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### The Permissibility of Acting Officials: May the President Work around Senate Confirmation?

Nina A. Mendelson

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# ARTICLES

## THE PERMISSIBILITY OF ACTING OFFICIALS: MAY THE PRESIDENT WORK AROUND SENATE CONFIRMATION?

NINA A. MENDELSON\*

*Recent presidential reliance on acting agency officials, including an acting Attorney General, acting Secretaries of Defense, and an acting Secretary of Homeland Security, as well as numerous below-Cabinet officials, has drawn significant criticism from scholars, the media, and members of Congress. They worry that the President may be pursuing illegitimate goals and seeking to bypass the critical Senate role under the Appointments Clause. But Congress has authorized—and Presidents have called upon—such individuals from the early years of the Republic to the present. Meanwhile, neither formalist approaches to the constitutional issue, which seem to permit no flexibility, nor current Supreme Court doctrine, which contributes few bounds on acting officials, satisfactorily answer how much latitude a president should have to work around Senate confirmation.*

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*After summarizing different methods Presidents have used to rely on unconfirmed officials to perform the work of Senate-confirmed offices, this Article advocates a functional approach to the constitutional question. A functional approach to acting officials possesses the twin virtues of pragmatism and constraint. Presidents have legitimate needs to rely briefly on unconfirmed individuals, but functional considerations, including the need to ensure the integrity, competence, and democratic responsiveness of senior agency officials, weigh against long-term reliance on such individuals. The Article concludes that because the Federal Vacancies Reform Act of 1998 authorizes overly lengthy service, the Act, together with other practices, is constitutionally problematic. The Article concludes with reform recommendations.*

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## INTRODUCTION

*The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints.*

—Justice Oliver Wendell Holmes, 1931<sup>1</sup>

*I sort of like acting. It gives me more flexibility.*

—President Trump, statement to reporters, January 2019<sup>2</sup>

Two years into the Trump Administration, tempers flared when President Donald Trump chose Justice Department Chief of Staff, Matthew Whitaker, as acting Attorney General in early November 2018, after Attorney General Jeff Sessions was pressured to resign and in preference to Deputy Attorney General Rod Rosenstein.<sup>3</sup> Seemingly responding to the negative press, the President nominated William Barr in December, but Whitaker served for over three months before Barr was finally confirmed by the Senate in February 2019. Whitaker's choice was controversial not just because of the circumstances of Session's departure, which suggested that the President had deliberately created a vacancy, but also because Whitaker, unlike Rosenstein, was not Senate-confirmed in any current role, yet possessed extensive powers in that office. Those powers presumably included the power to remove Special Counsel Robert Mueller.<sup>4</sup> Around that same time, in January and February 2019, the Departments of Defense and Interior, the Environmental Protection Agency (EPA), and the Social Security Administration (SSA) were all headed by acting officials, rather than individuals nominated and Senate-

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1. *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931).

2. Brett Samuels, *Trump: 'No Hurry' to Name Permanent Replacements for Acting Cabinet Members*, HILL (Jan. 6, 2019, 4:33 PM), <https://thehill.com/homenews/administration/424088-trump-no-hurry-to-name-permanent-replacements-for-acting-cabinet>.

3. *E.g.*, Editorial, *Matthew Whitaker and the Corruption of Justice*, N.Y. TIMES (Nov. 16, 2018), <https://nyti.ms/2DqL3IX> (noting the “storm of legal questions” set off by the Whitaker appointment). Among other objections, the State of Maryland filed a suit challenging the legality of Whitaker's appointment. *E.g.*, Charlie Savage, *Whitaker's Appointment as Acting Attorney General Faces Court Challenge*, N.Y. TIMES (Nov. 13, 2018), <https://nyti.ms/2DeD63j>.

4. *E.g.*, *In re Grand Jury Investigation*, 315 F. Supp. 3d 602, 653–54 (D.D.C. 2018) (affirming appointment of Special Counsel Robert Mueller by Deputy Attorney General Rosenstein serving as acting Attorney General following Attorney General Session's recusal).

confirmed to head those agencies.<sup>5</sup> As of writing, in November 17, 2020, the Department of Homeland Security (DHS) has not had a Senate-confirmed head since April 2019, when Secretary Kirstjen Nielsen was asked to resign.<sup>6</sup> Instead, for well over 500 days, DHS has been run by a series of acting officials, most recently Chad Wolf, Undersecretary for Strategy, Policy, and Plans, whose naming provoked opposition from both the left and the right.<sup>7</sup> The President finally formally submitted Wolf's nomination to the Senate in September 2020,<sup>8</sup> but the nomination was not filed until after the rise of public controversy over Wolf's service in the summer of 2020, including a federal court ruling as well as a Government Accountability Office (GAO) opinion that Wolf's service was illegal because his naming was not authorized by an order of succession valid under the relevant statute.<sup>9</sup> Wolf has taken

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5. All data is available at the Partnership for Public Service/Washington Post Political Appointee Tracker. See *Tracking How Many Key Positions Trump Has Filled So Far*, WASH. POST [hereinafter Partnership/Post Appointee Tracker], <https://www.washingtonpost.com/graphics/politics/trump-administration-appointee-tracker/database/> (last updated Nov. 16, 2020, 9:12 AM). At the Department of Defense, Deputy Secretary Patrick Shanahan's service as acting Secretary was followed by that of Army Secretary Mark Esper and then Navy Secretary Richard Spencer. See Helene Cooper, *Jim Mattis, Defense Secretary, Resigns in Rebuke of Trump's Worldview*, N.Y. TIMES (Dec. 20, 2018), <https://nyti.ms/2GyFDIQ>; Jim Garamone, *Esper Nominated as Defense Secretary, Spencer Now Acting Secretary*, U.S. DEP'T OF DEF. (July 15, 2019), <https://www.defense.gov/explore/story/Article/1905424/esper-nominated-as-defense-secretary-spencer-now-acting-secretary/>. Andrew Wheeler served as acting Environmental Protection Agency (EPA) Administrator, and David Bernhardt served as acting Secretary of the Interior. Wheeler and Bernhardt have since been confirmed.

6. Mara Liasson, *Kirstjen Nielsen's DHS Departure Means 3 Major Departments Will Have Acting Secretaries*, NPR (Apr. 8, 2019, 4:26 PM), <https://www.npr.org/2019/04/08/711169740/kirstjen-nielsens-dhs-departure-means-3-major-departments-will-have-acting-secre>.

7. See Partnership/Post Appointee Tracker, *supra* note 5 (reporting resignation of Nielsen on April 24, 2019); Quinn Owen & Luke Barr, *Chad Wolf Confirmed as Acting Homeland Security Chief*, ABC NEWS (Nov. 14, 2019, 11:35 AM), <https://abcnews.go.com/Politics/chad-wolf-confirmed-acting-homeland-security-chief/story?id=66989973> (noting opposition to Wolf); Colleen Long, *McAleenan, Acting Homeland Security Secretary, Stepping Down*, AP NEWS (Oct. 11, 2019), <https://apnews.com/41d8075b43e243beb7c327fde5a3b091>.

8. See Partnership/Post Appointee Tracker, *supra* note 5 (stating Wolf nomination announced in August 2020 and referred to Senate committee in September 2020).

9. See *id.* (regarding vacancy); Aaron Blake, *Trump's Portland Crackdown Is Controversial. The Man Spearheading It Might Be Doing So Illegally*, WASH. POST (July 22, 2020, 12:39 PM), <https://www.washingtonpost.com/politics/2020/07/22/trumps-actions-portland-are-controversial-man-spearheading-them-might-be-doing-so-illegally/> (noting legal controversies over Wolf's service); *Casa de Maryland, Inc. v. Wolf*, No. 8:20-cv-02118-PX, 2020 WL 5500165, at \*23 (D. Md. Sept. 11, 2020) (issuing preliminary injunction and finding Wolf's appointment as acting Secretary was likely invalid because he was not named pursuant to a valid order of

numerous controversial actions while purporting to act as Secretary of Homeland Security, including issuing policies to impede work authorization for asylum applicants and ordering federal law enforcement officials to intervene in protests in Portland, Oregon.<sup>10</sup>

Acting and other individuals unconfirmed for the role have also carried out the responsibilities of numerous Senate-confirmed Executive Branch positions below the Cabinet secretary level, including the Director of the Bureau of Land Management (BLM)<sup>11</sup> and the directors of the Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE).<sup>12</sup> As of writing, in November 17, 2020, no nominations whatsoever have been submitted for some of these roles.<sup>13</sup> All of this has prompted concerns that too much Executive Branch work has been carried out by “way too many” unconfirmed agency leaders.<sup>14</sup> Federal courts have ruled not only that the acting Secretary of Homeland Security is not legally serving, but also the acting Director of the

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succession); Dep’t of Homeland Sec., File No. B-332451, at 1 (U.S. Gov’t Accountability Off. Aug. 14, 2020) [hereinafter *DHS Decision*], <https://www.gao.gov/assets/710/708944.pdf> (finding Wolf’s appointment as acting Secretary invalid because he was not named pursuant to valid order of succession).

10. Lawsuits were filed in Summer 2020 challenging these and other actions, including on the ground that Wolf could not legally serve as acting Secretary. *E.g.*, *Casa de Maryland, Inc.*, 2020 WL 5500165, at \*23; Complaint ¶ 64, *Don’t Shoot Portland v. Wolf*, No.1:20-cv-02040-CRC (D.D.C. July 27, 2020) (challenging legality of Wolf’s service in connection with Operation Diligent Valor); Complaint ¶ 90, *Santa Fe Dreamers Project v. Wolf*, No. 1:20-cv-02465 (D.D.C. Sept. 3, 2020) (advancing similar arguments to *Don’t Shoot Portland v. Wolf*); *see also* Harrison Cramer, *Legal Challenges Descend on Trump’s Acting DHS Head*, NAT’L J. (July 28, 2020, 8:00 PM), <https://www.nationaljournal.com/s/708747/legal-challenges-descend-on-trumps-acting-dhs-head?>

11. *See* Scott Streater, *Bernhardt Names Pendley as Acting BLM Chief*, E&E NEWS (July 29, 2019), <https://www.eenews.net/stories/1060807233>; COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., 114TH CONG., U.S. GOV’T POLICY AND SUPPORTING POSITIONS 89 (Comm. Print 2016) [hereinafter PLUM BOOK] (noting that Deputy Director for Programs and Policy is a noncareer appointment).

12. *See* Zolan Kanno-Youngs & Maggie Haberman, *Trump to Name Chad Wolf as Acting Secretary*, N.Y. TIMES (Nov. 1, 2019), <https://nyti.ms/34JwYz> (noting the chief of U.S. Citizenship and Immigration Services (USCIS) is serving in an acting capacity as well).

13. *See infra* notes 104–107 and accompanying text.

14. Juliet Eilperin et al., *It’s Way Too Many: As Vacancies Pile up in Trump Administration, Senators Grow Concerned*, WASH. POST (Feb. 4, 2019, 3:53 PM), [https://www.washingtonpost.com/national/health-science/its-way-too-many-as-vacancies-pile-up-in-trump-administration-senators-grow-concerned/2019/02/03/c570eb94-24b2-11e9-ad53-824486280311\\_story.html?utm\\_term=.a5b09a4286ef](https://www.washingtonpost.com/national/health-science/its-way-too-many-as-vacancies-pile-up-in-trump-administration-senators-grow-concerned/2019/02/03/c570eb94-24b2-11e9-ad53-824486280311_story.html?utm_term=.a5b09a4286ef) (“The president has told others it makes the acting secretaries more ‘responsive,’ an administration official said.”).

U.S. Citizenship and Immigration Service (USCIS) and the acting Director of BLM.<sup>15</sup> Nonetheless, all still remain in place.<sup>16</sup>

Although extensive, the Trump Administration's use of acting officials has hardly been unique.<sup>17</sup> President-elect Joe Biden—expected to be the 46<sup>th</sup> President of the United States as this piece went to press in early November, 2020—will undoubtedly rely upon acting officials as well.

Indeed, acting officials have served in the federal government since the Washington Administration.<sup>18</sup> Congress began enacting so-called vacancies statutes, authorizing officials to “act” in Senate-confirmed posts, in 1792, starting with the leadership of the Departments of State, Treasury, and War.<sup>19</sup> Congress's most recent enactment of this sort, the Federal Vacancies Reform Act of 1998 (FVRA), authorizes generous periods of acting service of at least 210 days.

All recent Presidents have relied significantly on acting officials in Senate-confirmed roles. Professor Anne Joseph O'Connell has documented presidential reliance on acting officers since the Reagan Administration.<sup>20</sup> As of January 2020, O'Connell reported cumulative reliance on 147 acting officials in Cabinet secretary positions since January 1981, the start of the Reagan Administration, compared with 171 confirmed officials and three recess-appointed Cabinet secretaries.<sup>21</sup> Reagan relied on eleven acting Cabinet secretaries for at least ten days each, and Obama relied on fourteen acting Cabinet secretaries for at least ten days each; meanwhile, nearly all of Trump's acting Cabinet secretaries (twenty-seven of thirty) have served for

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15. *Bullock v. U.S. Bureau of Land Mgmt.*, 4:20-cv-00062-BMM, 2020 WL 5746836, at \*11 (D. Mont. Sept. 25, 2020) (finding acting Bureau of Land Management (BLM) Director Pendley's service illegal); *Casa de Maryland, Inc.*, 2020 WL 5500165, at \*23 (finding acting Secretary Wolf's service illegal); *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 24–26, 29 (D.D.C. 2020) (finding acting USCIS Director Cuccinelli's service illegal).

16. Lisa Friedman, *Judges Tell Trump His Officials Are Serving Illegally. He Does Nothing*, N.Y. TIMES (Oct. 5, 2020), <https://nyti.ms/3iuxcMd> (noting that Interior Department responded to ruling by “[t]weak[ing Pendley's] title”).

17. See ANNE JOSEPH O'CONNELL, ADMIN. CONF. OF THE U.S., ACTING AGENCY OFFICIALS AND DELEGATIONS OF AUTHORITY 21 (2019), <https://www.acus.gov/sites/default/files/documents/final-report-acting-agency-officials-12012019.pdf> (“President Trump's acting Secretaries have served longer, on average, than recent Administrations . . . . Because there are far more long-term acting Secretaries in this Administration, *in total*, their tenure is much longer.”).

18. See *infra* note 255 and accompanying text.

19. See *infra* note 252 and accompanying text.

20. Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 643 (2020).

21. *Id.* at 642.

at least ten days.<sup>22</sup> The Trump Administration has relied on acting Cabinet secretaries for more days than any earlier administrations, even comparing the first three years of a single term with earlier two-term Presidents—and even though the Senate was the same party as the President for two years.<sup>23</sup>

Presidents also have relied on acting and other unconfirmed officials to carry out the responsibilities of Senate-confirmed agency leadership posts below the Cabinet secretary level. These posts include heads of other agencies residing within the agency, undersecretaries, assistant secretaries, inspectors general, and the like.<sup>24</sup> As of September 10, 2019, to choose a date roughly two-thirds of the way through the Trump Administration's first term, the “appointee tracker” run jointly by the nonprofit Partnership for Public Service and The Washington Post reported that of 732 “key” posts, 480 were occupied by Senate-confirmed individuals, leaving 252 vacant—a one-third vacancy rate.<sup>25</sup> Furthermore, 144 positions had no nominee at all.<sup>26</sup>

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22. *Id.* at 643.

23. *See id.* at 646 (“[T]otal tenures of acting officials in the Trump Administration are much longer than in previous ones . . .”); *id.* at 665 (acting officials in Cabinet secretary positions, excluding very short periods of service, have served on average from fifty to sixty-five days in recent administrations).

24. *See generally* Partnership/Post Appointee Tracker, *supra* note 5 (listing vacancies in such “key” Senate-confirmed positions); PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY (1995). Critics have argued strongly that the number of agency positions subject to confirmation should be reduced. *See* Anne Joseph O’Connell, *Shortening Agency and Judicial Vacancies through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645, 1695 (2015). Congress has made small moves in this direction. *See id.* (discussing the bipartisan Presidential Appointment Efficiency and Streamlining Act of 2011).

25. *See* Partnership/Post Appointee Tracker, *supra* note 5 (as of September 10, 2019). The tracker includes certain posts excluded by O’Connell, such as independent agency posts. *See generally id.* (identifying “732 key positions requiring Senate confirmation”).

26. *See id.* (as of September 10, 2019). According to the 2016 Plum Book, statutes require presidential appointment and Senate confirmation for 1,248 Executive Branch positions, ranging from Cabinet secretaries to positions with little policymaking authority, such as members of the Barry Goldwater Scholarship and Excellence in Education Foundation. *See* PLUM BOOK, *supra* note 11. I calculated this figure by searching the Plum Book for all “PAS” positions and subtracting legislative positions. The Plum Book may contain errors. For example, although a 2011 statute removed the confirmation requirement for numerous Assistant Secretaries for Public Affairs, including at the Department of Housing and Urban Development, *see* Pub. L. No. 112-166, § 2(g) 126 Stat. 1283, 1285 (2012), that position was still listed as a “PAS” position in the Plum Book. *See* PLUM BOOK, *supra* note 11, at 83. Thanks to Anne Joseph O’Connell for identifying this issue.

As O’Connell reported in 2009 with respect to similar positions in presidential administrations from Reagan through George W. Bush, “[b]y one measure, Senate-confirmed positions were empty (or filled by acting officials), on average, one-quarter of the time over these administrations.”<sup>27</sup> While the numbers cannot be precisely compared, the Trump Administration appears to have only deepened this trend.

In short, we regularly face the specter of missing Senate-confirmed officials in the agencies. Presidents have used Vacancies Act authorities and other means—notably internal delegations of authority—to place unconfirmed individuals in these posts or to assign them the responsibilities of the posts.<sup>28</sup> The Clinton Administration used delegation to allocate the powers of three important Senate-confirmed Justice Department offices—the Solicitor General, the head of the Office of Legal Counsel (OLC), and the Assistant Attorney General for Civil Rights—to unconfirmed officials.<sup>29</sup>

Service by acting officials might be necessary because a Senate-confirmed officer has died, become ill, been fired, or resigned, especially at a time of presidential transition. Submitting a nomination on short order for every vacant Senate-confirmed office might be overwhelming or infeasible.<sup>30</sup> Senate recalcitrance in considering a nomination also might result in a persistent vacancy.

Further, a President might delay (or not submit) a nomination and rely on an acting official for more strategic reasons. Presidential delays in forwarding nominations to the Senate have been significant, particularly for appointments below the Cabinet secretary level. For example, O’Connell calculates, through the George W. Bush Administration, a mean nomination delay for agency heads (below Cabinet level) of 173 days.<sup>31</sup>

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27. Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 921 (2009). O’Connell’s list of positions totals roughly 300, depending on the administration. *See id.* at 956. She excludes ambassadors and United States Attorneys from her count, as well as members of boards, government corporations, and independent agencies.

28. *See infra* notes 132–134 and accompanying text.

29. *See infra* note 132 and accompanying text.

30. On average, during his first year, Obama took 130.5 days to nominate individuals for these positions, compared with 142.3 days for President George W. Bush; meanwhile, Senate confirmation took, on average, 60.8 days for Obama’s nominees during this period and 57.9 days for President George W. Bush’s nominees. *See* ANNE JOSEPH O’CONNELL, CTR. FOR AM. PROGRESS, WAITING FOR LEADERSHIP: PRESIDENT OBAMA’S RECORD IN STAFFING KEY AGENCY POSITIONS AND HOW TO IMPROVE THE APPOINTMENTS PROCESS 2 (2010), [https://cdn.americanprogress.org/wp-content/uploads/issues/2010/04/pdf/dww\\_appointments.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2010/04/pdf/dww_appointments.pdf). O’Connell notes that the statistics underestimate the length of the nomination process, as they exclude positions where there were no nominations in the first year. *See id.*

31. *See* O’Connell, *supra* note 27, at 967.

A President also might wish to select, as an acting official, someone for whom Senate confirmation is unlikely, including because of unacceptable policy commitments.<sup>32</sup> As Professor Christina Kinane has found, Presidents may even prefer leaving positions outright empty under some circumstances.<sup>33</sup> But even if an office appears “empty,” with neither a Senate-confirmed nor an acting official, someone often purports to exercise its authority.<sup>34</sup>

Presidents might rely on unconfirmed individuals to help politicize agencies, in the nonpejorative sense of ensuring that agency leadership policy preferences closely resemble the President’s.<sup>35</sup> Relying on acting officials and other unconfirmed individuals might also give a President freer rein to distribute “spoils” to loyalists, including campaign workers, to use more agency posts for patronage, and perhaps even to choose individuals whose record and commitments raise integrity-related concerns or conflicts of interest.<sup>36</sup>

But is such presidential reliance upon acting officials constitutional? The Appointments Clause requires the “Advice and Consent of the Senate” for so-called “principal” officers and for “inferior” officers whose appointment is not otherwise provided for “by law.”<sup>37</sup> It specifically authorizes unilateral presidential appointments to such positions in the so-called “Recess Appointment Clause,” under which the President may “fill up all Vacancies

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32. See Christina M. Kinane, Control without Confirmation: The Politics of Vacancies in Presidential Appointments 5–6 (Nov. 14, 2019) (unpublished manuscript), [https://harris.uchicago.edu/files/kinane\\_harris\\_2019.pdf](https://harris.uchicago.edu/files/kinane_harris_2019.pdf) (“[C]urrent theories of appointments maintain that presidents’ choices over agency leadership are constrained by the extent to which Senate preferences deviate from those of the president.”); e.g., Burgess Everett & Eliana Johnson, *Republicans Ready to Quash Cuccinelli*, POLITICO, (June 4, 2019, 6:24 PM), <https://www.politico.com/story/2019/06/04/cuccinelli-immigration-nomination-1353314> (anticipating Senate opposition, former and current Department of Homeland Security (DHS) officials predicted the President “may seek to install Cuccinelli at USCIS in an acting capacity”).

33. See Kinane, *supra* note 32 (“[E]mpty posts and interim appointees have been in the president’s toolbox . . . for decades.”).

34. See *infra* text accompanying notes 132–134 (elucidating use of delegations of authority).

35. See *infra* text accompanying notes 48–52 (discussing Barron and Moe on politicization).

36. See *infra* text accompanying notes 321–325 (considering the Office of Presidential Personnel (OPP)).

37. U.S. CONST. art. II, § 2 (providing that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for . . .” Congress may vest the appointment of inferior officers elsewhere).

that may happen during the Recess of the Senate,”<sup>38</sup> but otherwise does not speak expressly to this question.

Dean John Manning has argued that methods of appointment under the Appointments Clause are among the specific constitutional “context-specific choices” that interpreters should be loath to disturb, even if Congress sought to authorize expanded powers of appointment.<sup>39</sup> Prominent Washington attorneys Neal Katyal and George Conway III particularly called out Matthew Whitaker’s selection as acting Attorney General as unconstitutional and violative of the “explicit, textually precise design” of the Appointments Clause.<sup>40</sup> Justice Thomas might agree, based on his concurrence in *NLRB v. SW General, Inc.*,<sup>41</sup> where he noted that “[a]ppointing principal officers under the FVRA . . . raises grave constitutional concerns.”<sup>42</sup>

These critics wish to preserve the critical role of Senate confirmation in selecting principal officers and many inferior officers under the Appointments Clause. While central, of course, that is not the only issue at stake. We also must have a working Executive Branch, a value recognized and embodied in other constitutional clauses. Congress itself has, historically and of late, broadly authorized acting officials. Numerous past Presidents have relied on such officials, and that is likely to continue. Both the executive conduct and the purported legislative authorization raise constitutional issues. A close assessment of these issues should guide courts applying the Appointments Clause. It also might guide legislative reforms to narrow statutory authorization of acting officials.

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38. *Id.* art. II, § 2, cl. 3 (providing that such Commissions “shall expire at the End of their next Session”).

39. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1947–48 (2011) (“If the Appointments Clause supplies a precise method of appointing ‘Officers of the United States,’ the Court should not permit Congress to adopt a contrary approach under the more general authority it possesses under the Necessary and Proper Clause.”); see also Will Baude, *Who is Lawfully the Attorney General Right Now?*, REASON: THE VOLOKH CONSPIRACY (Nov. 10, 2018, 3:48 PM), <https://reason.com/2018/11/10/who-is-lawfully-the-attorney-general-rig/> (reasoning as a matter of text, “it should require a principal appointment . . . to occupy that office even for a day”).

40. Neal K. Katyal & George T. Conway III, *Trump’s Appointment of the Acting Attorney General Is Unconstitutional*, N.Y. TIMES (Nov. 8, 2018), <https://nyti.ms/2yZ1tyP>; see also Walter Dellinger & Marty Lederman, *Initial Reactions to OLC’s Opinion on the Whitaker Designation as “Acting” Attorney General*, JUST SEC. (Nov. 15, 2018), <https://www.justsecurity.org/61483/initial-reactions-olc-opinion-whitaker-designation-acting-attorney-general/> (positing that agency-specific statute should apply because acting Attorney General would be Senate-confirmed).

41. 137 S. Ct. 929 (2017).

42. *Id.* at 946 (Thomas, J., concurring).

I begin by documenting strategies used by Presidents and executive officials to work around Senate confirmation requirements. These include the naming of acting officials, the use of internal delegations to relocate the powers of a Senate-confirmed office to an unconfirmed individual, and multiple individual claims to “exercise the authority” of Senate-confirmed roles that do not seem grounded in any clear grant of authority. In the months immediately prior to the finalization of this Article for publication, executive agencies deployed even more strategies to bypass statutory constraints on acting officials. The Interior Department (DOI) used a bootstrapping “succession” order, in which an acting official designated himself as next in command.<sup>43</sup> Meanwhile, at DHS, an individual claimed to act as Secretary of Homeland Security for the sole purpose of issuing a succession order eliminating this acting role and reinstating as acting Secretary an individual whose service had been declared illegal under the applicable statutory framework.<sup>44</sup>

This volume of executive machinations around statutory restrictions underscores the need for clearer constitutional guidance. This Article accordingly turns to the Appointments Clause and analyzes the extent to which the Appointments Clause should constrain presidential reliance on unconfirmed officials in principal officer posts, including Cabinet secretaries and at least some officials within the thick layer just below. Although not anticipated in the drafting of the Appointments Clause, the early history of the Republic reflects presidential reliance on such officials and Congress’s recognition of presidential need for acting officials, at least for stopgap purposes. Meanwhile, Supreme Court doctrine has not directly addressed the question since 1898, when the Court, in *United States v. Eaton*,<sup>45</sup> approved as constitutional an unconfirmed acting general consul’s service in Bangkok.<sup>46</sup> But the *Eaton* approach does not fully engage the relevant considerations or provide meaningful limitations upon presidential use of unconfirmed officials in Senate-confirmed offices.

I argue that a formalist approach here cannot satisfactorily resolve the Appointments Clause question. An appropriately thorough analysis of the

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43. See *infra* text accompanying note 162 (discussing Pendley succession order).

44. See *infra* text accompanying notes 169–170 (describing Gaynor succession order).

45. 169 U.S. 331 (1898).

46. *Id.*; see *infra* note 199 and accompanying text (discussing the *NLRB v. SW General, Inc.* case); see also *NLRB v. Noel Canning*, 573 U.S. 513, 600 (2014) (Scalia, J., concurring for four Justices) (stating in dicta, “Congress can authorize ‘acting’ officers to perform the duties associated with a temporarily vacant office—and has done that, in one form or another, since 1792”). But see *id.* at 541 (majority opinion) (stating in dicta, “[a]cting officers may have less authority than Presidential appointments . . . [and] would lessen the President’s ability to staff the Executive Branch with people of his own choosing . . .”).

constitutional question must consider the Take Care and Vesting Clauses and, as implied by early vacancies statutes, approach these issues from a functional perspective. The literature so far, inexplicably, does not contain such an analysis. A functional perspective on acting officials is important to fully engage relevant concerns, including administrative function, Senate function, accountability, and democratic responsiveness. Such a thorough assessment requires considering valid reasons for flexibility, together with the extent of substitute forms of accountability, if any, for the accountability expected from the Senate confirmation process. The amount of power an official could exercise bears both on the need for a stopgap in the event of a vacancy and the importance of accountability for the choice of the official. Perhaps counterintuitively, a functional approach to this constitutional question is likely more constraining than other interpretive approaches.

A functional analysis of the Appointments Clause strongly suggests that current FVRA authorizations for principal officers are simply too long, and that courts should recognize their constitutional doubtfulness. The wholesale delegation of the responsibilities of a vacant principal officer post to an unconfirmed official also raises constitutional difficulties. In particular, the Appointments Clause should be interpreted to authorize the President to rely only briefly on acting officials for Cabinet-level principal officer roles. Instead, the President should be expected to promptly forward nominations to the Senate for advice and consent.<sup>47</sup>

A functional approach would also support appropriately calibrated legislative reforms. As discussed in greater detail below, Congress should set shorter time limits on acting service and specify that Senate-confirmed deputy secretaries should be preferred to serve as acting secretaries.

Parts I.A. and I.B. overview the problem of acting officials in principal officer positions and the statutory framework that governs it. Part I.C. documents presidential strategies to work around confirmation, including exploiting ambiguities in statutes that authorize acting officers, delegating Senate-confirmed office responsibilities wholesale to other officials, and permitting individuals to simply assert the authority of these offices without being named “acting” or receiving a delegation of authority. Part II addresses the constitutional issues. It advocates a functional approach to the Appointments Clause as both more clarifying and more constraining than a formal approach. In a functional analysis, at least some service by unconfirmed acting officials ought to be considered constitutionally tolerable to enable the President to carry out executive functions, but current statutes authorize unconstitutionally lengthy service by acting officials in principal

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47. This article leaves for another day the challenges raised by serious Senate confirmation delays or outright recalcitrance. *See infra* text accompanying notes 366–367.

officer roles. Part III concludes by considering implications and potential reforms. Among other changes, Part III recommends that acting Cabinet-level service be presumptively limited to thirty days and that below-Cabinet-level service be limited to 120 days, extended during the period that a presidential nomination is pending in the Senate.

## I. WORKING AROUND CONFIRMATION

### A. *Presidential Reliance on Acting Officials*

To achieve their policy priorities and expand their power, Presidents have increasingly focused on senior agency officials. Presidents could centralize administrative policymaking through regulatory review or other means of ensuring that the final decision tracks the President's priorities, but such centralizing takes considerable resources.<sup>48</sup> Accordingly, presidential administrations have moved toward "politicizing" agencies as a means of policy control by "[p]opulat[ing] the bureaucracy with politically responsive actors."<sup>49</sup> Selecting individuals loyal to the President's policy preferences (or to the President) may be a relatively efficient way of assuring that policies conform to the President's priorities.<sup>50</sup> The strategy also helps account for the "thickening" of the top layer of political officials at agencies over the past few decades.<sup>51</sup> As Professor Terry Moe wrote, if they have freedom to do so, Presidents are likely to find politicization "irresistible," since the power to select officials is simple, flexible, and incremental.<sup>52</sup>

We should see presidential use of acting officials as part of this politicization. Political scientists have long assumed that Presidents prefer to promptly

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48. See Terry M. Moe, *The Politicized Presidency*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 235, 240–45 (John E. Chubb & Paul E. Peterson eds., 1985) (explaining that political institutions, knowledge, and time all limit the President's policymaking abilities); David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 *GEO. WASH. L. REV.* 1095, 1102–03 (2008) (discussing Moe's theories).

49. See Barron, *supra* note 48, at 1102; Moe, *supra* note 48, at 240–45 (emphasizing that Presidents can and are expected to make agency appointments that align with the Executive's agenda).

50. See Barron, *supra* note 48, at 1096 (noting "a thick cadre of political appointees" are chosen to govern agencies "either for having close ties to the President or for making strong prior commitments to his regulatory vision").

51. See *id.* (reasoning Presidents also make use of their appointments powers to "remake agencies in their own image"). See generally LIGHT, *supra* note 24, at 8 (noting Presidents have the freedom to establish titles as they like, contributing to the thickening of government).

52. Moe, *supra* note 48, at 245.

nominate individuals to fill vacancies in Senate-confirmed offices.<sup>53</sup> Under that scenario, Presidents would rely on acting officials in Senate-confirmed roles only as stopgaps, pending a prompt nomination and confirmation process.<sup>54</sup> But as Kinane has documented, Presidents may also use such vacancies more strategically.<sup>55</sup> In deciding whom to formally nominate for a Senate-confirmed post, the President must consider whether the individual and her policy commitments are acceptable to a majority of Senators.<sup>56</sup> Senate confirmation requests can also prompt contentious battles over agency policies and direction. For example, the Senate used the 2018 confirmation hearing of Gina Haspel to lead the Central Intelligence Agency (CIA) to dig deeply into detainee torture under the CIA's auspices.<sup>57</sup> Several Senators also sought Haspel's assurances that she would not support a President who wished to "carry out some morally questionable behavior."<sup>58</sup>

The President might find an acting official appealing to avoid such confirmation battles and to empower someone whose policy commitments and loyalties more closely resemble the President's (or her key supporters) than the Senate's.<sup>59</sup> The individual might support aggressively moving policy in the President's preferred direction or, if the President prefers, contracting policy.<sup>60</sup> Kinane found that Presidents tend to rely on acting officials in Senate-confirmed "high capacity" posts when Presidents prioritize policy expansion.<sup>61</sup> She also found that Presidents tend to leave positions outright empty when policy contraction is prioritized, perhaps including when those positions are deemed "unnecessary."<sup>62</sup> As discussed below, despite Kinane's findings, even if neither a Senate-confirmed nor an acting official occupies a

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53. Kinane, *supra* note 32, at 5 (positing that political science theories "assume that Presidents will always make appointments").

54. Presidential ability to use acting officials may be critical if the Senate is obstructionist. Cf. Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 942 (2013) (noting the prospect of such Senate behavior).

55. Kinane, *supra* note 32, at 8–9 (overviewing presidential motivations).

56. *Id.* at 5.

57. Matthew Rosenberg et al., *Gina Haspel Vows at Confirmation Hearing that She Would Not Allow Torture by C.I.A.*, N.Y. TIMES (May 9, 2018), <https://nyti.ms/2KNLhFc>

58. *Id.*

59. *E.g.*, Everett & Johnson, *supra* note 32 (regarding selection of Cuccinelli as acting official).

60. Kinane, *supra* note 32, at 30.

61. *Id.* at 30–31 ("[W]hen presidents prioritize expansion, interim appointees in high capacity positions are over 30 percent more likely . . . as empty high capacity positions.").

62. See Kinane, *supra* note 32, at 39 ("[C]ontraction policy priorities *do* increase the number of empty high capacity positions.") (emphasis added); Cody Derespina, *Trump: No Plans to Fill 'Unnecessary' Appointed Positions*, FOX NEWS (Feb. 28, 2017), <https://www.foxnews.com/politics/trump-no-plans-to-fill-unnecessary-appointed-positions>.

post, someone else may be claiming to exercise the office's authority.<sup>63</sup> In short, a presidential strategy to politicize agencies—to bring agency leadership preferences closer to those of the President—might well include reliance on acting officers in preference to Senate-confirmed individuals.

Reliance on acting officials in Senate-confirmed roles might also give a President freer rein to make patronage-related appointments or to select individuals unlikely to be confirmed. For example, consider William Pendley who, until September 25, 2020, when a district court found it illegal, claimed to “exercise[e] the authority of the [d]irector” of the BLM from his post as Deputy Director for Policy and Programs.<sup>64</sup> Pendley's naming was controversial because he had publicly advocated for selling off all public lands.<sup>65</sup> As a Reagan Administration official, Pendley had also been criticized for “serious errors in judgment” and a “suspicion of wrongdoing,” prompting a Justice Department referral for criminal prosecution, though no charges were ever filed.<sup>66</sup> Probably in response to litigation challenging the legality of

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63. See *infra* notes 132–137 and accompanying text (discussing delegations of authority).

64. See *Bullock v. U.S. Bureau of Land Mgmt.*, 4:20-cv-00062-BMM, 2020 WL 5746836, at \*3 (D. Mont. Sept. 25, 2020) (describing Pendley's claim to authority); *infra* text accompanying notes 162–166. Secretary of the Interior, David Bernhardt, has indicated that he will exercise the power of the office rather than seeking the nomination of a new BLM Director. Rebecca Beitsch, *Interior Secretary Will Lead BLM After Judge Ousts Pendley from His Public Lands Role*, HILL (Sept. 30, 2020, 12:35 PM), <https://thehill.com/policy/energy-environment/518956-interior-sec-will-lead-blm-after-judge-ousts-pendley-from-public>.

65. Editorial, *William Perry Pendley Did Not Have Senate Approval. Congress Should Not Stand for It.*, WASH. POST (Aug. 8, 2019), [https://beta.washingtonpost.com/opinions/william-perry-pendley-can-do-a-lot-of-damage-in-a-short-period-of-time/2019/08/08/9fc881e-ba08-11e9-b3b4-2bb69e8c4e39\\_story.html](https://beta.washingtonpost.com/opinions/william-perry-pendley-can-do-a-lot-of-damage-in-a-short-period-of-time/2019/08/08/9fc881e-ba08-11e9-b3b4-2bb69e8c4e39_story.html) (“Mr. Pendley's promotion appears to be part of a broader effort to kneecap the agency.”).

66. Pendley and an associate allegedly signaled to lessees that the Department of Interior (DOI) would accept very low bids for coal leases in the very large 1982 Powder River Basin coal lease sales, as well as accepted a pricey dinner from industry representatives. Philip Shabecoff, *Report Finds Interior Department Mismanaged Coal Lease Program*, N.Y. TIMES, Feb. 9, 1984, at A1; Philip Shabecoff, *Coal Lease Disclosure to Industry is Reported*, N.Y. TIMES, Jan. 28, 1984, at 8 [hereinafter Shabecoff, *Coal Lease Disclosure*] (noting Mr. Pendley was a dinner guest for Interior representatives the day DOI changed bidding procedures, effectively halving the amount necessary to bid on coal tracts); U.S. GEN. ACCT. OFF., GAO/RCED-84-167, DEFICIENCIES IN THE DEPARTMENT OF THE INTERIOR OIG INVESTIGATION OF THE POWDER RIVER BASIN COAL LEASE SALE 19 (1984), <https://www.gao.gov/assets/150/141702.pdf> (noting that Russell and Pendley “attended a \$494.45 dinner at a Washington D.C.[] restaurant” with “coal company representatives . . . representing [Texas Energy Services, Inc. (TESI)], a bidder at the April 1982 sale”); Shabecoff, *Coal Lease Disclosure*, *supra* (explaining Pendley “removed from responsibility for the department's mineral programs after William P. Clark replaced Mr. Watt as Interior Secretary”). See generally COMM'N ON FAIR MKT.

Pendley's service, the President nominated Pendley to the post in June 2020.<sup>67</sup> The nomination, which seemed unlikely to succeed, was withdrawn shortly thereafter, in August 2020.<sup>68</sup> Despite the lack of Senate receptiveness to his service—and a district court ruling in that matter, issued in September 2020, finding his claim to exercise the Director's power illegal<sup>69</sup>—Pendley was still serving in the BLM as Deputy Director as of writing, in November 2020, and claiming that he was still in charge.<sup>70</sup>

*B. Current Statutory Authorization for Acting Officials: The Federal Vacancies Reform Act of 1998 and Agency-Specific Statutes*

The 1998 FVRA, together with multiple agency-specific statutes, broadly authorizes service by unconfirmed acting officials in numerous Executive Branch positions made Senate-confirmed by statute, with the exception of members of certain commissions and Article I courts.<sup>71</sup> The FVRA is keyed to positions that are Senate-confirmed by statute; it makes no distinction for principal officers for which Senate confirmation is constitutionally required.

The FVRA provides for acting officials if the occupant of a Senate-confirmed office “dies, resigns, or is otherwise unable to perform the

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VALUE POL'Y FOR FED. COAL LEASING, REPORT OF THE COMMISSION 385, 415–16 (1984) (reporting Pendley “had developed, well in advance of the sale, an overriding policy objective to lease a substantial amount of coal reserves,” and that the Russell/Pendley restaurant incident was referred for criminal prosecution to the Justice Department).

67. Scott Streater, *Trump to Formally Nominate Pendley to Lead BLM*, E&E NEWS (June 26, 2020), <https://www.eenews.net/stories/1063459085/print>.

68. Steven Mufson, *White House Withdraws Nomination of William Pendley to Head the Bureau of Land Management*, WASH. POST. (Aug. 15, 2020, 3:35 PM), <https://www.washingtonpost.com/climate-environment/2020/08/15/white-house-withdraws-nomination-william-pendley-head-bureau-land-management/> (describing the nomination as “controversial”); Friedman, *supra* note 16 (noting that withdrawal of nomination was “tacit acknowledgment that [Pendley] could not win Senate confirmation”).

69. See *Bullock*, 2020 WL 5746836, at \*10–11 (finding Appointments Clause and Federal Vacancies Reform Act (FVRA) violation and enjoining Pendley from claiming to exercise the authority of BLM Director).

70. Rebecca Beitsch & Rachel Frazin, *Overnight Energy: Pendley Says Court Decision Ousting Him from BLM Has Had ‘No Impact’*, HILL (Oct. 8, 2020, 6:56 PM), <https://thehill.com/policy/energy-environment/overnights/520300-overnight-energy-pendley-says-court-decision-ousting-him> (reporting Pendley's statements that “I'm still here, I'm still running the bureau”); Friedman, *supra* note 16 (Interior Department responded to ruling by “[t]weak[ing] Pendley's] title”).

71. 5 U.S.C. § 3345(a) (covering “an officer of an Executive agency”); § 3349c (excluding Article I courts, multi-member independent commissions and government corporations, the Federal Energy Regulatory Commission, and the Surface Transportation Board).

functions and duties of the office.”<sup>72</sup> The statute defaults to the “first assistant” of the office, whether or not Senate-confirmed, who is to perform the functions in an “acting capacity.”<sup>73</sup> The statute further grants the “President (and only the President)” the authority to select an alternative acting official, other than the first assistant, from those already serving in a Senate-confirmed office or those who have served in the agency for more than ninety days at a rate of pay at least as high as GS-15.<sup>74</sup>

The FVRA authorizes acting service by this individual for 210 days, even if the President does not submit a nomination to the Senate during that time.<sup>75</sup> The period is extended to 300 days at the start of an Administration.<sup>76</sup> Once a nomination is submitted, the acting official may serve as long as the nomination is pending in the Senate and an additional 210 days after the date of rejection, withdrawal, or return.<sup>77</sup> Even if the first nomination fails, the person may continue to serve as long as a second nomination is pending plus 210 days after the date of rejection, withdrawal, or return of that second nomination.<sup>78</sup> These time limits significantly expanded ones set in previous statutes,<sup>79</sup> and again, they apply equally to Cabinet-level roles and other Senate-confirmed roles with less authority.

These FVRA provisions give the President substantial flexibility to rely on acting officials. Permitted time periods are long and the qualifications requirements for acting officials are not terribly limiting. Most agency statutes establishing a non-Senate-confirmed deputy or “first assistant” position require no particular qualifications for that role, and the President and her staff can influence who is chosen to serve.<sup>80</sup> By the same token, the FVRA authorizes the President to select among the many individuals who have

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72. § 3345(a).

73. § 3345(a)(1).

74. § 3345(a)(2)–(3). “The GS-15 pay grade is generally reserved for top-level positions, such as supervisors, high-level technical specialists, and top professionals holding advanced degrees.” *GS-15 Pay Scale—General Schedule 2020*, FEDERALPAY.ORG, <https://www.federalpay.org/gs/2020/GS-15> (last visited Nov. 6, 2020). With the exception of “first assistant[s]” who have served at least 90 days or who are themselves Senate-confirmed, these individuals may not serve as acting officials if they have been nominated for the position. 5 U.S.C. § 3345(b)(1)–(2).

75. § 3346(a)(1).

76. §§ 3346, 3349a(b).

77. § 3346(a).

78. § 3346(b).

79. See *infra* text accompanying notes 229229–230 (discussing the duty and extent of power imposed by the Take Care Clause).

80. *E.g.*, 12 U.S.C. § 5491(b)(5) (imposing no qualifications for Consumer Financial Protection Bureau Deputy Director apart from selection by Director).

served for at least ninety days at a GS-15 level or higher in the agency or among Senate-confirmed presidential appointees across the government.<sup>81</sup>

The FVRA states that it is the exclusive means of addressing vacancies, except for agency-specific statutes that “expressly” designate an acting employee to serve “temporarily.”<sup>82</sup> Despite some textual ambiguity, the FVRA is understood not to displace agency-specific statutes, such as the Consumer Financial Protection Bureau (CFPB) statute specifying that the “Deputy Director . . . shall serve” as acting Director,<sup>83</sup> or the Justice

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81. The FVRA does not clearly permit an after-vacancy designation of a first assistant or address whether the President may designate an acting official to fill a vacancy caused by presidential firing. See generally O’Connell, *supra* note 20, at 672–75 (discussing issue). Although the prospect may be unappealing in some circumstances, the President must be able to remove a poorly performing individual or one engaged in misconduct, particularly from an at-will post, without being prohibited from using FVRA authorities. Such an individual is certainly “unable to perform” the duties of the office. The contrary position, moreover, would put courts in the uncomfortable position of investigating presidential motivations in individual cases. The FVRA’s own limitations, if adequately reformed, should be sufficient to limit potential presidential strategizing. The appointment of Matthew Whitaker as acting Attorney General seemed to raise the issue of whether a President could fill a firing-created vacancy because Attorney General Sessions was perceived to have been pushed out. See *supra* text accompanying note 3. Kenneth Cuccinelli’s selection as acting head of the USCIS raised the issue of an after-vacancy designation of a first assistant who would then become the acting official. See John Lewis et al., L.M.-M. v. Cuccinelli: *Trump’s Preference for Acting Officials Hits a Wall*, LAWFARE (Apr. 23, 2020, 11:59 AM), <https://www.lawfareblog.com/lm-m-v-cuccinelli-trumps-preference-acting-officials-hits-wall>. However, the district judge hearing a litigation challenge did not reach the issue. See L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 24–26 (D.D.C. 2020) (finding Cuccinelli not to be an “assistant” on other grounds); Ben Miller-Gootnick, Note, *Boundaries of the Federal Vacancies Reform Act*, 56 HARV. J. ON LEGIS. 459, 461 (2019) (arguing that the Vacancies Act “does not authorize the [P]resident to temporarily fill vacancies created by firing the prior officeholder”).

82. 5 U.S.C. § 3347(a)(1)(A).

83. 12 U.S.C. § 5491(b)(5) (deputy director to “serve as acting Director in the absence or unavailability of the Director”). The Consumer Financial Protection Bureau (CFPB) statute authorizes the Deputy Director to act in case of “absence or unavailability,” without mentioning the term “vacancy.” *Id.* Nonetheless, the Office of Legal Counsel (OLC) interpreted the statute to cover vacancies. See Memorandum from Steven A. Engel, Assistant Att’y Gen., Off. of Legal Couns., U.S. Dep’t of Just., to for Donald F. McGahn II, Couns. to the President 1 (Nov. 25, 2017), [https://www.justice.gov/sites/default/files/opinions/attachments/2017/11/25/cfpb\\_acting\\_director\\_olc\\_op\\_0.pdf](https://www.justice.gov/sites/default/files/opinions/attachments/2017/11/25/cfpb_acting_director_olc_op_0.pdf) (finding that the Deputy Director’s ability to serve as acting Director “does not displace the President’s authority under the [FVRA]”). These statutes’ designation of a particular officeholder to serve as an acting official could be considered legitimate qualifications requirements, but some suggest they represent Congress inappropriately “appointing” officeholders. Joshua Stayn argues that such statutes encroach on presidential

Department's statute stating that "Deputy Attorney General may exercise all the duties of [the Attorney General], and for the purposes of the [FVRA] is the first assistant . . ." <sup>84</sup> These statutes are often more limiting than the FVRA in identifying a particular individual who must act, often a Senate-confirmed official.

But the text does not clearly resolve whether the FVRA is entirely displaced by such statutes or retains some application. The FVRA's legislative history suggests Congress generally meant it to remain as an alternative. <sup>85</sup> Perhaps emphasizing the point, the occasional statute expressly bars the FVRA's application. <sup>86</sup> To date, this issue generally has been assessed case-by-case, creating confusion. In the case of the CFPB, two "acting" heads, Deputy Director Leandra English, so chosen by the outgoing CFPB Director and identified as "acting Director" by the CFPB statute, and Senate-confirmed Office and Management Budget (OMB) Director Mick Mulvaney, selected by the President to "act" under the FVRA, both appeared at the office the same day in November 2017. <sup>87</sup> Litigation was required to resolve the conflict; a district court concluded that the FVRA could still apply, validating the President's selection of Mulvaney. <sup>88</sup>

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prerogatives. Joshua Stayn, Note, *Vacant Reform: Why the Federal Vacancies Reform Act of 1998 Is Unconstitutional*, 50 DUKE L.J. 1511, 1513, 1525, 1533 (2001).

84. 28 U.S.C. § 508(a)-(b) (further designating the Associate Attorney General to act if the Deputy Attorney General is absent).

85. S. REP. NO. 105-250, at 15-17 (1998) ("Vacancies Act would continue to provide an alternative.").

86. For example, the DHS succession statute identifies the Deputy Secretary as the FVRA "first assistant," see 6 U.S.C. § 113(a)(1)(A), so that the Deputy automatically steps into the acting role if necessary. That statute further specifies, however, that "notwithstanding" the FVRA, if neither the "Secretary nor Deputy Secretary is available" the "Under Secretary for Management shall serve as the Acting Secretary," and that "the Secretary may designate such other officers . . . [to serve] in further order of succession." § 113(g) (emphasis added). It remains unclear, however, whether time limitations or other FVRA provisions might still apply.

87. Renae Merle, *Dueling Officials Spend Chaotic Day Vying to Lead Federal Consumer Watchdog*, WASH. POST (Nov. 27, 2017), [https://www.washingtonpost.com/business/economy/two-dueling-officials-spend-chaotic-day-vying-to-lead-federal-consumer-watchdog/2017/11/27/381eada2-d39c-11e7-b62d-d9345ced896d\\_story.html](https://www.washingtonpost.com/business/economy/two-dueling-officials-spend-chaotic-day-vying-to-lead-federal-consumer-watchdog/2017/11/27/381eada2-d39c-11e7-b62d-d9345ced896d_story.html).

88. *English v. Trump*, 279 F. Supp. 3d 307, 319-26 (D.D.C. 2018). Several commentators, including me, disagree with this interpretation. *E.g.*, Marty Lederman, *Who's the Acting Director of the CFPB? Understanding the Legal Dispute at the Center of the Kerfuffle*, BALKINIZATION (Nov. 26, 2017), <https://balkin.blogspot.com/2017/11/understanding-legal-dispute-at-center.html> (addressing the President's authority under the 1998 Vacancies Reform Act); Nina Mendelson, *More Thoughts on the CFPB Puzzle: President Trump Can Select Someone to Run the CFPB Only if the Senate Has an Opportunity to Confirm*, YALE J. ON REG.: NOTICE

Similarly, for Acting Attorney General Matthew Whitaker, some argued that the agency-specific statute that expressly identified the Deputy Attorney General, at the time Rod Rosenstein, as the “first assistant” and acting Attorney General in case of vacancy, should be understood to displace FVRA provisions authorizing the President to select someone else.<sup>89</sup> They emphasized that the Deputy Attorney General is Senate-confirmed, unlike Matthew Whitaker and some other FVRA-acceptable acting officials.<sup>90</sup> On the other hand, the agency-specific statute’s reference to “first assistant” seems to contemplate continuing application of the FVRA.<sup>91</sup>

Perhaps just as important, these statutes, like other agency-specific statutes, contain no time limitations on acting service, prompting controversy over whether the FVRA’s time limits continue to apply.<sup>92</sup> The overall point

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& COMMENT (Nov. 27, 2017), <https://www.yalejreg.com/nc/more-thoughts-on-the-cfpb-puzzle-president-trump-can-select-someone-to-run-the-cfpb-only-if-the-senate-has-an-opportunity-to-confirm-by-nina-a-mendelson/>.

89. See 28 U.S.C. § 508.

90. Critics of Whitaker’s selection argued that the relevant statutes should be interpreted to permit only the Deputy Attorney General to serve to avoid the potential constitutional issues presented by an unconfirmed official serving in a principal officer role. Dellinger & Lederman, *supra* note 40. Language in the Committee Report accompanying the FVRA supports this reading. S. REP. NO. 150-250, at 13 (1998) (“With respect to a vacancy in the office of Attorney General, 28 U.S.C. § 508 will remain applicable. That section ensures that Senate confirmed Justice Department officials will be the only persons eligible to serve as Acting Attorney General.”). But because the language addressed 28 U.S.C. § 508, which was enacted by a different Congress, courts would typically accord it little, if any, interpretive weight regarding the intention of that Congress. See *Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977) (reasoning that views of enacting Congress, not later Congress, deserve weight in interpretation). Earlier versions of the vacancies statutes had expressly excepted the Attorney General post from the President’s authorization to select individuals other than the first assistant, but the FVRA removed this limitation. Compare Act of Sept. 6, 1966, Pub. L. No. 89-554, § 3347, 80 Stat. 378, 426 (enacting 5 U.S.C. § 3347 and stating, “[t]his section does not apply to a vacancy in the Office of the Attorney General”), with Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, § 151, 122 Stat. 2681, 2681-613 (1998) (rewriting presidential discretion provisions of 5 U.S.C. § 3347 and omitting exception for Attorney General).

91. 28 U.S.C. § 508(a).

92. It could be argued that the agency-specific statutes with no time limitation are displaced altogether by the FVRA’s exclusivity clause, since the only exception to FVRA exclusivity is for undisturbed agency-specific statutes that authorize “an . . . employee to [act] . . . temporarily in an acting capacity.” 5 U.S.C. § 3347(a)(1)–(2). Agency-specific statutes with no time limits arguably do not qualify as temporary authorizations. Nonetheless, legislative history lists forty agency-specific statutes meant to survive, among them the Justice Department succession statute, 28 U.S.C. § 508, which, with no express

is that statutory instructions are often conflicting, unclear, or unbounded, leaving greater scope for argument and underscoring the importance of clearer constitutional guidance both to Congress and the courts.

### C. *Presidential Workarounds*

The FVRA imposes only loose limits on acting officials, since it broadly authorizes reliance upon unconfirmed individuals and permits lengthy terms of service. Nonetheless, perhaps due to the limits the FVRA does impose, together with potential controversy, disapproval, or delays in the Senate confirmation process, presidential administrations have gone outside the FVRA and deployed other methods of putting individuals in power without Senate confirmation.<sup>93</sup>

#### 1. *Historic - Recess Appointments*

Although the Supreme Court has now restricted this technique, it deserves mention as an important confirmation workaround strategy. The Recess Appointments Clause, again, gives the President the power to “fill up all Vacancies that may happen during the Recess of the Senate.”<sup>94</sup> The Clause has enabled Presidents not only to fill positions but to appoint individuals the Senate might not have been willing to confirm.<sup>95</sup> President Barack Obama made thirty-two recess appointments to full-time positions; President George W. Bush made ninety-nine recess appointments to full-time positions; President Bill Clinton made ninety-five recess appointments to full-time positions.<sup>96</sup>

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time limitation on “acting,” might not be understood as a “temporar[y]” authorization. *See* S. REP. NO. 105-250, at 15–17 (1998). Further, even if agency-specific statutes designating a particular acting official displace the FVRA’s more general provisions regarding who can serve as an acting official, a court might find that the FVRA’s time limitations nonetheless continue to apply. *But see, e.g.,* Casa de Maryland, Inc. v. Wolf, No. 8:20-cv-02118-PX, 2020 WL 5500165, at \*18–20 (D. Md. Sept. 11, 2020) (finding plaintiffs were unlikely to succeed in establishing that FVRA’s 210-day time limit applied to acting Secretary of Homeland Security).

93. *See* Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1610 (2015) (arguing that political polarization prompts “political innovation”).

94. U.S. CONST., art. II, § 2, cl. 3.

95. *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1489 (2005) (discussing the alternative means the President may take to bypass Senate resistance).

96. HENRY B. HOGUE, CONG. RSCH. SERV., R42329, RECESS APPOINTMENTS MADE BY PRESIDENT BARACK OBAMA 3 (2017), <https://crsreports.congress.gov/product/pdf/R/R4232>

In some cases, these were because of untoward delays in the Senate; in others, they seemed to be an effort to appoint an individual notwithstanding likely Senate opposition during the confirmation process. For example, President Clinton famously recess-appointed Bill Lann Lee as Assistant Attorney General for Civil Rights in 2000 when it was clear the Senate would not act to confirm him.<sup>97</sup> The Senate responded to such tactics by holding pro forma sessions to avoid the creation of a “recess.”<sup>98</sup> In 2012, President Obama made four controversial recess appointments, including naming the first director of the CFPB, Richard Cordray, following a Senate filibuster of that appointment, together with three members of the NLRB.<sup>99</sup> The Supreme Court ultimately curtailed presidential reliance on recess appointments in *NLRB v. Noel Canning*.<sup>100</sup> It interpreted the Recess Appointments power to be available only for Senate recesses of “substantial length,” presumptively not less than ten days.<sup>101</sup> This ruling enables the Senate to easily block recess appointments by the President, as the Senate reportedly did during the August 2017 recess by holding pro forma sessions every three business days.<sup>102</sup>

## 2. Exploiting Statutory Ambiguities and Ignoring Limits

Administrations can, of course, rely heavily on acting officials. Consider the EPA Office of Water in the Obama Administration. There, an acting official

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9. Obama’s recess appointments were all individuals with formal nominations pending in the Senate. *Id.* at 7. In twenty of the thirty-two cases, the Senate later confirmed the nominee; the other nominations were either returned to or withdrawn by the President. *Id.* at 8.

97. See Alex Keto, *Clinton Announces Recess Appointments, Naming Bill Lann Lee to Civil Rights Post*, WALL ST. J. (Aug. 4, 2000, 12:32 AM), <https://www.wsj.com/articles/SB96534730784374825>; Sonya Ross, *Clinton Appoints Lee to Civil Rights Job*, ABC NEWS (Jan. 6, 2006, 6:02 PM), <https://abcnews.go.com/Politics/story?id=123227&page=1> (quoting Senator Patrick Leahy (D-Vt) stating that nominees “especially women and minorities, have been subject to anonymous and humiliating delays”).

98. Metzger, *supra* note 93, at 1609.

99. E.g., David Nakamura & Felicia Sonmez, *Obama Appoints Richard Cordray to Head Consumer Watchdog Bureau*, WASH. POST (Jan. 4, 2012), [https://www.washingtonpost.com/politics/richard-cordray-appointed-by-obama-to-head-consumer-watchdog-bureau/2012/01/04/gIQAGyqraP\\_story.html](https://www.washingtonpost.com/politics/richard-cordray-appointed-by-obama-to-head-consumer-watchdog-bureau/2012/01/04/gIQAGyqraP_story.html).

100. 573 U.S. 513 (2014).

101. *Id.* at 527. A majority held that the Recess Appointments Clause, U.S. CONST. art. II, § 2, cl. 3, includes both inter-session recesses and intra-session recesses of substantial length and that “a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause.” *Noel Canning*, 573 U.S. at 538.

102. Jordain Carney, *Senate Blocks Trump from Making Recess Appointments over Break*, HILL (Aug. 3, 2017, 7:40 PM), <https://thehill.com/homenews/senate/345261-senate-blocks-trump-from-making-recess-appointments-over-break>.

served for years as the acting Assistant Administrator for Water while the nomination of Kenneth Kopocis was repeatedly submitted to the Senate without action. The acting official, Nancy Stoner, eventually departed, leaving the office vacant. It is unclear whether the Senate was generally recalcitrant, perhaps had signaled its unwillingness to confirm Kopocis or any nominee for the office, whether the Obama Administration preferred Stoner to an individual whom the Senate could be expected to confirm, or whether President Obama was simply lax in not making another nomination.<sup>103</sup>

Sometimes no nomination has been submitted at all—and none appears to be forthcoming. For example, three agencies located within the DOI—the BLM, the National Park Service (NPS), and the Fish and Wildlife Service (FWS)—were run by unconfirmed officials for a significant period of time beginning in January 2017; no Assistant Secretary was even nominated to head any of the agencies until mid-2019, roughly two and a half years into the Trump Administration.<sup>104</sup> Then-DOI Secretary Ryan Zinke commented casually to the press in May 2018 that he did not expect any nominees prior to 2019 for any of these positions.<sup>105</sup> Instead, these agencies were headed by individuals serving as acting officials and others, as discussed below, who claimed to be “exercising the power” of the relevant Senate-confirmed post. In February 2019, *The Washington Post* reported that “vast swaths of the government have top positions serving in an acting capacity,” noting particularly in the DOI “eight handpicked deputies” serving without confirmation.<sup>106</sup> As of November 17, 2020, no individual had been confirmed to lead the BLM, the NPS, or the Office of Surface Mining Reclamation and Enforcement.<sup>107</sup>

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103. See Nina A. Mendelson, *The Uncertain Effects of Senate Confirmation Delays in the Agencies*, 64 DUKE L.J. 1571, 1588–89, n.78 (2015).

104. Partnership/Post Appointee Tracker, *supra* note 5. Robert Wallace, Assistant Secretary for Fish, Wildlife, and Parks, was not nominated until May 2019, and not confirmed until July 2019. *See id.*

105. See Jennifer Yachnin, *3 Top Jobs Will Stay Vacant Until Next Year—Zinke*, E&E NEWS (May 10, 2018), <https://www.eenews.net/eenewspm/2018/05/10/stories/1060081409> (“It is unlikely as a secretary that I will have a director of the Park Service, a director of BLM, and a director of the Fish and Wildlife Service by two years in.”).

106. Eilperin et al., *supra* note 14.

107. The Administration’s nomination of Aurelia Skipwith for Fish and Wildlife Service Director, in October 2018, was returned; she was renominated in July 2019, and finally confirmed in December 2019. *See* Partnership/Post Appointee Tracker, *supra* note 5. An initial nomination for the Office of Surface Mining Reclamation and Enforcement was withdrawn in 2018; Lanny Erdos was nominated in October 2019. *See id.* As of late June 2020, Pendley was nominated to direct the BLM, but his nomination was withdrawn in August 2020. *See supra* notes 67–68 and accompanying text.

At DHS, as of November 17, 2020, an acting Secretary leads the agency; no Senate-confirmed individual has occupied the post for well over 500 days, since April, 2019.<sup>108</sup> The Deputy Secretary position also has been vacant for over 900 days, since April 2018, with no nomination pending.<sup>109</sup> DHS's website initially described the position as "vacant," but named David Pekoske as "Senior Official Performing the Duties of the Deputy Secretary."<sup>110</sup> (As of March 1, 2020, Kenneth Cuccinelli became that "Senior Official Performing the Duties of the Deputy Secretary" and continues to claim that title as of November 7, 2020.)<sup>111</sup> Pekoske acted in this capacity, including designating acceptable identity documents for certain individuals who wish to live and work in the United States. Pekoske signed these rules with the title "Senior Official Performing the Duties of the Deputy Secretary."<sup>112</sup>

At the U.S. Citizenship and Immigration Service (USCIS), as of writing, November 17 2020, no individual has been nominated to serve as Director since the Senate-confirmed Director L. Francis Cissna resigned on June 1, 2019; the post has been vacant for over 500 days.<sup>113</sup> Ken Cuccinelli claims to serve as "Senior Official Performing the Duties of the Director, U.S. Citizenship and Immigration Services."<sup>114</sup> In this capacity, he has issued numerous policies, including cutting the time asylum seekers have to consult with their attorneys prior to the crucial "credible-fear interview."<sup>115</sup> Cuccinelli continues to claim this authority despite the March 2020 district court ruling that Cuccinelli's service violates the Federal Vacancies Reform Act.<sup>116</sup>

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108. See Partnership/Post Appointee Tracker, *supra* note 5. Chad Wolf's nomination was referred to the relevant Senate committee in September 2020. *Id.*

109. *See id.*

110. See Leadership, DEP'T OF HOMELAND SEC., <https://www.dhs.gov/leadership> (last published Nov. 4, 2020).

111. *See id.*

112. Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 84 Fed. Reg. 46,423, 46,426 (Sept. 4, 2019); Designation of REAL ID Identity Documents for Citizens of the Freely Associated States, 84 Fed. Reg. 46,556, 46,557 (Sept. 4, 2019).

113. See Partnership/Post Appointee Tracker, *supra* note 5.

114. See DEP'T OF HOMELAND SEC., *supra* note 110. Cuccinelli is still listed as serving in this capacity despite a district court ruling declaring Cuccinelli's service illegal under the FVRA. See *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 24–29 (D.D.C. 2020).

115. See *L.M.-M.*, 442 F. Supp. 3d at 11–13 (detailing three "significant change[s] in policy" made by Cuccinelli pursuant to this claim of authority).

116. *Id.* at 24–26 (finding Cuccinelli not to qualify in any of the authorized FVRA "acting" official categories and setting agency directives aside); see also Friedman, *supra* note 16 (Cuccinelli "remain[s]").

At the SSA, Deputy Commissioner for Operations, Nancy Berryhill, served as acting Commissioner, but long overstayed the FVRA time limits. She nonetheless continued to take actions as acting Commissioner until a GAO Report officially found an FVRA violation in March 2018.<sup>117</sup> As discussed in greater detail below, however, she continued to claim to exercise the functions of the Commissioner, though she no longer used the title acting Commissioner.<sup>118</sup>

Similarly, even after a finding by the GAO that her service was in violation of the FVRA,<sup>119</sup> a biography of the “acting” Inspector General at the Department of Housing and Urban Development (HUD), Helen Albert, continued to appear on HUD’s website, describing her title as “Acting Inspector General.”<sup>120</sup>

Administrations have hired “first assistants” after a vacancy has occurred and then moved them into acting positions, despite the FVRA’s apparent plan to fill acting posts with experienced individuals. This was the strategy used at USCIS. After the post of Director became vacant, Kenneth Cuccinelli was hired in a newly created position, “Principal Deputy Director,” seemingly to vault him ahead of the Deputy Director, who might otherwise have been considered the “first assistant.”<sup>121</sup> Cuccinelli was then named acting Director.<sup>122</sup> In this case, the “first assistant” position was both created and filled after the vacancy arose.<sup>123</sup> Addressing a matter of first impression, the federal court that declared Cuccinelli’s service illegal ruled that Cuccinelli had never served as an assistant and, thus, could not be a first assistant for purposes of the FVRA, and set aside two directives issued by Cuccinelli.<sup>124</sup>

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117. Letter from Thomas H. Armstrong, Gen. Couns., U.S. Gov’t Accountability Off., to the President of the U.S. 1 (Mar. 6, 2018), <https://www.gao.gov/assets/700/690502.pdf>.

118. See *infra* text accompanying notes 156–158.

119. See Letter from Thomas H. Armstrong to the President of the U.S., *supra* note 117, at 1.

120. *About the Inspector General*, U.S. DEP’T OF HOUS. & URB. DEV. (Nov. 19, 2018), <https://www.hudoig.gov/about/about-the-inspector-general> [<https://web.archive.org/web/20181119184019/www.hudoig.gov/about/about-the-inspector-general>]. The Senate finally confirmed Rae Oliver as Inspector General on January 2, 2019, following a June 22, 2018 nomination. Partnership/Post Appointee Tracker, *supra* note 5.

121. See Ted Hesson, *Cuccinelli Starts As Acting Immigration Official Despite GOP Opposition*, POLITICO (June 10, 2019, 12:38 PM), <https://www.politico.com/story/2019/06/10/cuccinelli-acting-uscis-director-1520304>; 5 U.S.C. § 3345(a)(1) (“first assistant”).

122. Press Release, U.S. Citizenship & Immigr. Servs., Cuccinelli Named Acting Director of USCIS (June 10, 2019), <https://www.uscis.gov/news/news-releases/cuccinelli-named-acting-director-of-uscis>.

123. Some alleged similar strategic conduct at the CFPB, when Richard Cordray named Leandra English Deputy Director—making her eligible to be acting Director under the agency-specific statute—just prior to stepping down from his post. Merle, *supra* note 87.

124. *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 24–29 (D.D.C. 2020).

Finally, administrations have also sought to exploit ambiguity in the way the FVRA is read together with agency-specific statutes. For example, at the CFPB, in November 2017, President Trump appointed OMB Director Mick Mulvaney to serve as acting CFPB Director, despite a reasonable argument that the statute establishing the agency, the Dodd-Frank Act, specifically required the Deputy Director to serve as acting Director,<sup>125</sup> thus prevailing over the more flexible and general FVRA.<sup>126</sup>

### 3. *Delegating Authorities Elsewhere*

Most statutes that grant agencies authority delegate that authority to the Secretary or the Administrator. In turn, organic statutes are generally express in authorizing the head of the agency to redelegate statutory authorities within the agency.<sup>127</sup> Even without express statutory language, an agency head is typically assumed to be able to delegate powers in view of the impossibility of performing all tasks herself.<sup>128</sup> Prior to the FVRA's enactment in 1998, the Justice Department had long argued that an agency head with the power to delegate could simply delegate a vacant office's functions to a named individual without needing to seek Senate confirmation or complying further with Vacancies Act requirements.<sup>129</sup>

Both during that period and since, two sorts of delegation strategies have been deployed to relocate the powers of a particular office. One might be

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125. 12 U.S.C. § 5491(b)(5).

126. See Mendelson, *supra* note 88.

127. See *United States v. Giordano*, 416 U.S. 505, 513–14 (1974) (finding it unexceptionable that general language does not preclude delegation); *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121 (1947) (finding that rulemaking authority should be understood to authorize, rather than to restrict, subdelegation); *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1190 (10th Cir. 2014) (noting agreement among federal courts of appeals).

128. See Nathan D. Grundstein, *Subdelegation of Administrative Authority*, 13 GEO. WASH. L. REV. 144, 148 (1945) (arguing that necessity justifies implied power to subdelegate). See generally Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473 (2017) (articulating positive theory of delegation); Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 885–86 (2009) (discussing self-regulation to control delegations).

129. See *Acting Officers*, 6 Op. O.L.C. 119, 121 (1982) (suggesting that “practical and political” concerns are main obstacles to delegating); MORTON ROSENBERG, CONG. RSCH. SERV., 98-892, *THE NEW VACANCIES ACT: CONGRESS ACTS TO PROTECT THE SENATE'S CONFIRMATION PREROGATIVE* 4 (1998); S. REP. NO. 105-250, at 3 (1998) (discussing Justice Department's arguments that delegation authority supersedes Vacancies Act restrictions); see also George F. Will, *Time to Evict Bill Lann Lee*, WASH. POST (Mar. 26, 1998) <https://www.washingtonpost.com/archive/opinions/1998/03/26/time-to-evict-bill-lann-lee/f4b663a8-c958-45e2-98b0-fe105ffe0899/>.

termed a vertical, or “supervised” delegation. For example, President Clinton selected several officials with uncertain Senate confirmation prospects to serve as “acting” senior officials inside the Justice Department.<sup>130</sup> Attorney General Janet Reno delegated authorities to them, invoking the Justice Department’s organic statute, which authorizes the Attorney General to “make provisions . . . authorizing the performance by any . . . employee . . . of any function of the Attorney General.”<sup>131</sup> These individuals also used the title “acting.” These included Dawn Johnsen, who acted as head of the OLC; Walter Dellinger, who acted as Solicitor General; and Bill Lann Lee, who acted as Assistant Attorney General for Civil Rights.<sup>132</sup> Presumably, the Attorney General could supervise and revoke any of these delegations.<sup>133</sup>

The other sort might be termed an “unsupervised” horizontal delegation. For example, on his way out the door, Clinton Administration Office of Thrift Supervision Director Timothy Ryan delegated all the office’s powers to Deputy Director Jonathan Fiechter.<sup>134</sup> Fiechter exercised the powers for four years even though Ryan was no longer present to supervise or revoke the delegation.<sup>135</sup> Even under a statute authorizing delegations, this strategy is dubious. It effectively eliminates the “Director” position altogether and, despite the common-sense understanding of delegation, leaves no one in place to supervise or revoke the delegation.

Congress had attempted to restrict this strategy in earlier law (the 1988 Vacancies Act), but the Justice Department argued that the text of that statute did not accomplish the goal, and the accompanying legislative history

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130. See *infra* note 132 and accompanying text.

131. 28 U.S.C. § 510; see also S. REP. NO. 105-250, at 15 (stating that bill meant to foreclose the Justice Department’s argument that delegation power supersedes Vacancies Act restrictions); *infra* text accompanying notes 141–144.

132. E.g., Brannon P. Denning, *Article II, the Vacancies Act and the Appointment of “Acting” Executive Branch Officials*, 76 WASH. U. L.Q. 1039, 1052–55 (1998) (discussing acting Assistant Attorney General Bill Lann Lee and acting Solicitor General Walter Dellinger). The term “acting” continues to be used for these positions. E.g., *Solicitor General: Walter E. Dellinger III*, DEP’T OF JUST., <https://www.justice.gov/osg/bio/walter-e-dellinger-iii> (last updated Oct. 31, 2014) (describing him as “Solicitor General (Acting for the term)”).

133. Some statutes delegate authority directly to the President, which the President nearly always re-delegates to an agency head; presumably, the President also could seek to delegate to someone below the rank of agency head. See generally Nina Mendelson, *Another Word on the President’s Statutory Authority over Agency Action*, 79 FORDHAM L. REV. 2455, 2462 (2011) (discussing Presidential Subdelegation Act of 1950).

134. See generally *Doolin v. Office of Thrift Supervision*, 139 F.3d 203, 205, 208 (D.C. Cir. 1998).

135. *Id.*

could not affect the statute's interpretation.<sup>136</sup> According to the Congressional Research Service, as of 1998, of sixty-four acting officials in executive departments, forty-three of them had served beyond the statutorily specified time limit, likely owing to reliance on the delegation strategy.<sup>137</sup>

In 1998, responding to the Clinton Administration actions and the Justice Department position, Congress tried again to stamp out the delegation strategy.<sup>138</sup> The FVRA states that it is the "exclusive means for temporarily authorizing an acting official" except for the so-called "agency-specific" exception, a statutory provision that "expressly" authorizes the President, a court, or the head of an executive department to designate an officer or employee "temporarily in an acting capacity."<sup>139</sup> The Act then explicitly clarifies that a statute providing "general authority . . . to delegate duties statutorily vested in that agency head . . . or to reassign duties . . . is not [such] a provision."<sup>140</sup>

Legislative history confirms Congress's aim to limit delegation as a means of bypassing Senate confirmation. The Senate Report accompanying the Senate bill in the 105th Congress, which contained the identical language appearing in the enacted FVRA, stated, "[s]tatutes that generally permit agency heads to delegate or reassign duties within their agencies are specified not to constitute statutes that provide for the temporary filling of particular offices."<sup>141</sup> Legislative context, including the Clinton Justice Department examples, also suggests that a central congressional goal was to eliminate agency use of internal delegation to avoid Vacancies Act limits on acting appointments. The Senate Report specifically alluded to the Justice Department's position that the power to delegate "supersedes the Vacancies Act's restrictions" and characterized it as "wholly lacking in logic, history, or language,"<sup>142</sup> further stating that the bar on using delegation strategies "forecloses the argument . . . that [Justice Department and other agency organic statute delegation provisions] rather than the Vacancies Act, apply."<sup>143</sup> The Report also suggested that

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136. The Vacancies Act, 22 Op. O.L.C. 44, 46-48 (1998).

137. See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 268 (2003).

138. ROSENBERG, *supra* note 129, at 1; see also S. REP. No. 105-250 at 3-4 (1998) (describing Justice Department position).

139. 5 U.S.C. § 3347(a)(1)(A).

140. § 3347(b).

141. S. REP. No. 105-250, at 2.

142. *Id.* at 3.

143. *Id.* at 17.

the Justice Department had informally conceded that the bill would foreclose the delegation strategy.<sup>144</sup>

As I have discussed in greater detail elsewhere, the wholesale delegation of a Senate-confirmed office's responsibilities violates the text of FVRA, and Congress aimed to end these practices when it enacted the statute.<sup>145</sup> Nonetheless, administrations have continued to invoke the delegation strategy, effectively creating a cadre of shadow acting officials. Administrations have delegated power to people who would be ineligible to "act" under the FVRA's qualifications requirements, time limitations, or both. During the George W. Bush Administration, the deputy head of the OLC, Steven Bradbury, received power through a delegation around the vacant Assistant Attorney General position to sign opinions and supervise the office.<sup>146</sup> During the Obama Administration, the unconfirmed career deputy director of the Bureau of Alcohol, Tobacco, and Firearms, Thomas Brandon, also exercised the Director's power pursuant to a claim of delegated authority.<sup>147</sup>

The Trump Administration also has relied heavily on delegations. Secretary Betsy DeVos signed delegations repeatedly assigning the authorities of the Senate-confirmed post of Assistant Secretary for Communications and Outreach (vacant since inauguration) to a named special assistant, Nathan Bailey, through mid-November 2018.<sup>148</sup> Bailey was

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144. *Id.* at 10.

145. See Nina A. Mendelson, L.M.-M. v. Cuccinelli and the Illegality of Delegating Around Vacant Senate-Confirmed Offices, YALE J. ON REG.: NOTICE & COMMENT (Mar. 5, 2020), <https://www.yalejreg.com/nc/l-m-m-v-cuccinelli-and-the-illegality-of-delegating-around-vacant-senate-confirmed-offices-by-nina-a-mendelson/>; see also Bullock v. U.S. Bureau of Land Mgmt., 4:20-cv-00062-BMM, 2020 WL 5746836, at \*9 (D. Mont. Sept. 25, 2020) (describing use of delegations to effectively designate William Pendley as acting BLM Director as "wordplay" that was still illegal).

146. Letter from Gary L. Keppinger, Gen. Couns., U.S. Gov't Accountability Off., to Richard J. Durbin, U.S. Sen., Russell D. Feingold, U.S. Sen., and Edward M. Kennedy, U.S. Sen. 5 (June 13, 2008), <https://www.gao.gov/assets/390/383258.pdf> (reasoning that the Assistant Attorney General's regulatory functions were "not sufficiently prescriptive for us to conclude that they assign non-delegable duties"). The Senate had repeatedly returned Bradbury's nomination without action. *Id.* at 2.

147. See BOB BAUER & JACK GOLDSMITH, AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY 318–19 (2020) (ebook) (stating that delegation strategy was used to avoid a potentially difficult confirmation hearing).

148. See Memorandum from Betsy DeVos, Sec'y of Educ., to Nathan Bailey, Special Assistant, Off. of Commc'ns. & Outreach (June 5, 2017), <https://www2.ed.gov/about/offices/list/om/docs/delegations/ea-eo-15.doc>; Memorandum from Betsy DeVos, Sec'y of Educ., to Nathan Bailey, Personal Delegation of Authority (Mar. 1, 2018), <https://www2.ed.gov/about/offices/list/om/docs/delegations/ea-eo-16.doc>.

not formally named acting Assistant Secretary—and could not have been under the FVRA—but was described as such at the time he transitioned to Chief of Staff.<sup>149</sup> For another example, from January 2017 to May 2020, the Secretary of the Interior issued no fewer than thirty-three separate versions of Order 3345, delegating the powers of “vacant non-career [p]residentially appointed and Senate-confirmed positions for which there is no Principal Deputy that would automatically become acting” to other individuals.<sup>150</sup> The January 2, 2020 version (earlier lists have been longer), for example, includes the Directors of the NPS, BLM, Office of Surface Mining, and Special Trustee for American Indians, among others; it delegates “all functions, duties, and responsibilities” of each position to a named individual.<sup>151</sup> At the FWS, Susan Combs, then-Senior Advisor to the Secretary and the recipient of a similar delegation at the time, signed Federal Register notices this way: “Exercising the Authority of the Assistant Secretary for Fish and Wildlife and Parks.”<sup>152</sup> Numerous Federal Register notices of both proposed and final rules have been signed by individuals “exercising authority of” a Senate-confirmed position, including rules delisting the grizzly bear as an endangered species and suspending implementation of rules aimed at reducing natural gas venting, flaring, and leaking from gas production activities on federal lands.<sup>153</sup> In June 2020, the expired May 2020

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149. Monica Levitan, *Betsy DeVos Appoints New Chief of Staff*, DIVERSE (Oct. 26, 2018), <https://diverseeducation.com/article/130426/> (describing Bailey as “acting Secretary of Communications and Outreach”).

150. See DEP’T OF THE INTERIOR, ORDER NO. 3345 AMENDMENT NO. 32, TEMPORARY REDELEGATION OF AUTHORITY FOR CERTAIN VACANT NON-CAREER SENATE-CONFIRMED POSITIONS (2020), <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3345-amend-32-signed-05.05.2020-508.pdf>.

151. DEP’T OF THE INTERIOR, ORDER NO. 3345 AMENDMENT NO. 30, TEMPORARY REDELEGATION OF AUTHORITY FOR CERTAIN VACANT NON-CAREER SENATE-CONFIRMED POSITIONS (2020), [https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3345-a30-508\\_0.pdf](https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3345-a30-508_0.pdf) (delegating all functions of positions).

152. Migratory Bird Permits; Regulations for Managing Resident Canada Goose Populations, 83 Fed. Reg. 17,987, 17,992 (proposed Apr. 25, 2018) (proposing rule on management of resident Canada geese).

153. See Endangered and Threatened Wildlife and Plants; Review of 2017 Final Rule, Greater Yellowstone Ecosystem Grizzly Bears, 83 Fed. Reg. 18,737, 18,743 (regulatory reviewing determination) (reaffirming delisting and signed by Jim Kurth, “Exercising the Authority of the Director, U.S. Fish and Wildlife Service”); Endangered and Threatened Wildlife and Plants; Reinstatement of ESA Listing for the Grizzly Bear in the Greater Yellowstone Ecosystem in Compliance With Court Order, 84 Fed. Reg. 37,144, 37,145 (July 31, 2019) (Apr. 30, 2018) (to be codified 50 C.F.R. pt. 17) (implementing final rule and signed by Margaret Everson, “exercising the authority of the Director for the U.S. Fish and Wildlife

secretarial delegation document was replaced with a combination of additional delegation orders and designation of successors memoranda issued by others, though the authority is unclear for at least some of these documents, as discussed in greater detail below.<sup>154</sup>

#### 4. *Mystery Assertions of Authority*

In the Trump Administration, echoing Secretary of State Al Haig's famous "I am in control here" declaration following the assassination attempt on President Ronald Reagan,<sup>155</sup> officials have asserted they are "exercising the authority of" the Senate-confirmed office, though without using the title "acting."

At the SSA, once Nancy Berryhill stopped (illegally) claiming the title Acting Commissioner, she still signed Federal Register notices this way: "Nancy Berryhill, Deputy Commissioner for Operations, performing the duties and functions not reserved to the Commissioner of Social Security."<sup>156</sup> Although the language resembles that sometimes used with delegated authority, research has located no delegation or any other legal authority supporting this appointment.<sup>157</sup> Berryhill signed Federal Register notices in this way until

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Service"); Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58,050, 58,072 (Dec. 8, 2017) (to be codified at 43 C.F.R. pt. 3160, 3170) (implementing final rule and signed by Katharine MacGregor, Deputy Assistant Secretary, "Exercising the Authority of the Assistant Secretary—Land and Minerals Management").

154. See DEPT OF THE INTERIOR, ORDER NO. 3381, TEMPORARY REDELEGATION OF AUTHORITY OF THE DIRECTOR, NATIONAL PARK SERVICE (2020), <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3381-temp-del-dir-nps-508-compliant.pdf> (delegating authority of National Park Service Director to Counselor to Secretary); *infra* note 163 and accompanying text (discussing "designation of successors" memoranda issued by Pendley and Vela). See generally Rebecca Beitsch & Rachel Frazin, *Interior Move Keeping Controversial Acting Leaders in Office Faces Legal Scrutiny*, HILL (June 9, 2020, 6:00 AM), <https://thehill.com/policy/energy-environment/501735-interior-move-keeping-controversial-acting-leaders-in-office-faces>.

155. Following the assassination attempt on Ronald Reagan, and notwithstanding a living Vice President, Secretary of State Al Haig stated, "As of now, I am in control, here, in the White House." Richard V. Allen, *When Reagan Was Shot, Who Was 'In Control' at the White House?*, WASH. POST (Mar. 25, 2011), [https://www.washingtonpost.com/opinions/when-reagan-was-shot-who-was-in-control-at-the-white-house/2011/03/23/AFJlrfYB\\_story.html?utm\\_term=.ac46ec45f146](https://www.washingtonpost.com/opinions/when-reagan-was-shot-who-was-in-control-at-the-white-house/2011/03/23/AFJlrfYB_story.html?utm_term=.ac46ec45f146).

156. Extension of Expiration Dates for Two Body System Listings, 83 Fed. Reg. 13,862, 13,863 (Apr. 2, 2018).

157. 42 U.S.C. § 902(b)(4) designates the Deputy Commissioner of Social Security to act for the Commissioner in the event of "absence or disability," but the FVRA time limitation had run and Berryhill did not use the title "acting Commissioner."

April 2018, when the President nominated a new Social Security Administrator, Andrew Saul,<sup>158</sup> enabling Berryhill to resume using the title Acting Commissioner while Saul's nomination was pending in the Senate.

Since October 2019, a similar claim has been made for the Deputy Secretary of Homeland Security's powers. David Pekoske, head of the Transportation Security Administration, signed Federal Register notices as "Senior Official Performing the Duties of the Deputy Secretary."<sup>159</sup> He could not claim the title "Acting Deputy Secretary" of Homeland Security, since that position has been vacant since April 15, 2018,<sup>160</sup> far longer than the FVRA permits for an acting official. Research has located no publicly accessible delegation that authorized Pekoske to serve in this role. Since March 2020, and as of November 17, 2020, Kenneth Cuccinelli has claimed to be "Senior Official Performing the Duties of the Deputy Secretary."<sup>161</sup>

Meanwhile, from June 2020 through September 2020, William Perry Pendley continued to claim to "exercis[e] the authority of the [Bureau of Land Management] [D]irector," pursuant to a so-called succession order signed by Pendley himself, as recounted in the opinion of a district court finding Pendley's service illegal.<sup>162</sup> This bootstrapping succession order claims to be issued pursuant to the Federal Vacancies Reform Act, though the FVRA contains no authorization for the creation of either delegations or succession orders.<sup>163</sup> In response to the district court ruling, Pendley's bio page on the

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158. During the pendency of Saul's nomination, Berryhill resumed using the title Acting Commissioner, presumably relying upon the FVRA. Saul was finally confirmed in June 2019. Partnership/Post Appointee Tracker, *supra* note 5.

159. See *supra* note 112 and accompanying text.

160. See *Elaine C. Duke*, DEP'T OF HOMELAND SEC., <https://www.dhs.gov/archive/person/elaine-c-duke> (last published Apr. 11, 2017) (noting end of Deputy Secretary Duke's tenure).

161. See DEP'T OF HOMELAND SEC., *supra* note 110 (describing position in text).

162. See *Bullock v. U.S. Bureau of Land Mgmt.*, 4:20-cv-00062-BMM, 2020 WL 5746836, at \*2 (D. Mont. Sept. 25, 2020).

163. See Memorandum from William Perry Pendley, Deputy Dir. of Pol'y & Programs, U.S. Bureau of Land Mgmt. to Casey Hammond, Principal Deputy Assistant Secretary for Land & Mins. Mgmt., U.S. Bureau of Land Mgmt. (May 22, 2020), [https://www.eenews.net/assets/2020/08/19/document\\_gw\\_03.pdf](https://www.eenews.net/assets/2020/08/19/document_gw_03.pdf) (designating successors for presidentially-appointed, Senate-confirmed positions); 5 U.S.C. §§ 3345–3349 (containing no authority to issue succession or delegation orders). A similar bootstrapping succession order was prepared by Raymond Vela, National Park Service (NPS) Deputy Director, Operations, who is claiming to exercise the power of the NPS Director. See Memorandum of Raymond Vela, Deputy Dir. of Operations, Nat'l Park Serv. to Assistant Sec'y for Fish & Wildlife & Parks (June 4, 2020) (designating Deputy Director, Operations, as "First Assistant" to the National Park Service and "delegat[ing] the authority to perform all duties of the Director when required . . .") (on file with the *Administrative Law Review*); see also Beitsch & Frazin, *supra* note 154.

DOI website as of November 7, 2020, describes him merely as Deputy Director, Policy and Programs.<sup>164</sup> Despite reports that Secretary of the Interior Bernhardt would exercise the power of the office rather than seeking the nomination of a new BLM Director, a response authorized by the FVRA,<sup>165</sup> Pendley has continued to make public statements indicating that he is “still here, still running the bureau.”<sup>166</sup> As of November 17, 2020, despite the district court order specifically ruling this basis for service illegal, Pendley’s official biography still claims that his “Official Roles and Responsibilities” include the “Authority of the Director, BLM, as delegated.”<sup>167</sup>

At DHS, following the GAO Opinion and the federal court ruling that Chad Wolf had not been designated as acting Secretary of Homeland Security under a properly issued succession order,<sup>168</sup> yet another approach was deployed. Peter Gaynor, the Senate-confirmed Director of the Federal Emergency Management Authority (FEMA), who had been designated in an earlier succession order to serve as acting Secretary of Homeland Security, if needed, but who appears never to have been named in that role, reportedly signed a new succession order.<sup>169</sup> That succession order disclaimed Gaynor’s authority to act as Secretary and instead designated Wolf as acting Secretary of Homeland Security.<sup>170</sup> Wolf’s nomination to Secretary was forwarded to the relevant Senate committee the same day (triggering, under the FVRA, authorization of further service by an appropriate acting official beyond the 210-day time limit).<sup>171</sup> Wolf then issued a document entitled “Ratification,”

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164. See *William Perry Pendley*, U.S. BUREAU OF LAND MGMT., <https://www.blm.gov/bio/william-perry-pendley> (last visited Nov. 13, 2020).

165. See 5 U.S.C. § 3348(b)(2) (allowing exercise of authority by the head of the agency); Beitsch, *supra* note 64 (reporting Bernhardt statement that he will exercise power of BLM).

166. Beitsch & Frazin, *supra* note 70 (reporting Pendley’s statements that “I’m still here, I’m still running the bureau”).

167. See *Official Roles and Responsibilities*, U.S. BUREAU OF LAND MGMT., <https://www.blm.gov/basic/official-roles-and-responsibilities> (last visited Nov. 13, 2020); *Bullock v. U.S. Bureau of Land Mgmt.*, 4:20-cv-00062-BMM, 2020 WL 5746836, at \*9 (D. Mont. Sept. 25, 2020) (holding that use of delegation to effectively designate William Pendley as acting BLM Director as “wordplay” that was still illegal).

168. See *supra* note 9 and accompanying text (discussing *Casa de Maryland* litigation and GAO ruling).

169. See *Chad F. Wolf*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/person/chad-f-wolf> (last published May 18, 2020) (listing Chad Wolf as serving continuously as Acting Secretary of Homeland Security since November 2019).

170. See Adam Mazmanian, *Acting DHS Head Offers Alternate Succession Path*, FCW (Sept. 21, 2020), <https://fcw.com/articles/2020/09/21/dhs-succession-gaynor-memo-alternate.aspx>.

171. Partnership/Post Appointee Tracker, *supra* note 5 (noting that the nomination was forwarded on September 10, 2020); 5 U.S.C. § 3345.

purporting to ratify all of his actions taken during his period of illegal service as acting Secretary.<sup>172</sup>

Some of these claims of authority rest on foundations that are shaky at best; others may be pursuant to internal, though difficult to discover, delegations or other documents, potentially violating the FVRA. Some, such as the SSA case, may represent an unsupervised delegation (what I am calling “horizontal” delegation) or may not be pursuant to any delegation or other valid claim of authority.<sup>173</sup> Without a delegation, the legal basis for these claims of authority is unclear at best.

As a formal matter, the examples described above fall within the “contested zones of authority between the President and Congress.”<sup>174</sup> In recent years, however, despite press coverage of reliance on acting officials and delegation around Senate-confirmed officials, there does not seem to be much of a contest. Instead, the Senate has been largely quiescent. During the Trump Administration, as of November 7, 2020, the GAO had made FVRA violation findings in only six cases: the Inspector General of the Tennessee Valley Authority (TVA),<sup>175</sup> the Commissioner for the SSA,<sup>176</sup> the General Counsel for the Air Force,<sup>177</sup> the Inspector General for HUD,<sup>178</sup> and the Inspector General for the Export-Import Bank.<sup>179</sup> In August 2020, the

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172. Ratification of Department Actions, 85 Fed. Reg. 59,651 (Sept. 23, 2020) (claiming to “resolv[e] any potential defect in the validity of those actions” issued by Wolf during previous period of illegal service).

173. See *supra* text accompanying notes 156–158 (discussing Social Security Administration case).

174. Ronald J. Krotoszynski Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After Noel Canning*, 64 DUKE L.J. 1513, 1518 (2015).

175. Letter from Thomas H. Armstrong, Gen. Couns., U.S. Gov’t Accountability Off., to the President of the U.S. 1 (Aug. 6, 2018), <https://www.gao.gov/assets/710/700915.pdf> (reporting violation of FVRA time limits by Inspector General at the Tennessee Valley Authority).

176. Letter from Thomas H. Armstrong to the President of the U.S., *supra* note 117 (reporting continuing violation of FVRA time limits by acting Commissioner of the Social Security Administration).

177. Letter from Thomas H. Armstrong, Gen. Couns., U.S. Gov’t Accountability Off., to the President of the U.S. 1 (May 9, 2018), <https://www.gao.gov/assets/700/692014.pdf> (reporting violation from November 2017 to January 2018, though a Senate-confirmed official took the position of General Counsel for the Department of the Air Force in February 2018).

178. Letter from Thomas H. Armstrong, Gen. Couns., U.S. Gov’t Accountability Off., to the President of the U.S. 1 (May 9, 2018), <https://www.gao.gov/assets/700/692255.pdf> (reporting continuing violation of FVRA time limits by Inspector General for the Department of Housing and Urban Development).

179. Letter from Thomas H. Armstrong, Gen. Couns., U.S. Gov’t Accountability Off., to the President of the U.S. 1 (Jan. 27, 2020), <https://www.gao.gov/assets/710/704433.pdf>

GAO found that neither the acting Secretary of Homeland Security, Chad Wolf, nor acting Deputy Secretary Kenneth Cuccinelli, had been named legally.<sup>180</sup> Notwithstanding the GAO findings, the “acting” Commissioner for the SSA stayed on. She continued to sign Federal Register notices in her own name.<sup>181</sup> The HUD Inspector General similarly stayed on, as did the TVA Inspector General, albeit using other titles.<sup>182</sup> So has the acting Secretary of Homeland Security, following the “complicated legal maneuver” previously described,<sup>183</sup> as well as the acting Deputy Secretary, despite the lack of any clear claim to authority on his part.<sup>184</sup> Relatively few lawsuits have challenged these appointments as violating either the FVRA or the Appointments Clause.<sup>185</sup> Of course, neither Senate quiescence nor the

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(reporting continuing violation of FVRA time limits by Inspector General for the Export-Import Bank of the United States).

180. *DHS Decision*, *supra* note 9, at 1 (finding that the acting officials had been “named by reference to an invalid order of succession”).

181. *See supra* text accompanying notes 156–158.

182. *See supra* text accompanying notes 119–120 (Department of Housing and Urban Development IG); *Message from the Deputy Inspector General Performing the Duties of Inspector General Jill Matthews*, TENN. VALLEY AUTH., <https://oig.tva.gov/deputyigmatthews.html> (last visited Nov. 13, 2020) (using the title “Deputy Inspector General Performing the Duties of Inspector General”).

183. *See* Tanvi Misra, *Wolf to Face Heated Senate Confirmation Hearing for Homeland Security Job*, ROLL CALL (Sept. 22, 2020, 8:00 AM), <https://www.rollcall.com/2020/09/22/wolf-to-face-heated-senate-hearing-for-homeland-security-job/> (quoting American Immigration Council policy analyst Aaron Reichlin-Melnick); *supra* text accompanying notes 169–170 (discussing maneuvers in more detail).

184. The GAO opinion made clear that the Deputy Secretary position was governed by the FVRA and that the 210-day limit had passed, though it acknowledged the possibility that the department could designate someone to perform delegable duties of the position. It did not report any such delegations, however. *See DHS Decision*, *supra* note 9, at 10–11 n.14. Research also has not uncovered any.

185. In 2020, multiple lawsuits challenged the legality of Chad Wolf’s service as acting Secretary of DHS. *See supra* note 10 (listing lawsuits). Lawsuits were also filed challenging Cuccinelli’s ability to act as head of USCIS and Pendley’s ability to act as Director of the BLM. *See supra* note 15. Searching cases decided over the last five years on Westlaw has uncovered relatively few additional cases of this sort. Beyond the challenges already described, the lawsuits mainly concerned the service of Lafe Solomon as acting National Labor Relations Board (NLRB) General Counsel in the Obama Administration and the selection of Matthew Whitaker as acting Attorney General in the Trump Administration. *E.g.*, *NLRB v. SW Gen.*, 137 S. Ct. 929, 937–38 (2017) (challenging service of acting NLRB General Counsel); *Hooks ex rel. NLRB v. Kitsap Tenant Support Servs.*, 816 F.3d 550, 553 (9th Cir. 2016) (same); *Creative Vision Res., L.L.C. v. NLRB*, 882 F.3d 510 (5th Cir. 2018); *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 356 F. Supp. 3d 109, 144–45 (D.D.C. 2019), *cert. denied*, 140 S. Ct. 789 (2020) (mem.) (challenging Whitaker appointment as acting Attorney

lack of judicial rulings can resolve the potential undermining of the Constitution's structural safeguards against the abuse of power.<sup>186</sup>

## II. THE APPOINTMENTS CLAUSE AND BYPASSING SENATE CONFIRMATION

*Article II, Section 2, Clause 2 of the Constitution states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."<sup>187</sup>*

Until now, the specific limits upon acting service have mainly been delineated by statutes. But the lack of serious statutory limits on acting officials and the development of even more strategies to bypass the confirmation process underscore the need for clearer constitutional guidance. I now turn to those issues.

As commentators have noted, reliance on acting officials to fill principal officer positions raises Appointments Clause concerns. But for "inferior officers," the acting officer problem is much less significant from a constitutional perspective. In general, Congress may vest appointment of such officials in the President alone (or courts or heads of departments); that includes the power to make certain posts, although not others, Senate-confirmed.<sup>188</sup>

While the Constitution clearly requires Senate confirmation for principal officers, we lack needed clarity on *which* executive officers are principal officers. Cabinet officials and other heads of agencies who report directly to the President are indisputably principal officers. Regarding below-Cabinet-

General); *United States v. Patara*, 365 F. Supp. 3d 1085, 1088–89 (S.D. Cal. 2019) (same); *English v. Trump*, 279 F. Supp. 3d 307, 311–12 (D.D.C. 2018) (finding little likelihood of success on challenge to Mulvaney appointment as acting CFPB director).

186. *E.g.*, *NLRB v. Noel Canning*, 573 U.S. 513, 571–72 (2014) (Scalia, J., concurring) (stating, to protect the vitality of separation of powers, "[t]his Court does not defer to the other branches' resolution of such controversies"); *Freytag v. Comm'r*, 501 U.S. 868, 879 (1991).

187. U.S. CONST. art. II, § 2, cl. 2.

188. On the other hand, the FVRA's specification of the First Assistant as the default "acting official," 5 U.S.C. § 3345, subject to presidential choices of others, could prompt a challenge that Congress, rather than the President, has improperly selected the officer (assuming the acting official is an officer). *E.g.*, E. Garrett West, Note, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 215 (2018). But this portion of the statute also could be defended as a mere stopgap in the absence of affirmative presidential action and not a constraint on the President asserting her power to select the inferior officer.

level officials, the law remains uncertain—and there is considerable variability in individual circumstances. In other work, I suggest there are strong arguments that many members of the “thick layer” of political appointees below the level of agency head may be principal officers, rather than inferior officers.<sup>189</sup>

For now, it is fair to assume that, given their significant powers often specifically delegated by statute, many subcabinet agency heads, and some assistant and deputy secretaries above them on the organizational ladder, are principal officers. These might include the head of the FEMA and the Food and Drug Administration (FDA) Commissioner. The Constitution, as well as the statutes that created such posts, may require Senate confirmation even though these officers reside within an institutional structure headed by a principal officer who reports to the President.

For these important lower-level posts, as well as for Cabinet-secretary-level posts, the Constitution’s text, including the Appointments, Take Care, and Vesting Clauses, does not speak directly to the permissibility of acting officials not confirmed for the role. The implications of early history also are not clear-cut, but they imply agreement to the need for at least some acting service.

Particularly because it involves the administrative state, functional analysis provides a more logical frame for this question, and even for those who may tend toward more formalist constitutional interpretation, a functional approach can contribute usefully. As discussed in greater detail below, in this setting functional analysis may be more constraining than other interpretive approaches. In short, no matter how one views constitutional interpretation, there is important reason to consider a functional analysis.

A. *Current Appointments Clause Doctrine on Acting Officials: United States v. Eaton (1898)*

The constitutionality of unconfirmed acting officials in principal officer positions has been rarely litigated. When it has, the primary judicial approach has been to characterize an acting official as an inferior officer even if the office’s normal occupant would be a principal officer. In one very limited setting, that has been the Supreme Court’s answer.<sup>190</sup> As discussed below, however, it is a cursory and unsatisfying answer.

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189. Nina Mendelson, Which Executive Branch Officials Are Principal Officers? (July 2020) (unpublished draft) (on file with author).

190. See *Hilario v. United States*, 218 F.3d 19, 24–25 (1st Cir. 2000); *United States v. Eaton*, 169 U.S. 331 (1898).

In 1898, the Court approved the congressional authorization and actual selection of a temporary acting “consul” in *United States v. Eaton*.<sup>191</sup> The consul general himself temporarily assigned a missionary to serve as vice-consul and to take charge of the American consulate in Bangkok, then-Siam, during the consul general’s leave of absence for illness, “perform[ing] whatever duties were required there of . . . a consul-general, with the knowledge of the Department of State and with that department’s approval,” until a properly commissioned vice consul arrived in Bangkok to take over.<sup>192</sup> The missionary later sued for his compensation. The United States had not wished to pay the missionary the full consul general salary. The Court upheld the salary claim, in the process finding the appointment constitutionally unproblematic.<sup>193</sup>

The Court reasoned that the acting officer was not serving in a capacity akin to a principal officer, and thus concluded that presidential appointment and Senate confirmation were not required.<sup>194</sup> “Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official.”<sup>195</sup> The Court did not specify whether it considered the acting officer to be an inferior officer or merely an employee,<sup>196</sup> though in two later cases, it suggested that the officer in *Eaton* was an inferior officer.<sup>197</sup> The Court has never repudiated *Eaton*, and even Justice

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191. *Eaton*, 169 U.S. at 352.

192. *Id.* at 333.

193. The Court explained that a statute authorized the President to provide for the appointment of vice consuls and interpreted the consular regulations, which were promulgated “with the approval of the President,” to provide for temporary appointments of the sort received by Eaton. *Id.* at 337–343. The Court reasoned that without a legitimate acting appointment, “the public interest must inevitably suffer in consequence of the closing of the consular office.” *Id.* at 342.

194. The ill consul selected Eaton apparently pursuant to duly promulgated State Department regulations, something that might not pass muster if Eaton had been deemed an “Officer” rather than an employee. It is unclear whether State Department regulations could satisfy the Appointments Clause requirement that “Congress” vest appointment power, or whether the consul would be considered a “Head of Department.” *E.g.*, *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018) (finding Appointments Clause violation for Securities and Exchange Commission SEC Administrative Law Judges selected by internal staff; no apparent allegation of SEC rules violation for their selection).

195. *Eaton*, 169 U.S. at 343.

196. *E.g.*, Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 447–48 (2018) (discussing the difference between officers and employees).

197. *See* *Edmond v. United States*, 520 U.S. 651, 661 (1997) (“Among the offices that we have found to be inferior are . . . a vice consul charged temporarily with the duties of the

Thomas, who argued, concurring in the Court's 2017 decision in *NLRB v. SW General, Inc.*,<sup>198</sup> that the Appointments Clause generally bars an unconfirmed acting official from long-term service in a principal officer position, distinguished *Eaton* but did not argue for *Eaton's* abandonment.<sup>199</sup>

In 2003, the Justice Department OLC followed *Eaton* in opining that the selection of a non-Senate-confirmed acting Director of OMB would be constitutional.<sup>200</sup> Similarly, in 2018, OLC relied significantly on *Eaton* in opining that Justice Department Chief of Staff Matthew Whitaker could constitutionally serve as acting Attorney General.<sup>201</sup>

Although characterizing an acting official in a principal officer role as “inferior” represents a path around the constitutional text requiring Senate advice and consent for principal officers, *Eaton's* reasoning that the acting official is inferior because the appointment is “special and temporary” is otherwise unsatisfying.<sup>202</sup>

First, although the existence of a time limitation in tenure could be understood as relevant on the theory that it limits the total quantity of decisions an acting official may undertake, it is not much of a distinction. Although formally limited, the FVRA-permitted periods of service are very long, with a starter period of 210 days, for example, often stretching much longer.<sup>203</sup> The authorized period of service is on the same order of magnitude as the service of Senate-confirmed appointees; O'Connell has reported mean and median tenure rates for confirmed senior political appointees of well under three years.<sup>204</sup> Thus, *Eaton's* distinction of acting

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consul . . . .” (citing *Eaton*, 169 U.S. at 343)); *Morrison v. Olson*, 487 U.S. 654, 672 (1988) (characterizing *Eaton's* holding that the vice consul was a “subordinate officer” as addressing whether a “particular Government official is a ‘principal’ or an ‘inferior’ officer”). While characterizing an acting official as an “employee” would also obviate any constitutional problem, this is a dubious conclusion in view of the “significant authority” exercised by such individuals and their posting for more than occasional tasks. *See Lucia*, 138 S. Ct. at 2051.

198. 137 S. Ct. 929 (2017).

199. *Id.* at 946 n.1 (Thomas, J., concurring) (distinguishing *Eaton* from case at hand, while noting that acting official “exercised all of the statutory duties of that office” and served for “more than three years in an office limited by statute to a 4-year term”).

200. Designation of Acting Director of the Office of Management and Budget, 27 Op. O.L.C. 121, 123–24 (2003).

201. Designating an Acting Att’y Gen., 42 Op. O.L.C., slip op. at 1, 10, 19–21, 28 (Nov. 14, 2018) [hereinafter *Designating Acting Atty’ Gen.*], <https://www.justice.gov/olc/file/1112251/download>.

202. *Eaton*, 169 U.S. at 343.

203. *See supra* text accompanying notes 75–78.

204. O'Connell has reported that the “average tenure for cabinet and executive agency appointees” in the George W. Bush and Clinton Administrations was 2.5 years. O'CONNELL,

officials from Senate-confirmed officials based simply on whether the service is somehow “temporary” has not held up well over time.

Further, the extent of supervision by Senate-confirmed officials, as well as the magnitude of duties, has long been understood as central to whether an officer is a “principal” officer.<sup>205</sup> But an acting official serving in a Senate-confirmed office occupies the same place in the organizational structure as the duly Senate-confirmed official, is subject to no greater formal supervision, and typically can exercise the full powers of the office during their time of service.<sup>206</sup> Indeed, as implemented, that has been the whole point of having an acting official. According to press coverage, CFPB Acting Director Mulvaney, for example, ended several high-profile enforcement actions and apparently tried to change the agency’s direction to reduce enforcement overall during his period of service.<sup>207</sup> Many of these decisions will be difficult, if not impossible, for a new director to reverse.

Similarly, there is little argument that Matthew Whitaker, if legally appointed, possessed the full powers of the Attorney General to shape Justice Department enforcement actions, to authorize Foreign Intelligence Surveillance Act warrants, to resolve pending litigation, and to supervise independent counsel investigations.<sup>208</sup> To underscore the point, the statute defining the line of succession to the President expressly excludes acting Cabinet secretaries,<sup>209</sup> but other statutory limitations on the powers of acting

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*supra* note 30, at 919, n.23. The GAO reported a median appointee tenure of 2.1 years from 1981 to 1991. U.S. GOV’T ACCOUNTABILITY OFF., GAO/GGD-94-115FS, POLITICAL APPOINTEES: TURNOVER RATES IN EXECUTIVE SCHEDULING POSITIONS REQUIRING SENATE CONFIRMATION 2 (1994), <https://www.gao.gov/assets/90/89690.pdf>.

205. *E.g.*, *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988) (holding that independent counsel was inferior officer given limited scope of power); *Hilario v. United States*, 218 F.3d 19, 25 (1st Cir. 2000) (concluding that U.S. Attorneys were inferior officers in view of extensive supervision by Attorney General).

206. *But see infra* text accompanying notes 285–288 (discussing ways in which acting officers may have reduced status).

207. *E.g.*, Paul Kiel, *Newly Defanged, Top Consumer Protection Agency Drops Investigation of High-Cost Lender*, PROPUBLICA (Jan. 23, 2018, 6:12 PM), <https://www.propublica.org/article/consumer-financial-protection-bureau-drops-investigation-of-high-cost-lender>; Caroline Basile, *Leaked Mulvaney Memo: CFPB Must End Regulation by Enforcement*, HOUSINGWIRE (Jan. 23, 2018, 6:42 PM), <https://www.housingwire.com/articles/42357-mulvaney-memo-cfpb-to-end-regulation-by-enforcement>.

208. 50 U.S.C. § 1804 (Foreign Intelligence Surveillance Act warrants); Reply in Support of Motion to Substitute at 8–10, *Michaels v. Sessions*, 139 S. Ct. 936 (2018) (No. 18-496).

209. 3 U.S.C. § 19(e) (stating that statutory line of succession “shall apply only to officers appointed, by and with the advice and consent of the Senate”).

officials appear extraordinarily rare.<sup>210</sup> In general, an acting official is traditionally understood to possess the full powers of the office for the duration of the appointment.<sup>211</sup>

In short, the *Eaton* Court's apparent focus on the impermanent nature of an acting official's service obscures other meaningful issues, including the type and importance of powers exercised, the extent of supervision, and the necessity of filling the vacancy pending the arrival of a Senate-confirmed officer.

Consider, in particular, *Eaton's* relatively unusual facts—a consular vacancy in a far-flung land which, in the late 1800s, might have taken weeks or months for an individual to reach from the United States, even once confirmed. It also could be that consular powers in Bangkok at that time were, on balance, not all that significant. Rather than focusing on the characteristics of the appointment, *Eaton's* holding might be better understood—and better justified—as simply recognizing the need for some limited flexibility, under exigent circumstances, for unconfirmed acting individuals. As discussed in greater detail below, however, the need for flexibility should be understood to shrink over time. The need for flexibility in exigent circumstances was perhaps recognized in the opinion's vague characterization of the acting appointment as not only temporary, but under “special . . . conditions.”<sup>212</sup>

The only other potential Supreme Court guidance—albeit limited, and not in the context of acting officials—was in the Court's 1994 decision in

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210. I used Westlaw to search the U.S. Code Unannotated database for statutes excluding acting officials using language similar to 3 U.S.C. § 19(e), which excludes unconfirmed individuals from statutory succession. The query I used was “only” /s “advice and consent.” The search yielded 17 statutes. I reviewed all the statutes and located only two qualifying statutes: 3 U.S.C. § 19(e) and, arguably, a provision limiting the Defense Secretary's ability to designate the principal advisor on military cyberforce matters to an official “appointed to the position in which such official serves by and with the advice and consent of the Senate.” 10 U.S.C. § 2224I(1). That provision could exclude both unconfirmed acting officers and officers in positions not requiring confirmation at all. Of course, statutes restricting acting officials from exercising certain functions could be phrased differently.

211. 5 U.S.C. § 3345(a) (acting officials can “perform the functions and duties of the vacant office”). This is consistent with historic practice. See *Acting Officers*, 6 Op. O.L.C. 119, 120 (1982) (“An acting officer is vested with the full authority of the officer for whom he acts[]”); e.g., *Keyser v. Hitz*, 133 U.S. 138, 145–46 (1890) (same for deputy comptroller of the currency); *Ryan v. United States*, 136 U.S. 68, 81 (1890) (same for “[a]cting [s]ecretary of [w]ar”). See generally O'CONNELL, *supra* note 17, at 4 (“Acting officials generally have the same authority as confirmed leaders.”).

212. See *United States v. Eaton*, 169 U.S. 331, 343 (1898) (noting that the acting official served under “special and temporary conditions”).

*Weiss v. United States*.<sup>213</sup> The Court approved congressional authorization for certain of the “hundreds or perhaps thousands” of Senate-confirmed military officers to be posted among the “indefinite number of military judges” without another round of presidential nomination and Senate confirmation, reasoning that the authorization did not seek to “circumvent[] the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office” and that the new responsibilities were “germane” to the original appointment to which the individual had been confirmed by the Senate.<sup>214</sup> Although it raises the specter of authorizations that might seek to “circumvent” the Appointments Clause, *Weiss* offers relatively little guidance regarding the acting officer question, especially for principal officers. So far, no claims have been made that deputy secretaries, even if Senate-confirmed, can, without another round of confirmation, serve as Cabinet-level secretaries, perhaps in recognition that Cabinet secretary confirmation hearings may be more extensive and thorough.<sup>215</sup> Instead, such individuals have used the “acting” title.<sup>216</sup>

### B. Other Constitutional Clauses

As should be obvious from *Eaton*, the Constitution does not speak directly to the permissibility of an unconfirmed acting official serving in a Senate-confirmed position.

On the narrowest of readings, some might argue that the Appointments Clause implicitly bars *any* service by an individual not confirmed for the role in a principal officer position, because the Appointments Clause text lists no specific exceptions to the confirmation requirement for principal officers.<sup>217</sup> On an *expressio unius* theory, some might suggest that the Recess Appointments Clause, a supplement to the Appointments Clause’s means of appointing officers, confirms there are no further exceptions to the usual Senate confirmation process for principal officers.<sup>218</sup>

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213. 510 U.S. 163 (1994). The *Weiss* Court discussed *Shoemaker v. United States*, 147 U.S. 282, 300–01 (1893), in which the Court had approved the selection of two already Senate-confirmed officers to a commission to supervise Rock Creek Park in the District of Columbia, reasoning that Congress could “increase the power and duties” of an office without requiring the incumbent to again be nominated and confirmed. *Weiss*, 510 U.S. at 173–74.

214. *Id.* at 174–76.

215. *See, e.g., infra* text accompanying note 364 (regarding Shanahan hearing).

216. *Cf. Dellinger & Lederman, supra* note 40 (arguing only that Deputy Attorney General Rosenstein should “act” as Attorney General).

217. U.S. CONST. art. II, § 2.

218. *E.g., Manning, supra* note 39, at 1947. West has hybridized this argument with arguments that acting officials might be considered inferior officers by suggesting that, by

But even on a textual reading, other text might imply greater latitude or at least some ambiguity regarding whether or when an acting official is an “officer” or “principal officer.” The Constitution defines neither term.<sup>219</sup> The *Eaton* Court’s opinion exploited this in 1898 by suggesting that an acting official in a principal officer role might not be a principal officer at all.<sup>220</sup> Principal “Officers” presumably are the usual occupants of an “Office,” as implied by the Opinions Clause’s authorization of the President’s obtaining an Opinion of “the principal Officer . . . upon any Subject relating to the Duties of their respective Offices.”<sup>221</sup> But the Necessary and Proper Clause references powers vested in any “Department or Officer,” perhaps implying that not every individual exercising the powers of a “Department” is necessarily an “Officer.”<sup>222</sup>

Moreover, although such a reading certainly would be logical, the text also is not specific that a “Person holding any Office of Profit or Trust” (Emoluments Clause)<sup>223</sup> is necessarily identical to the Appointments Clause’s “Officer.” An acting official possibly might be a “Person holding [an] Office” or a person exercising the powers of a “Department” for a time without becoming an “Officer.”<sup>224</sup> Conceivably, the courts could recognize another category of “Person” in government, as the Supreme Court has with the category of “employee,” a term not appearing in the Constitution.<sup>225</sup>

One also might focus on the tension, or even conflict in some instances, between the narrowest reading of the Appointments Clause and other constitutional clauses. Consider the obvious management challenge of a Secretary of Defense’s death in wartime, a Treasury Secretary’s serious misconduct in office, or a newly arrived President facing resignations by the

“structural analogy,” “Congress may not promulgate a statute that allows an acting officer to serve longer than she otherwise could under the Recess Appointments Clause.” West, *supra* note 189, at 210, 217 (suggesting that nearly two years might be acceptable).

219. *E.g.*, Mascott, *supra* note 196, at 450 (relying on corpus linguistics analysis to argue the original public meaning of “officer” extends broadly to “encompass any individual who had ongoing responsibility for a governmental duty,” including recordkeeping).

220. *See supra* text accompanying notes 191–196 (discussing *Eaton*).

221. U.S. CONST. art. II, § 2, cl. 1 (implying that an Officer always holds an Office).

222. *Id.* art. I, § 8, cl. 18 (“Necessary and Proper” clause, referencing powers vested “in any Department or Officer”) (emphasis added); *see also* Mascott, *supra* note 196, at 450 (suggesting that deputies “acting as agents in place of an officer” might under some circumstances not themselves be officers).

223. U.S. CONST. art. I, § 9, cl. 8.

224. *Id.* art. I, § 8, cl. 18; *id.* art. I, § 9 cl. 8.

225. *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976) (per curiam) (“Officers of the United States’ does not include all employees . . . [e]mployees are lesser functionaries subordinate to officers.”).

previous Cabinet position holders. The narrowest interpretation of the Appointments Clause could require that these posts be left vacant pending confirmation of a new nominee. But vacancies—particularly unanticipated ones—in very senior offices could undermine government function.<sup>226</sup> Some authority for short-term coverage of Executive Branch vacancies seems consistent as well with the Take Care Clause, which requires the President to “take Care that the Laws be faithfully executed,” and with the Vesting Clause, which vests “executive Power” in the President.<sup>227</sup>

The extent of presidential powers implied, or obligations imposed, by the Take Care Clause is contested, including whether it imposes a duty on the President<sup>228</sup> or whether it implies powers beyond those expressly mentioned, such as the ability to deploy extra-statutory means to carry out statutes,<sup>229</sup> or to disregard or decline to enforce statutes on constitutional or other grounds.<sup>230</sup> Professors Andrew Kent, Ethan Leib, and Jed Shugarman have recently argued, based on historical and other evidence, that the Clause imposes a fiduciary-like obligation upon the President to carry out federal

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226. Cf. Krotoszynski, *supra* note 174, at 1522 (arguing that Senate confirmation delays burden the powers implied by the Take Care Clause).

227. See U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President.”); *id.* art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed.”). The Opinions Clause—“he may require the Opinion, in writing, of the principal Officer in each of the executive Departments”—also implies the regular presence of high-level officials, though the reference to “the principal Officer,” the term used by the Appointments Clause, also suggests the covered individuals are to be Senate-confirmed. See *id.* art. II, § 2, cl. 1.

228. See Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 275 (2003) (“[I]n its essence, this clause is a duty conferred.”); David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 83–84 (2009) (arguing that “the text strongly supports the duty-based theory”).

229. See Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1173 (2019) (arguing that executive power includes only “the narrow but potent authority to carry out projects defined by a prior exercise of the legislative power”). Jack Goldsmith and John Manning argue that the Clause implies what they term a “completion power,” a power to “prescribe extra-statutory means when necessary to execute a statute.” See Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1838, 1851 (2016) (discussing extra-statutory presidential power to protect judges with bodyguards); Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280, 2302–03 (2006); see also Stephenson, *supra* note 5454, at 953 n.37 (discussing literature).

230. E.g., Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2185 (2019) (arguing that “[n]on-enforcement for policy reasons sits most at odds with the historical meaning of the Faithful Execution Clauses” [including the Take Care Clause]); David Barron, *Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS., Winter/Spring 2000, at 61, 64; sources cited *supra* note 229.

statutes in a diligent and steady fashion.<sup>231</sup> But under any view, the presence of high-level officials might be considered essential to the President's ability to carry out executive functions, including under the Take Care Clause.<sup>232</sup> This is particularly so given the Executive Branch's size and the wide range of its functions under current statutes. As Attorney General John Young Mason commented in discussing the Recess Appointment Clause in 1846, "Offices without officers are useless to the public."<sup>233</sup>

Article I's Necessary and Proper Clause, which authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government" might be interpreted to authorize Congress to pass statutes needed to assure the reasonable level of government function at which the other clauses are aimed, including authorizing limited service by unconfirmed officials, even in principal officer roles.<sup>234</sup> At the least, Congress might authorize such service to support a reasonable opportunity to use the nomination as well as the advice and consent process laid out in the Appointments Clause. An adequately constrained authorization of acting officials is arguably both critical to the executive function and something different from the "nominat[ion] [of]

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231. Kent, *supra* note 230230, at 2190.

232. See, e.g., *Myers v. United States*, 272 U.S. 52, 117 (1926) (finding both "selection" and "his power of removing those for whom he can not continue to be responsible" implied by Take Care Clause); *Morrison v. Olson*, 487 U.S. 654, 692 (1988) (considering whether limitation on independent counsel impermissibly interfered with "means for the President to ensure the 'faithful execution' of the laws"); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010) (holding Take Care Clause implies that President must retain some removal authority over officers); Stephenson, *supra* note 54, at 953–54. In *English v. Trump*, 279 F. Supp. 3d 307, 327 (D.D.C. 2018), the district court, concerned about Take Care Clause issues, deployed the constitutional avoidance canon to interpret the FVRA as an alternative to the CFPB succession statute to avoid a setting in which the President could neither select the acting official nor remove that individual at will. That case, however, was highly specific to the CFPB, the structure of which was already facing constitutional challenge. My point is not that the Take Care Clause necessarily entitles the President to broad choice among acting officials, but simply to ensure that some work can be done pending a prompt nomination and confirmation.

233. Power of the President to Appoint to Office During Recess of Senate, 4 Op. Att'y Gen. 523, 525–26 (1846).

234. U.S. CONST. art. I, § 8, cl. 18; see also Manning, *supra* note 39, at 1967 (arguing that, despite critique that some have overread implications of Necessary and Proper Clause, the clause does grant "some authority to structure the way the executive and judicial powers are 'carried into Execution'").

Officers” to which the advice and consent requirements would otherwise apply.<sup>235</sup>

My goal at this juncture is not to offer a definitive reading of constitutional text. I simply note that undefined terms in the Appointments Clause, coupled by the issues raised by reading the Clause in a fuller constitutional context, leave significantly more space for unconfirmed acting officers than some have argued. Moreover, as discussed in greater detail below, historical practice around acting officials also is in tension with the narrow reading of the Appointments Clause advocated by some.

*Eaton’s* path through the text—denying under some circumstances that an acting official is a principal officer requiring Senate confirmation—could well be the best one from a purely textual perspective. But *Eaton’s* approach is incomplete, and thus unconvincing, because it fails to provide adequate guidance on *which* circumstances should prompt us to conclude that acting official service is constitutionally permissible.<sup>236</sup> In short, constitutional doctrine should go beyond *Eaton* to more thoroughly and directly engage functional and separation of powers considerations.

I next turn to historical practice around acting officials. I find that it is suggestive, but hardly dispositive, of the appropriateness of acting officials. I then return to *Eaton’s* challenge by developing a functional approach to address how much flexibility the Constitution should be interpreted to afford the President to rely on unconfirmed individuals in principal officer posts.

### C. Historical Use of Acting Officials

Constitutional drafters did not specifically address acting officers. From the very early years of the Republic, however, Congress authorized at least some acting service, and the President placed acting officials in principal officer positions. Commentators have disagreed whether and under which conditions historical practice can serve as reliable evidence of a widespread or shared constitutional understanding<sup>237</sup> or as a

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235. U.S. CONST. art. II, § 2, cl. 2.

236. See *supra* text accompanying notes 191–199 (discussing *Eaton v. United States*). Similarly, although Judge Morris of the District of Montana declared, “[William] Pendley’s previous and ongoing service as Acting BLM Director violates the Appointments Clause,” he did not set forth any criteria for distinguishing constitutional acting service from unconstitutional acting service. *Bullock v. U.S. Bureau of Land Mgmt.*, 4:20-cv-00062-BMM, 2020 WL 5746836, at \*11 (D. Mont. Sept. 25, 2020).

237. Compare William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 49 (2019) (suggesting that historical evidence may have value if interbranch constitutional deliberation and acquiescence amounts to “liquidation”), with Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 83 (2013) (critiquing approaches focused on congressional or presidential

“constitutional. . . precedent.”<sup>238</sup> Whether practices around acting officials amount to any sort of constitutional precedent or not, they suggest at least some perceived need for acting officials over time and greater reliance on acting officials than the narrowest reading of the Appointments Clause would suggest.

### 1. *The Lack of Express Consideration*

The Federalist Papers make no mention of potential high-level vacancies while the Senate is in session. For those who find them relevant,<sup>239</sup> records from the 1787 Constitutional Convention also do not address the prospect of vacant high-level posts other than during a Senate recess. Instead, the debate that resulted in the compromise of presidential nomination subject to Senate advice and consent was far more focused on how, precisely, to share appointments power between the President and the Legislature.<sup>240</sup> Although acknowledging the value of permitting “one man of discernment” to select

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acquiescence by noting their neglect of potential judicial acquiescence to one or another branch), and Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668, 672–74 (2016) (expressing concern that acquiescence analysis generally will simply validate the action of the more active and powerful branch).

238. E.g., Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 418 (2012) (defending use of history and observing that “the Supreme Court, executive branch lawyers, and academic commentators have all endorsed the significance of such practice-based ‘gloss’”); Baude, *supra* note 237, at 59–60 (“[R]epeated, sanctioned activity by public officials could create a form of constitutional precedent[]”); Stephenson, *supra* note 53, at 942; Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 714–18, 783–84 (2008). *But see* LaCroix, *supra* note 237, at 77–78 (“Historical practice is a slippery, unhelpfully capacious notion masquerading as a . . . neutral principle.”).

239. As Matthew Stephenson summarizes, Convention debates were supposed to be secret; moreover, as “modern originalists emphasize, what matters is not original intent but original meaning or understanding.” Stephenson, *supra* note 54, at 965 (emphasis omitted). Further, the participants’ understanding presumably should matter less than that of the ratifiers. *Id.*

240. Adam J. White, *Toward the Framers’ Understanding of “Advice and Consent”: A Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL’Y 103, 110–11 (2005) (describing focus of Convention discussion). The Convention considered a number of options, including a stronger presidential role and sole Senate appointment, before settling on this compromise in September 1787, as discussed at length elsewhere. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 497–99 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (recommendation of presidential nomination and Senate confirmation); *id.* at 599 (Committee on Style’s revision with minor changes); JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 17–25 (1953); White, *supra*, at 111–14.

officials,<sup>241</sup> the Senate advice and consent requirement, combined with that presidential nomination, was understood to counterbalance presidential power and to ensure a “judicious choice” of our most senior officials.<sup>242</sup> As Alexander Hamilton wrote in Federalist No. 76, Senate concurrence is meant to serve as an “excellent check upon a spirit of [presidential] favoritism,” tending to prevent the selection of unfit officers from “State prejudice, from family connection, from personal attachment, or from a view to popularity.”<sup>243</sup> Senate confirmation could represent an opportunity for thorough and public deliberation on a nominee and, with presidential nomination, supply public accountability for the appointment.

The Recess Appointments Clause, authorizing the President to “fill up all Vacancies that may happen during the Recess of the Senate,”<sup>244</sup> was added to the constitutional text in September 1787, without discussion or disagreement.<sup>245</sup> Later statements during the founding era suggest that the recess appointment power was meant to serve as a “supplement” to appointment authority, as it might be “necessary for the public service to fill without delay,” in Hamilton’s words in Federalist No. 67.<sup>246</sup>

Given the need for ensuring a “judicious choice” of officer—and the “necess[ity] for the public service to fill without delay,” as Hamilton commented regarding the Recess Appointments Clause, perhaps those considering the Appointments Clause ought to have anticipated deaths or misconduct among officials coupled with a less-than-instantaneous

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241. THE FEDERALIST NO. 76, at 484 (Alexander Hamilton) (Robert Scigliano, ed., 2000).

242. *Id.*

243. *Id.*; see also *Edmond v. United States*, 520 U.S. 651, 659 (1997) (Senate confirmation ensures that presidential appointment power is “not left unguarded” (citing 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 376–77 (1833))).

244. U.S. CONST., art. II, § 2, cl. 3.

245. The motion, seconding, and vote all apparently took place on September 7, 1787. See FARRAND’S RECORDS, *supra* note 240, at 533 (“It was moved and seconded to agree to the following clause . . . which passed in the affirmative[.]”); *id.* at 540 (motion of Mr. Spaight); *id.* at 600 (reporting language); HARRIS, *supra* note 240, at 24.

246. THE FEDERALIST NO. 67, at 432 (Alexander Hamilton) (Robert Scigliano, ed., 2000). At the North Carolina ratifying convention, Archibald Maclaine similarly suggested that the “public business may render it necessary.” Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 380–81 (2005) (quoting 4 THE FOUNDERS’ CONSTITUTION 37, 102–103 (P. Kurland ed., 1787)). Contemporaries also suggested that recess appointment authority would obviate the need for the Senate to sit constantly. See VIVIAN S. CHU, CONG. RSCH. SERV., RL33009, RECESS APPOINTMENTS: A LEGAL OVERVIEW 1 (2014) (quoting 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 537 (Merrill Jensen, ed. 1976)).

nomination and confirmation process.<sup>247</sup> Nonetheless, not only was Senate delay or inaction, let alone presidential delays, apparently unanticipated during the Convention,<sup>248</sup> but some even assumed that presidential nomination would essentially equate to appointment.<sup>249</sup>

Not long after ratification, however, in his July 1789 letters to Roger Sherman, John Adams recognized the prospect of Senate delays. He wrote, “The senate have not time . . . . [T]he whole business of this government will be infinitely delayed by this negative of the senate on treaties and appointments.”<sup>250</sup>

## 2. *Congressional Authorization of Acting Officials*

Likely in recognition of the practical difficulties Adams anticipated, Congress soon thereafter began authorizing acting officials. President George Washington’s initial Cabinet appointments were confirmed smoothly, within a day or so.<sup>251</sup> But by 1792, Congress had begun making arrangements for individuals to act in lieu of Senate-confirmed officers. The Second Congress enacted legislation providing that “in case of the death, absence . . . or sickness” of the Secretaries of State, Treasury or the War Department, or of any officer in those departments, “it shall be lawful for the President . . . to authorize any person or persons at his discretion to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease.”<sup>252</sup>

In 1795, during the second Washington Administration, Congress broadened the coverage of the “acting” provision to apply “in case of [unspecified] vacancy” in those offices, in which case the President could authorize “any person . . . at his discretion, to perform the duties of their

247. THE FEDERALIST NO. 67, *supra* note 246.

248. Stephenson, *supra* note 54, at 965–66 (“[T]he possibility of Senate inaction . . . seems not to have entered [Hamilton’s] mind . . . . Other influential members of the Founding generation [also seemed to] assume[] the Senate would take up all the President’s nominees.”) (emphasis omitted).

249. See HARRIS, *supra* note 240, at 18 (“They believed that the power to nominate was substantially equivalent to the power to appoint.”); THE FEDERALIST NO. 76, *supra* note 241, at 486 (“There can, in this view, be no difference between nominating and appointing.”). *But see* Letter from John Adams to Roger Sherman (July 20, 1789), in 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 434 (Charles Francis Adams ed. 1851) (Senate “negative on appointments” will involve Senate in “reproach . . . without doing any good”).

250. Letter from John Adams to Roger Sherman, *supra* note 249, at 435–36.

251. STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 52 (1993).

252. Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281. Research has not uncovered any relevant extant legislative history.

said respective offices.”<sup>253</sup> Congress did, however, limit the duration: “[N]o one vacancy shall be supplied, in manner aforesaid, for a longer term than six months.”<sup>254</sup> None of these statutes required acting officials to be Senate-confirmed, and none of them articulated a justification for authorizing acting officials.

Early sources also document service by individuals not Senate-confirmed for the particular position. John Jay served as acting Secretary of State during Washington’s first term until Thomas Jefferson was confirmed in September 1789 and began his service in March 1790, for example.<sup>255</sup> Timothy Pickering, confirmed as Secretary of War, also served briefly *ad interim* as Secretary of State, on Aug. 20, 1795.<sup>256</sup> And Charles Goldsborough, almost certainly not Senate-confirmed for any role and serving as Chief Clerk of the Navy, acted as Secretary of the Navy during the Madison Administration in 1809.<sup>257</sup>

In November 2018, the Justice Department OLC, in an opinion aimed at validating the Whitaker appointment, asserted that there were “over 160 times” pre-1860 appointments of non-Senate-confirmed acting officials to heads of Departments.<sup>258</sup> Thomas Berry has, however, documented that the “significant majority” of the appointments identified by the OLC were “only acting heads [serving during travel or sickness], not *ad interim*” [serving following death or resignation].<sup>259</sup> Berry elaborated further that periods of service, including for the *ad interim* appointments, generally were extremely short—on the order of days or weeks rather than months or years.<sup>260</sup> Simple practical necessity may well have prompted these actions.<sup>261</sup> Although they imply a level of acceptance of acting officials, neither the OLC nor the Berry

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253. Act of Feb. 13, 1795, ch. 21, 1 Stat. 415.

254. *Id.*

255. U.S. JOINT COMM. ON PRINTING, BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS, 1774–1961, H.R. Doc. No. 86-442, at 13 (1961).

256. *Id.*

257. *Id.* at 14.

258. *Designating Acting Att’y Gen.*, *supra* note 201201, at 1–2 (“Mr. Whitaker’s designation is no more constitutionally problematic than countless similar presidential orders dating back over 200 years.”).

259. See Thomas Berry, *Is Matthew Whitaker’s Appointment Constitutional? An Examination of the Early Vacancies Acts*, YALE J. ON REG.: NOTICE & COMMENT (Nov. 26, 2018), <http://yalejreg.com/nc/is-matthew-whitakers-appointment-constitutional-an-examination-of-the-early-vacancies-acts-by-thomas-berry/>.

260. *Id.* (“[P]residents seemed hesitant to [appoint non-Senate-confirmed individuals as *ad interim* officials] if the vacancy was expected to last for a significant length of time.”).

261. *Cf.* NLRB v. Noel Canning, 573 U.S. 513, 540 (2014) (citing Attorney General Wirt on the need for a president to obtain “assistance of subordinate officers”).

analysis yields a clear inference on what has been deemed acceptable, documents the justifications that might have been offered for these acting appointments, or discusses whether constitutional issues were confronted at the time.

Congress has, since 1868, provided more generally for the filling of vacancies.<sup>262</sup> The statutory limit on acting service was ten days until 1891, then thirty days, and then, the dramatically longer 120 days (plus the length of time a nomination is pending) in 1988.<sup>263</sup> All this culminated in the current, extraordinarily liberal FVRA regime, authorizing acting service for a period of 210 days to start. To emphasize, the FVRA seeks to authorize this length of acting service equally for all Senate-confirmed inferior and principal officers, including Cabinet secretaries.

Besides enacting the FVRA, Congress has acquiesced in other presidential conduct that does not conform to the narrowest reading of the Appointments Clause. For example, President-elects make pre-inauguration, pre-nomination announcements of nominees for high offices.<sup>264</sup> The Senate acts as if these are presidential nominations from the start, referring these individuals to committee for confirmation hearings that take place pre-inauguration. This custom is so well entrenched and the expectations of such nominations so strong that on January 18, 2017, even though President Trump had not yet been inaugurated, his announcement of only twenty-eight nominations prompted a Bloomberg headline: “The Empty Trump Administration.”<sup>265</sup>

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262. Act of July 23, 1868, ch. 227, 15 Stat. 168.

263. *See id.*; Act of June 22, 1870, ch. 150, § 9, 16 Stat. 162 (regarding Justice Department and Attorney General vacancies, and possible source for language later codified as Rev. Stat. 179); Act of Feb. 6, 1891, ch. 113, 26 Stat. 733 (extending to thirty days); 4 Rev. Stat. §§ 177–83 (1878) (enacted as 18 Stat. 1, 28–29) (containing some substantive changes not appearing in earlier statutes); Pub. L. No. 89-554, § 3348, 80 Stat. 426 (1966) (codifying thirty-day limit at 5 U.S.C. § 3348); Pub. L. No. 100-398, 102 Stat. 988 (1988) (codified at 5 U.S.C. § 3348). *See generally* ROSENBERG, *supra* note 129, at 2–3 (discussing the changes in statutory limits).

264. *E.g.*, Associated Press, *Obama Announces Final Cabinet Picks*, NBC NEWS (Dec. 19, 2008, 5:06 AM), [http://www.nbcnews.com/id/28308015/ns/politics-white\\_house/t/obama-announces-final-cabinet-picks/](http://www.nbcnews.com/id/28308015/ns/politics-white_house/t/obama-announces-final-cabinet-picks/) (“President-elect wraps up Cabinet appointments before vacation in Hawaii.”).

265. Jonathan Bernstein, Opinion, *The Empty Trump Administration*, BLOOMBERG. <https://www.bloombergquint.com/uselections/the-empty-trump-administration> (last updated Jan. 23, 2017, 9:08 PM). Note that confirmation votes typically do not occur until the President has assumed office. *E.g.*, *Confirmation Process Overview for Donald Trump’s Cabinet Nominees*, BALLOTPEdia, [https://ballotpedia.org/Confirmation\\_process\\_overview\\_for\\_Donald\\_Trump\\_p%27s\\_Cabinet\\_nominees](https://ballotpedia.org/Confirmation_process_overview_for_Donald_Trump_p%27s_Cabinet_nominees) (last visited Nov. 13, 2020) (noting pre-inauguration announcements and hearings for many nominees and post-nomination votes).

*D. Working Around Confirmation from a Functional Perspective*

Overall, Congress has, since 1792, gestured expansively toward presidential flexibility to use acting officials, and Presidents have also used them since those early days. This could mean little, of course, if Congress were uninterested in protecting the Senate's prerogatives or if judges had no opportunity or inclination to engage the issues, which seems probable given the comparative lack of litigation over acting officials.<sup>266</sup>

But the historical practice nonetheless underscores how unsatisfying it is to read the Appointments Clause in a “textually precise,” comparatively isolated manner to outright bar acting officials not confirmed for the post in Cabinet and other Senate-confirmed positions.<sup>267</sup> As discussed, contrary to such an acontextual approach, the Constitution might admit multiple paths through the text, including that an acting official does not become an “officer” until particular conditions are met. Meanwhile, the history around acting officials, combined with the obvious need for them given less-than-instantaneous Senate confirmation decisions, suggests the need for constitutional analysis that is both broader and more functional.

Adopting the narrowest view of the Appointments Clause—requiring any person exercising principal office powers to be “nominate[d]” by the President and Senate-confirmed<sup>268</sup>—would compel each President to begin her administration with headless Cabinet agencies unless previously confirmed Secretaries agreed to stay on. But having an acting agency head in place, even an unconfirmed official, could be critical to proper Executive Branch function and a functioning administrative state. Vacancies in certain high-level positions, particularly after deaths or unexpected resignations, may simply be intolerable if the Executive Branch is to do the work of modern government. Moreover, adopting this narrow Appointments Clause reading also would mean finding unconstitutional the numerous statutes enacted since 1792 that provide stopgaps for vacancies in high-level offices, including the FVRA and many agency-specific statutes.<sup>269</sup>

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266. *E.g.*, *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 949 (2017) (Thomas, J., concurring) (“That the Senate voluntarily relinquished its advice-and-consent power in the FVRA does not make this end-run around the Appointments Clause constitutional.”); LaCroix, *supra* note 237.

267. *See supra* text accompanying notes 39–40 (discussing arguments of Manning, Katyal, and Conway).

268. U.S. CONST. art. II, § 2.

269. *Cf.* Krotoszynski, *supra* note 174174, at 1536 (arguing that Breyer’s majority opinion interpreting Recess Appointment Clause, in *NLRB v. Noel Canning*, 573 U.S. 513 (2014), sought “an appropriate accommodation,” rather than “empowering the Senate to cripple the executive branch”).

In many respects, the problem is essentially pragmatic. We must maintain the government's core functions, a value embodied in the Take Care and Vesting Clauses, particularly when so many statutes authorize or even specifically require agencies to act. We should take seriously a more holistic and functional constitutional reading under which Congress may authorize some service by acting officials while simultaneously ensuring a meaningful Senate advice and consent role.

Such an approach would be partially consistent with the Supreme Court decision in *United States v. Eaton*, in that *Eaton* affirmed at least some presidential power to rely on unconfirmed officials in "special and temporary" conditions, though the Court has not further explicated either term.<sup>270</sup> But a functional approach also would improve upon *Eaton* by more seriously engaging relevant considerations and clarifying the appropriate limits on presidential use of acting officials.

Courts and scholars have taken similar functional approaches to other constitutional questions implicating the administrative state, such as the delegation of rulemaking power, an authority that resembles legislation in its effect, thus implicating Article I, Section I of the Constitution.<sup>271</sup> All members of the Court have agreed that the Constitution permits such delegation if Congress has supplied an "intelligible principle."<sup>272</sup> Despite recent criticism that the scope of permitted delegation is too broad, no Justice has suggested that Congress resume responsibility for all governmental standard-setting.<sup>273</sup> Much of this delegation has been justified in the literature and in the cases on functional grounds, since Congress "simply

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270. *United States v. Eaton*, 169 U.S. 331, 343 (1898).

271. U.S. CONST., art. I, § I.

272. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001) ("[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))). A majority of the *Whitman* Court characterized the power delegated to agencies to make broadly applicable rules with the force of law as executive. *Id.* at 475 ("[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action." (quoting *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting))); *see also* *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904) (stating that legislation at issue "does not, in any real sense, invest administrative officials with the power of legislation"). *But see* *Whitman*, 531 U.S. at 488–89 (Stevens, J., concurring) (arguing that agency rules should be characterized as quasi-legislative, since "[t]he proper characterization of governmental power should generally depend on the nature of the power, not on the identity of the person exercising it").

273. *E.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (arguing to strengthen nondelegation doctrine while reaffirming that Congress may assign power to "fill up the details" and find facts to Executive Branch).

cannot do its job absent an ability to delegate power under broad general directives.”<sup>274</sup>

The Court has also approved as consistent with Article III generous delegations of adjudicative authority to agencies, noting the need to relieve the courts of “a most serious burden.”<sup>275</sup> Even delegations to agencies to decide traditional private common law claims have been upheld conditioned on some federal court supervision.<sup>276</sup>

Similarly, we might understand some limited power to rely upon acting officials in senior posts as “necessary and proper” to effectuate the President’s powers under the Take Care and Vesting Clauses. The modern administrative state must function to implement statutory commands. A busy Senate docket, plus the demands of the process itself, predictably precludes instantaneous confirmation.

At the same time, a functionalist would recognize that such a scheme, even if it serves legitimate purposes, limits the Senate’s performance of its constitutionally assigned functions, presenting significant risks.<sup>277</sup> A functionalist might consider whether the arrangement nonetheless “preserve[s] an appropriate balance” among the branches of government,<sup>278</sup> including interbranch checks and other means of assuring accountability. Analogously, as the administrative state has grown, presidential accountability

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274. *Id.* at 2123 (plurality opinion) (holding that delegation is needed “[i]n our increasingly complex society, replete with ever changing and more technical problems” quoting *Mistretta*, 488 U.S. at 372); see also David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 267 (2013) (noting conventional argument that “no practicable alternative to such administrative policymaking exists in a world as complex as our own”). *But see* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1463 (2015) (arguing that delegations undermine congressional function). See generally JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 148–52 (1997).

275. *Crowell v. Benson*, 285 U.S. 22, 54 (1932).

276. *Id.* at 49–50 (approving statutory scheme in which federal courts could set aside agency findings contrary to evidence); *CFTC v. Schor*, 478 U.S. 833, 851 (1986) (in approving delegation of adjudication authority to an agency, considering the “concerns that drove Congress to depart from the requirements of Article III,” including the extent to which delegation serves a legitimate governmental purpose, such as enhancing agency function) (citation omitted).

277. *Cf. Schor*, 478 U.S. at 850 (noting in Article III challenge to delegation of adjudicative authority that the constitution bars congressional attempts to “emasculat[e]” the courts) (citation omitted).

278. *E.g.*, Manning, *supra* note 39, at 1950; *id.* at 1951 (“[F]unctionalists view their job as primarily to ensure that Congress has respected a broad background purpose to establish and maintain a rough balance or create tension among the branches.”).

has been identified as legitimizing rulemaking delegation to agencies.<sup>279</sup> We should consider a similar analysis in assessing the constitutional tolerability of acting officials in Senate-confirmed posts.

Although functional arguments are often perceived to support greater flexibility than text-based arguments, functional arguments, importantly, also can constrain. Functional arguments might prompt us to conclude that the Constitution requires greater limits on the use of acting officials than current doctrine or statutes appear to permit. For example, the *Eaton* Court's approach of characterizing acting officials in principal officer roles as something other than principal officers when they serve under "special and temporary conditions" has so far resulted in few, if any, particular limits.<sup>280</sup> "Temporary" implies some time limitation on service, but the Court has supplied no details or meaningful rationale. By focusing specifically on such issues, a functional approach could result in a clearer articulation of constitutional limits, including identifying current statutes not consistent with the Constitution.

Besides supporting courts in resolving the constitutional question, functional analysis could also inform congressional reform of acting service limitations. It also could inform decisions structuring inferior officer positions, including whether to vest an inferior officer's appointment in the President alone (or in the heads of agencies) or to retain the constitutional default Senate confirmation requirement. Commentators have called for Congress to shrink the number of Senate-confirmed posts in the Executive Branch.<sup>281</sup> The FVRA itself could be understood as Congress moving to vest more inferior officer appointments in the "President alone" under the Appointments Clause, since it gives the President significant flexibility to rely on acting appointments, but the FVRA does so only in a haphazard and obscure fashion.<sup>282</sup> A functional analysis could provide greater clarity and rationality to congressional decisions on structuring inferior officers.

I first turn to the functional advantages of acting officials in principal officer posts.

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279. *E.g.*, MASHAW, *supra* note 276, at 152.

280. *See supra* text accompanying notes 195–199 (discussing *Eaton*).

281. *See, e.g.*, LIGHT, *supra* note 24 (calling for reduction in Senate-confirmed posts). Partially responding to such concerns, the Presidential Appointment Efficiency and Streamlining Act of 2011 removed the confirmation requirement for roughly 160 positions. *See* Pub. L. No. 112-166, § 2, 126 Stat. 1283 (2012); S. Res. 116, 112th Cong. § 2 (2011) (provides for expedited Senate consideration, without formal committee referral, of many agency Chief Financial Officers and others).

282. *See* O'Connell, *supra* note 20, at 659.

### 1. *Stopgap Functions.*

At the most basic level, acting officials can help keep the trains moving, especially at a time when the implementation of critical federal missions depends very significantly on federal agency operation.<sup>283</sup> Acting officials can step in and lead when the Defense Secretary, the EPA Administrator, or the Attorney General suddenly resigns, dies, or is removed. Both nomination and confirmation take time<sup>284</sup>—more if the Senate is obstructionist—and the President must have senior agency personnel to respond to pressing challenges and to make implementation decisions that cannot wait. This argument from core function also would support the Senate’s treatment of pre-inauguration announcements as effective nominations, avoiding headless agencies at an administration’s start.

But arguments from exigency only justify a stopgap approach, not lengthy service—service long enough to enable a prompt White House nomination. Importantly, a stopgap justification would not seem to justify even the FVRA’s starter 210-day term for acting officials in principal officer roles, particularly Cabinet-level officials.<sup>285</sup>

### 2. *Longer-Term Agency Function and Efficient Allocation of Executive Resources.*

What about longer-term acting service, perhaps as long as the FVRA’s 210 days? Permitting it would ensure the presence of senior agency leadership; though, it is less necessary because leaders could simply be nominated and confirmed.

Beyond having a leader present, the impact on agency performance of an acting agency leader, compared with a Senate-confirmed individual, is uncertain. Much depends on the particulars. Especially when the acting individual heads the agency, the lack of Senate-approved leadership may hinder the agency’s effectiveness. The agency may be less effective at advocating its views in the interagency process or before Congress;<sup>286</sup> a Senate-confirmed head of an agency gives that agency more authority “throughout the government.”<sup>287</sup> An acting official may be “perceived by

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283. See generally MICHAEL LEWIS, *THE FIFTH RISK* (2018).

284. O’Connell, *supra* note 24, at 1660 (22.9% of nominations submitted to the Senate from 1981–2014 failed); *id.* at 1669 (“On average, from 1981 through 2014, successful nominations took 88.5 days to be confirmed.”).

285. 5 U.S.C. § 3346.

286. Mendelson, *supra* note 103, at 1585–86, 1590 (arguing that White House officials might trust an acting civil servant’s decision less).

287. E.g., Carrie Johnson, *Obama Picks New Nominee for Legal Counsel’s Office*, NPR (Jan. 5, 2011, 4:50 PM), <http://npr.org/2011/01/05/132681380/obama-picks-new-nominee-for->

those around them as [not] having the full authority [of a duly confirmed officer.]”<sup>288</sup>

On the other hand, depending on their agency-specific experience, qualifications and the tasks at hand, an acting official may positively impact agency function. Especially if the acting official is a “senior and highly-regarded leader[]” drawn from the agency’s career civil service (perhaps a first assistant or a long-serving civil servant),<sup>289</sup> and if the agency’s challenges are comparatively implementation-related or technical, the acting official may perform well.<sup>290</sup> A career deputy also may excel if stepping into a below-Cabinet-level post, including heading a sub-Cabinet agency—think the DHS’s Transportation Security Administration or the DOI’s FWS.<sup>291</sup> An experienced civil servant who is a competent, responsive leader may be more effective in overseeing program implementation than a newly arrived generalist political appointee.<sup>292</sup>

But if the acting official is a “first assistant” who lacks long agency experience or is a recently arrived Schedule C appointee excepted from the competitive service,<sup>293</sup> those benefits may disappear. Such an acting official may lack both the interagency connections and significant experience with the agency mission often critical to strong performance.

One also might anticipate difficulty if the career acting official’s policy preferences diverge significantly from the President’s and the official must

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legal-counsels-office (quoting former OLC head and current Harvard Law Professor, Jack Goldsmith).

288. *Lacking a Leader: Challenges Facing the SSA After over 5 Years of Acting Commissioners: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 115th Cong. 2 (2018), <https://docs.house.gov/meetings/WM/WM01/20180307/106947/HHRG-115-WM01-Wstate-StierM-20180307.pdf> (statement of Max Stier, President and CEO, Partnership for Public Service).

289. *Id.*; see Mendelson, *supra* note 103, at 1597.

290. For example, David Lewis found based on “PART” scores—a George W. Bush Administration measure of agency performance—that offices headed by careerists typically performed better than those headed by political appointees. DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 195–96 (2008).

291. Mendelson, *supra* note 103, at 1584.

292. See generally *id.* at 1586–87.

293. *E.g.*, *Public Financial Disclosure Guide*, U.S. OFF. OF GOV. ETHICS, <https://www2.oge.gov/Web/278eGuide.nsf/Content/Definitions~Schedule+C+Employee> (explaining that a Schedule C employee is excepted from the competitive service and possesses a “close and confidential working relationship with the agency head or other top appointed official . . . rang[ing] from secretaries and chauffeurs to policy advisors”); see PLUM BOOK, *supra* note 11, app. 3 (describing Schedule C positions).

guide broader policy choices. Although civil servants generally have had a reputation for loyalty to the President,<sup>294</sup> divergence seems more likely when the acting official is the default “first assistant” choice under the FVRA, rather than presidentially selected. Divergence also seems more likely when such an acting official must resolve prioritization issues or matters dominated by values, rather than technical issues.

In short, the impact of long-term acting officials on agency performance is uncertain. It may depend on the issues facing the agency and the individual’s characteristics, including whether the individual possesses significant agency experience or is an unseasoned newcomer.

Separately, authorizing lengthier acting service might support greater personnel experimentation, in turn leading ultimately to better qualified individuals in these posts. If the White House can more readily change leadership, unimpeded by the confirmation process, that might avoid “lock-in” of a less-than-ideal official.<sup>295</sup> The White House conceivably could easily implement the lessons learned regarding optimal qualifications for a particular principal officer.<sup>296</sup>

But easing selection and replacement of high-level officials also may raise the risk, discussed elsewhere, that the President will make more patronage appointments, choose ill-qualified individuals, or select candidates motivated by goals unrelated to agency function, owing simply to reduced checks on such appointments.

### 3. *Conserving Presidential Resources.*

Authorizing longer-term acting officials also could enable the President to save the resources that would otherwise be expended on nomination and confirmation. As with a legislative agenda, the President must “expend political capital, bargain, cajole, and engage in trade-offs” to get her nominees confirmed.<sup>297</sup> With longer-term acting officials, the President in

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294. E.g., Russell E. Travers, Opinion, *I’m a Former Civil Servant. We Are Professionals, Not a ‘Deep State.’*, WASH. POST (July 14, 2020, 5:34 PM), [https://www.washingtonpost.com/opinions/im-a-former-civil-servant-we-are-professionals-not-a-deep-state/2020/07/14/119b1280-c5f0-11ea-b037-f9711f89ee46\\_story.html](https://www.washingtonpost.com/opinions/im-a-former-civil-servant-we-are-professionals-not-a-deep-state/2020/07/14/119b1280-c5f0-11ea-b037-f9711f89ee46_story.html) (describing civil service attitudes and noting, but dismissing, “deep state” concerns).

295. E.g., George A. Krause & Anne Joseph O’Connell, *Experiential Learning and Presidential Management of the U.S. Federal Bureaucracy: Logic and Evidence from Agency Leadership Appointments*, 60 AM. J. POL. SCI. 914, 915 (2016).

296. *But cf.* Kinane, *supra* note 32, at 12 (“[C]ontraction priorities focus on shrinking the agency’s footprint.”).

297. Gary J. Andres, *The Contemporary Presidency: Parties, Process, and Presidential Power: Learning from Confirmation Politics in the U.S. Senate*, 32 PRESIDENTIAL STUD. Q. 147, 154 (2002).

theory could redirect resources to developing a substantive legislative or administrative agenda.<sup>298</sup>

#### 4. *Democratic Responsiveness.*

Bypassing confirmation has conflicting effects on the democratic responsiveness of the administrative state.<sup>299</sup> On one view, if a President chooses longer-term acting officials based on preferences, loyalty, or both,<sup>300</sup> the officials may operate the agencies more consistently with presidential preferences and, presumably, with public preferences expressed in the electoral process. If present, this effect may be strongest following inauguration of a President's first term, when the President's democratic mandate is arguably clearest, and the President has a strong incentive to respond to electoral preferences. The comparatively unfettered presidential ability to select acting officials may be the basis for President Trump's statements that acting officials are "more 'responsive.'"<sup>301</sup>

A relatively broad authorization of acting agency officials might even be seen as a democratic safeguard against an obstructionist Senate. Matthew Stephenson has argued that long-term Senate inaction on a presidential nominee ought to be construed as effective consent under some conditions,<sup>302</sup> but the argument could be broader. Suppose, for example, that Senate leadership has indicated that it will simply refuse meaningful consideration, much as the Senate did with respect to a Supreme Court appointment by President Obama in 2016.<sup>303</sup> Perhaps it could be argued that the President need not even bother with a formal nomination.

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298. *Id.* ("How much time should [the President] and his staff allocate to promoting nominees in Congress, including the required amount of bargaining and trade-offs, versus expending political capital on his core agenda?").

299. See Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 *Yale L.J.* (forthcoming 2021) ("[N]early all democratic theorists consider responsiveness to constituents as an important feature of a functioning democracy.") (draft at 21).

300. *E.g.*, Barron, *supra* note 48, at 1121.

301. See Eilperin et al., *supra* note 13.

302. See Stephenson, *supra* note 54, at 942 (challenging the assumption that an affirmative Senate vote is the only way for the Senate to provide the required advice and consent to nominate an appointee).

303. It could be argued, of course, that a completely obstructionist Senate is also expressing democratic will to some extent—the will to interfere with Executive Branch function—though that seems in tension with the way in which the Founders envisioned the Senate functioning: as a reason-giving, deliberative body. *E.g.*, THE FEDERALIST NO. 76, *supra* note 241, at 485–87.

On the other hand, authorizing long-term acting officials means losing the substantial democratic contribution of the Senate confirmation process.<sup>304</sup> Even without the involvement of the House (the more democratic of Congress's two chambers), and even with important obstacles to full inclusivity in American democratic processes<sup>305</sup>—the Senate often shows particular interest in a nominee's public policy views.<sup>306</sup>

First, Senators are elected, of course. Votes on particular nominees are not infrequently salient to election campaigns, making the Senate process more responsive to voter preferences.<sup>307</sup> As Professor Benjamin Eidelson has argued in defending Senate filibusters of judicial nominations as essentially majoritarian, even though a minority of Senators could halt a nomination, “[w]ithout them, there would often be no step in the confirmation process at which the elected representatives of a majority of the American people could veto a nomination.”<sup>308</sup> With the filibuster's abandonment for executive appointments in 2013, an outright majority of Senators now must vote either to close debate or to veto confirmation.<sup>309</sup>

Further, the 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>310</sup> Authorizing the President

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304. Some might argue that permitting a long-term acting official gives the Senate more choices in deciding whether to move forward with a nomination, but this choice is only possible when the President has submitted a nomination. See O'Connell, *supra* note 20, at 702.

305. See generally Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POL. 564, 569–70 (2014) (discussing only weak accountability of elected officials to non-wealthy constituents).

306. HENRY B. HOGUE & MAEVE P. CAREY, CONG. RSCH. SERV., R44083, APPOINTMENT AND CONFIRMATION OF EXECUTIVE BRANCH LEADERSHIP: AN OVERVIEW 4 (2015), <https://crsreports.congress.gov/product/pdf/R/R44083/4>; see also NAT'L ACAD. OF PUB. ADMIN., A SURVIVOR'S GUIDE FOR PRESIDENTIAL NOMINEES 33 (2013) (summarizing types of questions that Senate committees often ask).

307. E.g., Benjamin J. Hulac, *Maine Sen. Susan Collins Becomes First Republican to Oppose Trump's EPA Nominee*, ROLL CALL (Feb. 27, 2019, 6:26 PM), <https://www.rollcall.com/news/congress/susan-collins-republican-oppose-epa-nominee> (noting that Collins “likely will face a tough re-election race in 2020”).

308. Benjamin Eidelson, *The Majoritarian Filibuster*, 122 YALE L.J. 980, 1020 (2013).

309. See Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), [https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c\\_story.html](https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html).

310. AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 137 (1996) (discussing procedural democracy and ensuring accountability); Robert Howse,

to select long-term acting officials unilaterally could come at a significant cost to this democratic legitimacy.

5. *Checking Appointee Malfeasance and Incompetence.*

Beyond contributing to democratic legitimacy, the Senate confirmation process of course represents a critical check on poor quality or self-serving appointments by the President. Federalist No. 76 acknowledges the value of permitting “one man of discernment” to select officials, but nonetheless emphasizes the Senate as critical to guard against presidential “favoritism,” including through the nomination of unfit individuals.<sup>311</sup> Again, the historical argument is that Senate advice and consent, together with that presidential nomination, are critical to assure that our most senior officials are above reproach, including free from ethical conflicts and qualified to run the government.<sup>312</sup> The process ensures that officials may exercise major governmental authority only with the “blessing” of both institutions.<sup>313</sup>

Nonetheless, we must consider the prospect that some checking functions could be performed elsewhere. First, we might consider whether Executive Branch involvement could suffice to ensure that selected individuals are high quality and committed to the public interest. A nominee for a Senate-confirmed position must allow the Senate to assess her finances, national security risks, and general suitability.<sup>314</sup> But unconfirmed individuals could also be screened in this way, potentially by the Office of Presidential Personnel (OPP) and Government Ethics, in addition to the Federal Bureau of Investigation. Present rules require an acting official to obtain a security clearance, for example,<sup>315</sup> though not generally to file a financial disclosure

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*Democracy, Science and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98 MICH. L. REV. 2329, 2334 (2000) (describing democracy as a “form of legitimization of power that depends on a conception of public justification and deliberative reason”).

311. THE FEDERALIST NO. 76, *supra* note 241, at 487.

312. *Id.*

313. Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 736 (2007).

314. See BARBARA L. SCHWEMLE ET AL., CONG. RSCH. SERV., R40856, THE DEBATE OVER SELECTED PRESIDENTIAL ASSISTANTS AND ADVISORS: APPOINTMENT, ACCOUNTABILITY, AND CONGRESSIONAL OVERSIGHT 13–14 (2014) (explaining which presidential-appointed persons are required to file public financial disclosure reports).

315. But see Brian Naylor, *What You Need to Know about Security Clearances, Inside and Outside the White House*, NPR (Mar. 1, 2019, 4:35PM), <https://www.npr.org/2019/03/01/699407475/what-you-need-to-know-about-security-clearances-inside-and-outside-the-white-house> (noting that a President may overrule staff to grant security clearances, though other than President Trump, expert attorney found “no other occasions where a President has actively involved himself in

form if the official is compensated at less than 120% of the rate normally paid to a GS-15 employee.<sup>316</sup> Further, the OGE will evaluate a presidential nominee's record, but because an FVRA-qualified "acting" officer is paid at the level of her original role, for example, she may be excluded from ethics reporting requirements that would otherwise apply to the office-holder.<sup>317</sup>

The White House of course might choose to vet candidates for acting official appointments very carefully, considering expertise, integrity, ethics, and other issues of suitability for the position.<sup>318</sup> A presidential preference to expand (or modify) government programs might prompt the Executive Branch to search for highly competent and experienced individuals.<sup>319</sup> If so, we might have greater comfort overall with authorizing longer-term acting officials.

Recent reports regarding the OPP, which dates to the Nixon Administration,<sup>320</sup> have not been so positive, however. The OPP vets potential high-level political appointees, ranging from Cabinet secretaries to Schedule C special assistants, including policy advisors and confidential assistants.<sup>321</sup> The OPP has not been particularly stable—instead populated mainly by short-term political appointees, none Senate-confirmed—though, over time, it has increased its "professional executive recruitment capacity."<sup>322</sup> The OPP has long been under significant pressure from

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granting, or withdrawing a security clearance"); SCHWEMLE ET AL., *supra* note 314, at 14 (noting that certain employees of the President and Vice President may be exempted from the usual suitability checks and security clearances).

316. SCHWEMLE ET AL., *supra* note 314, at 15 (summarizing financial disclosure requirements; further noting that financial disclosure may be required if particular agency duties necessitate it).

317. See O'CONNELL, *supra* note 17, at 5.

318. Suitability and national security checks are governed by 5 C.F.R. parts 731, 732, and 736. See generally SCHWEMLE ET AL., *supra* note 314, at 12 & n.55 (discussing "[s]uitability checks and security clearances").

319. Cf. Kinane, *supra* note 32, at 30–31 (presidential interest in policy expansion correlated with reliance on interim appointees).

320. The Nixon Administration originated the OPP; the Reagan Administration expanded its scope from selecting Cabinet secretaries to choosing non-career SES and Schedule C appointments. JAMES PFIFFNER, THE WHITE HOUSE TRANSITION PROJECT, REPORT NO. 2017-27, SMOOTHING THE PEACEFUL TRANSFER OF DEMOCRATIC POWER 6–7 (2017).

321. See *supra* note 293 and accompanying text (discussing Schedule C positions); BRADLEY H. PATTERSON, TO SERVE THE PRESIDENT 95 (2008) (discussing OPP involvement in Schedule C position selection).

322. PFIFFNER, *supra* note 320, at 9. See generally Denis Slattery, *Trump's Presidential Personnel Office is Full of Young Staffers Who Vape and Drink on the Job*, N.Y. DAILY NEWS (Mar. 30, 2018, 6:33 PM), <https://www.nydailynews.com/news/politics/trump-personnel-office-staffed-drinking-vaping-youngsters-article-1.3906238>; Robert O'Harrow Jr. & Shawn

political organizations associated both with the President and with political parties to find patronage jobs for “loyalists,” including individuals and organizations heavily involved in the electoral process.<sup>323</sup> The needs and talents of loyalists of course may not align with what agencies need for effective program implementation.

Further, the OPP does not appear generally to rely on disciplined or transparent procedures, and no such procedures are required, impeding public monitoring of its decisions.<sup>324</sup> As if to make the point, in the George H.W. Bush Administration, George W. Bush ran a committee to find positions for loyalists entitled the “Silent Committee.”<sup>325</sup>

Meanwhile, a critical incentive for thorough Executive Branch vetting of an appointee’s qualifications and ethics is to avoid Senate confirmation trouble. In connection with a Federal Reserve Bank nomination, two Republican Senators recently reminded the White House of the importance of “vetting, vetting, vetting,” prior to submitting a nominee’s name to the Senate.<sup>326</sup> Senators also have objected to even considering a nomination

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Boburg, *Behind the Chaos: Office that Vets Trump Appointees Plagued By Inexperience*, WASH. POST (Mar. 30, 2018, 4:53 PM), [https://www.washingtonpost.com/investigations/behind-the-chaos-office-that-vets-trump-appointees-plagued-by-inexperience/2018/03/30/cde31a1a-28a3-11e8-ab19-06a445a08c94\\_story.html](https://www.washingtonpost.com/investigations/behind-the-chaos-office-that-vets-trump-appointees-plagued-by-inexperience/2018/03/30/cde31a1a-28a3-11e8-ab19-06a445a08c94_story.html); PLUM BOOK, *supra* note 11 at 2 (noting that the director of the OPP is not subject to Senate confirmation).

323. THOMAS J. WEKO, *THE POLITICIZING PRESIDENCY: THE WHITE HOUSE PERSONNEL OFFICE, 1948–1994*, at 119–20 (1995); *id.* at 77 (stating that the office is “deeply engaged in [responding to] the organizations that dominate contemporary, postparty electoral politics”).

324. Pfiffner explains that the OPP has essentially consolidated presidential control over appointments, though without tremendous transparency. PFIFFNER, *supra* note 320, at 2–3. See O’Harrow, Jr. & Boburg, *supra* note 324 (“Little is publicly known or disclosed about the office’s inner workings under Trump.”).

325. See PFIFFNER, *supra* note 320, at 7 (noting that “Silent Committee” was to ensure that loyalists were “taken care of”).

326. See Jordain Carney, *GOP Senator to White House on Fed Pick: ‘Please Do Some Research,’* HILL (May 2, 2019, 3:38 PM), <https://thehill.com/homenews/senate/441874-gop-senator-to-white-house-on-fed-pick-please-do-some-research> (quoting Sen. Joni Ernst (R-Iowa) and reporting on Sen. Lindsey Graham (R-S.C.)); Associated Press, *Lax Vetting of Trump Nominees Begins to Frustrate Some Senators*, CBS NEWS (Apr. 25, 2018, 1:34 PM), <https://www.cbsnews.com/news/lax-vetting-of-trump-nominees-begins-to-frustrate-some-senators/>; Catherine Rampell, Opinion, *Americans, It’s Time for Some Extreme Vetting*, WASH. POST (Apr. 5, 2018, 7:42 PM), [https://www.washingtonpost.com/opinions/americans-its-time-for-some-extreme-vetting/2018/04/05/e3aeb376-390c-11e8-9c0a-85d477d9a226\\_story.html](https://www.washingtonpost.com/opinions/americans-its-time-for-some-extreme-vetting/2018/04/05/e3aeb376-390c-11e8-9c0a-85d477d9a226_story.html); see also Mendelson, *Uncertain Effects*, *supra* note 103, at 1576 (“Continuing delays in confirmation may prompt the White House to further investigate nominees and pre-vet candidates with the relevant Senate committees . . .”).

when they perceive inadequate pre-nomination process and consultation.<sup>327</sup> Thus, permitting greater reliance on acting officials—bypassing Senate confirmation altogether—may significantly reduce the Executive Branch’s incentive to thoroughly vet potential appointees.

Meanwhile, for a formally nominated official, the Senate can gather its own information on an appointee’s history, finances, and ethics.<sup>328</sup> Some political scientists have characterized Senate confirmation as a “rigorous vetting process” overall.<sup>329</sup> Of course, Senate confirmation is no guarantee of thoroughness. The Senate’s consideration of many appointees is merely routine, though others may receive hearings and consideration in floor debate.<sup>330</sup> Particularly when the Senate and President are of the same party, some Senate confirmation decisions might be criticized as cursory and little more than rubberstamping.

On the other hand, senatorial accountability to constituents for confirmation votes can prompt Senators to exercise independent judgment.<sup>331</sup> Nor are all nominations approved. As O’Connell has documented, roughly 23% of what she calls “nonroutine” nominations to agency positions historically have failed in the Senate, either because they are voted down, withdrawn, or returned to the President at the end of a session.<sup>332</sup> Renominating the same person to an agency position in a later congressional session is “not typical,”<sup>333</sup> and the rate of failure has increased in recent years.<sup>334</sup> In short, the Senate confirmation process overall—including the anticipated threat of failure in that process—remains a very significant force for the careful choice of high-level Executive Branch officials.

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327. HOGUE & CAREY, *supra* note 304, at 2.

328. *Id.* at 3–4; *e.g.*, PIFFNER, *supra* note 320, at 25 (explaining nominees to Senate-confirmed posts “must survive vetting by the OPP, a national security investigation by the FBI, and financial scrutiny by the Office of Government Ethics;” meanwhile, “[Senate] committees have their own questionnaires that duplicate much of the information required by the executive branch”).

329. ROGER H. DAVIDSON ET AL., CONGRESS AND ITS MEMBERS 323 (14th ed. 2013).

330. HOGUE & CAREY, *supra* note 306, at 4 (noting some, but not all committees, hold hearings); ELIZABETH RYBICKI, CONG. RSCH SERV., RL31980, SENATE CONSIDERATION OF PRESIDENTIAL NOMINATIONS: COMMITTEE AND FLOOR PROCEDURE 5, 9 (2017).

331. *Cf.* Sheryl Gay Stolberg et al., *Interest Groups Turn up Pressure on Senators Before Kavanaugh Vote*, N.Y. TIMES (Sept. 11, 2018), <https://nyti.ms/2N4Q5uC>.

332. O’Connell, *supra* note 24, at 1654, 1660 (expressing 3.2% were withdrawn by the President, a “handful” were presumably voted down, and the rest were returned to the President). O’Connell notes that the “failure rate is generally rising by administration.” *Id.* at 1660.

333. *Id.* at 1668.

334. *Id.* at 1659–60, 1659 n.57.

### 6. *Public Accountability as a Safeguard.*

Even without the Senate confirmation process, the President's political accountability might deter poor quality acting appointments.<sup>335</sup> For example, press coverage exposing abuse of the office resulted in the departures of Secretary of Health and Human Services, Tom Price, in 2017 and EPA Administrator, Scott Pruitt, in 2018.<sup>336</sup> Meanwhile, the Trump White House withdrew the nomination of Ronnie Jackson, the President's personal physician, to head the Department of Veterans Affairs after stories broke about misconduct, including Jackson's generous hand with sleeping pills to reporters on Air Force One.<sup>337</sup> The White House also never nominated John Dunkin, the President's personal pilot, to head the Federal Aviation Administration following public discussion of his qualifications.<sup>338</sup> In none of these cases did the Senate confirmation process play a direct role in ensuring accountability. Price and Pruitt were both already confirmed when the stories broke.<sup>339</sup> Neither Jackson nor Dunkin had progressed to formal nomination, though the prospect of Senate confirmation failure could have deterred that nomination. Instead, public visibility appeared to supply the check.

The value of such checks may be reduced in a President's second term, however, and they are also likely to operate mainly at the Cabinet level. Acting appointments and appointments below the Cabinet level may draw relatively little public attention. For example, consider the examples above involving

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335. *E.g.*, JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at x-xvi, 209 (2012) (arguing that a variety of mechanisms constrain the President).

336. Peter Baker et al., *Health Secretary Tom Price Resigns After Drawing Ire for Chartered Flights*, N.Y. TIMES (Sept. 29, 2017), <https://nyti.ms/2fEBLtd>; Brady Dennis & Juliet Eilperin, *Scott Pruitt Steps Down as EPA Head After Ethics, Management Scandals*, WASH. POST (July 5, 2018, 10:12 PM), [https://www.washingtonpost.com/national/health-science/trump-epa-head-steps-down-after-wave-of-ethics-management-scandals/2018/07/05/39f4251a-6813-11e8-bea7-c8eb28bc52b1\\_story.html](https://www.washingtonpost.com/national/health-science/trump-epa-head-steps-down-after-wave-of-ethics-management-scandals/2018/07/05/39f4251a-6813-11e8-bea7-c8eb28bc52b1_story.html).

337. Lisa Rein et al., *Ronny Jackson Withdraws as Trump's Nominee to Lead Veterans Affairs*, WASH. POST (Apr. 26, 2018, 12:47 PM), [https://www.washingtonpost.com/politics/ronny-jackson-withdraws-as-trumps-nominee-to-lead-veterans-affairs/2018/04/26/5a343806-48f6-11e8-9072-f6d4bc32f223\\_story.html](https://www.washingtonpost.com/politics/ronny-jackson-withdraws-as-trumps-nominee-to-lead-veterans-affairs/2018/04/26/5a343806-48f6-11e8-9072-f6d4bc32f223_story.html); Eliana Johnson et al., *Jackson Troubles Shine Light on a Fact of Washington Life: Sleeping Pills*, POLITICO (Apr. 25, 2018, 5:04 PM), <https://www.politico.com/story/2018/04/25/ronny-jackson-nomination-va-sleeping-pills-553127>.

338. Isaac Stanley-Becker, *Trump Wanted His Personal Pilot to Head the FAA. The Critical Job is Still Vacant Amid Boeing Fallout*, WASH. POST (Mar. 14, 2019, 4:44 AM), <https://www.washingtonpost.com/nation/2019/03/14/trump-wanted-his-personal-pilot-head-faa-critical-job-is-still-vacant-amid-boeing-fallout/>.

339. See *supra* note 336.

individuals “exercising the authority” of Senate-confirmed posts at DHS, the NPS, and the SSA, all agencies comparatively well known to the public. While scattered articles were written, these cases received little, if any, focused public or congressional attention. Perhaps both the Senate and the public are acquiescing in the choice of reasonable acting officials. But more likely, absent a significant scandal or complaints from well-organized stakeholders, there is relatively little public monitoring of below-Cabinet appointments.

### 7. *Judicial Review and Other Institutional Safeguards.*

Judicial review and other safeguards might, in theory, represent *ex post* checks on poor decisions by an unconfirmed official. Senate confirmation, of course, is only an *ex ante* check on the official’s performance. Meanwhile, judicial review provides only a very limited check. Judicial review typically is available only for final agency actions, such as rulemaking or adjudication. Courts generally will not review agency reorganization, resource allocation, or prioritization decisions;<sup>340</sup> decisions not to enforce;<sup>341</sup> or a host of other important agency decisions. For example, a district judge hearing a challenge to asylum policies issued by Ken Cuccinelli (as he claimed to “act” as USCIS Director), found that the court lacked jurisdiction to review a “significant change in policy” that was not reduced to writing.<sup>342</sup> Meanwhile, litigation against acting officials is relatively rare in any event.<sup>343</sup>

Other institutions also might serve to check poor performance of agency duties by unconfirmed individuals, including a civil service guided by professional norms<sup>344</sup> or supervisors within the agencies.<sup>345</sup> It is worth emphasizing, however, that our concern here is with decisions of a long-term

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340. *E.g.*, *Lincoln v. Vigil*, 508 U.S. 182, 192–93 (1993) (finding agency allocation of funds from lump-sum appropriation to be unreviewable exercise of agency discretion).

341. *E.g.*, *Heckler v. Chaney*, 470 U.S. 821, 825, 837–38 (1985) (holding that agency decisions not to enforce are presumptively not reviewable under the APA).

342. *See L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 12, 19 (D.D.C. 2020) (terming policy as “third, significant change in policy,” but finding no jurisdiction over unwritten policies).

343. *See supra* note 185 and accompanying text (cataloging cases).

344. *Barron, supra* note 48, at 1104 (“[C]ivil servants may successfully push their own agenda . . . .”); *Neal Kumar Katyal, Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 *YALE L.J.* 2314, 2345 (2006) (arguing that bureaucratic wisdom stems from “tradition-bound professionalism”); *Gillian E. Metzger, The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 *HARV. L. REV.* 1, 77–85 (2017); *Jon D. Michaels, An Enduring, Evolving Separation of Powers*, 115 *COLUM. L. REV.* 515, 543–47 (2015).

345. *Cf. Nicholas Bagley, The Puzzling Presumption of Reviewability*, 127 *HARV. L. REV.* 1285, 1324–25 (2014) (discussing the various forces within agencies that keep them compliant with the law).

acting official who can exercise every power associated with the office. Civil service norms may restrain abusive or misguided agency decisions mainly when the acting official is herself a civil servant, such as a career deputy, or when significant civil service work is required to support new policy initiatives.<sup>346</sup> Meanwhile, not all civil servants supply wise “tradition-bound professionalism,” as articulated by Neal Katyal,<sup>347</sup> limiting their effectiveness as a check on poor leadership. And in agencies where the acting officials are recently arrived political appointees and the civil service is fleeing for the exits, civil service norms are unlikely to be an effective check.<sup>348</sup> Reports of greater White House control over policy in the Obama and Trump Administrations, including through “policy czars,” also seem likely to reduce any moderating influence of career civil service agency officials.<sup>349</sup>

Supervision could usefully check malfeasance by acting officials, but it requires a supervisor. Thus, the prospect of supervision represents little reassurance regarding acting Cabinet agency heads, though White House oversight, even if stretched thin, could be of some use. Supervision may be more useful for a principal officer below the level of Cabinet secretary, such as an acting assistant secretary; head of a subcabinet agency, such as the Federal Highway Administration; or ambassador working under State Department auspices. In short, supervision and judicial review may impose only very limited accountability upon unconfirmed officials, especially at the highest levels.

### 8. *Effect on Senate Oversight and Deliberation.*

Finally, we might consider that more broadly authorizing acting officials could save limited Senate resources. Perhaps the Senate would have greater

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346. *E.g.*, Mendelson, *supra* note 103, at 1596–98 (explaining that career civil servants bring crucial experience to the carrying out of agency projects).

347. *See* Katyal, *supra* note 344, at 2345 (“Wisdom requires tradition-bound professionalism.”).

348. Jack Corrigan, *The Hollowing-Out of the State Department Continues*, ATLANTIC (Feb. 11, 2018), <https://www.theatlantic.com/international/archive/2018/02/tillerson-trump-state-for-eign-service/553034/>; *e.g.*, O’Connell, *supra* note 20, at 713 n.546 (“The civil service is in crisis.”).

349. Leo Shane III, *Former VA Secretary Details Dysfunction, Chaos Within the Trump Administration*, MIL. TIMES (Oct. 17, 2019), <https://www.militarytimes.com/news/pentagon-congress/2019/10/17/former-va-secretary-details-dysfunction-chaos-within-the-trump-administration/> (describing White House officials calling veterans policy meetings without inviting Secretary of Veterans Affairs); *e.g.*, Aaron J. Saiger, *Obama’s “Czars” for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2577–78 (2011) (noting the Obama-era appointment of many czars, “where the more experienced and higher-profile policymaker serves as ‘czar’ and the junior in the Cabinet”).

latitude to prioritize legislative initiatives or conduct targeted agency oversight. And reduced demand for confirmation decisions might translate to higher quality Senate deliberation on the nominations that are submitted.

But cutting back on confirmation would also be costly for the Senate's key oversight function. Congressional oversight of the agencies has been regularly criticized as ad hoc. Although some political scientists have famously defended "fire-alarm" oversight as just as efficient as so-called "police-patrol oversight,"<sup>350</sup> such congressional oversight may respond more to publicly reported scandals or demands from well-organized, well-funded constituents than to areas of greatest need.<sup>351</sup>

By contrast, confirmation hearings, particularly for Cabinet officers, valuably enable more systematic agency oversight. In hearings, Senators may not only assess nominee qualifications but also "articulate policy perspectives or raise related oversight issues."<sup>352</sup> For example, the confirmation hearing for Gina Haspel to lead the Central Intelligence Agency (CIA) became a vehicle for broader discussion of CIA practices and policies.<sup>353</sup> Similarly, at the confirmation hearing for Scott Gottlieb to head the FDA, Senate committee members focused on the FDA's role in addressing opioid abuse.<sup>354</sup> As political scientists have documented, "senators use their confirmation power to wield influence over executive branch priorities."<sup>355</sup> Nothing stops the Senate from conducting oversight, of course. But without confirmation hearings, Senate oversight of agencies seems likely to adhere to its usual haphazard patterns.

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350. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 175–76 (1984) (arguing that what appears to be a "neglect of oversight is really a preference—an eminently rational one—for fire-alarm oversight"); Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*, 54 LAW & CONTEMP. PROBS. 205, 209–10 (1991).

351. *E.g.*, Richard J. Anderson, *Interest-Driven Oversight and the Failure of Congressional Control of the Bureaucracy* (2015) (Ph.D. dissertation, University of Michigan), at <https://deepblue.lib.umich.edu/handle/2027.42/116670> (describing the influence interest groups have over elected officials).

352. HOGUE & CAREY, *supra* note 306, at 4.

353. *See* Rosenberg et al., *supra* note 57 and accompanying text (discussing the motivations behind questions asked during Gina Haspel's confirmation hearing).

354. *E.g.*, Thomas Sullivan, *Senate Holds Confirmation Hearing on Gottlieb*, POL'Y & MED., <https://www.policymed.com/2017/04/senate-holds-confirmation-hearing-on-gottlieb.html> (last updated May 4, 2018) (showing how a confirmation hearing may be used as a proxy to conduct agency oversight).

355. DAVIDSON, *supra* note 329, at 320.

Overall, a functional analysis suggests that authorizing the President to appoint unconfirmed individuals to exercise the authority of positions normally subject to Senate confirmation, even Cabinet secretaries, seems warranted as a stopgap for vacancies in view of the ordinary time required for nomination and confirmation. Meanwhile, allowing a President to rely long-term on officials unconfirmed for the post—rather than requiring nominations and a Senate process—has much less justification and presents significant risks. Executive institutions may vet such officials less without a looming Senate confirmation process. Moreover, political accountability seems particularly lacking for lower-level acting officials. Judicial review of individual decisions also seems unlikely to serve as an effective *ex post* check upon poor appointments given the relatively limited judicial review of agency operations.<sup>356</sup>

Thus, the analysis implies that only very brief acting service for Cabinet-level officials should be considered consistent with constitutional limits, with somewhat longer service for lower level principal officer posts. The following section offers a more detailed assessment.

### III. CONCLUSION: IMPLICATIONS FOR CONSTITUTIONAL INTERPRETATION AND RECOMMENDATIONS FOR REFORM

A functional analysis of the acting officers problem leads naturally to important conclusions regarding the Appointments Clause's constraints upon acting officials. First, the best justification for interpreting the Constitution to permit acting officers in principal officer positions, such as Cabinet secretary roles, is the stopgap function—a value supported in the Take Care and Vesting Clauses. But given the risks inherent in permitting the President to unilaterally select an acting officer without the check of Senate confirmation, that rationale can only justify a very short term of acting service that is long enough to support a prompt presidential nomination. Courts should conclude that lengthy service without such a nomination, including service under the FVRA's "starter" period of 210 days, is simply too long and, thus, in violation of the Appointments Clause. Similarly lengthy service under agency-specific statutes with no express time limitations also should be understood to violate the Appointments Clause. Finally, the Constitution also should be understood to limit an agency head's use of general delegation statutes to delegate a Senate-confirmed office's responsibilities to an unconfirmed individual, since this practice amounts to creating a shadow acting official.

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356. See *supra* text accompanying notes 340–341 (citing *Lincoln v. Vigil* and *Heckler v. Chaney*).

From the constitutional perspective, a stopgap-based authorization for acting Cabinet secretaries, in view of the scope of their authorities and comparatively few checks on their powers, should only be for a short period—thirty days presumptively, with a possible extension to forty days at the outset of an Administration given the need to fill multiple positions.<sup>357</sup> Thirty days was the time limit until 1988.<sup>358</sup> Presidential nomination of Cabinet secretaries can feasibly be completed in this timeframe, even at the outset of an administration. Major presidential campaigns already invest significant pre-election effort in identifying candidates for senior positions; they can also plan for transition prior to inauguration.<sup>359</sup>

Beyond a short period of thirty to forty days, however, the Appointments Clause should not be interpreted to authorize any further acting service by unconfirmed individuals in Cabinet-level principal officer roles unless the President has submitted a nomination package to the Senate. Given the power of these officers, the Senate confirmation process remains a critical safeguard. Even with Executive Branch vetting, the opportunity for Senate consideration is essential to deter the selection of incompetent or corrupt principal officers or patronage appointees, and to regularly oversee agency performance.

For principal officers at other levels, possibly including supervised principal officers at the Deputy Secretary level, heads of subcabinet agencies, and ambassadors, the functional analysis could yield a different outcome. Because these unconfirmed individuals are generally subject to greater supervision, we might perceive fewer overall risks from malfeasance. Meanwhile, the President must fill many more such posts, requiring more time and resources. Courts accordingly should interpret the Constitution's Appointments Clause to allow greater presidential latitude to rely on an acting official in a lower level post prior to submitting a nomination, though the courts should still confine such latitude to 120 days—much less than the FVRA's 210-day starter period—and consistent with the time limit that appeared in the Vacancies Act of 1988.

A functional analysis could also guide legislative reform. Congress could simply adopt the thirty-day and 120-day limits in legislation authorizing acting officials in Cabinet-level and below-Cabinet level posts, respectively,

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357. *Cf.* *NLRB v. Noel Canning*, 573 U.S. 513, 527 (2014) (interpreting appointments under Recess Appointments Clause to be available only for Senate recesses of “substantial length,” presumptively not less than ten days).

358. *See supra* note 263 and accompanying text (listing history of session laws that changed the statutory provision limiting time for filling Cabinet posts).

359. *See generally* P'SHIP FOR PUB. SERV., MAKING GOVERNMENT WORK FOR THE AMERICAN PEOPLE 6, 10–11 (2016) (outlining best practices for presidential transitions).

plus the length of time a nomination is pending in the Senate.<sup>360</sup> Such legislative reform should extend to agency-specific statutes. Authorizing different time periods for the Cabinet-level and below-Cabinet-level officials would, of course, require drawing a clearer line between Cabinet-level principal officers and all other principal officers. To address the prospect of Senate recalcitrance, however, statutes should authorize an acting official to remain once the President has submitted a nomination to the Senate.

Congress also might consider generally requiring that, where possible, a Senate-confirmed deputy in the same agency serve as the acting Cabinet-level official. This person is confirmed not only to serve in the same agency but to a role adjacent to the Secretary. The initial Senate confirmation might not have precisely addressed the person's suitability for the Cabinet secretary role and would not have accounted for performance in the deputy role, but it still can represent something of a check on core issues of integrity, competence, and expertise in the agency's mission. These functional considerations may help explain greater comfort among commentators with acting Cabinet-level service by confirmed deputies<sup>361</sup> and Congress's choices in many statutes to identify confirmed deputy secretaries as acting Cabinet secretaries.<sup>362</sup>

Current statutory structures do not authorize a deputy secretary simply to rise into the role of Secretary without nomination and confirmation,<sup>363</sup> and the Appointments Clause might not authorize such a statute given the significant increase in power. As implied by the withdrawn nomination of already-confirmed Defense Deputy Secretary, Patrick Shanahan, for Secretary of Defense following reports of family violence, the confirmation process for a Secretary-level position may be more extensive and thorough than for a lower-level position.<sup>364</sup> But Senate confirmation in the adjacent

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360. Bauer and Goldsmith state that an "acting [officer] should be able to serve 120 days in office, with one renewal for a failed nomination, and then no more after that." BAUER & GOLDSMITH, *supra* note 147, at 330–331. Their recommendation, like mine, would limit the use of acting officers significantly compared with current law. They do not, however, distinguish between Cabinet-level and other officials. Nor do they tackle the problem of Senate recalcitrance.

361. See Dellinger & Lederman, *supra* note 40 (explaining that it is longstanding practice for a Senate-confirmed deputy to be acting Secretary). These functional advantages would be less significant if the acting official had been confirmed to a long-ago role or one in a different agency.

362. See, e.g., 42 U.S.C. § 7132(a) (identifying Senate-confirmed deputy Secretary of Energy, and stating such deputy "shall act" if the Secretary position becomes vacant).

363. E.g., *id.* (stating merely that the Senate-confirmed deputy "shall act" but not ascend if the Secretary position becomes vacant).

364. Michael D. Shear & Helene Cooper, *Shanahan Withdraws as Defense Secretary Nominee, and Mark Esper is Named Acting Pentagon Chief*, N.Y. TIMES (June 18, 2019), <https://nyti.ms/2WWe0Bq>.

role should signal that the person's service as an acting secretary presents fewer risks and provides greater value. Moreover, providing that deputy secretaries should generally serve as acting secretaries might improve Senate deliberation over a deputy secretary because the Senate could fairly anticipate the individual's potential service as an acting secretary.

Turning back to the problem with which this paper began, it is the functional considerations—rather than an analysis rooted in Appointments Clause text, say—that best explain arguments advanced by commentators that Senate-confirmed Deputy Attorney General Rod Rosenstein was the proper choice for acting Attorney General when Attorney General Sessions left his post, rather than Matthew Whitaker, who was not confirmed for any closely related post at the Justice Department.<sup>365</sup> On functional criteria, Rosenstein's choice would have presented fewer risks.

Even if acting service by confirmed deputies raises fewer concerns under a functional analysis, clear time limits remain critical. Time limits are important given the extent of a Secretary's power, relative lack of supervision, and the prospect that presidential reliance on an acting official is unjustified by genuine need but is simply to circumvent the Appointments Clause.

The prospect of Senate recalcitrance is, of course, serious, and perhaps explains why Presidents have sometimes not submitted nominations for vacant posts. But one implication of this Article's analysis is that the Senate must have an opportunity to perform its checking function. Thus, the President must at least submit a nomination to the Senate. Once that is done, the FVRA's extension of authorized acting service while a nomination is pending is a reasonable start to addressing Senate delays.<sup>366</sup> Such an indefinite extension still raises the risks posed by the occupying of Senate-confirmed posts by

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365. *E.g.*, Dellinger & Lederman, *supra* note 40 (arguing from “constitutional avoidance”). Conceivably, the role of acting Attorney General (though not the Attorney General role) could be considered “germane” to Rosenstein's position as Deputy Attorney General, *see id.*, but the germaneness analysis itself is essentially functional in nature.

366. 5 U.S.C. § 3346. None of these proposals, including my own, address the—ideally rare—prospect of Senate collusion with the President to delay confirmation hearings on a nomination. Such collusion might result in an unvetted acting official being left in place or the confirmation of an individual in a lower-level position with the expectation, say, that the person will act as Cabinet secretary. Such concerns might apply to the party-line vote to confirm Chad Wolf to be an undersecretary at DHS with the understanding that he would immediately rise to the post of acting Secretary for Homeland Security. *E.g.*, Nick Miroff, *Chad Wolf Sworn in as Acting Department of Homeland Security Chief; Ken Cuccinelli to be Acting Deputy*, WASH. POST (Nov. 13, 2019, 7:47 PM), [https://www.washingtonpost.com/immigration/chad-wolf-sworn-in-as-acting-department-of-homeland-security-chief-fifth-under-trump/2019/01/13/6633a614-0637-11ea-8292-c46ee8cb3dce\\_story.html](https://www.washingtonpost.com/immigration/chad-wolf-sworn-in-as-acting-department-of-homeland-security-chief-fifth-under-trump/2019/01/13/6633a614-0637-11ea-8292-c46ee8cb3dce_story.html) (commenting that senators voted fifty-four to forty-one to confirm him for a different job, “largely along party lines”).

unconfirmed individuals, but the Senate could reduce such risks by acting on the presidential nomination. Others, including Matthew Stephenson, have suggested solutions worth considering for significant Senate recalcitrance.<sup>367</sup>

Finally, consider inferior officers. Here, the 210-day FVRA authorization of acting service without Senate confirmation is constitutionally permissible, since such positions need not be filled by Senate-confirmed officials at all. And it may be that Senate confirmation realistically is not needed for these officials; supervision may be sufficient. But the FVRA's effective restructuring of such appointments is backhanded at best, because presidential choices or simple inaction might end up dictating which offices will or will not be occupied by Senate-confirmed officials. Instead, perhaps informed by the functional analysis above, and following its success with the Presidential Appointment Efficiency and Streamlining Act of 2011, Congress should directly deliberate over which Executive Branch positions should be subject to Senate confirmation.

The analysis here suggests several other reforms as well. First, Congress might more thoughtfully set eligibility requirements for acting principal officers. Currently, the FVRA's default is to the "first assistant," for example, but the FVRA requires no agency experience or other qualifications for that person to serve. The FVRA also authorizes the President to designate a civil servant, paid at a level of GS-15 or higher, and that person need only have worked at the agency for ninety days. If no Senate-confirmed deputy is available, Congress could limit acting officer eligibility to those with significant agency-specific experience predating the vacancy. Such a change might increase the likelihood that senior career officials will serve as acting officials, with probable benefits for agency function.<sup>368</sup> Congress might also more specifically limit the time of service by an inexperienced individual.

Congress also should attend to the particular tasks carried out by acting officials. Especially for Cabinet officials, Congress might specifically consider whether certain tasks simply should be undertaken only by a duly confirmed principal officer.

Congress also should clearly restrict the wholesale delegation of a vacant Senate-confirmed position's powers, as this practice has effectively created a new class of pseudo-acting officials subject to neither time nor qualifications limits. It should go without saying that a Senate-rejected nominee should not be able to exercise the powers of the office by receiving a delegation. Congress conceivably might deem permissible narrow delegations of individual authorities if accomplished significantly prior to the vacancy, consistent with traditional practice, or under particular conditions of need.

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367. See Stephenson, *supra* note 54.

368. See *supra* text accompanying notes 289–291.

Such an approach might allow some exigencies to be addressed while not seriously undermining the Senate confirmation process.

Finally, Congress might consider other solutions to the acting officials problem to reduce risks associated with an unconfirmed acting Cabinet secretary. For example, Congress could create a “shadow cabinet,” in which the President nominates and the Senate confirms “backup” Cabinet officials.<sup>369</sup> Such individuals could be confirmed to serve in case of Cabinet-level vacancies and occupy posts elsewhere in the meantime. This is a variant of the proposal to specifically require Senate-confirmed deputy officials to serve as acting Cabinet officials in those agencies<sup>370</sup> pending Senate confirmation of a presidential nominee.<sup>371</sup> Again, however, service by such individuals should be subject to strict time limitations.

The administrative state has long been a central feature of American government, raising recurring issues of accountability, democratic responsiveness, legitimacy, and institutional structure. The acting officials problem usefully focuses us on the tug-of-war over the role agency leaders play—whether conduits for democratic accountability, technical knowledge, or both—and how they are best chosen. A functional approach to the Appointments Clause in context must take account of the genuine need for presidential flexibility to support institutional function, but also honor the need for Senate confirmation to ensure that agency leaders are highly qualified, appropriately democratically responsive, and above reproach. Current Appointments Clause doctrine should be clarified and statutes reformed to limit presidential reliance on acting officials and ensure that the President properly nominates officials for Senate confirmation.

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369. Thanks to Dan Epps and Anne Joseph O’Connell, both of whom suggested variants of this idea in conversation. See also Stuart Minor Benjamin & Mitu Gulati, “Mr. Presidential Candidate: Whom Would You Nominate?,” 42 LOY. L.A. L. REV. 293, 295–96 (2009) (outlining a process to make presidential candidates propose nominees for Cabinet positions).

370. Currently, nearly all major agencies have a Senate-confirmed deputy position, including the Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, Interior, Justice, Labor, Transportation, Treasury, and Veterans’ Affairs, as well as the EPA, and the Small Business Administration. The Department of State has Senate-confirmed undersecretaries. Neither the General Services Administration, the Office of Government Ethics, nor the CFPB, however, have Senate-confirmed deputies. See generally PLUM BOOK, *supra* note 11 (listing federal government positions that require Senate confirmation).

371. See Shear & Cooper, *supra* note 364.