Kennedy v. Braidwood Management: The "Inferior Officer" Clause Loses Some Bite

*Thomas Berry and Charles Brandt**

The Appointments Clause lies at the heart of the separation of powers, ensuring the Washington bureaucracy remains accountable to the President and the People he serves. It dictates that the President "shall appoint" officers of the United States, but provides that "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."[1]

The Supreme Court's 2024-2025 Term sparked an unexpected debate over what is required in order for Congress to "vest" an inferior officer appointment "by law." In *Becerra v. Braidwood Management*, the Court granted certiorari to address whether members of the U.S. Preventive Services Task Force (Task Force) were inferior or non-inferior (i.e. principal) officers under the Appointments Clause.[2]

After oral argument, the Court requested supplemental briefing on the question of whether Congress had "by law" vested the Secretary of Health and Human Services (HHS) with the authority to appoint Task Force members.[3] The order asked the parties to address two precedents—*United States v. Hartwell* and *United States v. Smith*.[4]

In an opinion authored by Justice Brett Kavanaugh, the Court held that Task Force members are inferior officers because they are sufficiently supervised by the HHS Secretary, who may review and

* Director and legal associate, Robert A. Levy Center for Constitutional Studies, Cato Institute.

[1] U.S. Const. art. II, § 2, cl. 2 (emphasis added).

[2] 145 S. Ct. 1038 (2025).

[3] *Kennedy v. Braidwood Mgmt.*, 145 S. Ct., 1957 (2025).

[4] *Id.* (citing *United States v. Hartwell*, 73 U.S. 385 (1867); *United States v. Smith*, 124 U.S. 525 (1888)).

block their decisions and remove them without cause.[5] As to the question put to the parties in the supplemental briefing order, the Court found that Congress had "expressly vested" Task Force appointments in the Secretary—first, by authorizing the Director of the Agency for Healthcare Research and Quality (AHRQ) to "convene" the Task Force;[6] and second, by transferring the AHRQ Director's functions to the Secretary.[7]

Justice Clarence Thomas, joined by Justices Samuel Alito and Neil Gorsuch, dissented. Charging the majority with treating the Appointments Clause "as an inconvenient obstacle to be overcome, not a constitutional principle to be honored," the dissent would have required greater "clarity" from Congress "to depart from the default rule established by the Appointments Clause."[8] "[T]o vest appointment power for an office in a department head," the dissent explained, "Congress must pass a statute giving him the authority to assign a person to that office."[9] Furthermore, "[t]he vesting of appointment authority must be explicit."[10] Because the statutes relied upon by the majority did not give assignment authority to the Secretary "explicitly," Justice Thomas concluded that the appointment prerogative must remain with the President.

In our view, the Court's decision in *Braidwood* misreads the significance of *United States v. Hartwell* while completely ignoring *United States v. Smith*—a more relevant precedent that undermines the Court's holding. In *Smith*, the government advanced—and the Court rejected—an argument eerily similar to the vesting theory accepted in *Braidwood*. But the *Braidwood* Court does not purport to overrule *Smith*. Indeed, *Smith* garnered not a single citation, which is strange considering the Court *expressly* requested briefing on *Smith*. By contrast, the dissent mentions *Smith* and advances a clear statement rule faithful to it.

The article will proceed in six parts. Section One will explore the facts and holdings of *Hartwell* and *Smith*. Section Two will present a model approach to the vesting question taken by the Court

[5] *Kennedy v. Braidwood Mgmt.*, 145 S. Ct. 2427, 2439 (2025).

[6] *Id.* at 2453–54 (referencing 42 U.S.C. § 299b-4(a)(1)).

[7] *Id.* (referencing 80 Stat. 1610 & 98 Stat. 2705).

[8] *Id.* at 2462 (Thomas, J., dissenting).

[9] *Id.* at 2467.

[10] *Id*.

of Appeals for the Armed Forces (CAAF). Section Three will draw upon these insights to argue against the Court's *Braidwood* holding. Section Four will offer an account of which constitutional values might be advanced by the dissent's clear statement rule. Section Five will provide some potential implications. Lastly, Section Six will briefly conclude.

I. Hartwell and Smith

A. United States v. Hartwell

In *United States v. Hartwell*,[11] the Court considered the legal status of a bank clerk who was appointed by an assistant treasurer with the "approbation" (i.e. approval) of the Treasury Secretary.[12] The question was whether this bank clerk was an officer of the United States *within the meaning of a criminal statute*.[13] The defendant bank clerk was indicted under a statute which made it a crime for "officers" charged with the safekeeping of public money to embezzle or convert such funds.[14] The defendant sought to quash the indictment on the theory that was he not an "officer or person" subject to the act's prohibition.[15] The Court disagreed.

[11] 73 U.S. (6 Wall.) 385 (1867).

[12] A statute expressly required the Secretary's approbation for the clerk's appointment. 14 Stat. 191, 202 ("[I]n lieu of the clerks heretofore authorized, the assistant treasurer of the United States at Boston is hereby authorized to appoint, with the approbation of the Secretary of the Treasury, [the following clerks at the following salaries.]")

[13] *Hartwell*, 73 U.S. at 390 (framing the inquiry as whether "the defendant [was] an officer or person 'charged with the safe-keeping of the public money' *within the intent of the act of 1846*?") (emphasis altered).

[14] *Id.* at 393. The statute provided that "all officers and other persons, charged . . . with the safe-keeping, transfer, and disbursement, of the public moneys are hereby required to keep an accurate entry of each sum received, and of each payment or transfer; and . . . if any one of the said officers, . . . shall convert to his own use, in any way whatever, or shall use, by way of investment in any kind of property or merchandise, or shall loan, with or without interest, or shall deposit in any bank, or shall exchange for other funds, except as allowed by this act, any portion of the public moneys intrusted to him for safe-keeping, disbursement, transfer, or for any other purpose, every such act shall be deemed and adjudged to be an embezzlement . . .; and if any officer charged with the disbursements of public moneys shall accept, or receive, or transmit to the treasury department to be allowed in his favor, any receipt or voucher from a creditor of the United States, without having paid to such creditor, . . . every such act shall be deemed to be a conversion by such officer." 9 Stat. 59, 63.

[15] *Hartwell*, 73 U.S. at 393.

"An office," the Court explained, "is a public station, or employment, conferred by the appointment of government" that "embraces the ideas of tenure, duration, emolument, and duties."[16] Because the statute in question[17] "authorized the assistant treasurer . . . to appoint a specified number of clerks" (with the Secretary's assent), defined their duties, and set their salaries, the Court deemed the defendant an "officer" *for statutory purposes*.[18]

To be sure, the *Hartwell* Court briefly nodded to the Appointments Clause, stating: "The defendant was appointed by the head of a department within the meaning of the constitutional provision upon the subject of the appointing power."[19] But this statement is both dictum[20] and *ipse dixit*. It was accompanied by no analysis, and indeed, it was irrelevant to the question presented, which concerned *statutory* distinctions between officers (both principal and inferior), who were subject to indictment, and employees, who were not.[21] The apparent lack of judicial engagement with the constitutional question thus makes sense.

One other factor might explain the Court's scanty treatment of the Appointments Clause: Hartwell's counsel failed to attack the validity of his client's appointment.[22] Instead of challenging the indictment on *constitutional* grounds, counsel focused merely on the statute and whether its "terms" applied to Hartwell's clerkship.[23] In the absence of relevant "adversarial testing"—on which courts rely for "sound judicial decisionmaking"—*Hartwell* is seriously undermined as an Appointments Clause precedent.[24] Fortunately, *United States v. Smith*, discussed below, is significantly more illuminating.

[16] *Id.*

[17] General Appropriation Act of 1866, 14 Stat. 191, 202.

[18] *Hartwell*, 73 U.S. at 393.

[19] *Id.* at 393–94.

[20] *See Morrison v. Olson*, 487 U.S. 654, 719, 721 (1988) (Scalia, J., dissenting); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) (explaining that under the doctrine of *stare decicis*, courts are only "bound" by "those portions of the opinion necessary to that result").

[21] *See Morrison*, 487 U.S. at 719 (Scalia, J., dissenting).

[22] *Hartwell*, 73 U.S. at 389–91 (providing a recapitulation of counsel's arguments with no reference to the Appointments Clause).

[23] *E.g.*, *id.* at 391 (arguing that "[t]he terms of the sixteenth section . . . apply to principal officers alone; not to subordinates appointed by them.").

[24] *Sessions v. Dimaya*, 584 U.S. 148, 190 (2018) (Gorsuch, J., concurring in part and concurring in judgment); *see also Greenlaw v. United States*, 554 U.S. 237, 243–44 (2008) (discussing the importance of adversarial representation).

B. United States v. Smith

In *United States v. Smith*,[25] the Court meaningfully analyzed the vesting question that *Hartwell* only nodded to. Smith was a clerk for the collector of customs, and he was indicted for converting public monies to personal use.[26] Unlike Hartwell, Smith was not appointed under any statute that required the Secretary's approbation.[27] His appointment was made instead by the collector of customs, an inferior officer, and the indictment merely "averred" that "the appointment of the defendant as clerk was made with [the Secretary's assent]."[28] Also, unlike Hartwell, Smith actually moved to quash his indictment on the constitutional ground that he had not been "appointed by the head of a department."[29]

Given the similarities to the government's argument in *Braidwood*, we will break down the line of reasoning advanced by it in *Smith*. As recapitulated in the case caption, the government's argument that Smith was properly appointed proceeded in four parts:

First, "by authorizing the Secretary of the Treasury to fix the number [of clerks] to be employed and the compensation to be paid them," "[s]ection 2634 of the Revised Statutes establishe[d] the office of clerk."[30]

Second, "by a permanent appropriation," "[s]ection 3687 . . . provides for the payment of the expenses of collecting the revenue from customs, and [section] 2639 includes in those expenses clerk hire."[31]

Third, each department head was authorized under section 169 to "employ in his Department such number of clerks . . . at such rates of compensation respectively as may be appropriated for by Congress from year to year."[32]

Fourth, section 249 vested the duty of "superintend[ing] . . . the collection of the duties on imports and tonnage" in the Secretary.[33]

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

[26] *Id.* at 525.

[27] *Id.* at 532–33.

[28] *Id.* at 533.

[29] *Id.* at 527.

[30] *Id.* at 530.

[31] *Id.*

[32] *Id.*

[33] *Id.*

By establishing the office, appropriating funds for the salaries of the officer, authorizing assignment to the post, and granting general supervisory authority to a department head, the government argued that Congress had provided "a sufficient grant of power . . . to appoint."[34] As the indictment alleged that Smith was appointed with secretarial assent, the government concluded that the indictment was valid and the defendant's demurrer should be overruled.[35]

The Court rejected the government's implicit authority theory and held Smith's appointment invalid. Because the clerk's appointment was neither made nor approved by a principal officer pursuant to explicit statutory authority, the defendant could not be considered "appointed by the head of any department within the meaning of the [Appointments Clause]".[36] Treating *Hartwell*'s cursory treatment of the Appointments Clause as precedential, the Court distinguished it on the ground that that case involved a statute that expressly required secretarial assent to the appointment.[37]

In *Smith*, by contrast, there was *no law* vesting the Secretary with the power to appoint nor conditioning appointments on his approbation. That the indictment alleged the Secretary to have rubber-stamped Smith's hiring was irrelevant. Even if true, the allegation "could not add to the character, or powers, or dignity of the clerk."[38] *Smith* thus embraces a clear statement rule: In the absence of a statute that at least conditions an inferior's appointment on a principal's approval, Congress has not "vested" that appointment "by law" in a "head of department."

II. A Model Approach—United States v. Janssen

The Court of Appeals for the Armed Forces (CAAF) took what we consider to be the correct approach to the vesting question in *United States v. Janssen*, an approach faithful to *Smith* (despite not citing it).[39]

[34] *Id.*

[35] *Id.* at 533.

[36] *Id.*

[37] *Id.* at 532.

[38] That is, the character, powers, and dignity of an office find their source in statutory law, not executive action taken irrespective or in violation of statute. *Id.* at 533. *Accord United States v. Trump*, 740 F. Supp. 3d 1245, 1284 (S.D. Fla. 2024) (stating that the Executive may not "wrest[] from Congress its constitutionally prescribed role in the officer-appointing process").

[39] 73 M.J. 221 (C.A.A.F. 2014).

The CAAF, as will be shown, treats the inquiry as one of statutory interpretation—a measured approach that accounts for unique context and eschews one-size-fits-all jurisprudence.

Janssen considered whether a member of the Court of Criminal Appeals (CCA) was properly appointed under the Appointments Clause. The defendant was convicted by court martial and his conviction affirmed by CCA.[40] The panel that reviewed the sentence included a judge appointed by the Secretary of Defense. The defendant attacked the validity of that appointment, "asserting that the Secretary . . . lacked the statutory authority."[41]

The CCA disagreed, finding implicit authority for the appointment and affirming the sentence.[42] On appeal to the CAAF, the question presented was whether "Congress 'by law' vest[ed] the Secretary of Defense, the head of a department, with the authority to appoint a civilian as an appellate military judge."[43]

The CAAF found the appointment invalid, reversing the decision below. True, Congress had enacted statutes authorizing the Secretary to "employ such number of employees . . . as Congress may appropriate for from year to year"—"employee" being defined to include "officer[s]."[44] But in light of the statutory context, those general "'housekeeping' statutes" did not contain "the necessary authority" for making an appointment.[45]

"Congress," the court explained, "legislated with great specificity on the powers of the Secretary of Defense and the structure of the department," "rais[ing] the obvious question of why Congress would go to the trouble" if the Secretary already possessed an open-ended appointment power.[46] Indeed, "three positions within the Office of the Secretary" expressly required secretarial appointment under various statutes.[47] The court also pointed to another statute which "specifically provided for the appointment of administrative

[40] *Id.* at 222.

[41] *Id.* at 223.

[42] *Id.* at 222–23.

[43] *Id.* at 224.

[44] *Id.* (quoting 5 U.S.C. §§ 301, 2105(a), 3101).

[45] *Id.*

[46] *Id.* at 224, 225.

[47] *Id.* at 225 & n.9 (citing statutes).

law judges."[48] Particularly in light of the statutory scheme, "language *specifically granting* the head of a department the power to appoint inferior officers" would be required to override the default method of appointment (namely presidential nomination and Senate consent).[49]

The analysis in *Janssen* tracks with the Supreme Court's in *Smith*. Both cases recognized potentially implicit sources of appointment authority and both cases rejected such measures as insufficient to depart from the default rule of presidential nomination with Senate consent. What *Janssen* adds to the analysis is a greater sensitivity to statutory context and structure—tools that, had they been employed in *Braidwood*, would likely have carried the case the other way.

III. Where Braidwood Went Wrong

The Court erred in *Braidwood* in five noteworthy ways: (1) it failed to cite, let alone distinguish, *Smith*—notwithstanding the precedent's embrace of a clear statement rule; (2) it misconceived the significance of *Hartwell*, whose treatment of the Appointments Clause is nonprecedential; (3) it disregarded inconvenient statutory context that suggests Congress never intended to vest Task Force appointments in the HHS Secretary; (4) it rushed to judgment in denying lower courts the opportunity to weigh the issue first; and (5) it misused the doctrine of constitutional avoidance in shoring up its interpretation. We take up each error in turn.

A. Failure to Grapple with Smith

Despite the request for supplemental briefing on *Smith*,[50] Justice Kavanaugh's opinion for the Court never cited it. Evidently, six of the Justices agreed with the government's contention that *Smith* was "inapposite."[51] It is hard to see how.

Under *Smith*, the matter of vesting appointments is not up for legislative implication. Yet in *Braidwood*, the government advanced a hodgepodge of statutes—enacted decades apart with strange

[48] *Id.* at 225 (citing 5 U.S.C. § 3105).

[49] *Id.* at 224, 225 (emphasis added).

[50] *Kennedy v. Braidwood Management*, 145 S. Ct. 1957 (2025).

[51] Letter Brief for the United States at 8, *Braidwood Mgmt. v. Kennedy*, 145 S. Ct. 2427 (2025) (No. 24-316).

procedural wrinkles—and interpreted them, holistically, to provide "a sufficient vesting" and "a sufficient grant of power . . . to appoint."[52] The government's theory proceeded in three parts:

1. Section 299b-4(a)(1) of Title 42 authorized the AHRQ Director to "convene" the Task Force, which implied the power to appoint members.[53]

2. Section 299(a) made the Director an officer of the Public Health Service (PHS) and an agent of the HHS Secretary acting on the Secretary's behalf.[54]

3. Reorganization Plan No. 6 of 1966 transferred all of the functions of PHS officers to the Secretary,[55] and after doubt was cast on the plan's validity, Congress enacted a new statute ratifying and affirming the transfer.[56]

Together, the government argued, these three enactments provided "a reasonable basis for concluding that Congress vested the power to appoint Task Force members . . . in the Secretary himself."[57]

This line of reasoning harkens back to the implicit authority argument that the Court rejected in *Smith.* There, the government contended that while "[s]ometimes" Congress creates an office "in express terms," "more frequently," it will establish inferior offices "by implication."[58] The government then pieced together various statutes, including delegations for the Treasury Secretary to (1) fix the number of clerks, (2) set their compensation, and (3) "direct the superintendence of the collection of duties on imports and tonnage[.]"[59] The government argued that, read together, these measures provided "a sufficient vesting" and "grant of power . . . to appoint."[60]

[52] *Smith*, 124 U.S. at 530.

[53] Letter Brief for the United States, *supra*, at 1.

[54] *Id.*

[55] *Id.* (citing § 1(a), 80 Stat. 1610).

[56] *Id.* (quoting Reorganization Plan, Act of Oct. 19, 1984, Pub. L. No. 98-532, § 1, 98 Stat. 2705)

[57] *Id.* at 2.

[58] *Smith*, 124 U.S. at 529–30.

[59] *Id.* at 530 (quoting Rev. Stat. § 249, codified at 19 U.S.C. § 3).

[60] *Id.* at 530.

The *Smith* Court could easily have interpreted the statutes to "impose" by implication "the duty to carry out the selection" of clerks on the Secretary.[61] If the customs office fell under secretarial superintendence, and if the Secretary could fix the number of clerks as he saw fit (subject to appropriations), then presumably the Secretary could select clerks *acting through the customs office*. In the face of the default rule for officer appointments, however, this fact did not matter. The collage of statutes pieced together by the government furnished an authority too implicit, *even if plausible*, to override the Constitution's default method of appointment. In other words, only a statute explicitly "authorizing the head of a department to appoint" could satisfy the Excepting Clause.[62] So too the Court should have held in *Braidwood*.

Section 299b-4(a)(1), like Section 2634 from *Smith*, creates an office and authorizes the hiring of persons to fill the post. Section 299(a), like Section 249 from *Smith*, creates an agency relationship between a cabinet secretary and the officer responsible for appointing the putative inferior. Under *Smith*, neither measure is sufficient, independently or in conjunction, to vest Task Force appointments in the Secretary by law. Furthermore, the government's suggestion that "no law [in *Smith*], akin to the Reorganization Plan, . . . invested the Treasury Secretary himself with the selection of the clerks of the collector" is dubious.[63] Arguably, there *was* such a law;[64] the Court simply rejected the government's implicative construction of it.

True, the statute in *Braidwood* included a transfer-of-functions provision more specific than the superintendence measure from *Smith*—which could arguably distinguish it.[65] Whereas "superintendence" connotes the ability of a supervisor to reach down and direct the conduct of an inferior, "transfer" suggests the dislodging of power from an inferior in favor of principal. So, while in *Smith* the Secretary could direct the clerk's officer in choosing whom to hire, in *Braidwood* the Secretary could, following this theory, actually *wield* that power

[61] *Cf.* Letter Brief for the United States, *supra*, at 8.

[62] *Smith*, 124 U.S. at 530.

[63] Letter Brief for the United States, *supra*, at 8 (internal quotation marks omitted).

[64] 14 Stat. 191, 202 ("The Secretary of the Treasury shall direct the superintendence of the collection of the duties on imports and tonnage as he shall judge best.").

[65] 80 Stat. 1610 (transferring functions); 98 Stat. 2705 (ratifying transfer of functions post-*Chadha*).

for himself. But this difference is insufficient to distinguish *Smith* or to override the default rule for executive appointments.

Recall that the statute in *Braidwood* never used the word "appoint," instead employing the term "convene."[66] So, the "function" transferred from the Director to the Secretary was not the appointment of the Task Force, but the convening of its members. As Justice Thomas explains in dissent, the ordinary meaning of "convene"—"to cause to assemble"—does not encapsulate appointment or assignment, particularly in view of statutory context.[67] After all, Task Force members are unpaid, part-time volunteers who meet three times per year. It was to facilitate those meetings that Congress empowered the Director to "convene" the Task Force.[68] As such, the transfer-of-functions argument fails.

In contrast, the statutes in *Smith* used the language "employ," which more closely approximates "appoint" than "convene." The statute also provided greater control to the Secretary over the relevant inferior officer, by delegating the power to fix the number of available posts.[69] And yet, in the absence of "a law authorizing the head of a department to appoint clerks of the collector,"[70] neither of these facts proved sufficient to vest the clerk's appointment in the Secretary. In short, if the statutes in *Smith* did not vest an appointment, it is hard to see how the statutes in *Braidwood* do so; they neither use the term "employ" (or "appoint"), nor allow the Secretary to tweak the number of members on the Task Force.

B. Misconception of Hartwell

The Court treats *Hartwell*'s Appointments Clause analysis as if precedential,[71] based on a favorable citation in *Free Enterprise Fund v.*

[66] *Braidwood Mgmt.*, 145 S. Ct. at 2439 (internal quotation marks omitted).

[67] *Id.* at 2469 (Thomas, J., dissenting) (cleaned up).

[68] *Id.* at 2469–70.

[69] On the facts of this case, one can imagine an analogous power of the HHS Secretary to fix the number Task Force members.

[70] *Smith*, 124 U.S. at 533.

[71] Recall the full extent of *Hartwell*'s vesting analysis: "The defendant was appointed by the head of a department within the meaning of the constitutional provision upon the subject of the appointing power." 73 U.S. at 393–94. As discussed in Section I.A., *supra*, *Hartwell* was a statutory criminal law case that hinged on the difference between officers (both principal *and* inferior), who were indictable, and employees, who were not.

PCAOB.[72] There, the Court invoked *Hartwell* for the proposition that secretarial assent to an inferior officer's appointment of another inferior "satisfies the Appointments Clause."[73] But an approving citation in a subsequent case cannot transform what was *dictum* into holding, particularly when doing so would contravene *actually binding* precedent.[74] Nor can the Court be charged with ignorance—it cited to the *very pincite* of Justice Antonin Scalia's *Morrison* dissent in which he ridiculed the relevant analysis from *Hartwell* as nonbinding and "sketchy."[75]

C. Disregard of Statutory Context

For all its emphasis on "context,"[76] the Court's analysis in *Braidwood* is, in one important respect, divorced from statutory context. HHS, one of the largest cabinet departments, is governed by Title 42—a vast collection of complex and detailed statutes. Notably, throughout the title, Congress employs unambiguous—indeed, explicit—language in order to vest appointment powers in the HHS Secretary.[77] Elsewhere, Congress delegates a general appointment authority in order to carry out designated functions.[78]

Title 42 thus "sets out in great detail the officials who make up the Office of the Secretary . . . and the procedures to be employed for their appointment."[79] Naturally, then, one would expect a similarly explicit grant of authority for secretarial appointment of the

[72] 561 U.S. 477 (2010)

[73] *Id.* at 512 n.13.

[74] *See generally Smith*, *supra.*

[75] *Braidwood Mgmt.*, 145 S. Ct. at 2443; *Morrison*, 487 U.S. at 719, 721 (Scalia, J., dissenting).

[76] *Id.* at 2454.

[77] *See, e.g.*, § 300jj-11 ("The Office shall be headed by a National Coordinator who shall be appointed by the Secretary . . ."); § 300u(a) ("The Secretary shall appoint a Director for the Office of Disease Prevention and Health Promotion established pursuant to paragraph (11) of this subsection."); § 209(i) ("The appointment of any officer or employee of the Service made in accordance with the civil-service laws shall be made by the Secretary . . . .")

[78] *See, e.g.*, 42 U.S.C. § 913 ("[T]he Secretary is authorized to appoint and fix the compensation of such officers and employees and to make such expenditures as may be necessary for carrying out the functions of the Secretary under this chapter.").

[79] *Janssen*, 73 M.J. at 225.

Task Force. But Chapter 6A contains no such provision, nor does it contain "any provision conferring a general appointment power."[80]

Congress knows what language to use when it wants to vest appointments in the HHS Secretary. But none of the statutes advanced by the government in *Braidwood* contained "the clarity typical of past statutes used for that purpose."[81] By accepting the government's tortuous vesting theory regardless, the Court did an interpretative disservice to the carefully crafted handiwork of Congress.

D. Rush to Judgment

In a recent statement respecting the denial of certiorari in *Snope v. Brown*, Justice Kavanaugh stressed the importance of percolation of questions in the lower courts, stating: "Opinions from [the] Courts of Appeals . . . assist this Court's ultimate decisionmaking."[82] In *Braidwood*, the Justice showed no such restraint.

It is often said that the Supreme Court is "a court of review, not of first view."[83] But, as Justice Thomas observed in dissent, neither the district court nor the Fifth Circuit addressed whether Congress properly vested Task Force appointments by law.[84] Indeed, the lower courts had no occasion to address the question: Having classified Task Force members as principal officers (incorrectly, it turns out), they mooted the vesting question, which is relevant only to inferior officers.

Rather than rushing to judgment, the Court should have remanded the case for consideration of the vesting question. By relying solely on the parties' supplemental briefs, the Court denied itself the helpful insights of its lower court colleagues—some of whom have addressed this very question in prior cases.

While the counterfactual is impossible to know, had the Court remanded to the Fifth Circuit, presumably that court would have applied or distinguished its own precedent on the vesting issue,[85] thus better refining the relevant legal questions for Supreme Court

[80] *Id.*

[81] *Trump v. United States*, 603 U.S. 593, 648 (2024) (Thomas, J., concurring).

[82] 145 S. Ct. 1534, 1535 (2025) (statement of Kavanaugh, J., respecting denial of certiorari).

[83] *Cutter v. Wilkinson*, 544 U. S. 709, 718 n.7 (2005).

[84] *Braidwood Mgmt.*, 145 S. Ct. at 2465 (Thomas, J., dissenting).

[85] *Willy v. Admin. Rev. Bd.*, 423 F.3d 483, 492 (5th Cir. 2005).

review. Alas, the Court could not resist reaching the merits, the absence of these insights notwithstanding.[86]

E. Misuse of Constitutional Avoidance

As a final backstop against the dissent, the Court invoked constitutional avoidance. "[I]f there were any doubt" as to the constitutionality of the vesting, the Court explained, "the canon of constitutional avoidance . . . [would] dispel it."[87] While "reading the statutes at issue to vest appointment authority in the AHRQ Director alone would . . . render them 'clearly unconstitutional'," interpreting them holistically to "vest the Secretary with authority to appoint" was "at a minimum reasonable," and thus preferable as a matter of statutory construction.[88]

The problem with this argument is its failure to account for *Smith*, where constitutional avoidance did not save the appointment, notwithstanding the plausible basis for the government's saving construction. Furthermore, where the constitutional question is about the *language* Congress must use in order to depart from a default constitutional principle, statutory and constitutional dimensions fold into one and "avoidance" becomes little more than a thumb on the scale for government. Applying the canon here, as the Court does, is in effect to reject the necessity of a clear statement on the merits.[89]

IV. What a Clear Statement Rule Accomplishes

"Canons . . . are often expressed as clear statement rules that require a court to interpret a statute to avoid a particular result unless Congress speaks explicitly to accomplish it."[90] A clear statement rule under the Excepting Clause would advance important constitutional values: unitary executive control and senatorial oversight of appointments.

[86] *But cf. Snope*, 145 S. Ct. at 1535 (statement of Kavanaugh, J.).

[87] *Braidwood Mgmt.*, 145 S. Ct. at 2460.

[88] *Id.* at 2461 (internal quotation marks omitted).

[89] On the other hand, because *Smith* was a criminal prosecution, it is possible that the rule of lenity came into play—encouraging the Court to adopt a narrow construction. However, the Court gave no indication that this was the case. *But cf. Hartwell*, 73 U.S. at 395 ("We are not unmindful that penal laws are to be construed strictly.").

[90] Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 118 (2010).

First, a clear statement rule would advance unitary executive control of federal officers to the benefit of democratic accountability. The unitary executive provides a focal point "for the jealousy and watchfulness of the people."[91] By putting the onus on Congress to depart from *presidential* nomination by clear textual command, the rule would empower the President to superintend the conduct of *all* officers—principal and inferior—through direct removal in the absence of any statute, presumably signed by the President,[92] divesting him of that power in favor of a principal officer. When Congress vests executive appointments—and by implication, removals[93]—in cabinet secretaries, it renders them the direct object of an inferior officer's loyalty, *not* the President.[94] With each additional appointment vested in someone other than the President, there results an attenuation of presidential control and a diffusion of accountability.[95] If Congress desires that result, it should have to speak clearly. Otherwise, the power of appointment should presumably remain with the President—"the sword of the community"[96] and the only federal officer "elected by the entire Nation."[97]

Second, a clear statement rule would safeguard the Senate's advice and consent prerogative. The Excepting Clause's default method of appointment contains two elements: presidential nomination and senatorial confirmation. The Senate's power to review executive

[91] The Federalist No. 70, at 412 (Alexander Hamilton) (Royal Classics ed. 2020).

[92] Of course, Congress can override a presidential veto by a two-thirds supermajority in each house. *See* U.S. Const., art. I., § 2, cl. 2. But in today's age, Congress rarely does so. During President Trump's first term and President Obama's two terms, Congress overrode one presidential veto each. During President's Biden's term in office, Congress overrode none. That makes two veto overrides since 2009, for an average of one every eight years. *Vetoes, 1789 to Present*, U.S. Senate (last visited Aug. 8, 2025), https://tinyurl.com/5fu7wt7v.

[93] *See Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).

[94] *See* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1228 (2014) ("[A] simple truth of administration [is] that an officer will seek to please the person that decides whether the officer stays or goes.").

[95] *Cf.* Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 Harv. L. Rev. 1756, 1835 (2023) (raising the possibility of Congress "consolidating all existing departments into a single behemoth, staffed with thousands of tenure-protected inferior officers").

[96] The Federalist No. 78, at 499 (Alexander Hamilton) (Royal Classics ed. 2020).

[97] *Trump v. United States*, 603 U.S. 593, 622 (2024). The Vice President, of course, is also elected nationwide on the same ticket as the President. U.S. Const., amend. XII.

nominations was intended to prevent "unfit characters" from assuming positions of power merely for reasons of loyalty.[98]

A presumption should exist that advice and consent remains intact to guard against unfit presidential picks, unless Congress overrides it by unambiguous language. Vesting appointments by implication may leave the Senate in the dark about whether a statute divests it of its confirmation power. If a collection of statutes, enacted over several decades, may vest an inferior appointment in a principal office, that means the Senate may—also by implication—forfeit its right of reviewing that inferior's nomination. In contrast, a clear statement rule would force the enacting Congress to grapple with the potentially untoward consequences of waiving advice and consent, and to waive it *knowingly*.

Furthermore, the clear statement need not be specific to the inferior's office. Congress could, for instance, enact a broad yet unambiguous delegation to appoint officers in order to carry out designated functions.[99] That, too, would suffice under our proposed clear statement rule.

V. Implications

Braidwood carries several important implications—both specific to the Appointments Clause and more broadly relevant to the Court's jurisprudence.

First, *Smith* has in effect been overruled *sub silentio,* at least to the extent that precedent is read, as we think, to embrace a clear statement rule for inferior appointments. Second, *Hartwell*'s putative rule to the contrary—which was unreasoned *dictum*—has assumed the stature of binding precedent for Appointments Clause purposes. Under *Hartwell* and *Braidwood*, Congress may vest inferior appointments by implication, and the courts will not insist on clear legislative intent. So long as the statute might reasonably be read to require principal officer approval for the inferior appointment, the courts will deem the appointment "vested" "by law" in the sense of the Appointments Clause.[100] Courts may also employ constitutional avoidance to rescue questionable "vestings" of appointment.

[98] The Federalist No. 76, at 441 (Alexander Hamilton) (Royal Classics ed. 2020).

[99] *See, e.g.*, 42 U.S.C. §§ 300jj-11; 300u(a); 209(i); *see also* 42 U.S.C. § 913.

[100] U.S. Const. art. II, § 2, cl. 2 (capitalization normalized).

More broadly, *Braidwood* sends some interesting signals about the current Court. First, it arguably shows—once more—that the Justices will afford the Affordable Care Act charitable treatment—construing its provisions to comply with constitutional commands notwithstanding a more plausible construction to the contrary.[101] When construing the ACA, the Court thus sits more as a partner to Congress, not an independent check. Second, *Braidwood* suggests that the Court will not always remand for the lower courts to address constitutional issues they left untouched, even when the Court might benefit.

Third and lastly, while some issues—like gun control and the Second Amendment—warrant percolation in the lower courts before getting teed up for certiorari, other issues—like the vesting of inferior appointments—apparently do not. It is unclear how to grapple with this apparent inconsistency. Perhaps the Court was disinclined to remand the matter to a court of appeals that has been frequently reversed the last few Terms. Or perhaps the Court did not want to leave an important component of a healthcare subsidy program in legal limbo. Either way, it is unclear under what circumstances an issue might benefit from lower court percolation, at least according to Justice Kavanaugh.

VI. Conclusion

Justice Thomas summed up the fatal flaw in *Braidwood* best: "because the Appointments Clause's default rule, as a constitutional provision, is of greater dignity than a statute, we should not presume that Congress meant to set it aside if the question is doubtful."[102] By holding that appointments may be vested by implication, the Court has done just that, in disservice to the Appointments Clause.

[101] *See NFIB v. Sebelius*, 597 U.S. 519 (2012); *cf. also King v. Burwell*, 576 U.S. 473, 515 (2015) (Scalia, J., dissenting).

[102] *Braidwood Mgmt.*, 145 S. Ct. at 2467 (Thomas, J. dissenting) (cleaned up).