

A federal statute with inseverable provisions established a new five-member National Prosperity Board with broad regulatory powers over the operation of the securities, banking, and commodities industries, including the power to issue rules with the force of law. The statute provides for three of the board members to be appointed by the President with the advice and consent of the Senate. They serve seven-year terms and are removable only for good cause. The other two members of the board were designated in the statute to be the respective general counsel of the Senate and House of Representatives Committees on Government Operations. The statute stipulated that they were to serve on the board for as long as they continued in those positions.

Following all required administrative procedures, the board issued an elaborate set of rules regulating the operations of all banks, securities dealers, and commodities brokers. A securities company, which was subject to the board's rules, sought a declaratory judgment that the rules were invalid because the statute establishing the board was unconstitutional.

In this case, should the court rule that the statute establishing the National Prosperity Board is constitutional?

- A. No, because all members of federal boards exercising executive powers must be appointed by the President or in a manner otherwise consistent with the appointments clause of Article II.
- B. No, because all members of federal boards having broad powers that are quasi-legislative in nature, such as rulemaking, must be appointed by Congress.
- C. Yes, because the necessary and proper clause authorizes Congress to determine the means by which members are appointed to boards created by Congress under its power to regulate commerce among the states.
- D. Yes, because there is a substantial nexus between the power of Congress to legislate for the general welfare and the means specified by Congress in this statute for the appointment of board members.

## Explanation:

### Appointment of federal officers

(Art. II, § 2 appointments clause)

Type	Examples	Appointment
Principal	<ul style="list-style-type: none"><li>Ambassador</li><li>Supreme Court justice</li><li>Cabinet official</li></ul>	Appointed by President (with Senate approval)
Inferior	<ul style="list-style-type: none"><li>Independent counsel</li><li>Judicial clerk</li><li>Administrative law judge</li></ul>	Appointed by President (with Senate approval) <i>unless</i> Congress delegates appointment to: <ul style="list-style-type: none"><li>President alone</li><li>federal courts <i>or</i></li><li>heads of executive departments</li></ul>

**Federal officers** are persons who:

- hold a **continuing public office** (eg, for a term of years) *and*
- have significant discretionary authority to **administer and/or enforce laws** (ie, **executive powers**).

All federal officers must be **appointed by the President** or in a manner otherwise consistent with the Article II appointments clause. Under this clause, **Congress cannot appoint** federal officers.

Here, the National Prosperity Board comprises three members who serve seven-year terms and two who serve indefinitely—all of whom hold a continuing public office. And they all exercise executive powers since they have significant discretionary authority to issue rules with the force of law. As a result, they are federal officers who must be appointed by the President or in a manner otherwise consistent with the appointments clause. And since the applicable statute allows *Congress* to appoint two members, it is unconstitutional.

**(Choice B)** Congress may appoint persons to exercise quasi-legislative powers that are investigative or informative in nature. But in *Buckley v. Valeo*, the Supreme Court held that rulemaking is an administrative power that can only be exercised by federal officers (who can never be appointed by Congress).

**(Choice C)** The necessary and proper clause authorizes Congress to enact laws that are reasonably appropriate to carry out its express powers—including the power to regulate **commerce** among the states. But Congress cannot violate other constitutional provisions when doing so.

**(Choice D)** Article I, section 8 grants Congress the power to tax and spend for the general welfare. But Congress is not taxing or spending here, so this power does not apply.

**Educational objective:**

Federal officers are persons who hold a continuing public office AND have significant discretionary authority to administer and/or enforce laws (ie, executive powers). They can only be appointed by the President or in a manner otherwise consistent with the Article II appointments clause—never by Congress.

**References**

- Buckley v. Valeo, 424 U.S. 1, 132–33 (1976) (holding that federal officers must be appointed by the President or in a manner consistent with the appointments clause, which does not allow congressional appointments).
- Lucia v. SEC, 138 S. Ct. 2044, 2053 (2018) (describing the requirements for a federal officer).

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