NOTE

TOO MUCH "ACTING," NOT ENOUGH CONFIRMING: THE CONSTITUTIONAL IMBALANCE BETWEEN THE PRESIDENT AND SENATE UNDER THE FEDERAL VACANCIES REFORM ACT

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INTRODUCTION

Consider a dilemma the federal government encounters as a matter of course: An agency office requiring presidential appointment with the Senate's consent becomes vacant when its holder dies, resigns, or cannot fulfill the office's obligations for some other reason. The standard procedure for filling such an office, one laid out in the Constitution, would begin with the President nominating a replacement.[1] Then senators would need to weigh the nominee's qualifications for the office, mull over any complicating political considerations, and take a vote. This process could drag on—perhaps too long for the affected agency to have a confirmed officer in place to make an important decision or deal with a major crisis. How can this scenario be averted? That is a "uniquely Washingtonian question"[2] lacking a simple answer.

One answer—the answer Congress chose with the Federal Vacancies Reform Act of 1998 ("FVRA")—would be to create a statute granting the President vast power to temporarily fill key vacancies with acting officers absent Senate approval.[3] So much power, in fact, that the President can use it to designate an official with dubious credentials to lead the Department of Justice;[4] to elevate, notwithstanding Senate opposition, a handpicked candidate to oversee the implementation of a signature policy agenda;[5] or to rapidly cycle through a series of leaders[6] for a cabinet department with an expansive remit ranging from disaster relief to border enforcement.[7]

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1 *See* U.S. CONST. art. II, § 2, cl. 2.

2 Stand Up for California! v. U.S. Dep't of Interior, 298 F. Supp. 3d 136, 137 (D.D.C. 2018).

3 *See* 5 U.S.C. §§ 3345–3349d (2018).

4 *See* Mark Maremont, *Acting Attorney General Matthew Whitaker Incorrectly Claims Academic All-American Honors*, WALL ST. J., https://www.wsj.com/articles/acting-attorney-general-matthew-whitaker-incorrectly-claims-academic-all-american-honors-11545844613 [https://perma.cc/3B3R-KV3K] (last updated Dec. 26, 2018, 8:49 PM).

5 *See* Press Release, U.S. Citizenship & Immigration Servs., Cuccinelli Named Acting Director of USCIS (June 10, 2019), https://www.uscis.gov/news/news-releases/cuccinelli-named-acting-director-uscis [https://perma.cc/H47V-59LG].

6 *See* Camilo Montoya-Galvez, *Chad Wolf Takes Over as Trump's Homeland Security Chief, Tasked with Immigration Crackdown*, CBS NEWS (Nov. 13, 2019, 6:30 PM), https://www.cbsnews.com/news/chad-wolf-installed-as-trumps-homeland-security-chief-tasked-with-immigration-crackdown/ [https://perma.cc/R9VM-WG87] (pointing out the "unusual turnover for the [homeland security secretary] post").

7 *See Operational and Support Components*, U.S. DEP'T HOMELAND SECURITY, https://www.dhs.gov/operational-and-support-components [https://perma.cc/Z6XF-U8UY] (last visited Aug. 1, 2020).

The FVRA governs the circumstances and length of "acting" service for officials in the Executive Branch.[8] It is a functionalist statute that straddles two competing constitutional imperatives: the Senate's duty to provide "Advice and Consent" in the appointments process[9] and the President's obligation to "take Care that the Laws be faithfully executed."[10] This Note argues that the FVRA, as presently constituted, overwhelmingly facilitates the latter at the expense of the former. Acting service passes constitutional muster only if the President cannot use it to aggrandize the President's own authority by expediently bypassing Senate confirmation—an important check on presidential power enshrined in the Appointments Clause.[11] Accordingly, this Note proposes amending the FVRA with an eye toward reining in the President's capacity to use acting officials to thwart the Senate's constitutional prerogative to approve candidates for high-level positions in the Executive Branch.[12]

On a basic level, the FVRA can be understood as the codification of contingency plans for vacancies caused by specified events in Executive Branch offices that typically require presidential appointment with the Senate's consent. When high-level positions in executive agencies become vacant due to an officer's death, resignation, or inability to carry out the office's duties for some other reason, the FVRA activates to fill the position on a temporary basis with an acting officer absent Senate approval.[13] The FVRA thus promotes the smooth functioning of the Executive Branch at times when it would otherwise operate with a depleted membership.

The President's use of the FVRA to temporarily fill vacated agency posts with acting officers can be considered an "ap-

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8 *See* §§ 3345–3349d.

9 U.S. CONST. art. II, § 2, cl. 2.

10 *Id.* art. II, § 3.

11 *See id.* art. II, § 2, cl. 2.

12 An evaluation of the negative repercussions of using acting officials is beyond the scope of this Note. For a brief treatment of the topic, consider Acting Officers, 6 Op. O.L.C. 119, 121 (1982). The OLC argued that an acting officer's stature is "as a practical matter . . . often somewhat inferior" even though the officer "has the same legal authority as a presidential appointee." *Id.* An acting officer "is frequently considered merely a caretaker without a mandate to take far-reaching measures." *Id.* Professor Anne Joseph O'Connell has explained that the use of acting officers can undermine policymaking through agency inaction and confusion, as well as a reduction in agency accountability. *See* Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 938–46 (2009).

13 *See* Hooks *ex rel.* NLRB v. Kitsap Tenant Support Servs., 816 F.3d 550, 553 (9th Cir. 2016) (describing the Ninth Circuit's assessment of "the President's ability [under the FVRA] to temporarily fill vacancies in offices of the Executive branch that ordinarily require Senate confirmation").

pointment" in a literal sense if not a legal one. According to one view of the FVRA, the president makes an "appointment" pursuant to the Appointments Clause when the President "direct[s]" an official to "perform the functions and duties" of a vacated position on an acting basis pursuant to the FVRA.[14] A different view would posit that acting designations made pursuant to the FVRA are exceptions to the Appointments Clause similar in kind to recess appointments.[15] Yet unlike recess appointments, acting service has no explicit textual support in the Constitution.[16]

The use of acting officers long predates the FVRA's passage. The FVRA is merely the latest statutory iteration of a practice Congress first approved during George Washington's presidency.[17] The Department of Justice's Office of Legal Counsel (OLC) documented more than 160 instances prior to 1860 "in which non-Senate-confirmed persons performed, on a temporary basis, the duties of such high offices as Secretary of State, Secretary of the Treasury, Secretary of War, Secretary of the Navy, Secretary of the Interior, and Postmaster General."[18]

In spite of its deep historical support, the use of acting officials emerged as a major source of controversy during the presidency of Donald Trump, who liberally used the FVRA to fill a slew of influential positions in his administration.[19] Notably,

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14 *See* 5 U.S.C. § 3345(a) (2018); NLRB v. SW Gen., Inc., 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring) (noting that "[w]hen the President 'direct[s]' someone to serve as an officer pursuant to the FVRA, he is 'appoint[ing]' that person as an 'officer of the United States' within the meaning of the Appointments Clause" (alterations in original)).

15 *See* NLRB v. Noel Canning, 573 U.S. 513, 518–19 (2014) (explaining that "[o]rdinarily the President must obtain 'the Advice and Consent of the Senate' before appointing an 'Office[r] of the United States[,]' [b]ut the Recess Appointments Clause creates an exception" that grants "the President alone the power 'to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session'" (first alteration in original) (citations omitted)).

16 *See* U.S. CONST. art. II, § 2, cl. 3; E. Garrett West, Note, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 211 (2018) (stating that "the Constitution's text clearly forbids the President from making temporary appointments without prior congressional authorization").

17 *See* Doolin Sec. Sav. Bank v. Office of Thrift Supervision, 139 F.3d 203, 209–10 (D.C. Cir. 1998) (discussing legislation passed in 1792 allowing the President to designate officials to temporarily perform the duties of specified offices).

18 Designating an Acting Attorney General, 42 Op. O.L.C. 1, 2 (2018) [hereinafter Acting Attorney General].

19 *See* Rebecca Ballhaus, Natalie Andrews, & Nancy A. Youssef, *Number of Acting Cabinet Heads Raises Concern on Capitol Hill*, WALL ST. J., https://www.wsj.com/articles/number-of-acting-cabinet-heads-raises-concern-on-capitol-hill-11554853521 [https://perma.cc/LQU3-H2XS] (last updated Apr. 9, 2019, 11:46 PM) (asserting that "President Trump is filling his cabinet with acting

the designation of Matthew Whitaker—who previously served as the Attorney General's chief of staff and was widely considered unfit to serve as the federal government's top legal official—as acting Attorney General led to waves of criticism and precipitated multiple legal challenges.[20] There was also vehement pushback to the selection of Ken Cuccinelli—who previously did not hold a federal-government position of any kind—for acting Director of U.S. Citizenship and Immigration Services.[21]

While the recent uproar over acting service largely stems from perceived abuses of the FVRA during Trump's presidency, it is properly understood as a foreseeable consequence of the structure of the legislative lever that the President—*any* president, not just President Trump—can pull to temporarily fill key positions in the Executive Branch absent Senate consent. This Note charts a path toward fixing that structure. The changes to the FVRA it proposes will be guided, first and foremost, by the need to remedy the constitutional imbalance between Article II's Take Care Clause and the Senate's advice and consent authority. They will take into account how the understanding of the appointments process at the founding has shaped the Supreme Court's Appointments Clause jurisprudence; FVRA case law; and Executive Branch interpretations of the statute as expressed in OLC opinions. They also will be calibrated for the modern realities of the appointments process, particularly Senate obstructionism. The underlying goal with these proposals is to cabin the President's discretion to turn to acting service as a means of forgoing Senate approval to fill high-level offices in the Executive Branch.

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officials, leaving several agencies in limbo about their long-term priorities and prompting concerns from lawmakers in both parties about their accountability to Congress").

[20] *See, e.g.*, Motion of Plaintiff, Maryland v. United States, No. 1:18-CV-02849-ELH (D. Md. Nov. 13, 2018) (court challenge to Whitaker's acting designation from the state of Maryland); Press Release, Att'y Gen. Brian Frosh, Attorney General Frosh Files Motion Challenging the Appointment of Whitaker as Acting Attorney General (Nov. 13, 2018), http://www.marylandattorneygeneral.gov/press/2018/111318.pdf [https://perma.cc/L4SD-RLGJ] (noting the Maryland attorney general's description of "President Trump's brazen attempt to flout the law and Constitution in bypassing [the deputy attorney general] in favor of a partisan and unqualified staffer").

[21] *See, e.g.*, Letter from Democracy Forward Foundation et al. to William Barr, Att'y Gen. of the U.S., and Jessie K. Liu, U.S. Att'y (July 22, 2019), https://democracyforward.org/wp-content/uploads/2019/07/Cuccinelli-Letter-final-to-send.pdf [https://perma.cc/S2XB-F57X] (arguing that Cuccinelli's acting designation was unlawful).

This Note proceeds as follows. Part I describes the FVRA's basic mechanics, highlights aspects of the statute this Note's proposed changes seek to address, and details Trump Administration controversies illustrating how, with regard to the process of filling the upper ranks of executive agencies, the FVRA amplifies presidential authority to the detriment of the Senate's authority. Part II analyzes the FVRA's constitutional foundation, delineates the key tension in the statute flowing from the nexus between the President's take care obligation and the Senate's advice and consent function, argues that the FVRA aids the former at the expense of the latter, and contextualizes this argument by describing the increasing Senate resistance the President must overcome in today's appointments process. Part III sets forth changes to the FVRA in view of its constitutional imbalance between the Take Care Clause and Senate advice and consent.

I
THE FVRA'S APPLICATION AND TRUMP ADMINISTRATION CONTROVERSIES

The FVRA represents Congress's latest statutory formalization of a government practice with long-standing acceptance.[22] The use of acting officials dates back to the late eighteenth century.[23] A vacancies act passed in 1868[24] underwent significant changes over the next 130 years[25] leading up to the FVRA, which was enacted in the wake of Bill Lann Lee's controversial designation as Acting Assistant Attorney General for Civil Rights during Bill Clinton's presidency.[26]

22 *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 934 (2017) (noting that "Congress has long accounted for" vacancies in positions requiring Senate confirmation "by authorizing the President to direct certain officials to temporarily carry out the duties of [such positions] without Senate confirmation").

23 *See* Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281.

24 Act of July 23, 1868, ch. 227, 15 Stat. 168, 168–69.

25 *See, e.g.*, Presidential Transitions Effectiveness Act, Pub. L. No. 100–398, 102 Stat. 985, 988 (1988) (providing for the possibility of 120 days of acting service).

26 *See* MORTON ROSENBERG, CONG. RESEARCH SERV., THE NEW VACANCIES ACT: CONGRESS ACTS TO PROTECT THE SENATE'S CONFIRMATION PREROGATIVE 1 (1998), https://www.everycrsreport.com/files/19981102_98-892_e35b004e5166781e938da36cf87598c023b03614.pdf [https://perma.cc/5EHH-H67S] (noting that Bill Lann Lee's designation "revived a longstanding interbranch controversy over the legal propriety of the failure of executive branch departments and agencies to consistently comply with the provisions of the Vacancies Act").

A. Applying the FVRA

The FVRA provides a framework for acting officers to serve in vacant Executive Branch positions requiring appointment by the President with the Senate's consent,[27] otherwise referred to as "PAS" positions.[28] Its intention was to function "in most cases" as "the exclusive means for filling a vacant [PAS] position" in the Executive Branch with an acting official.[29] Pursuant to this role, the FVRA is triggered when an official serving in a PAS position in an executive agency "dies, resigns, or is otherwise unable to perform the functions and duties of the office."[30] Once triggered, the FVRA offers three methods for temporarily filling vacancies with acting officers.[31]

One method is for the first assistant to the vacated position to serve in that position on an acting basis.[32] This is the method the FVRA—through its directive that the "first assistant to the [vacated office] shall perform" the office's functions and duties in an acting capacity when the FVRA is triggered—contemplates applying as a natural consequence of the creation of a vacancy.[33] The Supreme Court has termed this FVRA method for filling vacancies the statute's "default rule."[34] The lack of clarifying details about the "first assistant" can complicate the application of this default rule.[35] The FVRA neither defines this phrase nor indicates when the first assistant's identity must be determined vis-à-vis the occurrence of the vacancy.[36] One general definition of first assistant provided around the time of the FVRA's passage is "a term of art that generally refers to the top deputy."[37] Yet depending on the

27 *See* 5 U.S.C. §§ 3345–3349d (2018).

28 NLRB v. SW Gen., Inc., 137 S. Ct. 929, 934 (2017) (explaining that an "office requiring Presidential appointment and Senate confirmation" is "known as a 'PAS' office").

29 Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 62 (1999) [hereinafter FVRA Guidance].

30 § 3345(a).

31 *See id.*

32 *See* § 3345(a)(1) (providing that "the first assistant to the [vacated office] shall perform the functions and duties of the office temporarily in an acting capacity").

33 *See* United States v. Patara, 365 F. Supp. 3d 1085, 1089 (S.D. Cal. 2019) (asserting that "[t]he imperative use of shall indicates that the operation of § 3345(a)(1) is automatic, thus establishing that the immediate successor to a vacant executive office is that office's 'first assistant'").

34 NLRB v. SW Gen., Inc., 137 S. Ct. 929, 935 (2017).

35 § 3345(a)(1).

36 *See* 5 U.S.C. §§ 3345–3349d (2018).

37 144 CONG. REC. S11,037 (daily ed. Sept. 28, 1998) (statement of Sen. Lieberman). The OLC has generally defined "first assistant" in functionally identical

agency position involved, the phrase may be specifically defined by statute or regulation.[38] For example, a statute specifies that the Department of Homeland Security's Deputy Secretary "shall be the Secretary's first assistant for purposes of" the FVRA.[39]

An alternative method for temporarily filling a vacancy through the FVRA is for the President to set aside the default rule and designate for acting service an official serving in a different PAS position.[40] Under this method, the President is not restricted to selecting officials from the agency in which the vacancy occurred.[41] One high-profile example from the Trump Administration is the selection of Mick Mulvaney, who was already serving as the Director of the Office of Management and Budget, to become the Acting Director of the Consumer Financial Protection Bureau.[42]

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terms. *See* Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177, 179 (2001) [hereinafter Acting Associate Attorney General].

38 *See* FVRA Guidance, *supra* note 29, at 63 (clarifying that "a designation of a first assistant by statute, or by regulation where no statutory first assistant exists, should be adequate to establish a first assistant for purposes of" the FVRA); VALERIE C. BRANNON, CONG. RESEARCH SERV., THE VACANCIES ACT: A LEGAL OVERVIEW 9–10 (2018), https://fas.org/sgp/crs/misc/R44997.pdf [https://perma.cc/ZB3E-Q4M3].

39 6 U.S.C. § 113(a)(1)(A) (2018). There are specific statutory provisions governing acting service for many agencies. *See* ANNE JOSEPH O'CONNELL, ACTING AGENCY OFFICIALS AND DELEGATIONS OF AUTHORITY 75–99 (2019) (draft report), https://www.acus.gov/sites/default/files/documents/draft-report-acting-agency-officials-09162019_0.pdf [https://perma.cc/5MGL-WGD6] (offering a lengthy list of succession statutes specific to particular agencies). How these provisions are to be harmonized with the FVRA is not entirely clear. A plain-text reading of the FVRA's exclusivity provision suggests the agency-specific provisions may be capable of displacing the FVRA. *See* § 3347(a)(1). But the weight of authority on this issue indicates the FVRA can operate alongside the agency-specific provisions. *See, e.g.*, Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 356 F. Supp. 3d 109, 139 (D.D.C. 2019), *aff'd*, 920 F.3d 1 (D.C. Cir. 2019) (stating that when an agency-specific statute applies "the FVRA is no longer the *exclusive* means of filling a vacancy, but it remains *a* means of filling the vacancy"), *aff'd*, 920 F.3d 1 (D.C. Cir. 2019); Designating an Acting Director of the Bureau of Consumer Financial Protection, 41 Op. O.L.C. 1, 5 (2017) [hereinafter Acting CFPB Director] (pointing out that "in calling the Vacancies Reform Act the 'exclusive means' for designations 'unless' there is another applicable statute, Congress has recognized that there will be cases where the Vacancies Reform Act is non-exclusive").

40 *See* § 3345(a)(2) (providing that the President "may direct a person who serves in [a PAS office] to perform the functions and duties of the vacant office temporarily in an acting capacity").

41 *See id.*; *see also* Thomas A. Berry, S.W. General*: The Court Reins in Unilateral Appointments*, 2017 CATO SUP. CT. REV. 151, 157 (noting that § 3345(a)(2) allows "the president [to] choose any currently serving Senate-confirmed officer from any part of the executive branch to serve as the acting officer").

42 *See* English v. Trump, 279 F. Supp. 3d 307, 314 (D.D.C. 2018), *motion for voluntary dismissal granted*, 2018 WL 3526296 (D.C. Cir. 2018).

The FVRA's third method for temporarily filling a vacancy with an acting officer is a different alternative to the default rule. In lieu of designating for acting service an official serving in a different PAS position, in accordance with the other default-rule alternative explained above,[43] the President can designate an official from inside the agency where the vacancy occurred who is not serving in a PAS position if that official meets specified experience and salary requirements.[44] In particular, the official must have served in a position in the affected agency for at least ninety of the 365 days preceding the creation of the vacancy, and the pay rate for that position must meet or exceed the minimum rate for a GS–15 position on the General Schedule pay scale for federal-government employees.

This FVRA method for temporarily filling a vacancy with an acting officer, prescribed by § 3345(a)(3), doubles as a largely unobstructed path for the President to evade the constitutional prescription that the Senate confirm Executive Branch nominees.[45] Although none of the FVRA's three options for initiating acting service requires Senate approval for the acting designation itself,[46] § 3345(a)(3)—unlike the FVRA's other alternative to the default rule[47]—expressly permits the president to temporarily fill a vacant PAS position in an executive agency with an officer serving in a position that does not require appointment by the President with the Senate's consent pursuant to the Appointments Clause.[48] It is undoubtedly true that "the pay scale and tenure requirements of [§ 3345(a)(3)] may ensure designees of adequate experience within the agency."[49] Indeed, such a designee may well be the best among possible choices for a particular vacancy.[50] But those considerations do not

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43 *See* § 3345(a)(2).

44 *See* § 3345(a)(3) (providing that the President "may direct an officer or employee of [the affected agency] to perform the functions and duties of the vacant office temporarily in an acting capacity" if the officer or employee meets specified experience and salary requirements).

45 *See* U.S. CONST. art. II, § 2, cl. 2.

46 *See* § 3345(a); *see also* Thomas Berry, *Is Matthew Whitaker's Appointment Constitutional? An Examination of the Early Vacancies Acts*, YALE J. REG.: NOTICE & COMMENT (Nov. 26, 2018), https://www.yalejreg.com/nc/is-matthew-whitakers-appointment-constitutional-an-examination-of-the-early-vacancies-acts-by-thomas-berry/ [https://perma.cc/JP5M-L33X] (noting that "[i]n any of [the FVRA's] three alternatives, the acting officer begins serving immediately, without the need for Senate consent").

47 *See* § 3345(a)(2).

48 *See* § 3345(a)(3).

49 Hooks *ex rel.* NLRB v. Kitsap Tenant Support Servs., 816 F.3d 550, 561 (9th Cir. 2016).

50 *See infra* notes 183–184 and accompanying text.

account for how § 3345(a)(3) both works a circumvention of the Senate's pivotal check on the President's constitutional appointment power[51] and undermines an important source of public accountability.[52]

Officers tabbed to serve in acting capacities cannot do so indefinitely. Rather, they can serve in an acting capacity for 210 days starting the day the vacancy is created.[53] Separately, the FVRA allows an official to serve in an acting capacity during the pendency of a nomination for the vacated position; if the nomination is withdrawn, rejected by the Senate, or returned to the President, the acting official can serve for 210 additional days.[54] If the President subsequently submits another nomination for the vacated position following the initial withdrawal, rejection by the Senate, or return to the President, the acting official can serve in the vacated position through the pendency of the subsequent nomination, plus an additional 210 days if the nomination is again withdrawn, rejected by the Senate, or returned to the President. Moreover, the FVRA accounts for the natural uptick in Executive Branch personnel turnover amid changes in presidential administrations[55] by delaying the start of the 210-day period for acting service if a vacancy exists within the sixty-day period that begins on inauguration day.[56]

Taken together, the FVRA's time restrictions on acting service are eminently lenient in a general sense and unquestionably accommodating of the President's take care obligation in a particular one, especially when compared with the time restric-

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[51] *See* John Y. Mason, Power of President to Appoint to Office During Recess of Senate, 4 Op. Att'y Gen. 523, 527 (1846) [hereinafter Recess Appointments] (asserting that "[t]he constitution, as a general proposition, gives to the President the power of appointment. To guard against its improper exercise the concurrence of the Senate is made necessary").

[52] *Cf.* NLRB v. Noel Canning, 573 U.S. 513, 541 (2014) (arguing that "to rely on acting officers would lessen the President's ability to staff the Executive Branch with people of his own choosing, and thereby limit the President's control and political accountability").

[53] *See* § 3346(a)(1) (2018) (providing that the acting official can serve in the vacated position "for no longer than 210 days beginning on the date the vacancy occurs").

[54] *See* § 3346(a)–(b).

[55] *See* Stand Up for California! v. U.S. Dep't of Interior, 298 F. Supp. 3d 136, 137 (D.D.C. 2018) (indicating that the use of acting officials is an issue that can "become[ ] acute during presidential transitions, when thousands of senior political appointees exit the government, often leaving their positions vacant for months or even years").

[56] *See* § 3349a(b) (providing that for vacancies that "exist[ ] during the 60-day period beginning on a transitional inauguration day, the 210-day period . . . shall be deemed to begin on the later of the date occurring" ninety days after the inauguration or ninety days after the creation of the vacancy).

tions imposed by the FVRA's predecessors. The 1868 vacancies act limited acting service to ten days in cases of "death or resignation."[57] Congress later increased the limit to thirty days,[58] and then increased it again to 120 days.[59] With the FVRA, Congress sanctioned extraordinarily long periods of acting service during which the President is not required to initiate the constitutional appointments process by submitting a nomination for the Senate's consideration: the FVRA allows an acting officer to serve in the vacated position either (a) for 210 days starting the day the vacancy is created or (b) for the pendency of two nominations to the vacated position as well as an additional period following a withdrawal, rejection by the Senate, or return to the president.

Among the questions the FVRA leaves unanswered, two are particularly relevant to the changes proposed in this Note.[60] The first is whether it is permissible for an official to serve in an acting capacity through the FVRA's default rule[61] when the official did not become the first assistant to the vacated position until after the vacancy was created. Stated differently, the issue is whether someone can become the acting officer on account of being the first assistant if that person took on the first assistant title after the vacancy occurred. The FVRA does not categorically prohibit such an action.[62] After initially expressing doubt over its propriety,[63] the OLC changed its view two years later, concluding that "our initial understanding was

57 Act of July 23, 1868, ch. 227, § 3, 15 Stat. 168, 168.

58 Act of Feb. 6, 1891, ch. 113, 26 Stat. 733.

59 Presidential Transitions Effectiveness Act, Pub. L. No. 100–398, 102 Stat. 985, 988 (1988).

60 *See infra* Part III.

61 *See supra* note 34 and accompanying text.

62 *See* § 3345(a)(1) (providing only that the first assistant to the vacated office "shall perform the functions and duties of the office temporarily in an acting capacity subject to [§ 3346's] time limitations").

63 *See* FVRA Guidance, *supra* note 29, at 63–64 (explaining that "we believe that the better understanding is that you must be the first assistant when the vacancy occurs in order to be the acting officer by virtue of being the first assistant").

erroneous."[64] If permissible,[65] the post hoc titling of first assistants amounts to an enormous loophole in the FVRA.

One of the other questions the FVRA leaves unanswered is whether the FVRA can be used to designate an acting officer to temporarily fill a vacancy caused by presidential removal. Here, too, the FVRA does not provide a straightforward solution.[66] The statute is triggered when an official serving in a PAS position in an executive agency "dies, resigns, or is otherwise unable to perform the functions and duties of the office."[67] Whether a presidential firing can bring about an officer's inability to perform a position's functions and duties is uncertain. For its part, the OLC has broadly read § 3345(a) to encompass presidential removal.[68] If that reading is correct, it would vest the President with broad authority to sidestep the Appointments Clause by using the FVRA to temporarily fill vacancies that can be created at the President's discretion.[69]

B. FVRA Controversies During the Trump Presidency

Until recently, the FVRA operated in tandem with the appointments process largely without drawing public attention.[70]

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64 Acting Associate Attorney General, *supra* note 37. The OLC explained that "we now believe that the better understanding is that an individual need not be the first assistant when the vacancy occurs in order to be the acting officer by virtue of being the first assistant." *Id.* at 181. The soundness of this conclusion arguably rests on slippery ground in light of the Supreme Court's decision in *SW General*. *See* Berry, *supra* note 41, at 171–73 (noting that one of the two arguments OLC provided for its change in position "depended entirely on the premise that the Supreme Court rejected in *S.W. General*").

65 In its next section, this Note will address this issue through a review of Ken Cuccinelli's designation as Acting Director of U.S. Citizenship and Immigration Services. In March 2020, the U.S. District Court for the District of Columbia held that Cuccinelli's acting designation did not comply with the FVRA. *See* L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 29 (D.D.C. 2020).

66 *See* § 3345(a) (providing only that a vacancy is created within the meaning of the FVRA when a specified official "dies, resigns, or is otherwise unable to perform the functions and duties of the office").

67 *Id.*

68 *See* Acting CFPB Director, *supra* note 39, at 4 (asserting that "[i]n our view, an officer is 'unable to perform the functions and duties of the office' during both short periods of unavailability, such as a period of sickness, and potentially longer ones, such as one resulting from the officer's removal"). *But see* United States v. Valencia, No. 5:17–CR–882–DAE(1)(2), 2018 WL 6182755, at *4 (W.D. Tex. Nov. 27, 2018) (concluding in dicta that the FVRA would not apply in the event of a firing).

69 *Cf.* Ben Miller-Gootnick, Note, *Boundaries of the Federal Vacancies Reform Act*, 56 HARV. J. LEGIS. 459, 490 (2019) (noting the "unique constitutional concerns removal presents, and the heightened interest the Senate retains in protecting its advice and consent role when an officer is fired").

70 *See* Richard E. Levy, *Presidential Power in the Obama and Trump Administrations*, 87 J. KAN. B. ASS'N 46, 54 (2018) (describing how "the FVRA was an

To be sure, issues occasionally arose concerning the FVRA's application in particular circumstances.[71] But Donald Trump's presidency exposed the FVRA to heightened scrutiny. Deployed promiscuously to carry out Trump's policies, the statute figured prominently in a number of controversies involving acting service and prompted criticism over the number of officials serving in important Executive Branch positions without Senate approval.[72]

One obvious reason these controversies arose is President Trump's preference for acting officials: Trump stated that making acting designations "gives you much greater flexibility. A lot easier to do things."[73] Trump acted on this preference by relying on the FVRA more consistently than his predecessors. As of July 2019, halfway through the third year of Trump's presidency, he had designated twenty-five cabinet secretaries to serve in an acting capacity for ten or more days—at least ten more than all but one of the previous five presidents designated during their entire time in office.[74] Using the same date as a benchmark, President Trump also had more cabinet secretaries serve in an acting capacity for at least 100 days than all five previous presidents did while they were in office.[75] Of the many officers who served in acting capacities during Trump's presidency, two are worth discussing at length because they illuminate issues this Note's proposed changes to the FVRA seek to address.[76]

The first relevant acting designation is that of Matthew Whitaker. President Trump chose Whitaker to serve as Acting Attorney General ("AG") following the resignation of AG Jeff

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obscure statute" when the Supreme Court issued its *SW General* decision in 2017).

71 *See, e.g.*, Designation of Acting Director of the Office of Management and Budget, 27 Op. O.L.C. 121 (2003) (providing advice about whether the President could use the FVRA to select the Executive Associate Director of the Office of Management and Budget to serve as that office's Director on an acting basis).

72 *See, e.g.*, Matt Ford, *An Administration Run by Temp Workers*, NEW REPUBLIC (June 19, 2019), https://newrepublic.com/article/154243/trump-administration-cabinet-acting-department-secretaries [https://perma.cc/JUF4-RZAM] (arguing that during Trump's presidency the FVRA "bec[a]me a vehicle to place favored underlings in charge of major federal bureaucracies without the Republican Senate's approval").

73 Remarks by President Trump Before Marine One Departure (June 18, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-48/ [https://perma.cc/G88X-FDKX].

74 *See* O'CONNELL, *supra* note 39, at 20.

75 *See id.* at 21.

76 *See infra* Part III.

Sessions.[77] Before being named Acting AG, Whitaker was serving as Sessions's chief of staff: a position within the Department of Justice but one that neither required presidential appointment with the Senate's consent nor qualified Whitaker as the department's specified first assistant to the AG for purposes of the FVRA.[78] But Whitaker had served in that position for at least ninety days in the year preceding Sessions's resignation, and the position did clear the minimum pay rate for a GS–15 position on the General Schedule pay scale.[79] This meant President Trump, pursuant to § 3345(a)(3), could designate Whitaker as Acting AG in compliance with the FVRA even though Whitaker was widely deemed unqualified to serve as the nation's chief law-enforcement official.[80] In doing so, President Trump dispensed with Senate approval to fill one of the most influential positions in the federal government, dodging the Appointment Clause's essential restraint on presidential discretion and "def[ying] one of the explicit checks and balances set out in the Constitution, a provision designed to protect us all against the centralization of government power."[81] Although the Senate confirmed an AG about three months after Whitaker replaced Sessions in that position in an acting capacity,[82] the FVRA would not have prevented Whitaker from serving a far longer tenure as acting AG.[83]

Had President Trump fired Sessions rather than accepted his resignation, it is unlikely that the FVRA would have stood in the way of Trump designating Whitaker as Acting AG.[84] In fact, the OLC took this position in the opinion it produced in

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77 Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 356 F. Supp. 3d 109, 126 (D.D.C. 2019), *aff'd*, 920 F.3d 1 (D.C. Cir. 2019).

78 *See* Acting Attorney General, *supra* note 18, at 4–5.

79 *Id.* at 5.

80 *See, e.g.*, Bruce Fein, *Whitaker is Unfit to Be Attorney General, Acting or Otherwise*, AM. CONSERVATIVE (Nov. 19, 2018), https://www.theamericanconservative.com/articles/whitaker-is-unfit-to-be-attorney-general-acting-or-otherwise/ [https://perma.cc/CWH5-PZ4F] (claiming that "[t]he infinitude of legal ignorance Mr. Whitaker brings to his position is disqualifying").

81 Neal K. Katyal & George T. Conway III, *Trump's Appointment of the Acting Attorney General Is Unconstitutional*, N.Y. TIMES (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/opinion/trump-attorney-general-sessions-unconstitutional.html [https://perma.cc/T2WM-MWNE]; *cf.* Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 949 (2013) (explaining that "[t]he Senate does play an important checking role . . . in the appointments context").

82 165 CONG. REC. S1397 (daily ed. Feb. 14, 2019) (noting the confirmation of William P. Barr as AG).

83 *See* 5 U.S.C. § 3346 (2018).

84 *See id.* § 3345(a).

the wake of Whitaker's acting designation.[85] The Whitaker designation nonetheless underscores the potential difficulty of determining whether an officer's ouster from a PAS position in an executive agency suffices to trigger the FVRA. Here, President Trump "request[ed]" Sessions's resignation.[86] But if Sessions's departure was formally a resignation rather than a firing, it functionally appears capable of falling into either category. Within the first two paragraphs of its story on Sessions's losing the AG title, the *New York Times* stated both that President Trump "fired" Sessions and that Sessions "delivered his resignation letter to the White House at the request of the president."[87]

The second relevant acting designation is that of Ken Cuccinelli. After Cuccinelli, a former state attorney general with no prior federal-government experience,[88] was publicly linked to a top immigration position in the Trump Administration,[89] news reports indicated it was unlikely that Cuccinelli would earn enough votes for Senate confirmation.[90] Yet the Trump Administration managed to install Cuccinelli as Acting Director of

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85 *See* Acting Attorney General, *supra* note 18, at 4 n.1 ("Even if Attorney General Sessions had declined to resign and was removed by the President, he still would have been rendered 'otherwise unable to perform the functions and duties of the office' for purposes of section 3345(a).").

86 *Id.*

87 Peter Baker, Katie Benner, & Michael D. Shear, *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html [https://perma.cc/6VWV-LMY5]. *Compare* Kaelyn Forde, Cheyenne Haslett & Mike Levine, *Attorney General Jeff Sessions Fired by President Trump, Leaving Mueller Probe in New Hands*, ABC NEWS (Nov. 8, 2018, 7:57 AM), https://abcnews.go.com/Politics/attorney-general-jeff-sessions-resigns-trumps-request/story?id=59037350 [https://perma.cc/YTD5-D3A2] (stating that "President Donald Trump fired Attorney General Jeff Sessions"), *with* Carrie Johnson, *Jeff Sessions Forced Out as Attorney General After Constant Criticism from Trump*, NPR (Nov. 7, 2018, 2:45 PM), https://www.npr.org/2018/11/07/539109386/jeff-sessions-out-as-attorney-general-after-steady-drumbeat-of-criticism-from-tr [https://perma.cc/TAJ7-YY4P] (stating that Sessions "resigned under pressure as attorney general").

88 *Kenneth T. (Ken) Cuccinelli, Senior Official Performing the Duties of the Director, U.S. Citizenship and Immigration Services; Director (Vacant),* U.S. CITIZENSHIP AND IMMIGR. SERVICES, https://www.uscis.gov/about-us/leadership/kenneth-t-ken-cuccinelli-ii-acting-director-uscis [https://perma.cc/A6RN-4YBS] (last visited Aug. 2, 2020).

89 *See* Maggie Haberman & Zolan Kanno-Youngs, *Trump Expected to Pick Ken Cuccinelli for Immigration Policy Role*, N.Y. TIMES (May 21, 2019), https://www.nytimes.com/2019/05/21/us/politics/trump-ken-cuccinelli-immigration.html [https://perma.cc/S7DQ-H7ZU].

90 *See, 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 [https://perma.cc/CZ59-Y9MR] (stating that "the bottom line is Cuccinelli has little chance of getting approved for the job").

U.S. Citizenship and Immigration Services (USCIS) anyway—and thereby foil the Senate's constitutional obligation to approve the officers the President chooses to fill PAS positions in the Executive Branch—by taking advantage of a loophole in the FVRA. After the USCIS Director resigned at the request of President Trump,[91] the USCIS Deputy Director became the acting director pursuant to the FVRA.[92] Then the Trump Administration created a brand new position for Cuccinelli, Principal Deputy Director, and amended USCIS's line of succession to make that position the first assistant under the FVRA.[93] This combination of moves facilitated Cuccinelli's ascension, by way of § 3345(a)(1), to the USCIS acting director post.[94]

The Cuccinelli saga points up the President's capacity, upon identifying a favored candidate for an agency office, to not only elude the burden of Senate confirmation but also bend agency personnel hierarchies to satisfy the FVRA. When President Trump decided Cuccinelli was a desirable choice to coordinate immigration policy, the Appointments Clause, the Senate's firm opposition to Cuccinelli, and the FVRA all presented hurdles to Cuccinelli joining the Trump Administration. They were cleared with little trouble. As a result, "through nothing other than internal administrative reshuffling . . . the Trump administration was able to bootstrap Cuccinelli into the role of acting [USCIS] director."[95]

II
THE FVRA'S CONSTITUTIONAL FOUNDATION

The FVRA's constitutional foundation is most easily conceptualized in relation to the Appointments Clause. This is true whether one views acting designations as appointments pursuant to the Appointments Clause or as exceptions to that

91 Matthew Choi & Anita Kumar, *Citizenship and Immigration Services Chief Resigns*, POLITICO (May 24, 2019, 6:46 PM), https://www.politico.com/story/2019/05/24/immigration-cissna-cuccinelli-trump-1344956 [https://perma.cc/6358-L3C7] (noting that the USCIS director "resigned from his post . . . at President Donald Trump's request").

92 *See* Letter from Jerrold Nadler, Elijah E. Cummings & Bennie G. Thompson, House Comm. on the Judiciary, to Kevin K. McAleenan, U.S. Dep't of Homeland Sec. (June 18, 2019), https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/06-18-2019%20Letter%20to%20Acting%20Secretary%20McAleenan.pdf [https://perma.cc/P6GK-T7SC].

93 *See* L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 10–11 (D.D.C. 2020).

94 *See id.*

95 Steve Vladeck, *Ken Cuccinelli and the Federal Vacancies Reform Act of 1998*, LAWFARE (June 10, 2019, 4:17 PM), https://www.lawfareblog.com/ken-cuccinelli-and-federal-vacancies-reform-act-1998 [https://perma.cc/L9GW-M8TE].

clause.[96] The Appointments Clause requires "the Advice and Consent of the Senate" for the appointment of "Officers of the United States."[97] Relatedly, the FVRA governs acting designations to fill vacancies in offices requiring appointment by the President with the Senate's consent.[98] The Supreme Court long ago signaled its view that acting service is constitutional,[99] and Congress, through the enactment of the FVRA and antecedent legislation, has repeatedly endorsed this sidestepping of Senate confirmation as a practical necessity of running the Executive Branch.[100]

Because the constitutional basis of acting designations made pursuant to the FVRA is best understood in relation to appointments made pursuant to the Appointments Clause, it is useful, before evaluating the FVRA's constitutional foundation, to examine some of the basic constitutional principles underlying appointments the President makes "by and with the Advice and Consent of the Senate."[101] In particular, appointments made pursuant to the Appointments Clause are defined in part by the tension between the Senate's "Advice and Consent" duty[102] and the President's mandate to "take Care that the Laws be faithfully executed."[103]

A. The President's Take Care Obligation

The Take Care Clause provides that the President "shall take Care that the Laws be faithfully executed."[104] It is the Constitution's means of assigning responsibility for a pivotal task, connoting the straightforward notion that the leader of the Executive Branch must tend to the administration of fed-

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96 *See supra* notes 14–15 and accompanying text.

97 U.S. CONST. art. II, § 2, cl. 2.

98 *See* 5 U.S.C. § 3345(a) (2018).

99 *See* United States v. Eaton, 169 U.S. 331, 343 (1898) (explaining that when a "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"). The OLC observed that the Court "has repeatedly cited [*Eaton*] for the proposition that an inferior officer may temporarily perform the duties of a principal officer without Senate confirmation." Acting Attorney General, *supra* note 18, at 20.

100 *See* NLRB v. Noel Canning, 573 U.S. 513, 600 (2014) (Scalia, J., concurring) (noting that 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").

101 U.S. CONST. art. II, § 2, cl. 2.

102 *Id.*

103 Id. art. II, § 3.

104 *Id.*

eral laws.[105] In view of Article II's conferral on the President of "the general administrative control of those executing the laws," it is the President's job to ensure that those laws are in fact executed.[106] President Harry Truman famously put it this way: "[t]he buck stops with the President."[107]

The idea rooted in the Take Care Clause that the President, in his role as the leader of the Executive Branch, needs to exert control over the administration of laws enacted by the Legislative Branch is a principal tenet of the unitary executive theory—a constitutional ideology that embraces a powerful chief executive with far-reaching authority over Executive Branch subordinates.[108] This theory is grounded in Article II's vesting of "[t]he executive Power" in the President[109] and it is consistent with the prominent view at the founding, as Alexander Hamilton put it, that "[e]nergy in the Executive is a leading character in the definition of good government."[110] Its adherents "read [the Article II Vesting Clause], together with the Take Care Clause, as creating a hierarchical, unified executive department under the direct control of the President."[111]

The significance of the Take Care Clause in the appointments context is predicated on a textual assumption that comports with the unitary executive theory: the take care obligation

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105 *See* Printz v. United States, 521 U.S. 898, 922 (1997) ("The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed,' personally and through officers whom he appoints . . . ." (internal citation omitted)).

106 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492–93 (2010) (quoting Myers v. United States, 272 U.S. 52, 163–64 (1926)).

107 *Id.* at 493.

108 *See generally* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 544 (1994) (explaining "[t]he claim made by unitary executivists that the Constitution creates only three branches of government and that the President must be able to control the execution of all federal laws"). In this view, the President has the "exclusive power to superintend the execution of all federal laws, and Congress can neither add to nor diminish the scope of this power." *Id.* at 593.

109 U.S. CONST. art. II, § 1, cl. 1. Justice Scalia once wrote, in reference to Article II's vesting of "[t]he executive Power" in the President, that it "does not mean *some* of the executive power, but *all* of the executive power." Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting); *cf.* Myers v. United States, 272 U.S. 52, 135 (1926) (asserting that "[t]he ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power").

110 THE FEDERALIST NO. 70, at 354 (Alexander Hamilton) (Ian Shapiro ed., 2009).

111 Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992) (footnote omitted).

cannot be fulfilled by the President alone.[112] Instead, the President is to oversee officials in the Executive Branch who will help the President fulfill that obligation.[113] And the Appointments Clause duly grants the President the power to appoint these officials; although it imposes as a prerequisite Senate confirmation of the President's nominees.[114] As James Madison once noted, "if any power whatsoever is in its nature executive it is the power of appointing, overseeing, and controlling those who execute the laws."[115] The President's ability to fulfill the take care duty would be undermined if the President could not use the appointments process to fill vacancies. Unfilled offices "are useless to the public";[116] alternatively, the fulfillment of the take care duty could be hampered by the presence of officials in the Executive Branch whom the President did not personally assess and select.[117]

Alexander Hamilton made an important argument in favor of the Constitution's allocation of authority between the President and Senate in the appointments process. Specifically, Hamilton described the wisdom of granting the President—as opposed to a group such as the Senate—the power to choose nominees: "one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment."[118] The Supreme Court has explained that the Constitution's appointments process was "designed to assure a higher quality of appointments: the Framers anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body."[119] The combination of presidential nomination and Senate consent was viewed as a means of creating political accountabil-

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112 *See* U.S. CONST. art. II, § 3.

113 *See id.*

114 *See id.* art. II, § 2, cl. 2.

115 REMOVAL POWER OF THE PRESIDENT, THE PAPERS OF JAMES MADISON DIGITAL EDITION 228 (J.C.A. Stagg ed., 2010).

116 Recess Appointments, *supra* note 51, at 526.

117 *See generally* Cunningham v. Neagle, 135 U.S. 1, 63 (1890) (asserting that the President "is provided with the means of fulfilling [the take care obligation] by his authority . . . by and with the advice and consent of the senate, to appoint the most important [officers]").

118 THE FEDERALIST NO. 76, *supra* note 110, at 383 (Alexander Hamilton). The President "will be compelled to consult public opinion in the most important appointments; and must be interested to vindicate the propriety of his appointments by selections from those whose qualifications are unquestioned and unquestionable." JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1529, at 339 (Thomas M. Cooley ed., 1873).

119 Edmond v. United States, 520 U.S. 651, 659 (1997).

ity.[120] The Court has remarked that "[t]he Framers understood . . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people."[121]

An additional concern that shaped the appointments process at the founding involves separation of powers theory: congressional aggrandizement. There was a particularized fear that Congress would overstep its allotted power and encroach upon the powers of the other branches.[122] The Court has recounted how "the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches."[123] One measure capable of staving off congressional aggrandizement was to tilt the division of power for the appointments process in the President's favor.[124] A plausible alternative would have been to vest Congress with far more power in that process.[125] The arrangement the Framers actually settled on authorizes the President to make personalized decisions to fill Executive Branch offices and leaves the Senate in a "defensive posture . . . in which it is largely confined to exercising a veto."[126]

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120 *See id.* at 660 (noting that "[b]y requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one").

121 Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 884 (1991).

122 *See* The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 131 (1996) (noting that "[a]lthough the founders were concerned about the concentration of governmental power in any of the three branches, their primary fears were directed toward congressional self-aggrandizement").

123 Buckley v. Valeo, 424 U.S. 1, 129 (1976) (per curiam).

124 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 501 (2010) (explaining that perhaps the "key 'constitutional means' vested in the President" to resist encroachment from the legislative and judicial branches is "the power of appointing, overseeing, and controlling those who execute the laws") (quoting 1 ANNALS OF CONG. 463 (1789)).

125 *See* MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 16–17 (2003) (noting that debates about the appointments process's structure concentrated on "whether the power should be vested in the entire legislature . . . ; in the Senate alone; in the president alone; or in the president with the advice and consent of the Senate").

126 *Id.* at 42.

B. The Senate's Well-Established Role as Confirmer

The President cannot appoint "Officers of the United States" without the Senate's "Advice and Consent."[127] The Constitution's establishment of this advice and consent requirement represents a kind of appointments-process middle ground between unbounded presidential discretion and senatorial nominating authority. While the Appointments Clause sets the power to choose nominees beyond the Senate's reach, it explicitly contemplates the involvement of senators in the appointments process.[128] The Supreme Court has noted that "[a]n interim version of the draft Constitution had vested in the Senate the authority to appoint Ambassadors, public Ministers, and Judges of the Supreme Court."[129] The Framers ultimately made a "deliberate change . . . with the intent to deny Congress any authority itself to appoint those who were 'Officers of the United States.'"[130] But the Framers foresaw the danger of consolidating too much power in the President during the appointments process; they "recognized the serious risk for abuse and corruption posed by permitting one person to fill every office."[131] Accordingly, the Constitution authorizes senators to "defeat one choice of the Executive, and oblige him to make another; but they cannot themselves [choose], they can only ratify or reject the choice of the President."[132]

As part of its duty to provide "Advice and Consent,"[133] the Senate is tasked with checking the President's power of appointment.[134] Before nominating an unfit official for a coveted Executive Branch position, the President must consider the possibility of Senate rejection and act accordingly: either by selecting someone else or pressing ahead with the original

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[127] U.S. CONST. art. II, § 2, cl. 2.

[128] *See id.*

[129] Buckley v. Valeo, 424 U.S. 1, 129 (1976) (per curiam).

[130] *Id.* Indeed, the Appointments Clause is the product of a compromise "between those who believed in and those who feared a strong executive." GERHARDT, *supra* note 125, at 27.

[131] NLRB v. SW Gen., Inc., 137 S. Ct. 929, 948 (2017) (Thomas, J., concurring); *see also* STORY, *supra* note 118, § 1530, at 340 (noting that the appointment power "may be abused; and assuredly it will be abused, except in the hands of an executive of great firmness, independence, integrity and public spirit").

[132] THE FEDERALIST NO. 66, *supra* note 110, at 338 (Alexander Hamilton).

[133] U.S. CONST. art. II, § 2, cl. 2.

[134] *See* Edmond v. United States, 520 U.S. 651, 659 (1997) (explaining that the Senate's advice and consent function "curb[s] executive abuses of the appointment power"); Brannon P. Denning, *Article II, The Vacancies Act and the Appointment of "Acting" Executive Branch Officials*, 76 WASH. U. L. REV. 1039, 1041 (1998) (noting that "[b]y involving the Senate in the appointment of executive and judicial officers, the Framers intended to provide a check on the power of the Executive").

nomination. The President, Joseph Story observed in his famous *Commentaries on the Constitution*, "will feel that, in case of a disagreement of opinion with the senate, his principal vindication must depend upon the unexceptionable character of his nomination."[135] More generally, the Senate's independence from the Executive Branch theoretically enables it to operate as a moderating influence on the President.[136] The Senate thus fulfills an important role in the appointments process—one inserted into the Constitution with the intention that it would not be reduced to mere "etiquette or protocol."[137]

C. The FVRA's Constitutional Imbalance Between the Take Care Clause and Senate "Advice and Consent"

Acting service for Executive Branch officials lacks an express constitutional basis.[138] But the statute governing it, the FVRA, sits at the nexus of competing constitutional precepts. On one hand, the President needs the FVRA to satisfy Article II's command to "take Care that the Laws be faithfully executed."[139] On the other, the FVRA allows the President to sidestep the Senate "Advice and Consent" requirement in the Appointments Clause.[140] This Note argues that the FVRA serves the former constitutional precept to the detriment of the latter. In particular, the Note argues that the FVRA constitutes an unduly broad conferral of presidential power, enabling the routine eschewal of the Senate's well-established checking role in the appointments process.

To be sure, acting service is an entrenched feature of the Executive Branch. Government actors have long recognized the necessity of deploying officers to temporarily serve in vacant positions.[141] Without this ingrained practice, the Executive Branch could not operate efficiently.[142] The Supreme

[135] STORY, *supra* note 118, § 1531, at 341.
[136] *See* GERHARDT, *supra* note 125, at 28 (explaining that as part of the appointments process the Senate "is sufficiently independent from the president . . . to prevent the president from nominating his cronies or other unfit people to important governmental positions, to make the president account relatively swiftly for his bad judgment in making nominations, and can otherwise check the president's abuse of his nominating authority").
[137] Buckley v. Valeo, 424 U.S. 1, 125 (1976) (per curiam).
[138] *See supra* note 16 and accompanying text.
[139] U.S. CONST. art. II, § 3.
[140] *Id.* art. II, § 2, cl. 2.
[141] *See, e.g.*, Act of July 23, 1868, ch. 227, 15 Stat. 168, 168–69 (the 1868 vacancies act).
[142] Expounding on this basic point, the D.C. Circuit articulated its view of Congress's motivation behind passing legislation in 1792 that authorized acting service:

Court has described how "Presidential appointment and Senate confirmation . . . can take time: The President may not promptly settle on a nominee to fill an office; the Senate may be unable, or unwilling, to speedily confirm the nominee once submitted."[143] To address the clear need for acting officials, Congress has repeatedly enacted legislation that furthers practical aims.[144]

The FVRA is the latest piece of such legislation. In the interests of "administrative convenience [and] efficiency,"[145] it licenses an evasion of the appointments procedure outlined in the Constitution. It accomplishes this by empowering the President and sidelining the Senate in a manner that aids the fulfillment of the President's take care duty, curtails the Senate's advice and consent authority, and trivializes the Appointments Clause's critical check on the President.[146] The excessive power the FVRA vests in the President at the Senate's expense cannot be explained away as a natural byproduct of a functionalist statute. Nor can it be defended as a practical necessity of managing a sprawling bureaucracy with millions of employees.[147]

The FVRA permits the President to designate for acting service officials not serving in positions requiring presidential appointment with the Senate's consent.[148] It entitles the President to designate for acting service officials who are serving in positions requiring presidential appointment with the Senate's consent but who have no prior experience in the agency in

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> By the election year 1792, Congress must have realized that transitions might not always go so smoothly; that, in any event, some provision should be made for temporary absences and illnesses of Presidential appointees; and that, as Justice Holmes later put it, "the machinery of government would not work if it were not allowed a little play in its joints."

Doolin Sec. Sav. Bank v. Office of Thrift Supervision, 139 F.3d 203, 209 (D.C. Cir. 1998) (quoting Bain Peanut Co. of Tex. v. Pinson, 282 U.S. 499, 501 (1931)).

143 NLRB v. SW Gen., Inc., 137 S. Ct. 929, 935 (2017).

144 *See, e.g.*, Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281 (vacancies legislation passed in 1792).

145 *SW Gen., Inc.*, 137 S. Ct. at 948 (Thomas, J., concurring).

146 Justice Thomas explained that "the 'burdens on governmental processes' that the Appointments Clause imposes may 'often seem clumsy, inefficient, even unworkable.'" *Id.* (quoting INS v. Chadha, 462 U.S. 919, 959 (1983)). Therefore, "[g]ranting the President unilateral power to fill vacancies in high offices might contribute to more efficient Government. But the Appointments Clause is not an empty formality." *Id.*

147 THE EXECUTIVE BRANCH, https://www.whitehouse.gov/about-the-white-house/the-executive-branch/ [https://perma.cc/38CZ-8U87] (last visited Aug. 2, 2020) (noting that "the Executive Branch employs more than 4 million Americans").

148 *See* 5 U.S.C. § 3345(a)(1), (a)(3) (2018).

which the vacancy occurred. It stands idly by without requiring the President to nominate a permanent appointee while allowing acting officials to serve for months on end in the vacated position. It often enables the President to make an expedient choice between vacancies statutes.[149] And it does not explicitly bar the President from making a selection for an important agency post, perceiving the unlikelihood of Senate confirmation, and jury-rigging an acting designation through the ad hoc creation of a new position that jumps to the front of the FVRA line of succession.[150]

This is only a partial list of avenues through which the President can exercise extensive authority pursuant to the FVRA. It nonetheless illuminates the breadth of the President's discretion to forgo cooperation with the Senate through the appointments process by placing officers into key Executive Branch positions on an acting basis.

The scope of the President's power under the FVRA is particularly striking given the predominant goal of the statute. At the time of the FVRA's passage, legislators were keenly aware of the consequences of bestowing the President with broad discretion to rely on acting service; the FVRA was passed, after all, in the aftermath of a controversial acting designation.[151] When it enacted the FVRA, Congress could sense the precarious status of the Senate's advice and consent authority.[152] The passage of the statute, at least in part, seemed an attempt by Congress to claw back power ceded to the President in the process of filling PAS positions in the Executive Branch; "[i]t seems clear that the purpose of the FVRA was to protect the Senate's interests in the confirmation process."[153] But if the FVRA's proponents

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149 *See supra* note 39.

150 *See* Cuccinelli discussion *supra* subpart I.B.

151 *See supra* note 26 and accompanying text; *see also* David L. Jordan, *Separation of Powers: The Appointment of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights*, 26 HASTINGS CONST. L.Q. 935, 950 (1999) (arguing that "President Clinton's appointment of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights was a clear violation of the doctrine of separation of powers").

152 *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 936 (2017) (describing how when Congress passed the FVRA it "[p]erceiv[ed] a threat to the Senate's advice and consent power").

153 English v. Trump, 279 F. Supp. 3d 307, 330 (D.D.C. 2018), *motion for voluntary dismissal granted*, 2018 WL 3526296 (D.C. Cir. 2018). It was noted in the FVRA's legislative history that "[t]he selection of officers is not a presidential power." S. REP. NO. 105–250, at 4 (1998). The President therefore can "choose whom he wishes to nominate, but the Senate has the power to advise and consent before those nominees may assume office." *Id.* Yet in the lead-up to the FVRA's enactment, "the Senate's confirmation power [was] being undermined as never before." *Id.* at 5.

had in mind a reaffirmation of the Senate's confirmation role, the statute ultimately fell way short, paving the way for the President to routinely skirt the constitutional appointments procedure in favor of acting service.

Recent developments that have increasingly bogged down the appointments process do not undercut the proposition that the FVRA lodges inordinate power in the President to the Senate's detriment. But they are worth discussing as a matter of contextual fairness. To put it simply: making Executive Branch appointments is more burdensome for presidents than it once was.[154] This owes in large part to rising Senate obstructionism.[155] Senators traditionally have shown deference toward the President's nominations for Executive Branch positions.[156] Yet they have exhibited an increasing tendency to use various tactics to delay or block the President's appointments.[157] Searching scrutiny of nominees is more desirable than blanket approval.[158] But today, senators may be more inclined to oppose the President's choices for purely political reasons.[159] And targeted, politically motivated opposition is only a small step away from wholesale, indiscriminate obstruction.[160]

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[154] *See* John C. Roberts, *The Struggle over Executive Appointments*, 4 UTAH L. REV. 725, 731 (2014) (discussing how "changes in the Senate have made it much more difficult and time-consuming for the President to obtain approval of executive-branch nominees").

[155] *See* Alicia Bannon, *Obstruction of the Senate and the Future of Rules Reform on Nominations*, BRENNAN CTR. FOR JUST. (Aug. 19, 2014), https://www.brennancenter.org/our-work/research-reports/obstruction-senate-and-future-rules-reform-nominations [https://perma.cc/R35E-8TJE] (describing how "[t]he nomination and confirmation process for judicial and executive branch positions has been embroiled in unprecedented levels of Senate obstruction since 2009").

[156] *See* Steven I. Friedland, *"Advice and Consent" in the Appointments Clause: From Another Historical Perspective*, 64 DUKE L.J. ONLINE 173, 181 (2015). Generally speaking, the norm has been for the Senate to show "relative[ ] deferen[ce] to the President's choices regarding cabinet-level nominations." Russell L. Weaver, *"Advice and Consent" in Historical Perspective*, 64 DUKE L.J. 1717, 1730 (2015).

[157] *See* Stephenson, *supra* note 81, at 944.

[158] *See* Friedland, *supra* note 156, at 175 ("Historical rubberstamping of nominees by the Senate, with lightning-fast approval, is not preferable to careful and reflective consideration and the opportunity for collaborative competency between two branches of government.").

[159] *Cf.* THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 94 (2012) (noting how, with regard to the appointments process for Executive Branch officials, "the more it has become a political weapon, the less effectively presidents have been able to staff their administrations and run the government").

[160] For example, Senate Majority Leader Mitch McConnell has spoken of "systematic obstruction, not targeted, thoughtful opposition to a few marquee nominations or rare circumstances but a grinding, across-the-board effort to delay and

Allegations of this type of sweeping, unparticularized resistance are problematic insofar as it impedes the appointment of officials qualified to perform the functions and duties of a given position. Fear of unqualified appointees has loomed over the appointments process since the founding: in a July 1789 letter to his nephew discussing the possibility of an appointment to a judicial position, George Washington explained that he could not justify nominating the nephew "in preference of some of the oldest, and most esteemed" candidates for the position.[161] Washington wrote that "[m]y political conduct in nominations, even if I was uninfluenced by principle, must be exceedingly circumspect."[162] It does not appear likely that Washington's view of the proper way to evaluate prospective appointees is likely to gain widespread acceptance in the near future. The rise in political polarization has hardened opposition to nominees along party lines and diminished the possibility for bipartisan consensus.[163]

These trends may be troubling for the long-term health of the appointments process.[164] Yet they do not alter the FVRA's underlying constitutional imbalance between the President's take care obligation and the Senate's advice and consent obligation.

III
FIXING THE FVRA

The Trump Administration's frequent—and often controversial—use of the FVRA laid bare the latitude it grants the President to amass power at the Senate's expense in the pro-

obstruct the people this President puts up, even if they have unquestionable qualifications and even if the job is relatively low-profile." 165 CONG. REC. S2164 (daily ed. Apr. 2, 2019) (statement of Sen. McConnell).

161 *See* Letter from George Washington to Bushrod Washington (July 27, 1789), *in* 3 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 334, 334 (Dorothy Twohig ed., Univ. Press of Va. 1989).

162 *Id.* Sounding a related note, Alexander Hamilton raised the possibility that "the intrinsic merit of the candidate will be too often out of sight." THE FEDERALIST NO. 76, *supra* note 110, at 384 (Alexander Hamilton).

163 *See* Roberts, *supra* note 154, at 731–32 (explaining how because of the "unprecedented increase in political polarization that has occurred since the 1970s[,]" "[m]ost issues are now defined by sharply contrasting party positions, discipline is rigid, and compromise is very difficult to achieve") (footnote omitted).

164 Although senators theoretically could choose to "block presidents from appointing any of their preferred cabinet members or justices," they have not in part due to an "established Senate norm of deferring to presidents to fill their cabinets and open Supreme Court seats." STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 135 (2018). Yet "[w]hile informal Senate norms historically constrained the abuse of [obstruction tactics], such norms appear to have eroded in recent years." Stephenson, *supra* note 81, at 944.

cess of filling PAS offices in the Executive Branch.[165] But absent significant changes to the statute, Trump will not be the last president to exploit the FVRA in this way. Not only will the FVRA's accordance of vast presidential discretion to bypass Senate confirmation persist into the post-Trump era; future presidents, newly alerted to the FVRA's potential for abuse, may well turn to it more readily than Trump or previous presidents.

Averting that possibility requires reforming the FVRA. To that end, there exist many options and permutations therein for sealing the statute's glaring cracks and plugging its yawning loopholes.[166] This Note does not set forth a comprehensive menu of alternatives. Rather, it suggests one suite of changes to rein in the power the President wields under the FVRA to circumvent Senate consent for Executive Branch appointments, in a fashion similar to a host of prior statutes constricting the President's nominating leeway.[167]

This Note proposes four separate changes. The first change would be to prohibit acting service through the FVRA's default rule for officers who do not become the first assistant to the vacated position until after the creation of the vacancy.[168] The second change would be to eliminate the FVRA's method to designate for acting service officials from within the agency where the vacancy occurred who are not serving in a PAS position.[169] The third change would be to foreclose the possibility of the FVRA authorizing acting service for a position that became vacant through a presidential firing.[170] The final proposed change consists of two parts: (1) reducing the FVRA's 210-day limit on acting service and (2) extending the possible length of acting service through presidential nomination.[171]

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165 *See supra* subpart II.C.

166 *See, e.g.*, Accountability for Acting Officials Act, H.R. 6689, 116th Cong. (2020) (proposing various reforms to the FVRA, including a reduction in the permissible time period for acting service by agency heads and requiring periodic congressional testimony from acting officers).

167 *See* Myers v. United States, 272 U.S. 52, 265–74 (1926) (Brandeis, J., dissenting) (noting that "a multitude of laws have been enacted which limit the President's power to make nominations, and which through the restrictions imposed, may prevent the selection of the person deemed by him best fitted").

168 *See* 5 U.S.C. § 3345(a)(1) (2018).

169 *See* § 3345(a)(3).

170 *See* § 3345(a).

171 *See* 5 U.S.C. § 3346 (2018).

A. Closing the Post-Vacancy Creation "First Assistant" Loophole

The first change to the FVRA proposed by this Note would be to bar acting service on account of being the "first assistant" when the officer did not become the first assistant until after the creation of the vacancy.[172] As currently constructed, the FVRA, once triggered by the occurrence of a vacancy, directs the first assistant to serve in the vacant office on an acting basis. The statute thus contemplates, as a natural consequence of the occurrence of a vacancy, that the first assistant will become the acting officer; although the President can prevent this result by opting for one of the FVRA's alternative options for the commencement of acting service.[173] Stated differently, the FVRA's "default rule" is for the first assistant to temporarily serve in the vacated position once the vacancy is created.[174]

The problem is that the FVRA elides clarifying details on the "first assistant."[175] Indeed, the FVRA neither defines that phrase nor prescribes when the first assistant's identity must be determined relative to the creation of the vacancy. This gap may be filled by specific statutes or regulations, depending on the agency office at issue.[176] But the breadth of the FVRA's "first assistant" term—in particular the term's encompassing first assistants titled as such post-hoc—remains an open invitation for a presidential administration to opportunistically create a new office after a position is vacated, attach the first assistant label, and fill it with an unqualified loyalist incapable of surviving a difficult Senate confirmation battle. This is not a

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172 *See* § 3345(a)(1).

173 *See* § 3345(a).

174 The Supreme Court has explained how the FVRA's default rule interacts with the statute's two other options for temporarily filling a vacancy with an acting officer:

> Section 3345(a) of the FVRA authorizes three classes of Government officials to become acting officers. The general rule is that the first assistant to a vacant office shall become the acting officer. The President may override that default rule by directing either a person serving in a different PAS office or a senior employee within the relevant agency to become the acting officer instead.

NLRB v. SW Gen., Inc., 137 S. Ct. 929, 934–35 (2017).

175 *See* §§ 3345–3349d.

176 *See, e.g.*, 7 U.S.C. § 2211 (2018) (noting that the "Deputy Secretary of Agriculture is authorized to exercise the functions and perform the duties of the first assistant of the Secretary of Agriculture within the meaning of" the FVRA); *see also* Acting Associate Attorney General, *supra* note 37 (noting that the OLC "has taken the position . . . that designation of a first assistant by regulation, if an agency's governing statute does not do so, is sufficient under" the FVRA).

far-fetched scenario; the Trump Administration executed a version of it,[177] and future presidential administrations may be tempted to take similar actions.

This Note posits eliminating that possibility by forbidding acting service through the FVRA's default rule for officers who become the first assistant to the vacated position after the creation of the vacancy.[178] Importantly, "there can be multiple deputy positions to a Senate-confirmed job, making it critical that one be designated as the first assistant for purposes of" the FVRA.[179] Ruling out acting service pursuant to the FVRA's default rule for officers designated as first assistants after the creation of the vacancy would simplify the operation of the statute: the official who is the first assistant at the time the vacancy is created would be slated to become the acting officer.[180] The President would retain other options to make acting designations through the FVRA, but they would not include waiting until after a vacancy occurs to either jumble agency organization charts or conveniently concoct a deputy-type position to facilitate acting service through the FVRA's default rule by virtue of a newly fashioned first assistant title.[181]

B. Eliminating § 3345(a)(3)

Two of the FVRA's three methods for temporarily filling a vacancy with an acting officer do not explicitly mandate that the officer was previously serving in a position requiring presi-

177 *See* Cuccinelli discussion *supra* subpart I.B.

178 *See* § 3345(a)(1).

179 O'CONNELL, *supra* note 39, at 42. Professor O'Connell explained that "[d]espite OLC guidance, some agencies will not let first assistants named after a vacancy occurs use the acting title." *Id.* at 43.

180 *See* § 3345(a).

181 In a March 2020 decision holding that Ken Cuccinelli's designation as acting director of USCIS did not comply with the FVRA, Judge Randolph Moss of the U.S. District Court for the District of Columbia cogently sketched out the implications of a permissive reading of the FVRA's default rule:

> The President would be relieved of responsibility and accountability for selecting acting officials, and the universe of those eligible to serve in an acting capacity would be vastly expanded. Except when the first assistant position is fixed by statute, the agency head—or, at times, even a subordinate agency official—could create a new office after the vacancy arose, designate that office as the "first assistant" to the vacant office, and fill the office with nearly anyone, regardless of whether that person had received prior Senate approval through the confirmation process and without regard to her seniority, experience, or tenure.

L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 28 (D.D.C. 2020); *see also* Cuccinelli discussion *supra* subpart I.B (explaining the circumstances surrounding Cuccinelli's acting designation).

dential appointment with the Senate's consent.[182] One of them is the FVRA's default method. The other method, prescribed by § 3345(a)(3), allows the President to designate for acting service an officer from within the agency where the vacancy occurred if (1) the officer served in a position in that agency for at least ninety of the 365 days preceding the creation of the vacancy and (2) the pay rate for that position meets or exceeds the minimum rate for a GS–15 position on the General Schedule pay scale. In many cases, officials who satisfy these two requirements, by dint of their extensive experience in the affected agency and well-honed expertise on its area of work, not only may be qualified to serve in the vacated position; they also may be the best choice under the circumstances.[183] This is particularly true when the only alternatives for acting service are valued for political reasons.[184] And the FVRA facilitates such politics-based designations by permitting the President to choose for acting service officials from agencies other than the one where the vacancy occurred, provided the official is serving in a PAS position.[185]

Having duly noted that possibility, this Note proposes deleting § 3345(a)(3) from the FVRA in order to lessen the President's leeway to rely on acting officers who have not been confirmed by the Senate. To be clear, none of the FVRA's three methods to temporarily fill a vacancy requires Senate approval with respect to the acting designation itself.[186] To drive the point home, an acting designation need not comply with the Appointments Clause; as Justice Kagan might explain it, that clause "cares not a whit about" how an officer is designated for acting service.[187] But excising § 3345(a)(3) from the FVRA would increase the likelihood that the official pressed into acting service has been appointed pursuant to the Appointments Clause in the past.

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182 *See* §§ 3345(a)(1), (a)(3).

183 *See generally* Nina A. Mendelson, *The Uncertain Effects of Senate Confirmation Delays in the Agencies*, 64 DUKE L.J. 1571, 1602–03 (2015) (stating that "[p]lacing long-term career officials into acting positions while awaiting confirmation may enhance not only the quality of management, but the job satisfaction and longevity of career civil servants—factors critical to agency effectiveness").

184 Prior to joining the Supreme Court, Justice Breyer wrote that "[a] depoliticized regulatory process might produce better results, hence increased confidence, leading to more favorable public and Congressional reactions." STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 55–56 (1993).

185 *See* § 3345(a)(2).

186 *See* § 3345(a).

187 Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018).

With § 3345(a)(3) removed, the FVRA would provide two options for temporarily filling a vacancy with an acting officer: the first-assistant default rule and the President overriding the default rule by designating an official serving in a different position requiring presidential appointment with the Senate's consent.[188] Therefore, the only recourse for a President opposed to the prospect of the first assistant becoming the acting officer under the default rule—and, thanks to this Note's first proposed change, a President unable to work around the issue by titling a new first assistant after the creation of the vacancy[189]—would be to designate for acting service an official serving in a different PAS office within the Executive Branch.[190]

There is at least one obvious drawback to restricting the FVRA to these two paths for temporarily filling a vacancy: raising the probability that a political appointee with no relevant experience, or even one who holds views at odds with the agency's mission, will become the acting officer.[191] One conspicuous example is Mick Mulvaney's stint as Acting Director of the Consumer Financial Protection Bureau.[192] In any event, the enhanced downside risk of a Mulvaney-type acting designation is overcome by the upside gain of precluding a Whitaker-type acting designation.[193] More importantly for the broader aim of this Note's package of proposed reforms, eliminating § 3345(a)(3) from the FVRA would limit the President's ability to circumvent Senate advice and consent in the appointments process by closing off an avenue for unconfirmed officers to be designated for acting service.

C. Preventing the FVRA's Use After Presidential Firings

A vacancy within the meaning of the FVRA is created when an official serving in a PAS position in an executive agency "dies, resigns, or is otherwise unable to perform the functions

[188] *See* § 3345(a).

[189] *See supra* subpart III.A.

[190] *See* § 3345(a).

[191] The OLC has highlighted other issues. Because many agencies "have few officers subject to Senate confirmation," the occurrence of a vacancy could mean that "such an agency would either lack a head or be forced to rely upon reinforcements from Senate-confirmed appointees outside the agency." Acting Attorney General, *supra* note 18, at 27. A FVRA shorn of § 3345(a)(3) could be particularly problematic following presidential transitions. *See id.*

[192] *See* Patricia A. McCoy, *Inside Job: The Assault on the Structure of the Consumer Financial Protection Bureau*, 103 MINN. L. REV. 2543, 2579 (2019) (noting that as the CFPB's leader Mulvaney took "an impressive number of steps to undermine the [CFPB's] structure and its ability to protect consumers").

[193] *See* Whitaker discussion *supra* subpart I.B.

and duties of the office."[194] Left unclear is whether the last item of that list is broad enough to subsume vacancies caused by a presidential firing. In other words, does presidential removal occasion an inability to perform a position's functions and duties? Notwithstanding the OLC's position on the matter,[195] an FVRA activated by presidential removal is a blatant tool for thwarting the Senate's important check on the President in the appointments process.[196] If the President—through a firing, unlike when an officer "dies" or "resigns"[197]—can single-handedly generate the factual predicate for triggering the FVRA, the statute operates less as a fallback to prevent vacancies from causing major disruptions in the Executive Branch than as an instrument for shoehorning preferred candidates into top Executive Branch offices without the Senate's consent.

This Note proposes prohibiting the FVRA's use to fill positions vacated through a presidential firing. While this change would not fully elucidate the scope of the FVRA's catch-all category for vacancy creation,[198] it would disqualify one constitutionally suspect subcategory not expressly forbidden by the FVRA's text. Read to exclude presidential firings as a triggering event, the FVRA grants the President ample discretion to use acting designations to stymie the Senate's advice and consent obligation.[199] Including presidential removal on the list of triggering events would buttress the statute's function as an "end-run around the Appointments Clause."[200]

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194 § 3345(a).

195 *See* Acting CFPB Director, *supra* note 39, at 4.

196 *See* Edmond v. United States, 520 U.S. 651, 659 (1997) (noting that the appointments clause's advice and consent requirement both "curb[s] executive abuses of the appointment power" and "promote[s] a judicious choice of [persons] for filling" the offices (third alteration in original) (internal quotation marks and citations omitted)); *see also* Joshua L. Stayn, Note, *Vacant Reform: Why the Federal Vacancies Reform Act of 1998 is Unconstitutional*, 50 DUKE L.J. 1511, 1514 (2001) (noting that "the Framers intended to make the President alone constitutionally responsible for nominating and temporarily appointing federal officers and to make the Senate responsible for checking those powers").

197 § 3345(a).

198 *See id.* (providing that a vacancy occurs when an officer is "otherwise unable to perform the functions and duties of the office"). The OLC has noted that "[t]he full range of what would constitute being 'otherwise unable to perform the functions and duties of the office' is unspecified in the [FVRA], except that [§ 3345(c)(2)] provides that 'the expiration of a term of office is an inability to perform the functions and duties of such office.'" FVRA Guidance, *supra* note 29, at 61.

199 *See supra* subpart II.C.

200 NLRB v. SW Gen., Inc., 137 S. Ct. 929, 949 (2017) (Thomas, J., concurring).

One practical effect of ruling out presidential removal as a trigger for the FVRA could be greater confusion over the precise nature of dismissals from PAS offices in executive agencies. It may well intensify efforts to classify ousters that would otherwise bear the "firing" label under a category that plainly falls within the FVRA's ambit. That is to say, a president who cannot turn to the FVRA after "firings" is a president with an incentive to manufacture "resignations" out of dismissals that, by all appearances, unfolded as firings. The resulting uncertainty over how to classify the way an official left office is an acknowledged shortcoming of this proposed change to the FVRA. But the classification problem exists under the statute as currently constructed.[201] The potential for exacerbating it is not a persuasive reason to refrain from making an important clarification to the FVRA's list of triggering events—one that would unequivocally block a path for the President to use acting service to elude Senate confirmation.

D. Adjusting the FVRA's Time Limits on Acting Service

As explained above,[202] the FVRA limits acting service to 210 days starting the day the vacancy is created or to two nomination cycles for the vacated position plus an additional 210 days if a nomination is withdrawn, rejected by the Senate, or returned to the President. These FVRA provisions make plain that the statute offers a generous timeline for the President to fill—or at least try to fill—the vacated office with a permanent appointee. And the FVRA grants the President even more flexibility right after inauguration day.[203] In short, the FVRA allows the President to rely on acting officers for exceedingly long periods of time without needing to cooperate with the Senate on an appointment made pursuant to the Appointments Clause.

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201 It is a problem made more vexing by the newfound possibility of presidential firings taking place over social media. *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 13, 2018, 5:44 AM), https://twitter.com/realDonaldTrump/status/973540316656623616 [https://perma.cc/3726-TGUL] (announcing that Mike Pompeo would replace Rex Tillerson as Secretary of State). One workable solution for the classification issue could be a "bright-line rule that presumes formal resignations are actual resignations." Michael C. Dorf, *Whitaker's Appointment is Despicable and Possibly Criminal, but Is It Unconstitutional?*, DORF ON L. (Nov. 9, 2018), http://www.dorfonlaw.org/2018/11/whitakers-appointment-is-despicable-and.html [https://perma.cc/Z2SP-NRSW]. In the case of Matthew Whitaker's acting designation, "Sessions could have refused to resign, thus forcing Trump to fire him." *Id.*

202 *See supra* subpart I.A.

203 *See* 5 U.S.C. § 3349a(b) (2018).

This Note offers a pair of changes that would achieve the twin aims of reducing the time limit on acting service in the absence of the President nominating a permanent appointee and encouraging the President to submit nominations for the Senate's approval. The first change would be to shorten the 210-day limit to sixty days.[204] While sixty days would mark a major reduction from the FVRA's current limit, it is not unduly restrictive. Instead, its adoption would represent a sensible balance, one informed by the manifest need for a far more permissive limit than the ten-day cap implemented by the 1868 vacancies act.[205] For context, note that a sixty-day limit is half as long as the 120-day limit imposed by the amendment to vacancies legislation made a decade before the FVRA's passage.[206] Moreover, the reduction to sixty days from 210 would be paired with a change extending the possible length of acting service through the President submitting nominations for the vacated position. Under this change, an officer's acting service could be prolonged through the pendency of a third nomination for the vacated position, plus an additional 210 days if that nomination is withdrawn, rejected by the Senate, or returned to the President. Such a change would constitute a significant extension of the possible length of acting service for any given officer.[207] But the extension would not kick in without another nomination for the vacated position. This two-part change to the FVRA thus would have the constitutionally salutary effect of incentivizing the President to obtain the Senate's consent for an appointment made pursuant to the Appointments Clause.

Admittedly, pushing the outer bound on active service beyond the pendency of a third nomination for the vacated post could compound the "sham nominee" problem. The idea would be for the President to nominate grossly unfit officials with virtually no chance of earning Senate confirmation solely for the purpose of extending an officer's acting service through the FVRA.[208] The likelihood of aggravating this problem is an ac-

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204 *See id.* § 3346(a)(1).

205 Act of July 23, 1868, ch. 227, § 3, 15 Stat. 168, 168; *cf.* West, *supra* note 16, at 218 (noting that "the FVRA's time limits go well beyond what Congress has historically allowed").

206 Presidential Transitions Effectiveness Act, Pub. L. No. 100–398, 102 Stat. 985, 988 (1988).

207 *See* § 3346(a)–(b).

208 The possibility of a "sham" nominee is helpfully illustrated by the appointment of President Trump's Director of National Intelligence (DNI). However, before a brief look at the John Ratcliffe saga, it must be noted that Ratcliffe was eventually confirmed as DNI. Vote Summary, Nomination Description: John L. Ratcliffe, of Texas, to be Director of National Intelligence, U.S. SENATE (May 21, 2020, 12:01

ceptable concession of presidential power given the overall consequence of this Note's set of proposed changes would be to curb the President's power to use the FVRA to sidestep the Appointments Clause.

CONCLUSION

The package of changes proposed by this Note would not cure all that ails the FVRA. Other changes are conceivable, and the proposals themselves could expose more of the statute's problems or worsen existing ones. The underlying issue is that the FVRA is flawed in its design.[209] The statute, for instance, applies narrowly to only certain "functions and duties" of the vacated office;[210] these functions and duties are referred to as "nondelegable."[211] Moreover, the FVRA is far from the sole tool at the President's disposal to bypass the

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PM), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=2&vote=00101 [https://perma.cc/RS7V-5N88]. When acting DNI Richard Grenell's timeline for acting service under the FVRA was nearing its end, Trump nominated Ratcliffe to become DNI. *See* Michael Crowley et al., *Trump Taps John Ratcliffe for Director of National Intelligence*, N.Y. TIMES (Feb. 28, 2020), https://www.nytimes.com/2020/02/28/us/politics/john-ratcliffe-director-national-intelligence.html [https://perma.cc/P9S3-E8EY] (noting in a story published on February twenty-eighth that "[u]nder the [FVRA], Mr. Grenell can serve in his post only until March 11 unless the president formally nominates someone else for the job"). Ratcliffe had withdrawn from consideration for the same position the previous year amid scrutiny of his background and questions over his fitness for the position. *See* Martin Matishak & Quint Forgey, *John Ratcliffe Won't Be Trump's Next National Intelligence Director*, POLITICO (Aug. 2, 2019, 2:13 PM), https://www.politico.com/story/2019/08/02/trump-rep-ratcliffe-out-of-the-running-to-be-national-intelligence-director-1445150 [https://perma.cc/KJ4D-FRPQ] (noting "concerns over [Ratcliffe's] lack of experience and questions about inflating his resume"). Several observers pointed out that, irrespective of the likelihood that Ratcliffe would be confirmed as DNI (which, as noted above, he eventually was), Trump's subsequent nomination of him permitted an extension of Grenell's stint as acting DNI. *See, e.g.*, Steve Vladeck (@steve_vladeck), TWITTER (Feb. 28, 2020, 5:32 PM), https://twitter.com/steve_vladeck/status/1233520404574167042 [https://perma.cc/26X6-6DUP] (noting that "[e]ven if there's no real chance that [Ratcliffe] will be confirmed by the Senate, the formal submission of his nomination will allow [Grenell] to continue to serve as Acting DNI past March 11—and for another 210 days [after] Ratcliffe's rejection or withdrawal").

209 *See* Richard K. Neumann Jr., *Why Congress Drafts Gibberish*, 16 J. ALWD 111, 116 (2019) (describing the FVRA as a "statute filled with mind-numbing complexity").

210 *See* 5 U.S.C. §§ 3345(a), 3348(a)(2) (2018). *See generally* Stand Up for California! v. U.S. Dep't of Interior, 298 F. Supp. 3d 136, 150 (D.D.C. 2018) (noting that "[t]hese 'functions and duties' encompass all of the obligations associated with that office, including any that are 'required by [regulation or statute] to be performed by the applicable officer (and only that officer)'" (second alteration in original) (quoting § 3348(a)(2)).

211 BRANNON, *supra* note 38, at 8.

appointments procedure outlined in the Constitution. The statute says nothing, for example, about influential advisors to the President known as "czars."[212] But with regard to the FVRA itself, this Note's proposed changes would amount to a necessary corrective. The statute affords the President—not only President Trump, but any successor who chooses to replicate Trump's extravagant FVRA reliance or even avail him or herself of the FVRA's vacancy-filling flexibility more often and for longer periods than Trump did—outsize authority to fill high-level agency positions with acting officers absent Senate approval. By constraining that authority, these changes would go a long way toward rectifying the FVRA's constitutional imbalance between Article II's Take Care Clause and the Senate's advice and consent role. In this way, the changes would rein in the President's capacity to use the statute to rely on acting service as a means of forgoing Senate cooperation in the constitutional appointments process.

212 *See generally* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 40 (6th ed. 2014) (discussing czars).