times to designate a definite eligibility, thereby virtually usurping the appointing power.[506] Despite the record of the past, however, it is not at all clear that Congress may cabin the President's discretion, at least for offices that he considers important, by, for example, requiring him to choose from lists compiled by others. To be sure, there are examples, but they are not free of ambiguity.[507]

But when Congress contrived actually to participate in the appointment and administrative process and provided for selection of the members of the Federal Election Commission, two by the President, two by the Senate, and two by the House, with confirmation of all six members vested in both the House and the Senate, the Court unanimously held the scheme to violate the Appointments Clause and the principle of separation of powers. The term "officers of the United States" is a substantive one requiring that any appoin-

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tions and jurisdiction, fix the terms of office, and prescribe reasonable and relevant qualifications and rules of eligibility of appointees, always provided "that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation." Id. at 128–29. For reiteration of Congress's general powers, *see* Buckley v. Valeo, 424 U.S. 1, 134–35 (1976); Morrison v. Olson, 487 U.S. 654, 673–77 (1988). *See also* United States v. Ferreira, 54 U.S. (13 How.) 40, 51 (1851).

[506] *See* data in E. Corwin, supra at 363–65. Congress has repeatedly designated individuals, sometimes by name, more frequently by reference to a particular office, for the performance of specified acts or for posts of a nongovernmental character; *e.g.*, to paint a picture (Johnathan Trumbull), to lay out a town, to act as Regents of Smithsonian Institution, to be managers of Howard Institute, to select a site for a post office or a prison, to restore the manuscript of the Declaration of Independence, to erect a monument at Yorktown, to erect a statue of Hamilton, and so on and so forth. Note, *Power of Appointment to Public Office under the Federal Constitution*, 42 HARV. L. REV. 426, 430–31 (1929). In his message of April 13, 1822, President Monroe stated that, "as a general principle, . . . Congress have [sic] no right under the Constitution to impose any restraint by law on the power granted to the President so as to prevent his making a free selection of proper persons for these [newly created] offices from the whole body of his fellow-citizens." 2 J. Richardson supra at 698, 701. The statement is ambiguous, but its apparent intention is to claim for the President unrestricted power in determining who are proper persons to fill newly created offices. *See* the distinction drawn in Myers v. United States, 272 U.S. 52, 128–29 (1926), quoted supra. And note that in Public Citizen v. U.S. Department of Justice, 491 U.S. 440, 482–89 (1989) (concurring), Justice Kennedy suggested the President has *sole* and unconfined discretion in appointing).

[507] The Sentencing Commission, upheld in Mistretta v. United States, 488 U.S. 361 (1989), numbered among its members three federal judges; the President was to select them "after considering a list of six judges recommended to the President by the Judicial Conference of the United States." Id. at 397 (quoting 28 U.S.C. § 991(a)). The Comptroller General is nominated by the President from a list of three individuals recommended by the Speaker of the House of Representatives and the President *pro tempore* of the Senate. Bowsher v. Synar, 478 U.S. 714, 727 (1986) (citing 31 U.S.C. § 703(a)(2)). In Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Airport Noise, 501 U.S. 252, 268–69 (1991), the Court carefully distinguished these examples from the particular situation before it that it condemned, *but see* id. at 288 (Justice White dissenting), and in any event it never actually passed on the list devices in *Mistretta* and *Synar*. The fault in *Airports Authority* was not the validity of lists generally, the Court condemning the device there as giving Congress control of the process, in violation of Buckley v. Valeo.