101 (Comp. Gen. June 13, 2008).

<sup>40</sup> *Federal Vacancies Reform Act: Violation Letters and Decisions*, GOV'T ACCOUNTABILITY OFF., <https://www.gao.gov/legal/federal-vacancies-reform-act> [<https://perma.cc/CAV4-4TUQ>].

<sup>41</sup> Letter from Assistant Attorney General Robert Dixon, Office of Legal Counsel, to Senator Roman Hruska (Mar. 13, 1973) [hereinafter Dixon Letter], *reprinted in Restructuring the Law Enforcement Assistance Administration: Hearings Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 95th Cong. 295 (1978).

unlawful delegations, those actions may be overturned by a court under the Administrative Procedure Act (“APA”) or an Appointments Clause challenge.<sup>42</sup>

Beyond deeply affecting the operation and structure of our government, the method and manner of permissible delegations also has important implications for several academic legal theories about the executive branch. Consider the unitary executive theory. At its most extreme end, proponents argue that all powers vested in subordinate officers are by implication concurrently vested in the Executive, or that the Executive may order officers who have duties directly assigned to them directly by Congress to do certain acts.<sup>43</sup> In countering that view, however, scholars have particularly relied on Congress’s practice of delegating authority to only specific officials.<sup>44</sup> Indeed, this Article’s conclusions provide new support not only to counter the expansive unitary executive theory but also for the theory that the structure of the executive branch, including its offices, is controlled by the legislature’s Necessary and Proper Clause.<sup>45</sup> Along similar lines, limitless implied delegation risks eroding one of the few meaningful checks the legislative branch has on the executive branch: structuring offices a certain way and with only certain limited authorities.<sup>46</sup> Still, certain other theories for executive power under the Vesting Clause<sup>47</sup> may actually gain support, as history shows that Congress provided officer-agents specifically for receiving delegated Article II military and foreign affairs executive authorities vested in the President by that constitutional clause.<sup>48</sup>

One might think that an issue as important as this would have scores of scholarly articles arguing one point or another. Indeed, on the three other main methods of who can exercise federal authority—specifically, normal appointments, recess appointments, and the FVRA—scholars are deeply

<sup>42</sup> 5 U.S.C. § 706(2) (APA). *Ultra vires* claims may also be based in part on an agency decision maker using unlawfully delegated authority, but they also require an action contrary to a specific prohibition that is clear and mandatory. *See Fed. Express Corp. v. United States Dep’t of Com.*, 39 F.4th 756, 763 (D.C. Cir. 2022).

<sup>43</sup> *E.g.*, Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 266 (2006) (discussing different theories); Zachary S. Price, *Congress’s Power over Military Offices*, 99 TEX. L. REV. 491, 501–02 (2021) (also discussing different theories of control over U.S. civil and military offices); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2329–31 (2001); Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 479 (2017) (“Subdelegations to career civil servants, however, weaken this [pro-unitary executive] mechanism of executive power.”).

<sup>44</sup> *E.g.*, Stack, *supra* note 43, at 289–90 (noting the “crucial” and “structural choice” Congress makes deciding to which office to delegate authority (first quoting DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 153 (1999))).

<sup>45</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>46</sup> *See infra* Section II.C.

<sup>47</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>48</sup> *See infra* Section II.C.

engaged.<sup>49</sup> But there is a dearth of discussion regarding the legality of the fourth main method: delegation. To be sure, there is emerging and interesting scholarship about the normative implications of subdelegation, including practical reasons why it is done and the costs and benefits of a reviewable and final unreviewable delegation.<sup>50</sup> But, with a few encouraging exceptions focusing primarily on constitutional questions,<sup>51</sup> most modern scholarship is largely absent in analyzing whether and when subdelegation (or any kind of broader redelegation) is otherwise permitted as a legal matter and why.<sup>52</sup> Instead, the sparse commentary on the issue mostly tends to repeat the holdings of the courts that have created the split, without deeper analysis,<sup>53</sup> or simply notes the issue is either unsettled or not well understood.<sup>54</sup> Scattered older

<sup>49</sup> See *NLRB v. Noel Canning*, 573 U.S. 513, 522–24 (2014) (collecting scholarship on recess appointments). See generally O’Connell, *supra* note 11; Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533 (2020).

<sup>50</sup> See generally Nou, *supra* note 43 (developing novel theories for how and why subdelegation occurs and some implications); see also *id.* at 479, 516 (accurately restating the holdings of *U.S. Telecom* and other recent case law to say that “judges read . . . silence to permit internal subdelegation,” but not focusing on those courts’ analyses).

<sup>51</sup> Brian D. Feinstein & Jennifer Nou, *Submerged Independent Agencies*, 171 U. PENN. L. REV. 945, 997, 1008 (2023) (recent scholarship beginning to explore some constitutional questions raised by subdelegation, and noting that certain courts have permitted internal delegation in the face of statutory silence based on a *Chevron* analysis, but mostly focusing on an interesting and detailed empirically driven study of the practice and normative implications of subdelegations); see also O’Connell, *supra* note 11, at 682–85 (noting the “little attention” devoted to the topic, raising constitutional questions surrounding delegation, and introducing some statutory dimensions). The breadth of both of these articles do, however, offer excellent discussions about many other facets of delegation, from introducing its basic concepts to considering many of its various implications.

<sup>52</sup> *But cf.* Samuel Lazerwitz, Note, *Sovereignty-Affirming Subdelegations: Recognizing the Executive’s Ability to Delegate Authority and Affirm Inherent Tribal Powers*, 72 STAN. L. REV. 1041 (2020) (focusing on external subdelegations to a Native American nation); F. Andrew Hessick & Carissa Byrne Hessick, *The Non-Redelegation Doctrine*, 55 WM. & MARY L. REV. 163 (2013) (arguing that an effective redelegation of sentencing guidelines from the Sentencing Commission to courts requires express authority).

<sup>53</sup> *Cf., e.g.*, Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 241 (2011) (focusing on overlapping congressional delegations to different federal agencies and arguing, among other things, that because subdelegation was supposedly presumed, that the Executive should have greater discretion to decide which agencies perform which functions).

<sup>54</sup> See, *e.g.*, Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886, 893 (2012) (“There are a few cases that have struck down intra-agency subdelegations even when there was no express evidence of contrary congressional intent. But by and large, since the early half of the twentieth century, courts have tended to interpret congressional silence in favor of intra-agency subdelegation.”). Distinctively, one article astutely noted the confusion, and also advocated for the same conclusion reached by this Article, but via only a few paragraphs and largely based on the idea that a delegator should not be able to override the judgment of Congress as to where to place an authority. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2175 (2004) (“The answer [as to why delegation is allowed] was never very clear, with some decisions suggesting that the President and department heads have inherent authority to delegate decisions to subordinate officers, and others suggesting that

commentaries exist on the topic, but they vary and do not account for major changes of the late 1940s and early 1950s that effectively embedded the *delegata* maxim into scores of express delegation statutes.<sup>55</sup> This Article attempts to go beyond current scholarship and offers compelling evidence for the conclusion that duties involving discretion are not inherently presumed delegable. Instead, express statutory text is required for such duties to be lawfully redelegated.

To explain why public officer delegation is generally impermissible absent express actual authority, five Parts present a traditional analysis focused on blended considerations of text, context, structure, historical understandings, early practices, and subsequent precedent.

Part I briefly describes necessary background to understand the delegation issue, including by briefly introducing the court split, the common-law maxim and doctrinal rule against redelegating duties involving discretion, as well as the confirming views of treatises and executive branch opinions. Part II warns of a few normative implications of unrestricted delegation, both legal and practical, and explains why there are and must be core differences between public and private agency, why only actual authority can be exercised by public officers, and why delegation may not be implied. Part III focuses on the nature and evolution of public offices to historically show that early understandings and practices from the start of our Republic embedded the express-delegation authority requirement into the very structure of our federal office system. Part IV highlights the vital affirming, but often overlooked, development of the enactment of scores of “housekeeping” or express delegation authority statutes around the 1940s. Finally, Part V discusses key court cases that have amplified delegation misunderstandings, explaining how a small split of cases that overlooked crucial circumstances and precedent only recently caused a significant split, upending long-standing legal principles without even apparently realizing it.

All told, this Article argues that the rule has always been—and must continue to be—that express authority is required for a public officer to delegate

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subdelegation is permissible only when authorized by Congress.”); *id.* at 2176 (arguing that “delegated power must rest where Congress has placed it” except when Congress transfers “the power to subdelegate”).

<sup>55</sup> *E.g.*, Nathan D. Grundstein, *Subdelegation of Administrative Authority*, 13 GEO. WASH. L. REV. 144 (1945) (collecting court cases that acknowledge assistant secretaries can perform most, if not all, discretionary duties of department head secretaries based on express authority, but examining whether implied authority to delegate could support further subdelegation deeper within an agency). This work reflects tensions during an era with rapidly expanding agencies and an inconsistent reliance on legislative intent, necessity, and practical efficiencies to try to justify subdelegation without express authority. *See generally id.* The many questions around these bases for implied authority, however, soon gave way to a different structural scheme. Within just a few years after this article, DOJ, Congress, and the President found problems with implied bases of authority and enacted scores of express delegation statutes for executive agency heads, and even one for the Executive. *See infra* Part IV.

their statutorily vested duties involving discretion to another. Hopefully, with the benefit of history, context, and analysis, the law on delegation in public offices may be put right-side up and reset to what it was.

#### I. THE EXPRESS DELEGATION MAXIM AND THE SPLIT OVER ITS APPLICABILITY

The modern split over the requirement for express subdelegation authority went from a whisper to a wail in 2004, when a D.C. Circuit opinion in a case called *U.S. Telecom* stated: “When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent.”<sup>56</sup> In other words, this *U.S. Telecom* text stands for the proposition that no express authority is required for an officer to subdelegate a statutory duty to a subordinate.

This was not the first case to suggest such a proposition, but it has become the most pivotal.<sup>57</sup> Before 2004, only a handful of cases stated anything similar, but they were not widely cited and thus had limited impact, especially amid other older cases that stood for the opposite conclusion.<sup>58</sup> Today, however, *U.S. Telecom*’s text has grown and it continues to gain steam as the prevailing view. Its text is cited in dozens of subsequent cases to endorse internal-to-government subdelegations, despite that *U.S. Telecom* was ultimately analyzing an external-to-government redelegation to state commissions and held those external delegations were not presumptively permissible.<sup>59</sup> Plus, many agencies now allow internal subdelegation without express authority precisely because of that case.<sup>60</sup> But only *U.S. Telecom*’s recency—and not any acknowledged legal change—has caused it to elbow out older cases that required an express statutory authority for further redelegation, also known as subdelegation.

It is not only older case law that stands in stark contrast to *U.S. Telecom*’s statement. Never-circumscribed Supreme Court case law appears to point the other way, too. Though not precisely on point, the last time the Supreme Court considered a similar issue was in a 1974 case called *Giordano*.<sup>61</sup> There, the Court first looked to see if there was an express general authority to delegate to the particular delegee.<sup>62</sup> Only after finding that there was such

<sup>56</sup> *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004).

<sup>57</sup> See *infra* Part V (tracing the split’s origins to at least 1977, when it was less pronounced).

<sup>58</sup> See *id.*

<sup>59</sup> *U.S. Telecom*, 359 F.3d at 564; see also cases cited *infra* notes 441–44. The key text in *U.S. Telecom* discussing internal delegations may arguably be viewed as dicta because the case was examining external delegations.

<sup>60</sup> See *supra* notes 30–40 and accompanying text.

<sup>61</sup> *United States v. Giordano*, 416 U.S. 505 (1974).

<sup>62</sup> *Id.* at 513 (noting “the provision for delegation . . . in 28 U.S.C. s 510”).

express general authority, did the Court look to see if that authority was limited by the specific-authority statute.<sup>63</sup> Before *Giordano*, two other Supreme Court cases, *Cudahy Packing* and *Fleming*, both similarly looked for express authorization by Congress, either in text expressly permitting delegation or in other statutory text that could evince such a congressional purpose.<sup>64</sup> So did at least two even older Court cases, *Norris* and *Parish*.<sup>65</sup> Accordingly, many other courts have followed the Supreme Court and looked for a textual hook for delegation, never presuming any inherent ability to delegate.<sup>66</sup> As will be explained in a later Part, however, the Supreme Court never directly stated that the express authority was required, so various courts followed the two-step analysis it performed which strongly suggested express authority was required, while other courts did not.<sup>67</sup> Additionally, various courts eventually developed different readings of *Fleming* decades after it was issued, which led to a delayed small split that grew more pronounced over time and eventually resulted in the troubling *U.S. Telecom* text.<sup>68</sup>

Regardless, it is far more than Supreme Court and older lower-court case law that appear at odds with the *U.S. Telecom* statement. There is also a long line of early legal authorities and executive branch opinions that clearly took the opposite view. To begin to frame why *U.S. Telecom's* statement shows such a split, particularly from the past, this Part briefly introduces delegation; a centuries-old delegation maxim requiring express authority; and the position of Restatements, revered treatises, and even some executive branch stances on the topic.

#### A. Agency Law and Its Key Limitation on Delegating Discretionary Duties

Delegation has existed since at least the end of the twelfth century.<sup>69</sup> It originated as a way to have one person conduct business at a distance and increase their sphere of dealings through another.<sup>70</sup> It also became a way for

<sup>63</sup> *Id.* at 513–14.

<sup>64</sup> *Cudahy Packing Co. of La. v. Holland*, 315 U.S. 357, 366 (1942) (“All this is persuasive of a Congressional purpose that the subpoena power shall be delegable only when an authority to delegate is expressly granted.”); *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 120–21 (1947) (finding express authority to delegate).

<sup>65</sup> *Norris v. United States*, 257 U.S. 77, 81–82 (1921); *Parish v. United States*, 100 U.S. 500, 504–05 (1879); see also *infra* notes 249–55 (explaining *Parish*).

<sup>66</sup> *E.g.*, *Splane v. West*, 216 F.3d 1058, 1066 (Fed. Cir. 2000) (“The Supreme Court has said [in *Cudahy*] that whether an agency head has the implicit ability to delegate his powers to subordinates depends on whether Congress has expressly granted the power to delegate.”).

<sup>67</sup> See cases cited *infra* notes 406–12.

<sup>68</sup> See *infra* Part V.

<sup>69</sup> R.D. Face, *Techniques of Business in the Trade Between the Fairs of Champagne and the South of Europe in the Twelfth and Thirteenth Centuries*, 10 ECON. HIST. REV. 427, 431 (1958).

<sup>70</sup> W. Müller-Freienfels, *Law of Agency*, 6 AM. J. COMP. L. 165, 165 (1957).

one to take advantage of another's special knowledge or experience.<sup>71</sup> Any person was deemed vested with authority to act through another via delegation.<sup>72</sup> But beyond a use to expand the reach and ability of persons in private commercial dealings, it also provided a method for non-natural persons in the form of businesses and governments to act.<sup>73</sup> Certain principles of commercial dealings in private agency, which required a fiduciary relationship, needed, however, to be altered for purposes of government dealings, or public agency, where there is no fiduciary relationship. Otherwise, several significant harms to the public welfare could occur with unabridged private agency principles.<sup>74</sup> For these reasons, and because any common-law principles, including those of agency law, are altered by statute, public agency doctrine developed different exceptions and principles from those of private agency.<sup>75</sup> Indeed, entire treatises have been written on the subject of public-officer agency to distinguish its principles and safeguards from those of private agency.<sup>76</sup>

Despite several pertinent distinctions between public and private agency, the principal reason that delegation in the executive branch requires express authority comes from a common-law maxim that still spans across all types of agency. This longstanding principle is also fairly well known, having been recently re-popularized because it is claimed to underpin the nondelegation doctrine in quasi-legislative rulemaking.<sup>77</sup> It is “*delegata potestas non potest delegari*,” which translates to “delegated power cannot be delegated.”<sup>78</sup> The full common-law *delegata* maxim, which originated in the law of agency and was prevalent in early authorities, states that “an agent cannot properly delegate to another the exercise of discretion in the use of a power held for the benefit of the principal,” unless “otherwise agreed.”<sup>79</sup> And, in public

<sup>71</sup> *Id.* at 166.

<sup>72</sup> STORY ON AGENCY, *supra* note 9, § 2 (any person not legally disabled, that is).

<sup>73</sup> *Id.*

<sup>74</sup> *See infra* Section II.A. While no found source has stated this, deep study of the issue also suggests that the maxim also functioned as a practical way to prevent unauthorized government expansion. If any person could subdelegate to anyone else, a government would not know who was authorized to act for it. This is contrast to special authorities or limited practices that allowed persons to deputize others for certain positions, but either at their own risk or based on posting a public bond.

<sup>75</sup> RESTATEMENT (SECOND) OF AGENCY § 17 cmt. b (AM. L. INST. 1958).

<sup>76</sup> *See infra* notes 87–88.

<sup>77</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

<sup>78</sup> *E.g.*, STORY ON AGENCY, *supra* note 9, § 13 (noting when “trust or confidence [is] reposed” then one “cannot delegate his authority to another” and quoting the *non potest delegari* maxim); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 405–06 (1928) (Taft, C.J.) (“The well-known maxim ‘*Delegata potestas non potest delegari*,’ applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of our federal and state Constitutions than it has in private law.”). This Article does not discuss nondelegation in the vested legislative powers sense between the branches of government. Rather, it only discusses how permissibly delegated powers may be distributed within the executive branch.

<sup>79</sup> RESTATEMENT (SECOND) OF AGENCY § 18 (AM. L. INST. 1958).

agency, the manifestation of the “agreement” has long required an express statute.<sup>80</sup> The Restatement correspondingly recites the law in this way:

Duties or privileges created by statute may be imposed or conferred upon a person to be performed or exercised personally only. Whether a statute is to be so interpreted depends upon whether or not . . . the knowledge, consent, or judgment of the particular individual is required.<sup>81</sup>

It goes on to say that the very “appointment of another to attempt to perform a nondelegable act for the first may, in itself, be criminal or tortious, as where a public officer permits a third person to perform the essential functions of his office, or where an agent, without authority to do so appoints a subagent.”<sup>82</sup> Additionally, when such a non-delegable act is attempted to be exercised by a purported delegee or subagent, it “does not operate as the performance of the act.”<sup>83</sup> These principles hold true regardless of whether the public officer who is delegating is considered the agent or the subagent.<sup>84</sup> And it is not just the Restatement (Second) on Agency that holds all of the above, the first and third Restatements align exactly.<sup>85</sup>

Conspicuously, warnings within the preamble to the Restatements on Agency show that it does not deal with the “special rules applicable to public officers,”<sup>86</sup> and thus previews that there are many other things that are different and warrant different considerations for public agency. Indeed, the fields of private and public agency can diverge so much that there have been at least two expert treatises written specifically on the topic of public officers. In 1890, Floyd Mechem, who had written a general treatise on the law of agency, thought that the laws of public offices and officers were so different in kind that he wrote a separate treatise on exactly that topic.<sup>87</sup> Two years after that, Montgomery Throop also published a specific treatise on public officers.<sup>88</sup> Both have been heavily cited in executive branch opinions from attorneys general and DOJ’s Office of Legal Counsel (“OLC”).<sup>89</sup>

<sup>80</sup> See, e.g., *id.* § 17 cmt. b.; see also, e.g., *infra* text accompanying notes 107–14.

<sup>81</sup> RESTATEMENT (SECOND) OF AGENCY § 17 cmt. b (AM. L. INST. 1958).

<sup>82</sup> *Id.* cmt. c.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* § 5 cmt. d.

<sup>85</sup> RESTATEMENT (FIRST) OF AGENCY §§ 17–18 (AM. L. INST. 1933); RESTATEMENT (THIRD) OF AGENCY §§ 3.04(3), 3.15 (AM. L. INST. 2006).

<sup>86</sup> E.g., RESTATEMENT (SECOND) OF AGENCY, scope note (AM. L. INST. 1958).

<sup>87</sup> FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS, at v (1890) [hereinafter MECHEM ON PUBLIC OFFICERS]. Mechem’s work has been often relied upon by the government. E.g., Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 84 (2007) (citing MECHEM, *supra*, and stating his treatise reflected “the understanding from the first hundred years of American law, including pre-Founding English law”).

<sup>88</sup> MONTGOMERY H. THROOP, A TREATISE ON THE LAW RELATING TO PUBLIC OFFICERS AND SURETIES IN OFFICIAL BONDS, at iii (1892) [hereinafter THROOP ON PUBLIC OFFICERS].

<sup>89</sup> Author-conducted search of “Mechem” on Westlaw in these opinions found sixteen separate results for his treatises, and one for “Throop” found another five.



But both treatises confirm that the discretionary nondelegation principle certainly applies to public agency. Throop states that the *delegata* maxim “will prevent a deputy from delegating his own power to another.”<sup>90</sup> Mechem states the same, reciting the same maxim, and then says:

This rule applies also to public officers. In those cases in which the proper execution of the office requires, on the part of the officer, the exercise of judgment or discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and, unless power to substitute another in his place has been given to him, he can not delegate his duties to another.<sup>91</sup>

Tellingly, both public officer-specific treatises heavily relied on one of the most seminal works on agency in the United States, a general treatise on agency authored in 1839 by Justice Joseph Story, who had then been a Supreme Court Justice for twenty-seven years.<sup>92</sup> Because Justice Story started on the Court in 1812, his 1839 understandings are remarkable evidence of how others historically understood the law of agency, either private or public, during the earliest days of our nation. In his hornbook treatise on agency, he too confirms the *delegata* maxim: if “the act to be done . . . is a personal trust or confidence [it is] therefore by implication prohibited from being delegated.”<sup>93</sup> The reason is that:

a trust or confidence [is] reposit[ed] in him [an agent] personally, it cannot be assigned to a stranger, whose ability and integrity might not be known to the principal, or, if known, might not be selected by him for such a purpose. . . . And hence is derived the maxim of the common law; *Delegata potestas non potest delegari*.<sup>94</sup>

Justice Story’s treatise also notes several differences between private and public agency,<sup>95</sup> and offers even older sources for the non-delegability of public powers involving discretion.<sup>96</sup>

These three renowned treatises, as well as others, including Kent<sup>97</sup> and Sugden,<sup>98</sup> all hold the same principles against the redelegation of duties requiring discretion or judgment without express authority. Some go even

<sup>90</sup> THROOP ON PUBLIC OFFICERS, *supra* note 88, § 575.

<sup>91</sup> MECHEM ON PUBLIC OFFICERS, *supra* note 87, § 567.

<sup>92</sup> *See generally* STORY ON AGENCY, *supra* note 9.

<sup>93</sup> *Id.* § 12.

<sup>94</sup> *Id.* § 13.

<sup>95</sup> *Id.* § 302 (“Hitherto we have been considering the personal liability of agents on contracts with third persons, in cases of mere private agency. But, a very different rule, in general, prevails in regard to public agents . . .”).

<sup>96</sup> *Id.* § 13 & n.1.

<sup>97</sup> 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 495 (1st ed. 1827) (“[T]he agency is generally a personal trust and confidence which cannot be delegated; for the principal employs the agent from the opinion which he has of his personal skill and integrity, and the latter has no right to turn his principal over to another of whom he knows nothing.”).

<sup>98</sup> EDWARD B. SUGDEN, A PRACTICAL TREATISE OF POWERS 144–45 (1st ed. 1808).

further to note many other differences that apply to public agents as opposed to private ones.<sup>99</sup> Other scholars have written in detail on the *delegata* maxim, which can be traced to at least 1566, and showed how throughout its long history, particularly in England and specifically in governmental applications, the maxim has held that “an authority involving ‘trust and confidence’ cannot be delegated.”<sup>100</sup>

One more introductory point is important to mention. In our federal government, it is not certain who the principal is in any principal-agent relationship.<sup>101</sup> Some say it is the People, others the Constitution, others still say Congress.<sup>102</sup> While the latter is likely—and there is much support for that view in case law<sup>103</sup>—it does not matter for purposes of this analysis. This Article treats and refers to executive branch officers as public agents. But they could also be sub-agents, with Congress as the agent carrying express power to authorize redelegation through the Necessary and Proper Clause.<sup>104</sup> That would make either the People or the Constitution the principal. Regardless, the treatises and the Restatement make clear the maxim applies to agents the same way it applies to sub-agents who have received delegations from agents with express authority to delegate.<sup>105</sup> And in any case, the laws of agency apply this maxim to public officers regardless of whether they are agents or subagents.

<sup>99</sup> *E.g.*, KENT, *supra* note 97, at 495.

<sup>100</sup> Patrick W. Duff & Horace E. Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 CORNELL L. Q. 168, 170–71 (1929); *cf. infra* note 208 (seeing “special trust and confidence” language in a commission in 1554).

<sup>101</sup> *E.g.*, Marisam, *supra* note 54, at 892 (suggesting there may be different principals for the legislative nondelegation doctrine and for the subdelegation doctrine).

<sup>102</sup> *Id.*; *cf. Hollingsworth v. Perry*, 570 U.S. 693, 722 (2013) (Kennedy, J., dissenting) (“[I]t is not clear who the principal in an agency relationship would be . . . the Restatement may offer no workable example of an agent representing a principal composed of nearly 40 million residents of a State.”).

<sup>103</sup> *See United States v. Grimaud*, 220 U.S. 506, 516 (1911) (“[I]n authorizing the Secretary of Agriculture[,] . . . Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power.”); *Brooks v. Dewar*, 313 U.S. 354, 361 (1941) (holding that an appropriations law “constitutes a ratification of the action of the Secretary as the agent of Congress in the administration of the act”); *Nutt v. United States*, 23 Ct. Cl. 68, 74 (“[Assigning a duty] was simply a direction by a principal, Congress, to an agent, the Quartermaster-General.”), *aff’d*, 125 U.S. 650 (1888); *cf. Bowsher v. Synar*, 478 U.S. 714, 731 (1986) (characterizing the Comptroller General as “an agent of the Congress”); *cf. also infra* Section IV.D (discussing when the President is the principal for functions constitutionally vested in the Executive and otherwise an agent when exercising authorities granted by Congress).

<sup>104</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>105</sup> RESTATEMENT (SECOND) OF AGENCY § 5 cmt. b (AM. L. INST. 1958) (“In such a case, the person so appointed [as a subagent] is not different from any other agent of the principal, and the fact that he was appointed by a superior agent rather than by the principal becomes immaterial.”); RESTATEMENT (FIRST) OF AGENCY § 5 (AM. L. INST. 1933) (any further delegation is by one kind of agent to another, who is generally known as a subagent).

*B. Early Executive Branch Legal Opinions Embraced the Delegation Maxim*

The split over express authority to delegate may now be more apparent. On one side is *U.S. Telecom's* concerning statement that none is needed, which is rapidly gaining momentum among modern courts. On the other side, a centuries-old *delegata* maxim states that subdelegations of discretion clearly require express authority. So too do the Restatements on Agency and some of the most respected 19th century treatises on the topics of both agency law and public officer law. Even a few previewed Supreme Court positions appear to differ from *U.S. Telecom*.

So where does the executive branch stand as to the need for express authority for their own officers? Well, DOJ now understandably asserts in court filings that express authority is not required, because it often must defend suits related to agency delegations made without express authority—and because it has *U.S. Telecom* and its progeny to rely upon.<sup>106</sup> But before it became necessary to defend such actions after agencies started shifting statutorily assigned duties, DOJ's more considered and consistent position used to be that delegation required express authority.

In the first volume of opinions of attorneys general (“AGs”), AG William Wirt wrote in 1823 that the maxim was so strong that when a statutory duty “require[d] a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law” (not even the President).<sup>107</sup> In 1832, when briefing a case in front the Supreme Court (which did not reach the issue), AG Roger Taney argued that when a duty has been assigned to an officer, no other can perform it:

When the law has fixed and established the duties of an officer, another person, or another officer, cannot be charged with them. When duties are not defined, and when any one has an appointment in a department, the officer at the head of the department may enlarge the duties of the subordinate, and they must be executed . . . But the case before the court is . . . that of giving duties to one, when another is the proper officer assigned by law to do them. The right to do this is denied. When the law is silent, the department may sanction an allowance, but when the law expressly provides for the service, no usages, no direction, can be set up, to control the law. It is precisely the same case, in principle, as if it had said the duties shall not be performed by any other.<sup>108</sup>

<sup>106</sup> *E.g.*, *Stand Up for California! v. United States Dep't of the Interior*, 994 F.3d 616, 622–23 (D.C. Cir. 2021) (newly applying *U.S. Telecom's* presumption of redelegability to regulations, but without any express authority, after the Deputy Secretary of Interior purported to redelegate regulatory authority of a vacant office); *see also supra* notes 30–34.

<sup>107</sup> *The President & Accounting Offices*, 1 Op. Att'y Gen. 624, 625 (1823). For a discussion over whether the President can order or perform the duties of subordinates, *see generally* Stack, *supra* note 43.

<sup>108</sup> *United States v. Macdaniel*, 32 U.S. 1, 8–9 (1833).

Indeed, in response to questions from within the executive branch, dozens of opinions from various attorneys general echoed the positions taken in 1823 and 1832, and for over 100 years held express authority is needed. For example, in 1886, the acting Treasury Secretary asked AG Augustus Garland whether a statute that gave a duty to the head of a department could be done by anyone else.<sup>109</sup> The AG responded by saying it “is a special authority, and cannot be by the head of the Department delegated or transferred to any one else.”<sup>110</sup> Such conclusions continued in opinion,<sup>111</sup> after opinion,<sup>112</sup> after opinion.<sup>113</sup> Another good example came in 1933, when AG Homer Cummings reviewed prior opinions on the topic and then reiterated the “common principle that ‘the performance of a power requiring the exercise of judgment or discretion may not be delegated to another, *unless the legislative authority conferring power has authorized the delegation.*’”<sup>114</sup>

To be sure, there are a handful of outlying opinions with certain nuances based largely on whether there was concurrent rulemaking authority that might authorize delegation. Those will be addressed and explained later, with better context.<sup>115</sup> With this Part’s introduction that *U.S. Telecom*’s take on subdelegation was a sea change from prior legal pronouncements and practice, the next Part explores some reasons why that prior practice was, and still is, necessary.

## II. IMPLICATIONS OF THE ISSUE

### A. Doctrinal: Upsetting Careful Public and Private Agency Distinctions

Apart from relying on the legal authorities just highlighted, this Article also argues that the very nature of public agency has made an express delegation requirement even more necessary and hardened. To show why, one can look to prudential reasons in other vital and well-recognized distinctions

<sup>109</sup> Contingent Fund, 18 Op. Att’y Gen. 424, 424 (1886).

<sup>110</sup> *Id.*

<sup>111</sup> Departmental Clerks—Delegation of Power, 21 Op. Att’y Gen. 355, 356 (1896) (power to appoint and remove is discretionary and cannot be delegated).

<sup>112</sup> Supervising Inspectors of Steam Vessels—Delegation of Auth., 25 Op. Att’y Gen. 56, 58 (1903) (“But the authority to make regulations . . . involving as it does the exercise of judgment and discretion, cannot, under a well-settled principle, be delegated. . . . The maxim is, *Delegata potestas non potest delegari.*”).

<sup>113</sup> Disposition of Shipping Board Vessels, 33 Op. Att’y Gen. 570, 580 (1923) (“It is a well-settled rule that a public officer or public body can not delegate powers which require the exercise of judgment and discretion.”); Trust of Restricted Indian Funds, 36 Op. Att’y Gen. 98, 100 (1929) (similar); Proposed Reorganization Affecting the Copyright Off., 39 Op. Att’y Gen. 429, 430 (1940) (similar).

<sup>114</sup> Delegation of Certain Powers & Duties to the Assistant Sec’y of Com., 39 Op. Att’y Gen. 541, 543–44 (1933) (emphasis added) (quoting Auth. of Sec’y of the Treasury to Delegate Certain Powers to the Dir. of Customs, 35 Op. Att’y Gen. 15, 19 (1925)).

<sup>115</sup> See *infra* text accompanying notes 295–99 and 391.

between private and public agency. Some of these developed from the common law and courts, which recognized the harm to the public good if private agency principles universally applied. Others were changed by statute for similar reasons and thus overrode the common law.<sup>116</sup>

Perhaps the largest and most often overlooked difference between the two types of agencies is that in private agency there can be both general and special (i.e., specific) agents. But in public agency, there are no general agents with broad authority to bind the United States in all matters.<sup>117</sup> Indeed, in public agency, there are only special agents, who have been expressly authorized by a principal to do only limited specific acts under *actual* authority as opposed to *apparent* authority.<sup>118</sup> The difference between the two types of agents and the two recognized types of authority in agency is critical. As explained more next, the sole applicability of special agents and actual authority reflect careful distinctions that have been purposefully built into public agency.

Broadly speaking, in private agency, general agents have the power to bind the principal in any matter when they go beyond their actual authority and third parties believe they have such apparent authority. Apparent authority results “when a principal is responsible for the appearance of an agent’s authority, a third party aware of this appearance may rely on it [and bind the principal].”<sup>119</sup> Already, it may be plainly evident why general authority would not work in public agency: the United States could not be bound by every public officer merely because a private person reasonably believes that officer possesses certain government authorities.

Indeed, the rule is markedly different for public officers. As special agents, they famously possess no more authority than what a statute gives

<sup>116</sup> See *infra* note 137.

<sup>117</sup> *E.g.*, *The Floyd Acceptances*, 74 U.S. 666, 676–77 (1868) (“But the government is an abstract entity, which has no hand to write or mouth to speak, and has no signature which can be recognized, as in the case of an individual. It speaks and acts only through agents, or more properly, officers. These are many, and have various and diverse powers confided to them. . . . We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority.”).

<sup>118</sup> *E.g.*, *Hawkins v. United States*, 96 U.S. 689, 691 (1877) (“Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents”); *Anthony v. Jasper Cty.*, 101 U.S. 693, 698 (1879) (“The authority of a public agent depends on the law . . . .”); *McCullum v. United States*, 17 Ct. Cl. 92, 102–03 (1881) (“The United States, as a body politic, act only by public officers, who are special agents intrusted [sic] with specific, defined duties, . . . . The state has no general agents . . . .” (quoting *McKee v. United States*, 12 Ct. Cl. 504, 552 (1876), *rev’d on other grounds*, 97 U.S. 233 (1877))); *Houser v. United States*, 39 Ct. Cl. 508, 522 (1904) (similar); *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 81–87, 98, 103–05 (2007).

<sup>119</sup> *Brunner v. United States*, 70 Fed. Cl. 623, 628 (2006); see also *NLRB v. Donkin’s Inn, Inc.*, 532 F.2d 138, 141 (9th Cir. 1976).

them.<sup>120</sup> Any other rule would mean that the United States could not control the apparent authority of its agents. As far back as 1813, and many times since, the Supreme Court made clear that apparent authority is inapplicable to public agency because “[i]t is better that an individual should now and then suffer by such mistakes, than to introduce a rule against an abuse, of which, by improper collusions, it would be very difficult for the public to protect itself.”<sup>121</sup> And so, in contrast to private agents, public agents cannot bind the government by mistaken or fraudulent representations because of the harms it would cause to the public good.<sup>122</sup> Instead, the rule is that “third parties have a duty to inquire into whether restrictions have been placed on that agent’s authority . . . [via] publicly-available laws and regulations . . . presumably because public entities act publicly.”<sup>123</sup>

So that leaves only actual authority as applicable. There are, however, two derivatives of actual authority: express and implied. Express actual authority is given when a principal specifies what the agent is able to do.<sup>124</sup> In the absence of that detailed instruction, implied authority may fill in the blanks.<sup>125</sup> But it is not a blank check. Implied actual authority, at least in public agency contracting has been described as sufficient when it is an “integral part of the duties assigned to a [public official].”<sup>126</sup> And if the private agency principles of implied authority do in fact fully carry over to other non-contractual elements of public agency (something that is not certain)—private agency limits implied authority to necessity, custom, or prior acquiescence by the principal.<sup>127</sup> Moreover, even within those limited instances the authority implied only extends to do “things normally incidental to the authorized transaction.”<sup>128</sup>

<sup>120</sup> See *infra* notes 219–20.

<sup>121</sup> *Lee v. Munroe*, 11 U.S. 366, 370 (1813).

<sup>122</sup> RESTATEMENT (SECOND) OF AGENCY § 3 cmt. d (AM. L. INST. 1958) (“[T]he general agent may have a power to bind his principal in excess of his authority or apparent authority in many situations in which the special agent may not have such power.”); *id.* § 161 (explaining unauthorized acts of a general agent); see also *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 419–20 (1990) (“From our earliest cases, we have recognized that equitable estoppel will not lie against the Government as it lies against private litigants.” (collecting cases)).

<sup>123</sup> *Brunner*, 70 Fed. Cl. at 629; see also MECHEM ON PUBLIC OFFICERS, *supra* note 87, § 21 (1890); STORY ON AGENCY, *supra* note 9, § 302 (“Hitherto we have been considering . . . private agency. But, a very different rule, in general, prevails in regard to public agents.”); *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383–84 & n.1 (1947); *The Floyd Acceptances*, 74 U.S. 666, 676–68, 680 (1868).

<sup>124</sup> RESTATEMENT (SECOND) OF AGENCY § 7 cmt. c (AM. L. INST. 1958).

<sup>125</sup> *Id.*

<sup>126</sup> *Thomas v. INS*, 35 F.3d 1332, 1339–40 (9th Cir. 1994) (quoting *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989)).

<sup>127</sup> *E.g.*, 2A C.J.S. *Agency* § 151 (2022); *Rankin v. Chase Nat. Bank*, 188 U.S. 557, 563 (1903); STORY ON AGENCY, *supra* note 9, §§ 14, 59; *Thomas*, 35 F.3d at 1339.

<sup>128</sup> *Thomas*, 35 F.3d at 1339 (also noting that implied authority relates to actual, not apparent authority).

In this smuggled import of implied authority principles from private agency into public agency is where the largest misunderstanding of delegation lies. Some scattered courts unfamiliar with the treatises, maxim, practice, and statutes recounted by this Article have simply assumed implied authority works the same way in the government as it does in the private sphere.<sup>129</sup> They did not analyze whether a delegation was integral or incidental to the duties assigned to the public official by Congress. Nor did they appear to know that Congress created specific offices as expressly authorized general delegates.<sup>130</sup> Instead, these scattered courts relied on a general type of implied authority in necessity, assuming that there was an impossibility of performance of all the tasks assigned to one office merely because certain officers' duties subjectively seemed numerous.<sup>131</sup>

But all three bases for implied authority to delegate, even if they apply in public agency, appear easily countered. History is rife with (1) various department and agency heads, not to mention presidents, claiming they have too much to do themselves;<sup>132</sup> (2) those same officers not delegating or believing they had implied authority to delegate based on necessity or anything else;<sup>133</sup> and (3) Congress usually responding by statute, whether in form of extra authorized officer-delees or granting an officer only certain express delegation authority.<sup>134</sup> All of that history, legal understanding, and tradition, stands squarely against the rationalization that too many duties might qualify for necessity, and consequently an implied authority to delegate (which itself is still separate and far from a default presumption of delegability). Relying on necessity is also naturally suspect when a delegation is not to several people, but to one, to effectively serve as a substitution. Moreover, it is quite a subjective standard that risks arbitrary application. That is not to say, however, that necessity has not occasionally persuaded some courts. Prior to the system of statutes presented later in this Article, scattered rulings and treatises

<sup>129</sup> *E.g.*, NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES & STATUTORY CONSTRUCTION § 4:14 (7th ed. 2022) (“Where a statute is silent on the question of redelegation and the delegation was to a single executive head, courts almost universally hold that the legislature, understanding the impossibility of personal performance, impliedly authorized the delegation of authority to subordinates.” (citing four cases for this proposition, two of which were in the 1940s and deal with whether existing regulations, by legislative intent, would permit the delegation at issue, and the most recent case from 1968 that had express authority to delegate; none mentioned implied authority)).

<sup>130</sup> *See infra* Section III.B.

<sup>131</sup> *E.g.*, Grundstein, *supra* note 55, at 148, 187 (arguing that a key basis of implied power to delegate is necessity). Notably, the other two conditions for implied authority delegation, custom and prior acquiescence by the principal, have not typically been noted as possible reasons for implied authority, likely for historical reasons apparent in this Article.

<sup>132</sup> *See infra* Sections IV.A–B & D.

<sup>133</sup> *See id.*; *see also infra* Sections III.A & D.

<sup>134</sup> *See infra* Sections III.B–C & IV.A–B.

accepted certain circumstances of necessity, though without much analysis to show they understood its limitations or full context.<sup>135</sup>

Implied redelegation also goes against the countless express delegations to certain offices enacted by Congress. This Article presents a multitude of examples from the earliest days of our Republic to recent times where Congress has specifically identified officers who can delegate authorities, and officers who can in certain cases receive delegations.<sup>136</sup> It would be untenable then to argue that any custom or congressional acquiescence for implied authority to delegate exists. As Justice Story has held for the Court, “the common law cannot control by implication that which the Legislature has expressly sanctioned.”<sup>137</sup> Similarly, in various other contexts, Supreme Court decisions have held that when another express law on a subject exists, it would “be strange to infer that . . . [an officer] has been silently granted by Congress [a] larger, . . . more pervasive power [than one that exists in statute].”<sup>138</sup> So too for delegation, particularly given the *delegata* maxim and the countless statutes expressly authorizing delegation. The significant constitutional questions surrounding implied delegation, summarized soon, also belies its use because, as another Supreme Court case noted, “acquiescence or implied ratification [are not] enough to show delegation of authority to take actions within the area of questionable constitutionality.”<sup>139</sup> These points only

<sup>135</sup> *Cf.* *Relco, Inc. v. Consumer Prod. Safety Comm’n*, 391 F. Supp. 841, 845 (S.D. Tex. 1975); *Shreveport Engraving Co. v. United States*, 143 F.2d 222, 226 (5th Cir. 1944) (noting many express delegation provisions, including in the case before it, but suggesting necessity can still apply, particularly when the President is involved).

<sup>136</sup> *See infra* Parts III & IV.

<sup>137</sup> *Fleckner v. Bank of United States*, 21 U.S. 338, 358 (1823) (Story, J.) (corporations created by statute need not adhere to the old common law doctrine that they can only act through their common seal); *see also* RESTATEMENT (THIRD) OF AGENCY intro. note (AM. L. INST. 2006) (“[S]tatutes have the effect of removing the assumptions on which a common-law doctrine rests.”); THROOP ON PUBLIC OFFICERS, *supra* note 88, at iv (“In this country, the appointment or election of public officers, their tenure of office, powers, duties, and liabilities, and their official oaths and bonds, are minutely regulated by statute.”).

<sup>138</sup> *Kent v. Dulles*, 357 U.S. 116, 130 (1958). Notably, some courts have applied *Chevron’s* two-step framework when there was a purported statutory silence on delegation and found various agencies’ interpretation of a statute allowing subdelegation despite the silence to be reasonable. *E.g.*, *Feinstein & Nou*, *supra* note 51, at 1008. But given the *delegata* maxim, the extensive number of statutes that expressly allow delegation, and the holding of cases like *Kent*, *supra*, *Chevron* appears to be an inapt framework to assess delegation authority. *See infra* note 429 (similarly stating); *see also* *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004) (rejecting *Chevron* for external delegation, stating “the failure of Congress to use ‘Thou Shalt Not’ language doesn’t create a statutory ambiguity of the sort that triggers *Chevron* deference,” and quoting from another case, *Ry. Lab. Execs. Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994), to say that “[w]ere courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.”).

<sup>139</sup> *Greene v. McElroy*, 360 U.S. 474, 506 (1959); *see also infra* Section II.C (for constitutional implications).



further reinforce that express, and not implied, actual authority is needed for redelegation, even as just a doctrinal matter.

Other various unique distinctions between private and public agency separately compel this Article's argument and why the express-delegation requirement is particularly hardened in public agency. For example, unlike public agency, private agency rests on a principal's consent, their control of their agent, and a fiduciary relationship.<sup>140</sup> But of course, the United States is no ordinary employer.<sup>141</sup> Rarely do federal laws allow for direct hiring by agency heads. And no known law allows an inferior officer to hire a non-contract employee. Instead, Congress generally controls appropriations for government employees,<sup>142</sup> and the Office of Personnel Management uses specific hiring authorities, not any supervisor or agency head.<sup>143</sup> Plus, there are ample protections for employees from being summarily fired.<sup>144</sup> Such protections also exist for PAS officers because only the President can remove them, not any agency head.<sup>145</sup> The inapplicability of private agency principles was also why public agents are only responsible for their own malfeasances and negligence and not for those of persons employed under them.<sup>146</sup> Because as Justice Story noted, their "subordinates are often appointed by another independent authority, and are not controllable by, or responsible to, the agents."<sup>147</sup> Moreover, unlike any private commercial principal, sovereign immunity prevents the United States from being sued on any subject without its express consent in statute.<sup>148</sup>

The distinctions above reflect critical balancing tests that courts and statutes carefully designed over centuries to impart only certain private agency principles to public officers. In this way, they give considered protections to

<sup>140</sup> RESTATEMENT (SECOND) OF AGENCY § 1 cmts. a, d, & e (AM. L. INST. 1958).

<sup>141</sup> *E.g.*, *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 & n.1 (1947) ("[T]he Government is not an ordinary commercial undertaking, and thereby reenforces the conclusion that the rules of law whereby private insurance companies are rendered liable for the acts of their agents are not bodily applicable to a Government agency like the Corporation, unless Congress has so provided."); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("[T]he United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.").

<sup>142</sup> 5 U.S.C. § 3101.

<sup>143</sup> *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-521, FEDERAL HIRING: OPM NEEDS TO IMPROVE MANAGEMENT AND OVERSIGHT OF HIRING AUTHORITIES (2016), <https://www.gao.gov/assets/gao-16-521.pdf> [<https://perma.cc/568F-DG9Y>].

<sup>144</sup> *See generally About MSPB*, U.S. MERIT SYS. PROT. BD., <https://www.mspb.gov/about/about.htm> [<https://perma.cc/Q67V-AQR7>].

<sup>145</sup> *E.g.*, Price, *supra* note 43, at 547–51 (collecting authorities).

<sup>146</sup> STORY ON AGENCY, *supra* note 9, §§ 321–22, 457.

<sup>147</sup> *Id.* § 457.

<sup>148</sup> *E.g.*, *Sossamon v. Texas*, 563 U.S. 277, 290 (2011) ("More fundamentally, [the plaintiff's] implied-contract-remedies proposal cannot be squared with our longstanding rule that a waiver of sovereign immunity must be expressly and unequivocally stated in the text of the relevant statute.").

public agents but only to the extent necessary and without surrendering too many of the rights a private party would have in interacting with them.<sup>149</sup> These distinctions also drive why the government instead operates on express actual authority, all done with public laws or documents in the light of day. Presuming either a default ability to delegate or implied actual authority to delegate risks the existing balance, ignores express statutes on the subject, and belies the principle that third parties could even look into the authority of officials they deal with. Those rules came about during times where written commissions were evidence of authority, and public laws showed what authorities laid in a particular office.<sup>150</sup> Only with expressly authorized delegation can the public know that who they are dealing with is appropriately empowered. Otherwise, the agent can lie or err at little risk to themselves, and with all the benefit to the government, which is able to disavow unauthorized binding actions. What's more, if the expanding trend of *U.S. Telecom* continues unexamined and unabated, it could risk extending the de facto officer doctrine (a rule that allows unlawfully serving officers to nevertheless have their actions be legally enforceable), to suddenly apply to delegates of that officer.<sup>151</sup> That would mean not only would the government be able to disavow unauthorized actions against them, but that it could actually enforce unauthorized actions against the public. The balanced scales would then tip that much more to the government, but without any purposeful consideration of whether or how it implicates private parties.

*B. Practical: Blurring Lines of Responsibility and Accountability*

Why else is it important for public officers to operate with expressly authorized delegated authority? Well, among others, there are the practical reasons that *U.S. Telecom* itself identified when applying the *delegata* maxim to external-to-government redelegations.<sup>152</sup> Indeed, that was the very issue that *U.S. Telecom* was trying to decide.<sup>153</sup> And it got the answer right on that external-delegation issue before it, just not on the in the internal-subdelegation issue it was not asked to decide. It is therefore quite interesting to examine *U.S. Telecom's* reasons for why one kind of delegation should follow the maxim but another kind should not—particularly because its distinctions were based on what it called “sensible” (i.e., practical), rationales, and not any clear legal ones.<sup>154</sup>

<sup>149</sup> See, e.g., *Lee v. Munroe*, 11 U.S. 366, 368–70 (1813).

<sup>150</sup> See *infra* Section III.A.

<sup>151</sup> Taylor Nicolas, Note, *Modern Vacancies, Ancient Remedy: How the De Facto Officer Doctrine Applies to Vacancies Act Violations (and How It Should)*, 74 STAN. L. REV. 687, 697 (2022).

<sup>152</sup> *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565–66 (D.C. Cir. 2004).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

In *U.S. Telecom*'s opinion, internal subdelegation allows “responsibility—and thus accountability—[to] clearly remain with the federal agency.”<sup>155</sup> But external subdelegation supposedly presents different risks, that “lines of accountability may blur, undermining an important democratic check on government decision-making . . . [and] that these parties will not share the agency’s ‘national vision and perspective’ . . . and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme . . . aggravat[ing] the risk of policy drift.”<sup>156</sup>

But those practical effects, questionable as they are for a court to rest upon,<sup>157</sup> are just as applicable to an agency as they are to a particular officer. Indeed, OLC has recognized that high-level PAS officers in a department may almost exclusively be “held accountable through the political process, and . . . are politically responsive in the relevant sense.”<sup>158</sup> Accordingly, delegating to someone else allows an officer to blur or sidestep accountability and responsibility, and avoid thorny issues vested in their judgment and discretion.<sup>159</sup> Professor Jennifer Nou, who studies the practice and normative implications of internal agency subdelegations, has been similarly skeptical of that *U.S. Telecom* rationale.<sup>160</sup> More concerning, internal delegation sidesteps the trust that a President and Senate place in an officer’s personal abilities by choosing them for a public office with specific and limited responsibilities. It also undermines a careful structure Congress has enacted and allows any one desirous delegator an effective authority to overcome Congress’s express wishes and wisdom.

*U.S. Telecom*'s take also treats agencies as monoliths and single unified actors. They are not. They are run by people, public officers with significant differences of opinion based on which person happens to be empowered by the agency.<sup>161</sup> Moreover, if a private person is harmed by the action of a delegatee who was not authorized under the relevant statute or regulation, it takes

<sup>155</sup> *Id.* at 565.

<sup>156</sup> *Id.* 565–66 (quoting *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 20 (D.D.C. 1999)).

<sup>157</sup> *Bowles v. Willingham*, 321 U.S. 503, 515 (1944) (“Whether a particular grant of authority to an officer or agency is wise or unwise, raises questions which are none of our concern. Our inquiry ends with the constitutional issue.”).

<sup>158</sup> *Auth. of Acting FBI Officials to Sign Nat'l Sec. Letters*, 33 Op. O.L.C. 146, 149 (2009).

<sup>159</sup> *E.g.*, *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1981 (2021) (“[D]iffusion of power carries with it a diffusion of accountability.” (quoting *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010))); *see also id.* at 1982 (calling one of the “lines of accountability demanded by the Appointments Clause” a “transparent decision for which a politically accountable officer must take responsibility”).

<sup>160</sup> Nou, *supra* note 43, at 516–17 (“While these [*U.S. Telecom*] justifications may be true as a relative matter (an open empirical question), it is worth pausing before accepting them at face value. . . . As these examples reveal, it is not always the case that internal delegations preserve accountability at the top or ensure against policy drift.”).

<sup>161</sup> *E.g.*, Daniel A. Farber & Anne Joseph O’Connell, *Agencies as Adversaries*, 105 CAL. L. REV. 1375, 1448 (2017) (“[D]elegation within an agency can create conflict.”).

from that private person the possibility that a different and proper official would have made a different decision.<sup>162</sup> Most concerning, however, is that inherently presumed delegation operates in the dark. Current law and precedent do not require those delegations to be made public, even though there is much to suggest they should be.<sup>163</sup> That darkness also degrades lines of accountability and important democratic checks.

Other practical reasons for the conclusion were recently suggested by someone who clerked for Judge Williams at the time he authored the *U.S. Telecom* opinion.<sup>164</sup> Apart from noting the “doctrinal chaos,” in his view, regarding delegation at that time, the former clerk further expounded upon *U.S. Telecom*’s rationales, stating, “the core value of requiring the agencies in which Congress has vested authority to take responsibility for making the hard choices trumps whatever policy benefits might be associated with devolution of federal power.”<sup>165</sup> He also went on to say that “interested parties (such as Members of Congress, firms, and advocacy groups) will not be as certain as to who is responsible for the implementation of the . . . Act,” and that “agencies in this situation cannot pass the buck. Congress, for better or worse, lodged the decision with the federal agency.”<sup>166</sup> But the applicability of these practical arguments for why express authority is necessary for external delegations also similarly extend to intra-agency subdelegations. Simply substitute “officer” for “agency” in the reasons given above, and they remain just as applicable.

The external-internal distinctions made are further suspect because the practical reasons given to distinguish internal intra-agency subdelegation would certainly apply to inter-agency redelegation, which *U.S. Telecom* did not discuss. But in inter-agency redelegation, as now with external-to-government delegation, OLC and courts overwhelmingly agree that express

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<sup>162</sup> *Cf., e.g., Spiva v. Astrue*, 628 F.3d 346, 353 (7th Cir. 2010) (legal harmless error doctrine only applies when there is overwhelming evidence the decision maker would make the same decision on remand or reconsideration).

<sup>163</sup> *E.g., Mendelson, supra* note 49, at 563–66 (noting several officers who exercised the delegated authorities of a PAS office did not have any publicly accessible delegation). Indeed, delegations used to be required by the APA to be made public precisely so that the public would know whom to deal with and who is making important decisions. *See infra* Section IV.E. Now, many agencies simply issue internal orders to delegate authority that are only potentially made public through a FOIA requests, which often takes months, or through litigation. *E.g., id.; see also L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 10 (D.D.C. 2020) (detailing an internal memorandum delegating authority that came to light via litigation). Thus, by the time a member of the public can learn about the internal delegation, let alone the public at large, a person can have been long exercising the authorities of a PAS office without public knowledge.

<sup>164</sup> Stephenson, *supra* note 19, at 752–53.

<sup>165</sup> *Id.* at 753–65.

<sup>166</sup> *Id.* at 759–60.

authority is needed.<sup>167</sup> It is therefore only internal intra-agency delegations that are treated differently by *U.S. Telecom* and this temporal split, and for no apparent legal basis or distinction, just for proffered practical reasons and effects that seem inapposite.

*C. Constitutional: Appointments Clause and Separation of Powers Problems*

For all the current confusion about requiring express statutory text to delegate statutorily vested authorities, it is striking that for constitutionally vested authorities, the express delegation *delegata* maxim normally was and is faithfully followed. For instance, the President is vested with a discretionary pardon power,<sup>168</sup> which the Federalist Papers viewed as probably non-delegable, and which DOJ views as definitely non-delegable because it is a discretionary authority and because the Constitution says nothing of the ability to delegate it.<sup>169</sup> For the very same reasons, DOJ long ago made a list of other constitutional duties vested in the President's discretion that it later reaffirmed are non-delegable.<sup>170</sup> But the best example of the *delegata* maxim's applicability to constitutional authorities is in the Appointments Clause. The default appointing power is vested in only the President and is discretionary.<sup>171</sup> The Constitution, however, expressly grants Congress the authority to

<sup>167</sup> *E.g.*, Litigating Auth. of the Off. of Fed. Inspector, Alaska Nat. Gas Transp. Sys., 4B Op. O.L.C. 820, 823–24 (1980) (“In the absence of any general provision of law permitting an agency to transfer its statutory authority to another agency, such transfers or delegations may normally be accomplished only by legislation . . .”); Delegation of the Att’y Gen.’s Auth. to Investigate Credit Card Fraud, 7 Op. O.L.C. 172, 174–75 (1983) (same); ETSI Pipeline Project v. Missouri, 484 U.S. 495, 517 (1988) (“[T]he Executive Branch is not permitted to administer the Act in a manner that is inconsistent with the administrative structure that Congress enacted into law.”); State v. Rettig, 987 F.3d 518, 532 (5th Cir. 2021) (stating subdelegation to private entities is only allowed when the agency “has authority and surveillance over [their] activities,” and when it does not merely “rubber stamp[]” a statement prepared by others) (first alteration in original) (first quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940); then quoting *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974)); *Perot v. Fed. Election Comm’n*, 97 F.3d 553, 559 (D.C. Cir. 1996) (“[W]hen Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor.”); *cf.* First War Powers Act, ch. 593, §§ 1–3, 401, 55 Stat. 838, 838, 841 (1941) (an example of a statute conferring express authority to the President to transfer functions between agencies, but only for the duration of the war and six months thereafter); *infra* note 324 and accompanying text (discussing other express statutory authorities to transfer functions from one agency to another).

<sup>168</sup> U.S. CONST. art. II, § 2.

<sup>169</sup> THE FEDERALIST NO. 74 (Alexander Hamilton) (“[I]t should be observed, that a discretionary power . . . is questionable, whether, in a limited Constitution, that power could be delegated by law.”); Centralizing Border Control Pol’y Under the Supervision of the Att’y Gen., 26 Op. O.L.C. 22, 25 (2002) (“[T]he President may not delegate his pardon power . . .”).

<sup>170</sup> Presidential Succession & Delegation in Case of Disability, 5 Op. O.L.C. 91, 93–96 (1981) (listing non-delegable presidential duties from a 1950s-era memo).

<sup>171</sup> *E.g.*, *id.* at 97–99.

delegate that discretionary power to appoint inferior officers to a list of certain authorized delegees.<sup>172</sup> Were it not for the express authority to delegate that discretionary function, there is sound unanimity that the appointing power for inferior officers would not be re-delegable, just as it is not for principal officers.<sup>173</sup>

The Appointments Clause is also at the heart of why delegation should never be presumed. That Clause, “among the significant structural safeguards of the constitutional scheme,”<sup>174</sup> is itself an express authority to appoint agents to exercise the “delegated sovereign authority of the federal government.”<sup>175</sup> But the Clause requires strict procedures to become an officer of the United States.<sup>176</sup> So when are those strict procedures required, and are they implicated by this delegation issue?

Two of the most important hallmarks of whether someone is an officer is whether they (1) “exercise[] significant authority pursuant to the laws of the United States,”<sup>177</sup> and (2) “exercise . . . ‘significant discretion.’”<sup>178</sup> A delegation of statutory duties requiring discretion usually meets both tests. This means that the recipient of a delegation (the delegee) would be an officer of the United States. But becoming an officer by delegation alone quite likely runs afoul of the Appointments Clause for several reasons, including that the default manner of appointment is Senate confirmation.<sup>179</sup> Only with express statutory text delegating inferior officer appointments can officers be appointed by a department head.<sup>180</sup> And courts would not give effect to any

<sup>172</sup> U.S. CONST. art. II, § 2 (“[B]ut 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.”).

<sup>173</sup> *McElrath v. United States*, 102 U.S. 426, 436 (1880); *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997) (“[The] appointment and removal power, a quintessential and non-delegable Presidential power.”); Departmental Clerks—Delegation of Power, 21 Op. Att’y Gen. 355, 356 (1896); Centralizing Border Control Pol’y Under the Supervision of the Att’y Gen., 26 Op. O.L.C. 22, 24–25 (2002).

<sup>174</sup> *Edmond v. United States*, 520 U.S. 651, 659 (1997).

<sup>175</sup> Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 82–83, 87, 90, 93 (2007).

<sup>176</sup> *E.g.*, Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 447–48 (2018).

<sup>177</sup> *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

<sup>178</sup> *Id.* at 2052 (quoting *Freytag v. Comm’r*, 501 U.S. 868, 882 (1991)).

<sup>179</sup> *E.g.*, O’Connell, *supra* note 11, at 683; Mendelson, *supra* note 49, at 544 (“The wholesale delegation of the responsibilities of a vacant principal officer post to an unconfirmed official also raises constitutional difficulties.”); Feinstein & Nou, *supra* note 51, at 1001 (“As a result, some submerged independent agencies [made by subdelegation] likely violate the Appointments Clause.”). These articles provide a more fulsome constitutional conversation than the one briefly introduced here.

<sup>180</sup> *E.g.*, Appointment of Assistant Sec’y of State, 6 Op. Att’y Gen. 1, 1 (1853); Appointment & Removal of Fed. Rsrv. Bank Members of the Fed. Open Mkt. Comm., 43 Op. O.L.C., slip op. at 13, 2019 WL 11594453, at \*6 (Oct. 23, 2019).

action taken by unappointed officials using such delegated authority.<sup>181</sup> That is so because, again, officers of the United States are special agents, not general ones.<sup>182</sup> They are only empowered with the actual authorities of a specific office, and no more.<sup>183</sup> This also means officers are not interchangeable. When an officer has been appointed to one office, and that officer desires appointment to another office with different duties, they must be reappointed anew.<sup>184</sup> That has long been the practice for nearly all officers, including those for seemingly similar offices, such as going from the office of Associate Justice to that of Chief Justice.<sup>185</sup> So even if the delegee was already an officer, the delegee would most likely not be specifically empowered by their current office to wield the different authority delegated to them. That would require a separate appointment to such an office—unless Congress had expressly altered the duties of the office as being authorized to give or receive delegations.

Next, consider separation-of-powers equities. The Supreme Court and others have already written much regarding how the Appointments Clause is important to the “Constitution’s structural integrity by preventing the diffusion of the appointment power.”<sup>186</sup> Clearly, the executive branch could use implied or presumed delegation to broadly diffuse the Clause via an effectively equivalent appointment power. But another separation-of-powers issue pervades this issue too. Congress’s ability to create and empower offices with only certain limited authorities is one of its most meaningful structural checks on the executive branch.<sup>187</sup>

Deciding in which agency or office to place a specific authority is one of the ways Congress can help shape policy choices.<sup>188</sup> When dealing with

<sup>181</sup> *E.g.*, *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1985 (2021). Indeed, the Supreme Court has even held that if a delegee was an inferior officer but has final authority, then that too presents a constitutional problem. *Id.* (“[U]nreviewable authority . . . is incompatible with their appointment by the Secretary to an inferior office.”).

<sup>182</sup> *See* sources cited *supra* notes 117–20. A question this Article leaves for another time is how the oath required by the Constitution for an officer of the United States is applied and practically done by those exercising delegated authorities so as to at a minimum make them an inferior officer. U.S. CONST. art. VI (“[A]ll executive and judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution . . .”).

<sup>183</sup> *See supra* Section II.A.

<sup>184</sup> *E.g.*, *Deceased Retired Army Officers-Nomination for Advancement-Approval of Senate*, 25 Op. Att’y Gen. 312, 315 (1905) (“Congress is not merely conferring advanced rank either directly in the statute, or through the discretion of the President as here, but is creating distinct offices, the statutes are specific and clear to that effect . . .”).

<sup>185</sup> Only when an office is undefined by statute, as it often is for assistant secretaries, a department head can reassign duties, because it would not be violating any congressionally vested duties, and because the statute empowered its duties to be assigned by the department head. *See Reassignment of Assistant Sec’y of Lab. Without Senate Reconfirmation*, 19 Op. O.L.C. 274, 275–76 (1995).

<sup>186</sup> *Ryder v. United States*, 515 U.S. 177, 182 (1995) (quoting *Freytag v. Comm’r*, 501 U.S. 868, 878 (1991)).

<sup>187</sup> *E.g.*, Price, *supra* note 43, at 546.

<sup>188</sup> *Id.*

overlapping Article I and Article II authorities, where a power is placed can constrain a President from otherwise acting without restriction.<sup>189</sup> Assigning functions directly to subordinate officers, be they civil or military, may purposefully make the policy less subject to political influences and instead rely on subject-specific experts.<sup>190</sup> The same can be said for assigning a duty to a lower-level office instead of an agency head. Put another way, the further down within an agency that Congress assigns an authority may indicate how specialized, as opposed to politicized, it wanted the authority to be. Indeed, commentators identify similar separation-of-powers considerations when addressing why inter-agency redelegation requires express authority.<sup>191</sup>

For analogous reasons, accountability can be enhanced or degraded based on where a specific authority is placed. Often, PAS officer-nominees may make representations to the Senate about their normative viewpoints in order to receive its consent, and thus feel more obligated not to go back on their word and act in more unusual or extreme ways.<sup>192</sup> Plus, at least PAS officers can be impeached by Congress.<sup>193</sup> But if the PAS officer delegates a final authority to a non-PAS officer, say a politically appointed employee, then the ability of Congress to have any meaningful check on that person is erased. And if delegated to a non-political employee, then civil service protections against firing also kick in.<sup>194</sup> Moreover, problems regarding who might have Article III judicial standing to challenge non-officers exercising certain authorities of officers may often preclude courts from hearing the case and invalidating the action altogether.<sup>195</sup>

Regardless, when one executive branch officer delegates duties involving discretion to another without express congressional authority, then that officer alone aggrandizes themselves, and thus the whole executive branch. They substitute their personal preference of who should have what authority, including who is fit to have it, at the expense of the legislative branch, in which the discretion to assign authorities or permit delegation is constitutionally vested.<sup>196</sup> The impliedly delegating official also substitutes their own

<sup>189</sup> *E.g.*, Stack, *supra* note 43, at 296.

<sup>190</sup> *Id.* at 319–20.

<sup>191</sup> *E.g.*, Hessick & Hessick, *supra* note 52, at 168 (“[T]he decision of who receives delegated power will inevitably affect the ultimate substantive policy that is adopted.”).

<sup>192</sup> *Cf.* sources cited *infra* notes 213–14.

<sup>193</sup> *See* U.S. CONST. art. II, § 4.

<sup>194</sup> *See About MSPB*, *supra* note 144. For a deeper study of subdelegations to civil servants and resulting normative implications and certain legal concerns, see generally Feinstein & Nou, *supra* note 51.

<sup>195</sup> *See, e.g.*, Mendelson, *supra* note 49, at 569 (“The constitutionality of unconfirmed acting officials in principal officer positions has been rarely litigated.”).

<sup>196</sup> *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (“The Framers regarded the checks and balances . . . as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”); Hessick & Hessick, *supra* note 52, at 200 (“[R]edelegation risks substituting . . . [a] judgment for the one Congress made.”).



judgment at the expense of the Senate's, within which judging the fitness, experience, character, trust, and judgment of a nominee is likewise vested via the Constitution.<sup>197</sup>

Indeed, the Supreme Court has held multiple times that “the legislature cannot ingraft executive duties . . . upon a legislative office, since that would usurp the power of appointment by indirection.”<sup>198</sup> Since the appointment power is shared between the Executive and Congress unless expressly delegated via statute, the same logic would mean that an executive officer ingrafting duties upon another office by delegation without express authority would similarly usurp the power of appointment.<sup>199</sup>

### III. THE DELEGATION MAXIM WAS BUILT INTO OUR OFFICE STRUCTURE FROM THE START

Given how long-standing the *delegata* maxim has been, and all that had been already said to reinforce it, it should not be surprising that the maxim is one of the legal bases on which our system of federal offices rests. In this Part, examples are newly contextualized vis-a-vis the maxim to show how it secures the very structure and operation of our government.

#### A. Public Offices Are Ones of Trust That Exercise Significant Discretion

It is often said that a public office is a public trust. But it is in fact more than just a saying, and it carries within it the very principles behind the delegation maxim.

OLC, citing to various early authorities, describes offices of public trust as “offices that, because they required ‘the exercise of discretion, judgment, experience and skill’ . . . could not be deputized [i.e. performed by deputy].”<sup>200</sup> This description stands in contrast to ministerial offices, which are ones that perform mandatory duties or follow the orders of other officers and could be performed by a deputy (i.e., delegated).<sup>201</sup> Similarly, in her extensive study on officers, Professor Jennifer Mascott argues that an officer is “anyone with ongoing responsibility for a statutory duty,” and that Founding-era

<sup>197</sup> *Id.*

<sup>198</sup> *Buckley*, 424 U.S. at 136.

<sup>199</sup> *Cf.* Reassignment of Assistant Sec’y of Lab. Without Senate Reconfirmation, 19 Op. O.L.C. 274, 276 (1995) (arguing that the Senate would “aggrandize itself by effectively redefining offices established by statute” in requiring an extra reappointment for an already appointed assistant secretary to another assistant secretary office with no different statutory description).

<sup>200</sup> Application of the Emoluments Clause to a Member of the President’s Council on Bioethics, 29 Op. O.L.C. 55, 61–62 (2005) (quoting *MECHEM ON PUBLIC OFFICERS*, *supra* note 87, § 16); Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 94 (2007).

<sup>201</sup> Application of the Emoluments Clause to a Member of the President’s Council on Bioethics, 29 Op. O.L.C. 55, 61 (2005).

dictionaries further show that an officer was one who was “intrusted” by the public, meaning the public had placed their “confidence” in that person.<sup>202</sup>

Those terms are not mere puffery. They carry legal connotations. First, they help show that anyone holding an office of public trust and exercising statutory authority qualifies as an officer of the United States, and therefore must be appointed in accordance with Appointments Clause. Second, the very description of a public office is directly related to the *delegata* maxim and shows that only the particular person holding the office may execute its statutory authorities, unless Congress has expressly said otherwise. This second legal connotation is supported by Mascott’s and OLC’s study of public trust, and by how their histories and contemporary explanations match nearly exactly what Justice Story gave as the reasoning and purpose behind the *delegata* maxim: “a trust or confidence reposed in him [an agent] personally [that] cannot be assigned to a stranger, whose ability and integrity might not be known to the principal, or, if known, might not be selected by him for such a purpose.”<sup>203</sup> Indeed, Justice Story’s treatise states that acts tied to a “personal trust or confidence [are] therefore by implication prohibited from being delegated,” and lists an example from both old English case law and treatises that say “where an act is required by statute to be done by the party, if it can be fairly inferred from the nature of the act, that it was intended to be personally done, it cannot be done by an attorney [in-fact, i.e. a substituted agent].”<sup>204</sup>

To see how this principle was weaved into our federal office structure, consider one of the earliest commissions ever granted under our Constitution, one to Alexander Hamilton as Treasury Secretary in September 1789. It begins by saying that he occupies a position of public trust and that he was chosen for it due to the personal confidence of President Washington and the Senate:

Know ye that reposing special trust and confidence in the patriotism, integrity, and abilities of Alexander Hamilton . . . and [I] do authorize and empower him to execute and fulfill the duties of that office according to law, and to have and to hold the said office, with all the powers, privileges, and emoluments to the same of right appertaining, during the pleasure of the President for the United States for the time being.<sup>205</sup>

Hamilton’s commission was of course not unique. The first known American commission was given to George Washington as Commander in Chief in June 1775, devised by a committee of the Continental Congress who, in their apparent knowledge of the law of agency and commissions granted in England, used similar language:

<sup>202</sup> Mascott, *supra* note 176, at 487, 507.

<sup>203</sup> See STORY ON AGENCY, *supra* note 9, at § 13.

<sup>204</sup> *Id.* §§ 12–13 & n.5.

<sup>205</sup> Nat’l Archives, Record Group 59, Entry 774, Vol. 2, at 7 [<https://perma.cc/M5P3-PUJN>] (photograph of a copy of this commission was taken by the author and is available for viewing at the link provided).

reposing special trust and confidence in your patriotism, valor, conduct, and fidelity, do, by these presents, constitute and appoint you . . . .<sup>206</sup>

Before Washington's first congressional commission, the same "special trust and confidence" language was present in commissions or charters from the English Crown, both to colonists in America since at least 1681,<sup>207</sup> and within England since at least 1554.<sup>208</sup> Indeed, even today commissions in the form of letters patent are still issued by the English Crown to grant an exclusive office or an exclusive right.<sup>209</sup> Thus, the core "special trust and confidence" was carried forth from English law and tradition, seen in many colonial commissions, and made part of United States commissions from the earliest days of our nation.<sup>210</sup> That core text remains in federal office commissions to this day.<sup>211</sup>

Personal selection and the vetting of a particular person for their character, judgment, and abilities is evident in the Appointments Clause process.<sup>212</sup> According to Hamilton, that process was designed for the President to

<sup>206</sup> 2 Journals of the Continental Congress, 1774–1789, at 96 (June 17, 1775) (Worthington Chauncey Ford ed., 1905), <https://memory.loc.gov/ammem/amlaw/lwjclink.html> [<https://perma.cc/Z6FE-JFAA>]; Commission from the Continental Congress, June 19 1775, *Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-01-02-0004> [<https://perma.cc/A6E7-RYFM>].

<sup>207</sup> 1 PENNSYLVANIA ARCHIVES 8 (Gertrude MacKinney ed. 1931), <https://hdl.handle.net/2027/uva.x030224071> [<https://perma.cc/28PS-T6J4>] (Charter of King Charles II, unto William Penn, Governor of the Province of Pennsylvania, using said text in 1681).

<sup>208</sup> THOMAS WARTON, *THE LIFE OF SIR THOMAS POPE* 47 (1780), <https://hdl.handle.net/2027/mdp.39015068293086?urlappend=%3Bseq=67%3Bownerid=13510798887006922-71> [<https://perma.cc/8TCT-9NR2>] (citing a commission from March 15, 1554: "We having special trust and confidence in your approvid fidelities, wifdomes, and circumfpections. . . .").

<sup>209</sup> *E.g.*, *Royal Grants in Letters Patent and Charters from 1199*, NAT'L ARCHIVES OF ENGLAND, <https://www.nationalarchives.gov.uk/help-with-your-research/research-guides/royal-grants-letters-patent-charters-from-1199/> [<https://perma.cc/8NH7-28E5>]; Application of Bo Thuresson Af Ekenstam, 256 F.2d 321, 323 (C.C.P.A. 1958).

<sup>210</sup> James Hamilton: Commission to Treat with the Indians, 22 September 1753, *Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Franklin/01-05-02-0018> [<https://perma.cc/SS53-8JT4>] ("Know Ye, . . . *Reposing Special Trust and Confidence* in your Loyalty, Abilities, and Circumspection, We have thought fit to nominate and appoint You the said Richard Peters, Isaac Norris, and Benjamin Franklyn . . . ." (emphasis added)); King George III: Commission for Determining the New York–New Jersey Boundary, 26 June 1767, *Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Franklin/01-14-02-0115> [<https://perma.cc/5FZ9-W3RZ>]; Commission to James Parker as Comptroller of the Post Office, 22 April 1757, *Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Franklin/01-07-02-0082> [<https://perma.cc/6QRJ-8X3C>] (using the "special Trust and Confidence" language, but also expressly delegating "all our Power and Authority, to appoint Deputy Postmasters").

<sup>211</sup> *See, e.g.*, Image of a Commission of Office, WIKIMEDIA, <https://upload.wikimedia.org/wikipedia/commons/0/0f/Commissionussfo.jpg> [<https://perma.cc/Z7YP-ZMLD>].

<sup>212</sup> *E.g.*, *Providence Tool Co. v. Norris*, 69 U.S. 45, 55 (1864) ("These offices are trusts, held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity, and fitness for the position of the appointee.").

“investigate with care the qualities requisite to the stations to be filled” and so the Senate can confirm those qualities “to prevent the appointment of unfit characters.”<sup>213</sup> Indeed, today’s careful investigations include thorough personal background checks by the FBI, tax filings, reviews of writings, ethics and financial disclosures, personal questionnaires, and Senate and White House meetings with a PAS nominee, not to mention sworn testimony.<sup>214</sup> Consider whether that long process, judgment, and work should be nullified by one person’s decision to delegate their entrusted duty to someone else not so selected, vetted, or trusted by constitutionally designated officers.

That is all part and parcel of why the commission’s language of trust and confidence are no coincidence. It was likely related to the *delegata* maxim, and used words that underpinned its rationale. It shows that without other express permission, the appointee and only the appointee could exclusively exercise the authorities of that office because they were selected as a particular special agent of the government. Moreover, it shows they were selected for their personally vetted characteristics of trust, judgment, and confidence in their ability to discharge the duties of that particular office that could involve discretion.

Commissions also serve as evidence of one’s authority.<sup>215</sup> And in that practice is yet another reason why implied or presumed delegation, where no written record of the delegation may exist, makes little sense for significant statutory duties. These practice and understandings surrounding delegation also served another important function: preventing the unbridled expansion of government and its authorities to unknown persons, or to unscrupulous ones pretending they were vested with governmental powers. Only with a written commission from a recognized authority, could one show that they had been delegated governmental powers.

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<sup>213</sup> FEDERALIST NO. 76 (Alexander Hamilton), [https://avalon.law.yale.edu/18th\\_century/fed76.asp](https://avalon.law.yale.edu/18th_century/fed76.asp) [<https://perma.cc/6NKD-G7ST>].

<sup>214</sup> Robert Kelner et al., *A Primer on the Presidential Appointee Vetting Process*, LAW360.COM (Nov. 16, 2016, 12:02 PM), [https://www.cov.com/-/media/files/corporate/publications/2016/11/a\\_primer\\_on\\_the\\_presidential\\_appointee\\_vetting\\_process.pdf](https://www.cov.com/-/media/files/corporate/publications/2016/11/a_primer_on_the_presidential_appointee_vetting_process.pdf) [<https://perma.cc/T47H-8944>]; see also Mendelson, *supra* note 49, at 592 (“[T]he Senate confirmation process represents an important institutionalized space for elected officials to hold hearings, deliberate publicly, and give reasons regarding a particular confirmation decision. All are important forms of democratic legitimation.”).

<sup>215</sup> Recall that the core issue in *Marbury v. Madison*, 5 U.S. 137 (1803), was whether an express and exclusive authority in the form of a signed commission of office would be delivered to several judicial nominees or if they could be voided before delivery. The ability to show such evidence of the appointment was so vital to the judges that they sued and went to the Supreme Court, and its necessity as evidence was remarked upon by Chief Justice Marshall. *Id.* at 157 (“This is an appointment . . . evidenced by no act but the commission itself. In such a case therefore the commission and the appointment seem inseparable; it being almost impossible to shew an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment; though conclusive evidence of it.”).

Commissions of office from our earliest days to today can therefore tell us much about delegation. First, they confirm that a person exercising significant authority delegated by Congress is an officer of the United States.<sup>216</sup> Second, they show that the person was specifically appointed for the trust and confidence in their personal abilities and judgment, meaning that they cannot select substitutes for their duties via delegation without express authority.<sup>217</sup> And third, they indicate that evidence of the ability to exercise statutory and significant authorities of the United States were to be expressly stated, made public and patent, under seal, and based on set of limited authorities given to that particular office and person.<sup>218</sup> It is not clear that other commentators have previously made these links between the *delegata* maxim and commissions because the issue used to be so well settled prior to the recent divergent cases that it may have never been necessary to consider the purpose or text of commissions in this context.

*B. The Earliest Public Offices Had Express Authority to Receive Delegations*

It bears repeating that public offices are solely creatures of statute.<sup>219</sup> And the significant power of the officers who occupy them are limited by and to the authorities Congress has delegated to them.<sup>220</sup> But conspicuously, when Congress first created certain offices, it did not always assign specific duties to them. Rather, the statutory duties of many offices, particularly assistant secretaries, were written to be an expressly authorized delegee of duties that were actually vested in their department's secretary. As this Section will show, that practice started in the early years of our Republic. It continued as many court and legal opinions recognized and reinforced that being an

<sup>216</sup> See *supra* notes 178–85.

<sup>217</sup> See *supra* notes 200–11.

<sup>218</sup> See *supra* notes 182–85; *Supervisors v. United States*, 85 U.S. 71, 77 (1873). Federal commissions are also notably made under seal. *E.g.*, 5 U.S.C. § 2902. At common law, and prior to state statutory laws changing that, a corporation could “only act through the instrumentality of its common seal.” *Fleckner v. Bank of U.S.*, 21 U.S. 338, 357 (1823).

<sup>219</sup> *E.g.*, *Supervisors*, 85 U.S. at 77 (“Such officers are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred upon them by the author of their being.”); *Gomez v. United States*, 490 U.S. 858, 864 (1989) (“When a statute creates an office to which it assigns specific duties, those duties outline the attributes of the office.”).

<sup>220</sup> *E.g.*, *Marbury v. Madison*, 5 U.S. 137, 158 (1803) (“[T]he duty of the secretary of state. . . [as] an officer of the United States, bound to obey the laws. He acts, in this regard. . . under the authority of law, and not by the instructions of the President.”); *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 80 (2007) (stating a federal office is a “delegated sovereign authority of the federal government”); *Auth. Delegated Under the Nat’l Indus. Recovery Act to the Att’y Gen. & the Sec’y of Lab.*, 37 Op. Att’y Gen. 576, 576 (1934) (“Since the offices [of Attorney General and the Labor Secretary] were created and their scope defined by Congress, no change can be made therein except by an act of Congress.”).

authorized delegee was the very purpose of such offices. And even in modern times, Congress still creates PAS positions as specifically authorized delegees.<sup>221</sup>

Though it appears in many executive departments, this concept can be shown in early practice by looking to the example of the first four secretaries, those of the Departments of State, Treasury, War, and the Navy. The first three departments were created in the first year of our Republic, and the Navy Department was created nine years later.<sup>222</sup> The next department to be created, Interior, would not be born until fifty-one years after that.<sup>223</sup>

When the office of Secretary of the Treasury was first created in 1789, it was given a specific list of duties, as were the new offices of the Comptroller, Auditor, Treasurer, and Register.<sup>224</sup>

Similarly, the collectors, naval officers, and surveyors who were one of the first offices created by Congress, were given specific duties to execute, and specific limited authorities to hire persons for weighing, measuring, and inspecting.<sup>225</sup> Although collectors were given express permission to appoint deputies, Congress made clear that those deputies would act in the name of the appointing officer “under his hand and seal, to execute and perform on his behalf” and who would be “answerable for the neglect of duty, or other mal-conduct of his said deputy in the execution of the office” even after death, where the officer’s estate would be liable.<sup>226</sup>

For different reasons, duties for the Secretaries of State, War, and the Navy all initially had no specific duties vested by Congress other than to receive orders from the President (i.e., to be the executive’s agents).<sup>227</sup> Chief Justice Marshall (who was Secretary of State directly before his appointment

<sup>221</sup> *E.g.*, Homeland Security Act of 2002, Pub. L. No. 107-296, § 103, 116 Stat. 2132, 2145 (“[E]very [previously listed] officer of [DHS] shall perform the functions specified by law for the official’s office or prescribed by the Secretary.”).

<sup>222</sup> Act of Apr. 30, 1798, ch. 35, 1 Stat. 553.

<sup>223</sup> Act of Mar. 3, 1849, ch. 108, § 1, 9 Stat. 395.

<sup>224</sup> Act of Sept. 2, 1789, ch. 12, 1 Stat. 65, 66–67.

<sup>225</sup> Act of July 31, 1789, ch. 5, §§ 5–8, 1 Stat. 29, 37.

<sup>226</sup> *Id.* §§ 6–7; *see also, e.g.*, Form of Commission to Deputy Attorney Generals, [June 1779?], *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-03-02-0025> [<https://perma.cc/HSV2-P784>] (“On verso appears a memorandum in [Thomas Jefferson’s] hand, partly illegible, as follows: ‘query [. . .] no law has authorised the governour to grant such a commission, if any person may do it, it must be the Attorney general whose deputy he is, & who therefore must give him letters of deputation.’” (second alteration in original)).

<sup>227</sup> Act of July 27, 1789, ch. 4, 1 Stat. 28, 29 (duties of the Secretary of Foreign Affairs were “to such other matters respecting foreign affairs, as the President of the United States shall assign to the said department,” and to “conduct the business of the said department in such manner as the President . . . shall . . . order or instruct”); Act of Aug. 7, 1789, ch. 7, 1 Stat. 49, 50 (Secretary of War’s duties were to “perform and execute such duties . . . entrusted to him by the President . . .”); Act of Apr. 30, 1798, ch. 35, § 1, 1 Stat. 553 (Secretary of the Navy’s duties were to “execute such orders as he shall receive from the President . . .”).

as Chief Justice) expressly recognized this difference in *Marbury v. Madison*, because the authority for military and foreign affairs functions came from Article II, and because Congress created those three offices before it assigned other authorities to them.<sup>228</sup> Only later would Congress create specific duties for those offices based on Article I authorities.<sup>229</sup> In this way, the Secretaries of State, War, and Navy were first created to be agents of the Executive because their military and foreign affairs functions made them unique, and uniquely had them execute Article II executive authorities vested in the President—unlike the Secretary of the Treasury. Formal offices needed to be created for such Article II agents because they would still, according to another part of Article II, be an officer who could exercise some of the government’s significant authority.<sup>230</sup> But over time, they also became officer-agents of Congress for the other duties were vested in them via Article I authorities.<sup>231</sup>

That early practice of creating an office simply to be a statutorily authorized delegee continued into modern times. As an early example, in 1792, when Congress created a new office of Commissioner of Revenue, it said that officer was to “execute such other services . . . as shall be directed by the Secretary of the Treasury.”<sup>232</sup> Eventually, that text and authorization became more refined when the first position of Assistant Secretary was created in the State Department in 1853, and was by the authorities of that office-creating statute, to “perform all such duties in the office of the Secretary, . . . belonging to that Department, as shall be prescribed by the Secretary.”<sup>233</sup> Over time, several other assistant secretary positions would eventually be created with the same language.<sup>234</sup> And when the number of assistant secretaries kept growing,

<sup>228</sup> *Marbury v. Madison*, 5 U.S. 137, 149 (1803) (“The secretary of state acts, as before observed, in two capacities. As the agent of the President, he is not liable to a mandamus; but as a recorder of the laws of the United States; . . . &c. he is a ministerial officer of the people of the United States. As such he has duties assigned him by law, in the execution of which he is independent of all control, but that of the laws.”); see also Letter to Thomas Jefferson from George Washington, 13 Oct. 1789, *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-15-02-0496> [https://perma.cc/T6FY-RKQ7] (“[T]he Department of State . . . involves many of the most interesting objects of the Executive Authority.”).

<sup>229</sup> *E.g.*, Act of Mar. 2, 1799, ch. 41, § 2, 1 Stat. 731 (requiring the Secretary of State to give Congress certain records).

<sup>230</sup> *E.g.*, *Edmond v. United States*, 520 U.S. 651, 662 (1997).

<sup>231</sup> See *The President’s Power in the Field of Foreign Relations*, 1 Supp. Op. O.L.C. 49, 60 (1937); see also, *e.g.*, *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (“Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation . . .”).

<sup>232</sup> Act of May 8, 1792, ch. 37, § 6, 1 Stat. 279, 280.

<sup>233</sup> *E.g.*, Act of Mar. 3, 1853, ch. 97, § 6, 10 Stat. 212.

<sup>234</sup> *E.g.*, Act of July 31, 1861, ch. 27, 12 Stat. 282–83 (Assistant Secretary of the Navy); Act of Aug. 3, 1861, ch. 42, 12 Stat. 287 (Assistant Secretary of War); Act of Mar. 14, 1862, ch. 41, § 6, 12 Stat. 369 (Assistant Secretary of the Interior); see also Act of Feb. 17, 1922, ch. 55, 42 Stat. 366–67 (Undersecretary of the Treasury); Act of Dec. 16, 1940, ch. 931, § 1, 54 Stat. 1224 (Under Secretary of War); Act of June 20, 1940, ch. 400, § 3, 54 Stat. 493–94

eventually a more senior position was desired, which led to Congress creating an office in many departments called Under Secretary, which also bore that same statutory language authorizing them to exercise authority delegated from their respective secretary.<sup>235</sup>

Given the express statutory language for these offices, courts have had no trouble holding that these assistant secretaries, under secretaries, and other officers with similar descriptions for their office, were statutorily authorized

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(Under Secretary of the Navy); *cf.* Act of Feb. 20, 1863, ch. 44, 12 Stat. 656 (Assistant Register of the Treasury, with duties such as may be devolved upon by him by the Register, and who acts for them in case of absence).

<sup>235</sup> While the office of Under Secretary of State was the first of its kind and contained no description in the appropriations act in which it became law (Act of Mar. 1, 1919, ch. 86, 40 Stat. 1213, 1224), records show that the office was envisioned as early as 1909. Congress was lobbied to create the office so as to “roll back from the shoulders of the Secretary of State the great burdens of that office and make it possible for him to attend to the other duties that are thrust upon him . . .” 43 CONG. REC. 3042 (1909) (also saying the name was chosen because of its familiarity in “statecraft” and to create a “higher rank” than those of existing assistants). The 1909 proposal expressly said the Under Secretary of State “shall perform such duties as the Secretary of State may designate.” *Id.* at 1097, 2573. At first, the Under Secretary “title was objected to because it was taken from the British nomenclature, and it was not approved by the Senate.” *Id.* at 1097–98; 48 CONG. REC. 7794 (June 7, 1912). Eventually the office was created in lieu of an existing second-most senior position, Counselor for the Department. 40 Stat. at 1224; H.R. REP. NO. 65-910, at 4 (1919). The office’s duties as an authorized delegee were therefore well known by these prior proposals, by title, and by salary above those of assistant secretaries. It was also a long standing international and British practice that undersecretaries had such duties. *See* 2 OFFICE-HOLDERS IN MODERN BRITAIN, OFFICIALS OF THE SECRETARIES OF STATE 1660-1782 (J.C. Sainty ed., Univ. of London 1973), <https://www.british-history.ac.uk/office-holders/vol2/pp1-21#h3-0008> [<https://perma.cc/UAE5-S4W7>]. Confirming all of this, the 1922 office of the same name in the Treasury Department expressly conveyed duties as an authorized delegee, like those of assistant secretaries. *See* Act of Feb. 17, 1922, ch. 55, 42 Stat. 366, 366–67 (Undersecretary of the Treasury who “shall perform such duties in the office of the Secretary of the Treasury as may be prescribed by the Secretary or by law [and who shall act as Secretary in case of vacancy].”).



delegates for duties specifically vested in their respective secretary or department.<sup>236</sup> Even the Supreme Court has so held.<sup>237</sup>

This is also why some departments currently have assistant secretaries who perform particular functions or oversee certain areas by internal delegation or delegation in a public regulation, but have no formal statutory text or title for those functions. They receive a commission simply as “Assistant Secretary,” despite the Senate preferring that nominations reflect the responsibilities the nominee would receive through lawful internal delegation, like Assistant Secretary of Commerce for Enforcement and Compliance.<sup>238</sup>

Summarizing the above, principal officers initially had no general express authority vested to them to delegate statutory duties to anyone. But they could not run agencies by themselves. So, Congress eventually created offices whose sole function was to receive delegations from the head of that agency.<sup>239</sup> Put another way, if subdelegation is presumed, why did Congress feel it needed to formally and specifically create offices, like assistant secretaries, whose only functions was to receive subdelegations?

It was not just courts, however, that recognized the purpose of these PAS offices. Legal opinions from the executive branch across many decades

<sup>236</sup> *E.g.*, U.S. *ex rel.* Petach v. Phelps, 40 F.2d 500, 501 (2d Cir. 1930) (Secretary of Labor’s PAS assistants were empowered by statute to “perform such duties as may be prescribed by the Secretary”); *Lew Shee v. Nagle*, 22 F.2d 107, 108 (9th Cir. 1927) (“[T]hese statutes have been construed by executive and judicial authority as empowering the heads of departments to prescribe that the assistants shall dispose of such matters as the Secretaries see fit to refer to them, and as they themselves could dispose of.”); *Bowling v. United States*, 299 F. 438, 442 (8th Cir. 1924) (highlighting that statutory duties supported that “the Assistant Secretary is authorized to act in place of the Secretary”); *Turner v. Seep*, 167 F. 646, 650 (C.C.E.D. Okla. 1909) (citing the statute that created the Assistant Secretary and stating “[s]o long as the powers delegated to an Assistant Secretary of the Interior by his superior remain unrevoked, the authority [of the Assistant Secretary] is co-ordinate and concurrent with that [of the Secretary].”), *aff’d as modified sub nom.* *Midland Oil Co. v. Turner*, 179 F. 74 (8th Cir. 1910); *Robertson v. U.S. ex rel. Baff*, 285 F. 911, 914–15 (D.C. Cir. 1922) (“If Congress could by statute legally authorize the Commissioner of Patents and the Secretary of the Interior to hear, determine, and finally decide disbarment cases, it could, by statute, legally empower those officials to delegate the performance of such duties to a designated subordinate. . . . The section says that the Assistant Secretary shall perform such duties, not such administrative duties, as the Secretary shall prescribe . . . .”); *Crane v. Nichols*, 1 F.2d 33, 36 (S.D. Tex. 1924) (same for Assistant Postmaster General).

<sup>237</sup> *Norris v. United States*, 257 U.S. 77, 81 (1921) (quoting statutory duties of the Assistant Secretaries of the Treasury and finding them a sufficient basis for the delegation).

<sup>238</sup> *E.g.*, *Chadwick v. United States*, 3 F. 750, 756 (C.C.D. Mass. 1880); PN1003 — Lisa W. Wang — Department of Commerce, 117th Cong. (nominated Aug. 9, 2021; confirmed Dec. 16, 2021) (the nomination was made to the unspecified office of Assistant Secretary of Commerce, even though it was known that once she was appointed she would function as the specified Assistant Secretary for Enforcement and Compliance); Reassignment of Assistant Sec’y of Lab. Without Senate Reconfirmation, 19 Op. O.L.C. 274 (1995) (explaining Senate preferences).

<sup>239</sup> *E.g.*, *John Shillito Co. v. McClung*, 51 F. 868, 871 (6th Cir. 1892) (“It having been found impossible for the heads of departments to perform, in person, all the duties imposed on them by law, the office of assistant secretary was created for all the departments.”).

similarly concluded that offices like assistant secretaries are expressly authorized recipients of delegated statutory authority. In more modern times, this consensus view has been confirmed in 1995 and in 1978 by OLC Assistant Attorneys General as diverse in their views as Walter Dellinger and Antonin Scalia.<sup>240</sup>

But even in older generations of opinions, this view was staunchly held. For example, then-Attorney General (and later-Supreme Court Justice) Robert Jackson took just that same view in 1941 when he concluded that an office of the Assistant Secretary, created with the authority to “perform such duties in the conduct of the business of the Department of Agriculture as may be assigned by the Secretary,” is by its text and nature able to receive delegations from the Secretary.<sup>241</sup> Two years before that, other 1939 opinions by Jackson and AG Frank Murphy (who three months later would also be appointed to the Supreme Court), likewise confirmed that the Secretary was able to delegate functions vested in that office to the Assistant Secretary.<sup>242</sup>

Both of these eminent jurists’ conclusions similarly conformed to earlier AG opinions, like one reached in a 1933 opinion from AG Cummings, which concluded that an assistant secretary was an authorized delegee of duties statutorily assigned to the secretary.<sup>243</sup> These all also aligned with a 1925 opinion by AG John Sargent, which stated the same about other assistant secretaries.<sup>244</sup> And a 1903 opinion by AG Philander Knox likewise based its conclusion that an assistant secretary of war could sign certain authorizations for the secretary based on the statute creating that office and its language as an authorized delegee.<sup>245</sup>

Even before that, an 1886 opinion by AG Garland characterized the office of the Assistant Secretary of the Interior as an authorized delegee of any duty

<sup>240</sup> Reassignment of Assistant Sec’y of Lab. Without Senate Reconfirmation, 19 Op. O.L.C. 274, 275 (1995) (“The relevant statutes, on their face, divide Assistant Secretaries into two classes: those whose duties are assigned by statute and those whose duties are allocated to them by the Secretary. . . . [A] Senate confirmed Assistant Secretary of Labor [is] performing duties lawfully assigned to her by the Secretary under 29 U.S.C. § 553.”); Dep’t of Housing & Urban Dev.—Delegations of Auth.—42 U.S.C. §§ 3533, 3535, 2 Op. O.L.C. 87 (1978) (highlighting a statute that said departmental officers may receive delegations from their secretary).

<sup>241</sup> Fed. Food, Drug, & Cosmetic Act Delegation of Auth., 40 Op. Att’y Gen. 34, 36 (1941).

<sup>242</sup> Inland Waterways Corp.—Delegation of Powers & Duties to Assistant Sec’y of Com., 39 Op. Att’y Gen. 371, 372–73 (1939); *id.* at 383 (clarifying opinion by AG Murphy).

<sup>243</sup> Delegation of Certain Powers & Duties to the Assistant Sec’ys of Com., 39 Op. Att’y Gen. 541, 547 (1933).

<sup>244</sup> Auth. of Sec’y of the Treasury to Delegate Certain Powers to the Dir. of Customs, 35 Op. Att’y Gen. 15, 19 (1925) (“There is, however, a distinction between powers conferred upon a public officer, which he may delegate to his subordinates, and powers which must be exercised by him personally. It has been said that the performance of a power requiring the exercise of judgment or discretion may not be delegated to another, unless the legislative authority conferring power has authorized the delegation.”).

<sup>245</sup> Auth. of Chief Clerk of War Dep’t to Sign Requisitions, 24 Op. Att’y Gen. 646, 648–49 (1903).

vested in the Secretary because of the express text of the duties of that assistant office.<sup>246</sup> AG Garland followed that up with another affirming opinion two years later in 1888 that confirmed that when acting under a delegation made under the same express statute that has not been revoked, the Assistant Secretary can, in their own name, sign a determination statutorily assigned to the Secretary.<sup>247</sup>

Supreme Court decisions and other court cases also recognized this purposefully constructed structure. One notable precedent was a 1879 Supreme Court opinion, *Parish*, which similarly described the purpose of the assistant office as made to “relieve the over-burdened principal” where it was found “that it is impossible for a single individual to perform in person all the duties imposed on him by his office[,] [h]ence statutes have been made creating the office of assistant secretaries for all the heads of departments.”<sup>248</sup>

But *Parish* is important to fully understand, because some mistakenly point to it as precedent supporting an inherent ability to subdelegate to anyone.<sup>249</sup> It, however, stands for just the opposite. *Parish* centered around a 1863 Civil War procurement contract of ice for hospitals, and “the validity of [a modifying] notice of the Assistant Surgeon-General” (“A-SG”).<sup>250</sup> That A-SG office was created as a PAS (Senate-confirmable) office by the same act that set duties of the SG PAS office.<sup>251</sup> But while no duties of the A-SG were set forth by statute creating it, the powers of the office were known by its title, as over seventy years of prior statutes and practice had demonstrated.<sup>252</sup> In other words, because the office was created by statute, and because it had a title of “assistant” with a long historical and statutory precedent for what that meant, it was expressly authorized to be a delegee of authorities vested in the principal SG office. It is not clear if regulation, or practice, or an oral instruction had allowed the A-SG to order a set amount of ice, but the Court appeared to presume the regularity of the act and, more importantly, refused to read in any necessity for contractual ratification by the SG.<sup>253</sup> Instead, the Court discussed the very point just made, that statutes creating offices like assistants have been created for the express purpose of executing duties assigned to the higher-level office.<sup>254</sup> The Court even went on to distinguish

<sup>246</sup> Contingent Fund, 18 Op. Att’y Gen. 432, 432–33 (1886).

<sup>247</sup> Appeals from Gen. Land Office, 19 Op. Att’y Gen. 133, 133 (1888).

<sup>248</sup> *Parish v. United States*, 100 U.S. 500, 504–05 (1879).

<sup>249</sup> *E.g.*, Marisam, *supra* note 53, at 241 & n.276 (citing *Parish* as an example of a case “presuming agency heads’ power to subdelegate”); *see also id.* (not noting the other case cited, *McCullum*, concerned the validity of not any random delegee, but the First Assistant Postmaster General, who by statute and title had authority to execute the Postmaster General’s duties).

<sup>250</sup> *Parish*, 100 U.S. at 504.

<sup>251</sup> Act of Apr. 16, 1862, ch. 55, 12 Stat. 378–79.

<sup>252</sup> *See sources cited supra* note 234.

<sup>253</sup> *Parish*, 100 U.S. at 504.

<sup>254</sup> *Id.*

how the very title and nature of that A-SG office empowered it, noting that otherwise “any inferior clerk would have answered the purpose as well.”<sup>255</sup> To simplify the takeaway, the Court expressly said that the A-SG office carried a validity to the act assigned to the SG, one that another inferior officer, like a clerk would not have carried—thus indirectly stating that a delegation to anyone else would not have been valid.

The Court’s observation was spot-on, and not just because many subsequent courts and executive branch opinions would hold the same. As the next Section will show, many offices and even departments were created to relieve heavy workloads precisely because various department heads knew they could not implicitly delegate the increasing volume of duties vested in their office, and pled for express statutory relief. Put differently, if *U.S. Telecom* was correct in saying subdelegation is presumptively permissible,<sup>256</sup> then none of the massive government-office infrastructure built to relieve such burdens would have been needed.

*C. New Offices and Even Departments Were Created Because Delegation Was Not Implicitly Allowed*

Many of us often complain we are overworked. Executive department heads were no different, except that one can definitively trace the increase in statutory duties added to their offices by various congresses over time. For a while these officers managed their increased workloads by having their subordinates brief and prepare issues for their final approval. But as more responsibilities were conveyed by statute, department heads began to complain that they could still not keep up with the workload. Although Congress had often expanded the number of clerks and staff in their departments, that did not help because department heads still knew the *delegata* maxim and that they could not delegate their own duties to anyone without express permission. Of course, Congress knew this as well. And so, Congress’s first solution was to create other offices with carved out specific duties, and later ones like assistant secretary, which were expressly authorized to receive delegations generally.<sup>257</sup> Eventually, though, it became apparent that creating new offices was not always enough to relieve the amount of statutory duties assigned to department heads. So as an alternative, Congress occasionally even created entirely new departments and agencies, complete with new agency heads, precisely because of the *delegata* maxim.

The historical views on using internal delegations to offset burdens can be seen in an 1834 example, when the Treasury Secretary made a proposal to Congress, which it did not act on, that “a slight [statutory] alteration, which would seem advisable in all the Departments, is recommended, so as to make

<sup>255</sup> *Id.* at 504–05.

<sup>256</sup> *See* *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004).

<sup>257</sup> *See supra* Section III.B.

the chief clerk, . . . empower[ed] . . . to discharge the duties of the head of the Department in his absence.”<sup>258</sup> Had usual agency principles applied, then a department head could have simply delegated his duties to the clerk or another subagent in his absence. But clearly that was thought impermissible without express statutory text.

Similarly, when the first office of Assistant Secretary of State was advocated for by various Secretaries of State numerous times between 1830 and the early 1850s, the arguments advanced for it were based on necessity from being overburdened. But had delegation been presumed or permitted by implication, there would have been no need to create such a high-level PAS office, as many inferior-officer clerks could have alleviated the workload. Instead, the need for express authority to delegate caused Secretary of State Martin Van Buren (later the 8th President) to write to the Chairman of the House Foreign Affairs Committee in 1830 to suggest that instead of creating a new executive department “to be charged with the duties now overburdening other Departments,” it might “be more acceptable” to pass “a law authorizing the appointment of an Assistant Secretary of State, . . . with the hope that the duties of this [office] may be conveniently and satisfactorily discharged by the means of this addition to the existing establishment.”<sup>259</sup> Congress initially responded by creating a new office in 1836 with specific duties called the Commissioner of Patents to perform certain duties previously vested in the office of Secretary of State.<sup>260</sup>

But even the addition of a PAS office in 1836, which relieved some specific duties, did not solve the problem of being overburdened generally. To that end, even more requests were made for a new PAS assistant.<sup>261</sup> Secretary of State James Buchanan (before he later became the 15th President), wrote to Congress in 1846 complaining that because he was the only one authorized to sign documents, he did not have time to perform his job or to consider weighty issues, and that his Department, consisting of himself, one chief clerk, twelve clerks, one translator, and one librarian, could not conduct the business of the nation.<sup>262</sup> His solution was to have Congress convert the office of Chief Clerk to one of an Assistant Secretary and make it “authorized by law, under the general supervision of the Secretary, to transact all the business of the department, except that which is of a purely diplomatic character.”<sup>263</sup> Instead, in 1849, Congress transferred certain departmental functions

<sup>258</sup> H.R. REP. NO. 24-740, at 24, 35 (1836).

<sup>259</sup> H.R. REP. NO. 21-380, at 2 (1830).

<sup>260</sup> Act of July 4, 1836, ch. 357, 5 Stat. 117; *see also* H.R. REP. NO. 21-380, at 7 (containing an 1826 letter from Secretary Clay regarding his excessive duties).

<sup>261</sup> *E.g.*, H.R. REP. NO. 29-552 (1846).

<sup>262</sup> *See id.*; *see also* S. REP. NO. 29-100 (1847).

<sup>263</sup> H.R. REP. NO. 29-552, at 3.

and offices, like the Patent Office, to an entirely new Department of the Interior and Secretary of the Interior.<sup>264</sup>

The new Interior Department did not, however, sufficiently relieve the deluge of duties vested in a single office either. So, in 1850, Secretary of State Daniel Webster made yet another similar request, asking that a new office be authorized to “perform such duties . . . as shall be assigned to them by the Secretary.”<sup>265</sup> This time, instead of creating an entirely new department or agency, Congress finally acceded to the request and created an assistant secretary office capable of receiving assigned (i.e., delegated) duties in 1853.<sup>266</sup>

And so, as government expanded, and as more statutory functions were given to department heads, Congress knew it could only relieve that increased burden by creating new PAS offices either with express authority to generally receive any delegation or with functions that were reassigned from other officers. First, various assistant secretary offices were created, then under secretary offices were often added to be senior to those assistants, and eventually deputy secretaries were created to be senior to both. In this way, Congress still limited who could perform discretionary statutory functions and was able to personally vet them through the appointment process. This purposeful structure was built on the very principle that the express authority to receive such delegations, as was typically placed in those new offices, was necessary for delegation or reassignment to occur.

*D. If Delegation Was an Option, Vacancies Acts Would Have Been Different*

So-called “Vacancies Acts” are various statutes enacted many times starting in 1792 and most recently in 1998, that allows the executive branch to address vacancies in public offices.<sup>267</sup> Simply put, they authorize the President to designate another (historically almost always another officer), to act in a vacant office, including that of a department head. Sometimes the vacancy described is due to death or other unplanned event, like a firing or resignation. But since 1792, Vacancies Acts have also covered predictable events, like “absence from the seat of government” and “sickness,” which would not always be debilitating or unplanned.<sup>268</sup>

<sup>264</sup> Act of Mar. 3, 1849, ch. 108, § 1, 9 Stat. 395.

<sup>265</sup> H.R. REP. NO. 31-491, at 2 (1850).

<sup>266</sup> Act of Mar. 3, 1853, § 6, 10 Stat. 212. The Department of Agriculture offers another example, as it was first created in 1862 as a separate, non-cabinet level agency, headed by a new PAS office of Commissioner with new statutory duties and a staff to direct, after being represented for a long time by only a clerk and embedded in the Interior Department, without sufficient funding or staffing to issue desired reports or take on other duties. H.R. REP. NO. 37-21 (1862); Act of May 15, 1862, ch. 37, 12 Stat. 387, 388.

<sup>267</sup> Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281; 5 U.S.C. §§ 3345–3349d.

<sup>268</sup> § 8, 1 Stat. at 281.

It is quite conspicuous then, that the last two conditions would have been included if an officer had inherent power to delegate their duties before they temporarily left their office. Had delegation been allowed, it would have been the simplest course of action for two main reasons. First, the President would not need to be troubled by each such short vacancy to invoke the Vacancies Act and designate someone by executive order.<sup>269</sup> And second, many of the Vacancies Acts that authorized temporary acting officials limited them to act for only ten or thirty days in cases of resignation,<sup>270</sup> and those short time limits were strictly construed.<sup>271</sup> But because delegations have no time limit, if such delegation was inherently permitted, it would have been easier for a President to ask or order the outgoing officer to delegate all their functions.

Even early practice showed that at least one cabinet officer, Treasury Secretary Alexander Hamilton, did not simply delegate when he left “the seat of Government” (the physical location of his office) in 1794 to accompany the Army against insurgents in Western Pennsylvania.<sup>272</sup> Rather, he apparently viewed himself as having simply two options: (1) trouble the President to invoke the Vacancies Act so that the Comptroller could act, as Hamilton put it, as a “substitute”; or (2) have the Comptroller act as an agent, but only doing so in Hamilton’s name, administering blank warrants he signed in advance, meaning Hamilton would, as he put it, bear “responsibility” and risk for the actions of the agent acting in his name.<sup>273</sup> Hamilton chose the latter, not apparently even considering that he could have authority to delegate a final authority himself—his choice was thus well in line with the *delegata* maxim and other early practices and understandings.<sup>274</sup> Certainly, this decision made sense. If a statute in the form of the Vacancies Act was needed to have

<sup>269</sup> *E.g.*, Exec. Order No. 620-1/2 of Apr. 25, 1907; Exec. Order No. 1590 of Aug. 24, 1912; Exec. Order No. 7487-A of Nov. 6, 1936.

<sup>270</sup> Act of July 23, 1868, ch. 227, 15 Stat. 168, 168 (1868) (10 days’ acting time for resignation); Act of Feb. 6, 1891, ch. 113, 26 Stat. 733, 733 (1891) (extended to 30 days’ acting time for resignations, which remained until 1988).

<sup>271</sup> *E.g.*, Filling Vacancies in Office Temporarily, 17 Op. Att’y Gen. 535, 536 (1883).

<sup>272</sup> Letter from Alexander Hamilton to Oliver Wolcott, Junior, 29 September 1794, *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Hamilton/01-17-02-0263> [<https://perma.cc/2PJ5-6LLD>].

<sup>273</sup> Letter from Alexander Hamilton to George Washington, 2 February 1795, *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Hamilton/01-18-02-0149> [<https://perma.cc/FYA9-KP68>] (“It is left [as a] matter of discretion whether the duties of the officer shall be performed by his Agent empowered by himself and acting for him or by a substitute for him appointed by the President and acting as The Officer. This I take to be the distinction. In the first case [leaving signed warrants] the business must be done in the name of the principal and upon his responsibility. In the second [the Vacancies Act] it would be done in the name of the substitute and upon his own responsibility. The head of the Department would be exonerated. . . . In other respects in formal Acts which were to be avoided as far as practicable and when blanks could not have been properly or safely left[,] my name was to be used.”).

<sup>274</sup> *Id.*

someone act as a substitute, then it would be especially odd to think that the same end could be accomplished via some kind of inherent ability to subdelegate final authority.

Only far more recently, around the 1970s, did delegating final authority become more pervasive in order to have others perform the duties of vacant offices.<sup>275</sup> But crucially, it was only justified on the basis of the express statutory authority to delegate—and not any presumed or implied kind.<sup>276</sup> Despite the use of express authority, such delegations were still decried by Congress<sup>277</sup> and the Comptroller General,<sup>278</sup> until finally, in 1998, the FVRA prohibited the use of express general delegation authorities as a way to perform all the duties of a vacant office.<sup>279</sup> So, even today, the use of express delegation is restricted, at least when it comes to the functions and duties of vacant offices. That makes it all the more confusing as to why delegations could be implied or presumed to be allowed, even without any express text to support it.

Even the limited three-year practice before the first Vacancies Act further shows that in absence of that statute, necessity did not excuse the law or require any kind of implied authorities. George Washington had been President for only six weeks before the problem of temporary vacancies first arose. Thomas Jefferson, having been appointed Minister of the United States in France in May of 1784, had served abroad for over five years.<sup>280</sup> He wrote John Jay in November 1788 asking for a leave of absence of a few months to return home and tend to his affairs.<sup>281</sup> Jay mentioned that request to President Washington shortly after he entered office, and Washington formally nominated William Short to take charge of that office's affairs during Jefferson's "absence."<sup>282</sup> The Senate confirmed Short to that temporary post two days later, on June 18, 1789.<sup>283</sup> And so, as the Senate Executive Journal confirms, the first-ever nomination and confirmation to any office under the Constitution was a temporary one. Had Secretary of Foreign Affairs John Jay possessed authority to delegate the duties of Minister to France, or had that Thomas Jefferson been able to himself delegate his duties to another, surely that would

<sup>275</sup> See Dixon Letter, *supra* note 41, at 295 (reprinting OLC letters).

<sup>276</sup> *Id.* at 295–97.

<sup>277</sup> S. REP. NO. 105-250, at 4 (1998).

<sup>278</sup> The Honorable William Proxmire U.S. Senate, B-220522, 65 Comp. Gen. 626, 634 (1986).

<sup>279</sup> 5 U.S.C. § 3347(b).

<sup>280</sup> Letter from Thomas Jefferson to John Jay, 19 November 1788, *Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/jefferson/01-14-02-9004> [<https://perma.cc/2NA8-WJFS>].

<sup>281</sup> *Id.*

<sup>282</sup> Letter from John Jay to Thomas Jefferson, 19 June 1789, *Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/jay/01-05-02-0082> [<https://perma.cc/4H3M-HVK7>].

<sup>283</sup> 1 S. EXEC. J. 6–7 (1789).



have been the most efficient solution instead of waiting for a year and then nominating a temporary position for Senate consent.

The Founding-era practice may have come from well-aligned, pre-constitutional understandings and department practices. During the Second Continental Congress, the business of the nation was first run by Congress “through the whole body or through special committees.”<sup>284</sup> It was only after this process proved cumbersome that, especially during the time of the Confederated Congress, a shift was made to single-headed departments.<sup>285</sup> And so, Congress resolved, in February 1781, that there should be a Secretary of War and three other civil executive department heads, in addition to the Secretary of Foreign Affairs.<sup>286</sup> Not long after General Benjamin Lincoln was finally appointed as the first Secretary of War on October 30, he wrote to Congress in January 1782 requesting permission to take a leave of absence for a short time and to request the ability to appoint clerks and assistants for whose conduct he “must be responsible.”<sup>287</sup> Congress not only authorized the leave, but on his recommendation created additional offices within the department, those of Assistant, Secretary, and Clerk, all of whom were accountable to the Secretary and all of whom he could both appoint and remove.<sup>288</sup> But Congress then also expressly resolved into law that in “all times in the absence of the Secretary at War, the Assistant be authorized to transact all such business within the Department as shall be assigned to him by the said Secretary, who shall be responsible for the conduct of the Assistant.”<sup>289</sup> And so an agency-type of delegation was permitted, but only upon express authorization, and only to the assistant, who was already an officer in that department. Thus, even exigent circumstances like the Revolutionary War did not apparently allow necessity under implied actual authority to serve as a basis for delegation, and actual express authority was needed. A similar example was seen during the same war when the Quartermaster General, Major General Greene resigned on July 26, 1780, along with his staff, and General Washington warned that there “there must of necessity be a total stagnation of military business.”<sup>290</sup> Fortunately, just a few days later, on August 5th, the Continental

<sup>284</sup> JENNINGS BRYAN SANDERS, *EVOLUTION OF EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS 1774-1789*, at 4 (1935).

<sup>285</sup> *Id.* at 95–97.

<sup>286</sup> 19 *Journals of the Continental Congress, 1774–1789*, at 124–26 (Feb. 7, 1781) (Gaillard Hunt ed., 1912).

<sup>287</sup> SANDERS, *supra* note 284, at 99–100 & n.13.

<sup>288</sup> 22 *Journals of the Continental Congress, 1774–1789*, at 36–37 (Jan. 17, 1782) (Gaillard Hunt ed., 1914).

<sup>289</sup> *Id.* at 37. A note to that journal entry explains that James Madison wrote the provision, and that Congress rejected a system where the business in the war office would “devolve” on the Assistant, but the Secretary would still be responsible for the transaction of business in his absence as when present. *Id.*

<sup>290</sup> Letter from George Washington to Samuel Huntington, 30 July 1780, *Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-27-02-0305> [<https://perma.cc/7RCK-4B6W>].

Congress swiftly appointed Timothy Pickering to fill the role.<sup>291</sup> Again, had implied delegation based on necessity been allowed, certainly General Washington could have assumed and then redelegated these most vital supply and provisioning duties for his army—but he did not apparently view delegation that way.

The same practices and understandings of delegation and authority apparently continued into the start of our Republic, hardened by constitutional principles and the need for Congress to create offices and the Senate to advise and consent to those appointed to run them.

#### IV. CONGRESS REINFORCES THE NEED FOR EXPRESS DELEGATION AUTHORITY

The use of delegation for acts requiring judgment, was, as shown above, overwhelmingly thought to be impermissible absent express authority in the first 150-plus years of the Constitution, and even in the years that preceded it.

Crucially, however, a substantial and often-overlooked change to government structure occurred in the mid-20th century that adds enormous weight to the already amassed stack of evidence on this issue. That change occurred when Congress reconciled a rapidly growing country and government supplied with vast new statutory authorities and responsibilities, with overwhelmed officers, or their authorized delegees like assistant secretaries, who already were having trouble keeping up with the prior statutory responsibilities assigned to them. Congress's solution to that problem: enacting scores of statutes that gave express and general delegation authority to agency heads to redistribute their organization's functions.

These superabundant statutes are compelling evidence of three important points. First, Congress understood that there was no presumed delegation authority and that delegation instead had to be based on express actual authority, and effectively codified that understanding. Second, whatever statutes then existed and were occasionally considered to grant the needed express authority were clearly considered insufficient. And third, even had the existing understanding suggested otherwise, the purposeful enactment of scores of specifically targeted express delegation statutes replaced any common law uncertainty or suggestion that express authority was unnecessary. This is again because common law inferences give way to statutory law.<sup>292</sup>

##### A. *In Response to Administration Asks, Congress Begins Giving Express Delegation Authority to Department Heads*

From the early days of our Republic, attorneys general had consistently agreed that duties involving discretion vested in a specific officer could not

<sup>291</sup> *Id.* at n.3.

<sup>292</sup> See *supra* note 137 and accompanying text.

be delegated without express authority.<sup>293</sup> Typically, that express authority was found in the statute creating the office of the delegee, as for an assistant secretary.<sup>294</sup> A minority of scattered courts and a few attorneys general, however, eventually came to believe that an existing general statute known as Revised Statute (“R.S.”) § 161 (1873)<sup>295</sup>—which was a consolidation of various early statutes that gave general internal management authorities to department heads<sup>296</sup>—could provide such requisite authority to subdelegate when the duty was assigned to a department and not a particular office.<sup>297</sup> Still others believed it was a way to delegate only ministerial and non-discretionary duties.<sup>298</sup> The issue never appeared completely settled, but the more accepted position appeared to be that R.S. § 161 could enable redelegation of duties requiring discretion only to officers who were themselves expressly authorized by statute to receive delegations.<sup>299</sup>

This combination-of-statutes view offered the most practical construction. R.S. § 161 was a general and internal authority for regulating a department’s affairs through rules. The internal rules, however, were not considered publicly binding. But if such internal management statutes did in fact provide enough authority to delegate another statute’s functions, then because laws like R.S. § 161 existed as early as 1789, surely none of the subsequent several

<sup>293</sup> See *supra* notes 107–14.

<sup>294</sup> See *supra* notes 236–47.

<sup>295</sup> In 1925, R.S. § 161 was reclassified to 5 U.S.C. § 22. Today, it still exists in 5 U.S.C. § 301. This provision is also known as a general “housekeeping statute.” *E.g.*, *United States v. Concord Mgmt. & Consulting LLC*, 317 F. Supp. 3d 598, 622 (D.D.C. 2018). Today, the provision is most commonly seen in the *Touhy* regulations context, regarding producing information related to litigation. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467–68 (1951).

<sup>296</sup> *E.g.*, *Luhning v. Glotzbach*, 304 F.2d 560, 564 (4th Cir. 1962) (“This statute was originally passed in 1789 and codified in 1875 as section 161 of the Revised Statutes. Its purpose . . . was to enable General Washington to get his administration under way by spelling out the authority of Government officers to set up offices and to file Government documents.”).

<sup>297</sup> *E.g.*, *Wirtz v. Atl. States Const. Co.*, 357 F.2d 442, 445 (5th Cir. 1966); *Plapao Lab’ys v. Farley*, 92 F.2d 228, 229 (D.C. Cir. 1937). *But cf.* cases cited *infra* note 391 (which relied on authority to issue regulations commensurate with a specific authority statute, and not R.S. § 161); *Consolidation of Bureaus in the Dep’t of Com. & Labor*, 27 Op. Att’y Gen. 542, 546 (1909) (R.S. § 161 could not redistribute functions of an agency created by statute); *Transfer of Duties of Disbursing Clerk of the Bureau of the Census to Disbursing Clerk of the Dep’t of Com. & Labor*, 29 Op. Att’y Gen. 247, 249 (1913) (R.S. § 161 cannot be used to transfer duties statutorily assigned to one clerk to another); *Accounts of Persons in the Revenue Serv.*, 19 Op. Att’y Gen. 401, 403 (1889) (R.S. § 161 could be used so long as the assigned duties did not conflict with statutes, implying that statutes that assigned a duty to a particular office would create the conflict).

<sup>298</sup> 2 Am. Jur. 2d Administrative Law § 65.

<sup>299</sup> *E.g.*, *Norris v. United States*, 257 U.S. 77, 81 (1921); *Lew Shee v. Nagle*, 22 F.2d 107, 109 (9th Cir. 1927); *Bowling v. United States*, 299 F. 438, 442 (8th Cir. 1924); *Keane v. United States*, 272 F. 577, 584 (4th Cir. 1921); *John Shillito Co. v. McClung*, 51 F. 868, 872 (6th Cir. 1892); see also O’Connell, *supra* note 11, at 685–87 (discussing cases that considered whether 5 U.S.C. § 301 could be used as an appointing authority).

dozen specifically authorized-delegee statutes for assistant or under secretaries would have been necessary. Yet there was a deep history of department heads asking for such assistant offices for decades. Plus, the existence of other statutes that authorized only certain officers to receive only certain delegated authorities lent further weight against an expansive reading of R.S. § 161.<sup>300</sup> Furthermore, many attorneys general from the 1800s to the 1930s were well aware of R.S. § 161, and still advised that a separate, specific statute was needed to find the express authority required for delegation.<sup>301</sup>

Thus, for a time, the practice of either (1) vesting authority to delegate in a specific authority statute; (2) increasing the number of generally authorized delegees, like assistant and under secretaries; or (3) creating new agencies and offices to take on certain duties from overburdened ones, served to keep up with the demands placed upon departments. But as the country and government continued to grow, those few officers would soon again become overwhelmed. At no time was this more prevalent than in the 1930s when government expanded at its largest rate ever during the era of the New Deal.<sup>302</sup> Amid that growth in 1933, AG Homer Cummings reviewed several other opinions on delegation and restated “the common principle that ‘the performance of a power requiring the exercise of judgment or discretion may not be delegated to another, *unless the legislative authority conferring power has authorized the delegation,*’” but found that the Assistant Secretaries of Commerce had such general authority to receive delegations from the Secretary.<sup>303</sup>

Just a few years later, in 1936, the Supreme Court decided a case called *Morgan I*, which set forth the general principle that “[t]he one who decides must hear,” and more specifically held that the Secretary of Agriculture could not have certain persons examine evidence, and others who had “not considered the evidence” separately “make the findings and order.”<sup>304</sup> Not long after *Morgan I*, and because of the principle set forth in that case, Secretary of Agriculture Henry Wallace (who would incidentally later be Vice President from 1941 to 1945) began to strongly advocate for new legislation to expressly allow for more delegation, eventually even detailing his request in writing to the Speaker of the House in June 1939.<sup>305</sup> As contemporary observers would explain, the *Morgan I* decision directly led Secretary Wallace to advocate for “statutory authority . . . [to] delegate to subordinates . . . [certain] quasi-

<sup>300</sup> *E.g.*, Act of Mar. 2, 1867, ch. 163, 14 Stat. 439 (Treasury Secretary may delegate signing authority to an assistant secretary).

<sup>301</sup> *E.g.*, Delegation of Certain Powers & Duties to the Assistant Sec’y of Com., 39 Op. Att’y Gen. 541, 543–44 (1933).

<sup>302</sup> Stephen Migala, *The Lost History of the APA’s Foreign Affairs Exception*, 31 GEO. MASON L. REV. 119, 134 & n.84 (2024).

<sup>303</sup> Delegation of Certain Powers & Duties to the Assistant Sec’y of Com., 39 Op. Att’y Gen. 541, 543 (1933) (emphasis added).

<sup>304</sup> *Morgan v. United States (Morgan I)*, 298 U.S. 468, 481 (1936).

<sup>305</sup> Letter from Secretary Wallace to the Speaker of the House (June 30, 1939) (on file with author).

judicial functions.”<sup>306</sup> Even though the Secretary acknowledged that he could delegate statutory functions “generally” to the department’s Under Secretary or Assistant Secretary, he stated it was “obviously impossible” to have three officers run all of the administrative hearings.<sup>307</sup> And while some statutes already expressly authorized the Secretary to delegate to different persons, most other statutes were silent, which apparently led to his advocacy.<sup>308</sup> Thus, even when advocating for a general authority to delegate, there was already an understanding that certain PAS officers were already statutorily authorized to receive delegations.<sup>309</sup> It was just that those few officer-delegees were no longer enough, particularly after *Morgan I* was then viewed as requiring the decision maker to also devote significant time to hear evidence in a quasi-judicial hearing.

Congress responded to Secretary Wallace’s ask. After first considering adding an office of second assistant secretary, Congress expressly authorized the Secretary of Agriculture to delegate any regulatory function to officers or employees of the same department.<sup>310</sup> The law, which became known as Schwellenbach Act of 1940, became one of the first of its kind to grant express and broad delegation authority to a department head instead of creating specific delegation-receiving offices.<sup>311</sup>

Soon thereafter, Congress would start to recognize that because of “the size to which the Government establishment has grown, delegation of authority [of certain kinds] . . . [is] desirable and necessary in the interest of rapid and efficient administration.”<sup>312</sup> To those ends, in 1946, it enacted broad authority for the head of a department to delegate to subordinate officials the

<sup>306</sup> 84 CONG. REC. 7092 (1939); S. REP. NO. 76-565, at 1 (1939); *see also* Letter from H.A. Wallace, Secretary of Agriculture to Senator Adams (June 20, 1940) (“The Schwellenbach Act grew out of a request to the Congress by me for legislation to enable the Secretary of Agriculture to delegate to appropriate responsible officials or employees of the Department much of the regulatory duties which, under the laws then existing, could be performed only by the Secretary of Agriculture, the Under Secretary, or the Assistant Secretary.”), *reprinted in Hearings on H.R. 10104 Before the Subcomm. of the S. Comm. on Appropriations*, 76th Cong. 3d Sess., 71–72 (1940). The laws were listed at 84 CONG. REC. 8368 (1939).

<sup>307</sup> H.R. REP. NO. 76-1381, at 2 (1939) (reprinting letter from the Agriculture Secretary to the Speaker of the House dated Jan. 31, 1939, and detailing there were some twenty-two statutes that required “quasi-judicial functions”).

<sup>308</sup> *Id.*

<sup>309</sup> *Morgan I*, 298 U.S. at 478–79 (explaining that the government argued that the statute that created the assistant secretary office “authoriz[ed] him to perform such duties . . . as may be assigned to him by the Secretary,” and the Court suggested that had the assistant secretary both heard and decided the hearing, it would have no concerns).

<sup>310</sup> H.R. REP. NO. 76-1808, at 1–3 (1940); *see also* 86 CONG. REC. 3169 (1940).

<sup>311</sup> Schwellenbach Act, ch. 75, 54 Stat. 81 (1940).

<sup>312</sup> H.R. REP. NO. 79-2186, at 8 (1946).

power to take final action on only certain administrative matters.<sup>313</sup> Today, that law still exists at 5 U.S.C. § 302.<sup>314</sup> But that law, combined with a strong history of similar principles, reinforced that (1) express authority to delegate was required; (2) a department head did not have implicit authority to delegate; and (3) R.S. § 161 (now codified at 5 U.S.C. § 301) did not suffice either.

Following these acts, at the end of the 1940s, another pivotal wave started: Congress, over the next several years, would grant express delegation authority to every department head and many other agencies to mirror efficiencies found in the private sector, and to have a department or agency head be more directly responsible for their organization.<sup>315</sup>

*B. The Advent of Housekeeping Statutes in the Late 1940s and Early 1950s*

The prevailing view heading into the late 1940s continued to be that express actual authority, and not any implied or presumed authority, was required for an officer to redelegate functions or duties assigned to them by Congress. But with the enactment of the Reorganization Act of 1949 and the scores of resulting reorganization plans, that view became effectively enshrined in law, with both the executive branch and Congress making pronouncements and laws to that effect. Consequently, any vestiges of uncertain common-law arguments, or questions about R.S. § 161, were functionally replaced by this new statutory scheme.

The origins of these series of statutes can be traced to at least 1947 when, following a growing private-sector trend of trying to create efficiencies in business and management, Congress enacted a law calling for a commission to study and report to Congress how similar efficiencies could be promoted in the executive branch.<sup>316</sup> President Truman appointed former President Herbert Hoover to head that study in what became popularly known as the Hoover Commission.<sup>317</sup>

Several resulting recommendations in the Hoover Commission's Report No. 1 on General Management in February 1949 aimed to create certain efficiencies and allow department heads to have clearer lines of responsibility, including ensuring that no subordinate had authority independent from the secretary or equivalent, while also empowering those department heads to

<sup>313</sup> *Id.*; Act of Aug. 2, 1946, ch. 744, § 12, 60 Stat. 806, 809; *see also* Act of June 26, 1930, 46 Stat. 817 (authorizing the head of a department to delegate authority to employ persons for field service).

<sup>314</sup> 5 U.S.C. § 302.

<sup>315</sup> *E.g.*, *Reorganization Plan No. 2 of 1953: Hearings Before the Subcomm. on Reorganization of the S. Comm. on Gov't Operations*, 83rd Cong. 190 (1953) (statement of Joseph M. Dodge, Director, Bureau of the Budget).

<sup>316</sup> Act of July 7, 1947, ch. 207, 61 Stat. 246.

<sup>317</sup> U.S. COMM'N ON ORG. OF THE EXEC. BRANCH OF THE GOV'T, *THE HOOVER COMMISSION REPORT*, at ii, vi (1949).

organize their own department and be in control of its administration.<sup>318</sup> These recommendations were ultimately effected by two proposed and packaged statutory changes: first, functions and duties that were previously statutorily assigned to subordinate officers of an agency would flow up the organizational chain to be vested in the agency head; and second, the agency head was given broad but express authority to flow those or any of their own authorities downward to any other officials in the same agency via delegation. Together, these authorities became collectively known as either “vesting and delegation statutes” or “housekeeping statutes.”<sup>319</sup>

Among other Hoover Commission recommendations, was the idea to bring about its desired changes through reorganization plans, which offered a fast-tracked process to implement them. Under the authority and process laid out by Reorganization Acts, reorganization plans were submitted by the Executive to Congress to consolidate government functions and create efficiencies.<sup>320</sup> But instead of being passed through the normal bill and presentment processes, such plans would become statutory law after being submitted to Congress so long as it did not pass a resolution opposing the plan—in other words, a plan would become law if there was not a legislative veto within a certain number of days.<sup>321</sup> These kinds of reorganization acts were quite common in the mid-1900s, with the first enacted in 1932 and the authority of the last one ceasing in 1984.<sup>322</sup>

And so, in 1949, at the behest of Mr. Hoover and President Truman, a new kind of Reorganization Act was enacted. Not only did it authorize the first unicameral legislative veto and authorize the vesting of subordinates’ duties in an agency head, but more pertinently, it focused on and would present express authority for delegation, citing an identified need for “any officer to delegate any of his functions” as a valid presidential finding that would justify submitting a reorganization plan.<sup>323</sup> The accompanying Senate Report noted this delegation authority was different from previous reorganization acts and described it in this way:

Section 3 (5). Delegation of functions.

This provision adds another possible type of reorganization. The main purpose is to make it possible for top officials to delegate routine functions, *which are now vested in them by law in such a manner as to prevent delegation*. A survey of the statutory duties of the President discloses a great many matters requiring Presidential action, a large part of which could appropriately be assigned to other officers, but many of which the Attorney General indicates cannot now

<sup>318</sup> *Id.* at 24–28 (specifically, recommendations numbered 14, 18, and 20).

<sup>319</sup> *E.g.*, Migala, *supra* note 29, at 710.

<sup>320</sup> *E.g.*, Act of June 30, 1932, ch. 314, tit. IV, § 401, 47 Stat. 382, 413.

<sup>321</sup> Reorganization Act of 1939, ch. 36, § 5, 53 Stat. 561, 562–63.

<sup>322</sup> HENRY B. HOGUE, CONG. RSCH. SERV., R42852, PRESIDENTIAL REORGANIZATION AUTHORITY: HISTORY, RECENT INITIATIVES, AND OPTIONS FOR CONGRESS, at 3 n.11, 4 tbl. 1 (2012), <https://fas.org/sgp/crs/misc/R42852.pdf> [<https://perma.cc/77RW-T8ZY>].

<sup>323</sup> Reorganization Act of 1949, ch. 226, § 3, 63 Stat. 203, 204.

be delegated. A similar situation exists as to department heads. While it would be possible under the old language of the act to “transfer” such functions to subordinates in many cases outright transfer is not desirable as the officer in whom the function is now vested may need to be able to personally perform some part of the function or to withdraw or modify the delegation.<sup>324</sup>

Delegation was thus, yet again, thought to need an express statutory authority. Not only according to Congress, but also according to the Attorney General. The Reorganization Act of 1949 was written precisely to provide that express authority.

The Hoover Commission’s report and recommendations were lauded and employed with speed. Within two months of their February 1949 transmittal, a Senate Report on a separate bill that would give the first vesting and delegation authority to the Secretary of State cited the Hoover Commission’s recommendations as its primary rationale.<sup>325</sup> That law for the State Department was enacted three months later, in May 1949, through the normal presentment process.<sup>326</sup>

On the same day that the Reorganization Act of 1949 was itself enacted into law, June 20, 1949, a series of seven ready plans were immediately transmitted to Congress, two of which contained full vesting and delegation, or “housekeeping” authorities.<sup>327</sup> Thus began a paradigm shift. Congress would create express vesting and delegation laws for each executive department. Apart from the State Department, whose statute allowing delegation just barely preceded the Reorganization Act of 1949, the Defense Department would be the only other agency of that era to have an express general delegation authority enacted through a normal bill and presentment process.<sup>328</sup>

On August 20, 1949, the Post Office became the first agency to obtain express vesting and delegation authority from a reorganization plan.<sup>329</sup> Not long after that, President Truman submitted plans numbered 1 through 6 of

<sup>324</sup> S. REP. NO. 81-232, at 7 (1949) (emphasis added). As noted in the excerpt, and in other sections of the report, different reorganization acts existed from 1932 to 1945, including ones that expressly authorized the President to transfer functions from one agency to another. *Id.* at 1–2.

<sup>325</sup> S. REP. NO. 81-304, at 1–2 (1949) (describing the need to centralize in the Secretary the conduct of foreign affairs which was vested by statute in certain subordinates).

<sup>326</sup> Act of May 26, 1949, ch. 143, §§ 3–4, 63 Stat. 111.

<sup>327</sup> *E.g.*, Special Message to the Congress Upon Signing the Reorganization Act, 1949 PUB. PAPERS 307 (June 20, 1949). Of the seven submitted only Nos. 2 through 6 would go into effect and would be all published in 14 Fed. Reg. 5225–28 (Aug. 23, 1949) and in 63 Stat. 1065–70. Plan No. 1 contained vesting and delegation authorities within a plan to create a new Department of Welfare, but the plan was vetoed. *See id.*; H.R. DOC. NO. 81-222, at 4 (1949). The author notes that a tailored citation style for reorganization plans is used in this Article to show that they were a form of law, included within the *Statutes at Large*, but they were also required to be published in the *Federal Register* and a parallel citation thereto is more helpful both for purposes of accessibility and to find plans’ effective dates.

<sup>328</sup> National Security Act Amendments of 1949, ch. 412, § 5(f), 63 Stat. 578, 580–81.

<sup>329</sup> Reorganization Plan No. 3 of 1949, § 1(b), 14 Fed. Reg. 5225 (Aug. 23, 1949); S. REP. NO. 81-837 (1949).



1950, which called for the “transfer to the respective Department heads the functions of other officers and agencies of the Departments [of Treasury,<sup>330</sup> Justice,<sup>331</sup> Interior,<sup>332</sup> Agriculture,<sup>333</sup> Commerce,<sup>334</sup> and Labor<sup>335</sup>],” and to “permit each Department head to authorize the functions vested in him to be performed by any officer, agency, or employee of the Department.”<sup>336</sup> Most were enacted by later that year, and the one outlier became law in 1953.<sup>337</sup> By June 1953 all executive departments had their many functions, with only minimal and sporadic exceptions, vested in their department head.<sup>338</sup> Subsequently, when any new executive department came into existence, each was given housekeeping authorities in their organic act (or had them carried over as in

<sup>330</sup> Notably, reorganization of the Treasury Department was initially submitted as Reorganization Plan No. 1 of 1950. *E.g.*, H.R. DOC. NO. 81-505 (1950) (Message of the President Transmitting Reorganization Plan No. 1 of 1950). However, the Senate vetoed it on May 11, 1950. S. REP. NO. 81-1518, at 2 (1950) (stating, as reasons for veto, that the “quasi-judicial functions, now administrated by the Comptroller of the Currency, should not be controlled by the President,” and that said office “should remain independent of control by the Secretary of the Treasury”). When the plan was resubmitted, it expressly exempted the functions of the Comptroller of the Currency from being vested in the Secretary, and it was not vetoed and became law. Reorganization Plan No. 26 of 1950, 15 Fed. Reg. 4935, *reprinted in* 64 Stat. 1280 (now partly at 31 U.S.C. § 321(c)(2)).

<sup>331</sup> Reorganization Plan No. 2 of 1950, 15 Fed. Reg. 3173, *reprinted in* 64 Stat. 1261.

<sup>332</sup> Reorganization Plan No. 3 of 1950, 15 Fed. Reg. 3174, *reprinted in* 64 Stat. 1262.

<sup>333</sup> The plan for the Agriculture Department was first submitted as Reorganization Plan No. 4 of 1950 on Mar. 13, and was disapproved by the Senate on May 18, 1950. S. REP. NO. 83-297, at 2 (1953). A second plan was resubmitted three years later as Reorganization Plan No. 2 of 1953 and became effective in June 1953. *Id.*; Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, *reprinted in* 67 Stat. 633.

<sup>334</sup> Reorganization Plan No. 5 of 1950, 15 Fed. Reg. 3174, *reprinted in* 64 Stat. 1263.

<sup>335</sup> Reorganization Plan No. 6 of 1950, 15 Fed. Reg. 3174, *reprinted in* 64 Stat. 1263.

<sup>336</sup> *E.g.*, H.R. DOC. NO. 81-504, at 2 (1950) (Message of the President Transmitting Reorganization Plans No. 1 to 13 of 1950).

<sup>337</sup> The Department of Health, Education, and Welfare (“HEW”) was created by Reorganization Plan No. 1 of 1953, 18 Fed. Reg. 2053, *reprinted in* 67 Stat. 631. It too, in sections 5 and 6, contained housekeeping authorities. *Id.* Those were continued when this department, HEW, was renamed the Department of Health and Human Services (“HHS”); Pub. L. No. 96-88, § 509, 93 Stat. 668, 695 (1979); *see also* 42 U.S.C. § 3501 note (setting out the Reorganization Plan No. 1 of 1953); 42 U.S.C. § 202 note (setting out Reorganization Plan No. 3 of 1966).

<sup>338</sup> Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, *reprinted in* 67 Stat. 633. The Department of Agriculture was the last to implement the vesting and delegation functions for a department in that era. S. REP. NO. 83-297, at 2-3 (1953).

the case of the VA).<sup>339</sup> Today, every executive department still has vesting and delegation authorities.<sup>340</sup> And many other agencies do too.<sup>341</sup>

The practice of using reorganization plans came to an abrupt halt in 1984, when the authority of the latest act expired. The authority was not continued in the same way because a year before, the Supreme Court held in *INS v. Chadha* that laws that provided a legislative veto, like the Reorganization Acts and the plans issued pursuant thereto, were unconstitutional.<sup>342</sup> As a result, the reorganization plans became far less common after 1984, and when they did occur, they did not depend on a legislative veto.<sup>343</sup> As for the ones that had already become law but which *Chadha* then held were unconstitutional, Congress enacted a law in 1984 to ratify and continue them.<sup>344</sup> The last major housekeeping statute for a department came by way of usual congressional enactment with the organic act for the Department of Homeland Security (“DHS”).<sup>345</sup>

Putting all this together more simply, the housekeeping statutes were a way that Congress effectively ratified the understanding that express delegation authorities were needed, and simply expanded their number and scope, making anyone a purported delegee.<sup>346</sup>

<sup>339</sup> Department of Veterans Affairs Act, Pub. L. No. 100-527, § 10, 102 Stat. 2635, 2640 (1988).

<sup>340</sup> *E.g.*, 22 U.S.C. § 2651a(a) (State); 31 U.S.C. § 321(b) & (c) (Treasury); 10 U.S.C. § 113(d) (Defense); 28 U.S.C. §§ 509–10 (DOJ); Reorganization Plan No. 3 of 1950, 64 Stat. 1262, 5 U.S.C. app. (Interior); Reorganization Plan No. 2 of 1953, 67 Stat. 633, 5 U.S.C. app. (Agriculture); 7 U.S.C. § 6912 (also Agriculture); 7 U.S.C. § 2204–02 (also Agriculture re regulatory functions); Reorganization Plan No. 5 of 1950, 64 Stat. 1263, 5 U.S.C. app. (Commerce); Reorganization Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. app. (Labor); Reorganization Plan No. 1 of 1953, 67 Stat. 631, 5 U.S.C. app. (HHS); 42 U.S.C. §§ 3534, 3535(d) (HUD); 49 U.S.C. § 322 (DOT); 42 U.S.C. §§ 7151–52, 7252 (Energy); 20 U.S.C. §§ 3441, 3447, 3472 (Education); 38 U.S.C. §§ 303, 512 (Veterans Affairs); 6 U.S.C. § 112(a)(3), (b) (DHS). The author notes a unique citation style is presented for the reorganization plans here due to this note’s focus on laws that are still in effect today, but which may sometimes be overlooked by their placement within a long appendix to title 5 of the U.S. Code.

<sup>341</sup> *E.g.*, Reorganization Plan No. 3 of 1970, 84 Stat. 2086, 5 U.S.C. app. (EPA Administrator); 22 U.S.C. § 2381(a) (USAID Administrator); 5 U.S.C. § 1104 (Director of Office of Personnel Management); 15 U.S.C. § 78d-1(a) (SEC). Numerous plans in 1950 gave similar authorities to independent agencies. *See* S. REP. NO. 81-1774, at 2 (1950).

<sup>342</sup> *INS v. Chadha*, 462 U.S. 919, 954 (1983) (“Amendment and repeal of statutes, no less than enactment, must conform with Art. I.”).

<sup>343</sup> Reorganization Act Amendments of 1984, Pub. L. No. 98-614, §§ 3(c)(1)–(2), 4, 98 Stat. 3192, 3193 (amending certain sections of 5 U.S.C. §§ 901–912).

<sup>344</sup> Pub. L. No. 98-532, 98 Stat. 2705 (1984) (set forth in 5 U.S.C. § 906 note).

<sup>345</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, § 102, 116 Stat. 2135, 2142–43.

<sup>346</sup> *E.g.*, *Brooks v. Dewar*, 313 U.S. 354, 361 (1941) (appropriations and reenactment “confirms the . . . construction of the statute” and also “constitutes a ratification of the action of the Secretary as the agent of Congress in the administration of the act”).

*C. Congress Knew Redelegation Similarly Requires Express Authority*

By now, it should be evident that most believed express authority was needed to delegate discretionary functions, and so many such laws were enacted because they were considered legally necessary. As a corollary, this short Section notes that authority to redelegate already subdelegated functions would, by the same logic, also need express authority. As just some examples, Congress has expressly given broad successive redelegation authority by statute to the Secretaries of Housing and Urban Development,<sup>347</sup> Transportation,<sup>348</sup> Energy,<sup>349</sup> Education,<sup>350</sup> and Veteran's Affairs.<sup>351</sup>

Even when the Secretary of State only initially had authority to simply subdelegate, Congress later in 1956 expressly authorized the Secretary to "if he shall so specify . . . [authorize others to] successively . . . redelegate any of such functions."<sup>352</sup> After that time, it became more common to expressly authorize delegation and redelegation at once, as when, for example, the U.S. Agency for International Development (USAID) was created in 1961, the administrator was vested with authority to delegate and authorize successive redelegations.<sup>353</sup>

All told, because department heads needed both authority to subdelegate and to authorize sub-delegees to redelegate, then it simply cannot be the case that other officers had any implied or presumed authority to themselves redelegate. As has been shown, there are hundreds of statutes with express authority to delegate, to receive delegations, or to authorize successive redelegation. Many more specific-authority statutes have been enacted with their own particular express delegation authorities. If these superabundant statutes are to mean anything, surely they mean that in the rare cases that express delegation authority does not exist, it is purposeful. Moreover, the extensive number of deputy, under, and assistant secretaries who may broadly receive delegations, or occasionally even redelegate themselves, ought to belie any concerns that returning to the *delegata* maxim would cause reverberations throughout the executive branch. Doing so would instead recapture Congress's responsibility for federal offices and duties. It would also help to prevent abuses by presidential administrations who aim to sidestep the Senate confirmation process and potentially aggregate power in those not confirmed for that (or perhaps to any) office.

<sup>347</sup> 12 U.S.C. § 1701c(a).

<sup>348</sup> 49 U.S.C. § 322(b).

<sup>349</sup> 42 U.S.C. § 7252.

<sup>350</sup> 20 U.S.C. § 3472.

<sup>351</sup> 38 U.S.C. § 512(a).

<sup>352</sup> Mutual Security Act of 1956, ch. 627, § 11(a), 70 Stat. 555, 563.

<sup>353</sup> Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424, 445 (classified at 22 U.S.C. § 2381(a)).

*D. Presidential Delegation Can Present Similar Principles*

While the foregoing has focused on delegations by officers in the executive branch, it is important to note that the ability of the President to delegate is not always analogous due to certain express powers of the office that derive not from Congress and statutes, but from the Constitution, such as overseeing the nation's military and foreign affairs functions.<sup>354</sup> In other words, in delegating certain authorities derived from the Constitution, the President acts more like a principal. This too was reflected in early practice and opinion.<sup>355</sup> But when Congress delegates authorities to the President, it is Congress that assumes the role akin to the principal, and the President becomes an agent, with similar restrictions on subagent delegations.<sup>356</sup> For example, when the President performed duties involving judgment and discretion in a judicial character, the Supreme Court held that that personal judgment was required and that it could not be delegated.<sup>357</sup> DOJ's OLC has agreed with this principle, as well as the non-delegability of other authorities involving discretion that are vested in the President.<sup>358</sup> Thus, understanding the President's authority to subdelegate when acting like an agent can provide useful background for subdelegation from other executive branch offices in which Congress specifically vested a function.

A helpful understanding comes from 1949, when President Truman remarked to House Majority Leader McCormack that reading and signing the papers on his desk "takes 3 hours every night."<sup>359</sup> To alleviate this burden, a bill was proposed that would eventually become known as the Presidential Subdelegation Act of 1950, and which is now codified at 3 U.S.C. §§ 301–03.<sup>360</sup> The purpose of the bill was explained by its authors as "enabling the

<sup>354</sup> *E.g.*, *supra* notes 227–31; *Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)*, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."); *see also id.* at 635–37 (Jackson, J., concurring) (discussing three ways a President acts).

<sup>355</sup> *E.g.*, *Relation of the President to the Exec. Dep'ts*, 7 Op. Att'y Gen. 453 (1855) (chronicling early cases for support).

<sup>356</sup> *E.g.*, Stack, *supra* note 43, at 267 ("[A]s a matter of statutory construction the President has directive authority—that is, the power to act directly under the statute or to bind the discretion of lower level officials—only when the statute expressly grants power to the President in name."); *see also* H.R. REP. NO. 81-1139, at 2 (1949) (the House report to 3 U.S.C. § 301 stating that the delegation authority authorized in that law applied only to authorities vested in the President by statute, and not to those reposed by the Constitution).

<sup>357</sup> *Runkle v. United States*, 122 U.S. 543, 557 (1887).

<sup>358</sup> *Participation of the Vice President in the Affairs of the Exec. Branch*, 1 Op. O.L.C. Supp. 214 (1961) ("[I]t is evident that [when] the personal, individual judgment of the President is required to be exercised, the duty may not be transferred . . . to anyone else." (quoting 3 WESTEL WOODBURY WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES 1482 (2d ed. 1929))).

<sup>359</sup> S. REP. NO. 81-1867, at 1 (1950).

<sup>360</sup> Act of Aug. 8, 1950, ch. 646, 64 Stat. 419 (now codified at 3 U.S.C. §§ 301–03).

President to cause other officers of the Government to perform in his behalf functions of the President designated by him.”<sup>361</sup> It authorized the President to delegate to any agency head or PAS officer, by written instrument, any function of the President which was set out by statute.<sup>362</sup> Functions of the President authorized by the Constitution were specifically noted in the House Report as not being affected by the bill.<sup>363</sup> Again, if the President had the inherent ability to delegate any function, there would have been no need to ask for and receive such express authority.<sup>364</sup> Moreover, this exchange reinforces that the notion that being “overburdened” is not an implied authority based on necessity that might somehow allow delegation without express actual authority.<sup>365</sup> If even one so overburdened as the President could not impliedly or presumptively delegate, and Congress confirmed this by arguing for and enacting express actual authority, then it is less rational that sub-cabinet officers within the executive branch would somehow be able to rely on necessity, let alone a general unwritten presumption, to delegate.

*E. Delegations in the C.F.R.’s Were Overwhelmingly Based on Express Authority*

The Code of Federal Regulations (“C.F.R.’s”) are filled with chapters expressly outlining which statutory authorities are delegated to which office via

<sup>361</sup> H.R. REP. NO. 81-1139, at 1 (1949). Notably, another section of the same Presidential Subdelegation Act, codified at 3 U.S.C. § 302, makes clear that 3 U.S.C. § 301 would not enable the President to delegate if a statute “specifically designate[s] the officer or officers to whom it may be delegated.” *Accord* H.R. REP. NO. 81-1139, at 1 (the House Report expressly stating the same); S. REP. NO. 81-1867, at 1 (the Senate Report similarly stating). In this way, the interpretations in the reports and the codified statutory text happen to align with the Supreme Court’s decision in *United States v. Giordano*, 416 U.S. 505, 513, 523 (1974), where a specific delegation to certain officers was found to preclude the use of a separate general delegation statute to delegate that same authority to others. *See infra* notes 419–23.

<sup>362</sup> H.R. REP. NO. 81-1139, at 1. Additionally, though not analyzed here, it is noteworthy that OLC has concluded that since § 301 restricts presidential delegation of a congressionally conferred function to only PAS officers, even when such a PAS officer-deegee uses another express delegation authority to further subdelegate that function, the initial limitation carries forward and that the successive subdegee must still be a PAS officer. *E.g.*, Auth. of the Deputy Att’y Gen. Under Exec. Order 12333, 25 Op. O.L.C. 236, 236–37 (2001) (“When the President uses this statute to delegate a function, we have concluded that the power may be redelegated only to officials who occupy Senate-confirmed positions and would also qualify under the statute to receive delegations directly from the President.” (citing a 1971 OLC memo from AAG William Rehnquist)). Such a position would not be tenable under an implied authority to delegate.

<sup>363</sup> H.R. REP. NO. 81-1139, at 2.

<sup>364</sup> *See, e.g.*, *United States v. Chem. Found.*, 272 U.S. 1, 13–14 (1926) (relying on express authority for a President to delegate functions in the same specific-authority-granting statute).

<sup>365</sup> *See supra* note 127 and accompanying text.

regulation.<sup>366</sup> Though the executive branch has now taken the position that delegations need not be published in the C.F.R.'s to be effective,<sup>367</sup> having a record of many express delegations issued as quasi-regulations in the *Federal Register* makes it easy to show that the delegations that were once and are still codified were based on express statutory authority.<sup>368</sup>

In fact, one can easily look back to most any delegation of statutory authority between 1946 and 1967 because the Administrative Procedure Act ("APA") of 1946, within its section 3 on public information, originally required that "[e]very agency shall . . . publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority . . ."<sup>369</sup> This meant, even according to the Senate Report, that "agencies must also publish their internal delegations of authority."<sup>370</sup>

The 1941 Senate hearings on the APA stated that the authors of the law viewed the publication "condition upon delegation as fundamental, because in no other way can the citizen know how to proceed."<sup>371</sup> The APA followed recommendations included in the report of the Attorney General's Committee on Administrative Procedure, specifically those provisions recommended by Carl McFarland, the architect of the APA, that delegations, except as to matters of routine and internal management, be specifically provided and reflected in published rules.<sup>372</sup>

Thus, for twenty years, there was a requirement to publish delegations in the *Federal Register*. Entire parts of the Code of Federal Regulations were devoted to agency publications of delegated authority, and many remain in place today.<sup>373</sup> That is, until 1967, when the APA was amended to increase

<sup>366</sup> *E.g.*, 7 C.F.R. pt. 2 (Agriculture Dep't delegations); 14 C.F.R. pt. 1204, subpt. 5 (NASA delegations).

<sup>367</sup> Applicability of APA Notice & Comment Procs. to Revocation of Delegation of Auth., 25 Op. O.L.C. 99 (2001). Interestingly, however, presidential delegations under 3 U.S.C. § 301, must be in writing and published in the *Federal Register*. 3 U.S.C. § 301.

<sup>368</sup> *E.g.*, 2 Fed. Reg. 2419 (Oct. 2, 1937) (Agriculture Secretary publishing a delegation and stating its authority was from a specific act). The author randomly examined thirty of these codified delegations and found none that did not have an express statutory authority to delegate.

<sup>369</sup> Administrative Procedure Act, ch. 324, § 3, 60 Stat. 237, 238 (June 11, 1946).

<sup>370</sup> S. REP. NO. 79-752, at 12 (Nov. 19, 1945).

<sup>371</sup> *Administrative Procedure: Hearings Before a Subcomm. of the S. Comm. on the Judiciary*, 77th Cong. (pt. 3) at 1329 (May 27–July 2, 1941).

<sup>372</sup> FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 218–19 (1941).

<sup>373</sup> *Compare, e.g.*, 28 C.F.R. pt. 0 (DOJ delegations mentioned over one hundred times in public rules); 7 C.F.R. pt. 2 (similar for Agriculture Department delegations); 39 C.F.R. pt. 222 (public Post Office delegations); 49 C.F.R. pt. 1 (DOT delegations); 17 C.F.R. §§ 200.30-1 to -19 (SEC delegations), *with* 40 C.F.R. § 1.5(b) (stating that the EPA's internal "Directives System contains . . . delegations of authority" and can be provided upon personal visit or FOIA request), *and* 22 C.F.R. § 5.2 ("The [State] Department will generally publish such delegations of authority in the Federal Register."). *See also* Applicability of

public access to government information through a law that would later become known as the Freedom of Information Act or FOIA.<sup>374</sup> Legislative history for that change suggests that because the delegation-publication requirement was prefaced with “including,” Congress believed that the text preceding it, regarding descriptions of an agency’s organization, was the source of the requirement.<sup>375</sup> Indeed, the bills that became FOIA originally intended to broaden the number and kind of delegations published by deleting the limiting adjective, “final” and retain simply “delegations by the agency of authority.”<sup>376</sup> Feedback from multiple agencies, however, worried that either the public might be confused by extra publication of delegations for preliminary actions rather than ones that might affect the public more directly, or that the language would not change much from what was then required.<sup>377</sup> The compromise was to remove the language.<sup>378</sup> Later, agencies and courts would construe the removal of the provision to mean such publication was no longer required.<sup>379</sup>

Because many express delegations are still published in the *Federal Register*, including to update delegations that were codified in the C.F.R.’s and which are thus controlling until rescinded,<sup>380</sup> two things can be shown. First, the many delegations examined by the author were based on express statutory authority, likely because the APA definitionally considered delegations to be

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APA Notice & Comment Procs. to Revocation of Delegation of Auth., 25 Op. O.L.C. 99, 99 (2001) (on APA delegations).

<sup>374</sup> Pub. L. No. 89-487, 80 Stat. 250 (July 4, 1966) (the first version of FOIA). Note that after this law was passed, another law was shortly enacted as part of a long project to codify title 5 into positive law (Pub. L. No. 89-554, 80 Stat. 378, 383 (Sept. 6, 1966)), but it did not have the July 1966 change just mentioned. So, another law was needed to codify that missing change, and it was done in Pub. L. No. 90-23, 81 Stat. 54 (June 5, 1967). But the first law cited in this note, is the one whose legislative history explains the change.

<sup>375</sup> See *Freedom of Information: Hearings on S. 1666 Before the Subcomm. on Administrative Practice and Procedure, S. Comm. on the Judiciary*, 88 Cong. 4 (Oct. 28–31, 1963) [hereinafter *Freedom of Information Hearings*] (“[I]t was the intent of its drafters to direct the bureaus, departments, and agencies to describe their central and field organizations in the Federal Register. In an excess of caution, the phrase ‘including delegations by the agency of final authority’ was added.”); *id.* at 246 (similar).

<sup>376</sup> S. 1666, 88th Cong. at 2 (as introduced June 4, 1963); S. 1663, 88th Cong. at 4–5 (as introduced June 4, 1963).

<sup>377</sup> See *Freedom of Information Hearings*, *supra* note 375, at 4, 163–64, 169–70, 207–08, 245–46, 256, 259, 264, 267, 282, 286, 296–97, 313–14.

<sup>378</sup> *Id.* at 4.

<sup>379</sup> *E.g.*, *Nolan v. United States*, 44 Fed. Cl. 49, 55–59 (1999) (collecting cases). The problem, however, with this construction is that it erroneously assumes delegation does not affect the public. But it does when the delegee may exercise a final authority that impacts any person. Thus, 5 U.S.C. § 552 could still be read to require publication. Additionally, the Federal Register Act has its own requirement to publish documents that have “general applicability and legal effect.” 44 U.S.C. § 1505.

<sup>380</sup> *E.g.*, *Nolan*, 44 Fed. Cl. at 56–59.

rules.<sup>381</sup> Second, that they were required to be published as rules showed that delegations were, at least for a time, not able to be impliedly, presumptively, or even orally issued.<sup>382</sup> The 1967 change, however, created the oddity that since so many delegations are still published as holdovers in the C.F.R.'s or now also in *Federal Register* notices, they remain operative law and can only be amended or rescinded by issuing another rule or notice.<sup>383</sup>

Today, some, but not all, agencies, continue to publicly notice in the *Federal Register* and to codify in the C.F.R.'s their updated delegations of authority, at least in part so that they are not subject to legal challenge for not following their own public delegation regulations.<sup>384</sup> And unsurprisingly, these modern published delegations continue to rely on express statutory authority to subdelegate.

#### V. KEY COURT CASES THAT SPREAD CONFUSION REGARDING DELEGATION

As has been shown above, for much of America's history, Congress knew express delegation was required, and accordingly, courts usually conducted a proper delegation analysis, looking first for express authority to delegate a statutory duty that required discretion or judgment. But somewhere along the line, that analysis went awry. This Part traces and explains how the modern court confusion came to be, focusing on three key cases that led to today's problem.

##### A. *No Split*: Fleming – *S. Ct.* 1947

Many discussions of *Fleming*<sup>385</sup> do not and should not start with that case, but with its usual comparator, *Cudahy*.<sup>386</sup> *Cudahy* preceded *Fleming* by just five years, and saw the Supreme Court deal with the same issue of whether subdelegation of a subpoena power was lawful, albeit under a different statutory regime and to and from different officials. The Court in *Cudahy* famously found the subdelegation it examined was not lawful because of “a

<sup>381</sup> 5 U.S.C. § 551(4) (definition of “rule” includes organization of an agency); *id.* § 553(b)(B).

<sup>382</sup> In ordinary commercial agency, delegations may normally be authorized orally. *E.g.*, RESTATEMENT (SECOND) OF AGENCY § 26 (AM. L. INST. 1958). The exceptions to this are when instruments are executed under seal or transactions are required by statute to be authorized in a certain way. *Id.* Notably, commissions of officers of the United States are made under seal. *See, e.g., supra* notes 211, 218 and accompanying text.

<sup>383</sup> *E.g., Nolan*, 44 Fed. Cl. at 56–59; *Humane Soc’y of U.S v. U.S. Dep’t of Agric.*, 41 F.4th 564, 570 (D.C. Cir. 2022) (holding that under the Federal Register Act, a rule becomes operative according to its effective date, when it goes on display for public inspection, and that only another rulemaking can alter an existing and valid rule).

<sup>384</sup> *E.g.*, 87 Fed. Reg. 44265 (July 26, 2022) (Dep’t of Agriculture delegation).

<sup>385</sup> *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111 (1947).

<sup>386</sup> *Cudahy Packing Co. of La. v. Holland*, 315 U.S. 357 (1942).



Congressional purpose that the subpoena power shall be delegable *only when an authority to delegate is expressly granted*.<sup>387</sup>

In holding this way, the Court looked beyond just the statute at issue and viewed a larger “history of the legislation controlling the use of subpoenas.”<sup>388</sup> With that context and several listed statutory examples, the Court noted that “Congress, in numerous cases, has specifically authorized delegation of the subpoena power.”<sup>389</sup> Moreover, the Court also looked to legislative history of the specific act, where it traced that (a) an express authority by the Wage and Hour Division Administrator to delegate the subpoena power was eliminated from a bill by a conference committee, and that (b) the same committee chose to move that subpoena authority from the Secretary of Labor who had “a general power of delegation under Rev. Stat. s 161” and in the specific statute expressly gave the subpoena authority to the Administrator (a lower-level officer in the Labor Department), who did not have any general powers of delegation, or the authority to issue regulations.<sup>390</sup>

*Cudahy*'s conclusions, however, were not any kind of a change. Courts had already been looking for express authority to delegate, and though not always accepted, a growing trend emerging with the growth of government was to find such express authority in the power to issue regulations.<sup>391</sup> Executive branch legal opinions and practice had been even more plentiful regarding the express need for delegation, though a few scattered opinions that found that certain authority to issue regulations sufficed.<sup>392</sup> And so, after *Cudahy*, courts simply continued looking for express authority to delegate, either in on-point text or from other indicia that reflected a clear congressional purpose or legislative intent, as was the dominant method of statutory construction at the time.<sup>393</sup>

<sup>387</sup> *Id.* at 366 (emphasis added); *see also id.* at 360–61 (the Administrator of the Wage and Hour Division arguing that he had “implied” powers of delegation, and the Court rejecting that argument because “[a] construction of the Act which would thus permit the Administrator to delegate all his duties, including those involving administrative judgment and discretion which the Act has in terms given only to him, can hardly be accepted unless plainly required by its words.”).

<sup>388</sup> *Id.* at 364.

<sup>389</sup> *Id.* at 365 & n.9.

<sup>390</sup> *Id.* at 366.

<sup>391</sup> *E.g.*, *Bowles v. Wheeler*, 152 F.2d 34, 39 (9th Cir. 1945) (“[A]uthority to delegate powers has also been implied from statutory rule making powers . . . .”); *La Porte v. Bitker*, 145 F.2d 445, 447 (7th Cir. 1944) (similar); *S. Garment Mfrs. Ass’n v. Fleming*, 122 F.2d 622, 626 (D.C. Cir. 1941) (similar); *cf.* cases cited *supra* note 297 (holding that R.S. § 161 supported subdelegation).

<sup>392</sup> *See supra* text accompanying notes 107–14 (discussing AG opinions asserting express authorities were needed); *see also supra* text accompanying notes 293–99 (questioning whether the authority to issue regulations encompassed the power to delegate).

<sup>393</sup> *E.g.*, *Addison v. Holly Hill Fruit Prods.*, 322 U.S. 607, 615 (1944) (looking for “Congressional purpose as manifested by text and context” and then looking to see if it was “rendered doubtful by legislative history”).

Five years later, *Fleming*, which was written by Justice Douglas who had dissented in *Cudahy*, looked at delegation again, but under a different statute.<sup>394</sup> The difference between *Fleming* and *Cudahy*, however, was specifically addressed in *Fleming*, and can be summarized as turning on three key points. First, unlike the clear legislative history showing a congressional purpose to withhold the delegation of subpoena authority from the Administrator in *Cudahy*, clear legislative history in *Fleming* showed the Senate committee desired delegation and thought that general delegation text in the subject statute supported the delegation at issue there.<sup>395</sup> Second, *Cudahy*'s statute gave the officer there express authority to delegate a specific function, investigations, which cut against the argument that there was any general delegation of authority for other functions vested in that office.<sup>396</sup> But in *Fleming*'s statute, there was a grant of general delegation authority—“[the Administrator] or any duly authorized representative may exercise any or all of his powers in any place”—and there was a Senate Report expressly stating that this statutory text could authorize delegation.<sup>397</sup> That text alone would have sufficient express authority to satisfy the *delegata* maxim. But third and next, the *Fleming* Court then went even further and pointed to yet another piece of text in its statute not present in *Cudahy*—“broad rule-making power”—and said, “a rule-making power may itself be an adequate source of authority to delegate a particular function, unless by express provision of the Act or by implication it has been withheld.”<sup>398</sup>

This third point is important. It restated the framework already present for dealing with construction of two statutory provisions, one general and one specific, and how the latter controls over the former when they conflict.<sup>399</sup> But *Fleming* marked the first time the Court stated it specifically in the context of delegation authorities. Recognizing that statutes often confer broad delegation authority, and also suggesting without deciding that broad rule-making authority “may” also have granted broad delegation authority, the *Fleming* Court effectively exemplified the proper test: (1) find a general express grant of authority for delegation, and; (2) only then look to see if “by express provision of the Act or by implication it has been withheld.”<sup>400</sup> This

<sup>394</sup> *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 119–20 (1947) (examining § 201 of the Emergency Price Control Act).

<sup>395</sup> *Id.* at 120–21.

<sup>396</sup> *Id.* at 121 (“In the *Cudahy* case the Act made expressly delegable the power to gather data and make investigations, thus lending support to the view that when Congress desired to give authority to delegate, it said so explicitly. In the present Act, there is no provision which specifically authorizes delegation *as to a particular function.*” (emphasis added)).

<sup>397</sup> *Id.* at 120–21 (“[Section] 201(b) authorized him or ‘any representative or other agency to whom he may delegate any or all of his powers, to exercise such powers in any place.’” (citing S. REP. NO. 77-931, at 20–21 (1942))).

<sup>398</sup> *Id.* at 121.

<sup>399</sup> *E.g.*, *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974).

<sup>400</sup> *Fleming*, 311 U.S. at 121.

test is in accord with the *delegata* maxim and with this Article's argument. The test worked in *Fleming*. It worked the same way in *Cudahy*. It similarly worked and was applied long before that. Moreover, it was hardened by the housekeeping statutes that would be enacted shortly after *Fleming*.

After *Fleming*, many courts picked up on the key distinctions mentioned above. For example, the Second Circuit in 1980, citing to *Fleming*, recognized that express statutory authority, like ones that empower regulations to be issued under the specific act, would allow an officer "vested with such authority [to] delegate unless expressly forbidden by statute."<sup>401</sup> In other words, as this Article has advocated, first step then second step. More circuits and other appellate courts would repeat this delegation-analysis dance.<sup>402</sup> But eventually, various courts would not read *Fleming* the same way.

### B. Starting a Small Split: *Tabor* – D.C. Cir. 1977

*Tabor* twisted *Fleming*. In contrast to the way other circuits initially read *Fleming*—which first looked for express delegation authority before looking to see if a specific provision limited it—*Tabor* cited both *Cudahy* and *Fleming* for the proposition that no express authority is necessary for delegation and courts instead ought to look for "clearly expressed [congressional] intent that no delegation . . . was to be permitted."<sup>403</sup> Put simply, *Tabor* skipped delegation step one and went straight to step two.

What's more, the 1977 *Tabor* panel said so in dicta, in a footnote, because earlier in that same note it found that "[a]s a factual matter, the Board has not substantially delegated its responsibility."<sup>404</sup> That unnecessary note was responding to an argument raised by appellants that a joint board established with a statutory duty to regulate private pension plans could not externally delegate its responsibility to a private association to set qualification standards for actuaries who would administer pension plans.<sup>405</sup>

Cases after *Tabor* started to show a small split. Those which cited only *Fleming* or other prior case law, kept at least some effective allegiance to the *delegata* maxim and looked for some kind of express text. Other cases that cited to *Tabor* began repeating its pernicious proposition that express statutory authority for delegation is not required.

<sup>401</sup> *Rodriguez v. Compass Shipping Co.*, 617 F.2d 955, 958 (2d Cir. 1980), *aff'd*, 451 U.S. 596 (1981).

<sup>402</sup> *District of Columbia v. White*, 435 A.2d 1055, 1056 (D.C. 1981) ("A rulemaking power may constitute a source of authority to delegate a certain function unless it is expressly or impliedly withheld."); *United States v. Cuomo*, 525 F.2d 1285, 1288 (5th Cir. 1976) (finding a general delegation statute is "presumptively applicable" because the specific "statute says nothing about delegation").

<sup>403</sup> *Tabor v. Joint Bd. for Enrollment of Actuaries*, 566 F.2d 705, 708 n.5 (D.C. Cir. 1977).

<sup>404</sup> *Id.*

<sup>405</sup> *Id.*

One of these cases was *Loma Linda University* in the Ninth Circuit in 1983.<sup>406</sup> Oddly, despite stating and citing *Tabor's* problematic proposition, the *Loma Linda* panel had just two paragraphs prior identified the regulation that contained the delegation, which itself clearly cited to an express statutory authority to delegate and redelegate.<sup>407</sup> In other words, much like many other cases where there was already an express authority to delegate, the court did not note and may not have realized that there such was such an authority, for it would be odd to explain express authority is not needed when it was present. It is likely that courts like this one did not understand the relevance of housekeeping statutes, passed decades earlier, and how they further hardened the express-text principles set forth in *Cudahy* and *Fleming*, which were decided before those general delegation authorities were enacted. Moreover, the very location these laws were classified, in a hard-to-find or search appendix to Title 5 of the U.S. Code, may have further contributed to their obscurity, as new generations of judges, attorneys, and commentators became less and less familiar with them.

Following *Loma Linda*, the Ninth Circuit did not always carry a divergent view of subdelegation. For example, in a well-reasoned opinion called *Assiniboine* in 1986, the Ninth Circuit analyzed an effective subdelegation to an external state board,<sup>408</sup> but noted that there was no express authorization for a subdelegation, and that even after looking to the purpose of the statute, it was “reluctant to read broad authority to subdelegate into these statutes, absent clear proof of legislative intent.”<sup>409</sup> Neither *Tabor* nor *Loma Linda* were cited.<sup>410</sup> But later when other cases did cite *Tabor*, they followed its problematic proposition.<sup>411</sup> Thus, these cases show that a split started, but that it was not very significant, particularly because various courts read *Fleming* to go the other way when they did not cite *Tabor*.<sup>412</sup>

### C. *The Significant Split: U.S. Telecom – D.C. Cir. 2004*

One case, however, more than any other, grew *Tabor's* troubling proposition into significant split: *U.S. Telecom* in 2004.<sup>413</sup> That case assessed

<sup>406</sup> *Loma Linda Univ. v. Schweiker*, 705 F.2d 1123, 1128 (9th Cir. 1983).

<sup>407</sup> *Id.* at 1127 (citing 42 Fed. Reg. 13262 (Mar. 9, 1977), which relied on delegation authority from section 6 of Reorganization Plan No. 1 of 1953).

<sup>408</sup> *Assiniboine & Sioux Tribes of Fort Peck Indian Rsrv. v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 785 (9th Cir. 1986).

<sup>409</sup> *Id.* at 796.

<sup>410</sup> *See generally id.*

<sup>411</sup> *E.g.*, *S. Pac. Transp. Co. v. Watt*, 700 F.2d 550, 556 (9th Cir. 1983) (citing both *Fleming* and *Tabor*); *Washington Mint v. U.S. Postal Serv.*, 919 F. Supp. 7, 13 (D.D.C. 1994) (same), *summarily aff'd*, No. 94-5335, 1995 WL 418656 (D.C. Cir. June 2, 1995).

<sup>412</sup> *E.g.*, *United States v. Lippner*, 676 F.2d 456, 461 (11th Cir. 1982) (upholding delegation after finding express authority in DOJ's housekeeping statute); *United States v. Burnes*, 816 F.2d 1354, 1359–60 (9th Cir. 1987) (same).

<sup>413</sup> *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

whether a function statutorily given to the FCC was able to be externally re-delegated to state utility commissions.<sup>414</sup> The panel correctly held that it may not since there was no express authority to do so.<sup>415</sup> But in its opinion, the panel aimed to distinguish internal subdelegations from external ones, and said express authority is only needed for the latter.<sup>416</sup> In doing so, *U.S. Telecom* characterized the law—which a clerk for the authoring judge on the panel would later note was a “mess” and full of “doctrinal chaos”<sup>417</sup>—in this way: “When a statute delegates authority to a federal officer or agency, sub-delegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent.”<sup>418</sup>

Of course, as already argued, that was never the correct casting of the law. It actually flipped the correct characterization on its head. Instead of requiring an express authority to delegate in-line with case law and the *delegata* maxim, *U.S. Telecom* stated that express evidence is needed to stop delegation—in other words, that it was assumed allowable without express prohibition in statute, as opposed to only being allowed by some sort of express authority in statute.

Apart from tracing *U.S. Telecom* to *Tabor*, and the way it in turn flipped *Fleming*, one can find several problems with its proposition simply from what it included in its opinion. For example, the first in the series of cases *U.S. Telecom* cited, *United States v. Giordano*, actually explained and applied the proper test well, even though the *U.S. Telecom* panel apparently missed it.<sup>419</sup> In *Giordano*, DOJ argued that the housekeeping statute codified at 28 U.S.C. § 510 permitted the Attorney General to redelegate a specific wiretapping authority vested by a separate statute, 18 U.S.C. § 2516(1), in “the Attorney General, or any Assistant Attorney General specially designated by the Attorney General,” to someone not listed in that series, the Executive Assistant to the Attorney General.<sup>420</sup> DOJ’s argument was essentially that because no statute affirmatively precluded delegation, the statute specifying a small group of officer-delegees should not be read to limit the broad delegation authority provided by the general delegation statute. The Supreme Court was not persuaded. It held that “[d]espite s 510, Congress does not always contemplate that the duties assigned to the Attorney General may be freely delegated,”<sup>421</sup> and it found that the function could not be so delegated.<sup>422</sup> Put another way, *Giordano* compared two statutes together, a general one regarding delegation

<sup>414</sup> *Id.* at 565.

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

<sup>417</sup> Stephenson, *supra* note 19, at 752–53.

<sup>418</sup> *U.S. Telecom*, 359 F.3d at 565.

<sup>419</sup> *United States v. Giordano*, 416 U.S. 505, 513 (1974).

<sup>420</sup> *Id.* (quoting 18 U.S.C. § 2516(1)).

<sup>421</sup> *Id.* at 514.

<sup>422</sup> *Id.* at 523, 533.

and a specific one. It simply found that the specific statute conflicted and thus controlled. While *U.S. Telecom* did not apparently glean this from *Giordano* and oddly cited to it for support of its proposition, other circuit and Supreme Court cases did take away the right test from *Giordano* and first looked to see if general delegation authority existed before looking to see if a second specific statute limited it.<sup>423</sup> *U.S. Telecom* next cited to *Fleming* (discussed above), but in a way that was apparently tainted by *Tabor's* characterization, which it discussed later.<sup>424</sup>

The other four circuit cases cited by *U.S. Telecom* as supportive were written in the 1990s but they vary widely from the associated proposition that duties are presumptively or inherently subdelegable. The first case cited, *Halverson*, came from the same D.C. Circuit, but in 1997.<sup>425</sup> There, the court specifically identified two separate express delegation authorities: one was a general delegation authority for the secretary to anyone, and the second was conveyed to the secretary by the specific statute, but only permitted delegation to Coast Guard officials.<sup>426</sup> The court then held that the second specific delegation prevailed over the general one, as it noted is proper in construing any two statutes together.<sup>427</sup> *Halverson* even characterized the test in *Giordano* as “constru[ing] two grants of delegation authority—a broad one and a specific one.”<sup>428</sup> It is therefore quite head-scratching as to why *Halverson* was cited by *U.S. Telecom* for support. If anything, *Halverson* stands for the exact opposite position, that express authority is in fact needed, and it shows that the D.C. Circuit had so held before *U.S. Telecom*.

The next case cited was *Mango*, in which a 1999 Second Circuit panel relied on *Chevron* deference to say that the agency could take a reasonable reading of its own authorities.<sup>429</sup> But perhaps fatal to its own rationale, *Mango*

<sup>423</sup> *E.g.*, *United States v. Touby*, 909 F.2d 759, 770 (3d Cir. 1990) (recognizing Supreme Court precedent held subdelegation is presumed when in a separate express statute: “[I]n *Fleming* and *Giordano* the Supreme Court made clear that Congress need not expressly authorize subdelegation when a general subdelegation statute exists.”), *aff'd*, 500 U.S. 160, 169 (1991) (the Supreme Court finding an express delegation authority in 21 U.S.C. § 871(a), and holding that it “permit[s] the delegation of any function vested in the Attorney General under the Act unless a specific limitation on that delegation authority appears elsewhere in the statute.”).

<sup>424</sup> *U.S. Telecom*, 359 F.3d at 565; *see also supra* Section V.A (discussing *Fleming*).

<sup>425</sup> *Halverson v. Slater*, 129 F.3d 180 (D.C. Cir. 1997).

<sup>426</sup> *Id.* at 184.

<sup>427</sup> *Id.* at 185–86 (“That section 2104(a) authorizes delegations to Coast Guard officials only cannot be disregarded. . . . [T]he more specific provision controls, again according to the traditional tools of statutory construction.”).

<sup>428</sup> *Id.* at 188.

<sup>429</sup> *United States v. Mango*, 199 F.3d 85, 89 (2d Cir. 1999); *id.* at 91 (“Because the statutory language is ambiguous, we must decide whether the Secretary’s interpretation is reasonable [under *Chevron*]. If it is, we must accept it. We conclude that the Secretary’s interpretation is reasonable . . . .”). Given the extensive historical and current statutory scheme across the U.S. Code where delegation is expressly authorized, this Article’s conclusions would generally couch against applying *Chevron* in this way so as to not enable an agency

only considered whether one particular statute, the Clean Water Act, itself allowed a delegation by the Secretary of the Army.<sup>430</sup> It did not look elsewhere to see if the secretary already had authority to delegate, and indeed and again, such a statute and express delegation authority existed.<sup>431</sup> *Mango* also involved the construction of an issued regulation, meaning the panel presumed not an inherent power of delegation, but that delegation was incident to the express authority to issue regulations.<sup>432</sup>

Another cited case, *Inland Empire*, supported *U.S. Telecom's* proposition but relied on the “purpose of the statute” and the practical burden of work placed on the named office to analyze whether delegation was possible.<sup>433</sup> But conspicuously, like *Mango*, that case did not at all recognize or analyze that the subject secretary already had a housekeeping statute that expressly permitted delegation.<sup>434</sup>

The final case, *Widdowson*, was equally inapposite because, like *Inland Empire*, it focused on whether the Attorney General could delegate a congressionally vested authority.<sup>435</sup> The *Widdowson* panel cited two statutes expressly authorizing the Attorney General to delegate authorities, both generally and specifically under the Controlled Substances Act (“CSA”) at issue.<sup>436</sup> The panel then went on to examine the specific authorities and, due to its interpretation of congressional intent, concluded they were not delegable.<sup>437</sup> Oddly, *U.S. Telecom* cited *Widdowson* for support, despite also specifically noting it was “vacated on other grounds.”<sup>438</sup> But the Supreme Court vacated *Widdowson* for further consideration in light of its decision in *Touby*.<sup>439</sup> *Touby*, in turn, also conducted the proper two-step analysis, but found that the CSA expressly allowed delegation by the Attorney General and that it was not limited by any provision in the specific statute.<sup>440</sup>

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to invent an implied grant of authority where the *delegata* maxim forecloses it, or where Congress has otherwise showed a pervasive scheme to expressly authorize it only to certain officers. See *supra* note 138; see also text accompanying notes 136–39.

<sup>430</sup> *Mango*, 199 F.3d at 89.

<sup>431</sup> Pub. L. No. 99-433, 100 Stat. 922, 1035–36 (1986) (now codified at 10 U.S.C. § 7013(g)).

<sup>432</sup> *Mango*, 199 F.3d at 89.

<sup>433</sup> *Inland Empire Pub. Lands Council v. Glickman*, 88 F.3d 697, 702 (9th Cir. 1996).

<sup>434</sup> The Secretary of Agriculture in *Inland Empire* delegated a statutory authority to an Assistant Secretary who then delegated authority to another. *Id.* at 703. But the focus of the analysis was on whether the Secretary could delegate, and numerous uncited laws said that the Secretary could subdelegate. See 7 U.S.C. § 6912; Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, reprinted in 67 Stat. 633.

<sup>435</sup> *United States v. Widdowson*, 916 F.2d 587, 592 (10th Cir. 1990), judgment vacated, 502 U.S. 801 (1991).

<sup>436</sup> *Id.* at 592–94.

<sup>437</sup> *Id.*

<sup>438</sup> *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004).

<sup>439</sup> *Widdowson*, 502 U.S. at 801.

<sup>440</sup> *Touby v. United States*, 500 U.S. 160, 169 (1991) (presuming subdelegability only after identifying an express delegation statutory provision, and then not finding anything to

For all of these reasons, the *U.S. Telecom* statement that subdelegation is generally presumed or somehow inherent was indeed quite flawed. In line with the *delegata* maxim, and the long set of opinions and cases presented above, an agent may not delegate a duty involving discretion to another without the express consent of Congress. Nowhere in the text of *U.S. Telecom* or other cases it cited was this baseline understanding examined or articulated. Equally problematic, the cases *U.S. Telecom* cited never acknowledged that their cases actually had an express delegation authority, usually granted by a 1940s-era housekeeping statute, which was enacted precisely because it was known that delegation required express authority.

The significance, however, of *U.S. Telecom* has been its impact in creating a larger split of authority, and doing so temporally. Because it is a somewhat recent appellate case with ostensibly detailed consideration, it has practically become the dominant modern view. Several cases, including ones from the Third,<sup>441</sup> Tenth,<sup>442</sup> and Federal Circuits,<sup>443</sup> have cited to it in recent years for the same proposition, not recognizing the error, or that there had been prior in-circuit and never-abrogated Supreme Court case law going the other way.<sup>444</sup>

#### D. *Stitching the Split for the Future*

So, where to go from here? A split exists. While it is only somewhat recent, it is also precocious, gaining momentum and growing larger every year. It is now poised to dominate, swallowing the old rule completely, and without

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limit “that delegation authority” (citing *United States v. Giordano*, 416 U.S. 505, 512–14 (1974))).

<sup>441</sup> See *La. Forestry Ass’n Inc. v. Sec’y U.S. Dep’t of Lab.*, 745 F.3d 653, 671 n.15 (3d Cir. 2014). *But see* *Zirin v. McGinnes*, 282 F.2d 113, 116 (3d Cir. 1960) (rejecting that a certain “power was delegated by implication” when there was an express delegation).

<sup>442</sup> See *Kobach v. U.S. Election Assistance Comm’n*, 772 F.3d 1183, 1190 (10th Cir. 2014) (“Absent some indication in an agency’s enabling statute that subdelegation is forbidden, subdelegation to subordinate personnel within the agency is generally permitted.”). *But see* *Widdowson*, 916 F.2d at 592.

<sup>443</sup> See *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1031–32, 1032 n.5 (Fed. Cir. 2016) (discounting *Spalne, infra*, and stating “in *Fleming* . . . the administrator . . . could delegate . . . despite absence of an explicit authorization in the statute”). *But see* *Splane v. West*, 216 F.3d 1058, 1066 (Fed. Cir. 2000) (“The Supreme Court has said [in *Cudahy*] that whether an agency head has the implicit ability to delegate his powers to subordinates depends on whether Congress has expressly granted the power to delegate.”).

<sup>444</sup> See *United States v. Vivian*, 224 F.2d 53, 55 (7th Cir. 1955) (noting express authority for delegation); *United States v. Gordon*, 580 F.2d 827, 840 n.6 (5th Cir. 1978) (stating “the subdelegation of power is not inherently invalid” but citing an express delegation statute, perhaps meaning, as the Third Circuit meant in *Touby*, 909 F.2d 759, that expressly authorized subdelegation is not de facto invalid); *House v. S. Stevedoring Co.*, 703 F.2d 87, 88 (4th Cir. 1983) (first construing a statute to expressly “permit an official to delegate duties,” and secondly looking for any express restriction); see also Grundstien, *supra* note 55 (collecting many other pre-1945 district and circuit court cases that required express delegation authority).



ever considering it might do so. Obviously, recognizing the problem and that it is a split is a big first step. So too is understanding all the reasons presented here for why it was incorrect, including how older circuit case law held the other way, and that never-abrogated Supreme Court opinions also contravenes *U.S. Telecom's* view. Other alternative or post-hoc rationalizations for implied actual authority to delegate, like relying on necessity, should be considered only in the most extreme circumstances. Ample history has shown that being busy does not equate to necessity, or an impossibility of performance, to somehow justify implied actual authority to delegate. Such implied delegation authority without guardrails for all but the most exigent of circumstances is rife for dodging accountability, Appointments Clause avoidance, and even outright abuse and authoritarianism.

Finally, the judicial philosophy change from purposivism to textualism over recent decades makes it particularly odd to still try to divine congressional purpose from absent text for delegation, as cases involving delegation used to do.<sup>445</sup> But at the same time, that change presents an opportunity to further distinguish why the divergent cases are even more out of place today than they were previously. Any of that ought to be used to sow this issue back shut, put delegation back in the hands of Congress, and return to requiring express statutory text to authorize delegation.

Practically speaking, for anyone who worries that such a return to delegation first principles would cause functional or reverberating problems in government, those concerns are overblown. Housekeeping statutes allow practically all authorities in every agency to be redelegated under express authority, but only from the agency head. It is only when that authority is absent that the principles advocated for here would cause a change. As, for instance, when a mid-level officer receives a subdelegation and then redelegates it to someone else. But because Congress rarely delegates to anyone outside of the agency head, the practical impact of returning to the *delegata* maxim on government operations means the vast majority of duties can still be delegated and even redistributed if necessary.

Finally, one more action is recommended. For the same reasons that express delegation authority is required and why officers' commissions and laws are public, the APA's prior requirement that delegation must be published in the *Federal Register* and thus the C.F.R.'s should be definitively reinstated by Congress. Delegations should be written, public, traceable, and based on express authority. Once again publishing them as rules and codifying them for ease of reference would enable that. It would also prevent midnight changes done to help a particular person, perhaps unconfirmable by the Senate, to achieve their desired authorities through a backdoor. Allowing

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<sup>445</sup> *E.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 73 (2006) ("Near the close of the twentieth century, however, the 'new textualism' challenged the prevailing judicial orthodoxy [of purposivism] . . .").

subdelegations to reside in darkness buried inside agencies goes against key principles of responsibility, accountability, and transparency. People should know exactly where and in whom their own originally delegated authorities to the Constitution and Congress have been vested. In this way, our government's power structure should be equally as traceable and diagrammable as any structure's electrical power. This still happens for most delegations made by the actual Executive, and it should return to being the norm for all delegations within the executive branch.

#### CONCLUSION

In our first two centuries under the Constitution, there was relative certainty that there was no inherent authority for public officers to delegate, nor any kind of default presumption of delegability. Instead, Congress knew express authority was required and created senior PAS offices like assistant secretaries for the purpose of receiving delegations from their agency heads.

But as government was expanding, and as only a few officers in each agency were lawful delegees of authority vested elsewhere, Congress conferred express authority in the mid-20th century via "housekeeping statutes" to empower agency heads to generally delegate any function to others. Shortly after their enactment, courts properly construed two statutes together: the express general delegation authority statute, and the specific source authority statute to see if the latter conflicted with the former. But over time, the focus on the source authority statute, combined with only brief mentions of the express delegation authority statute, and less familiarity with such "housekeeping statutes" caused the latter two to fade from view. Fading along with them were the core distinctions between private and public agency, along with the *delegata* maxim, that long required the enactment of express delegation statutes.

Now, unfamiliarity with this history and with basic public agency principles by courts, and by litigants expected to thoroughly brief them, have caused confusion over a once-stable maxim. Consequently, stalwart legal principles have only recently been replaced with practical rationales, and a conflicting split of authorities has emerged. That split, however, came not because of any purposeful change in paradigm or understanding, but out of misunderstanding and misapplication. This troubling development risks destabilizing basic concepts of how government has, should, and will function. It also opens a pathway for abuse. It must be corrected.

All told, a proper presumption of delegability, sometimes couched as subdelegation or redelegation, for a function authorized by Congress that requires judgment or discretion, exists only in two overarching circumstances: (1) where an officer (usually the agency head), has expressly been granted those authorities by Congress, either in (a) the specific statute authorizing them to delegate, or (b) in a general statute authorizing the same, or (c)

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arguably by the authority to issue regulations implementing the specific statute; or (2) where the recipient of the delegation has, either (a) by the general statutory descriptions of their own office, or (b) by a specific statute, been granted express authority to receive delegated statutory duties from certain offices (usually that of an agency head).

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