ACTING UNPREDICTABLY – UNCONSTITUTIONAL VACANCY APPOINTMENTS CREATE INSTABILITY IN THE EXECUTIVE BRANCH

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INTRODUCTION

In early 2019, the American news cycle encountered an all-too-familiar headline: another presidential cabinet member had resigned.[1] On April 7th, President Trump Tweeted that Kevin McAleenan, the Commissioner for Customs and Border Patrol, would become acting Secretary of Homeland Security (Secretary).[2] Shortly after this announcement, Secretary Kirstjen Nielsen confirmed her resignation via Twitter.[3] But just a few hours later, Nielsen Tweeted that her resignation was not immediate – rather she had agreed to "stay on" until April 10th to ensure an "orderly transition."[4] President Trump and his advisors possibly encouraged her to stay after an

[1] Secretary Kirstjen M. Nielsen (@SecNielsen), TWITTER (Apr. 7, 2019, 7:02 PM), https://twitter.com/SecNielsen/status/1115027147893235712; *see* Denise Lu & Karen Yourish, *The Turnover at the Top of the Trump Administration*, N.Y. TIMES (July 29, 2019), https://www.nytimes.com/interactive/2018/03/16/us/politics/all-the-major-firings-and-resignations-in-trump-administration.html; Kathryn Dunn Tenpas, *Tracking Turnover at the Trump Administration*, BROOKINGS (updated Dec. 2020), https://www.brookings.edu/research/tracking-turnover-in-the-trump-administration/.

[2] President Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 7, 2019, 6:02 PM), https://twitter.com/realDonalTrump/status/1115011884154064896. Note that President Trump's twitter account was permanently suspended in January, 2021. Kate Conger and Mike Isaac, *Twitter Permanently Bans Trump, Capping Online Revolt*, N.Y. TIMES (updated Jan. 12, 2021), https://www.nytimes.com/2021/01/08/technology/twitter-trump-suspended.html.

[3] Secretary Kirstjen M. Nielsen (@SecNielsen), TWITTER (Apr. 7, 2019, 7:02 PM), https://twitter.com/SecNielsen/status/1115027147893235712.

[4] Secretary Kirstjen M. Nielsen (@SecNielsen) TWITTER (Apr. 7, 2019, 10:36 PM), https://twitter.com/SecNielsen/status/1115080823068332032.

obstacle to McAleenan's appointment emerged: the Under Secretary of Homeland Security, Claire Grady.[5] The President may have assumed that a statute known as the Federal Vacancy Reform Act (FVRA) would govern his choice for acting Secretary before realizing the under secretary automatically assumes the acting role pursuant to another statute.[6]

The FVRA vests the president with exclusive power to unilaterally appoint an acting officer when the head of an agency can no longer serve and the first assistant role is vacant.[7] But this exclusivity is limited in three scenarios: first, when another statute grants the head of an agency, the courts, or the president the authority to designate the officer or employee that will assume the acting role; second, when another statute specifically designates who will assume the role in the event of a vacancy and; third, when the President makes a recess appointment under Article II, Section 2, Clause 3 of the Constitution.[8] President Trump overlooked the Homeland Security Act (DHS Act) that designates the under secretary of management to assume the role of acting Secretary by operation of law if both the Secretary and deputy secretary roles are vacant.[9] To implement the President's desired successor, Nielsen attempted to alter the order of succession to place McAleenan in line after Grady,[10] as is also permitted by the DHS Act.[11] By securing Grady's resignation a few

[5] Federal Vacancy Reform Act (FVRA), 5 U.S.C. §§ 3345-3349d; Homeland Security Act (DHS Act), 6 U.S.C. §§ 101-674; *see* Steve Vladeck, *Trump Is Abusing His Authority to Name "Acting Secretaries." Here's How Congress Can Stop Him.*, SLATE (Apr. 09, 2019, 12:34 PM) [hereinafter "Abusing Authority"] https://slate.com/news-and-politics/2019/04/trump-acting-secretaries-dhs-fvra-senate-reform.html.

[6] Steve Vladeck, *The Federal Vacancies Reform Act Under Trump: The Department of Homeland Security Edition*, LAWFARE, (April 9, 2019, 6:30 AM) [*hereinafter* "The DHS Edition"], https://www.lawfareblog.com/federal-vacancies-reform-act-under-trump-department-homeland-security-edition.

[7] 5 U.S.C. § 3345.

[8] 5 U.S.C. § 3347(a).

[9] *See* 6 U.S.C. § 113(g)(1); Vladeck, *Abusing Authority*, *supra* note 5.

[10] Memorandum from John M. Mitnick to Secretary Kirstjen M. Nielsen (Apr. 9, 2019), https://affordablecareactlitigation.files.wordpress.com/2020/10/24832668-16-6760.pdf.

[11] *See* 6 U.S.C. § 113(g).

days later, President Trump believed McAleenan would be the valid acting Secretary.[12]

A similar personnel shuffle occurred approximately six months later when McAleenan announced his own resignation.[13] This time, President Trump tapped Chad Wolf, Acting Under Secretary, Office of Strategy, Policy, and Plans (OSSP), to take the helm.[14] But before Wolf could validly assume the role, the administration faced additional obstacles.[15] McAleenan first attempted to strategically place Wolf's position in the DHS line of succession,[16] just as Nielsen had done for his position in April. However, Wolf was only the acting under secretary, OSPP at the time because the Senate had not yet confirmed him for the role.[17] President Trump resubmitted Wolf's nomination to the Senate[18] and once confirmed as under secretary, OSSP, Wolf immediately became the acting Secretary under McAleenan's new succession order.[19]

Nine months after Wolf assumed the acting role, questions arose about the validity of both his and McAleenan's appointments.

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[12] *See* 6 U.S.C. § 113(g)(2).

[13] Zolan Kanno-Youngs, Maggie Haberman & Michael D. Shear, *Kevin McAleenan Resigns as Acting Homeland Security Secretary*, N.Y. TIMES (Oct. 11, 2019), https://www.nytimes.com/2019/10/11/us/politics/kevin-mcaleenan-homeland-security.html.

[14] Nick Miroff, *Chad Wolf to Take Over at DHS, but Senate Needs to Confirm Him for Different Job First*, THE WASH. POST (Nov. 5, 2019, 4:03 PM) [*hereinafter* Different Job], https://www.washingtonpost.com/immigration/chad-wolf-to-take-over-at-dhs-but-senate-needs-to-confirm-him-for-different-job-first/2019/11/05/6a9e31d8-ffed-11e9-8501-2a7123a38c58_story.html.

[15] *Id.*

[16] *See* DEP'T OF HOMELAND SEC., DELEGATION NO. 00106, REVISION NO. 08.6, *ORDERS OF SUCCESSION AND DELEGATIONS OF AUTHORITIES FOR NAMED POSITIONS* (2019).

[17] Camilo Montoya-Galvez, *Senate to vote on Trump's Homeland Security pick as early as Tuesday*, CBS NEWS (Nov. 6, 2019, 6:47 PM), https://www.cbsnews.com/news/chad-wolf-nomination-senate-to-vote-on-trumps-homeland-security-pick-as-early-as-tuesday/.

[18] Miroff, *Different Job*, *supra* note 14.

[19] Nick Miroff, *Chad Wolf sworn in as acting Department of Homeland Security chief, Ken Cuccinelli to be acting deputy*, WASH. POST (Nov. 13, 2019), https://www.washingtonpost.com/immigration/chad-wolf-sworn-in-as-acting-department-of-homeland-security-chief-fifth-under-trump/2019/11/13/6633a614-0637-11ea-8292-c46ee8cb3dce_story.html?arc404=true.

The Government Accountability Office (GAO) issued a report stating both McAleenan and Wolf were invalidly acting Secretaries because of a technicality that Nielsen overlooked when she amended the succession order.[20] However, DHS disputed GAO's findings, arguing that the DHS Act did indeed support both appointments.[21] The ongoing disputes regarding the validity of McAleenan's and Wolf's appointments emphasize a broader issue with both of these statutes. Regardless of whether McAleenan and Wolf were validly acting under the statutes, the statutes themselves are unconstitutional and create significant instability.

These issues are not confined to the Department of Homeland Security. Throughout his presidency, President Trump frequently relied on the FRVA and other agency succession statutes[22] similar to the DHS Act to employ acting officers across federal agencies.[23] Acting officers are those who temporarily "perform the functions and duties" of an officer appointed by the president with the advice and consent of the Senate[24] and have "the same authority as the officer for whom he acts."[25] Indeed, President Trump exhibited a preference for these

[20] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO B-331650, DEPARTMENT OF HOMELAND SECURITY—LEGALITY OF SERVICE OF ACTING SECRETARY OF HOMELAND SECURITY AND SERVICE OF SENIOR OFFICIAL PERFORMING THE DUTIES OF DEPUTY SECRETARY OF HOMELAND SECURITY, 7 (2020), https://www.gao.gov/assets/710/708830.pdf; Elliot Setzer, *Top Homeland Security Officials were Invalidly Appointed, GAO Rules*, LAWFARE (Aug 14, 2020, 10:57 PM), https://www.lawfareblog.com/top-homeland-security-officials-were-invalidly-appointed-gao-rules. While Nielsen made changes to the order of succession shortly before leaving office, these changes did not impact the order of succession in the event of the Secretary's resignation. Rather, her changes would only be valid in the event of sickness or emergency. *See id.*

[21] *See* Dep't of Homeland Security Office of the Gen. Council, Letter to Thomas Armstrong, at 3 (April 17, 2020), https://www.dhs.gov/sites/default/files/publications/20_0817_ogc_gao-as1-succession-response.pdf.

[22] *See, e.g.,* 28 U.S.C. § 508.

[23] *See* Arnie Seipel, *Trump's 'Acting' Cabinet Grows with Acosta Departure*, NPR (July 12, 2019, 11:47 PM), https://www.npr.org/2019/07/12/741094931/trumps-acting-cabinet-grows-with-acosta-departure.

[24] 5 U.S.C. § 3345(a).

[25] Acting Officers, 6 Op. O.L.C. 119, 119 (1982).

statutory workarounds over the Article II process.[26] In January of 2019, when asked whether he would move to fill vacancies in cabinet positions, President Trump responded, "I'm in no hurry, I have 'actings' . . . ."[27] In February of that same year, he elaborated, "I like actings because I can move quickly. It gives me more flexibility."[28] He echoed these sentiments again in November 2019 after tapping Wolf for acting Secretary.[29]

However, the Appointments Clause in Article II of the United States Constitution provides the precise process for the appointment of principal officers (POs): nomination by the president, "*with the Advice and Consent of the Senate*."[30] This establishes the singular process by which the president and Senate must operate. Because Congress provides for appointment of POs outside of this process through the FVRA and succession statutes like the DHS Act, the statutes are unconstitutional as they pertain to POs.

These extra-constitutional processes are not simply harmless deviations, but rather they undermine important protections that the Framers intended to endow through separation of powers.[31] Further, their misuse and potentially superseding provisions have created

[26] U.S. CONST. art. II, § 2, cl. 2 (". . . 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 . . .").

[27] '*I like actings…gives me more flexibility': Trump on cabinet*, GLOBAL NEWS (Jan. 26, 2019, 10:08 AM), https://globalnews.ca/video/4820395/i-like-acting-gives-me-more-flexibility-trump-on-staff-roles.

[28] *Transcript: President Trump on "Face the Nation," February 3, 2019*, CBS NEWS (Feb. 3, 2019, 7:31 AM), https://www.cbsnews.com/news/transcript-president-trump-on-face-the-nation-february-3-2019/.

[29] Brett Samuels, *Trump Taps Chad Wolf as New Acting DHS Secretary*, THE HILL (Nov. 1, 2019, 6:03 PM), https://thehill.com/homenews/administration/468628-trump-taps-chad-wolf-as-new-acting-dhs-secretary ("[A]s you know I like actings . . . It gives you great, great flexibility.").

[30] U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

[31] THE FEDERALIST NO. 76 (Alexander Hamilton) ("It 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. In addition to this, it would be an efficacious source of stability in the administration.").

instability at the top of DHS, an agency facing growing national security challenges.[32]

The FVRA affords the president a powerful, unilateral tool to appoint POs without any check by the Senate. And even with the best intentions, the FVRA encourages instability in important PO roles by allowing actings to serve for periods of time dictated entirely by the president. This instability correspondingly disrupts the many goals and missions of DHS[33] and other federal agencies headed by acting officers.

Similarly, agency succession statutes like the DHS Act allow the president, through influence and pressure, to unilaterally appoint other POs with no time limit at all.[34] These statutes foster the same instability as the FVRA, and potentially allow for a line of acting officials in which the Senate has no power to meaningfully exercise its check.[35]

Part I of this comment introduces Article II provisions, describes the legal distinctions between types of officers of the United States, and discusses Supreme Court decisions regarding Article II. It presents the FVRA and DHS Act, Executive Branch and Supreme Court treatment of the FVRA, and Supreme Court treatment of other Appointments Clause issues. Part II argues that the FVRA and DHS Act succession processes are unconstitutional as they pertain to POs, asserts that these extra-constitutional processes create significant

[32] *See, e.g.*, Paulina Villegas, *Detentions of Child Migrants at the U.S. Border Surges to Record Levels*, THE N.Y. TIMES (updated Nov. 5, 2019), https://www.nytimes.com/2019/10/29/world/americas/unaccompanied-minors-border-crossing.html.

[33] *See Memo from the Office of the Inspector General of Homeland Security to Kevin McAleenan, Acting Secretary*, OIG-20-02, 2 (Nov. 13, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-02-Nov19.pdf.

[34] *See* 6 U.S.C. §113(g); Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 680-81 (2020).

[35] *See* 6 U.S.C. §113(g); Acting Officers, 6 Op. O.L.C. 119, 119 (1982) (actings have the same authority as the principal officer); *see also* GAO B-331650, *supra* note 20, at 10.

instability, and suggests possible solutions to increase stability and better align the vacancy statutes with the Constitution.

I. BACKGROUND

A. Constitutional Provisions and Supreme Court Treatment of Officers

The Constitution prescribes methods for appointing officers in the Appointments Clause of Article II.[36] The manner in which appointments are made depends on whether the role is a PO, an inferior officer (IO), or an employee. And although the Supreme Court has found that in limited circumstances deviation from the Article II process is permissible, the underlying purpose of Article II is to provide structural protections and stability in roles exercising great power on behalf of the executive branch.[37]

1. The Appointments Clause

The Constitution stipulates the exclusive appointment procedure for officers in three instances: POs, IOs and vacancies.[38] For POs, Article II, Section 2, Clause 2 of the Constitution states that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and *all other Officers of the United States*, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . ."[39] The clause also grants Congress the authority to determine the appointment procedure for IOs: "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."[40]

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[36] U.S. CONST. art. II, § 2, cl. 2.
[37] *See* Freytag v. Commissioner, 501 U.S. 868, 878 (1991); THE FEDERALIST NO. 76 (Alexander Hamilton).
[38] U.S. CONST. art. II, § 2, cl. 2-3; NLRB v. SW Gen. Inc., 137 S. Ct. 929, 945 (2017) (Thomas, J., concurring) (citing United States v. Germaine, 99 U.S. 508, 510 (1879)).
[39] U.S. CONST. art. II, § 2, cl. 2 (emphasis added).
[40] U.S. CONST. art. II, § 2, cl. 2.

For vacancies occurring when the Senate is not in session, the next clause provides a remedy.[41] Article II, Section 2, Clause 3 grants the president the additional power to "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."[42]

2. Employees, Inferior Officers, and Principal Officers

Because Article II provides the specific method of appointment for POs, but grants Congress the power to determine the appointment method for IOs, scholars and the Supreme Court have attempted to differentiate IOs, POs, and employees.[43] There are two steps to this process: first, determine whether the individual is an employee or an officer, and second, if the individual is an officer, decide whether she is an IO or PO.

Whether an individual is an officer or employee depends on the nature of her duties and the position.[44] In *Buckley v. Valeo*, the Court found that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,'" and is therefore subject to Article II, Clause II appointments.[45] Once this threshold is met, whether that officer must be appointed with the advice and consent of the Senate necessarily turns on whether the officer is an IO or PO.[46]

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[41] *See* U.S. CONST. art. II, § 2, cl. 3.
[42] U.S. CONST. art. II, § 2, cl. 3.
[43] *See* U.S. CONST. art. II, § 2, cl. 2; Buckley v. Valeo, 424 U.S. 1, 126 (1976); Jennifer L. Mascott, *Who are "Officers of the United States"?*, 70 STAN. L. REV. 443, 454 (2018); O'Connell, *supra* note 34, at 662-64.
[44] Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018) (citing United States v. Germaine, 99 U.S. 508, at 511-12 (1879)) ("*Germaine* held that 'civil surgeons' (doctors hired to perform various physical exams) were mere employees because their duties were 'occasional or temporary' rather than 'continuing and permanent.'); NLRB v. SW Gen. Inc., 137 S. Ct. 929, 946-47 (2017) (Thomas, J., concurring); Morrison v. Olson, 487 U.S. 654, 719 (1988) (Scalia, J., dissenting); *Buckley*, 424 U.S. at 126; *Germaine* 99 U.S. at 512; Mascott, *supra* note 43, at 454 ("This evidence indicates that the most likely original public meaning of 'officer' is one whom the government entrusts with ongoing responsibility to perform a statutory duty of any level of importance.").
[45] *Buckley*, 424 U.S. at 126.
[46] *See* U.S. CONST. art. II § 2 cl. 2.

Although the Court has not prescribed precise definitions or elements for discerning between IOs and POs, it has presented qualities that distinguish these officers.[47] In *Morrison v. Olson*, the Court outlined three factors that characterize an IO.[48] An IO is someone who (1) performs "certain, limited duties," (2) has an "office of limited jurisdiction" and "limited tenure," and (3) is "subject to removal by a higher executive branch official" who is not the president.[49]

In his dissenting opinion in *Morrison*, Justice Scalia argued that an even simpler description of an IO is an officer who is "subordinate" to some official other than the president.[50] In *Edmond v. United States*, the Court agreed with Justice Scalia, and defined IOs as those "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."[51] Applying this definition, The Court determined that Coast Guard Criminal Court of Appeals judges were IOs because they had "no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers," even though they exercised some measure of independence.[52] Although *Edmond* did not overrule *Morrison*, the simpler test appears to have prevailed as the preferred means of determining IO or PO status.[53]

[47] Edmond v. United States, 520 U.S. 651, 661 (1997) (citing *Morrison*, 487 U.S. at 670; Go-Bart Importing Co. v. United States, 282 U.S. 344, 352-354 (1931); United States v. Eaton, 169 U.S. 331, 343 (1898); Ex parte Siebold, 100 U.S. 371, 397-398 (1880); Ex parte Hennen, 38 U.S. 225 (1839)).
[48] *Morrison*, 487 U.S. at 671.
[49] *Id.*
[50] *Id.* at 719 (Scalia, J., dissenting) ("Dictionaries in use at the time of the Constitutional Convention gave the word 'inferiour' two meanings which it still bears today: (1) '[l]ower in place, . . . station, . . . rank of life, . . . value or excellency,' and (2) '[s]ubordinate.'").
[51] *Edmond*, 520 U.S. at 663.
[52] *Id.* at 664-65.
[53] NLRB v. SW Gen. Inc., 137 S. Ct. 929, 937 n. 4 (2017) (Thomas, J., concurring); *see e.g.* Ortiz v. United States, 138 S. Ct. 2165, 2183 (2018).

3. Supreme Court Treatment of Article II and Acting Officers

Article II appointment standards are not required for POs when another officer fulfills the duties of the PO in certain circumstances.[54] In a late 19th century opinion, the Court found that sometimes an individual fulfilling the duties of a PO is not a PO if she is acting under "special and temporary" conditions.[55] The Court in *United States v. Eaton* reviewed a statute that allowed the vice-consul, or in absence of vice-consul, another person appointed by the diplomatic representative, to perform the duties of the consul-general during a vacancy.[56] Using this statutory authority, the gravely ill consul-general of Siam appointed a new vice-consul who was still in the United States, and then appointed Eaton to perform the duties of the consul-general until the vice-consul could travel to Siam.[57] The Court held that Eaton's role did not automatically convert to that of a PO simply by executing the responsibilities of the PO "for a limited time and under special and temporary conditions."[58]

However, the Court did not elaborate on this temporary or special performance that allowed the appointment to sidestep the Article II requirements. Instead, the Court reasoned that if it were to find that an IO becomes a PO when performing the duties of the PO, it "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."[59]

The Court in *Morrison* tried to maintain the principle expressed by the *Eaton* Court, defining an IO as one who holds an office for limited tenure.[60] However, *Morrison* similarly does not

[54] *See* United States v. Eaton, 169 U.S. 331, 343 (1898).
[55] *Id.*
[56] *Id.* at 336-38.
[57] *Id.* at 331.
[58] *Id.* at 343.
[59] *Id.*
[60] Morrison v. Olson, 487 U.S. 654, 672 (1988).

define "temporary," finding only that the tenure in question was short enough to qualify.[61]

4. The Importance of Article II Processes

Although it may seem purely process-based, Article II contains the important foundations, checks, and balances of republican government contemplated by the Framers.[62] The intentional separation of powers in the Constitution act as a safeguard to restrict encroachments by any one branch on another's constitutionally granted authority.[63] The president's explicit authority to appoint POs operates as a check against Congress,[64] while the Senate's approval of presidential nominees acts as a check against the president.[65] In Federalist No. 76, Alexander Hamilton argued that these checks act to protect against favoritism and self-interest within both branches.[66] Regarding the president's role in the process specifically, he suggested, "the possibility of rejection would be a strong motive to care in proposing" nominees and provides a basis for accountability.[67]

The Appointments Clause also acts as a broader protection of the balance of power. It not only protects each branch from itself, but "also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power."[68] Because the clause articulates who may exercise nomination and confirmation

[61] *See id.* at 672.
[62] Edmond v. United States, 520 U.S. 651, 659 (1997) (citing Buckley v. Valeo, 424 U.S. 1, 125 (1976)).
[63] *See id.*
[64] *Edmond* 520 U.S. at 659 (citing Weiss v. United States, 510 U.S. 163, 183-85 (1994) (Souter, J., concurring)).
[65] NLRB v. SW Gen. Inc., 137 S. Ct. 929, 935 (2017) (citing THE FEDERALIST NO. 76 (Alexander Hamilton)).
[66] THE FEDERALIST NO. 76 (Alexander Hamilton) (The purpose of the Senate confirmation process "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. In addition to this, it would be an efficacious source of stability in the administration.").
[67] THE FEDERALIST NO. 76 (Alexander Hamilton).
[68] Freytag v. Commissioner, 501 U.S. 868, 878 (1991).

power, it "prevents Congress from dispensing it too freely."[69] Because of these in-clause limitations "[n]either Congress nor the Executive can agree to waive this structural protection,"[70] "no more than they could agree to disregard an enumerated right."[71]

B. Vacancy Statutes and Treatment

Despite these intentional constitutional safeguards, throughout its history Congress has promulgated several statutes to specifically address possible confusion and leadership gaps that arise when a vacancy occurs in a PO position. As early as 1792, Congress passed limited provisions allowing for vacancies, regardless of whether the Senate was in session.[72] These early laws allowed actings to assume certain roles outside of the Article II process, and for the acting PO to remain in the position until the appointed PO could resume the duties, or a new PO was appointed.[73] Similarly in 1868, Congress passed the Vacancies Act, which expanded the types of PO roles that could be filled by actings, but included additional time restraints and restrictions regarding who could be appointed in the case of a

[69] *Id.* at 880.
[70] *Id.*
[71] *NLRB*, 137 S. Ct. at 949 (Thomas, J., concurring) (citing *Freytag*, 501 U.S. at 880 (1991)); *See also* United States v. Gundy, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting) (quoting Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 340 (2002) ("[I]f Congress could pass off its legislative power to the executive branch, the '[v]esting [c]lauses, and indeed the entire structure of the Constitution,' would 'make no sense.'")).
[72] Act of May 8, 1792, ch. 37, § 8, 1 Stat. 2, 281 ("And be it further enacted, That in case of the death, absence from the seat of government, or sickness of the Secretary of State, Secretary of the Treasury, or of the Secretary of the War department, or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons at his discretion to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease.").
[73] *See NLRB*, 137 S. Ct. at 935 (discussing history of vacancy acts).

vacancy.[74] Today, after many more changes to vacancy legislation, the president and Congress rely on several, sometimes overlapping statutes to manage in-session vacancies.

1. The Federal Vacancy Reform Act

In 1998, Congress passed the FVRA, which generally dictates the succession of POs in case of vacancy.[75] Section 3345 provides the methods to fill a vacancy when:

> . . . 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, dies, resigns, or is otherwise unable to perform the functions and duties of the office. . . . [76]

If there is someone in the role of the first assistant to the officer, that person will automatically assume the role of acting officer.[77] However, if that role is empty, then the president may choose between two methods to fill the role:[78] either the president can choose anyone "who serves in an office for which appointment is required to be made by the president, by and with the advice and consent of the Senate,"[79] or the president may select any officer or employee from the agency in which the vacancy exists, as long as that person has worked in that agency for at least 90 ninety of the 365 days preceding the cause of the vacancy, and maintains a GS-15 pay level or higher.[80]

Regardless of which FVRA provision the president relies on to fill the position, all actings are subject to time limitations, but these limitations can vary depending on the president's actions.[81] The acting

[74] *NLRB*, 137 S. Ct. at 935; Act of July 23, 1868, ch. 227, 15 Stat. 168; *See* Brannon P. Denning, *Article II, the Vacancies Act and the Appointment of "Acting" Executive Branch Officials*, 76 WASH. U. L. REV. 1039, 1043 (1998).
[75] 5 U.S.C. § 3345-3349d.
[76] 5 U.S.C. § 3345(a).
[77] 5 U.S.C. § 3345(a)(1).
[78] 5 U.S.C. § 3345(a)(2)-(3).
[79] 5 U.S.C. § 3345(a)(2).
[80] 5 U.S.C. § 3345(a)(3).
[81] *See* 5 U.S.C. § 3346.

"may serve in office . . . for no longer than 210 days beginning on the date the vacancy occurs."[82] However, if the president nominates someone other than the acting to the role, the authorized period of time begins to fluctuate.[83] The acting may continue performing the duties of the role "for the period the nomination [if someone other than the acting] is pending in the Senate."[84] Additionally, "[i]f the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the acting may continue to serve as the acting officer for no more than 210 days after" that date.[85] But if the president nominates a second person who is not the acting to the role, the clock resets again.[86] The acting may then continue performing the duties of the role during the period that the nomination is pending, or "for no more than 210 days after the second nomination is rejected, withdrawn, or returned."[87]

The statute is silent about what would happen after a third nomination attempt, but this silence may allow for the acting to remain in the role indefinitely, as long as the president continues to nominate other individuals to the role.[88] However, if at any point the acting officer is nominated by the president to the PO role and sent to the Senate, that person may no longer perform the duties of the office as acting, and the president would need to rely on the FVRA to appoint someone else as acting.[89]

Finally, the FVRA states that it is the exclusive means for appointing an acting official, except in one of three scenarios:[90] first, if another statute "authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform" the role in an acting capacity;[91] second, if a statute designates a specific

[82] 5 U.S.C. § 3346(a)(1).
[83] 5 U.S.C. § 3346(a)(2).
[84] 5 U.S.C. § 3346(a)(2).
[85] 5 U.S.C. § 3346(b)(1).
[86] *See* 5 U.S.C. § 3346(b)(2).
[87] 5 U.S.C. § 3346(b)(2).
[88] Vladeck, *Abusing Authority*, *supra* note 5.
[89] 5 U.S.C. § 3346(b)(1); NLRB v. SW Gen. Inc., 137 S. Ct. 929, 938 (2017).
[90] 5 U.S.C. § 3347(a).
[91] 5 U.S.C. § 3347(a)(1)(A).

"officer or employee to perform" the role[92] and; third, if the President makes an appointment while the Senate is in recess under Article II, Section 2, Clause 3.[93]

2. The Department of Homeland Security Act and Succession

Congress has created many agency-specific statutes that interact with the FVRA's exclusivity provision to determine succession of POs.[94] When Congress established the Department of Homeland Security in 2002, and with it the position of Secretary,[95] it established specific succession procedures should a vacancy occur.[96] In the event that neither the Secretary nor the deputy secretary of Homeland Security is available to perform the duties of the office due to "absence, disability, or vacancy," then the under secretary of Homeland Security automatically assumes the duties of the role.[97]

The DHS Act also allows for another mode of succession. Despite "chapter 33 of title 5 [the FVRA], the Secretary *may* designate such other officers of the Department in further order of succession to serve as acting Secretary."[98] And unlike the FVRA, the DHS Act dictates no time limits for actings assuming such authority.[99]

Therefore, if the roles of deputy secretary or under secretary for management are both vacant, and the Secretary has not selected anyone else to succeed the role, the president is free to appoint an acting Secretary under the FVRA: either someone who is serving in any Senate confirmed role, or someone who has worked in the Department of Homeland Security for at least ninety of the 365 days preceding the cause of the vacancy at a GS-15 level.[100] Additionally,

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[92] 5 U.S.C. § 3347(a)(1)(B).
[93] 5 U.S.C. § 3347(a)(2) (citing U.S. CONST. art. II, § 2, cl. 3).
[94] *See e.g.,* 6 U.S.C. §§ 101; Intelligence Reform and Terrorism Prevention Act (IRTPA), 50 U.S.C. § 3026.
[95] 6 U.S.C. § 101.
[96] 6 U.S.C. § 113(g)(1).
[97] 6 U.S.C. § 113(g)(1).
[98] 6 U.S.C. § 113(g)(2) (emphasis added).
[99] *See* 6 U.S.C. §113(g); O'Connell, *supra* note 34, at 680.
[100] 5 U.S.C. § 3345(a)(2)-(3).

even though President Obama issued an executive order in 2016 amending the order of succession for the Secretary role, the order denotes that "the President retains discretion, to the extent permitted by the Vacancies Act, to depart from this order in designating an acting Secretary."[101]

However, under the power of the DHS Act,[102] secretaries of DHS have, with varying degrees of success, attempted to modify the order of succession.[103] Whether this entirely supersedes the president's power under the FVRA or is merely another means for succession is a topic for another comment.[104]

3. Treatment of the FVRA and Other Appointments Clause Issues

The Office of the Chief Legal Counsel (OLC) and the Supreme Court have contemplated the constitutionality of the FVRA and other vacancy appointment procedures.[105] In 2003, OLC issued a memorandum opinion to President Bush, relying on *United States v. Eaton*.[106] OLC contended that the President, under the FVRA, was authorized to appoint the executive director of the Office of Management and Budget (OMB) to the role of acting director of OMB.[107] OLC considered whether there would be an issue with the President appointing someone to an officer role (either PO or IO) who was not already an officer, and assumed *arguendo* that the Executive Director was simply an employee.[108]

[101] Exec. Order 13753, 81 C.F.R. 90667; Vladeck, *The DHS Edition*, *supra* note 6.
[102] 6 U.S.C. 113(g)(2).
[103] *See, e.g.*, DHS Delegation No. 00106, Revision 8 of December 15, 2016 (Dkt. 324-1) at ECF pp.21.
[104] *See* CONG. RSCH. SERV., THE VACANCIES ACT: A LEGAL OVERVIEW 22-23 (2020) (discussing whether the agency statutes supersede the FVRA), https://fas.org/sgp/crs/misc/R44997.pdf.
[105] Designation of Acting Dir. of the Office of Mgmt. and Budget, 27 Op. O.L.C. 121 (2003); NLRB v. SW Gen. Inc., 137 S. Ct. 929, 938 (2017).
[106] 27 Op. O.L.C. at 121; United States v. Eaton 169 U.S. 331 (1898).
[107] 27 Op. O.L.C. at 121.
[108] 27 Op. O.L.C. at 122.

Ultimately, OLC determined there was no issue, contending that someone acting in the role of a PO is not *actually* a PO.[109] OLC supported its conclusion with the Court's rationale in *Eaton*: because the acting officer is performing the duties "under special and temporary conditions," and, to hold otherwise would hinder all delegations of duty by a PO to an IO or employee, an acting is "not thereby transformed into the superior and permanent official." [110] OLC concluded that the Court's decision in *Edmond v. United States* – that an inferior officer is one that answers to an officer nominated by the president and confirmed by the senate – was merely suggestive because it held only "that '[g]enerally speaking' an inferior officer is subordinate to an officer other than the President" and did not pertain to acting officers.[111] OLC determined that because actings are "temporary," and Article II, Section 2, Clause 2 allows Congress to vest appointments of IOs "in the President alone, in the Courts of Law, or in the Heads of Departments,"[112] Congress had simply employed "one of the modes by which it may provide for appointment of an inferior officer."[113]

FVRA issues have also reached the Supreme Court. In 2017, the Court found that 5 U.S.C. § 3345(b)(1), the provision prohibiting an acting officer from continuing to act once nominated to the PO role, applied to anyone "acting" in that role, and not only those who were the first deputy.[114] The Court decided that Lafe Solomon, President Trump's appointed "acting" General Counsel of the National Labor Relations Board (NLRB) under 5 U.S.C. § 3345(a)(3), was prohibited from continuing the duties of the position as soon as the President officially nominated him for the role.[115] Because of this, the Court was able to avoid the constitutional question of whether

[109] 27 Op. O.L.C. at 123.
[110] 27 Op. O.L.C. at 123 (citing *Eaton*, 169 U.S. at 343).
[111] 27 Op. O.L.C. at 124 (citing Edmond v. United States 520 U.S. at 662, 663 (1997)).
[112] U.S. CONST. art. II, § 2, cl. 2.
[113] 27 Op. O.L.C. at 124 (citing U.S. CONST. art. II, § 2, cl. 2).
[114] NLRB v. SW Gen. Inc., 137 S. Ct. 929, 938 (2017).
[115] *NLRB*, 137 S. Ct. at 943-44.

appointments under the FVRA contravene Article II.[116] However, Justice Thomas addressed the issue at length in his concurrence.[117]

Justice Thomas argued that the general counsel of the NLRB is a PO because the role "answers to no officer inferior to the President."[118] Because of its PO status, a statute allowing the president to appoint someone as acting general counsel would be unlawful "without first obtaining the advice and consent of the Senate."[119] Distinguishing *Eaton*, Justice Thomas explained that there was "nothing 'special and temporary'" about the acting general counsel's appointment: he "served for more than three years in an office limited by statute to a four-year term, and he exercised all of the statutory duties of that office."[120] Addressing "special and temporary" directly, Justice Thomas "did not think the structural protections of the Appointments Clause [could] be avoided based on such trivial distinctions."[121]

He was also not persuaded that the FVRA's efficiency, compared to the channels set forth in the Appointments Clause, somehow validated it.[122] Quoting the Court in *INS v. Chadha*, he emphasized that the Framers "had lived under a form of government that permitted arbitrary governmental acts to go unchecked,"[123] and the structure and checks of the Appointments Clause were written to "protect individual liberty."[124]

The Court has addressed additional issues regarding the appointment of POs. In *Weiss v. United States*, the Court found that commissioned officers appointed to serve as military judges were constitutional appointments under the Appointments Clause because

[116] *Id.* at 946 (Thomas, J., concurring).
[117] *Id.* at 945 (Thomas, J., concurring).
[118] *Id.* at 948 (Thomas, J., concurring).
[119] *Id.*
[120] *Id.* at 946, n. 3 (Thomas, J., concurring) (quoting United States v. Eaton, 169 U.S. 331, 343 (1898)).
[121] *Id.*
[122] *See id.* at 948 (Thomas, J., concurring).
[123] *Id.* at 948 (Thomas, J., concurring) (quoting INS v. Chadha, 462 U.S. 919, 959 (1983)).
[124] *Id.* at 949 (quoting NLRB v. Noel Canning, 573 U.S. 513, 587 (2014)).

they had already been appointed with the advice and consent of the Senate to another role.[125] However, the Court determined these judges were IOs, and therefore Congress could, by law, determine the appointment of these judges.[126] Justice Souter, in his concurrence, agreed that the judges were IOs, and that Congress may choose its method of appointment, including "with advice and consent of the Senate."[127] He asserted that it would be different if the judges were POs:[128] "[Congress] may not, even with the President's assent, disregard the Constitution's distinction between principal and inferior officers. It may not, in particular, dispense with the precise process of appointment required for principal officers, whether directly or 'by indirection.'"[129]

C. Article II Presidential Succession in Case of Vacancy

Finally, the Constitution contemplates vacancy and appointment provisions beyond just POs and IOs. Article II also stipulates the process for presidential vacancies in Section 1, Clause 6.[130] It states:

> In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the *Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President*, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.[131]

Similar to Article II, Section 2, Clause 2, granting Congress the authority to establish appointment procedures for inferior officers,[132] this provision grants Congress the explicit authority to determine

[125] Weiss v. United States, 510 U.S. 163, 170 (1994).
[126] *Id.* at 182-83 (Souter, J., concurring).
[127] *Id.*
[128] *See id.* at 183 (Souter, J., concurring).
[129] *Id.*
[130] *See* U.S. CONST. art II, § 2, cl. 6.
[131] U.S. CONST. art. II, § 1, cl. 6 (emphasis added).
[132] U.S. CONST. art. II, § 2, cl. 2.

which officer succeeds in the case of a vacancy where neither the president nor the vice president are available to perform the duties of the office.[133]

II. ANALYSIS

While the FVRA and DHS Act may provide an efficient and convenient means for maintaining occupancy of important leadership roles in the government, they are unconstitutional authorizations of appointment power. Because actings appointed to PO roles assume PO status, the Constitution lays out the exclusive process for appointing them: by the president and with the advice and consent of the Senate. Because neither act requires the acting PO to be confirmed by the Senate, they are both unconstitutional as they pertain to POs.

This constitutional violation is not innocuous. It threatens to undermine the balance of power that the Framers intentionally incorporated into the Constitution, and with it, stability at the top of federal agencies ensuring our national security.

A. "Actings" in PO Roles Are POs

Because actings are POs, they must be appointed under the Article II process. An employee or IO acting in the role of a PO is also a PO. The acting performs all of the duties of the PO and answers only to the president.[134] Additionally, an acting appointed under the FVRA is not "special and temporary."

1. Both the Secretary and the Acting Secretary Are Principal Officers

Anyone acting in the role of PO is also a PO, and therefore the Secretary is indisputably a PO. First, the Secretary is an officer, not an employee of the United States for the purposes of Article II, because the role performs "significant duties pursuant to the laws of the United

[133] David A. Erhart, *"I Am in Control Here": Constitutional and Practical Questions Regarding Presidential Succession*, 51 U. LOUISVILLE. L. REV. 323, 334 (2013).
[134] *See* Edmond v. United States, 520 U.S. 651, 663 (1997).

States" through the DHS Act.[135] Second, the Secretary does not satisfy the characteristics of an IO under *Morrison v. Olson* or *Edmond v. United States*.[136] The Secretary answers only to the president, does not perform limited duties, and does not serve in an office of limited tenure or jurisdiction.[137] Thus, the Secretary is a PO.

An acting Secretary is also a PO. When former Secretary Nielsen resigned from office, and President Trump tapped McAleenan and subsequently Wolf to assume the acting Secretary role, both became POs. Neither the DHS Act nor the FVRA place the acting Secretary under any other officer's control.[138] The acting Secretary performs the same duties and has the same power as the Secretary, [139] including the ability to amend the order of succession under the DHS Act,[140] and is therefore an officer under the *Buckley* analysis.[141]

Under the *Edmond* analysis, the acting Secretary cannot be an IO because she is not "directed and supervised at some level by another officer who was appointed by presidential nomination with the advice and consent of the Senate," and definitely has "power to render a final decision on behalf of the United States."[142] The *Morrison* factors also suggest that the acting Secretary must be a PO.[143] The role is not "subject to removal by a higher executive branch official" who is not the president, nor does it perform only "certain, limited duties" in an "office of limited jurisdiction."[144] The only *Morrison* factor weighing in favor of IO status is that the role is technically a "limited tenure"

[135] Buckley v. Valeo, 424 U.S. 1, 126 (1976); 6 U.S.C. § 112.
[136] *See Edmond*, 520 U.S. at 663; Morrison v. Olson, 487 U.S. 654, 671.
[137] *See Morrison*, 487 U.S. at 671.
[138] *See* FVRA §§ 3345-3349 ; 6 U.S.C. § 113(g).
[139] *See* 6 U.S.C. § 113(g); Acting Officers, 6 Op. O.L.C. 119, 119.
[140] *See* GAO B-331650, *supra* note 20, at 10; Batalla Vidal v. Wolf, 16-cv-04756, 2020 at 18 (E.D.N.Y. Nov. 14, 2020) (https://www.justsecurity.org/wp-content/uploads/2020/11/Garaufis.DACA_.decision.pdf) (stating the McAleenan had no power to designate successors only because he was not statutorily authorized to be acting).
[141] *See Buckley*, 424 U.S. at 126 (An IO is someone who performs "certain, limited duties," has an "office of limited jurisdiction" and "limited tenure, and is "subject to removal by a higher executive branch official" who is not the President.).
[142] *See Edmond*, 520 U.S. at 663, 664-65.
[143] *See Morrison*, 487 U.S. at 671.
[144] *Id.*

under the FVRA – based on the 210-day limitation built into the statute.[145] But the role is not "limited" or "temporary" in the manner contemplated by *Morrison* and *Eaton*.

2. The Acting Secretary Is Neither Special nor Temporary

While OLC has argued that under *Eaton,* acting POs are actually IOs because of the "special and temporary condition" of their appointment,[146] this is not true in every circumstance. In *Eaton*, the Court addressed the appointment of an officer by the consul-general of Siam to perform the duties of the role until the vice-consul could reach Siam, a considerable distance from the United States.[147] The Court did not specify the temporal limits of a "temporary" period, nor did it explain what "special" connotes. Instead, the majority argued that failure to allow appointments of this kind "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."[148] This appears to be the "special" nature of the appointment: An unforeseen circumstance somehow warrants circumvention of the Appointments Clause by creating a "temporary" inferior officer that still acts as and performs all the duties of a PO. As Justice Thomas expressed, such a trivial distinction should not permit deviation from the constitutional structure.[149]

Regardless of whether a temporary or special acting PO can avoid the Appointments Clause formalities, the acting Secretary is neither temporary nor special. First, the FVRA allows for actings to continue serving in the role for periods greater than 600 days, and the DHS Act imposes no time limit.[150] Second, the appointment of an

[145] *Id.* at 672; 5 U.S.C. § 3346.
[146] Designation of Acting Dir. of the Office of Mgmt. and Budget, 27 Op. O.L.C. 121, 124 (2003) (citing United States v. Eaton, 169 U.S. 331, 343 (1898)).
[147] *Eaton*, 169 U.S. at 331-32.
[148] *Id.* at 343.
[149] NLRB v. SW Gen. Inc., 137 S. Ct. 929, 946, n.3 (2017) (Thomas, J., concurring) (quoting *Eaton*, 169 U.S. at 343).
[150] *See* 5 U.S.C § 3346 (1998); 6 U.S.C. § 113(g).

acting Secretary in this manner is not "special" in the way the Court contemplated in *Eaton*.[151]

Under the FVRA, the acting is no more temporary than the PO. The provisions of the FVRA can allow an "acting" to retain his or her position for at least three successive periods of 210 days, plus any time another nomination is pending in the senate, based on the president's actions.[152] Moreover, if one assumes that the FVRA's silence on additional nominations allows the 210-day period to toll again, then the statutorily permissible time period expands further still.[153]

A possible scenario could involve an acting Secretary acting for the entirety of the first period of 210 days. If the president then appoints someone other than the acting to the Senate, and the nomination is rejected, returned or withdrawn, the acting could continue to serve in the role while the nomination is pending, and another 210-day period would begin. The president could continue to nominate less than desirable individuals to the role, and as long as the Senate never confirms a nominee, the acting Secretary could continue acting until the president decided to remove her.

Under the DHS Act, an acting Secretary is even less temporary than under the FVRA because, unlike the FVRA, the DHS Act imposes no time limit whatsoever.[154] Thus the acting Secretary could continue in the role until the president decided to nominate someone for Senate confirmation, or, alternatively, to induce resignation so that another neatly calculated individual in the line of succession could step into the role.

However, one can conceive of constitutional temporary delegations of PO power under the OLC's interpretation of *Eaton.*[155] If the PO went on vacation, or took a temporary leave of absence, it might be appropriate to appoint the first officer to temporarily

[151] *See Eaton*, 169 U.S. at 343.
[152] 5 U.S.C. § 3346(a)(1); *see supra* text accompanying notes 81-89.
[153] *See* 5 U.S.C. § 3346(a)-(b); Vladeck, *Abusing Authority*, *supra* note 5.
[154] *See* 6 U.S.C. § 113(g); O'Connell, *supra* note 34, at 680.
[155] *See Eaton*, 169 U.S. at 331.

discharge the duties of the role, depending on the length of the absence. In this scenario, the PO would still oversee the acting to some degree because the PO would eventually return to the role. This is closer to the facts of *Eaton*.[156] The consul-general first appointed a vice-consul located in the United States, and then appointed Eaton to act until that officer arrived.[157] The Court was not considering the validity of the vice-consul's appointment, only the appointment of Eaton as acting consul-general.[158]

Similarly, the acting Secretary position is not "special" in the way the Court contemplated in *Eaton*. In *Eaton*, the consul-general became fatally ill, and there was no choice but for the vice-consul to fill the role during the inevitably lengthy process of communicating the vacancy back to the president, filling the role, and sending the new consul to Siam.[159] Unlike the consul of Siam, the Secretary's role is primarily in the United States and thus avoids the unique role-filling challenges presented in *Eaton*. Even if the Secretary were abroad at the time a vacancy occurred, communication capabilities are wildly different now than they were in the 1890s. The court may very well have considered it a "special" circumstance in 1892, when the consul-general of Siam vacated his position with no available replacement from the United States for a matter of months and with no means of communication faster than a few weeks.[160] But today, communication is instantaneous in most circumstances, evidenced by President Trump's formerly prolific use of Twitter, and no special barrier keeps the president from nominating someone immediately for Senate confirmation.

This is particularly apparent in the activity surrounding Wolf's appointment as acting Secretary. While Wolf had worked for DHS for a period of ninety days in the 365 preceding Nielsen's resignation[161] and could have qualified under the third prong of the

[156] *Id.* at 331-32.
[157] *Id.* at 342.
[158] *Id.* at 335-36.
[159] *See id.* at 342.
[160] *See id.*at 342-43.
[161] *See* Steve Inskeep, *Trump Picks Chad Wolf to Lead Department of Homeland Security*, NPR (Nov. 11, 2019, 5:05 AM)

FVRA,[162] President Trump wanted to ensure that Wolf met the DHS Act's requirements,[163] thus freeing Wolf from the FVRA's time restrictions. Accordingly, after McAleenan announced his resignation, and before appointing Wolf to acting Secretary, President Trump put forward Wolf's under secretary nomination and the Senate confirmed him, allowing Wolf to assume the role under the DHS order of succession created by McAleenan.[164] While this may have its own constitutional invalidities,[165] it demonstrates that this was not such a special circumstance.[166] There was ample time for President Trump to nominate someone to the Secretary role and for the Senate to confirm them.

The lack of oversight and the potentially indefinite nature of the acting Secretary role demonstrates that it is not merely an IO position. Because the acting is not supervised by anyone but the president, and is neither "temporary" nor "special," the acting is a PO.

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https://www.npr.org/2019/11/11/778158813/trump-picks-chad-wolf-to-lead-department-of-homeland-security. Also note that Nielsen's resignation was the "cause of the vacancy" for purposes of applying the FVRA. *See* 5 U.S.C. § 3345(a)(3)(A).

[162] 5 U.S.C. § 3345(a)(3).

[163] *See* Daniel Lippman, Ian Kullgren, and Anita Kumar, *White House Plans to Name Chad Wolf Acting DHS Secretary*, POLITICO (Oct. 31, 2019 05:33 PM), https://www.politico.com/news/2019/10/31/chad-wolf-acting-dhs-secretary-063363; Burgess Everett, Anita Kumar, and Daniel Lippman, *Republicans shoot down White House plan to install Cuccinelli atop DHS*, POLITICO (Oct. 30, 2019, 10:50 AM), https://www.politico.com/news/2019/10/30/grassley-cuccinelli-homeland-security-department-061665 ("There's some opposition to Senate confirmation. I have not heard anything about some go-around. But it's my understanding that the existing law would not permit him to" lead the organization, Grassley said in an interview. "I don't know how you get around that. I don't think it's possible because of what the law says, not because of anything else.").

[164] *See* Miroff, *Different Job*, *supra* note 14.

[165] *See* 5 U.S.C. § 3345(b)(1)(B); NLRB v. SW Gen. Inc., 137 S. Ct. 929, 943-44 (2017) (finding that under the FVRA it is impermissible for an individual to continue acting in a PO role after being nominated to the role).

[166] *See* Designation of Acting Dir. of the Office of Mgmt. and Budget, 27 Op. O.L.C. 121, 124 (2003) (citing United States v. Eaton, 169 U.S. 331, 343 (1898)).

B. Acting Appointments Require the Advice and Consent of the Senate

Article II, Section 2, Clause 2 dictates that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States."[167] Clause 2 also allows Congress "by Law [to] 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."[168]

The clause creates two methods for appointing officers: (1) POs must be confirmed with the advice and consent of the Senate, and (2) IOs may be confirmed in whatever method Congress determines by law.[169] The Framers contemplated and purposefully limited the method of appointment for POs.[170] The president's "explicit authority" to nominate the PO acts as a check against Congress, while the Senate's confirmation acts as a check against the potential for self-interested decisions by the president.[171] By allowing the president to unilaterally appoint a PO without the advice and consent of the Senate under the FVRA, Congress has destroyed both checks built into the Appointments Clause.

Similarly, the statutes are not constitutional simply because Congress has authorized the president to unilaterally appoint an acting under the FVRA, or the Secretary to create an order of succession.[172] The separation of powers in the Constitution protect individual liberty, and the individual branches of the government may not permit encroachment by another, nor waive these structural provisions.[173]

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[167] U.S. CONST. art. II, § 2, cl. 2.
[168] U.S. CONST. art. II, § 2, cl. 2.
[169] *See* U.S. CONST. art. II, § 2, cl. 2; NLRB v. SW Gen Inc., 137 S. Ct. 929, 945 (Thomas, J., concurring) (citing United States v. Germaine, 99 U.S. 508, 510 (1879)).
[170] Edmond v. United States, 520 U.S. 651, 659 (1997) (citing Weiss v. United States, 510 U.S. 163, 183-85 (1994) (Souter, J., concurring)).
[171] THE FEDERALIST NO. 76 (Alexander Hamilton).
[172] *NLRB*, 137 S. Ct. at 949 (Thomas, J., concurring).
[173] *See id.* at 945 (Thomas, J., concurring) (citing Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497 (2010)).

Article II, Section 1, Clause 6 and Article II, Section 2, Clause 3 highlight the exclusivity of the process for appointing POs in the Appointments Clause.[174] The text of Section 1, Clause 6 explicitly grants Congress the power to statutorily dictate which officer will succeed the role of president if both the president and vice president are unable to perform.[175] However in Section 2, Clause 3, the Framers provided only for vacancy appointments when the Senate was not in session.[176] This demonstrates that when the Framers wanted to grant Congress the power to designate successors in the case of any vacancy, they did so.

The Appointments Clause provides for the intentionally exclusive means of appointing a PO, and for vacancy appointments only when the Senate is not in session.[177] Therefore, acting POs must be confirmed by and with the advice and consent of the Senate. Because both the FVRA and DHS Act allow for the appointment of POs without Senate confirmation, appointments under them contravene Article II of the Constitution.

Additionally, moving an officer from one Senate-confirmed role to another does not avoid the constitutional issues. First, not all roles that are confirmed by the Senate are POs. Because Congress has the ability to create IO roles and vest appointment power with the president, the courts, or department heads,[178] Congress has created IO roles that mirror the appointment requirements for PO roles.[179] But while the confirmation processes may be identical, there is likely a vast gap in the level of responsibility between an IO and a PO. Confirming someone to an IO role, and then suggesting the confirmation is somehow transferable to any PO role, is an unacceptable contortion of the precise process dictated by Article II.[180]

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[174] *See* U.S. Const. art. II, § 1, cl. 6; U.S. CONST. art. II, § 2, cl. 3.
[175] U.S. CONST. art. II, § 1, cl. 6.
[176] U.S. CONST. art. II, § 2, cl. 3.
[177] *See* U.S. CONST. art. II, § 2, cl. 2-3.
[178] U.S. CONST. art. II, § 2, cl. 2.
[179] *See* Weiss v. United States, 510 U.S. 163, 182-183 (1994) (Souter, J., concurring).
[180] *Id.*

C. History and Precedent of Unconstitutional Congressional Acts Do Not Validate the Statutes

Although the Court will turn to history and precedent when determining constitutionality,[181] the existence of an established, historical practice of extra-constitutional appointments does not in itself validate the statutes.[182] Nor does that which Congress finds convenient automatically authorize the practice.[183] The Supreme Court has struck down statutes that clearly step outside the intentional, plain language of the Constitution, even when history and precedent support the delegation of power.[184]

The Court adhered to these principles in *Marbury v. Madison*, using the clear language of Article III to strike down a provision that attempted to expand the original jurisdiction of the Supreme Court.[185] The Appointments Clause is just as clear: it expressly provides the process for appointing POs, IOs, and filling vacancies that occur when the Senate is not in session.[186]

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[181] *See* District of Columbia v. Heller 554 U.S. 570, 582 (2008); *Chadha*, 462 U.S. at 944; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Jackson, J., concurring).

[182] *See* Act of May 8, 1792, ch. 37, §8, 1 Stat. 2, 281; Denning, *supra* note 74, at 1043.

[183] *See* INS v. Chadha, 462 U.S. 919, 944-45 (1983).

[184] *Id.* at 944.

[185] *See* Marbury v. Madison, 5 U.S. 137, 177-78 (1803). In *Marbury v. Madison*, the Court severed part of a congressional act that attempted to establish original jurisdiction in the Supreme Court to issue writs of mandamus. *Id.* at 173. Article III of the Constitution clearly enumerates the cases in which the Supreme Court has original jurisdiction: "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction." *Id.* at 174 (citing U.S. CONST. art. III, § 2). By expressly delineating these cases, "the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate . . . ." *Id.* at 175. Because the plain language of Article III clearly set forth those exclusive cases over which the Supreme Court had original jurisdiction, and Congress was not permitted to expand those cases by statute, the Court severed the unconstitutional provision. *Id.* at 177-78.

[186] *See* U.S. CONST. art. II, § 2, cl. 2-3.

In *INS v. Chadha*, the Court used the plain language of the Constitution to overcome the weight of historical practice.[187] Although Congress had been using the legislative veto for over forty years, the plain language of Article I and separation of powers principles demonstrated its unconstitutional nature.[188] "Convenience and efficiency are not the primary objectives - or the hallmarks - of democratic government and our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency . . . ."[189]

Likewise, although Congress has periodically passed statutes similar to the FVRA and the DHS Act since the late 1700s,[190] this alone does not validate the acts. The plain language of Article II and the clear intention of the Framers to create checks on both the president and the Senate should overcome any weight that historical practice lends to these vacancy appointments.[191] While it may be convenient, convenience alone does not justify a departure from the Constitution.[192]

Because the plain language of the Appointments Clause provides the express method for appointing POs, and a history of Congressional permission does not alone negate the Constitution, the

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[187] *Chadha*, 462 U.S. at 944. In *Chadha*, the Court severed a statutory provision that allowed for a single house of Congress to exercise a legislative veto. *Id.* at 944. The plain language of Article I clearly presents two bastions of separation of powers: the presidential veto, and bicameralism. U.S. CONST. art I, §1; U.S. CONST. art I, §7, cl. 2-3; *Chadha*, 462 U.S. at 945-46. Both were intentionally included in the Constitution to protect against tyranny and despotism, and to preserve personal liberty. *Id.* 949-50 (Citing 1 M. Farrand, The Records of the Federal Convention of 1787, 254; THE FEDERALIST NO. 22 (Alexander Hamilton)). Because the legislative veto encompassed a legislative purpose, it needed to conform to the "procedures set out in Article I[:]" approval by both houses of Congress and "presentment to the President." *Id.* at 944. Even though there were 295 legislative veto provisions enacted by Congress between 1932 and 1977, its prevalence alone did not legitimize the practice and the legislative veto was unconstitutional. *Id.*

[188] *Chadha*, 462 U.S. at 945-46.

[189] *Id.* at 944-45.

[190] *See* Act of May 8, 1792, ch. 37, § 8, 1 Stat. 2, 281.

[191] *See Chadha*, 462 U.S. at 944.

[192] *See id.* at 944-45 ("Convenience and efficiency are not the primary objectives - or the hallmarks - of democratic government . . . .").

FVRA and DHS Act are unconstitutional as they pertain to extra-constitutional appointments of POs.

D. The Extra-Constitutional Appointment Powers in the FVRA and DHS Act Create Instability in Federal Agency Leadership

This deviation from the Constitution is not harmless. While separation of powers in the Appointments Clause is meant to create stability and protect important leadership roles from favoritism and nepotism,[193] the flexibility provided by the FVRA and DHS Act undermines those goals by allowing a perpetual chain of acting Secretaries for indefinite periods of time. The separation of powers principles imbedded in the Constitution are meant to create a stable and effective form of government that safeguards personal liberty from the ramifications of unchecked federal power.[194] The country loses this stability and protection when a president appears to flout the intent of such principles in favor of unilateral control.

The FVRA and DHS Act undermine the stability and goal-reaching ability of agencies with many vacant positions. This issue was prominent during the Trump Administration. Because of President Trump's affinity for the flexibility and control he maintained over actings,[195] and his apparent apathy toward nominating individuals to vacant leadership roles, DHS and other agencies facing similar vacancy issues were hard-pressed to fulfill their missions.[196] It is

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[193] THE FEDERALIST NO. 76 (Alexander Hamilton) ("It 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. In addition to this, it would be an efficacious source of stability in the administration.").

[194] THE FEDERALIST NO. 47 (James Madison) ("There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.").

[195] *See I like actings…gives me more flexibility': Trump on cabinet*, GLOB. NEWS (Jan. 26, 2019, 10:08 AM), https://globalnews.ca/video/4820395/i-like-acting-gives-me-more-flexibility-trump-on-staff-roles.

[196] *See Memo from the Office of the Inspector General of Homeland Security to Kevin McAleenan, Acting Secretary*, *supra* note 33, at 2 ("[M]any of these senior leadership positions continue to suffer from a lack of permanent, Presidentially Appointed and Senate confirmed officials. More broadly, DHS and its roughly

challenging for any agency to operate and pursue its goals when so many roles are vacant, or when individuals fulfilling the duties of the role act fully at the whim of the president.[197] While it remains true that the president may unilaterally remove POs,[198] generally a properly nominated and confirmed agency head can take ownership of the role with the expectation that he or she will continue working in the role for more than a few months.

However, while an acting agency head could continue for successive 210-day periods of appointment under the FVRA[199] (and indefinitely under the DHS Act), she still acts at the behest of the president. Combined with vacancies in many of the top leadership positions, this lack of stability and support impairs the government's national security initiatives. This instability is especially damaging to those interests at a time when the crisis at the border continues to grow[200] and tensions mount with foreign powers.[201]

240,000 employees work in an environment marked by high attrition, changing mandates, and difficulties implementing permanent plans, procedures, and programs.").

[197] *See id.*

[198] Myers v. United States, 272 U.S. 52, 122 (1926) ("The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.").

[199] *See* Vladeck, *Abusing Authority*, *supra* note 5.

[200] *An Overwhelming Surge in Illegal Immigration is Worsening the Crisis at the Border*, Immigration, WHITE HOUSE (April 5, 2019), https://www.whitehouse.gov/briefings-statements/overwhelming-surge-illegal-immigration-worsening-crisis-border/ ("OVERWHELMING SURGE AT THE BORDER: President Donald J. Trump has warned repeatedly that our border is being overwhelmed and, as the numbers show, that is exactly what is happening.").

[201] *See* Peter Baker and Edward Wong, *Trump Says He Ordered Killing of Iranian to Prevent New Attack on Americans*, N.Y. TIMES (Jan. 3, 2020, 1:07 PM), https://www.nytimes.com/2020/01/03/world/middleeast/trump-iran-iraq.html; Warren P. Strobel, Nancy A. Youssef and Vivian Salama, *Intelligence Suggests U.S., Iran Misread Each Other, Stoking Tensions*, WALL ST. J. (May 16, 2019, 7:25 PM), https://www.wsj.com/articles/trump-told-aides-he-doesnt-want-war-with-iran-11558036762.

To illustrate this instability, there were six acting or confirmed secretaries of DHS during the Trump Administration,[202] with many other roles remaining vacant or filled only by actings despite bipartisan efforts to convince the President to nominate individuals to those roles.[203] By contrast, President Bush had only three Secretaries from 2003 to 2009,[204] and President Obama had only three during his eight years in office.[205] Additionally, both Nielsen and John Kelley, President Trump's only Senate-confirmed Secretaries, served shorter tenures than any Senate-confirmed Secretary in both the Bush and Obama administrations, while acting Secretaries Duke, McAleenan, and Wolf served longer periods of time than any acting Secretaries prior to the Trump administration.[206]

The recent flurry of challenges to the Wolf and McAleenan appointments likewise demonstrate additional instability caused by

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[202] *See* Claire Hansen, *Chad Wolf Becomes Acting Secretary of Homeland Security*, U.S. NEWS (Nov. 13, 2019, 4:44 PM), https://www.usnews.com/news/national-news/articles/2019-11-13/chad-wolf-becomes-acting-secretary-of-homeland-security; *Peter T. Gaynor,* DEP'T OF HOMELAND SEC., https://www.dhs.gov/person.peter-t-gaynor.

[203] *See Homeland Security Leadership*, DEP'T OF HOMELAND SEC., https://www.dhs.gov/leadership; *Letter from United States Senate Committee on Homeland Security and Governmental Affairs, Gary C. Peters and Ron Johnson, to President Donald Trump* (Nov. 6, 2019); Nick Miroff, *Bipartisan Senate letter urges Trump to fill Department of Homeland Security vacancies*, WASH. POST (Nov. 6, 2019, 6:34 PM), https://www.washingtonpost.com/immigration/bipartisan-senate-letter-urges-trump-to-fill-department-of-homeland-security-vacancies/2019/11/06/d7b4fe6e-00e2-11ea-8501-2a7123a38c58_story.html.

[204] Note that DHS was created in 2003. *See* Thomas J. Ridge, Secretary of Homeland Security 2003 – 2005, DEP'T OF HOMELAND SEC. (last updated Dec. 11, 2019), https://www.dhs.gov/thomas-j-ridge.

[205] *See Secretaries of Homeland Security*, DEP'T OF HOMELAND SEC. (last updated Dec. 11, 2019), https://www.dhs.gov/secretaries-homeland-security; *Rand Beers*, DEP'T OF HOMELAND SEC. (Aug. 25, 2015), https://www.dhs.gov/person/rand-beers; *Admiral James Loy*, WHITE HOUSE, https://georgewbush-whitehouse.archives.gov/government/loy-bio.html.

[206] *See Secretaries of Homeland Security*, DEP'T OF HOMELAND SEC. (last updated Dec. 11, 2019), https://www.dhs.gov/secretaries-homeland-security.; *Kevin McAleenan*, DEP'T OF HOMELAND SEC. (Aug. 1, 2019) https://www.dhs.gov/person/kevin-k-mcaleenan; *Elaine Duke*, DEP'T OF HOMELAND SEC. (Apr. 11, 2017), https://www.dhs.gov/archive/person/elaine-c-duke.

actings appointed under these vacancy statutes.[207] The absence of finality in the statutory processes leaves acting POs open to legal challenge that would not occur in a Senate-confirmed process. In November 2020, a federal district court struck down Wolf's changes to the Deferred Actions on Childhood Arrivals rule because the court found Wolf was not validly acting.[208] If courts can strike down attempted rulemaking by the purported head of an agency, how can the country expect stable national security practices?

Additionally, the flexibility afforded by the FVRA and DHS Act undermines the protections created by the Constitution. Allowing the president full, unchecked power to appoint an individual performing all the duties of a PO role destroys the check that the Senate is supposed to exercise. It leaves the president free to appoint "unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity,"[209] without any mechanism for the Senate to restrain him.

E. Solutions

There are several approaches Congress could take to resolve the issues created by these statutes. The simplest would be to entirely rescind the FVRA and DHS Act as they pertain to acting POs. Congress could maintain the provisions as they pertain to IO roles, but narrowing its application would force compromise between the president and Senate to fill vacancies in PO roles. This would also remedy the constitutional tension that exists between both statutes.

However, some may find it troubling to have no process for temporarily filling vacancies. To maintain at least some semblance of

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[207] *See* GAO B-331650, *supra* note 20, at 2; Batalla Vidal v. Wolf, 16-cv-04756, 2020 at 2 (E.D.N.Y. Nov. 14, 2020) (https://www.justsecurity.org/wp-content/uploads/2020/11/Garaufis.DACA_.decision.pdf).

[208] *See* Batalla Vidal v. Wolf, 16-cv-04756, 2020 at *31 (E.D.N.Y. Nov. 14, 2020) (https://www.justsecurity.org/wp-content/uploads/2020/11/Garaufis.DACA_.decision.pdf).

[209] THE FEDERALIST NO. 76 (Alexander Hamilton).

a temporary process, there are a few possible remedies, but all present varying degrees of constitutional issues.

Congress could maintain the provision of the FVRA that requires the first assistant to the office to assume the role.[210] This might avoid constitutional issues because, if the Senate knew at the time of confirmation that such person would likely assume the role of Secretary at some point, one could regard that person appointed with advice and consent of the Senate. For example, when confirming an individual to the role of deputy secretary of DHS,[211] the Senate would be on notice that he or she may need to fulfill the duties of the Secretary role at some point during her tenure.[212]

This argument begins to collapse, however, if Congress were to maintain the provision allowing the president to choose from any officer appointed and confirmed by the Senate at any agency,[213] because most likely the Senate is not truly contemplating that person's ability to serve in *any* other PO or IO role. For example, consider a fictional officer, Mr. Smith. If the Senate confirmed Mr. Smith as Chief Financial Officer for the Department of Agriculture, they were likely not considering his ability to serve as Secretary (of DHS) in the event the president were to appoint him under the FVRA. It would be an aggrandizement of the text of Article II[214] to conclude that it allows anyone appointed with the Senate's advice and consent to be moved between roles. And if that were permitted, the president would not need to rely on the FVRA or DHS Act at all in doing so, because Article

[210] 5 U.S.C. § 3345(a)(1); 6 U.S.C. § 113(g)(1).
[211] Even though the Deputy Secretary would not be a PO, but rather an IO under *Edmond* and *Morrison*, and thus the Article II mandatory process would not apply for his or her appointment. *See* U.S. CONST. art. II, § 2, cl. 2; Edmond v. United States, 520 U.S. 651, 661 (1997) (citing *Morrison*, 487 U.S. 654, 670 (1988)).
[212] And the Senate likely is on notice under the DHS Act. *See* 6 U.S.C. § 113(g)(1).
[213] 5 U.S.C. § 3345(a)(2).
[214] *See* U.S. CONST. art. II, § 2, cl. 2 (". . . 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 . . .").

II would then explicitly grant him that authority once Mr. Smith was confirmed.[215]

Another option, although not as constitutionally sound, is to limit an acting to serve just one period of 210 days under both Acts. This method would provide more stability for planning purposes and reduce the amount of unilateral control (whether actual or influential) that the FVRA and DHS Act currently afford the president. Returning to the Mr. Smith illustration, if the Acts allowed Mr. Smith to serve in the role for just a single 210-day period, he would have a more finite understanding of the duration of the position, as would those serving under him or working with him in other capacities. It would allow for more stable, accurate, and constructive planning to carry out agency goals by establishing the clear, temporary nature of the position. While this option is still outside the Article II process because it permits someone not Senate confirmed to serve as a PO, it restores some of the stability the FVRA and DHS Act intended to provide, and certainly appears to be more "temporary" and "special" in nature.

It similarly reduces the president's unilateral control over the position under the Acts. If the president chooses to trigger additional periods of 210 days under the FVRA by nominating someone else to the role and then withdrawing the nomination,[216] the acting Secretary is totally reliant on the president's whim to continue in the position. However, without the possibility of additional periods, the position would end naturally after the 210-day period. While one could argue that this would merely encourage the president to continue appointing new individuals to this role, the inherent difficulty in finding acting appointments[217] would encourage the president to nominate someone on a more permanent basis via the Article II process.

Additionally, Congress, along with limiting the number of periods an acting can serve, could shorten the number of days the

[215] *See id.*
[216] 5 U.S.C. § 3345(c)(1).
[217] *See* Zolan Kanno-Youngs and Maggie Haberman, *Trump Running Out of Options for Homeland Security Secretary*, N.Y. TIMES (Oct. 19, 2019), https://www.nytimes.com/2019/10/21/us/politics/trump-homeland-security-secretary.html.

acting can serve as well. This would have a stabilizing effect by limiting duration and reducing the president's unilateral control over the position. A period of forty-five days with no additional tacking of periods would encourage the president to quickly nominate someone to the role pursuant to the Article II process and would limit any undue influence by the president or personal benefits to the president. Additionally, this would conform more closely with the need for a special and temporary acting as described in *Eaton*.[218]

This does not mean there should be no room for flexibility. One can easily imagine a scenario in which the Senate obstinately refuses to confirm any presidential nominee to a role. In this situation, if the acting was restricted from continuing in the role, appointing a new acting Secretary every 45 days would create the instability these solutions seek to avoid. An amended FVRA could prevent this by allowing an additional period as long as the president has nominated someone to the role (similar to how it works now) but the duration of the acting term would not be long enough to deter the president from nominating someone. "[T]he ball would be in the Senate's court—to decide between confirming the president's nominee, rejecting the nomination, or not acting on it (thereby leaving the acting officeholder in place)."[219]

CONCLUSION

The FVRA and DHS Act are unconstitutional as they apply to POs. An officer or employee appointed to an acting PO role under the Acts is a PO because the acting performs all duties of a PO, is supervised by the president alone, and the appointment is neither temporary nor special. POs must be appointed with the advice and consent of the Senate because the Appointments Clause provides the exclusive method for such appointments. The Framers intentionally formulated this exclusive method to ensure separation of powers. Historical practice does not itself outweigh the clear and plain language of the Appointments Clause, and Congress may not waive the Senate's constitutional check. Because the FVRA and DHS Act

[218] United States v. Eaton, 169 U.S. 331, 343 (1898).
[219] Vladeck, *Abusing Authority*, *supra* note 5.

allow the president to make unilateral appointments to acting PO roles without the advice and consent of the Senate, the statute is unconstitutional.

This unconstitutionality creates instability and confusion that the FVRA and DHS Acts were arguably enacted to avoid. It encourages lack of leadership at the very agency charged with protecting our borders at a time of building tension and uncertainty. Under the FVRA the president holds the power to decide how long and under what circumstances that individual will remain in the role. Under the DHS Act, the president can exert influence to ensure a preferred transition of power. Thus, the Acts create instability while eliminating the Senate's constitutional check on the process, leaving them powerless to intercede.