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Squaring a Circle: Advice and Consent, Faithful Execution, and the Vacancies Reform Act

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SQUARING A CIRCLE: ADVICE AND CONSENT, FAITHFUL EXECUTION, AND THE VACANCIES REFORM ACT

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Successive presidents have interpreted the Federal Vacancies Reform Act of 1998 to authorize the appointment of principal officers on a temporary basis. Despite serving in a mere "acting" capacity and without the Senate's approval, these acting principal officers nevertheless wield the full powers of the office. The best argument in favor of this constitutionally dubious practice is that an acting principal officer is not really a "principal officer" under the U.S. Constitution because she only serves for a limited period. Although not facially specious, this claim elides the most important legal fact: an acting principal officer may exercise the full powers of the office, just like a Senate-confirmed cabinet officer. This approach broadly vindicates Article II's Take Care Clause, which requires that the President have the assistance needed to ensure that "the laws be faithfully executed." Unfortunately, this approach effectively reads the Appointments Clause out of the Constitution. For a person to hold a principal office, the

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Appointments Clause expressly requires that the President first seek and obtain the "advice and consent" of the Senate. Without the Senate's approval, a person cannot constitutionally hold a principal office (i.e., head a cabinet-level department or agency).

This Article proposes a better approach that would vindicate both the Take Care and Appointments Clauses: federal courts should limit the scope of authority acting principal officers may exercise to the performance of essential and necessary tasks—in other words, an acting principal officer must be a caretaker in both form and substance. Federal courts should not allow acting principal officers to undertake new discretionary programmatic initiatives. Moreover, if an acting principal officer attempts to wield the full powers of the office, federal courts should nullify, as ultra vires*, discretionary policymaking initiatives that are not clearly essential and necessary to the performance of core executive functions. This approach would render acting principal officers more plausibly "inferior" under the Appointments Clause, would make them subordinate to a supervisor other than the President (Article III courts), and would create a powerful incentive for the President to nominate and obtain the Senate's approval of a principal officer who could constitutionally exercise the full powers of the office.*

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I. INTRODUCTION

Federal courts presently interpret and apply the Federal Vacancies Reform Act of 1998 (VRA)[1] in a way that violates the constitutional doctrine of separation of powers. Persons serving as acting heads of cabinet-level departments are not inferior officers.[2] Although temporally limited in service—generally to "210 days beginning on the date the vacancy occurs," but with some important exceptions that can lead to significantly longer service—these acting principal officers still exercise the full scope of the office's powers.[3] Moreover, through expedient, successive acting appointments, a President may never have to obtain the Senate's consent to persons serving in a principal office within the Executive Branch.[4] This practice negates the Appointments Clause, which

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[1] 5 U.S.C. §§ 3345–3349 (2018).

[2] *See* Edmond v. United States, 520 U.S. 651, 662 (1997) ("Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President . . . ."). An acting principal officer heading a cabinet department on a temporary basis is not supervised by another higher ranking officer within the department—she is accountable only to the President. Absent direction and supervision by a superior within the same department or agency, an officer is a "principal," not "inferior," officer for purposes of the Appointments Clause. *See id.* at 662–63 ("Whether one is an 'inferior' officer depends on whether he has a superior. . . . '[I]nferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."); *see also* U.S. CONST. art. II, § 2, cl. 2 (providing that principal officers of the United States must be appointed by the President "by and with the Advice and Consent of the Senate"). To be sure, the Appointments Clause does permit Congress, by statute, to authorize the direct appointment of "inferior" officers by the President alone. *See id.* ("[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."). This provision provides ample constitutional authority for the appointment of acting *inferior* officers, but it has no relevance to the appointment of acting *principal* officers. *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring) (positing that the VRA's authorization of unilateral presidential appointments to inferior offices fully complies with the Appointments Clause and, accordingly, does not raise any separation of powers issues).

[3] *See* 5 U.S.C. § 3346(a); *see also* VALERIE C. BRANNON, CONG. RESEARCH SERV., R44997, THE VACANCIES ACT: A LEGAL OVERVIEW 11–13 (2017) (discussing how long an acting officer may serve under the VRA).

[4] Justice Clarence Thomas has forcefully argued that the VRA violates the Appointments Clause precisely because it authorizes this outcome. *See SW Gen.*, 137 S. Ct. at 949 (Thomas, J., concurring) ("That the Senate voluntarily relinquished its advice-and-consent power in the FVRA does not make this end-run around the Appointments Clause constitutional."). For a

expressly requires that all principal officers of the United States be nominated by the President *and* confirmed by the Senate before taking office.[5]

At the Philadelphia Convention, the Framers seriously considered vesting the President with a free hand to name principal and inferior officers.[6] However, they ultimately rejected this approach in favor of requiring joint action by the President and Senate for the appointment of all principal officers.[7] Importantly, the Framers authorized Congress to permit *inferior officers* to be appointed by "the President alone, [by] the Courts of Law, or [by] the Heads of Departments."[8] They also provided a mechanism for recess appointments that permits the President to appoint principal and inferior officers for a limited time when the Senate is unavailable to receive presidential nominations and provide its advice and consent.[9] Neither of these exceptions authorizes the indefinite appointment of a principal officer without the Senate's advice and consent; yet, the VRA authorizes precisely this result.[10]

This system of appointment has increasingly not worked quite as the Framers had envisioned. Long delays between nomination and a Senate approval vote are now commonplace; some nominees never receive a confirmation hearing (much less a vote on the merits).[11]

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thoughtful discussion of Justice Thomas's position on this point, see Justin C. Van Orsdol, Note, *Reforming Federal Vacancies*, 54 GA. L. REV. 297, 309–11 (2019).

[5] U.S. CONST. art. II, § 2, cl. 2.

[6] *See* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 225–26 (Max Farrand ed. 1911) [hereinafter FARRAND'S RECORDS] (describing a Federal Convention resolution to establish "a national Executive . . . with power . . . to appoint to offices in cases not otherwise provided for"); *id.* at 292 (proposing that the Executive Branch "have the sole appointment [power for] the heads or chief officers of the departments of Finance, War and Foreign Affairs").

[7] 2 FARRAND'S RECORDS, *supra* note 6, at 533, 627 (detailing the affirmative vote to add "[b]y & with the consent of the Senate" as limit on presidential appointment power for principal, but not inferior, officers). For an overview of the deliberations over the President's appointments power at the Federal Convention, see Lois Reznick, Note, *Temporary Appointment Power of the President*, 41 U. CHI. L. REV. 146, 148–50 (1973).

[8] U.S. CONST. art. II, § 2, cl. 2.

[9] *Id.* art. II, § 2, cl. 3 ("The President shall have 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."); *see* NLRB v. Noel Canning, 573 U.S. 513, 519, 522–26 (2014) (discussing the historical background and purpose of the Recess Appointments Clause).

[10] 5 U.S.C. §§ 3345–3349d (2018) (codifying the VRA).

[11] *See* S. REP. NO. 105-250, at 33 (1998) ("[T]he Senate has frequently declined to exercise its advice and consent responsibility in a timely and appropriate manner. Too often,

Meanwhile, Presidents have become somewhat lackadaisical in even sending formal nominations to the Senate for approval.[12] Instead, Presidents increasingly staff both principal and inferior offices with temporary (or "acting") appointees.[13] These temporary appointments do not require the Senate's approval; the VRA facially authorizes them.[14] A President's ability to appoint unilaterally an Attorney General, Secretary of Defense, or Secretary of State is deeply troubling and presents a difficult separation of powers problem.[15] Indeed, Justice Thomas recently expressed serious

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nominations die in Committee, languish on the Executive Calendar, or simply take months or years to move through this Chamber."); Nina A. Mendelson, *The Uncertain Effects of Senate Confirmation Delays in the Agencies*, 64 DUKE L.J. 1571, 1572 (2015) ("The federal executive agencies have been plagued by persistent delays in Senate confirmation." (footnote omitted)); *see also* Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645, 1681–83 nn.90–118 (2015) (collecting empirical research on the connection between nomination success or failure and various external factors, including presidential popularity and partisan polarization).

[12] *See* Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 915–18 (2009) (noting the delays in both the confirmation of agency heads but also in the submission of nominees during the early days of the Obama administration); John C. Roberts, *The Struggle Over Executive Appointments*, 2014 UTAH L. REV. 725, 727 (describing delays in confirmation of nominees to Executive Branch positions as having "reached a crisis" and positing that delays might seriously impair "the President's crucial duty to take care that the laws be faithfully executed"); *see also* Mendelson, *supra* note 11, at 1572–73 (explaining that some of the delay in staffing Executive Branch posts "is attributable to nomination delays inside the White House" but adding that "much is also attributable to Senate delays").

[13] O'Connell, *Vacant Offices*, *supra* note 12, at 933–35 (discussing the growing use of temporary "acting" appointments under the VRA and observing that "[f]or the most critical positions, there is a default acting official"). *But cf.* Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 942 (2013) ("[E]xecutive branch vacancies—particularly at the senior level—can make it difficult or impossible for important departments and agencies to fulfill their statutorily and constitutionally mandated functions.").

[14] *See* 5 U.S.C. § 3345(a) (2018); *see also* Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 625–36 (2020) (explaining the "primary components of the 1998 Vacancies Act, the latest statute providing mechanisms for acting agency leadership with all the formal authority of confirmed officials").

[15] O'Connell, *Actings*, *supra* note 14, at 667 ("At a much broader level, acting officials in federal agencies raise separation of powers concerns. On one hand, the positions covered by the Vacancies Act are supposed to be filled by individuals nominated by the President and confirmed by the Senate. The Act, therefore, operates as a workaround to the constitutionally

doubts about the constitutionality of unilateral presidential appointments to principal offices.[16]

The Framers carefully considered how to structure the appointment of principal and inferior Executive Branch officers.[17] The Senate's advice and consent role was intended to prevent imprudent presidential appointments.[18] As Alexander Hamilton explains in Federalist No. 76, requiring the President to seek and obtain the Senate's approval of appointments to principal offices "would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."[19]

The Framers clearly foresaw the possibility of a President attempting to make unwise and arbitrary appointments to senior federal government posts.[20] The Senate's approval of presidential nominations was an important structural check against

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prescribed process that splits authority between the two political branches." (footnote omitted)).

[16] *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 946–49 (2017) (Thomas, J., concurring) (arguing that unilateral presidential appointments to principal offices raise constitutional concerns).

[17] *See* Reznick, *supra* note 7, at 148–50 (discussing the constitutional history of appointments); *see also* E. Garrett West, Note, *Congressional Power Over Office Creation*, 128 YALE L.J. 166, 183–85 (2018) (detailing the drafting history of the Appointments Clause).

[18] Ronald J. Krotoszynski, Jr., *"A Republic If [We] Can Keep It": A Prolegomenon on Righting the Ship of State in the Wake of the Trumpian Tempest*, 98 TEX. L. REV. 539, 557 (2020) (reviewing SANFORD LEVINSON & JACK M. BALKIN, DEMOCRACY AND DYSFUNCTION (2019)) ("The Framers anticipated a President making highly questionable (perhaps even corrupt) appointments to important executive and judicial offices. They sought to prevent such appointments from happening by requiring the Senate's advice and consent for all principal offices and federal judgeships, and even for inferior Executive Branch offices in the absence of a statute permitting appointments by 'the President alone,' by 'the Heads of Departments,' or by 'the Courts of Law.'" (quoting U.S. CONST. art. II, § 2, cl. 2).

[19] THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[20] *See* Krotoszynski, *supra* note 18, at 557 n.77 (observing that "the Framers did not foresee the members of the Senate serving, more or less, as a rubber stamp for an impetuous and vindictive President" and positing that "the contemporary Senate no longer serves as a reliable check on arbitrary presidential appointments"). Of course, if one must choose between an unduly credulous Senate approving presidential nominations without engaging in sufficient due diligence and unilateral presidential appointments under the VRA, it is clearly better to have the Senate on record as having given its stamp of approval to senior officers within the Executive Branch. After all, an imperfect Senate vetting process should be deemed preferable to no external vetting process at all.

improvident appointments to key government positions, and, more generally, served as "an efficacious source of stability in the administration."[21] In short, "[t]he Framers intended for the Senate to serve as a reliable institutional check on the President."[22]

The VRA goes well beyond the constitutionally authorized means of unilateral presidential appointments.[23] As presently enforced, this statute allows the Senate to evade its constitutional obligation to vouch for persons who hold principal offices when it is available to consider such nominations.[24] The separation of powers doctrine should prohibit this attempt to shirk the Senate's constitutional obligation. Simply put, Congress by statute cannot absolve the Senate of its constitutional duty to take political responsibility for the President's appointments to principal offices—including heads of the various cabinet-level departments and members of federal independent agencies.[25]

On the other hand, the President must be able to undertake "core" Article II duties.[26] Such duties encompass, at a minimum,

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[21] THE FEDERALIST NO. 76, *supra* note 19, at 457 (Alexander Hamilton).

[22] Krotoszynski, *supra* note 18, at 557–58.

[23] *Compare* 5 U.S.C. §§ 3345–3349 (2018) (authorizing unilateral Presidential appointments of acting principal officers), *with* U.S. CONST. art. II, § 2, cl. 2 (requiring the Senate's advice and consent for appointments to principal offices).

[24] O'Connell, *Actings*, *supra* note 14, at 667 (explaining that the VRA "operates as a workaround" to the Senate's constitutionally mandated advice and consent role).

[25] *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 949 (2017) (Thomas, J., concurring) (arguing that Congress agreeing to waive the Senate's advice and consent function through the VRA "does not make this end-run around the Appointments Clause constitutional" and positing that "[t]he Judicial Branch must be most vigilant in guarding the separation between the political powers precisely when those powers collude to avoid the structural constraints of our Constitution").

[26] U.S. CONST. art. II, § 3 (providing that the President "shall take Care that the Laws be faithfully executed"); *see id.* art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."). Some legal scholars have questioned whether the federal courts should attempt to enforce the more general clauses of the U.S. Constitution that allocate powers among the three federal branches. *See, e.g.*, John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1943–49, 2014–24 (2011) (questioning whether federal courts should enforce the more general constitutional provisions, such as the Vesting Clauses of Articles I, II, and III, as part of the separation of powers doctrine). *But cf.* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836–38 (2016) (acknowledging that the federal courts rely on the Take Care Clause to support important separation of powers doctrines but complaining that "the Court uses the Take Care Clause as a placeholder for more abstract and generalized

presidential control over foreign and military affairs, national security, and criminal law enforcement. To discharge these Take Care Clause duties—even if the VRA did not exist—someone in the Departments of State, Defense, and Justice must be able to assist the President with managing these constitutional responsibilities.[27] As Professor Walter Dellinger—then serving as the head of the DOJ's Office of Legal Counsel—has explained, "[e]arly Attorneys General repeatedly opined that the President enjoyed a constitutional power of appointment empowering the President to make temporary or *ad interim* appointments to offices in cases of need without conforming to the requirements of the Appointments [Clause] or Recess Appointments Clause."[28] To the extent that the VRA normalizes this process, it arguably does more good than harm.[29]

The U.S. Constitution thus creates an inherent tension—or conflict—between the baseline process for appointing principal and inferior officers within the Executive Branch (namely, presidential nomination coupled with Senate approval) and the President's duty

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reasoning about the appropriate role of the President in a system of separation of powers" and have failed "to approach the Take Care Clause seriously on the clause's own terms").

[27] *See* The Constitutional Separation of Powers Between the President and Cong., 20 Op. O.L.C. 124, 161–64 (1996) [hereinafter Dellinger Memorandum] (expanding on the President's Take Care authority to make acting officer appointments). *But cf.* Brannon P. Denning, *Article II, The Vacancies Act and the Appointment of "Acting" Executive Branch Officials*, 76 WASH. U. L.Q. 1039, 1042 (1998) ("As a result of the Framers' design, courts have consistently rejected the proposition that the President may evade the Appointments Clause by claiming an inherent power to fill vacancies under the so-called Take Care Clause, which obligates the President to see that the laws are faithfully executed." (footnote omitted)).

[28] Dellinger Memorandum, *supra* note 27, at 161–62; *see also* O'Connell, *Vacant Offices*, *supra* note 12, at 975 (noting that "[e]arly Attorneys General consistently argued that the president retained power to make temporary appointments outside of the Appointments Clause" and that "[t]his power derived, in their view, from the Take Care Clause").

[29] In this regard, and as Professor Anne Joseph O'Connell notes, the DOJ initially took the position that the VRA and its statutory predecessors did not displace or revoke the President's inherent authority under the Take Care Clause to make temporary appointments to vacant government offices as needed. O'Connell, *Vacant Offices*, *supra* note 12, at 975. At the same time, O'Connell cautions that "[t]he limited case law on the topic, however, suggests that the president does not have such inherent authority." *Id.* at 976. She persuasively argues that whatever the merits of the Executive Branch position, the strongest basis for unilateral presidential appointments to vacant offices "rests on statutory arrangements." *Id.* at 977. Yet, she is also spot on when she observes that "[t]hese statutory arrangements comport with the Appointments Clause[] to varying degrees of satisfaction." *Id.*

to ensure that all laws, presumably including the Constitution itself, are "faithfully executed."[30] The federal courts must resolve this conflict in a way that gives meaningful effect to both clauses; an approach that reads either the Appointments Clause or the Take Care Clause out of the U.S. Constitution is simply unworkable.

In some instances, reconciling these text-based constitutional conflicts is akin to trying to square a circle because drawing a bright-line rule that cleanly disentangles the overlapping responsibilities of Congress and the President is simply impossible.[31] The Appointments and Take Care Clauses present a case of overlapping responsibilities that courts must reconcile—despite the obvious difficulty of doing so in a way that will command universal assent.[32]

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[30] *See* Goldsmith & Manning, *supra* note 26, at 1839–52 (detailing the various uses and meanings that the federal courts have given the Take Care Clause). Professor Goldsmith and Dean Manning observe that "[p]hrased in a passive voice, the clause seems to impose upon the President some sort of duty to exercise unspecified means to get those who execute the law, whoever they may be, to act with some sort of fidelity that the clause does not define." *Id.* at 1836. Even so, the U.S. Supreme Court's jurisprudence on the President's appointment and removal powers consistently leans on the Take Care Clause as an important justification for some measure of unilateral presidential authority. *See, e.g.*, Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 513–14 (2010) (holding that "[t]he Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so" and "[w]ithout such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else"). What is more, the Executive Branch has consistently invoked the Take Care Clause as a basis for presidential control over its staffing. *See* President—Temporary Recess Appointments, 25 Op. Att'y Gen. 258, 261 (1904) (opining that the Take Care Clause grants the President constitutional authority "to make such a temporary appointment, designation, or assignment of one officer to perform the duties of another whenever the administration of the Government requires it").

[31] *See* Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After* Noel Canning, 64 DUKE L.J. 1513, 1517–19 (2015) (noting that the Framers "create[d] contested zones of authority between the President and Congress without offering *any* textual guidance on how to resolve the inevitable conflicts").

[32] *See infra* Section II.C; *see also* Krotoszynski, *Transcending*, *supra* note 31, at 1518–19, 1521–22 (arguing that "[a] workable approach to enforcing the separation-of-powers doctrine must address the problems associated with blended, rather than separated, powers and responsibilities," observing that "[t]he Framers intentionally designed the federal appointments process as a shared power held jointly by the President and the Senate," and concluding that "the federal appointments process provides a poster-child example of the problem of blended, rather than clearly separated, powers").

When thinking about how to resolve the problem of institutionalized Senate inaction on presidential nominees,[33] and the President's increasingly frequent use of acting Executive Branch officers in response,[34] three circles must be "squared" (or reconciled with each other): (1) the Appointments Clause, (2) the Take Care Clause, and (3) securing political accountability—and a democratic imprimatur—for all principal officers who exercise the full power of their offices free and clear of any supervision, except by the President.[35] Unfortunately, as presently interpreted and applied, the VRA fails to secure these important values and, in fact, authorizes excessive presidential unilateralism.

The VRA empowers a President to appoint an acting principal officer and—provided he nominates someone who has scant prospects for speedy Senate approval—to leave the acting principal officer in place indefinitely. Although intended to serve as a check on the Executive Branch, the VRA—as applied over the last several presidencies—has actually morphed into a *blank check* that permits a President to staff principal offices with persons whom the Senate has not confirmed.[36] In short, if intended to circumscribe the President's ability to routinely bypass the Senate, the VRA is an abject failure.

The key to threading Charybdis and Scylla[37] lies in adopting a rule that requires the President to obtain the Senate's affirmative

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[33] *See infra* notes 118, 121–126 and accompanying text.

[34] *See* Stephenson, *supra* note 13, at 942–44, 978 (discussing the problem of Senate inaction on presidential appointments of principal officers and noting that "Senate obstruction of executive branch appointments seems to be getting out of hand"). *But cf.* O'Connell, *Vacant Offices*, *supra* note 12, at 957 (noting that delays in the confirmation of principal officers heading cabinet departments are typically shorter than the average delay for nominees to inferior offices in lower tiers of the administrative state).

[35] *See* Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1159 (2014) ("Lacking permanency and Senate imprimatur, acting officials are less able to advocate forcefully for the agency . . . ."); *see also* O'Connell, *Actings*, *supra* note 14, at 707–26 (outlining several thoughtful proposals to reform the VRA that would help to reduce the tension between practices the VRA authorizes and the Appointments Clause).

[36] O'Connell, *Actings, supra* note 14, at 707 ("It is critical to remember that Presidents of both parties have relied heavily on acting officials and delegated authority.").

[37] *See* HOMER, THE ODYSSEY 273–79 (Robert Fagles trans., 1996); WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1313 (David B. Guralnik et al. eds., 1968)

consent to the appointment of principal officers yet preserves the President's ability to discharge "core," "necessary," or "essential" Executive Branch tasks.[38] This approach would ensure that an acting principal officer has her wings clipped a bit to render the office plausibly "inferior" and to meaningfully incentivize the President to nominate a principal officer for Senate confirmation.

Under the VRA at present, however, an acting officer holding a principal office is not really "inferior." Because the Constitution does not require the Senate to consider presidential nominations on a timely basis,[39] the Senate's advice and consent power, if maximally used, could cripple the President's ability to discharge core functions of the Executive Branch.[40] Yet, it is inconceivable that a federal court would order the Senate to vote on a presidential nomination—the decision to act on a nomination or to ignore it rests with the Senate alone. If the President lacks any ability to name acting officials within the Executive Branch, the Senate's advice and consent power would allow it to stonewall presidential

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("[B]etween Scylla and Charybdis, facing difficulty or danger on either hand; between two perils or evils, neither of which can be evaded without risking the other.").

[38] Stephenson, *supra* note 13, at 942–46, 953–55 (discussing the growing problem of "Senate obstructionism" to senior presidential appointments and positing that "[t]he sheer breadth of the federal government's many functions means that the President cannot perform this constitutional task [of taking care that the laws are faithfully executed] without assistance"). Pointing to the mandate expressed in the Take Care Clause, Professor Stephenson argues that "the inability of the President to staff the most senior offices of the executive branch makes it extraordinarily difficult for the President to fulfill this constitutional function." *Id.* at 954. He suggests reading the Appointments Clause in a way "that minimizes the tension between the role for the Senate specified in the Appointments Clause and the President's more general obligations under the Take Care Clause." *Id.* at 955.

[39] *See* Krotoszynski, *Transcending*, *supra* note 31, at 1521–22 ("[T]he Senate's constitutional power of advice and consent does not force the Senate to vote on all presidential nominations subject to the Appointments Clause—or even to consider them on the merits."); *see also* Stephenson, *supra* note 13, at 944 ("Excessive Senate obstructionism is made possible because the Senate's institutional rules give a minority of senators the ability to block an appointment without a formal vote.").

[40] *See* Stephenson, *supra* note 13, at 953–55 (discussing the "tension between the role for the Senate specified in the Appointments Clause and the President's more general obligations under the Take Care Clause"); *see also* Roberts, *supra* note 12, at 726–28, 749–56 (noting that excessive Senate obstructionism has compromised the President's ability to ensure faithful execution of the laws and proposing that the federal courts liberalize the ability of the President to make recess appointments as a means of resolving the interbranch gridlock).

appointments to key offices and potentially disable the Executive Branch from performing its constitutionally assigned functions.

To permit this result would be to prioritize the Appointments Clause over the Take Care Clause. The U.S. Constitution does not authorize such an outcome. On the other hand, to permit presidential "Take Care" appointments, as some Attorneys General have posited the Constitution allows,[41] would zero out the Appointments Clause and the requirement that the Senate lend its imprimatur to presidential appointees. What, then, is the answer? And what bearing, if any, does the VRA have on resolving this constitutional conflict?

In this Article, we argue that the VRA, if properly interpreted and applied, provides a potential means of resolving the inherent tension between the Appointments and Take Care Clauses. If courts read the VRA to allow temporary appointments to principal offices, but also to limit an acting principal officer's ability to exercise the full powers of her office, the VRA would ensure that the President has the assistance he or she needs to perform critical or essential functions without a Senate-approved principal officer in place. At the same time, it seems essential that temporary principal officers

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[41] *See* Dellinger Memorandum, *supra* note 27, at 161–62 ("Early Attorneys General repeatedly opined that the President enjoyed a constitutional power of appointment . . . in cases of need without conforming to the requirements of the Appointments or Recess Appointments Clause."); O'Connell, *Vacant Offices*, *supra* note 12, at 975–77 (noting that "[e]arly Attorneys General consistently argued that the president retained power to make temporary appointments outside of the Appointments Clause"). *But cf.* Denning, *supra* note 27, at 1042 ("If the Constitution denies any inherent power to the President to fill vacancies outside the processes set forth in Article II, it would seem absurd to argue that such power is possessed by one of the President's subordinates."). Professor Denning fails to consider the narrower question of whether the Take Care Clause permits the President to reassign delegable *duties* within Executive Branch agencies—rather than make new temporary officers. The ability to reassign duties seems both plausible and necessary. Indeed, Congress itself acknowledged the legitimacy of the practice when it wrote the VRA. *See* S. REP. NO. 105–250, at 15 (1998) (noting that the VRA "retains existing statutes that are in effect" that permit "the President, or the head of an executive department" to assign "the temporary performance of the functions and duties of an office by a particular officer or employee"); *see also* Doolin Sec. Sav. Bank v. Office of Thrift Supervision, 139 F.3d 203, 208 (D.C. Cir. 1998) (noting that the temporary performance of specific duties within an agency "does not make him 'head of an Executive agency' or an 'officer' in a department's bureau for the purposes of the Act" and noting that "[t]he Vacancies Act itself gives rise to this prospect"), *superseded by statute on other grounds*, Federal Vacancies Reform Act of 1998, Pub. L. No. 105-277, 122 Stat. 2681, *as recognized in* SW Gen., Inc. v. NLRB, 796 F.3d 67 (D.C. Cir. 2015).

not be able to exercise the full powers of the office, including the undertaking of non-essential tasks, because Congress cannot consent to extraconstitutional appointments of principal officers—by statute or otherwise.[42]

Simply put, if a person holds a principal office, as Justice Clarence Thomas argues, that person must be approved by the Senate.[43] However, if a person holds merely an inferior office, the Constitution permits Congress to allow for unilateral presidential appointments.[44] The characterization of an acting Secretary of Defense or Attorney General as an "inferior" officer therefore becomes constitutionally critical. As presently applied, however, the VRA permits the President to name an acting principal officer who may serve up to 210 days, and possibly longer if the President submits another person's name to the Senate.[45] This approach

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[42] This concept enjoys limited support in the (admittedly sparse) judicial precedents addressing so-called "Take Care" appointments, which some lower federal courts have opined must be limited to "emergency" situations. *See* Williams v. Phillips, 482 F.2d 669, 670–71 (D.C. Cir. 1973) (opining, in dicta, that the Take Care Clause might support the President's claim of an inherent power "to appoint an acting director for a reasonable period of time"); Williams v. Phillips, 360 F. Supp. 1363, 1369 (D.D.C. 1973) ("Whatever the merits of the argument finding an interim appointment power in the President may be, it is clear from the defendant's own citation of authority that that power, if it exists at all, exists only in emergency situations."). Of course, the VRA's scope is not limited to "emergency" situations or to "core" executive functions; in this sense, it goes beyond what the Take Care Clause might require Congress to tolerate with respect to presidential self-help. *See* Dellinger Memorandum, *supra* note 27, at 163–64 (arguing that "take care" appointments should be governed by "a variety of pragmatic factors" that include the specific functions at issue, how the vacancy came into being, and the difficulty of finding suitable candidates and that the power to make such appointments exists in a "twilight area where the President may act so long as Congress is silent, but may not act in the face of congressional prohibition").

[43] NLRB v. SW Gen., Inc., 137 S. Ct. 929, 945 (2017) (Thomas, J., concurring) ("Principal officers must be appointed by the President by and with the advice and consent of the Senate.").

[44] U.S. CONST. art. II, § 2, cl. 2; *see SW Gen.*, 137 S. Ct. at 946 (Thomas, J., concurring) ("Appointing inferior officers in this manner raises no constitutional problems. That is because the Appointments Clause authorizes Congress to enact 'Law[s],' like the FVRA, 'vest[ing] the Appointment of such inferior Officers . . . in the President alone.'" (alterations in original)).

[45] 5 U.S.C. § 3346(a) (2018); *see* O'Connell, *Actings*, *supra* note 14, at 631 ("For instance, during the President's first year, an acting official could serve through November 16; the President could submit a nomination on November 17 and the Senate could return it on January 3; and the second nomination could be made 211 days after the return of the first

certainly obviates concerns that some academics have expressed about the ability of the President to ensure faithful execution of the laws,[46] but permitting unilateral presidential appointments to principal offices within the Executive Branch under the VRA effectively reads the Appointments Clause out of the Constitution.[47]

We believe that characterizing an acting principal officer as an "inferior" officer is plausible for purposes of the Appointments Clause—but only if the acting officer's scope of authority is (1) limited and (2) subject to supervision by an entity other than the President.[48] As we will explain,[49] if the federal courts gloss the VRA by limiting an acting principal officer's authority to essential or necessary tasks, and by voiding any discretionary actions undertaken by that acting principal officer, these two conditions would be met. This approach also would incentivize the President to nominate and obtain Senate approval of a principal officer who could exercise the full powers of the principal office.

One useful model might be that of a "caretaker" prime minister in a parliamentary system.[50] In a parliamentary system, the prime minister (PM) holds office by virtue of being selected by a majority of legislators—their support conveys democratic legitimacy on the PM because each legislator won election to office.[51] Their support

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nomination (on August 1) and be returned on January 3 of the third year. The final 210 days would run out on July 31 again—over two and a half years after the acting official began.").

[46] *See* Roberts, *supra* note 12, at 726–27 (expressing concern about the President's ability to perform constitutional duties); *see also* Stephenson, *supra* note 13, at 953–57 ("The sheer breadth of the federal government's many functions means that the President cannot perform this constitutional task without assistance.").

[47] *SW Gen.*, 137 S. Ct. at 948 (Thomas, J., concurring) ("We cannot cast aside the separation of powers and the Appointments Clause's important check on executive power for the sake of administrative convenience or efficiency.").

[48] *See* Edmond v. United States, 520 U.S. 651, 662–63 (1997) ("Whether one is an 'inferior' officer depends on whether he has a superior."); Morrison v. Olson, 487 U.S. 654, 671–73 (1988) (distinguishing principal and inferior officers based on whether they are "subject to removal by a higher Executive Branch official" and on whether they are "empowered . . . to perform only certain, limited duties").

[49] *See infra* notes 58–63 and accompanying text.

[50] *See infra* Section IV.A.

[51] RODNEY BRAZIER, CONSTITUTIONAL PRACTICE 40, 46 (2d ed. 1994) (describing how a government must enjoy the support of a majority in Parliament in the United Kingdom and noting how a caretaker government has limited authority to "ensure continuity of administration" and to undertake "the efficient discharge of government" until an election produces a clear majority in Parliament).

legitimates the PM's official actions.[52] However, when a PM lacks the support of a parliamentary majority, her actions also lack the requisite democratic imprimatur.[53]

When an incumbent PM loses her majority, but no party wins a majority of the seats in the parliament, the incumbent PM continues serving, but only in a "caretaker" capacity.[54] The caretaker will not exercise the office's full powers because she lacks the imprimatur of a parliamentary majority.[55] As an electoral mandate is to a PM, so the Senate's advice and consent should be to a principal officer of the United States.[56] The model of a caretaker PM helps frame the normative basis for why this Article's proposed rule is essential to honoring the Appointments Clause's central purpose—requiring the Senate to lend its democratic legitimacy to presidential appointees and to take political responsibility for the wisdom of the appointment.[57] If an acting principal officer's powers are limited to those essential or necessary to perform the President's Take Care Clause duties—with judicial assessment of whether an exercise of a particular power was in fact essential or necessary—acting principal officers would actually be "inferior" because the scope of their authority would be strictly limited and supervised by

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[52] *See* Jonathan Boston, Stephen Levine, Elizabeth McLeay, Nigel S. Roberts & Hannah Schmidt, *Caretaker Government and the Evolution of Caretaker Conventions in New Zealand*, 28 VICT. U. WELLINGTON L. REV. 629, 634 (1998) ("One of the fundamental principles of responsible government in New Zealand is that the government must hold the confidence of the House of Representatives in order to remain in office.").

[53] *Cf. id.* at 631 ("While caretaker governments are generally deemed to have full executive powers, it is expected that they should not embark upon major new policy initiatives.").

[54] *Id.* at 634 ("[W]hile the government continues in office . . . its actions are expected to be constrained on matters of political significance . . . .").

[55] *See infra* notes 242–244 and accompanying text.

[56] *See* Mendelson, *supra* note 11, at 1585–86 (noting that the lack of democratic legitimacy, conveyed through Senate approval, arguably compromises the practical authority of acting officials); *see also* Farber & O'Connell, *supra* note 35, at 1159 ("Lacking permanency and Senate imprimatur, acting officials are less able to advocate forcefully for the agency within the Executive Branch or fend off pressure from the White House or other agencies.").

[57] THE FEDERALIST NO. 76, *supra* note 19, at 457–58 (Alexander Hamilton) (arguing that requiring Senate consent increases political accountability for presidential appointments); *see also* Mendelson, *supra* note 11, at 1580–81, 1585–86 (discussing how Senate "confirmation delays" or "lack of a confirmed official in certain senior agency positions may impair the agency's function" and harm its legitimacy).

the Article III courts when their acts are challenged as *ultra vires*.[58] Taking this approach would reduce, although not entirely resolve, the tension between the Appointments and Take Care Clauses.

Note that the VRA's principal enforcement mechanism involves judicial invalidation of the acts of an improperly appointed acting officer.[59] This Article's proposed reform—limiting acting principal officers' scope of authority to tasks that are both essential and necessary—would mirror the statute's existing enforcement scheme by merely extending this remedy to impose substantive limits on acting principal officers' authority.

To clarify, our concerns relate to the appointment of an acting principal officer—not to the temporary reassignment of particular delegable duties that belong to a principal officer, an inferior officer, or an employee. The VRA itself distinguishes between the delegation of discrete tasks and the appointment of a temporary officer empowered to wield the full powers of the respective office.[60] Of course, the performance of particular duties or the accumulation of duties could render an inferior officer or employee a "principal officer" for purposes of the Appointments Clause.[61] If Congress enacts a statute that permits a duty to be reassigned within an agency, whether by the President or someone else, the VRA says nothing about the person to whom a delegable statutory duty may

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[58] *See* Edmond v. United States, 520 U.S. 651, 661–63 (1997) (noting that inferior officers generally have supervisors other than the President); Morrison v. Olson, 487 U.S. 654, 671–73 (1988) (outlining factors courts use to distinguish between principal and inferior officers).

[59] *See* 5 U.S.C. § 3348(d) (2018); *see also* BRANNON, *supra* note 3, at 19–22 (outlining the VRA's enforcement mechanisms).

[60] *See infra* notes 62–63 and accompanying text.

[61] *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 947 (2017) (Thomas, J., concurring) (explaining that "a principal officer is one who has no superior other than the President"). In general, an officer may be distinguished from a mere employee based on "the ideas of tenure, duration, . . . and duties." United States v. Hartwell, 73 U.S. 385, 393 (1867). An "officer" will typically possess significant policymaking authority. *See* Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam) ("We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause]."); *see also* Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018) (holding that whether a federal worker is an officer or an employee turns on "the extent of power an individual wields in carrying out his assigned functions" and that "officers" wield "significant authority" whereas "employees" do not (quoting *Buckley*, 424 U.S. at 126)).

be assigned.[62] Still, some delegations could, in theory, raise Appointments Clause problems if the scope of authority being delegated renders the holder a "principal" officer because the scope of the accumulated delegated responsibilities exceeds those typical of an inferior officer and the performance of these duties is not otherwise subject to supervision by someone else within the department or agency.[63]

This Article proceeds in four additional parts. Part II considers the conflicting constitutional mandates of Senate approval of all U.S. officers and the President's concurrent duty to ensure enforcement of the U.S. Constitution and laws. Part III examines the VRA and how it attempts to delimit the President's authority to unilaterally appoint temporary principal and inferior officers. Unfortunately, rather than checking unilateral presidential appointments, the VRA has become a general warrant to make them. This Part discusses and critiques the increasing use of acting officers within the Executive Branch, including principal officers with great responsibility and power, and explains why the VRA's conveyance of unilateral power to appoint principal officers seriously undermines the Appointments Clause.

Part IV proposes a solution to the VRA's problematic conferral of unilateral presidential power to appoint principal officers: federal courts should prevent acting principal officers from exercising the full scope of their office's powers. If an acting principal officer's scope of authority more closely resembled that of a caretaker PM, one could more plausibly characterize the acting principal officer as "inferior." This is admittedly a functionalist solution,[64] but the inherent tension between the Appointments and Take Care Clauses

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[62] *See* Schaghticoke Tribal Nation v. Kempthorne, 587 F.3d 132, 135 (2d Cir. 2009) (distinguishing between the appointment of an acting officer and the transfer of a discrete duty to another person within an agency and noting the VRA permits the reassignment of delegable duties).

[63] *See* O'Connell, *Actings*, *supra* note 14, at 721–24 (questioning the meaningfulness of the distinction between the temporary appointment of an acting officer and the temporary reassignment of specific duties and positing that "[a]cting officials and delegated authority are largely two sides of the same coin").

[64] For a general and thorough discussion of "formalism" and "functionalism" in the U.S. Supreme Court's separation of powers jurisprudence, see Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 854–61 (2009).

means that some play in the joints must exist.[65] Finally, Part V offers a brief overview and conclusion.

An inherent tension exists between the central mandates of the Appointments Clause (at least in a hyper-partisan era) and the Take Care Clause. As courts currently interpret and apply it, the VRA goes too far in authorizing presidential self-help by permitting the President to name acting principal officers whose scope of authority is indistinguishable from regular, Senate-confirmed principal officers. This outcome reads the Appointments Clause out of the U.S. Constitution and violates the separation of powers doctrine. However, if federal courts were to meaningfully limit an acting principal officer's scope of authority by restricting that officer's authority to performing only caretaker duties, courts could honor—if not in letter, then in spirit—the Appointments Clause while permitting the President to discharge core executive functions. In sum, the best solution would be for the federal courts to embrace a saving construction of the VRA that effectively clips the policymaking wings of persons serving in principal offices by dint of a unilateral presidential appointment under the VRA.

Permitting the President to name an acting principal officer, who may exercise limited powers of the office, will ensure that the President has the assistance he or she needs to "take care" that the laws, including the Constitution itself, are faithfully executed.[66] This limit would also create a powerful incentive for the President to nominate and obtain approval of a properly appointed—meaning Senate-confirmed—principal officer.

II. THE INHERENT TENSION BETWEEN THE APPOINTMENTS AND TAKE CARE CLAUSES

Before critiquing the VRA, we must first clearly lay out the constitutional problem that it creates. The main problem arises from the Appointments Clause, which requires that principal officers of the United States be appointed by the President and

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[65] *See* Krotoszynski, *Transcending*, *supra* note 31, at 1517–19, 1521–26 (explaining how "formalist textualism" alone cannot resolve this conflict between clauses "because the Constitution's text points in different directions").

[66] U.S. CONST. art II, § 3.

confirmed by the Senate.[67] Simply declaring the VRA unconstitutional, however, would present its own constitutional problems, as strong arguments support the President having sufficient staff assistance to exercise his or her constitutional duty to "take Care that the Laws be faithfully executed."[68] The Appointments and Take Care Clauses create serious tension because if the Senate uses its discretion to ignore presidential nominations in a maximal way, the President's ability to discharge core executive functions—such as foreign and military affairs, national security, and law enforcement—may be fatally compromised. The tension between the clauses must be addressed but in a fashion that accounts for both clauses simultaneously.

A. THE APPOINTMENTS CLAUSE

As noted in Part I, the delegates at the Federal Constitutional Convention debated at some length where to place the appointments power. In the end, they gave the President the power to make nominations but conditioned the validity of these appointments on the Senate's approval. More specifically, the Appointments Clause provides the following:

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[69]

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[67] *Id.* art II, § 2, cl. 2.
[68] *Id.* art. II, § 3.
[69] *Id.* art. II, § 2, cl. 2.

The default rule for appointments to federal offices, whether principal or inferior, is thus an initial appointment by the President and subsequent confirmation by the Senate.[70]

The U.S. Constitution provides another means of appointment, on a temporary basis, that the President may use when the Senate has recessed or is not in session. The Recess Appointments Clause provides, "The President shall have 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."[71] The U.S. Supreme Court has held that the recess appointment power applies whenever the Senate has recessed for at least ten days and may be used to fill any existing vacancy within the Executive or Judicial Branches (regardless of whether the vacancy itself arose while the Senate was in recess).[72] As Justice Stephen Breyer explained, "the Recess Appointments Clause sets forth a subsidiary, not a primary, method for appointing officers of the United States";[73] the Clause "is not designed to overcome serious institutional friction."[74]

Today, neither clause reliably ensures that the President can name subordinates to assist him or her in ensuring faithful execution of the laws.[75] Why? The Constitution imposes temporal deadlines in a number of instances[76] but does not impose any deadline on the Senate for action on a presidential nomination.[77] Accordingly, no constitutional obligation on the Senate's part exists to consider a presidential nomination on the merits.[78] Since the

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[70] *Id.*

[71] *Id.*

[72] NLRB v. Noel Canning, 573 U.S. 513, 538 (2014) ("[A] recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause.").

[73] *Id.* at 522.

[74] *Id.* at 556.

[75] *See* Roberts, *supra* note 12, at 725–30, 745–49 (laying out obstacles to the appointment of executive officers).

[76] *See* Krotoszynski, *Transcending*, *supra* note 31, at 1523–26 (providing examples of "fixed time limits" found in the Constitution).

[77] *Id.* at 1524 ("The Appointments Clause . . . contains no comparable default rule requiring the Senate to act on presidential nominations . . . ." (footnote omitted)).

[78] *See id.* at 1524–25 (arguing that the lack of specific time limits in the Appointments Clause leads to the inescapable conclusion "that the Framers intended to give the Senate an unreviewable veto power over presidential nominations through the expedient of simply not voting on a pending nomination" and observing that this conclusion "finds further

George W. Bush administration, the Senate has adopted a practice of holding "pro forma" sessions at least once every three days.[79] This Senate practice effectively precludes the President from making recess appointments, even if most Senators are nowhere near the Capitol. Provided that the Senate deems itself to be in session and capable of receiving and acting on presidential nominations, the President may not use the Recess Appointments Clause to install either Executive or Judicial Branch personnel.[80]

As levels of partisanship have increased within the body politic, they also have increased within the Senate.[81] This has led to long delays between the nomination of candidates for Executive Branch positions and action by the Senate on these nominations. Although the delays are typically short for principal officers,[82] the delays for mid-tier agency personnel and appointees to multi-member independent boards and commissions can be interminable—measured in months and years rather than days or weeks.[83] This,

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confirmation in consistent practice over time"); *see also* Roberts, *supra* note 12, at 749–51 (noting the dangers posed by pro forma Senate sessions and sclerotic Senate proceedings to the Executive Branch's ability to operate); Stephenson, *supra* note 13, at 943–46 (observing how internal Senate regulations allow a minority of senators to indefinitely prevent the appointment of executive officers).

[79] Roberts, *supra* note 12, at 745–49.

[80] *See* NLRB v. Noel Canning, 573 U.S. 513, 550 (2014) ("We hold that, for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business."); Roberts, *supra* note 12, at 727 (observing that "[p]ervasive obstruction by the minority in the Senate prevents action on nominations" and that the Senate "through its brief pro forma sessions during longer periods of absence . . . can completely negate the President's recess appointments power").

[81] *See* O'Connell, *Filibuster Reform*, *supra* note 11, at 1681–83 nn.90–106 (collecting theoretical research and empirical data on the connection between confirmation times, presidential approval, and nominations to independent agencies with "holdover capacity," in addition to empirical studies on the connection between nomination success or failure and various external factors, such as presidential popularity and partisan polarization).

[82] *See* Mendelson, *supra* note 11, at 1574–75 (discussing the average length of vacancy periods for various offices); O'Connell, *Vacant Offices*, *supra* note 12, at 957 ("Recent presidents have filled the highest positions in cabinet departments relatively quickly when they took office . . . .").

[83] *See* O'Connell, *Vacant Offices*, *supra* note 12, at 957 (noting that it has taken much longer to "staff[] lower-level positions"); Stephenson, *supra* note 13, at 943–44 ("[W]hile historically the Senate has moved swiftly, and generally deferentially, with respect to the President's top-level appointments (such as cabinet secretaries), if the CFPB and NLRB fights are harbingers of things to come, there is no guarantee that this will remain the case." (footnote omitted)).

in turn, has forced successive presidents to more regularly rely on acting appointments to staff important offices within the Executive Branch. As we explain in Part III, it became quite common during the Trump administration for the President to rely on acting principal officers to head important cabinet agencies such as the Department of Defense and the Department of Justice.[84]

B. THE TAKE CARE CLAUSE

Although the U.S. Supreme Court has never clearly defined the Take Care Clause's precise meaning and scope,[85] the Court has routinely invoked the Clause as creating both a power and a duty on the President's part to take personal responsibility for the Executive Branch's operations.[86] The Take Care Clause provides that the President "shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."[87] Thus, the Clause provides a basis for disallowing novel administrative schemes that unduly insulate Executive Branch personnel from direct forms of presidential supervision and control.[88] The power to supervise Executive Branch personnel—and to remove them if the President concludes that they are not performing their jobs satisfactorily—is only one side of the coin. The power to remove, although clearly important, presumes that officers are in place to be removed.[89]

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[84] *See infra* notes 173–178, 187–194 and accompanying text.

[85] *See* Goldsmith & Manning, *supra* note 26, at 1836–38, 1863–67 (noting how the Court has previously interpreted the Take Care Clause in a variety of ways, not all of them consistent with each other).

[86] *See id.* at 1863–67 (discussing the duties that the Court has held the Take Care Clause imposes on the President).

[87] U.S. CONST. art. II, § 3.

[88] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2207–08 (2020) (holding "that the CFPB's leadership by a single independent Director violates the separation of powers" by "insulat[ing] the agency's Director from removal by the President"); *see* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 498 (2010) ("By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts.").

[89] *See* Myers v. United States, 272 U.S. 52, 117 (1926) (observing that the Vesting and Take Care Clauses of Article II both assume "the assistance of subordinates" because "the President alone and unaided could not execute the laws").

When the Senate refuses to consider presidential nominations and holds pro forma sessions to block the President from using the Recess Appointments Clause, the President faces a different, but equally vexing, problem from the inability to remove feckless subordinates. Namely, the President lacks sufficient hands on deck to ensure that the U.S. Constitution, treaties, statutes, and federal regulations are all faithfully executed.[90] For better or worse, the Framers did not anticipate that the Senate would undermine the President's ability to implement the Constitution and laws by using its advice and consent power to keep vacant key Executive Branch offices empty indefinitely.[91]

The Executive Branch has posited that the Take Care Clause allows unilateral presidential appointments to ensure that the President can faithfully perform his or her duties.[92] Some legal academics, during the Obama administration at least, argued that the President has a constitutional right to have principal and inferior officers assist him or her in running the Executive Branch.[93] For example, Professor John C. Roberts argues that:

> In the case of executive branch functionaries—including members of the cabinet, lower ranking officials, and more recently, members of a bewildering variety of administrative entities—giving a veto power over such appointments to the Senate stands in obvious conflict with the President's constitutional duty to take care that the laws passed by Congress are "faithfully executed."[94]

He proposes, as a solution, that federal courts permit the President broad recourse to use recess appointments to make appointments even when the Senate claims to be in session and available to

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[90] *See* David J. Arkush, *The Original Meaning of Recess*, 17 U. PA. J. CONST. L. 161, 240–43 (2014) (explaining how the Recess Appointments Clause's use and application have shifted from their original purposes).

[91] *Cf. id.* at 200 ("It would have been reasonable for the Framers to anticipate that the Senate would readily confirm most recess appointees . . . .").

[92] *See supra* note 41.

[93] *See, e.g.*, Roberts, *supra* note 12, at 726, 756.

[94] *Id.* at 726 (quoting U.S. CONST. art. II, § 3).

receive and consider nominations.[95] Other academics, such as Professor Matthew Stephenson, have suggested that Senate inaction on senior Executive Branch nominations should be deemed "tacit" consent to the appointment.[96]

Whatever objections one might have to the lack of a precise U.S. Supreme Court interpretation of the Take Care Clause,[97] the Executive Branch has consistently invoked it over time as a basis for the President's ability to ensure that he or she has the support needed to enforce federal laws.[98] At the same time, the Court routinely has cited the Clause when disallowing novel administrative structures that unduly attenuate the President's ability to oversee Executive Branch operations.[99] As Chief Justice William Howard Taft observed in *Myers*, "The vesting of the executive power in the President was essentially a grant of the power to execute the laws."[100] However, "the President alone and unaided could not execute the laws" and required "the assistance of subordinates" to perform his constitutional responsibilities.[101] Thus, both the Constitution's text and its settled understanding support the view that the President has a constitutional right to the assistance of subordinates in order to ensure that federal laws are properly enforced.

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[95] *See id.* at 750 ("[W]hile the Court could not prohibit the use of pro forma sessions by the Senate, it could hold that such sessions do not interrupt a period of recess for purposes of recess appointments.").

[96] *See* Stephenson, *supra* note 13, at 946 ("[T]he Senate's failure to act on the nomination within a reasonable period of time . . . shall be construed as providing the Senate's tacit or implied 'Advice and Consent' to the appointment within the meaning of the Appointments Clause." (quoting U.S. CONST. art. II, § 2, cl. 2)).

[97] *See* Goldsmith & Manning, *supra* note 26, at 1838–39, 1866–67 (discussing various judicial interpretations of the Take Care Clause).

[98] Dellinger Memorandum, *supra* note 27, at 161–64.

[99] Selia Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2208 (2020) (invalidating provisions that "insulate[d]" the CFPB's independent director "from removal by the President"); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 495–99, 513–14 (2010) (striking down a "second level of tenure protection" that overly restricted the President's removal power).

[100] Myers v. United States, 272 U.S. 52, 117 (1926).

[101] *Id.*

C. THE APPOINTMENTS AND TAKE CARE CLAUSES CREATE AN INHERENT INTERBRANCH TENSION THAT THE TEXT, UNAIDED, CANNOT RESOLVE

Having now considered the meaning and requirements of the Appointments and Take Care Clauses, we arrive at the place where an irresistible force (the President's duty to ensure enforcement of federal law) meets an immovable object (the Senate's constitutional power to reject presidential nominees through inaction). The Take Care Clause imposes a duty that the President can discharge *only* if the Senate agrees to receive, consider, and approve presidential appointments to Executive Branch offices on a timely basis.[102] Yet, the Framers did not require the Senate to act in a timely fashion on even the most important presidential nominations.[103] In sum, the Clauses create a clear constitutional conflict between the Senate's discretion and the President's duty.

Conflicts between constitutional clauses reflect deliberate decisions rather than design flaws. In several instances, the Framers intentionally created overlapping spheres of authority that

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[102] We agree with Professor Stephenson that the Take Care Clause argument, predicated on necessity, for presidential self-help is considerably weaker with respect to *judicial* appointments. *See* Stephenson, *supra* note 13, at 974 ("It is the responsibility of the President, not Congress, to 'take Care that the Laws be faithfully executed,' and this justifies an unusual (but textually permissible) reading of 'Consent' in the context of appointing the most senior executive branch officials, who act as the President's surrogates. Article III judges, though appointed by the President, perform a different constitutional function, and the Take Care Clause has little bearing on how one should interpret the process for judicial appointments."). After all, the President's ability to enforce the Constitution and laws does not directly depend on fully staffed federal courts. *See id.* at 973–74. To be sure, Senate inaction on judicial nominations might raise separation of powers issues, but these issues would relate to the ability of the Article III courts to function properly in exercising the "judicial power of the United States"—rather than to the President's constitutional obligation to enforce the Constitution and laws.

[103] *See supra* notes 77–78. Given the centrality of foreign affairs, military affairs, national security, and criminal law enforcement, one could plausibly suggest that the Secretaries of Defense and State, and the Attorney General, are the apex of the "take care" obligation. *See Seila Law LLC*, 140 S. Ct. at 2206 n.11 (noting that the President's claims over foreign and military affairs are particularly robust but cautioning that "the same Article that establishes the President's foreign relations and war duties expressly entrusts him to take care that the laws be faithfully executed"). As the Court has observed, "from the perspective of the governed, it is far from clear that the President's core and traditional powers present greater cause for concern than peripheral and modern ones." *Id.*

virtually guaranteed substantial interbranch friction. For example, Article I grants Congress the exclusive power "[t]o declare War,"[104] but Article II declares the President to be the "Commander in Chief."[105] These constitutional commitments create overlapping authority over control of U.S. military forces.[106] At a relatively high level of generality, one can disentangle these overlapping assignments of authority by describing the Commander-in-Chief power as tactical control over the U.S. armed forces and the War Power as giving Congress control over major strategic decisions (such as whether to initiate armed conflict with a foreign sovereign). However, precisely discerning where one power ends and the other begins can be quite difficult; indeed, in some circumstances, the powers certainly overlap in scope.[107]

Correctly resolving the tensions that arise from overlapping spheres of constitutional authority is, in some ways, impossible.[108] Because the text itself creates the conflict, any resolution by the Article III courts must rest on something *other than* the Constitution itself. Potentially useful guideposts exist—including constitutional conventions (consistent historical practices embraced by both the Executive and Legislative Branches),[109] intratextual interpretation (using other clauses of the Constitution to clarify or

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[104] U.S. CONST. art. I, § 8, cl. 11.

[105] *Id.* art. II, § 2, cl. 1.

[106] Krotoszynski, *Transcending*, *supra* note 31, at 1517 n.14 ("The Constitution simply does not provide a clear answer as to when the Commander-in-Chief's power ends and Congress's authority over declaring war and establishing the armed forces of the United States begins.").

[107] *See id.* ("In this context, as with appointments, the Framers intentionally blended, rather than separated, the war powers. . . . Thus, in most cases presenting war-powers questions, a federal judge cannot rely solely on the Constitution's text, but must instead integrate text, history, practice, and conventions in order to fashion a persuasive opinion.").

[108] *See id.* at 1517–19 (noting that "the Constitution's text points in different directions").

[109] *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 414–15 (2012) (observing that "it is important to identify the reasons why historical practice is invoked in any given separation of powers context"); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1129 (2013) (discussing constitutional conventions and how "many scholars today suggest that conventions can play a limited role in litigated controversies and thus are not strictly extrajudicial"); *see generally* Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1 (discussing when a settled practice between the Congress and the President should be deemed to give rise to a binding constitutional convention that the federal courts should ratify in their decisions).

address an ambiguity),[110] and normative arguments based on the nature of the power and how best to reconcile competing claims by the President and Congress to exercise it.[111]

The Framers debated at length how to staff Executive and Judicial Branch offices.[112] They settled upon a default process that requires the President to nominate officers of the United States and Article III judges but makes the validity of such appointments contingent on the Senate granting its approval (or "Advice and Consent").[113] For "inferior officers," Congress may by statute provide an alternative means of appointment by permitting appointments by the President alone, the head of a department (which includes multi-member Executive Branch agencies, commissions, and boards), or in the courts of law (the Article III courts—not so-called Article I tribunals).[114] Finally, if the Senate is in recess, the President may appoint a person temporarily to an

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[110] *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748–49, 788–95 (1999). As Professor Amar states his overarching interpretive theory, "[g]ood interpreters need to know when and how to read between the lines." *Id.* at 827.

[111] *See* EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 10–12 (2005) (noting that political and legal theorists mainly draw on "inherited ideas" about governance); *see generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) (explaining the general principles of constitutional, statutory, and contractual interpretation); *see also* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1129–38 (2000) (criticizing the traditional formalism/functionalism dichotomy as "a distraction, masking a robust consensus to which nearly all participants in the debate subscribe" and advocating for a pragmatic approach that seeks to assign tasks to the branch of government best able to undertake them); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 650–60 (2001) (arguing that the federal courts should attempt to "match[] the exercise of certain types of government authority with specific types of government decisionmakers").

[112] *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1971–2004 (2011) (providing historical background on the Framers' positions on how to select Executive and Judicial Branch officers).

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

[114] *Id.*; *see* Buckley v. Valeo, 424 U.S. 1, 124–27 (1976) (per curiam) (noting that the Appointments Clause governs the appointment of "any appointee exercising significant authority pursuant to the laws of the United States," and observing that "there is no provision of the Constitution remotely providing any alternative means for the selection" of U.S. officers).

Executive or Judicial Branch office.[115] These are the exclusive means of appointing U.S. officers and Article III judges.[116]

Today, however, the Senate routinely fails to consider, in a timely fashion, presidential nominations.[117] The modern practice of the Senate simply ignoring presidential nominations has generated some interesting proposals for reform. For example, Professor Matthew Stephenson has offered a novel proposal that would treat Senate inaction on nominations to "important" principal offices as a form of de facto or "implied consent to the appointment" after the passage of some minimum period of time.[118] He leans in on the common law maxim *qui tacit consentire videtur*—often associated with Sir Thomas More[119]—to support this striking proposition.[120]

To be sure, Professor Stephenson would exclude nominations to inferior offices and federal judgeships from this theory of implied

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[115] *See* U.S. CONST. art. II, § 2, cl. 3; *see also* NLRB v. Noel Canning, 573 U.S. 513, 522–23 (2014) (explaining that "the Recess Appointments Clause sets forth a subsidiary, not a primary, method for appointing officers of the United States" and that "the Recess Appointments Clause reflects the tension between, on the one hand, the President's continuous need for 'the assistance of subordinates,' and, on the other, the Senate's practice, particularly during the Republic's early years, of meeting for a single brief session each year" (citation omitted)). Justice Breyer, writing for the *Noel Canning* majority, explained that it was necessary "to interpret the Clause as granting the President the power to make appointments during a recess but not offering the President the authority routinely to avoid the need for Senate confirmation." *Id.* at 524.

[116] To be sure, by far the largest category of federal workers constitute mere "employees" who are neither principal nor inferior officers because they do not exercise any significant policymaking authority. *See* Lucia v. SEC, 138 S. Ct. 2044, 2051–52 (2018) (discussing and distinguishing "officers" from mere "employees" for purposes of the Appointments Clause).

[117] *See* Roberts, *supra* note 12, at 733–39 (arguing that "a general breakdown in the appointments process" has taken place over time and placing the blame on "minority obstruction" through the use of "procedural delays"). For countervailing evidence that the problem with delays in the confirmation process is most acute with mid-tier executive appointments rather than with confirmations of principal officers, see *supra* notes 12, 85–86.

[118] Stephenson, *supra* note 13, at 942.

[119] *See* ROBERT BOLT, A MAN FOR ALL SEASONS: A PLAY IN TWO ACTS 152 (1960) (reciting the maxim and observing that "[i]f, therefore, you wish to construe what my silence 'betokened,' you must construe that I consented, not that I denied").

[120] *See* Stephenson, *supra* note 13, at 952 ("Indeed, a hoary English common law maxim, derived from Roman law, asserts that *qui tacet consentire videtur* ('one who keeps silent is understood to consent')—a principle famously (and successfully) invoked by Thomas More at his trial for treason." (footnote omitted)).

Senate approval through inaction;[121] his approach would constitute a radical break from settled constitutional practice—which requires the Senate to vote a presidential nominee up or down (by a majority vote with a quorum present).[122] The problem of the Senate slow-walking or simply ignoring presidential nominations is a real and serious one, but the cure must not be worse than the disease. Moreover, the VRA seemingly goes a long way toward answering Stephenson's Take Care Clause concerns about a President potentially being hobbled by the lack of ready-to-hand assistants.[123]

Stephenson's argument is highly creative but ultimately unpersuasive. The United States has a well-settled and longstanding constitutional practice of reading the "advice and consent" language in the Appointments Clause to require not merely inaction by the Senate but rather an affirmative, majority

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[121] *See id.* at 973–75 (excluding "judicial appointments" because "the Take Care Clause has little bearing on how one should interpret the process for judicial appointments" and also limiting the implied consent rule "to senior executive officers—cabinet secretaries, agency heads, commissioners, senior deputies, and ambassadors—who are [indispensable] to carrying out the core programs and missions of the executive branch" because vacancies in "less important positions, while surely an inconvenience, are unlikely to deprive the White House, or any particular agency or department, of the capacity to fulfill its core functions" (footnote omitted)). We agree with Professor Stephenson's concern for "core functions," which we refer to as "essential and necessary functions." *Id.* at 975. We differ in our proposed solutions, however—Stephenson would use the concept of "core functions" to justify unilateral presidential self-help, whereas we propose using the concept as a basis for strictly delimiting the scope of an acting officer's policymaking authority. In other words, Stephenson uses the concept as a license, whereas we propose that the federal courts should impose it as a limit on acting principal officers' authority. *See infra* notes 123–126 and accompanying text.

[122] *See* Stephenson, *supra* note 13, at 944 (discussing the recent erosion of past "informal Senate norms" and procedures).

[123] *See id.* at 976–77 (discussing the VRA as a means of addressing his Take Care Clause concerns but ultimately concluding that "even if the Vacancies Act . . . provides for the appointment of an acting official to carry out the functions of a vacant office on an interim basis, the President should still be able to treat the Senate's failure to act on the President's nominee for that office within a reasonable period of time as implicit consent"). Stephenson's position, which he labels as "tentative," does not make much sense. *Id.* at 975 n.112. If the VRA permits the President to name an acting principal officer and keep her in office indefinitely by simply nominating someone else to the position, it is hard to perceive any plausible Take Care Clause problem. *See* 5 U.S.C. § 3346(a) (2018). In short, the VRA, as presently applied, seems to give Stephenson exactly what he says he wants: the ability of a President to name a principal officer who will serve indefinitely if the Senate takes no action on a nomination to that office. It is puzzling why he fails to acknowledge that the VRA, if used in a maximal way, solves the problem he identifies.

vote by the Senate that approves the nomination in a recorded vote. This practice enjoys support not merely from a page of history, but rather from literal *volumes* of history.[124] The affirmative consent by recorded vote rule reflects a consistently observed understanding between the Senate and the President about how to fulfill the Appointments Clause's requirements.[125] In light of these considerations, Stephenson's reform proposal goes too far toward enabling presidential absolutism and would, if adopted, permit the Senate to entirely exit the field of confirming appointments to principal offices by simply not acting on presidential nominations to principal offices within the prescribed period.[126]

To be sure, Stephenson correctly notes that the Senate's ability to approve or reject Executive Branch nominations cannot be used to impair the Executive Branch's ability to function. A plausible solution to the inherent structural conflict between the Appointments and Take Care Clauses must give the President the ability to discharge the core functions of the Executive Branch (at a minimum, statecraft, defense, and law enforcement) without letting him or her bypass the Senate's advice and consent function. A "rule of necessity" problem exists; not having someone to undertake, say, the Secretary of State's duties is constitutionally unacceptable. But not everything a Secretary of State actually does relates to the Executive Branch's core functions. Put simply: the Senate's advice and consent power cannot be deployed in a way that divests the President of the ability to "take care" that the Executive Branch can exercise these constitutionally assigned powers.

Consider too the U.S. Supreme Court's decision in *Noel Canning*—which limits the President's use of recess appointments

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[124] Krotoszynski, *Transcending*, *supra* note 31, at 1543 ("Professor Stephenson's proposal, of course, essentially reads the consent requirement out of Article II, Section 2. It also ignores over 225 years of settled practice between the President and the Senate.").

[125] *See id.* at 1521–26, 1542–44 (discussing the historical development of "the federal appointments process").

[126] Stephenson, *supra* note 13, at 946 ("[W]hen the President nominates an individual to a principal office in the executive branch, where filling that office is essential for the President to fulfill his or her duty faithfully to execute the laws, the Senate's failure to act on the nomination within a reasonable period of time, despite good faith efforts of the nominee's supporters to secure a floor vote, shall be construed as providing the Senate's tacit or implied 'Advice and Consent' to the appointment within the meaning of the Appointments Clause" (quoting U.S. CONST. art. II, § 2, cl. 2.)).

to periods in which the Senate is in recess for ten or more days.[127] President Obama, despairing of Senate action on important nominations, attempted to use the Recess Appointments Clause power to staff vacant offices (and, more specifically, to fill NLRB seats necessary to create a quorum at the agency).[128] Justice Breyer, a committed functionalist, derived the ten-day minimum recess period from consistent practice over time—essentially finding a constitutional convention or gloss based on the practice of past Presidents and Senates.[129] Because the Senate recess at the time of President Obama's NLRB appointments was only around three days—not ten or more—the Court held the appointments to be invalid under the Recess Appointments Clause.[130]

What's the point of limiting the recess appointments power in this way if, by statute, Congress may essentially obviate the need for a President to ever seek confirmation of a cabinet officer? The VRA permits a President to appoint anyone confirmed by the Senate to a very minor subordinate office (for example, an assistant secretary for public affairs) to later hold the full powers of the cabinet-level office (for at least seven months and, if the President submits a nomination to the Senate, even longer while the nomination is pending) without the Senate's advice and consent—or to name a senior employee within the department to the principal office,[131] provided that the person's employment overlapped with the prior principal officer for at least ninety days.[132]

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[127] NLRB v. Noel Canning, 573 U.S. 513, 538 (2014) (holding "that a [Senate] recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause"). Writing for the *Noel Canning* majority, Justice Stephen Breyer explained that "[i]f a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause" and, based on relatively consistent historical practice over time, "a recess lasting less than 10 days is presumptively too short as well." *Id.*

[128] *Id.* at 520–22.

[129] *See id.* at 526–38.

[130] *Id.* at 557 ("[W]e conclude that the Recess Appointments Clause does not give the President the constitutional authority to make the appointments . . . at issue.").

[131] Matthew Whitaker, for example, served as a senior aide to Attorney General Jeff Sessions but did not hold a Senate-confirmed position within the Department of Justice at the time President Trump appointed him to serve as the acting Attorney General following Sessions's resignation from office. *See* O'Connell, *Actings*, *supra* note 14, at 617–22 (providing a detailed account of Whitaker's transition from senior aide to Acting Attorney General).

[132] 5 U.S.C. § 3345(a)(3) (2018); *see also* Mendelson, *supra* note 11, at 1584–85 (outlining the "three methods" the VRA provides to fill a vacancy"); O'Connell, *Vacant Offices*, *supra*

III. THE VRA AND THE PRESIDENT'S POWER TO MAKE UNILATERAL APPOINTMENTS TO PRINCIPAL EXECUTIVE BRANCH OFFICES

The VRA has transformed the laws that govern federal vacancies. From Congress's perspective, the purpose of the VRA was to ensure that the President respects the Senate's advice and consent authority when appointing Executive Branch officers.[133] This Part provides a history of the precursors to the VRA and the impetus that led to it. Then, Section III.A turns to the scope of the VRA and explains its contemporary operation. Section III.B then provides background and examples of when acting appointments, particularly of principal officers, became commonplace. Lastly, Section III.C will highlight the problem with authorizing a President to unilaterally appoint acting principal officers without limiting the scope of the officer's authority while in the vacant office.

A. THE VRA: ITS PRECURSORS AND CONTEMPORARY OPERATION

The allocation of the appointment power between Congress and the President has evolved over time since the Framers drafted the Constitution.[134] Starting from the first term of President George

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note 12, at 934 (noting that "the president can select a senior civil servant, who is paid at least at the GS-15 level and who has worked in that agency for at least ninety days of the past year").

[133] Senator Robert Byrd (D-WV), co-sponsor of the VRA, encouraged his fellow senators to vote for passage of the VRA by arguing that:

> [E]ach time a vacancy is filled by an individual in violation of the Vacancies Act, yet another pebble is washed off the riverbank of the Senate's constitutional role, and . . . as more and more of these pebbles tumble downstream, the bank weakens, until, finally, it collapses. . . . [W]e have a responsibility to the American people and to . . . the Senate . . . to shore up that riverbank, to stop the erosion that has taken place, and to reverse the wretched trend of acquiescing on our constitutional duties that seems to have so ominously infected this Senate.

144 CONG. REC. 22,512 (1998) (statement of Sen. Byrd).

[134] *See* THE FEDERALIST NO. 76, *supra* note 19, at 457 (Alexander Hamilton) (observing that the Senate's role in the appointments process would provide "an excellent check upon a spirit of favoritism in the President" by preventing "the appointment of unfit characters . . . from family connection, from personal attachment, or from a view to popularity"); *see also* JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 17–18 (1968) ("One group . . . [was]

Washington, Congress has limited the President's "authority to appoint acting officials to temporarily perform the functions of a vacant" office, namely those requiring presidential appointment and Senate confirmation (PAS office), "without first obtaining Senate approval."[135] Initially, the earliest statutes permitted the appointment of "any person or persons" to fill vacancies in the Treasury, State, and War Departments.[136] Although Congress permitted acting officers to serve until a permanent official could return to his duties or until a successor was appointed, the third Congress imposed a six-month limit on the length of an acting officer's service.[137] Over time, subsequent Congresses' most common method to limit Presidents' discretion when selecting nominees and temporary officials has been through vacancies legislation.[138]

Congress attempted to restrict the President's *removal* power, the other side of the appointments' coin, in the 1867 Tenure in Office Act.[139] This statute also indirectly affected unilateral presidential appointments, however, by denying persons holding such positions their government salaries unless and until the President sought and obtained the Senate's approval of a temporary appointment.[140] At

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afraid of granting the appointing power to the executive . . . and believed that the power would be more safely entrusted to the upper branch of the legislature. . . . Another group . . . favored the creation of a strong executive, who they believed would be better qualified . . . than a numerous body."); Jeffrey K. Tulis, *Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court*, 47 CASE W. RESERVE L. REV. 1331, 1339–42 (1997) (summarizing the views of individual members of the Constitutional Convention concerning the proper role of the President and Senate in making appointments); Reznick, *supra* note 7, at 147 n.9 (examining the language, history, and executive and judicial interpretations of the Appointments Clause).

[135] NLRB v. SW Gen., Inc., 137 S. Ct. 929, 935 (2017).

[136] Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281.

[137] *See* Act of Feb. 13, 1795, ch. 21, 1 Stat. 415 ("[N]o one vacancy shall be supplied, in manner aforesaid, for a longer term than six months.").

[138] *See* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 39–43 (4th ed., rev. 1997) (discussing Congress's periodic efforts to impose statutory restrictions on the President's power to fill vacant offices requiring presidential appointment and Senate confirmation).

[139] Act of Mar. 2, 1867, ch. 154, 14 Stat. 430, 431.

[140] *Id.* (requiring that vacant or temporarily filled advice and consent PAS offices "remain in abeyance, without any salary, fees, or emoluments" if the President does not promptly fill them with Senate-confirmed nominees during the Senate's next session). For a discussion and analysis of the Tenure in Office Act, see WILLIAM H. REHNQUIST, GRAND INQUESTS: THE

the urging of President Grover Cleveland, Congress repealed the Tenure in Office Act on March 3, 1887.[141]

Congress first squarely revisited the appointments issue with the enactment of the Vacancies Act of 1868,[142] which "expanded the number of PAS offices that the President could fill with acting officers" while also imposing new constraints.[143] These new constraints restricted the President's temporary appointment options by requiring that a temporary or recess appointee be either the first assistant to the vacant office or an already confirmed federal officer and by limiting the chosen appointee's tenure to ten days.[144] Subsequent Congresses amended the 1868 Act[145] and adopted other limitations on unilateral presidential appointments by expanding the permissible term of temporary service from ten days to thirty days, withdrawing financial support of officer posts, establishing eligibility guidelines, and threatening to reject unwelcome nominees if the President did not withdraw their nominations from consideration.[146]

Throughout most of the nineteenth century, Presidents used the Appointments Clause, without the Senate's advice and consent, to fill vacancies and make recess appointments, even when the Senate was in session.[147] Moreover, most of the Presidents from 1880

HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 210, 259–68 (1992).

[141] Act of March 2, 1887, ch. 353, 24 Stat. 500; *see* Raines v. Byrd, 521 U.S. 811, 826 (1997) ("The Tenure of Office Act, passed by Congress over the veto of President Andrew Johnson in 1867, was a thorn in the side of succeeding Presidents until it was finally repealed at the behest of President Grover Cleveland in 1887.").

[142] Act of July 23, 1868, ch. 227, 15 Stat. 168; *see also* Act of Feb. 20, 1863, ch. 45, 12 Stat. 656.

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

[144] Act of July 23, 1868, ch. 227, 15 Stat. 168.

[145] Act of Feb. 6, 1891, ch. 113, 26 Stat. 733 (expanding the window of acting service from ten days to thirty days for a temporary appointee's tenure).

[146] *See* FISHER, *supra* note 138, at 26–43.

[147] Attorneys General from 1823 through 1866 offered formal legal opinions that empowered the President to utilize broadly his recess appointment powers and to make "take care" appointments. *See* President's Power to Fill Vacancies in Recess of the Senate, 12 Op. Att'y Gen. 32, 39 (1866) ("[W]here the vacancy exists in the recess, whether it first occurred in the recess or in the preceding session, the power to fill is in the President alone."); President's Appointing Power, 10 Op. Att'y Gen. 356, 356 (1862) ("The President has lawful power in the recess of the Senate to fill a vacancy on the Bench of the Supreme Court . . . ."); Ambassadors and Other Pub. Ministers of the U.S., 7 Op. Att'y Gen. 186, 225–26 (1855) ("If

through 1972 seemed to respect the Senate's disapproval of consecutive "recess appointments of the same or another officer to a vacant office and of recess appointments to vacancies that did not occur during a Senate recess."[148] However, interbranch conflicts over appointments frequently arose during the 1970s and 1980s, specifically over the Vacancies Act's proper scope of application.[149]

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he choose to remove any of the present ministers he can do so, and that creates a vacancy, which he may fill by temporary appointment."); Power of President to Appoint to Office During Recess of Senate, 4 Op. Att'y Gen. 523, 526 (1846) ("It is doing no violence to the language of the constitution to maintain, that this vacancy happening from the inaction of the Senate on the nomination made, is within the meaning of the section quoted, and may be filled by an Executive appointment."); Power of President to Fill Vacancies, 2 Op. Att'y Gen. 525, 529–30 (1832) ("If it took place after the adjournment, it happened during the recess, according to the narrowest interpretation proposed to be given to the article; and, consequently, even in that view of the subject the President has a right to fill it."); Exec. Auth. to Fill Vacancies, 1 Op. Att'y Gen. 631, 633 (1823) ("Is the Senate in session? Then he must make a nomination to that body. Is it in recess? Then the President must fill the vacancy by a temporary commission."). The U.S. Court of Appeals for the Second Circuit also approved of these precedents in the appointments context. *See* United States v. Allocco, 305 F.2d 704, 713 (2d Cir. 1962) ("Our decision is not without precedent. The Attorneys-General of the United States . . . have held in a long and continuous line of opinions that the recess power extends to vacancies which arise while the Senate is in session.").

[148] Joshua L. Stayn, *Vacant Reform: Why the Federal Vacancies Reform Act of 1998 Is Unconstitutional*, 50 DUKE L.J. 1511, 1517 (2001); *see also* Vacancy in Office of Sec'y of State, 32 Op. Att'y Gen. 139, 141 (1920) (acknowledging the 30-day time limit); Vacancy in Head of Dep'ts, 20 Op. Att'y Gen. 8, 9 (1891) (discussing the previous ten-day time limit); Performing Duties of Vacant Office, 18 Op. Att'y Gen. 58, 59 (1884) (same); Appointments Ad Interim, 17 Op. Att'y Gen. 530, 531 (1883) ("When the vacancy is thus temporarily filled once for [ten days], the power conferred by the statute is exhausted; it is not competent to the President to appoint either the same or another officer to thereafter perform the duties of the vacant office for an additional period of ten days."); Appointments Ad Interim, 16 Op. Att'y Gen. 596, 597 (1880) (stating that the President lacks the power to make a consecutive ten-day appointment). *But cf.* President—Appointment of Officers—Holiday Recess, 23 Op. Att'y Gen. 599, 603 (1901) ("If a temporary appointment could in this case be legally made during the current adjournment as a recess appointment, I see no reason why such an appointment should not be made during any adjournment, as from Thursday or Friday until the following Monday.").

[149] For example, four senators sought to remove Howard Phillips as acting director of the Office of Economic Opportunity in 1973. *See* Williams v. Phillips, 360 F. Supp. 1363, 1371 (D.D.C. 1973) (holding that "in the absence of such legislation [providing for succession of an acting director] or legislation vesting a temporary power of appointment in the President, the constitutional process of nomination and confirmation must be followed" and, accordingly, an individual who was appointed acting director by the President but whose appointment was not confirmed by the Senate "was not appointed lawfully to his post").

The Nixon Administration (specifically the Department of Justice) asserted that heads of executive agencies, through the enabling statutes of some departments and agencies, had independent authority to temporarily fill vacancies irrespective of the Vacancies Act's requirements.[150] This led Congress to amend the Vacancies Act to clarify that it applies to virtually all federal agencies (including cabinet-level departments).[151] Simultaneously, the amendments lengthened the temporary or acting service term to 120 days, including a tolling period that applied while a nomination was pending before the Senate.[152]

However, the interbranch tensions did not ease as the Nixon Administration and subsequent presidential administrations failed to comply with the Vacancies Act. For instance, "[a]t the Justice Department alone, at least forty-eight people between 1981 and 1998 served as temporary appointees in advice and consent positions for longer than the 120 days authorized by the Vacancies Act in effect during that time."[153] Therefore, several "acting officers filled high-level positions, sometimes in obvious contravention of the Senate's wishes."[154] Thus, by the end of the twentieth century,

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[150] *See* MORTON ROSENBERG, CONG. RESEARCH SERV., 98-892, THE NEW VACANCIES ACT: CONGRESS ACTS TO PROTECT THE SENATE'S CONFIRMATION PREROGATIVE 2–4 (1998). However, the Comptroller General disagreed and argued that the Vacancies Act provided the sole authorization for temporarily filling vacancies. *Id.* at 3. The Justice Department during the Nixon administration took the position that 28 U.S.C. § 509 and § 510 authorized the Attorney General "from time to time to make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." *Id.* at 2.

[151] *Id.* at 9 (describing Congress's amendment which "expressly negate[d] the DOJ position that the statutory vesting of general agency authority in the head of any agency . . . thereby provide[d] an alternative to the Act's otherwise exclusive means of temporarily filling vacant positions").

[152] *Id.* at 2; *see* Presidential Transitions Effectiveness Act, Pub. L. No. 100-398 § 7, 102 Stat. 985, 988 (1988).

[153] Stayn, *supra* note 148, at 1518; *see* ROSENBERG, *supra* note 150, at 4 (noting that "as of February 28, 1998, 64 acting officials in the 320 advice and consent positions, 43 of whom were serving beyond the 120-day limit of the Act").

[154] NLRB v. SW Gen., Inc., 137 S. Ct. 929, 936 (2017); *see also* MORTON ROSENBERG, CONG. RESEARCH SERV., VALIDITY OF DESIGNATION OF BILL LANN LEE AS ACTING ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS 1–3 (1998), *reprinted in Oversight of the Implementation of the Vacancies Act: Hearing before the S. Comm. on Governmental Affairs*, 105th Cong. 62–64 (1998) (discussing President Bill Clinton's unilateral appointment of Bill Lann Lee from outside the federal government and, without regard to the Vacancies Act's

the practice of relying on acting officers to staff major positions within the Executive Branch—as a means of avoiding Senate confirmation—became quotidian. Recognizing that this trend represented a growing threat to the Senate's power, Congress enacted the Federal Vacancies Reform Act of 1998.[155]

The Federal Vacancies Reform Act of 1998 replaced all prior Vacancies Acts while retaining some of the provisions and rules governing the President's unilateral exercise of the appointment power on a temporary basis.[156] The VRA retains the following "three primary functions of the original Act: (1) to define which positions can be filled temporarily, (2) to define who is eligible to fill vacancies, and (3) to set time limitations on acting appointments."[157] Under the VRA's contemporary operation, § 3345(a) first limits the positions that can be filled temporarily to PAS positions within executive agencies, with the exception of positions in the Government Accountability Office.[158] Second, § 3345(a) permits

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limits, to serve as acting Assistant Attorney General for the Civil Rights Division of the Justice Department, despite the Senate's refusal to confirm Lee to that office).

[155] 5 U.S.C. §§ 3345–3349 (2018); *see also* Stayn, *supra* note 148, at 1518–21 (analyzing the interbranch conflict between the President and the Senate over President Clinton's appointment of Bill Lann Lee to serve as the acting Assistant Attorney General for the DOJ's Civil Rights Division); West, *supra* note 17, at 176–96, 213–14 (offering a thorough history of the Appointments Clause and the Vacancies Acts); HENRY B. HOGUE, CONG. RESEARCH SERV., RS21412, TEMPORARILY FILLING PRESIDENTIALLY APPOINTED, SENATE-CONFIRMED POSITIONS 1–2 (2017) (describing temporary appointment tools for addressing vacancies under the VRA).

[156] *See* 5 U.S.C. §§ 3345–3349. Section 3347(a) states that "Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency" for a vacancy in a PAS office. *See also* O'Connell, *Actings*, *supra* note 14, at 625–37 (providing a detailed summary of the VRA and its operation and identifying some lingering uncertainties associated with its limitations on acting officers).

[157] Van Orsdol, *supra* note 4, at 305–06.

[158] 5 U.S.C. § 3345(a) (providing that "[i]f an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate" cannot perform his or her duties, the President may appoint an acting officer). A vacancy may be filled temporarily when a PAS officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office." *Id.* However, there are exclusions of certain officers under the VRA per § 3349c:

> Sections 3345 through 3349b shall not apply to[:] (1) any member who is appointed by the President, by and with the advice and consent of the Senate to any board,

three categories of individuals to serve as acting officers in a vacant PAS office.[159] Specifically, the President's choices of an acting officer are: (1) the "first assistant to the [vacant] office";[160] (2) any previously Senate-confirmed officer who works in a PAS office;[161] and (3) any grade GS–15 or above career civil servant who worked for the executive agency for at least ninety of the past 365 days.[162] Third, the VRA restricts an acting officer's tenure to a 210-day period that commences from the date the office becomes vacant.[163]

> commission, or similar entity that—(A) is composed of multiple members; and (B) governs an independent establishment or Government corporation; (2) any commissioner of the Federal Energy Regulatory Commission; (3) any member of the Surface Transportation Board; or (4) any judge appointed by the President, by and with the advice and consent of the Senate, to a court constituted under article I of the United States Constitution.

See Colonial Press Int'l, Inc. v. United States, 788 F.3d 1350, 1357 (Fed. Cir. 2015) (holding that the Government Accountability Office (GAO) constitutes "a legislative agency" rather than an Executive Branch agency and accordingly should be excluded from the VRA). The legislative history of the VRA explains why these particular positions were exempted. S. REP. NO. 105-250, at 20 (1998).

[159] 5 U.S.C. § 3345(a); *see* BRANNON, *supra* note 3, at 9–11 (explaining the VRA's contemporary operation and who may serve as an acting officer).

[160] 5 U.S.C. § 3345(a)(1) (providing that such an appointee is "subject to the time limitations of [§] 3346"); *see* BRANNON, *supra* note 3, at 9 ("The term 'first assistant' . . . is not defined by the [VRA] and its meaning is not entirely clear. For many offices, a statute or regulation explicitly designates an office to be the 'first assistant' . . . ." (footnotes omitted)).

[161] 5 U.S.C. § 3345(a)(2).

[162] *Id.* § 3345(a)(3)(A)–(B) (providing that such an appointee is "subject to the time limitations of [§] 3346"); *see* O'Connell, *Vacant Offices*, *supra* note 12, at 950 (discussing "senior careerists"); Mendelson, *supra* note 11, at 1584–85 (explaining the three methods of filling a vacancy in an executive agency).

[163] 5 U.S.C. § 3346(a)(1) ("Except in the case of a vacancy caused by sickness, . . . an acting officer . . . may serve in the office . . . for no longer than 210 days . . . ."). However, if the President nominates another individual to fill the position permanently, the acting officer can serve beyond the 210-day period. *Id.* § 3346(a)(2). In addition, if the nominee is "rejected by the Senate, withdrawn, or returned to the President by the Senate," then another 210-day period commences. *Id.* § 3346(b)(1) ("If the first nomination for the office is rejected . . . withdrawn, or returned . . . the person may continue to serve as the acting officer for no more than 210 days after . . . ."). This process can occur twice before the President needs to appoint another acting officer. *Id.* § 3346(b)(2)(A) ("[T]he person serving as the acting officer may continue to serve . . . until the second nomination is confirmed . . . ."). Notably, an acting officer can serve for 300 days during a presidential inauguration transition period. *Id.* § 3349a; *see* BRANNON, *supra* note 3, at 11–13 (discussing the rules governing the period of time that an acting officer may serve under the VRA).

Lastly, an individual cannot serve as an acting officer while also being nominated to the same office unless the individual was the Senate-confirmed, first assistant to a principal officer and is serving in an acting capacity in the principal office.[164]

Additionally, the VRA "only applies to nondelegable 'functions or duties' that a statute or regulation has exclusively assigned."[165] However, "most of the functions and duties are tasks that can be assigned to someone else,"[166] meaning that many, perhaps most, official duties may be assumed by a higher officer when a time restriction expires under the VRA.[167]

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[164] 5 U.S.C. § 3345(b)(1)(B). An exception exists for first assistants who served at least ninety days prior to the vacancy occurring; they may be nominated while serving in an acting capacity. *Id.* § 3345(b)(2); *see* Jennifer A. Dlouhy, *Temporary EPA Chief Could Keep Gig for Years Without Senate Vote*, BLOOMBERG NEWS (July 16, 2018, 4:00 AM), https://www.bloomberg.com/news/articles/2018-07-16/temporary-epa-chief-could-keep-gig-for-years-without-senate-vote (noting that former EPA Deputy Administrator Andrew Wheeler was five days shy of the ninety-day requirement to simultaneously serve as Acting Administrator and as a nominee). Therefore, a first assistant who satisfies this condition could possibly serve for an entire presidential term if her nomination remained pending for the Senate.

[165] Van Orsdol, *supra* note 4, at 307; *see* 5 U.S.C. § 3345(a)) ("If an officer of an Executive agency . . . whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or *is otherwise unable to perform the functions and duties of the office* . . . ." (emphasis added)); *id.* § 3348(a)(2)(A)(i)–(B)(i)(I) ("[T]he term 'function or duty' means any function or duty of the applicable office that . . . is established by statute . . . or . . . is established by regulation . . . ."); *see also* BRANNON, *supra* note 3, at 7–9 (discussing the concept of a "function or duty" under the VRA); Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 420 (D. Conn. 2008) ("The question before the Court is whether the authority to make tribal acknowledgment decisions is required by statute or regulation to be performed only or exclusively by the [absent officer]."), *aff'd*, 587 F.3d 132 (2d Cir. 2009); S. REP. NO. 105-250, at 18 (1998) ("The functions or duties of the office that can be performed only by the head of the executive agency are therefore defined as the non-delegable functions or duties of the officer . . . .").

[166] Jen Kirby, *A Top Official at the Justice Department Is Resigning. The Federal Vacancies Act has a Solution for That*, VOX (Feb. 9, 2018, 7:57 PM), https://www.vox.com/2018/1/30/16924764/trump-government-appointees-vacancies-act (quoting from an interview with Anne O'Connell); *see also* Office of Thrift Supervision v. Paul, 985 F. Supp. 1465, 1474–75 (S.D. Fla. 1997) (holding that an officer previously in a vacant office had "validly delegated his responsibilities" to another officer; therefore, the other officer had the power to act under the Office of Thrift Supervision's orders, not the provisions of the Vacancies Act).

[167] *See* Kirby, *supra* note 166 ("[F]or the functions and duties you can't delegate down, you *can* delegate up.").

The VRA's principal enforcement mechanism involves voiding, as *ultra vires*, the official acts of an improperly appointed acting officer. When an acting officer performs a duty or function of that vacant office outside the time restrictions, the action has no force or effect.[168] The same holds true if a person serves as an acting officer despite being ineligible for the position.[169] Moreover, any actions undertaken by an unauthorized acting officer may not be ratified later by someone else within the agency or department.[170]

Notably, the VRA creates an easy way to "delegate the tasks of the vacant office."[171] As Professor O'Connell explains, "Despite the [VRA]'s prohibition on certain delegations, many functions and duties are regularly delegated to lower-level officials when vacancies arise, particularly after the Act's time limits for acting service have expired—the scope of which Congress almost certainly did not anticipate."[172] As a result, the VRA's contemporary

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[168] 5 U.S.C. § 3348(d)(1) ("An action taken by any person who is not acting under [the VRA] . . . in the performance of any function or duty of a vacant office . . . shall have no force or effect."); *see* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 938 n.2 (2017) (observing "that actions taken in violation of the FVRA are void *ab initio*"); *Void ab initio*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "void ab initio" as "[n]ull from the beginning, as from the first moment when a contract is entered into"); BRANNON, *supra* note 3, at 2–4 (explaining the scope and limitations of permissible actions under the VRA); O'Connell, *Actings*, *supra* note 14, at 631–33 (explaining that although the VRA does not establish a way to remove a noncompliant acting official, it effectively renders certain actions of improperly serving acting officials to have "no force or effect" (quoting 5 U.S.C. § 3348(d)(1))).

[169] *See, e.g.*, U.S. Gov't Accountability Office, Opinion Letter on Violations of the 210-Day Limit Imposed by the Federal Vacancies Reform Act of 1998—General Counsel, Department of Health and Human Services 7 (June 18, 2014), https://www.gao.gov/assets/680/670945.pdf (determining that two acting officials were not the first assistant and "were therefore ineligible to become the Acting General Counsel").

[170] 5 U.S.C. § 3348(d)(2) ("An action that has no force or effect under paragraph (1) may not be ratified.").

[171] O'Connell, *Actings*, *supra* note 14, at 633 n.105 (noting that "these delegation practices are pervasive and have largely been upheld by the limited courts to consider them"); L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 34 (D.D.C. 2020) ("Department heads and other officials may . . . delegate duties to multiple officials, so long as they do so 180 days before the vacancy arises.").

[172] O'Connell, *Actings*, *supra* note 14, at 634. Professor O'Connell adds that "[a]fter the GAO notified [Social Security Administration (SSA) acting commissioner Nancy Ann] Berryhill of her noncompliance with the Vacancies Act, she stepped down as 'acting Commissioner' of the SSA." *Id.* Thus, Berryhill "continued to perform the same role as before, but without the acting title, until Andrew Saul was formally nominated as the next SSA Commissioner in January 2019." *Id.* This proved to be a distinction without a difference because "[a]s Deputy

operation makes acting appointments the norm instead of the exception for both principal and inferior Executive Branch officers.

B. GROWING PRESIDENTIAL RECOURSE TO ACTING APPOINTMENTS OVER TIME

The use of acting principal officers in cabinet secretary posts has become commonplace in all modern presidential administrations—Democratic and Republican alike.[173] Professor O'Connell observes that "[b]etween January 20, 1981 and January 19, 2020, there have been 171 confirmed, 3 recess-appointed, and 147 acting cabinet secretaries."[174] Notably, all modern presidents since Ronald Reagan have heavily utilized acting principal officers in cabinet positions during their first few years in office.[175] Conversely, earlier presidents used secretaries from their predecessors during their first few years in office.[176] As levels of partisanship have increased,

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Commissioner of Operations, Berryhill could exercise all the functions of the commissioner through delegation." *Id.*

[173] *Id.* at 642–43 tbl.1. Table 1 divides the types of secretaries into three categories—confirmed, recess-appointed, and acting—by administration from the Reagan Administration through the third year of the Trump Administration. *Id.*; *see Federal Vacancies Reform Act,* U.S. GOV'T ACCOUNTABILITY OFFICE, https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act (last visited Nov. 2, 2020) (listing VRA violation letters since September 15, 2000).

[174] O'Connell, *Actings*, *supra* note 14, at 642. These increasing numbers may reflect the Senate blocking presidential recourse to recess appointments. *See id.* ("Since the Supreme Court's decision in *NLRB v. Noel Canning* in 2013, the Senate has conducted pro forma sessions to prevent recess appointments." (footnote omitted)).

[175] *Id.* at 642–44 tbl.1. The breakdown of modern Presidents' use of acting secretaries through each of their third year in office is: President Trump relied on eight or nine, depending on whether you include or exclude Rod Rosenstein's reported one-day tenure as acting Attorney General before the White House picked Whitaker; President George H.W. Bush relied on six; President Reagan relied on three; President George W. Bush relied on two; and Presidents Clinton and Obama relied on one. *Id.* Table 2 of O'Connell's research breaks down the types of cabinet secretaries—confirmed, recess, or acting—by agency between January 20, 1981, and January 19, 2020. *Id.* at 644 tbl.2.

[176] *See* ANNE JOSEPH O'CONNELL, ADMIN. CONFERENCE OF THE U.S., ACTING AGENCY OFFICIALS AND DELEGATIONS OF AUTHORITY 27 (2019) [hereinafter O'CONNELL, ACTING AGENCY OFFICIALS], https://www.acus.gov/sites/default/files/documents/final-report-acting-agency-officials-12012019.pdf (finding that "before President Truman took office in 1945, 27 Attorneys General, 26 Secretaries of the Treasury, and 23 Secretaries of State kept serving from one Administration into the next").

however, the practice of keeping carry-over officers from a prior administration has broadly declined over time.

The Departments of Commerce, Health and Human Services, Labor, and Veteran Affairs have had "more acting than confirmed secretaries" between January 20, 1981 and January 19, 2020.[177] Specifically, twenty-three acting secretaries have served for at least 100 days (rounded to five-day increments) in a Presidential administration between the start of the Reagan presidency and the third year of Trump's first (and only) term.[178]

Since the VRA's enactment in November 1998, all presidential administrations more frequently relied on naming acting principal officers to cabinet-level positions that require the advice and consent of the Senate. For example, Hershel Gober served as Acting Secretary of Veterans Affairs (VA) for 306 days during the Clinton administration.[179] Gober's tenure as Acting Secretary of the VA was the longest ever acting service within the VA.[180] Additionally, Togo D. West, Jr. served as Acting Secretary of the VA for approximately 125 days while also serving as Secretary of the Army during the Clinton Administration.[181] Another example from the Clinton Administration is Cynthia Metzler, who served as Acting Secretary of Labor for about 110 days.[182]

In the George W. Bush Administration, Charles Conner served as Acting Secretary of Agriculture for about 130 days starting in 2007.[183] Maria Cino also served as Acting Secretary of Transportation during the second term of the Bush Administration starting in 2006 for about 100 days.[184] Rebecca Blank served as

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[177] O'Connell, *Actings*, *supra* note 14, at 644 & tbl.2 (providing the average tenures of cabinet secretaries by type and administration rounded to five-day increments).

[178] *Id.* at 646 tbl.4, 647 ("President Trump has the most acting secretaries of all Presidents on this list (seven), with only three years in office and a Senate controlled by his party. By contrast, President Obama has five (including the one vacant period at the Department of Commerce) and President Clinton has four." (footnote omitted)).

[179] O'CONNELL, ACTING AGENCY OFFICIALS, *supra* note 176, at 27 tbl.10. Gober served as Acting Secretary of the VA on two occasions—the first time starting in 1997 for approximately 185 days and a second time in 2000 until the end of the Clinton Administration for approximately 180 days. *See* O'Connell, *Actings*, *supra* note 14, at 646–47 tbl.4.

[180] *See* O'CONNELL, ACTING AGENCY OFFICIALS, *supra* note 176, at 27 tbl.10.

[181] O'Connell, *Actings*, *supra* note 14, at 646–47 tbl.4.

[182] *Id.*

[183] *Id.*

[184] *Id.*

Acting Secretary of Commerce for about 215 days during the second term of the Obama Administration, and Seth Harris served as Acting Secretary of Labor in 2013 for about 180 days during the second term of the Obama Administration.[185] Another example of an acting principal officer in a cabinet post during the Obama Administration was Rand Beers, as Acting Secretary of Homeland Security for about 110 days.[186]

What about the Trump Administration? Kevin McAleenan served as Acting Secretary of Homeland Security for about 215 days, as of January 19, 2020.[187] In 2019, Patrick Shanahan served as Acting Secretary of Defense in the Trump Administration for about 175 days.[188] Matthew Whitaker provides yet a third example—he served as Acting United States Attorney General for about 100 days in 2018.[189]

At this juncture, it is too soon to know with certainty whether the Biden Administration will use acting appointments and targeted delegations of particular duties with the same gusto as its immediate predecessor. Even so, it seems highly likely that, with a closely divided Senate, President Joseph R. Biden will follow the example of other modern Presidents and make use of these tools to bypass the Senate to install his appointees (including to principal offices).[190] Whenever Senate confirmation of an Executive Branch nominee seems either difficult or doubtful, recourse to acting officer appointments under the VRA and targeted delegations will present an easy and obvious solution. Given that the use of acting officers transcends party (both that of the President and the Senate's majority), and has done so consistently over time, the practice is virtually certain to continue going forward.

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[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] *See* Sabrina Siddiqui & Ken Thomas, *Biden to Appoint Acting Agency Heads Due to Transition Delays*, WALL ST. J. (Jan. 12, 2021, 11:14 PM), https://www.wsj.com/articles/janet-yellen-senate-confirmation-hearing-for-treasury-secretary-set-for-jan-19-11610467975 ("President-elect Joe Biden intends to appoint acting agency heads across the federal government once he takes office because of delays to his transition and Senate consideration of his nominees . . . .").

In sum, since the VRA's enactment in 1998, presidents have used acting appointments in cabinet posts on an ever-growing basis. Moreover, this trend extends to principal officer positions that the Appointments Clause expressly conditions on the office holder having first obtained the Senate's "Advice and Consent" to his or her service.[191] Overall, of the twenty-three longest serving acting secretaries, President Trump has had the most with seven acting secretaries (as of January 19, 2020)[192]—President Obama had five (including the one vacant period for the Secretary of Commerce), President Clinton had four, President George W. Bush had three, President George H. W. Bush also had three, and President Reagan had one.[193] The Trump Administration also differs from previous presidential administrations in that it has used acting principal officers in more than one of the "core four" (or inner) cabinet posts—Defense, State, Justice, and Treasury.[194] As evident from the

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

[192] Since January 19, 2020, President Trump has had several other acting secretaries. *See Christopher C. Miller*, U.S. DEP'T. OF DEF., https://www.defense.gov/OurStory/Biographies/Biography/Article/2111192/christopher-c-miller/ (last visited Jan. 23, 2021) (stating that Christopher C. Miller served as the Acting Secretary of Defense from November 9, 2020 until January 20, 2021); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, B-331650, LEGALITY OF SERVICE OF ACTING SECRETARY OF HOMELAND SECURITY AND SERVICE OF SENIOR OFFICIAL PERFORMING THE DUTIES OF DEPUTY SECRETARY OF HOMELAND SECURITY 1 (2020), https://www.gao.gov/assets/710/708830.pdf (finding that "[t]he Homeland Security Act of 2002 provides an order of succession outside of the [VRA]" for the Secretary of Homeland Security position, and that Kevin McAleenan improperly assumed the title of Acting Secretary after Kristjen Nielsen resigned on April 10, 2019; thus, subsequent amendments to the order of succession were also invalid, such that the subsequent appointments of Chad Wolf and Ken Cuccinelli were improper).

[193] O'Connell, *Actings*, *supra* note 14, at 646–47 tbl.4.

[194] *See supra* notes 188–189 and accompanying text; *see also* Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 751 (2001) (positing that that "core or essential governmental functions are those that reside in the departments that make up the inner cabinet (State, Defense, Treasury, and Justice Departments), that is, those departments established immediately after the nation's founding because their activities were deemed essential to the nation's operation"); THOMAS E. CRONIN, THE STATE OF THE PRESIDENCY 177–210 (1975) (discussing the historical roles cabinet members have played to their Presidents). In addition, the first cabinet, that of President George Washington, in 1789, consisted of only four department heads: State, Treasury, War (now Defense), and the Attorney General. *See id.* at 178 ("Washington did not seek to have his department heads—State, Treasury, War, and a part-time Attorney General—function as a policy-making and program-coordinating body . . . ."); JOHN E. FERLING, THE FIRST OF MEN: A LIFE OF GEORGE WASHINGTON 381 (1988) (describing how Washington filled his cabinet);

growing list of examples of acting principal officers, a general trend exists for presidential administrations to rely more frequently on naming acting principal officers to senior cabinet posts.

C. THE CONSTITUTIONAL PROBLEM WITH GRANTING THE PRESIDENT UNILATERAL AUTHORITY TO APPOINT ACTING PRINCIPAL OFFICERS

The Appointments Clause "divides all officers into two classes—'inferior officers' and noninferior officers, which we have long denominated 'principal' officers."[195] As discussed above, Congress may statutorily authorize the President, the head of an executive department, or a court of law to appoint inferior officers without the advice and consent of the Senate.[196] Accordingly, whether an office is principal or inferior may significantly affect the appointment process, making the distinction crucial.

Unfortunately, however, the U.S. Supreme Court has yet to articulate a clear distinction between principal and inferior officers. In *Morrison v. Olson*, the Court used a functionalist test based on factors like removability, limitations on duties, and the office's limited jurisdiction.[197] More recently, then-Professor, now Court of

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JAMES THOMAS FLEXNER, WASHINGTON: THE INDISPENSABLE MAN 222–23 (1974) (observing that Washington saw his cabinet selection process as "essential to the ever deepening unity" of the country); RICHARD NORTON SMITH, PATRIARCH: GEORGE WASHINGTON AND THE NEW AMERICAN NATION 44–60 (1993) (detailing how Washington selected the four cabinet positions); *see also* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 53–54 (1993) (discussing the individuals that President George Washington selected for his first cabinet in 1789).

[195] NLRB v. SW Gen., Inc., 137 S. Ct. 929, 945 (2017) (Thomas, J., concurring) (citing United States v. Germaine, 99 U.S. 508, 509, 511 (1879)); *see* U.S. CONST. art. II, § 2, cl. 2; *see also* Buckley v. Valeo, 424 U.S. 1, 132 (1976) (per curiam) ("[A]ll officers of the United States are to be appointed in accordance with the Clause. . . . No class or type of officer is excluded because of its special functions.").

[196] U.S. CONST. art. II, § 2, cl. 2 ("[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

[197] *Compare* Morrison v. Olson, 487 U.S. 654, 671–72 (1988) (stating that the "line between 'inferior' and 'principal' officers is one that is far from clear" but should take account of factors like removability, duty limitations, and limited jurisdiction), *with id.* at 722 (Scalia, J., dissenting) (finding that "it is surely a *necessary* condition for inferior officer status that the

Appeals Judge, Neomi Rao has observed, "the Court has explained that an inferior officer must have a superior, which is not simply a person with formally a higher rank."[198] In *Edmond v. United States*, decided in 1997, the Court held that:

> [I]n the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.[199]

Essentially, if an officer has the authority to render final policy decisions within an agency or department, free and clear of the direction or supervision of another officer within that agency, the officer holds a "principal"—rather than an "inferior"—office.[200] Inferior officers—whose appointments may be exempted from the advice and consent requirement—report to an individual below the President and are subject to that person's direction and supervision.[201] *Edmond* thus adopts a strict categorical rule that

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officer be subordinate to another officer," so the independent counsel was not inferior because she was not subordinate to the President or a principal officer within the DOJ).

[198] Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1244–45 (2014).

[199] 520 U.S. 651, 663 (1997); *see* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 510 (2010) (reaffirming the formulation set forth in *Edmond*).

[200] Dellinger Memorandum, *supra* note 27, at 150 ("In determining whether an officer may properly be characterized as inferior, we believe that the most important issues are the extent of the officer's discretion to make autonomous policy choices and the location of the powers to supervise and to remove the officer."); *see* Rao, *supra* note 198, at 1245 n.159 ("For the Appointments Clause the significance of the distinction between principal and inferior officers relates to the ability of Congress to vest appointment of inferior officers in someone other than the President."). Walter Dellinger described the distinction in these terms: "While an officer responsible only to the President for the exercise of significant discretion in decision making is probably a principal officer, an officer who is subject to control and removal by an officer other than the President should be deemed presumptively inferior." Dellinger Memorandum, *supra* note 27, at 150.

[201] *Edmond*, 520 U.S. at 662 ("[T]he term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior.").

creates a limited universe of "principal" officers—those officers who sit atop an agency's organizational flowchart.

As previously discussed, the VRA "governs the process by which the President may temporarily fill a vacancy in an Executive Branch office normally occupied by an officer of the United States."[202] Therefore, "when a vacancy arises, the President may 'direct' an official to 'perform the functions and duties of the office temporarily.'"[203] This means that the VRA permits the President to appoint both inferior and principal officers without first obtaining the advice and consent of the Senate. The President's unilateral appointment of inferior officers does not raise constitutional issues because Congress "may by Law" exempt these appointments from the advice and consent requirement, and Congress has done so with the VRA.[204] However, the President appointing *principal* officers under the VRA does raise constitutional concerns "because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate."[205] If an acting official is a principal officer, "at least the third category of the Vacancies Act and some agency succession statutes (which rely on nonconfirmed deputies) would be unconstitutional."[206]

The U.S. Supreme Court last directly addressed the constitutionality of temporary officers in principal positions in the

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[202] NLRB v. SW Gen., Inc., 137 S. Ct. 929, 945 (2017) (Thomas, J., concurring).

[203] *Id.* (quoting 5 U.S.C. § 3345(a)(1)–(3)); *see infra* text and accompanying notes 236–240 (providing an explanation of authorized functions and duties under the VRA); *see also* BRANNON, *supra* note 3, at 7–9 (explaining permissible "function[s] or dut[ies]" for the purposes of the Vacancies Act).

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

[205] *SW Gen.*, 137 S. Ct. at 946 (Thomas, J., concurring).

[206] O'Connell, *Actings*, *supra* note 14, at 660 & n.231 (describing the concept of "de facto" officers created via the delegation of discrete responsibilities); Memorandum from Steven A. Engel, Assistant Att'y Gen., Office of Legal Counsel, to Emmet T. Flood, Counsel to the President 17 (Nov. 14, 2018), https://www.justice.gov/olc/page/file/1110881/download (citing the statutes that allow the appointment of acting heads for the Federal Housing Finance Agency, the Consumer Financial Protection Bureau, the Office of National Drug Control Policy, and the General Services Administration, as well as an Acting Archivist). The de facto officer doctrine, which does not apply to violations of the Vacancies Act, may, however, apply to any violations of the Appointments Clause in this context. *See* Phillips v. Payne, 92 U.S. 130, 132 (1875) (allowing courts to treat "[t]he acts of an officer *de facto*" as "valid and binding," even if the person was not "an officer *de jure*"); *see also* O'Connell, *Actings*, *supra* note 14, at 659–61 (analyzing and critiquing the de facto officer doctrine).

nineteenth century. *United States v. Eaton*, decided in 1898, centered around whether the ailing consul or the vice consul, Sempronius Boyd, who was temporarily acting as the consul, was entitled to be paid the consul's salary.[207] The Court found that Boyd, the vice consul to Siam (what is now Thailand), could temporarily act as the consul (a principal office) even though he had not been confirmed by the Senate.[208] The Court reasoned that "[i]n case a vacancy occurs in the offices both of consul and vice-consul, which requires the appointment of a person to perform temporarily the duties of the consulate, the diplomatic representative has authority to make such appointment . . . ."[209] The Court determined Boyd was an inferior officer, although he was serving as the acting consul to Siam by performing the functions of that principal office on a temporary basis.[210] The Court explained:

> Because the subordinate *officer* is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered.[211]

The Court recently reiterated in *Edmond* that "*Eaton*'s holding that 'a vice consul charged temporarily with the duties of the consul'

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[207] United States v. Eaton, 169 U.S. 331, 337 (1898).

[208] *See Eaton*, 169 U.S. at 338; *see also* Nick Bravin, Note, *Is* Morrison v. Olson *Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1115–16 (1998) (summarizing *United States v. Eaton*); Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533, 568–74, 601–06 (2020) (discussing the current cursory and unsatisfying answers of the Appointments Clause doctrine on acting officials, notably from the Court's holding in *Eaton* and its broad construction of a "principal" officer to include a person lacking significant independent policymaking authority and subject to plenary supervision by the Secretary of State).

[209] *Eaton*, 169 U.S. at 338.

[210] *Id.* at 343–44.

[211] *Id.* at 343 (emphasis added).

is an 'inferior' officer."[212] The Court also reaffirmed the holding of *Eaton* in *Morrison v. Olson*.[213]

Of course, using the metrics of *Edmond*, vice-consuls, consuls, and ambassadors, would all constitute "inferior" officers today because the Secretary of State exercises broad authority to control and supervise them. Indeed, a consul—who does not have any policymaking authority but who does process important requests (such as visa applications) and who assists U.S. residents abroad—is more akin to an ALJ, which *Lucia* found to be an inferior officer (rather than an "employee").[214]

Professor O'Connell correctly observes that, in dicta, the *Eaton* Court characterized a consul as a "principal" officer,[215] but that conclusion cannot be reconciled with today's governing *Edmond* test. Consuls, like ambassadors, are directly supervised and controlled by a superior within the department—the Secretary of State. Just as a U.S. Attorney exercises significant policymaking authority—but is nevertheless an inferior officer because U.S. Attorneys are supervised by the Attorney General—under the governing test today, a consul should be labeled an inferior, not a principal, officer. On the other hand, whether an acting Secretary of State, who serves for over half a year, should be deemed an inferior officer for purposes of the Appointments Clause should raise grave constitutional doubts.

Of course, one still must deal with *Eaton*'s ruling that an acting principal officer is merely an "inferior" officer for constitutional purposes.[216] We believe that the precise facts in *Eaton* should be

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[212] Engel Memorandum, *supra* note 206, at 15 (quoting Edmond v. United States, 520 U.S. 651, 661 (1997)).

[213] Morrison v. Olson, 487 U.S. 654, 672 (1988) ("This conclusion is consistent with our few previous decisions that considered the question whether a particular Government official is a 'principal' or an 'inferior' officer. In *United States v. Eaton*, 169 U.S. 331 (1898), for example, we approved Department of State regulations that allowed executive officials to appoint a 'vice-consul' during the temporary absence of the consul, terming the 'vice-consul' a 'subordinate officer' notwithstanding the Appointment Clause's specific reference to 'Consuls' as principal officers.").

[214] Lucia v. SEC, 138 S. Ct. 2044, 2051–55 (2018).

[215] O'Connell, *Actings*, *supra* note 14, at 661 ("In 1898, the Supreme Court upheld the temporary service of Sempronius Boyd, a private missionary, as consul general—*a principal office at the time*—to what is now Thailand in *United States v. Eaton*." (emphasis added)).

[216] *See supra* notes 210–211 and accompanying text.

kept in mind when considering this precedent's scope. The vice-consul served for only a few days while the consul was ill, and both claimed the full pay for the days in question. Clearly, the acting consul could not have made policy or undertaken major new initiatives while serving as a mere placeholder for the consul for a few days. Simply put, when an officer or employee covers for a very short period of time while a principal officer is away (whether on vacation or for health reasons), the person "pinch-hitting" should be deemed an inferior officer because they cannot possibly engage the full powers of the office in a single day—or even in ten days.[217]

Justice Thomas takes a position consistent with this analysis in *SW General, Inc.* He seems to suggest that serving in a principal office for a *significant* period of time will trigger the advice and consent requirement, and because the VRA authorizes unilateral appointments to principal offices for more than *de minimis* time periods, the statute therefore violates the Appointments Clause.[218] Thomas explains his positions as follows:

> That Solomon was appointed "temporarily" to serve as *acting* general counsel does not change the analysis. I do not think the structural protections of the Appointments Clause can be avoided based on such

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[217] Ten days is the period Justice Breyer identified as the minimum period for a Senate recess of sufficient length to put the Recess Appointments Clause into play. *See* NLRB v. Noel Canning, 573 U.S. 513, 538 (2014) (holding that the Senate has to be in recess at least 10 days to "trigger the Recess Appointments Clause"). We believe that service on an ad hoc basis in a principal office, for a *de minimis* period (i.e., no more than ten days), should not render the place holder a "principal" officer. It is simply not possible to undertake a major new policy initiative—or even to complete ongoing initiatives—when serving for such a limited period of time. Seven months, however, presents the acting officer with sufficient time to fully engage the powers of a principal office. Simply put, if the Secretary of State's chief of staff delivers a speech on behalf of the Secretary to the Council on Foreign Relations, it would be ludicrous to suggest that she must first obtain the advice and consent of the Senate. Serving for ten days or less as an acting principal officer is more akin to delivering a speech at a dinner than to exercising the full authority of a principal office. We would distinguish *Eaton* on this basis as well as observe that the consul's position, under current controlling precedent, would constitute an inferior office.

[218] NLRB v. SW Gen., Inc., 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring) ("Appointing principal officers under the FVRA, however, raises grave constitutional concerns because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate.").

> trivial distinctions. Solomon served for more than three years in an office limited by statute to a 4-year term, and he exercised all of the statutory duties of that office. 29 U.S.C. § 153(d). There was thus nothing "special and temporary" about Solomon's appointment.[219]

Although Solomon's appointment as general counsel was not temporary or transitory, vice consul Boyd became the acting consul to Siam for a few days because the Senate-confirmed consul became ill.[220] As Justice Thomas argues, a world of difference exists between pinch-hitting for a few days for a sick colleague and holding a government office for weeks, months, or even, as in Solomon's case, years.[221] The length of acting service should prefigure whether a person covering for a principal officer constitutes an inferior or principal officer.

In our view, service on an acting basis for a few days should not trigger the Appointments Clause's advice and consent requirement. The clause should apply only when the person holds a principal office for a sufficient period of time to engage the full policymaking powers of the position. Using this approach, service as a principal officer for ten or fewer days on an acting basis should be presumptively constitutional. However, acting service in principal offices under the VRA almost invariably exceeds ten days. For example, Matthew Whitaker's appointment as acting Attorney General lasted for over ninety days (from November 7, 2018 to February 14, 2019) and brought *Eaton*'s characterization of an acting principal officer as an "inferior officer" back into the spotlight.[222] In Whitaker's case, the Office of Legal Counsel (OLC)

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[219] *Id.* at 946 n.1 (quoting United States v. Eaton, 169 U.S. 331, 343 (1898)).

[220] *Eaton*, 169 U.S. at 332–33.

[221] O'Connell, *Actings*, *supra* note 14, at 662 (observing that "Justice Thomas . . . takes a formalist view of the Appointments Clause").

[222] *See* Aaron Blake, *The Legal Fight over Matthew Whitaker's Appointment, Explained*, WASH. POST (Nov. 14, 2018, 11:30 AM), https://www.washingtonpost.com/politics/2018/11/14/matthew-whitakers-shaky-legal-footing-explained/ ("The basic issue at hand is whether Whitaker, who did not need to be confirmed by the Senate for his previous job as then-Attorney General Jeff Sessions's chief of staff, can replace Sessions in an acting capacity."); Jason Tashea & Lee Rawles, *Who Is Matthew Whitaker, the New Acting Attorney General?*, ABA J. (Nov. 8, 2018, 6:10 AM), https://www.abajournal.com/news/article/who_is_matthew_

formally found that Whitaker was an "inferior officer" when he served as Acting Attorney General for the Department of Justice.[223] The OLC supported its position by pointing to historical practice from previous presidential administrations that "identified over 160 occasions between 1809 and 1860 on which non-Senate-confirmed persons served temporarily as an acting or ad interim principal officer in the Cabinet."[224] Additionally, as Professor O'Connell has observed, the Trump Administration did not seem to think that the Court's decision in *Eaton* imposed "an emergency condition on temporary service"—like a principal officer falling ill (as was the case in *Eaton* itself).[225]

An alternative view is that President Trump's appointment of Whitaker as Acting Attorney General violated the Appointments Clause.[226] Whitaker served as a principal officer per the language of the Appointments Clause (at least as glossed in *Edmond*) for more than a *de minimis* period; therefore, he should have first obtained the Senate's approval before serving as the Attorney General.[227]

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whitaker_the_new_acting_attorney_general (explaining how Senate-confirmed Attorney General Jeff Sessions resigned, and then how Whitaker, Attorney General Sessions's Chief of Staff (a non-Senate-confirmed position) became the Acting Attorney General).

[223] *See* Engel Memorandum, *supra* note 206, at 6 ("If so, it does not matter whether an acting official temporarily filling a vacant principal office is an inferior officer or not an 'officer' at all within the meaning of the Constitution, because Mr. Whitaker was appointed in a manner that satisfies the requirements for an inferior officer . . . ."). The OLC has previously reasoned that an employee who "act[s] in the vacant position of a Senate-confirmed officer" under the VRA "is, temporarily, a properly appointed inferior Officer of the United States." Designation of Acting Dir. of the Office of Mgmt. & Budget, 27 Op. O.L.C. 121, 124 (2003).

[224] Engel Memorandum, *supra* note 206, at 7.

[225] O'Connell, *Actings*, *supra* note 14, at 663 (citing Engel Memorandum, *supra* note 206, at 14–15).

[226] *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring) ("Appointing principal officers under the FVRA, however, raises grave constitutional concerns because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate.").

[227] *See* Neal K. Katyal & George T. Conway III, Opinion, *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 ("A principal officer *must be* confirmed by the Senate. . . . [This] means that Mr. Trump's installation of Matthew Whitaker as acting attorney general of the United States after forcing the resignation of Jeff Sessions is unconstitutional."); *see also* Walter

Professor O'Connell observes that "[m]any formalists, relying on the structure of the Appointments Clause, view acting officials in principal offices as principal officers."[228] On the other hand, functionalists tend to be ersatz originalists and purport to rely "on the 1792 Vacancies Act and other early historical practice" to support their position that temporary appointments to principal offices, even for more than *de minimis* periods of service, are inferior officers—"at least if their service is under six months, as the 1795 statute prescribed."[229] One could, of course, split the difference. Truly ad hoc service for a few days should not trigger the advice and consent requirement—it would be ludicrous to require Senate approval for an inferior officer or employee to substitute for a very brief period for her boss; the service would end well before the Senate could conceivably take up the matter. The acting officer also could not engage in any serious supervisory or policymaking duties; after all, no need for "supervision" and "direction" exists if the person is not exercising the full powers of a principal office. Thus, someone serving for ten or fewer days could be deemed "inferior"

Dellinger & Marty Lederman, *Initial Reactions to OLC's Opinion on the Whitaker Designation as "Acting" Attorney General*, JUST SEC. (Nov. 15, 2018), https://www.justsecurity.org/61483/initial-reactions-olc-opinion-whitaker-designation-acting-attorney-general (positing that *Eaton* should be read to impose an emergency condition, such as a consul falling ill, on the appointment of a temporary official to a principal office without the advice and consent of the Senate); Will Baude, *Who Is Lawfully the Attorney General Right Now?*, REASON: THE VOLOKH CONSPIRACY (Nov. 10, 2018, 3:48 PM), https://reason.com/2018/11/10/who-is-lawfully-the-attorney-general-rig ("If you asked me to consider this purely as a matter of text and structure, I doubt that the President can name an 'Acting' Attorney General without Senate confirmation . . . .").

[228] O'Connell, *Actings*, *supra* note 14, at 664. O'Connell observes that "although no formalist appears to have made the argument, the Opinion Clause supports the view that acting officials in principal offices are principal officers." *Id.* at 664 n.253. She correctly posits that if the federal courts do not treat them as such, the President could not invoke the Opinion Clause to require them to provide opinions regarding the operation of their department or agency. *Id.* (citing Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647 (1996)).

[229] O'Connell, *Actings*, *supra* note 14, at 664 (citing Andrew Hyman, *Old English Law Indicates that "Six Months" Is the Maximum Necessary and Proper Constitutional Limit on Tenure of Acting Cabinet Secretaries*, ORIGINALISM BLOG (Nov. 16, 2018), https://originalismblog.typepad.com/the-originalism-blog/2018/11/old-english-law-indicates-that-six-months-is-the-maximum-necessary-and-proper-constitutional-limit-o.html).

precisely because she cannot realistically put the office's full suite of powers to use.[230]

An acting official appointed to a principal office by the President, like Whitaker, should not automatically be deemed an inferior officer simply because the VRA establishes a temporal limit on the acting officer's term of service. An acting principal officer can still wield the full power of that office, and the VRA's vagaries could leave an acting principal in office for months—even years.[231] If the *Edmond* test governs, an acting officer in a principal office under the VRA cannot be deemed inferior because no supervisor exists to direct her work; the acting principal officer calls the shots (subject only to the President's supervision).[232] Because of this reality, the VRA raises grave separation of powers concerns, and no obvious workaround exists if one takes the Appointments Clause's plain language seriously (as textualist judges should).[233]

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[230] *See* NLRB v. Noel Canning, 573 U.S. 513, 538 (2014) (holding that the Senate has to be in recess at least 10 days to "trigger the Recess Appointments Clause"). As one commentator explains, "in 2007, Senate Majority Leader Harry Reid used pro forma sessions for the first time to prevent recess appointments by President George W. Bush near the end of his Administration." Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2245 (2018). The use of pro forma sessions "to prevent the business of governance, including the exercise of presidential authority under Article II" has become the norm. *Id.* Therefore, the Recess Appointments Clause has been effectively nullified by the Senate's routine practice of holding pro forma sessions.

[231] *See* 5 U.S.C. §§ 3345–3346 (2018) (failing to limit the scope of authority that an acting officer in a principal office may wield during their acting service).

[232] *See* Edmond v. United States, 520 U.S. 651, 666 (1997) ("49 U.S.C. § 323(a) authorizes the Secretary of Transportation to appoint judges of the Coast Guard Court of Criminal Appeals; and that such appointment is in conformity with the Appointments Clause of the Constitution, since those judges are 'inferior Officers' within the meaning of that provision, by reason of the supervision over their work exercised by the General Counsel of the Department of Transportation.").

[233] *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1738 (2020) (noting that the "Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment" because "[i]f judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives"). What holds true for *statutes* should also hold true for the text of the *Constitution* itself. Thus, even if Congress, in 1792, purportedly authorized the President to name acting principal officers who could serve for indefinite periods, this de facto emendation of the Constitution's text should not control over the plain text of the Constitution itself. *See* THE FEDERALIST NO. 78, *supra* note 19, at 468 (Alexander Hamilton) (explaining that "where the will of the legislature, declared in its statutes, stands in opposition to that of the people,

The VRA provides the President incredibly broad authorization to place acting officers in positions that would otherwise require Senate confirmation.[234] And, despite *Eaton*'s characterization of an acting officer in what the Court characterized as a "principal" office, service for a few days—or even ten days—is one thing, but service for seven or more months is quite another.[235] Acting principal officers, under current practice, are accountable *only* to the President and have broad policy discretion (coupled with the time and space to put that power to work). Simply put, they are not "inferior" in any meaningful sense. If an acting principal officer enjoys the full power of the Secretary of State, the Secretary of Defense, or the Attorney General, for more than a *de minimis* period of time, one cannot conclude that he or she is "inferior" because the acting officer will enjoy ample time and space to harness the office's full suite of authority without *any* supervision within the agency.

Matters stand on quite different constitutional footing with respect to inferior officers. It would be wildly wide of the mark to characterize the VRA's authorization of acting appointments of

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declared in the Constitution, the judges ought to be governed by the latter rather than the former"). What is more, "the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former." *Id. But cf. Noel Canning*, 573 U.S. at 600 (Scalia, J., concurring) ("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." (citing 5 U.S.C. § 3345; Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281)). It is exceedingly strange for an ostensibly textualist, originalist jurist, like Antonin Scalia, to afford greater interpretative primacy to early congressional practice and precedent than to the text of the Constitution itself. Strictly speaking, the constitutional validity of the 1792 statute authorizing indefinite acting appointments to principal offices was not before the Court in *Noel Canning*. Even so, Justice Scalia seems to presume its validity—despite it essentially zeroing out the express requirements of the Appointments Clause.

[234] *See* 5 U.S.C. §§ 3345–3349 (2018).

[235] The point here is simple: Ten days is such a slight period of office that an acting principal officer serving for ten (or fewer) days would be very hard pressed to undertake any major policymaking initiatives—or even to complete major policy initiatives that were ongoing within the agency or department. *See supra* note 217. This would be a quite logical, and practical, way to distinguish *Eaton* and the 1868 statute (but not the 1792 and 1795 statutes) from the VRA. *See United States v. Eaton*, 169 U.S. 331, 343 (1898) ("Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official.").

inferior officers as a kind of "loophole."[236] Whether for good or bad reasons, Congress can waive the advice and consent requirement for inferior offices—and the VRA constitutes a broad and deep exercise of this constitutional authority.[237] Thus, Congress has only itself to blame for the breadth of authority it gave the President to appoint inferior officers on a temporary basis. The federal courts' job is not to fix what Congress, or some members in Congress, have come to regret and view as a mistake.

By way of contrast, however, Congress lacks the constitutional authority to authorize direct presidential appointments of principal officers.[238] Therefore, the VRA is on doubtful constitutional ground with respect to principal officers, at least if they may exercise the full scope of the principal office's non-delegable powers.[239] We believe that the VRA, as presently interpreted and applied, unconstitutionally authorizes long-serving acting principal officers without the Senate's approval of their service.

It is true that Senate confirmations do not come swiftly these days.[240] Consequently, temporary appointments to principal offices

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[236] *See, e.g.*, Lara Seligman, *Trump Skirting Congress to Install Loyalists in the Pentagon*, POLITICO (July 17, 2020, 4:30 AM), https://www.politico.com/news/2020/07/17/trump-loyalists-pentagon-366922 (quoting Senator Richard Blumenthal (D-Conn.) as arguing that "[t]his administration is shamefully circumventing the Senate confirmation process to install partisan puppets in senior Pentagon posts" and that "[b]y exploiting loopholes, they seek to escape congressional and public scrutiny of these underqualified officials").

[237] *See supra* note 204 and accompanying text.

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

[239] *Compare* 5 U.S.C. §§ 3345–3349, *with* U.S. CONST. art. II, § 2, cl. 2 (requiring that principal officers be appointed "with the Advice and Consent of the Senate"); *see also* Morrison v. Olson, 487 U.S. 654, 671–72 (1988) (explaining that the line between principal officers and inferior officers includes certain factors, such as limits on the scope of an officer's authority, the length of the officer's service, and whether the officer is subject to direction and supervision within the agency). One could characterize acting service as serving as a mere caretaker—after all, what can one do in ten days? *See supra* note 217. If this intuition is correct, our proposal to limit *all* acting principal officers to caretaker duties would reconcile the VRA's authorization of the practice with the 1868 statute that authorized acting officials of any rank to serve for up to ten days without the Senate's approval—as well as the facts and holding in *Eaton*, which involved very short-term acting service. Serving for a day, or even for ten days, and serving for a year are simply not the same—and the U.S. Supreme Court's Appointments Clause jurisprudence should be subtle enough to take proper account of the difference.

[240] *See* Doolin Sec. Sav. Bank v. Office of Thrift Supervision, 139 F.3d 203, 209 (D.C. Cir. 1998) (observing that Senate confirmations of Executive Branch nominees were much faster

are probably necessary for the federal government to function without Senate-confirmed principal officers.[241] Nevertheless, striking a sensible and constitutionally plausible balance between the Appointments and Take Care Clauses is complicated. One approach would be for the federal courts to adopt a saving construction of the VRA under which only a Senate-confirmed principal officer could exercise the office's full authority, whereas an acting principal officer, appointed solely by the President and who lacks Senate approval, could exercise only limited authority and could undertake solely caretaker responsibilities. The next Part discusses precisely how this might work in practice.

IV. MAKING THE VRA (MORE) CONSISTENT WITH THE APPOINTMENTS CLAUSE

Before discussing why the analogy between a caretaker Prime Minister (PM) and an acting principal officer could make the VRA more consistent with the Appointments Clause, we must first explain the concept of a caretaker PM in a parliamentary system of government and the significance of her role. Specifically, this Part will describe the limitations applicable to a caretaker PM's authority and will explain why a caretaker PM does not wield the same powers as a PM selected and supported by a majority of the legislature. Notably, a caretaker PM carries out only the necessary and essential functions required to keep the government running.

The caretaker PM provides a useful model for acting principal officers in the United States. We argue that judicial intervention is necessary to constrain acting principal officers to carrying out only the essential functions of their offices. The analogy works quite nicely because both situations involve the lack of a necessary democratic imprimatur. A principal officer appointed by the President with the advice and consent of the Senate is akin to a PM who enjoys the ongoing support of a majority of the parliament's members, whereas an acting principal officer appointed by the President without Senate confirmation closely resembles a

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in the past and noting that President's Washington's typically "followed on the same day, or the next" day as he made his nominations).

[241] *See id.* at 209 ("[T]he machinery of government would not work if it were not allowed a little play in its joints." (quoting Bain Peanut Co. of Tex. v. Pinson, 282 U.S. 499, 501 (1931))).

caretaker PM, who lacks the support of a parliamentary majority. Adopting this approach would incentivize future Presidents to seek and obtain the Senate's consent for their principal officers.

A. THE EXAMPLE OF CARETAKER PRIME MINISTERS IN PARLIAMENTARY SYSTEMS

When a sitting PM loses her majority, but no other party obtains a majority, she will continue to serve as PM in a caretaker capacity.[242] Under various parliamentary systems of government, a caretaker PM may only undertake essential or necessary actions; she may not engage the full powers of the office (unless she enjoys support from a majority of the members of the legislature).[243] Typically, a caretaker PM will serve in this capacity until a new election results in a parliamentary majority for a regular PM or until negotiations with the leadership of other parties in parliament secures majority support for the caretaker PM (at which point the caretaker PM would be entitled to exercise the full powers of the office).[244] A similar problem arises when a principal officer within the Executive Branch lacks the imprimatur of the Senate.

The rules governing caretaker governments vary from place to place but usually possess some common features. Despite common

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[242] *See* Catherine Haddon, *Caretaker Government,* INST. FOR GOV'T, https://www.instituteforgovernment.org.uk/explainers/caretaker-government (last updated Dec. 11, 2019) (noting that the caretaker PM may "remain in office but should not announce new policy, make new appointments, sign new contracts or take decisions of long-term consequence unless not doing so would be detrimental to public interest").

[243] *See* Michael Laver & Kenneth A. Shepsle, *Cabinet Government in Theoretical Perspective*, *in* CABINET MINISTERS AND PARLIAMENTARY GOVERNMENT 285, 291–92 (Michael Laver & Kenneth A. Shepsle eds., 1994) (comparing and contrasting the constitutional provisions relating to caretaker governments in parliamentary democracies); *see also* Anne Twomey, *Explainer: What are the Caretaker Government Conventions?*, CONVERSATION (Aug. 7, 2013, 4:16 PM), https://theconversation.com/explainer-what-are-the-caretaker-government-conventions-16817 (explaining the basics of caretaker conventions, particularly the limits that apply to government actions during the caretaker period); *Guidelines on the Conduct of Ministers, Ministers of State, Exempt Staff and Public Servants During an Election*, GOV'T CAN., [hereinafter CAN. MANUAL], https://www.canada.ca/en/privy-council/services/publications/guidelines-conduct-ministers-state-exempt-staff-public-servantselection.html (last modified Sept. 11, 2019) (explaining the limited powers of a caretaker PM in Canada).

[244] *See* BRAZIER, *supra* note 51, at 39–41 (explaining the intricacies and process of a caretaker government).

design elements, however, one should note that there is no one-size-fits-all caretaker government; slight variations exist from one parliamentary system to the next based on individual countries' caretaker government conventions. In general, a government acts in a caretaker capacity in three situations: (1) during a general election, (2) if a vote of no confidence is passed in the House of Commons or Representatives, and (3) if an election produces an unclear result (or a "hung" parliament).[245] During a caretaker period, the government continues handling essential matters, but it must follow the policies and practices of the country's caretaker convention.[246]

Caretaker conventions ensure that caretaker governments avoid: (1) "making major policy decisions that are likely to commit an incoming government;" (2) "making significant appointments;" and (3) "entering major contracts or undertakings."[247] Effectively, a

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[245] Haddon, *supra* note 242 ("In the UK, government acts in a caretaker capacity in three scenarios: 1. During a general election campaign[,] 2. If a vote of no confidence is passed by the House of Commons[, and] 3. If an election produces an unclear result."); *see also* CABINET OFFICE, U.K. GOV'T, THE CABINET MANUAL: A GUIDE TO LAWS, CONVENTIONS AND RULES ON THE OPERATION OF GOVERNMENT 17 (2011) [hereinafter U.K. MANUAL], https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf (stating that a caretaker government should "observe discretion in initiating any new action of a continuing or long-term character in the period immediately preceding an election, immediately afterwards if the result is unclear, and following the loss of a vote of confidence"); DEP'T OF THE PRIME MINISTER AND CABINET, AUSTL. GOV'T, GUIDANCE ON CARETAKER CONVENTIONS 1 (2018) [hereinafter AUSTL. MANUAL], https://www.pmc.gov.au/sites/default/files/publications/guidance-caretaker-conventions-2018.pdf ("[D]uring the period preceding an election for the House of Representatives, the government assumes a 'caretaker role.'"); CAN. MANUAL, *supra* note 243 ("The caretaker period begins when either the Government loses a vote of non-confidence or Parliament has been dissolved (either as a result of the Prime Minister asking for dissolution, or because of an election date set by legislation). It ends when a new government is sworn-in, or when an election result returning an incumbent government is clear.").

[246] AUSTL. MANUAL, *supra* note 245, at 1 ("[S]uccessive governments have followed a series of practices, known as the 'caretaker conventions', which aim to ensure that their actions do not bind an incoming government and limit its freedom of action."). The UK Government issued a Cabinet Manual during the David Cameron Administration that lays out in detail the restrictions placed on government activity during a caretaker period. However, the U.K. notably does not use the word "caretaker" to describe such a period. *See* U.K. MANUAL, *supra* note 245, at 17.

[247] AUSTL. MANUAL, *supra* note 245, at 1 ("There are also established practices associated with the caretaker conventions that are directed at protecting the apolitical nature of the public service and avoiding the use of Commonwealth resources in a manner to advantage a

caretaker government is meant to *take care* of essential business to keep the government functioning without making any significant decisions that pre-commit the next government.[248]

The scope of these three limitations on caretaker governments might seem fuzzy. In most places, however, they are reasonably well-defined, although "[w]hether a particular policy decision qualifies as 'major' is a matter for judgment."[249] Relevant factors for determining whether a matter constitutes a "major" policy decision include the "significance of the decision in terms of policy and resources" and "whether the decision is a matter of contention between the Government and Opposition in the election campaign."[250] Sometimes, however, making a major policy decision is unavoidable; then, "the Minister would usually consult the Opposition spokesperson beforehand."[251]

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particular party. The conventions and practices also aim to prevent controversies about the role of the public service distracting attention from the substantive issues in the election campaign.").

[248] *See* Boston et al., *supra* note 52, at 632 ("Wherever possible, [caretaker] governments are expected to avoid issues of significance, such as taking major policy decisions which are likely to commit the next government, making important appointments and entering into major contracts."). In Canada, a caretaker government "retains its full legal authority to carry on the government of the country and remains fully responsible for ensuring the provision of effective government . . . [and at the same time] such a government is expected to show restraint." *Id.* (footnote omitted) (quoting Machinery of Government Secretariat, *Major Actions by a Government Before an Election and During Transition* (Machinery of Government Secretariat, Privy Council Office, Ottawa, 1997)).

[249] AUSTL. MANUAL, *supra* note 245, at 2; *see also* Twomey, *supra* note 243 ("Deciding whether a policy is major or an appointment or contract is significant is a matter of judgement. There are no hard and fast rules.").

[250] AUSTL. MANUAL, *supra* note 245, at 2 (observing that "[caretaker] conventions apply to the making of decisions, not to their announcement," accordingly, caretaker governments can announce major policy decisions that were made before the commencement of the caretaker period); *see also* Twomey, *supra* note 243 ("Factors include whether or not it is a routine or contentious matter, whether it commits government resources, whether it involves large amounts of money, the length of any commitment and whether or not it can easily be reversed.").

[251] AUSTL. MANUAL, *supra* note 245, at 2 (noting that a caretaker government "has agreed to provide urgent financial assistance to drought-affected areas following consultation with the Opposition"); *see also* Twomey, *supra* note 243 ("If circumstances arise where a major decision has to be made during the caretaker period (for example about whether to commit Australian troops to military action or whether to provide emergency relief to deal with a natural disaster), it is customary for the government to consult the Opposition to try to find a mutually agreed position.").

Additionally, caretaker governments should avoid making significant appointments.[252] The key factors for determining whether an appointment is "significant" typically include "the importance of the position" and "whether the proposed appointment would be . . . controversial."[253] Moreover, if deferring an "appointment is impracticable, usually for reasons associated with the proper functioning of an agency, there are several options . . . ."[254] First, the PM "could make an acting appointment where permissible."[255] Second, the PM "could make a short term appointment until shortly after the end of the caretaker period."[256] Lastly, if the first two options are unavailable, the PM "could consult the relevant Opposition spokesperson regarding a full term appointment."[257]

The third significant restriction on caretaker government activity is on entering into major contracts or undertakings.[258] The relevant factors that a caretaker government should consider before entering into a major contract or undertaking is the "dollar value of the commitment" and "whether the [undertaking] involves a routine matter of administration or rather implements or entrenches a policy, program or administrative structure which is politically contentious."[259] Another important consideration is "whether the commitment requires ministerial approval."[260] Again, if avoiding the major undertaking during the caretaker period is impracticable, then the PM should consult with the Opposition leader about the major undertaking.[261]

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[252] CAN. MANUAL, *supra* note 245 (explaining that, in Canada, a caretaker government should "defer to the extent possible such matters as appointments").

[253] AUSTL. MANUAL, *supra* note 245, at 2.

[254] *Id.*

[255] *Id.*

[256] *Id.* at 3.

[257] *Id.*

[258] CAN. MANUAL, *supra* note 243 ("The processing of routine and non-controversial contracts and grants and contributions needs to continue.").

[259] AUSTL. MANUAL, *supra* note 245, at 3.

[260] *Id.*

[261] *Id.* ("Agencies could also explain the implications of the election to the contractor and ensure that contracts include clauses providing for termination in the event of an incoming government not wishing to proceed. Similarly, in the case of tenders, agencies should warn potential tenderers about the implications of the election and the possibility that the tender might not be completed.").

Although countries with parliamentary systems (and caretaker conventions) provide guidelines that lay out the policies and practices of caretaker PMs, little information exists on the consequences of a breach of a caretaker convention.[262] This is likely because caretaker conventions are only conventions: "They are not law and are therefore not legally binding limits on the powers of the government."[263] Ultimately, PMs during caretaker periods still have the full power of the office "to enter into contracts and make decisions as long as they continue to hold office."[264] Moreover, there are "no legal grounds to challenge the validity of contracts or appointments simply because they are made during the caretaker period."[265]

Despite arising and existing by mere convention in most places, the rules delimiting the powers of a caretaker government are, in practice, routinely observed. Accordingly, a caretaker PM labors under significant limitations on the scope of her authority compared with a PM supported by a majority of parliament. One reason for this limited authority is that, once a parliament is dissolved, the PM is "no longer 'accountable' to parliament for [her] actions and should therefore be constrained in the way [she] behave[s]."[266] This makes

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[262] *See* Twomey, *supra* note 243 (discussing the consequences of a breach of the caretaker conventions).

[263] *Id.*

[264] *Id.*

[265] *Id.* ("There is a possibility (albeit a remote one) that the governor-general could refuse to act upon advice (for instance, to make an appointment) during the caretaker period, or defer any action until after the caretaker period was over, if that advice involved a serious breach of the caretaker conventions. In constitutional terms, this would be because ministers are not responsible to parliament during the caretaker period . . . ."). Twomey observes that "in Canada in 1896, after the Tupper government had lost the election but before a new government was sworn-in, prime minister Charles Tupper advised the governor-general to appoint a number of senators and judges." *Id.* In this circumstance, "[t]he governor-general refused and left it to the new government to advise upon filling the places." *Id.* So too, "South Australian premier Don Dunstan sought the appointment of a new governor days before the election in 1968," but "the appointment was deferred until after the election, and the incoming government decided to appoint someone else." *Id.*

[266] Twomey, *supra* note 243; *see also* Claude Klein, *The Powers of the Caretaker Government: Are They Really Unlimited?*, 12 ISR. L. REV. 271, 283 (1977) (explaining on a political level why a caretaker PM does not enjoy the same powers as a PM for an established government).

sense because no action can be taken to remove the caretaker PM.[267] A second reason is that it is unfair for an outgoing government to bind a future government before it takes to office; it presents a "dead hand" problem of the first magnitude.[268] Moreover, an outgoing government that loses its majority could begin major undertakings during the caretaker period that saddle the democratically elected successor government with policy commitments it does not support and will not pursue.[269] In sum, caretaker PMs are meant to ensure that only necessary and essential functions are performed to keep the government operating—nothing more.

As with acting principal officers in the United States, caretaker PMs can serve for relatively long periods. For example, Belgium set a record for having a caretaker government that served for over 500 days.[270] In April 2010, the PM resigned, which triggered an election in June 2010; however, a new government was not sworn in until December 2011.[271] The political parties in Belgium were unable to form a coalition agreement because of linguistic and ethnic tensions.[272] During this period, a caretaker PM, Yves Leterme, was

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[267] *See* Klein, *supra* note 266, at 283 (explaining how a PM who receives a vote of no-confidence means that her policy has been defeated by parliament and that parliament no longer supports her policies, and therefore, a better scenario in a parliamentary system is a PM continuing to serve in a caretaker capacity).

[268] *See* Twomey, *supra* note 243.

[269] *See id.* (observing that the incoming government could face "booby-traps" or "enormous financial commitments" imposed by the outgoing government).

[270] *See Belgium Swears in New Government Headed by Elio Di Rupo*, BBC NEWS (Dec. 6, 2011), www.bbc.co.uk/news/world-europe-16042750 ("Belgium has sworn in a new government, ending a record-breaking 541 days of political deadlock.").

[271] *See* Raymond A. Smith, *How Belgium Survived 20 Months Without a Government*, WASH. MONTHLY (Oct. 9, 2013), https://washingtonmonthly.com/2013/10/09/how-belgium-survived-20-months-without-a-government/ ("In December 2011, the Belgians were finally forced to end their squabbling . . . . The threat of a collapse of the Euro forced Brussels . . . to forge a consensus government . . . ."); *see also* Marleen Brans, Valérie Pattyn & Geert Bouckaert, *Taking Care of Policy in Times of Crisis: Comparative Lessons from Belgium's Longest Caretaker Government*, 16 J. COMP. POL'Y ANALYSIS, 448, 453 (2016) (providing a history of the growing political crisis in Belgium between the "right-wing" Dutch-speaking (Flemish) population in the north and the "left-wing" French-speaking population in the south that led to the fragmented party landscape without any party having enough representation to form a government).

[272] *See* Smith, *supra* note 271 ("Round after round of fruitless negotiations went on for the rest of 2010 and most of 2011. No faction or party was willing to compromise, nor could any single politician emerge as a unifying figure.").

responsible for "keeping the lights on"[273] in the Belgian government.[274] Simultaneously, the Eurozone faced an economic crisis, which Leterme, as Belgium's caretaker PM, was ill-equipped to deal with because of his limited policymaking authority under the caretaker conventions.[275]

Although the Belgian caretaker conventions have no formal foundation in Belgium's Constitution, they are customary laws that are "legally enforceable by the Supreme Court."[276] The caretaker conventions for the 2010–11 period aimed to "prevent policy termination," "continu[e] [the] daily administrative management," and "rule[] out [policy innovation] since committing to significantly new initiatives is the prerogative of the incoming government."[277]

Because the caretaker period in Belgium lasted so long, the caretaker provisions were relaxed in a few instances, such as "complying with the North Atlantic Treaty Organization (NATO) decisions to send troops to Libya, concluding deals to save banks,

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[273] *Keep the lights on*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/keep-the-lights-on (last visited Feb. 12, 2021) (giving an explanation of the expression, "keep the lights on," which means "to make sure that business, system, etc. continues to operate, even if it does not make much progress").

[274] *See* Peter Van Aelst & Tom Louwerse, *Parliament Without Government: The Belgian Parliament and the Government Formation Processes of 2007–2011*, 37 WEST EUR. POL. 475, 481–86 (2014) (providing empirical research on the number of bills and resolutions tabled by the Belgian Parliament during a caretaker period as well as the total number of bills produced). During the 2010–2011 caretaker government, parliament tabled more than 1500 bills and resolutions and produced merely 98 bills—showing a less active government. *Id.; see also* Leo Cendrowicz, *Belgian Waffling: Who Needs Government, Anyway?*, TIME (Feb. 21, 2011), http://content.time.com/time/world/article/0,8599,2052843,00.html ("[T]he absence of a government makes little difference to day-to-day life in Belgium."); Lieven De Winter & Pierre Baudewyns, *Belgium: Towards the Breakdown of a Nation-State in the Heart of Europe?*, 15 NATIONALISM & ETHNIC POL. 280, 291–94 (2009) (describing the divide prevalent in Belgium's society).

[275] *See* Brans et al., *supra* note 271, at 454 (noting that "[t]he nature of Belgian caretaker provision is such that they principally prevent both policy termination and policy innovation" but cautioning that caretaker provisions are "relaxed for policy change under predominantly exogenous pressures").

[276] *Id.* ("As for the 2010–2011 caretaker period, the contours of the caretaker conventions were specified in a two-page circular prepared by the Prime Minister's Services and issued the very day the King accepted the resignation of government (26 April 2010).").

[277] *Id.* (observing that the caretaker government convention rules required the caretaker government to avoid "encroach[ing] upon the incoming government's right to appoint and promote public managers" and provided that "[a]ny decisions resulting in personnel changes were to be implemented with prudency").

contributing capacity to support the euro, authorizing budgets for urgent needs . . . and voting new migration legislation."[278] More fundamentally, because Yves Leterme, the caretaker PM, lacked the authority to act, the Belgian parliament placed major long-term questions concerning the nation's biggest policy challenges on the back-burner.[279] Ultimately, in December 2011, the threat of the euro's collapse forced the political parties to form a coalition government.[280]

Another example of a caretaker PM in action is the New Zealand government in July 1984.[281] After nine years of a National Party government, Labour won the 1984 election in a landslide victory.[282] During the caretaker period, a serious exchange rate crisis arose, and the day after Labour's election victory, the Reserve Bank "was forced to suspend all foreign exchange dealings in order to halt a run on the currency."[283] Before the new Labour government was officially formed, the Reserve Bank urged the caretaker PM (i.e., the outgoing PM), Sir Robert Muldoon, to devalue the New Zealand dollar, which was in line with the incoming government's policies.[284] However, caretaker PM Muldoon "initially refused" because, in his view, he was still the PM, so he could make major policy decisions that he thought were in the best interests of the country.[285]

In the end, caretaker PM Muldoon, under pressure from colleagues, agreed to act on the advice of the incoming government

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[278] Smith, *supra* note 271.

[279] *See* Brans et al., *supra* note 271, at 456 (noting that once a new government with majority support came into existence after eighteen months, "[s]ubstantial measures were taken with regard to work and pensions, the accelerated naturalization of immigrants, and the closure of nuclear power plants, to name but a few examples of policy innovation with new goals and new objectives").

[280] *See* Smith, *supra* note 271 (discussing the consensus government's reformation).

[281] *See* Justin Gregory, *Crisis—Who Runs the Country?*, RNZ (June 7, 2017, 3:30 PM), https://www.rnz.co.nz/national/programmes/eyewitness/audio/201844823/crisis-who-runs-the-country (discussing the history and background that led to the snap election in New Zealand in 1984).

[282] *See* Boston et al., *supra* note 52, at 635.

[283] *Id.* (citing GEOFFREY PALMER & MATTHEW PALMER, BRIDLED POWER: NEW ZEALAND GOVERNMENT UNDER MMP 34 (3d ed. 1997)).

[284] *Id.* ("Complications arose . . . because of significant pressure on the New Zealand dollar during the election campaign, prompted in part by the widespread expectation that a Labour government would devalue the currency.").

[285] *Id.*

rather than bind the incoming government to a major policy decision it did not support (much less intend to maintain).[286] The lack of clarity regarding the caretaker PM's authority led New Zealand's Officials Committee on Constitutional Reform to make clear that there are "several significant constitutional constraints" on an acting PM's powers.[287]

More recently, Benjamin Netanyahu served as the caretaker PM in Israel from March 2019 to April 2020.[288] During this caretaker period, Netanyahu was forestalled from making major policy decisions, like passing legislation related to the COVID-19 pandemic.[289] As of April 2020, a new government was formed by a majority in Israel's parliament (the Knesset), reinstalling Netanyahu (the leader of the Likud Party) with the full authority of the PM's office on a power-sharing basis with Benny Gantz (the leader of Blue and White Party).[290] Shortly after, Netanyahu's government passed "temporary legislation allowing for digital tracking of coronavirus patients by the Shin Bet security service."[291]

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[286] *See id.* ("Sir Robert Muldoon, the [caretaker] Prime Minister and Minister of Finance, disagreed with th[e] advice [to devalue the New Zealand dollar] and initially refused . . . .").

[287] *Id.* at 635–36 ("[A]n outgoing government's conduct during a caretaker period is subject to several significant constitutional constraints: (a) It will undertake no new policy initiatives. (b) It will act on the advice of the incoming government on any matter of such great constitutional, economic or other significance that it cannot be delayed until the new government formally takes office—even if the outgoing government disagrees with the course of action proposed.").

[288] Ben Sales, *5 Key Takeaways About the Gantz-Netanyahu Deal and Israel's New Government*, JEWISH TELEGRAPHIC AGENCY (Apr. 21, 2020, 5:07 PM), https://www.jta.org/2020/04/21/israel/5-key-takeaways-about-the-gantz-netanyahu-deal-and-israels-new-government ("Prime Minister Benjamin Netanyahu and chief rival Benny Gantz signed an agreement to form a coalition government together. The deal ends more than a year of deadlocked elections and political stalemate.").

[289] *See id.* ("Coordinated action on the pandemic has been forestalled until now because Netanyahu, as caretaker prime minister, did not command a majority in Israel's parliament . . . ."); *see also* Rivka Weill, *Constitutional Transitions: The Role of Lame Ducks and Caretakers,* 2011 UTAH L. REV. 1087, 1113–15 (explaining the Israeli National Supreme Court's criteria that are considered on a case-by-case basis to determine what actions are not part of the "regular course of affairs" during a transitional government—or in other words, the limitations on the authority of a PM during a caretaker period).

[290] Sales, *supra* note 288 (discussing major takeaways of the deal signed between Netanyahu and Benny Gantz that formed a coalition government).

[291] Jonathan Lis, *Knesset Passes Temporary Law Allowing Digital Tracking of Coronavirus Patients by Security Service*, HAARETZ (July 1, 2020), https://www.haaretz.com/israel-

The distinction in the PM's authority to tackle COVID-19 in Israel between his caretaker period and after forming a new government highlights the clear power differentiation.

Although no consistent limitations exist on the authority of PMs during caretaker periods across parliamentary systems, these examples highlight a key commonality: a caretaker PM and a PM who has majority support within the parliament enjoy different levels of power. A caretaker PM may exercise only the essential and necessary functions of government.[292] Major policy decisions, significant appointments, and important national financial commitments all lay outside the caretaker PM's authority because he or she is not accountable to parliament. An acting officer in a principal office who lacks the advice and consent of the Senate is similarly unaccountable. It is thus quite tenable to draw a material equivalence between a caretaker PM and an acting principal officer who lacks Senate confirmation. Moreover, the same remedy should apply—an acting principal officer's policymaking authority should be circumscribed and limited to essential and necessary tasks. This approach would go a long way toward reconciling the VRA with the express requirements of the Appointments Clause.

B. THE NEED FOR PRINCIPAL FEDERAL OFFICERS TO POSSESS DEMOCRATIC LEGITIMACY

A PM derives her democratic legitimacy from the support of a majority in Parliament. All of the legislators were elected to public office, and their support, by implication, conveys democratic legitimacy on the PM.[293] When the PM lacks the support of a majority of the members, she also lacks a democratic mandate to exercise the broad powers of the office. Yet, as a practical necessity, someone has to keep the functions of government ongoing. So, even absent the support of a majority in Parliament, a PM may undertake essential or necessary actions to keep the government

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news/.premium-knesset-passes-bill-allowing-digital-tracking-of-covid-19-patients-by-shin-bet-1.8961520.

[292] *See supra* notes 242–261 and accompanying text.

[293] *See supra* note 51.

going until a new election can be held (and a new majority or coalition comprises a majority that supports the incumbent PM).[294]

One might object that the U.S. Constitution does not create a parliamentary system of government; it creates a presidential system.[295] Although this is true, the model of a caretaker PM is relevant not because parliamentary systems are preferable to presidential systems, but because the majority support from the members of the legislature conveys democratic legitimacy on a PM. A PM who lacks majority support also lacks the requisite democratic imprimatur necessary to justify her exercise of the full powers of the office. So too, a principal officer of the United States who lacks the Senate's approval does not have the democratic imprimatur that should be a precondition to exercising the office's full powers.

To be sure, prior to the Seventeenth Amendment, state legislatures, rather than voters, selected U.S. Senators.[296] Nevertheless, the members of a state legislature each had to be elected. And, since 1913, members of the U.S. Senate must seek and obtain direct election from the citizens of their states—providing a direct electoral mandate.[297] When the Senate confirms a presidential nominee to a principal office, it lends its democratic legitimacy to that officeholder[298]—just as a parliamentary majority's support of an incumbent PM legitimates her exercise of the broad powers of that office.

The parliamentary system rule that caretaker PMs may lawfully exercise only circumscribed powers of office because they lack an important indicator of democratic legitimacy—namely, the support of a majority of members of the parliament who have all been

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[294] *See supra* notes 52 & 242–244 and accompanying text.

[295] *See generally* Thomas O. Sargentich, *The Presidential and Parliamentary Models of National Government*, 8 AM. U. J. INT'L L. & POL'Y 579 (1993) (discussing the key differences between presidential and parliamentary governments).

[296] *See* U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.").

[297] *See id.* amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.").

[298] *See* Mendelson, *supra* note 11, at 1585–87 (discussing the importance of an official's confirmation by the Senate to the official's effectiveness).

elected to office—provides a model to reconcile the Appointments and Take Care Clauses. Accordingly, one need not embrace the arguably radical proposal that the United States should adopt "foreign law" to draw on the example of a caretaker PM exercising only limited authority to inform the permissible scope of an acting principal officer's authority.[299] Rather, the argument draws on the notion that under the U.S. Constitution all principal officers must have a democratic imprimatur in order to legitimately exercise the full powers of their offices—and, under the Appointments Clause, they receive it through the Senate's approval of their service.[300]

Of course, the President is indirectly elected by We the People—all states and the District of Columbia have chosen to have popular elections for presidential electors.[301] But principal officers lack any comparable democratic legitimacy—they do not seek a direct mandate from We the People to hold their offices. However, when the Senate gives its advice and consent to the nomination of a

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[299] *See* Roper v. Simmons, 543 U.S. 551, 623–28 (2005) (Scalia, J., dissenting) (objecting to the majority's reliance on foreign law as persuasive authority and arguing that "the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand"); Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (objecting to the majority's reliance on foreign law to determine the scope of substantive due process rights and characterizing the majority's "discussion of these foreign views" as both "meaningless" and "[d]angerous dicta"); Foster v. Florida, 537 U.S. 990, n.* (2002) (Thomas, J., concurring in denial of certiorari) ("While Congress, as a *legislature*, may wish to consider the actions of other nations on any issue it likes, this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans."). For a sustained critique of the Article III courts relying on foreign law as persuasive authority when interpreting the U.S. Constitution, see Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005).

[300] *See* Farber & O'Connell, *supra* note 35, at 1159 ("Lacking permanency and Senate imprimatur, acting officials are less able to advocate forcefully for the agency within the Executive Branch or fend off pressure from the White House or other agencies."); Krotoszynski, *supra* note 18, at 557–58 ("The Framers intended for the Senate to serve as a reliable institutional check on the President."); O'Connell, *Vacant Offices*, *supra* note 12, at 942–45 (discussing the disadvantages that acting officials face and how those disadvantages impact the effectiveness of an acting official's agency).

[301] *See* U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."); *see also* Chiafalo v. Washington, 140 S. Ct. 2316, 2319–22 (2020) (providing a thorough historical overview of state laws and practices governing the selection of presidential electors from 1788 to the present.)

principal officer, it conveys democratic legitimacy on the appointment (and the office holder).[302] By way of contrast, an acting principal officer who does not possess this important imprimatur from a majority of legislators (who successfully stood for and won public office within their respective states) lacks democratic legitimacy. When a principal officer lacks the democratic legitimacy that Senate approval conveys, such an office holder, like a caretaker PM, should not be able to exercise the full powers of the office.[303] Instead, she should be permitted to serve only as a caretaker and discharge only essential and necessary functions.[304]

Perhaps most importantly, taking this approach would render acting principal officers more plausibly inferior.[305] It would strongly incentivize the President to nominate and obtain Senate confirmation of principal officers. Finally, limiting the scope of an acting principal officer's authority would significantly reduce, though not entirely reconcile, the tension between the Appointments Clause and the Take Care Clause.[306]

To make this proposal work, the federal courts would have to resolve over time which specific actions constitute essential and necessary ones.[307] Ambiguity in this context constitutes a virtue rather than a vice. Uncertainty about the scope of her authority should lead an acting principal officer to be more, rather than less, circumspect in engaging the full powers of a principal office.[308] Under our proposed approach, to the extent that an acting principal officer strikes out boldly by creating new policy initiatives, she

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[302] *See* Mendelson, *supra* note 11, at 1585–86 (positing that "an official's lack of Senate confirmation can impair her status and effectiveness in furthering the agency's goals" because such an official lacks the legitimacy, and hence the authority, of "someone endorsed by both federal political branches").

[303] *See* O'Connell, *Actings*, *supra* note 14, at 724–26 (discussing how to increase incentives for a President to nominate principal officers).

[304] Professor O'Connell observes that, as a practical matter, acting officers may lack sufficient legitimacy, or clout, within the agency that they head to do more than serve as caretakers. *See* O'Connell, *Vacant Offices*, *supra* note 12, at 942 ("Acting officials will generally lack sufficient authority to direct careerists beyond the most basic agency functions.").

[305] *See infra* notes 327–336 and accompanying text.

[306] *See supra* notes 108–116, 127–132 and accompanying text.

[307] *See infra* notes 325–326, 337–343 and accompanying text.

[308] *See* O'Connell, *Vacant Offices*, *supra* note 12, at 942–44 (identifying problems that may arise when gaps in agency leadership are filled with acting officials).

would risk a federal court finding that her actions exceeded the scope of her authority under the Take Care Clause. In turn, this limited scope of authority should incentivize the President to nominate and obtain the Senate's consent to a permanent, rather than acting, appointee.

C. CREATING A MEANINGFUL PRESIDENTIAL INCENTIVE TO NOMINATE AND SECURE SENATE APPROVAL OF PRINCIPAL OFFICERS

Absent some meaningful check on the use of acting department heads, the Senate can routinely shirk its constitutional duty to prevent improvident, or worse yet, even corrupt, presidential appointments—as well as evade any political accountability or responsibility for poor presidential choices.[309] Moreover, cabinet members will lack the enhanced legitimacy that comes with the Senate's official imprimatur.[310]

Just as Congress cannot itself name Executive Branch officers[311] or place Legislative Branch officers in charge of executing laws,[312] it should not be permitted to avoid its constitutional duty of taking political responsibility for those appointees serving as, for example, Secretary of Defense and Attorney General by broadly delegating the power to appoint principal officers to the President.[313] To the extent that the VRA, as presidential administrations interpret and

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[309] *See* Krotoszynski, *supra* note 18, at 558 (noting that "the Senate today serves as the President's enabler rather than a meaningful check" on President Trump's appointment power, allowing him to "stack the federal courts with judges . . . who embrace the unitary executive theory with real brio").

[310] *See* Mendelson, *supra* note 11, at 1585–86 (arguing that "the lack of a confirmed official in certain senior agency positions may impair the agency's function by undermining its ability to provide a person with appropriate status—someone endorsed by both federal political branches—to represent the administration on significant policy issues" and positing that "an official's lack of Senate confirmation can impair her status and effectiveness in furthering the agency's goals").

[311] *See* Buckley v. Valeo, 424 U.S. 1, 132, 135 (1976) (per curiam) (holding that Congress may not constitutionally appoint officers of the United States).

[312] *See* Bowsher v. Synar, 478 U.S. 714, 726–27 (1986) (opining that Congress lacks constitutional authority to empower an officer under its control to execute the laws).

[313] *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 949 (2017) (Thomas, J., concurring) ("That the Senate voluntarily relinquished its advice-and-consent power in the FVRA does not make this end-run around the Appointments Clause constitutional.").

apply it, permits this outcome, it is unconstitutional on separation of powers grounds.

Based on recent experience, a carrot and stick are both clearly needed to prod both the President and the Senate to discharge their constitutional duties. Limiting the ability of an acting principal officer to undertake non-essential duties associated with the office would create a powerful, and likely effective, incentive for the President to nominate—and obtain the Senate's approval of—a new principal officer.

The conflict between structural design and operational necessities requires that a balance be struck—but the current de facto balance permits the President to vest vast powers in persons that the Senate has not vetted and approved to exercise those powers. The separation of powers doctrine should prohibit that—at least if the U.S. Supreme Court actually means what it has repeatedly said about the centrality of the Appointments Clause to securing government accountability.[314] The Court has made much of the need to enforce the Appointments Clause strictly—for example, by disallowing legislative appointments to independent boards and commissions.[315] As previously explained,[316] the Court's precedent in *Noel Canning* already has limited the President's

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[314] *See* NLRB v. Noel Canning, 573 U.S. 513, 522–26 (2014) (emphasizing the limited purpose of the Recess Appointments Clause and disallowing its use when the Senate is available to receive and consider Presidential nominations); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 495–97 (2010) (recognizing the dangers that would arise if Congress could unduly insulate executive officers from the President); *Bowsher*, 478 U.S. at 722–27 (noting that separation of powers principles require supervision of officers to be an executive, not a legislative, function); *Buckley*, 424 U.S. at 124–28 (prohibiting, on separation of powers grounds, congressional appointments to Executive Branch agencies, boards, and commissions).

[315] *See Buckley*, 424 U.S. at 118–19 (holding that "if Congress insists upon retaining the power to appoint [members of the Federal Election Commission], then the members of the Commission may not discharge those many functions of the Commission which can be performed only by 'Officers of the United States,' as that term must be construed within the doctrine of separation of powers"); *see also Bowsher*, 478 U.S. at 722, 726 (holding that "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts" and positing that "[t]o permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto" because "Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress").

[316] *See supra* notes 72–74 and accompanying text.

power to use the Recess Appointments Clause to bypass the Senate's confirmation process.[317]

What precisely was the point in taking these steps if Congress, via the VRA, can empower the President to never have to nominate and obtain the Senate's approval of a principal officer, relying instead on a series of acting department heads?[318] This would work in the same way as in *Mead Corporation*[319] with respect to the *Chevron*[320] doctrine. If an agency has statutory authority to engage in relatively formal procedures to establish policies—namely notice and comment rulemaking or formal adjudication—and the agency uses one of these modalities of policymaking, the agency's interpretation of an ambiguous statutory provision will receive *Chevron* deference.[321] Strictly speaking, a federal court reviewing

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[317] *See Noel Canning*, 573 U.S. at 519, 538, 550 (holding that the President's ability to make recess appointments applies only if the Senate is in recess for at least ten days and that *pro forma* sessions taking place at least once every ten days will prevent the President from making recess appointments because "for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that . . . it retains the capacity to transact Senate business").

[318] Provided that the President submits a nominee to the Senate for its consideration, the VRA permits an acting principal officer to hold a position indefinitely—until the Senate either confirms or rejects the President's nominee. *See* 5 U.S.C. § 3346(a) (2018) (enumerating the length of time an acting officer may serve); *see also* BRANNON, *supra* note 3, at 12 (noting that the VRA provides for both a 210-day period of service and a period of service while a nomination is pending before the Senate, while observing that since "[t]hese two periods run independently and concurrently," the "submission and pendency of a nomination allows an acting officer to serve beyond the initial 210-day period").

[319] United States v. Mead Corp., 533 U.S. 218 (2001).

[320] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–45 (1984) (holding that if a federal statute is ambiguous, a court reviewing an agency's interpretation of the statute should defer to any reasonable agency interpretation of the statutory language on a theory of an implied delegation from Congress to the agency to fill in gaps through policymaking). *But cf.* Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 754 (2002) ("If expertise, rather than some sort of fictional delegation of lawmaking power, undergirds judicial deference to administrative interpretations of ambiguous statutory texts, judicial review will have to rely upon a sliding scale of deference, depending on the indicia of expertise associated with a particular agency decision.").

[321] *See Mead Corp.*, 533 U.S. at 229 ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991))); *id.* at 230 (observing that "[i]t is fair to assume generally that Congress contemplates administrative

an administrative agency's interpretation of a statute cannot *require* the agency to use procedures that are not imposed by the agency's organic act or by the Administrative Procedure Act.[322] The *Mead Corporation* rule, however, does not violate the *Vermont Yankee* proscription against a reviewing court imposing new or additional procedures on an administrative agency; instead, the decision merely creates an incentive—a carrot—that rewards an agency that voluntarily uses notice-and-comment rulemaking or formal adjudication to interpret an ambiguous statutory provision.

So too, the federal courts should create an incentive to play by the rules in the context of the VRA—without demanding it. Why should a presidential administration undertake the arduous and time-consuming process of seeking the Senate's approval of a principal officer if it can use the VRA to unilaterally appoint a string of acting principal officers? Simply put, an incentive is needed to prod presidents to nominate principal officers—rather than rely on a succession of acting principal officers. This is a policy argument, to be sure, rather than a constitutional argument. But a constitutional argument also exists—the Appointments Clause strictly prohibits a President from appointing a principal officer without the Senate's advice and consent.[323]

Accordingly, if the President uses the VRA to name an acting Attorney General, that placeholder would be permitted to undertake only essential and necessary duties. This would involve the federal courts imposing a gloss on the VRA—a gloss in the nature of a saving construction.[324] To render an acting principal

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action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force" and "the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication").

[322] *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978) ("Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.").

[323] *See supra* notes 17–22 and accompanying text.

[324] Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); Hooper v. California, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."). For an excellent general

officeholder even plausibly "inferior," thereby permitting a direct presidential appointment consistent with the requirements of the Appointments Clause, the scope of the power vested in that person must be something less than the full powers of the office. The Take Care Clause requires that the officeholder be able to perform essential and necessary duties—but nothing more.

Under this approach, if an agency headed by an acting officer undertook a major policy initiative, there would be a substantial risk that the federal courts might invalidate it as an *ultra vires* action by the acting principal officer—beyond the limited caretaker duties that an acting principal officer may perform consistent with the imperatives of the Appointments Clause (and hence void). Just like a caretaker PM who cannot undertake any major new policies or initiatives because she lacks the support of a majority of the legislature,[325] an acting principal officer can keep the lights on within the department but cannot embark on major programmatic reforms.

A prudent President will want a Senate-confirmed principal officer in place who can exercise the full panoply of institutional powers associated with a principal office without incurring a serious risk of judicial invalidation. Courts are unlikely to second-guess decisions that clearly must be made—for example, whether to recognize a revolutionary group in Venezuela as the legitimate government of that nation or a deployment of troops to Iraq to counter an Iranian threat. Questions that brush against the political question doctrine,[326] for example, should easily fall within

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discussion of the practice of adopting "saving constructions" to avoid potential constitutional problems with a statute, see Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997); SCALIA & GARNER, *supra* note 111, at 392–93 (discussing the concept of a saving construction).

[325] *See* Weill, *supra* note 288, at 1097–1104, 1111–12 (explaining relevant parliamentary procedures and noting that "[t]he widespread approach among parliamentary systems is that caretaker governments must only deal with regular affairs, a policy in alignment with its role as a 'babysitter' until the newly elected government takes office" (footnote omitted)); Can. Manual, *supra* note 243 (explaining that after Parliament has dissolved prior to a national election, government activity should be limited to matters that are "routine," "non-controversial," "urgent and in the public interest," "reversible by a new government without undue cost or disruption" or "agreed to by opposition parties").

[326] *See* Baker v. Carr, 369 U.S. 186, 210–18 (1962) (discussing matters that present nonjusticiable political questions, notably including questions related to foreign affairs and questions related to military matters, both of which constitute core executive functions).

the "essential and necessary" category. On the other hand, an acting Secretary of State should not have the ability to reorganize assignments within the State Department. That kind of internal administration is clearly not essential and necessary; accordingly, it should be reserved for someone who has sought and obtained the Senate's consent to serve as Secretary of State.

Equally important, this approach would render the designation of an acting officer more consistent with the Court's present principal/inferior dichotomy.[327] Limiting the scope of the acting principal officer's duties renders the office less powerful; disallowing an acting officer from undertaking duties beyond those that are essential and necessary would remove much of the policymaking authority that makes an office "principal" rather than "inferior" in the first place.[328] Merely limiting the time that an acting officer can serve does nothing to circumscribe the powers of the office—and, under *Morrison*'s more functionalist metrics, the limited temporal duration of an office is merely one of three relevant considerations (the others being the scope of the office holder's policymaking authority and whether the office holder may be removed by "a higher Executive Branch official" other than the President).[329] As presently applied, an acting principal officer clearly meets only one of these three conditions (namely, limited time in office). With no limits on the scope of an acting principal officer's powers and no supervisor beyond the President, two important factors are missing.

Under *Edmond*'s more formalistic, categorical approach, the question of whether an officer holds a principal office boils down to whether the person is subject to supervision within the same

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[327] *See* Edmond v. United States, 520 U.S. 651, 662 (1997) ("Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President . . . ."); Morrison v. Olsen, 487 U.S. 654, 671–72 (1988) (discussing factors that help courts distinguish inferior from principal officers).

[328] *See Morrison*, 487 U.S. at 672 (finding an independent counsel to be an "inferior" officer because the "office is limited in jurisdiction" and also "limited in tenure"). The scope of an officer's duties, under *Morrison*, is critical to determining whether the office falls within the principal or inferior classification. *See id.* at 671–73; *see also id.* at 716 (Scalia, J., dissenting) (agreeing with the majority that the scope of an officer's powers is relevant to properly determining whether the person holds a principal or inferior office).

[329] *Id.* at 671–72.

department.[330] To be sure, an acting principal officer does not currently answer to a superior within the same department or agency that she heads; she is accountable only to the President. This indicates that an acting principal officer remains a principal officer for purposes of the Appointments Clause—and because the Senate does not give its advice and consent to such appointments, the appointments violate the separation of powers doctrine.[331] Because "a principal officer is one who has no superior other than the President,"[332] an acting principal officer's service is arguably unconstitutional.

Our proposal, however, addresses the question of supervision by empowering the federal courts to ascertain if an acting principal officer has undertaken discretionary tasks that are not essential and necessary. Such officers *would be* subject to supervision by someone other than the President—federal judges called upon to ascertain if an acting principal officer has exceeded the scope of her authority. Indeed, *Edmond* and *Morrison* both anticipate that supervision will come from within the Executive Branch, not the Judicial Branch.[333] However, because of the inherent conflict between the imperatives of the Appointments and Take Care Clauses, some flexibility must exist that reconciles the longstanding practice of empowering the President to designate temporary principal officeholders with the constitutional requirement that principal officers serve only after obtaining the Senate's approval. After all, as Justice Oliver Wendell Holmes, Jr. astutely observed, "the machinery of government would not work if it were not allowed a little play in its joints."[334] What is more, "[t]he interpretation of constitutional principles must not be too literal."[335] Although Justice Holmes was speaking in general terms, literal interpretation and mechanical application of constitutional text

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[330] *Edmond*, 520 U.S. at 663 (opining that "we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate").

[331] *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 945–49 (2017) (Thomas, J., concurring) (arguing that the Appointments Clause likely prohibited the appointment of an acting principal officer without Senate confirmation).

[332] *Id.* at 947.

[333] *See supra* notes 327–330 and accompanying text.

[334] Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931).

[335] *Id.*

simply do not work when two separate constitutional provisions point in opposite directions (as the Appointments and Take Care Clauses do).[336]

Equally important, restricting the scope of an acting principal officer's authority to essential and necessary tasks would also create a powerful incentive for the President to seek the confirmation of a principal officer who could constitutionally exercise the full powers of the office. If the President can avoid having to seek the Senate's approval for the heads of cabinet departments, and it is politically expedient for both the President and the Senate to dispense with the formalities of the Appointments Clause, such behavior will take place with ever-growing frequency.

Moreover, under *Ashwander v. Tennessee Valley Authority*,[337] the U.S. Supreme Court may impose a limiting construction on the scope of authority of acting principal officers. The *Ashwander* doctrine, explicated in a famous concurring opinion by Justice Louis Brandeis, holds that if a federal court can resolve a case without reaching and deciding a constitutional question, it should.[338] As Brandeis explains, "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."[339] Accordingly, "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."[340] The *Ashwander* doctrine intersects with the rule of embracing a saving construction to avoid invalidating an act of

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[336] The U.S. Supreme Court has made it very clear that the Take Care Clause safeguards, at least to some extent, the ability of the President to have the assistance of loyal subordinates. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497–98 (2010) (observing that "[t]he diffusion of power carries with it a diffusion of accountability" and noting that "[t]he people do not vote for the 'Officers of the United States,'" and explaining that undue statutory restrictions on the President's removal power over Executive Branch officers "subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts" (quoting U.S. CONST. art. II, § 2, cl. 2)).

[337] 297 U.S. 288, 339–40 (1936).

[338] *Id.* at 347 (Brandeis, J., concurring).

[339] *Id.*

[340] *Id.*

Congress.[341] Indeed, even if one interpretation would create only a "serious doubt" about a statute's constitutionality when another, equally plausible interpretation would not, a reviewing court should avoid adopting the interpretation that gives rise to that doubt.[342] Accordingly, if it is possible to interpret a federal law in a way that avoids a constitutional problem, a federal court should embrace that interpretation if the statute's text could reasonably bear it.

Applying these rules to the VRA, restricting the scope of an acting principal officer's authority to essential and necessary tasks—caretaker duties—would do less harm to the statute than simply disallowing acting principal officer appointments (the solution proposed by Justice Thomas[343]). As Justice Thomas explained in *SW General*, the VRA as presently applied raises serious constitutional questions under the separation of powers doctrine.[344] If the federal courts restrict acting principal officers to performing only caretaker functions, however, these concerns would be substantially reduced (although not entirely eliminated).

On the other hand, the federal courts should *not* impose the same limitations on acting inferior officers. Assuming that a principal officer was in place to superintend the inferior officer's exercise of policymaking authority, the VRA's authorization of a unilateral appointment of an inferior officer simply constitutes an exercise of the discretion that the Appointments Clause itself provides for Congress to permit the "President alone" to exercise.[345] Congress, in the VRA, authorized unilateral presidential appointments of inferior officers on a temporary, or acting, basis.[346] The VRA *itself*

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[341] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.").

[342] *Id.* (holding that a reviewing court should embrace a saving construction "[e]ven to avoid a serious doubt" and in such cases "the rule is the same" as when an interpretation would clearly create a constitutional problem with the statute).

[343] NLRB v. SW Gen., Inc., 137 S. Ct. 929, 948–49 (2017) (Thomas, J., concurring) (opining that the President may not unilaterally appoint an acting principal officer because "the FVRA does not make this end-run around the Appointments Clause constitutional" and positing that "[w]e cannot cast aside the separation of powers and the Appointments Clause's important check on executive power for the sake of administrative convenience or efficiency").

[344] *Id.*

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

[346] 5 U.S.C. §§ 3345–3346 (2018).

authorizes these unilateral presidential appointments, and the Appointments Clause permits Congress to authorize direct presidential appointments to inferior offices.[347] Accordingly, provided that a Senate-confirmed principal officer is available to supervise the work of an acting inferior officer, such appointments do not present any material separation of powers problems.

One should also distinguish a temporary appointment to an office from the temporary assignment of delegable duties to someone within a cabinet department or agency. The VRA concerns itself *only* with the appointment of temporary "acting" officers—not with the reassignment of delegable duties within an administrative agency. Provided that an agency's organic act permits a particular statutory duty to be reassigned within the agency, having another Senate-confirmed officer—or even a mere employee—perform the duty does not raise any material separation of powers problems. Indeed, Congress itself recognized that the temporary reassignment of delegable duties does not implicate the VRA,[348] and the federal courts have also embraced this position.[349] If a department or agency's organic act authorizes the principal officer within the agency, or the President, to reassign particular functions, doing so

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[347] U.S. CONST. art. II, § 2, cl. 2 (providing that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in *the President alone*, in the Courts of Law, or in the Heads of Departments" (emphasis added)).

[348] *See* S. REP. NO. 105-250, at 15 (1998) (noting that under the VRA, the President may "designate an officer" to perform the duties of a vacant office or to "provide for the temporary performance" of duties that are delegable); *see also* Guidance on Application of the Fed. Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 72 (1999) ("Most, and in many cases all, the responsibilities performed by a PAS officer will not be exclusive, and the Act permits non-exclusive responsibilities to be delegated to other appropriate officers and employees in the agency.").

[349] Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 421 (D. Conn. 2008) (upholding the assignment of certain specific duties involving the resolution of tribal recognition claims and distinguishing between another officer or employee performing "certain non-exclusive responsibilities . . . for a finite period" and temporary appointment to an office on an acting basis), *aff'd*, 587 F.3d 132 (2d Cir. 2009). The U.S. Court of Appeals for the Second Circuit specifically upheld U.S. District Judge Peter C. Dorsey's holding on this point. *See Schaghticoke Tribal Nation*, 587 F.3d at 135 (holding that tribal recognition decisions "could be made *either* by the Assistant Secretary *or* by his or her 'authorized representative'" and finding that the Secretary of the Interior had lawfully delegated this task to an associate deputy secretary without appointing him the acting assistant secretary (quoting 25 C.F.R. §§ 83.1, 83.10(*l*)(2))).

should not necessarily render the person performing a discrete duty a principal officer.[350]

V. CONCLUSION

The VRA, as presidential administrations presently interpret and apply it, permits the President to unilaterally appoint principal officers of the United States. This practice cannot be reconciled with the text of the Appointments Clause—which requires that the Senate approve the appointment of any person holding a principal office. Fortunately, a relatively modest judicial renovation of the VRA would provide an acceptable, if imperfect, solution. The key consideration is avoiding the pitfalls of either zeroing out the Senate's advice and consent role or the President's duty to ensure the faithful execution of the laws.

Drawing on the example of a caretaker PM as a model for the scope of authority that an acting principal officer may lawfully exercise under the VRA would do exactly this. This approach would both preserve the relevance of the advice and consent requirement (and the democratic imprimatur that the Senate's consent conveys)

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[350] This is so because such an assignment is limited in scope, limited in temporal duration, and performed by someone who is subject to supervision within the relevant department or agency. *See* Edmond v. United States, 520 U.S. 651, 662–63 (1997) (noting that "whether [the officer] has a superior" is a key consideration for distinguishing inferior from principal officers); Morrison v. Olson, 487 U.S. 654, 671–73 (1988) (outlining relevant factors that differentiate inferior and principal officers). Accordingly, even if the assignment involves sufficient policymaking authority to render the person performing it an "officer" rather than an "employee," no separation of powers problem should arise from its performance on a temporary basis by someone else within the administrative entity. *See* Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam) ("We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article."). If an organic act permits the reassignment of a duty by either the President or the head of a department, even if the person performing that duty is thereby rendered an "inferior officer," the organic act itself would seem to authorize the appointment, and, if the delegation is to someone holding "inferior officer" status, no constitutional problem whatsoever exists under the Appointments Clause. To the extent that a problem might arise, it would be in delegating policy making authority to a mere "employee" who does not hold an "inferior office." Even then, however, one could construe the provision permitting the delegation to an employee as authorizing the creation, on an ad hoc basis, of an inferior office; so long as the delegation ("appointment") is made by the President or the head of a department, the requirements of the Appointments Clause will have been met.

and avoid the problem of preventing the President from executing constitutionally assigned powers when essential and necessary. An acting principal officer who can discharge essential and necessary functions permits the President to conduct the diplomatic, military, national security, and law enforcement duties that lie at the heart of the Article II Executive Power. By validating the VRA, but performing a minor surgery on the scope of acting principal officers' powers to restrict them to essential and necessary tasks, the practice of having acting principal officers can be reconciled with the Appointments Clause (only inferior officers may serve without first obtaining the Senate's approval), the Take Care Clause (the President must, at all times, be able to discharge core executive functions and must have reliable staff assistance to do this), and the need to ensure that great powers are only exercised by those who possess the requisite democratic imprimatur (the Senate's approval of the principal officer's service).

Because of the inherent tension between the Appointments and Take Care Clauses, a perfect solution is not possible—advancing the core purposes of one provision impedes the core purposes of the other. Limiting the authority of acting principal officers would represent the best and most effective means of giving force and effect to both clauses. In contrast, the current approach, which lets the President appoint principal officers without ever seeking the Senate's consent, unjustifiably violates the Appointments Clause. A meaningful commitment to separation of powers requires that the current approach be abandoned in favor of an approach that takes proper account of the Senate's role in legitimating senior appointments within the Executive Branch.

Finally, but no less important, limiting an acting principal officer's scope of authority to reach only essential and necessary tasks would render such acting officers more plausibly "inferior"—an essential consideration to reconcile the VRA with the mandatory language of the Appointments Clause, which mandates Senate approval of all "principal" officers.[351] If an acting principal officer

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[351] *See* U.S. CONST. art. II, § 2, cl. 2; *see* also NLRB v. SW Gen., Inc., 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring) (observing that "[t]he FVRA authorizes the President to appoint both inferior and principal officers without first obtaining the advice and consent of the Senate" and suggesting that vesting the President with the unilateral power to appoint principal officers "raises grave constitutional concerns because the Appointments Clause

may perform all the duties of a principal office without supervision within the department or agency, one cannot plausibly characterize the position as "inferior" for purposes of the Appointments Clause. Imposing limits on the ability of an acting principal officer to exercise the full powers of the office would effectively address Justice Thomas's stated concerns about the constitutional infirmity of the VRA. In sum, by rendering acting principal officers arguably "inferior" for constitutional purposes, our proposed reform would bring such appointments closer to falling within the scope of the exceptions set forth in the Appointments Clause itself.

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forbids the President to appoint principal officers without the advice and consent of the Senate").