Georgia Law Review

Volume 54 | Number 1 Article 7

2019

Reforming Federal Vacancies

Justin C. Van Orsdol

REFORMING FEDERAL VACANCIES

Justin C. Van Orsdol[*]

The Federal Vacancies Reform Act (FVRA) is a powerful but complicated and overlooked statute. At its best, it is a pragmatic mechanism designed to fill vacancies in executive agencies. But the complicated nature of the FVRA has paved the way for Presidents to manipulate its numerous loopholes in effect bypassing Senate approval when appointing federal officers. These loopholes raise several issues that threaten the existence of the FVRA—including invalidation under the Constitution. Further, regulated entities and citizens should also be concerned about invalid rule promulgation and enforcement actions, increased procurement costs, lack of agency transparency, increased risk of agency capture, and lack of judicial remedies. But invalidation of the FVRA would create chaos and disruption—negating a useful and necessary mechanism—meant to keep administrative agencies running when vacancies occur. Thus, this Note argues that these loopholes should be closed to save the FVRA from invalidation and offers potential legislative solutions to accomplish this task.

[*] J.D. Candidate, 2020, University of Georgia School of Law; M.S.A., 2014 California State University of Bakersfield; B.S., 2009, California State University Bakersfield; A.S., 2007, Antelope Valley College. I would like to thank Professors Kent Barnett, Christian Turner, Stephen Vladeck, and Anne Joseph O'Connell for their help and inspiration of this Note. I would also like to thank Alex Weathersby, Caroline Harvey, Amy Shehan, and the Volume 54 Editorial Board for their insightful edits.

TABLE OF CONTENTS

"Temporary solutions often become permanent problems."[1] — Craig Bruce

I. INTRODUCTION

After 500 days of the Trump Administration, over 200 key executive branch positions requiring presidential nomination and Senate confirmation sit vacant.[2] Which leads one to wonder, who is running the show at the approximately 115 administrative agencies?[3] The answer: "acting officers."[4] Acting officers can fill these vacancies on a "temporary" basis because of an obscure statute,[5] known as the Federal Vacancies Reform Act of 1998 (FVRA or the Act).[6]

According to Professor Anne Joseph O'Connell, the leading authority on the FVRA, the Act serves three primary functions.[7] First, it "identif[ies] a set of positions that can be filled

---

[1] Phil Simon, *ERP: It All Starts with an "E,"* PHIL SIMON (June 11, 2013), https://www.philsimon.com/blog/consulting/erp-it-all-starts-with-the-e/.

[2] *See* John W. Schoen, *After 500 Days, Hundreds of White House Jobs Remain Unfilled by Trump Administration*, CNBC NEWS (June 4, 2018, 5:17 PM), https://www.cnbc.com/2018/06/04/after-500-days-dozens-of-white-house-jobs-remain-unfilled.html ("[T]he White House ha[s] yet to put forward the names of candidates for 204 of the 665 key positions that require Senate confirmation . . . .").

[3] The number of administrative agencies is unknown, but the Administrative Conference of the United States estimates there are 115 agencies. *See* DAVID E. LEWIS & JENNIFER L. SELIN, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 14–15 (1st ed. 2012), https://www.acus.gov/sites/default/files/documents/Sourcebook%202012%20FINAL_May%202013.pdf ("[T]here is no authoritative list of government agencies . . . . For example, FOIA.gov lists 78[,] . . . [t]he *United States Government Manual* lists 96[, and] . . . USA.gov . . . lists 137 . . . .").

[4] *See* Lisa Desjardins, *Hundreds of Top Government Jobs Under Trump Are Unfilled. So Who's Running Things?*, PBS NEWS HOUR (Jan. 29, 2018, 6:20 PM), https://www.pbs.org/newshour/show/hundreds-of-top-government-jobs-under-trump-are-unfilled-so-whos-running-things (reporting that temporary acting replacements fill federal vacancies during presidential transitions).

[5] *Id.*; *see also* VALERIE C. BRANNON, CONG. RESEARCH SERV., R44997, THE VACANCIES ACT: A LEGAL OVERVIEW 1 (2018) (citing Doolin Sec. Sav. Bank v. Office of Thrift Supervision, 139 F.3d 203, 209–10 (D.C. Cir. 1998)) ("In the case of . . . a vacancy, Congress has long provided that individuals who were not appointed to that office may *temporarily* perform the functions of that office.").

[6] *See generally* 5 U.S.C. §§ 3345–49c (2012) (outlining relevant United States Code language for the FVRA).

[7] *See* 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 (noting that Professor O'Connell is an expert on the FVRA and that "the [FVRA] basically does three things").

temporarily."[8] Second, it identifies who can fill these vacancies.[9] And third, it sets the time limitation on how long acting officers can serve.[10]

The FVRA, however, has numerous loopholes that allow Presidents to manipulate the filling of vacant positions.[11] For example, under certain conditions, an acting officer can serve for much of a President's term.[12] And acting officers who serve past the statutory time limitation face minimal consequences.[13] Which leads to the question, are these individuals truly "acting" officers?

Both Democratic and Republican Presidents either have violated or have been accused of violating the FVRA.[14] For instance, take the concerns over President Clinton's appointment of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights,[15] President Obama's appointment of Vanita Gupta to the same office,[16] Beth

---

[8] *Id.*

[9] *See id.* ("The second thing the [FVRA] does is say who can fill those positions.").

[10] *See id.* ("The last category of the [FVRA] is how long these acting officers can serve.").

[11] *See, e.g.*, Brief for Morton Rosenburg as Amicus Curiae Supporting Respondent at 18, 34, NLRB v. SW General, Inc., 137 S. Ct. 267 (mem) (2016) (No. 15-1251) (noting that "Congress has strictly limited the President's use of temporary [President and Senate confirmed] officials" and that "[t]he manipulation of official appointments ha[s] long been one of the . . . greatest grievances against executive power").

[12] *See* 5 U.S.C. § 3346(b) (2012) (explaining that while a nomination is pending an acting officer may continue to serve until that nomination is rejected, withdrawn, or returned and then 210 days thereafter); *see also* BRANNON, *supra* note 5, at 12 ("Section 3346 allows an acting officer to serve while a nomination to that position 'is pending in the Senate,' regardless of how long that nomination is pending." (citing 5 U.S.C. § 3346(a)(2))).

[13] *See* Matthew Kahn, *Acting Accordingly: Acting Officers and the Federal Vacancies Reform Act*, LAWFARE BLOG (Nov. 27, 2017, 7:00 AM), https://www.lawfareblog.com/acting-accordingly-acting-officers-and-federal-vacancies-reform-act ("The FVRA does not provide a mechanism for removing officers who continue to act beyond their statutorily authorized period" and while these actions may be void ab initio, parties need "standing to challenge an action taken by a non-compliant officer.").

[14] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act (last visited Oct. 13, 2019) (listing FVRA violation letters dating back to Sept. 15, 2000).

[15] *See* Steven J. Duffield & James C. Ho, *The Illegal Appointment of Bill Lann Lee*, 2 TEX. REV. L. & POL. 335, 338 (1998) ("[T]he appointment of Bill Lann Lee was illegal. It violates the Vacancies Act . . . ."); *see also* Ilya Shapiro & Thomas Berry, *A New Way that Obama's Justice Department Breaks the Law*, NAT'L. REV. (Dec. 19, 2016, 9:00 AM), https://www.nationalreview.com/2016/12/justice-department-civil-rights-division-vanita-gupta-illegally-appointed-federal-vacancies-reform-act/ ("Eighteen years ago, without the Senate's consent, Bill Clinton illegally appointed Bill Lann Lee to head the Justice Department's Civil Rights Division.").

[16] *See* Thomas Berry, *The Illegal Tenure of Civil Rights Head Vanita Gupta* (Jan. 19, 2017), https://www.object.cato.org/sites/cato.org/files/pubs/pdf/legal_policy_bulletin_1.pdf ("In April 2015 Vanita Gupta's tenure as the acting assistant attorney general (AAG) for the

Cobert as Acting Office of Personnel Management (OPM) Director,[17] and Lafe Solomon as Acting General Counsel to the National Labor Relations Board (NLRB).[18] More recently, a growing number of accusations and lawsuits allege that the Trump Administration violated the FVRA by appointing Mick Mulvaney as Consumer Financial Protection Bureau (CFPB) Acting Director,[19] Robert Wilkie as Department of Veterans Affairs (VA) Acting Secretary,[20] and Brian Steed as Bureau of Land Management (BLM) Acting Director.[21] Perhaps the recent Attorney General vacancy has finally brought the FVRA at least close to public consciousness.[22] Whatever

---

civil rights division expired."); Shapiro & Berry, *supra* note 15 ("Vanita Gupta, the division's deputy head, has continued serving as acting chief, although, according to the law, her time was up.").

[17] *See* Charles S. Clark, *Cobert Ineligible to be Acting OPM Director, IG Says*, GOV'T EXEC. (Feb. 17, 2016), https://www.govexec.com/management/2016/02/cobert-ineligible-be-acting-opm-director-ig-says/125994/ (reporting that Beth Cobert was deemed ineligible per the OPM inspector general).

[18] *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 937 (2017) (holding that Solomon was ineligible to serve as Acting General Counsel once he was nominated); Mark Theodore & Joshua Fox, *Supreme Court Holds that Lafe Solomon Improperly Served as NLRB General Counsel*, PROSKAUER: LAB. REL. UPDATE (Mar. 21, 2017), https://www.laborrelationsupdate.com/nlrb/supreme-court-holds-that-lafe-solomon-improperly-served-as-nlrb-general-counsel/ (stating that the U.S. Supreme Court held that the "FVRA clearly prevents [Solomon] who has been nominated to fill a vacant office requiring [p]residential appointment and Senate confirmation . . . from performing the duties of that office in an acting capacity").

[19] *See* Alan S. Kaplinsky, *How Long Can Mick Mulvaney Serve as CFPB Acting Director?*, BALLARD SPAHR: CONSUMER FIN. MONITOR (Feb. 27, 2018), https://www.consumerfinancemonitor.com/2018/02/27/how-long-can-mick-mulvaney-serve-as-cfpb-acting-director/ (noting that Leandra English filed a lawsuit challenging Mick Mulvaney's appointment under 5 U.S.C. § 3345(a)(2)).

[20] *See* Nicole Ogrysko, *Facing a Lawsuit, VA Now a New Victim of Vacancy Act's Ambiguous Language*, FED. NEWS NETWORK (May 1, 2018, 12:46 PM), https://federalnewsnetwork.com/veterans-affairs/2018/05/facing-a-lawsuit-va-now-a-new-victim-of-vacancy-acts-ambiguous-language/amp/ (explaining that a non-profit organization is suing the VA and new Acting Secretary Robert Wilkie for alleged FVRA violations).

[21] *See* Scott Streater, *Wanted, Once Again: BLM Deputy Director*, E&E NEWS (Aug. 14, 2018), https://www.eenews.net/stories/1060094077 ("Interior Secretary Ryan Zinke last year appointed Brian Steed as acting BLM director but revised that title after complaints that his appointment violated the [FVRA] . . . .").

[22] *See* Darren Samuelsohn & Caitlin Oprysko, *Sessions Ousted*, POLITICO (Nov. 17, 2018), https://www.politico.com/story/2018/11/07/jeff-sessions-out-as-attorney-general-972776 (reporting that President Trump's temporary appointment of Matthew Whitaker utilizing the FVRA could be subject to legal challenges). In fact, a lawsuit was filed challenging Whitaker's appointment on November 19, 2018. *See* Anushka Limaye, *Document: Three Senators Challenge Whitaker Appointment in D.C. Federal District Court*, LAWFARE (Nov. 19, 2018), https://www.lawfareblog.com/document-three-senators-challenge-whitaker-appointment-dc-federal-district-court.

the cause of increased attention, the time is ripe to examine this statute further.

Though myriad FVRA loopholes merit discussion,[23] this Note focuses on three of the most significant loopholes due to space constraints: (1) self-created vacancies through terminations and forced resignations; (2) subdelegation of "functions or duties"; and (3) lack of meaningful enforcement provisions.

On the one hand, these loopholes raise several issues that threaten the existence of the FVRA, including invalidation under the U.S. Constitution, as Justice Thomas opined in his concurrence in *NLRB v. SW General, Inc*.[24] Specifically, the FVRA raises separation-of-powers and Appointments Clause concerns.[25] Moreover, regulated entities and citizens should be concerned about

---

[23] *See* Brief for the Defendants-Appellees at 13–17, English v. Trump, No. 18-5007, 2018 WL 1043610 (D.C. Cir. Feb. 23, 2018), ECF No. 1719366 (arguing that the FVRA is the non-exclusive appointment mechanism when an agency statute exists); Thomas A. Berry, S.W. General: *The Court Reins in Unilateral Appointments*, 2017 CATO SUP. CT. REV. 151, 170 (2017) (hypothesizing a situation in which a President could nominate someone who does not meet the eligibility criteria in 5 U.S.C. § 3345(a)(2)–(3) by first nominating them to the position of first assistant and then "immediately elevat[ing them to] . . . the acting officer under subsection (a)(1)"); Christopher Fonzone & Joshua Geltzer, *Can Trump Refuse to Fill Key Jobs?*, HILL (July 31, 2017, 12:00 PM), https://thehill.com/blogs/pundits-blog/the-administration/344606-can-President-trump-refuse-to-fill-key-jobs (discussing whether the President has to fill vacancies). Another possible loophole would allow the President to use military officers to fill acting positions despite statutes that prohibit such appointments because there are no consequences. *See* Joseph F. Barbano, *Dual Office-Holding—Federal, State and Municipal*, 10 ST. JOHN'S L. REV. 83, 87 (2014) (discussing statutory bans on dual office holding); Stephen I. Vladeck, *The White House Doctor and the Dual-Officeholding Ban*, ATLANTIC (Mar. 29, 2018), https://www.theatlantic.com/politics/archive/2018/03/jackson-dual-officeholding-ban/556781/ ("If there really is no remedy for violations of the ban, it is hard to see how the statute could . . . stop someone . . . from filling . . . civilian positions throughout the executive branch with active-duty military officers."). There is also the longstanding practice of appointing "advisors" or "czars" who are technically not officers but often are top picks for officer positions and may exercise significant administrative power. *See* Hannah Northey, *No Senate Confirmation? No Problem*, E&E NEWS (Oct. 19, 2017), https://www.eenews.net/stories/1060064115 (noting that the practice of utilizing advisors is not new, but that advisors are "an arm's length from the program and policy they could one day shape").

[24] 137 S. Ct. 929, 945 (2017) (Thomas, J., concurring) (explaining that the FVRA violates the Appointments Clause).

[25] *See id.* at 948–49 ("We cannot cast aside the separation of powers . . . . [T]hat the Senate voluntarily relinquished its advice-and-consent power in the FVRA does not make this end-run around the Appointments Clause constitutional."); *see also* Joshua L. Stayn, Note, *Vacant Reform: Why the Federal Vacancies Reform Act of 1998 Is Unconstitutional*, 50 DUKE L.J. 1511, 1513 (2001) ("The Act violates Article II by allowing the Senate unilaterally to nominate and confirm or reject individuals whom the President has not actually nominated . . . .").

invalid rule promulgation and enforcement actions,[26] increased procurement costs,[27] lack of agency transparency,[28] increased risk of agency capture,[29] and lack of judicial remedies.[30] On the other hand, invalidation of the FVRA would create chaos and disruption, negating a useful and necessary mechanism meant to keep administrative agencies running when vacancies occur.

To balance these concerns, this Note argues that these loopholes should be closed in order to save the FVRA. First, this Note contends that self-created vacancies via termination violate the Appointments Clause and that, for clarity, the FVRA should be amended to explicitly prohibit this practice. Second, this Note advocates for greater restrictions on subdelegation of duties to increase transparency in administrative agencies, fend off agency capture, and place pressure on the President and Senate to appoint permanent officers more quickly. Last, this Note argues that the FVRA needs meaningful enforcement provisions to give teeth to the FVRA by broadening standing and adding removal provisions to deter future violations.

This Note proceeds as follows. Section II.A discusses the purpose and history of the FVRA. Section II.B outlines the Act's scope by examining the application of relevant provisions. Section III.A

---

[26] *See* Marquez Bros. Enters. v. NLRB, 650 F. App'x 25, 27 (D.C. Cir. 2016) (per curiam) (denying petitioner's claim of an allegedly invalid enforcement action because of failure to exhaust an FVRA claim during the administrative proceedings).

[27] *See* Chase Gunter, *Does the Vacancies Act Really Matter?*, FCW (Apr. 2, 2018), https://fcw.com/articles/2018/04/02/vacancies-act-matter.aspx ("In the event an acting official signed off on a contracting decision . . . a rival could cite a Vacancies Act violation as grounds for protest.").

[28] *See* Kirby, *supra* note 7 (noting Professor O'Connell believes subdelegation "to be less transparent" because unlike most officials who are listed on agency websites "certain tasks that [have been] delegated . . . [are] hard to find").

[29] *See* Dahlia Lithwick & Mark Joseph Stern, *A Legal Fight Donald Trump Should Win*, SLATE (Nov. 27, 2017, 5:11 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/11/trump_should_win_the_battle_over_the_consumer_financial_protection_bureau.html (noting that by appointing Mick Mulvaney as Acting Director of the CFPB he will "dismantle consumer protections, and . . . claim[] . . . big businesses need more protection"). This, coupled with the accusation that Mulvaney "tak[es] meetings with . . . companies who financed his past political campaigns," presents an opportunity for agency capture. *See* Lachlan Markay & Sam Stein, *Mick Mulvaney Met with Lobbyist Donors While at Trump White House*, DAILY BEAST (Apr. 27, 2018, 12:51 PM), https://www.thedailybeast.com/mick-mulvaney-met-with-lobbyist-donors-while-at-trump-white-house.

[30] *See* Gunter, *supra* note 27 ("Under the [FVRA], decisions made by an acting agency head found to be serving in violation of the act could be potentially be voided . . . [but] the [FVRA's] language is vague and its precedent is limited.").

examines the three selected loopholes and analyzes their possible ramifications if left uncorrected. Section III.B proposes solutions and addresses potential questions that could be raised as a result. Part IV concludes that without action the FVRA may be doomed, converting a temporary solution into a permanent problem.

II. FEDERAL VACANCIES REFORM ACT OF 1998 BACKGROUND

The FVRA is a complicated and ambiguous statute that affects multiple federal agencies. This Part first outlines the purpose and history of the FVRA and its predecessor. It then turns to the scope of the FVRA by explaining how its various provisions operate.

A. PURPOSE AND HISTORY OF THE FVRA

The Appointments Clause of the U.S. Constitution requires that principal officers be appointed through nomination by the President with the advice and consent of the Senate.[31] These positions are colloquially referred to as President and Senate confirmed (PAS) positions.[32] Inevitably, vacancies in PAS positions occur, so Congress enacted the FVRA as a mechanism to appoint acting officers to temporarily perform PAS functions and duties.[33]

Under the original Vacancies Act, enacted in 1868, temporary appointments were limited to 10 days, but this was later amended in 1988 to 120 days.[34] It also provided for automatic succession by the "first assistant" to the officer.[35] The Act went relatively

---

[31] *See* U.S. CONST. art. II, § 2, cl. 2 ("[A]nd he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States . . . .").

[32] *See* Steven M. Swirsky & Laura C. Monaco, *Supreme Court Rules That Former NLRB Acting General Counsel Served in Violation of Federal Law*, EPSTEIN BECKER GREEN (Mar. 22, 2017), https://www.managementmemo.com/2017/03/22/supreme-court-rules-that-former-nlrb-acting-general-counsel-served-in-violation-of-federal-law/ ("[I]ndividual[s] nominated by the President and confirmed by the Senate [are referred to as] so-called 'PAS' positions." (internal parenthesis omitted)).

[33] *See* Steve Vladeck, *The Federal Vacancies Reform Act and the VA: A Study in Uncertainty and Incompetence*, LAWFARE (May 23, 2018, 11:25 AM), https://www.lawfareblog.com/federal-vacancies-reform-act-and-va-study-uncertainty-and-incompetence (explaining the purpose of the FVRA).

[34] *See* Act of July 23, 1868, ch. 227, 15 Stat. 168, 168 (amended 1891) ("[N]othing in this act shall authorize the supplying as aforesaid a vacancy for a longer period than ten days . . . ."); Pub. L. No. 100-398, 102 Stat. 985, 988 (codified at 5 U.S.C. § 3348) ("A vacancy caused by death or resignation may be filled temporarily . . . for not more than 120 days . . . .").

[35] *See* Duffield & Ho, *supra* note 15, at 348 (citing 5 U.S.C. § 3346 (1994)) (explaining that an officer is automatically succeeded by their first assistant).

unnoticed until President Clinton appointed Bill Lann Lee to Acting Assistant Attorney General for Civil Rights in 1997.[36] Republicans and scholars believed that because Lee served past the statutory deadline his appointment was illegal, but nothing in the original Vacancies Act voided his actions.[37] In response, Congress enacted the FVRA in an effort to "bring[] to an end a quarter century of obfuscation, bureaucratic intransigence, and outright circumvention."[38]

As lofty as the FVRA drafters' goals were, the resulting statute is nothing more than a paper tiger.[39] The FVRA was a step in the right direction, but at its core the changes appear to be superficial—with two notable exceptions. First, the FVRA added a third category of eligible individuals who may serve as acting officers: senior federal employees.[40] Second, the FVRA depersonalized the term "first assistant," broadening the pool of eligible individuals by tying the position to an office, rather than to an officer.[41] This allows the President to fill vacancies more easily because an office has a permanent existence, whereas an officer may come and go—thereby preventing an appointment due to their departure.

B. SCOPE AND APPLICATION OF THE FVRA

The FVRA retains the 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

---

[36] *See* Kirby, *supra* note 7 (noting that Bill Lann Lee served past the statutory deadline, prompting the FVRA as a "compromise to allow the executive branch to staff these important jobs, but put a limit on it to protect the Senate's prerogative of confirmation in these positions"); Linda Vester & Joe Johns, *President Clinton Appoints Bill Lann Lee to the Justice Department*, NBC LEARN (Dec. 16, 1997), https://archives.nbclearn.com/portal/site/k-12/flatview?cuecard=2448 (reporting that the appointment of Bill Lann Lee "caus[ed] an outcry from Republicans because, as an acting chief, Lee d[id] not need Senate confirmation").

[37] *See* Duffield & Ho, *supra* note 15, at 362 ("Not only has Lee overstayed his welcome, he never should have been invited to enter office in the first place."); Kirby, *supra* note 7 (noting that "there was nothing that voided his action").

[38] 144 CONG. REC. S12810, S12824 (daily ed. Oct. 21, 1998) (statement of Sen. Thompson).

[39] *See infra* Section III.A.

[40] *See* 5 U.S.C. § 3345(a)(3)(A)–(B) (2012) ("[T]he President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily . . . .").

[41] 144 CONG. REC. S12810, S12824 (daily ed. Oct. 21, 1998) (statement of Sen. Thompson) ("The term 'first assistant to the office' is incorporated into 5 U.S.C. Sec. 3345(a)(1), rather than 'first assistant to the officer.' This change is made to 'depersonalize' the first assistant.").

acting appointments.[42] Section 3345(a) limits the scope of the FVRA to filling PAS positions within Executive agencies, except for those within the Government Accountability Office.[43] Additionally, it establishes the applicable conditions under which a vacancy can be filled temporarily to when a PAS officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office."[44] Further, § 3349c limits the reach of the FVRA by exempting "(1) member[s] of a multi-member board that 'governs an independent establishment or Government corporation'; (2) a 'commissioner of the Federal Energy Regulatory Commission'; (3) a 'member of the Surface Transportation Board'; or (4) a federal judge serving in 'a court constituted under article I of the United States Constitution.'"[45]

The FVRA defines three categories of individuals that can serve as acting officers.[46] The default replacement for a vacant PAS position is the "first assistant" to the office.[47] Despite some confusion as to who qualifies as a first assistant, generally a statute or regulation will define the position.[48] Alternatively, the President may direct any previously Senate-confirmed individual to fill a vacant position.[49] Last, the President may temporarily appoint any grade GS-15 or above employee who worked for the agency for at least ninety days prior to the vacancy,[50] otherwise known as a "senior careerist."[51]

The FVRA also places time restrictions on the tenure of acting officers.[52] Generally, acting officers may serve for a 210-day period

---

[42] *See supra* notes 8–10 and accompanying text (discussing the primary functions of the FVRA).

[43] *See* 5 U.S.C. § 3345(a) (2012) ("If an officer of an Executive agency . . . other than the Government Accountability Office . . . .").

[44] *Id.*

[45] BRANNON, *supra* note 5, at 5 (quoting 5 U.S.C. § 3349c).

[46] 5 U.S.C. § 3345 (2012).

[47] *Id.* § 3345(a)(1); *see* BRANNON, *supra* note 5, at Summary ("As a default rule, the first assistant to a position automatically becomes the acting officer.").

[48] *See* BRANNON, *supra* note 5, at 9 ("The term 'first assistant' . . . is not defined by the [FVRA] and its meaning is not entirely clear. For many offices, a statute or regulation explicitly designates an office to be the 'first assistant' . . . .").

[49] 5 U.S.C. § 3345(a)(2) (2012).

[50] *Id.* § 3345(a)(3)(A)–(B).

[51] *See* Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 950 (2009) (discussing senior careerists).

[52] 5 U.S.C. § 3346 (2012).

beginning on the date the vacancy occurs.[53] If another individual is nominated to fill the position permanently, the acting officer may continue to serve past the 210-day tolling period.[54] If the nominee is rejected, withdraws, or is otherwise returned, another 210-day clock begins.[55] This process can occur twice before another acting officer needs to be appointed.[56] During a presidential transition, the time limitation is extended to 300 days.[57] Individuals, however, cannot simultaneously be nominated and serve as an acting officer, but a carve out exists for first assistants who served at least ninety days prior to the vacancy.[58] Theoretically then, a first assistant who satisfies this condition could serve for an entire presidential term if a nomination remained pending.

The FVRA only applies to nondelegable "functions or duties" that a statute or regulation has exclusively assigned.[59] But as O'Connell notes, "most of the functions and duties are tasks that can be assigned to someone else."[60] In circumstances where the statutory time limit has expired, duties can also be assumed by higher officials.[61] When an acting officer takes an action outside of the statutory time limit, the FVRA provides some protection for regulated entities—at least textually—by rendering any noncompliant act as "hav[ing] no force or effect."[62] Further,

---

[53] *See id.* § 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 . . . .").

[54] *Id.* § 3346(a)(2).

[55] *See 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 . . . .").

[56] *See id.* § 3346(b)(2)(A) ("[T]he person serving as the acting officer may continue to serve until the second nomination is confirmed . . . .").

[57] *Id.* § 3349a(b)(1)–(2).

[58] *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 90-day requirement to simultaneously serve as Acting Administrator and as a nominee).

[59] *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 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 . . . .").

[60] Kirby, *supra* note 7.

[61] *See id.* ("[F]or the functions and duties you can't delegate down, you *can* delegate up.").

[62] 5 U.S.C. § 3348(d)(1) (2012).

noncompliant actions cannot be ratified.[63] But while this sounds good on paper, as I explain in Part III, these provisions provide little to no protection in a practical sense.[64]

III. ANALYZING FVRA LOOPHOLES AND RECOMMENDED CHANGES

The FVRA is an important mechanism for filling vacant PAS positions, but as discussed in Part I, many Presidents are either confused by the Act,[65] or plainly disregard it.[66] This Part examines three loopholes that both previous and the current administration have exploited. It then provides recommendations to close these loopholes and highlights questions that may be raised as a result of their implementation.

A. SUMMARY OF LOOPHOLES AND POTENTIAL RAMIFICATIONS

Three major loopholes exist within the construct of the FVRA: (1) self-created vacancies through terminations and forced resignation; (2) subdelegations and the definition of "functions or duties"; and (3) lack of meaningful enforcement provisions. Each loophole presents its own challenges, either constitutionally or pragmatically.

1. Creating Vacancies Through Terminations and Forced Resignations.

The text of the FVRA is unclear as to whether a self-created vacancy, either by termination or forced resignation, is eligible to be filled by an acting officer.[67] If the Act allows this, it creates a

---

[63] *Id.* § 3348(d)(2).

[64] *See infra* Section III.A.3.

[65] *See* Meredith Somers, *Confusion over OPM IG Memo Symptom of Larger Political Appointee Bottleneck*, FED. NEWS RADIO (Feb. 24, 2016, 5:35 AM), https://federalnewsradio.com/opm/2016/02/confusion-over-opm-ig-memo-symptom-of-larger-political-appointee-bottleneck/ (noting a dispute over the proper interpretation of the FVRA as it pertained to Beth Cobert).

[66] *See* Steven Aftergood, *Some "Acting" Officials Will Soon Lose Authority*, FED'N OF AM. SCIENTISTS (Nov. 6, 2017), https://fas.org/blogs/secrecy/2017/11/vacancies-act/ (noting that "acting officials will no longer be able to carry out their duties" and "President Trump does not appear to be concerned about the matter" because, according to Trump, "most of the government positions awaiting confirmed nominees [are] superfluous").

[67] *See* Susan B. Cassidy et al., *If Shulkin Didn't Resign, Who Runs the VA Until a New Secretary Is Confirmed? A Vacancies Act Puzzle*, INSIDE GOV'T CONTRACTS (Apr. 3, 2018), https://www.insidegovernmentcontracts.com/2018/04/if-shulkin-didnt-resign-who-runs-the-va-until-a-new-secretary-is-confirmed-a-vacancies-act-puzzle/ (discussing how the "express language of the Vacancies Act . . . does not permit the President to appoint an acting

constitutional problem, potentially violating the Appointments Clause and separation of powers. If the FVRA precludes this, however, then the decisions of acting officers are likely void.

The FVRA drafters likely intended it to allow the filling of self-created vacancies. During a floor debate, both Senators Thomas and Byrd stated that vacancies created by terminations were an example of § 3345(a)'s "otherwise unable to perform the functions and duties of [such] office" language.[68] In fact, this language was specifically chosen "[t]o make the law cover all situations" because, under *Doolin Security Savings Bank v. Office of Thrift Supervision*,[69] the original Vacancies Act's language did not apply to officers who were fired.[70] But even the Trump Administration appears to be "a bit gun-shy about relying" on a floor debate for authority to create a vacancy by firing.[71] Case in point, when President Trump appointed Robert Wilkes to be the Acting VA Secretary, "the White House began arguing . . . that [the former VA secretary] had not been fired, but that instead, he resigned."[72]

Justice Thomas recently illuminated the constitutional concerns in *SW General*.[73] In his concurrence, he stated that the FVRA violates the Appointments Clause because it "authorizes the President to appoint both inferior and principal officers without first obtaining the advice and consent of the Senate."[74] To be sure,

---

replacement . . . created by a [p]residential firing" but "informal DOJ guidance . . . leaves open the possibility").

[68] *See* GUIDANCE ON APPLICATION OF FEDERAL VACANCIES REFORM ACT OF 1998, at 61 (1999), https://www.justice.gov/olc/opinion/guidance-application-federal-vacancies-reform-act-1998 [hereinafter DOJ GUIDANCE ON FVRA] (noting that during a floor debate Senators Thomas and Byrd stated that firing was an example of not being able to perform one's duties under 5 U.S.C. § 3345(a)).

[69] *See* 139 F.3d 203, 207 (D.C. Cir. 1998) ("[I]t becomes clear that the [original Vacancies Act] contemplates *only* the death, resignation, illness or absence of someone appointed to the position by the President." (emphasis added)), *superseded by statute*, Federal Vacancies Reform Act of 1998, Pub. L. No. 105–277.

[70] 144 CONG. REC. S12810, S12823 (daily ed. Oct. 21, 1998) (statement of Sen. Thompson).

[71] *See* Vladeck, *supra* note 33 (noting that the "White House is at least outwardly wary of the open question concerning [the FVRA's] application in cases in which the vacancy is created by firing" and that "[i]t might therefore be a bit gun-shy about relying on the FVRA"). *But cf. Resigned or Fired? Why the Controversy over Shulkin's Departure Could Raise Big Legal Questions*, ADVISORY BD. (Apr. 3, 2018, 9:30 AM), https://www.advisory.com/daily-briefing/2018/04/03/shulkin ("O'Connell said she believes [the] FVRA does apply in instances in which a cabinet secretary is fired, and there would be a number of hurdles to filing a lawsuit . . . including differentiating between a forced resignation and firing.").

[72] Vladeck, *supra* note 33.

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

[74] *Id.* at 946 (Thomas, J., concurring).

Justice Thomas's concerns were limited to aggrandizing the President's power in appointing principal officers, not inferior officers.[75] When I pressed Justice Thomas on my recommendation of transforming "actings" into true inferior officers, as I discuss in Section III.B, he was not receptive.[76] Citing his concurrence in *SW General*, he explained "[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."[77] Other scholars agree with Justice Thomas's underlying premise but also posit that the FVRA is unconstitutional because it "interfer[es] with the President's exercise of his exclusive constitutional power . . . by facilitating congressional encroachment on the President's long recognized prerogative to nominate and control subordinate executive officers."[78] These scholars argue that the FVRA "effectively empowers the Senate unilaterally" to "designate whom the President selects to fill a particular office."[79]

If the FVRA disallows self-created vacancies, it exchanges the constitutional problem for a practical one. Any actions taken by acting officers who have filled the position of a terminated PAS officer would be void ab initio.[80] The effect of this interpretation is profound because it would invalidate any promulgated rules, enforcement actions, or other decisions—creating a deluge of potential litigation. And in some contexts, this would directly affect taxpayers. For example, this could become problematic in federal procurement, as many high-dollar value contracts require approval from senior officials.[81] A noncompliant acting officer's approval of a

---

[75] *See id.* ("Appointing inferior officers in this manner raises no constitutional problems . . . . [But a]ppointing 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."). The existence of a constitutional problem with principal, but not inferior officers, appears to be due to the Exceptions Clause. *See infra* note 128.

[76] Interview with Clarence Thomas, Supreme Court Justice, in Athens, Ga. (Oct. 16, 2018).

[77] *SW General*, 137 S. Ct. at 948 (Thomas, J., concurring) (citing Bowsher v. Synar, 478 U.S. 714, 736 (1986)).

[78] Stayn, *supra* note 25, at 1513.

[79] *Id.* at 1527.

[80] *See* 5 U.S.C. § 3348(d)(1) (2012) ("An action taken by any person who is [noncompliant] . . . shall have no force or effect."); *see also* BRANNON, *supra* note 5, at 3 ("The Supreme Court has suggested that the [FVRA] renders any noncompliant actions 'void *ab initio* . . . .'").

[81] *See, e.g.*, AFFARS 5301.9001(f)(1)(i), http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/af_afmc/affars/5301.htm (noting that the

contract award could spark a bid protest,[82] costing not only time (while the current contract is stayed)[83] but also significant resources both in litigation (or settlement) costs and in any re-procurement effort.[84] And taxpayer dollars would fund both the procurement and resulting litigation.[85]

2. Subdelegation and the Definition of Functions or Duties.

The second major loophole involves subdelegation. The FVRA allows acting officers to temporarily perform the functions and duties of PAS officers.[86] But the FVRA does not clearly define functions or duties; rather it leaves the heavy lifting to other statutes and regulations.[87] Here is the rub: "[m]ost, and in many cases all, [of] the responsibilities performed by a PAS officer will not be exclusive, and the [FVRA] permits non-exclusive responsibilities to be delegated to other appropriate officers and employees in the agency."[88] At first, this may not seem problematic, but, as O'Connell explains, this is actually a "big loophole"[89] even if the FVRA does not consider it to be one because the President can essentially play

---

Deputy Assistant Secretary for Contracting approves "noncompetitive contract actions $500M or more and competitive contract actions valued at $1B or more").

[82] *See* Gunter, *supra* note 27 ("[If] an acting official signed off on a contracting decision . . . a rival could cite a . . . [FVRA] violation as grounds for protest.").

[83] *See* Daniel Chudd & James Tucker, *Stays of Contract Award and Performance (Post-Award Protest Primer #6)*, GOV'T CONT. INSIGHTS (Aug. 16, 2017) (citing FAR 33.103(f)(1); FAR 33.104(b)(1)), http://govcon.mofo.com/post-award-protest-primer-series/stays-of-contract-award-and-performance-pre-award-protest-primer-6/ ("When a [bid] protest is filed . . . *before* contract award . . . the stay prevents the contract *award* . . . [and] [f]or protests filed . . . *after* contract award there is a stay of contract *performance* . . . .").

[84] *See* DAVID H. CARPENTER & MOSHE SCHWARTZ, CONG. RESEARCH SERV., R45080, GOVERNMENT CONTRACT BID PROTESTS: ANALYSIS OF LEGAL PROCESSES AND RECENT DEVELOPMENTS 7 (2018) (citing 31 U.S.C. § 3554(c)) ("If GAO concludes that an agency failed to comply with . . . [a] regulation . . . the agency [may have to] pay the challenging party's attorneys' fees and certain other costs associated with filing the protest.").

[85] *See* William D. Hartung, *Here's Where Your Tax Dollars for 'Defense' Are Really Going*, NATION (Oct. 10, 2017), https://www.thenation.com/article/heres-where-your-tax-dollars-for-defense-are-really-going/ (discussing that in 2016 five defense firms alone "gobbled up nearly $100 billion of your tax dollars").

[86] 5 U.S.C. §§ 3345(a), 3348(a) (2012).

[87] *See id.* § 3348(a)(1)–(2) ("[T]he term 'action' includes any agency action as defined under section 551(13); and 'function or duty' means any function or duty of the applicable office that is established by statute; . . . or is established by regulation."). The Administrative Procedure Act defines action as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13).

[88] DOJ GUIDANCE ON FVRA, *supra* note 68, at 72.

[89] *See* Kirby, *supra* note 7 ("Now, I should say there is a big loophole—I call it a loophole; the Vacancies Act does not call it a loophole.").

a shell game, merely "reshuffl[ing] responsibilities and . . . leaving those positions vacant."[90]

This shell game comes at a cost and presents four problems: (1) lack of transparency, (2) lack of political accountability, (3) increased risk of agency capture, and (4) prolonged vacant offices. As duties are delegated to lower level employees, agency transparency becomes clouded as it becomes difficult to determine who is performing which duties, even in the rare case that the delegation is published.[91] This leads to the second issue—lack of political accountability. Without transparency, "political officials, lobbyists, and interest groups" cannot adequately monitor or "become aware of the real power brokers within an agency and invest their resources accordingly."[92]

Moreover, subdelegation exposes agencies to an increased risk of capture. Under the normative agency capture definition, "agencies consistently adopt regulatory policies favored by regulated entities."[93] As duties are delegated, it becomes easier for an administration to dissolve positions entirely and subcontract those duties to private companies.[94] And, given President Trump's newest Executive Order, it will be even easier to remove federal agency employees.[95] This is the ultimate form of agency capture because it gives regulated entities the ability to transcend agency capture in the normative sense. But by subdelegating, dissolving positions,

---

[90] *Id.*

[91] *See supra* text accompanying note 28.

[92] Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 502 (2017).

[93] Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1, 64 (2015) (quoting Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221, 224 (2012)).

[94] *See* Paul R. Verkuil, *Outsourcing and the Duty to Govern* (quoting David M. Walker, *The Future of Competitive Sourcing*, 33 PUB. CONT. L.J. 299, 304 (2004)) (describing how the GAO has increasingly delegated oversight power to private contractors even though "[w]ar fighting, judicial, enforcement, regulatory, and *policy-making* functions should never be privatized"), *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 313 (Jody Freeman & Martha Minnow eds., Harvard Univ. Press 2009). *But cf.* Barnett, *supra* note 93, at 64 (arguing that "[h]aving various actors involved in administering a statute is one way of seeking to insulate agencies from capture" and noting that "[i]nterpretive primacy requires courts to defer to agency action only to the extent that it is founded on *agency expertise*" (emphasis added)).

[95] *See* Tom McCuin, *Executive Order Makes It Easier to Fire Federal Employees*, CLEARANCE JOBS (May 30, 2018), https://news.clearancejobs.com/2018/05/30/executive-order-makes-it-easier-to-fire-federal-employees/ (discussing how "government managers increasingly turn to contractors for most things that are not 'inherently governmental functions'").

and then subcontracting these duties to private companies, the administration is providing regulated entities the "authority to perform enforcement and policymaking functions" directly.[96]

Last, subdelegation may lead to prolonged vacancies. If an administration does not elect to outsource duties to private companies, it may simply choose not to fill the position, especially if it believes the position is superfluous.[97] Vacancies, particularly "in key executive agency positions[,] have several deleterious consequences . . . includ[ing] agency inaction, confusion among nonpolitical workers, and decreased agency accountability."[98] I realize that prolonged vacancies may yield benefits like greater involvement from line-level civil servants, which could in turn boost morale.[99] But the consensus among administrative law scholars is that the costs of prolonged vacancies outweigh the benefits because many of these benefits can be realized without delaying appointments.[100]

3. Lack of Meaningful Enforcement Provisions.

The FVRA is all bark and no bite. As a precursory matter, § 3348 does not apply to all executive branch PAS officers, meaning some actions that otherwise would be noncompliant would not be void ab initio—they may not even be voidable.[101] Consider a hypothetical: an acting inspector general (IG), who serves past the statutory deadline, authorizes an investigation into a Department of Justice (DOJ) employee. The employee is terminated as a result of the

---

[96] Verkuil, *supra* note 94, at 313.

[97] *See supra* note 66 and accompanying text.

[98] O'Connell, *supra* note 51, at 937–38.

[99] *See* Nina A. Mendelson, *The Uncertain Effects of Senate Confirmation Delays in the Agencies*, 64 DUKE L.J. 1571, 1601–02 (2015) (noting that if civil servants are responsive to an administration's goals there may be "greater engagement in policy issues" which "may increase the civil servant's job satisfaction"); *see also* O'Connell, *supra* note 51, at 946 (noting that "[a]gency vacancies are not always costly . . . [and] may actually be desirable" because they can lead to the "ability to select better appointees, potentially better performance from frequent turnover, the need or preference for agency inaction . . . and the advantages of temporary officials over proper appointees in certain contexts").

[100] *See* Mendelson, *supra* note 99, at 1602 ("These potential advantages could be counterbalanced by other significant problems . . . ."); *see also* O'Connell, *supra* note 51, at 951 ("[A]lthough more research needs to be done, the risks . . . outweigh the potential benefits . . . [a]nd many of the benefits may be obtainable without fostering delays in the appointments process.").

[101] 5 U.S.C. § 3348(e) (2012); *see also* BRANNON, *supra* note 5, at 5 (citing SW Gen., Inc. v. NLRB, 796 F.3d 67, 79 (D.C. Cir. 2015)) ("[A] court might conclude . . . that even if these officers violate the [FVRA], that law will not invalidate their actions.").

investigation. Normally, this investigation would be considered a noncompliant act, but because the IG is exempted under § 3348(e)(3) the employee cannot challenge the IG's authorization on FVRA grounds.

Even where a noncompliant action is void, or voidable, the primary enforcement mechanism of the FVRA stems from administrative proceedings, litigation, and in defending enforcement actions.[102] But these proceedings come with their own obstacles.[103] First, the time and cost of litigation have to be considered.[104] Second, parties must have standing which would likely be impossible when the acting officer has either taken beneficial action,[105] or not taken any action at all.[106] Or if an acting officer provided a general policy statement, there would be no action to challenge because such statements do not bind the agency or courts.[107]

---

[102] *See* BRANNON, *supra* note 5, at 20 ("Arguably, the most direct means to enforce the [FVRA] is through private suits in which courts may nullify noncompliant agency actions.").

[103] *See* Charles S. Clark, *Time Is Running Out on Acting Officials' Authority Under Vacancies Act*, GOV'T EXEC. (Nov. 7, 2017), https://www.govexec.com/management/2017/11/time-running-out-acting-officials-authority-under-vacancies-act/142368/ (discussing the slowness of the judicial process, issues with standing, and rarity of Vacancy Act lawsuits).

[104] *See* Gregory S. Wright et al., *Insurance Coverage for CFPB Investigations and Enforcement Actions*, K&L GATES (Apr. 25, 2013), http://www.klgates.com/insurance-coverage-for-cfpb-investigations-and-enforcement-actions-04-25-2013/ ("[C]ompanies often incur *substantial* costs in defending an investigation, even prior to the commencement of any enforcement proceeding or lawsuit." (emphasis added)).

[105] The difficulty would lie in proving the standing requirements: (1) injury in fact, (2) causation, and (3) redressability. Consider a hypothetical: an acting officer promulgates a (Pareto efficient) rule that is minimally beneficial to Corporation *A* but greatly beneficial to that company's direct competitor, Corporation *B*. The benefit is so great that Corporation *B* will likely overtake Corporation *A*'s market share. It would be hard to argue that Corporation *A* suffered a concrete and particularized injury, not a conjectural or hypothetical one—Corporation *A* could likely not prove sufficient causation because their demise may not be traceable back to the agency's action. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)) ("First the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."). But if couched as an Appointments Clause claim, this may still be a viable injury. *See* Landry v. FDIC, 204 F.3d 1125, 1131 (D.C. Cir. 2000) ("[J]udicial review of an Appointments Clause claim will proceed even where any possible injury is radically attenuated.").

[106] *See* Kirby, *supra* note 7 (noting that where an acting officer "didn't do anything[, t]hen you don't have an action to void" and that it may "be hard to find an actual action, even though [an acting officer] may be doing things, but it might not come in a particular concrete action").

[107] *See* Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1013 (9th Cir. 1987) (first citing Guardian Federal Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp., 589 F.2d 658, 666–67 (D.C. Cir. 1968); and then citing Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir. 1975)) (noting that

More peculiar still is the absence of any provision in the FVRA to remove unauthorized "actings."[108] Section 3349 requires the Comptroller General to report officers who have served longer than the 210-day limitation to the President and various congressional committees,[109] but these reports might as well be tossed into the recycling bin because nothing in the letters require affirmative action.[110] Further, by failing to remove noncompliant acting officers within the statutory time limit, the President may be violating the Take Care Clause.[111] If "[i]mplement[ing] the legislative mandate is the very essence of 'execution' of the law,"[112] then failure to implement (i.e., failing to remove noncompliant acting officers) or acting contra to the legislative mandate would be *not faithfully executing the law*.[113] To be sure, the Take Care Clause has been used as justification "[t]o authorize the President to act outside of direct statutory authorization when needed to protect important government functions."[114] And in the rare circumstance that a PAS position had nondelegable duties that would have drastic effects on the nation (i.e., national emergencies), perhaps this argument

---

general policy statements do not establish binding norms and the agency is free to exercise its discretion); *see also* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 12 (2017) ("[P]olicy statements . . . and other guidelines . . . 'lack the force of law.'" (quoting Christensen v. Harris Cty., 529 U.S. 576, 587 (2000))).

108 *See* BRANNON, *supra* note 5, at 20 (citing 5 U.S.C. § 3349(b)) ("[T]he Vacancies Act does not contemplate a means of removing any noncompliant acting officers from office.").

109 *See* 5 U.S.C. § 3349(b) (2012) ("If the Comptroller General of the United States makes a determination that an officer is serving longer than the 210-day period . . . [they] shall report such determination immediately to . . . the Senate and House of Representatives; [and] the President . . . .").

110 *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, B-329853, VIOLATION OF THE TIME LIMIT IMPOSED BY THE FEDERAL VACANCIES REFORM ACT OF 1998—COMMISSIONER, SOCIAL SECURITY ADMINISTRATION 1–2 (2018). Additionally, there is no requirement as to when these letters must be sent. *See* Chase Gunter, *GAO: SSA Chief Has Been 'Acting' Too Long*, FCW (Mar. 9, 2018), https://fcw.com/articles/2018/03/09/ssa-gao-vacancies-act.aspx (noting that it took four months for the GAO to notify the President and Congress that the Acting Commissioner of the SSA had served past the statutory time limit).

111 *See* U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . . .").

112 Bowsher v. Synar, 478 U.S. 714, 733 (1986).

113 *See* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1848 (2016) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)) ("The Supreme Court has also invoked the Take Care Clause as the textual source of the President's duty to abide by . . . the laws enacted by Congress—that is, as the instantiation of the President's duty to respect legislative supremacy and not to act *contra legem*.").

114 James Rathz, *Does Anyone Know What the "Take Care Clause" Means?*, REG. REV. (Jan. 28, 2016), https://www.theregreview.org/2016/01/28/rathz-take-care-clause/.

would have merit.[115] But overall, this argument fails because the President cannot "claim[] an inherent power to fill vacancies," contravening the FVRA.[116] After all, "the Framers intended to provide a check on the power of the Executive" because they feared that a "President would [ab]use the power of appointment."[117]

B. RECOMMENDATIONS FOR CLOSING THE FVRA LOOPHOLES

What then can be done to close the loopholes? This Section proposes solutions to remedy the FVRA loopholes discussed in Section III.A and raises additional concerns that may arise if these solutions were implemented.

1. Clarifying and Prioritizing the Types of Vacancies Covered by the FVRA.

Given the power that acting officials wield,[118] combined with the lack of removal provisions, allowing the President unilateral authority to create vacancies through firing circumvents the power of Congress and the Appointments Clause. But contrary to Justice Thomas and other legal scholars,[119] this should not be the FVRA's death knell—and with some clarification and prioritization—the Act can be saved.

Scholars who argue that the FVRA is unconstitutional because it gives the Senate too much control over limiting whom the President

---

[115] *See* HAROLD C. RELYEA, CONG. RESEARCH SERV., 98-505 GOV, NATIONAL EMERGENCY POWERS 4 (2007) ("[T]he President . . . may exercise certain powers in the event that the continued existence of the nation is threatened by crisis, exigency, or *emergency* circumstances.").

[116] Brannon P. Denning, *Article II, the Vacancies Act and the Appointment of "Acting" Executive Branch Officials*, 76 WASH. U. L. REV. 1039, 1042 (1998).

[117] *Id.* at 1041 (citing the DECLARATION OF INDEPENDENCE paras. 12–13 (U.S. 1776)).

[118] *See* Anne Joseph O'Connell, *Staffing Federal Agencies: Lessons From 1981–2016*, BROOKINGS (Apr. 17, 2017), https://www.brookings.edu/research/staffing-federal-agencies-lessons-from-1981-2016/ [hereinafter O'Connell *Staffing*] (noting these powers include: issuing binding regulation, writing influential guidance documents, making final calls on major adjudications, regulating rates for mail, running embassies, and launching investigations into presidential candidates). This power even extends internationally. *See* Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 906 (2014) (noting that the "U.S. Permanent Representative to the United Nations" is covered by the FVRA).

[119] *See supra* note 25 and accompanying text.

can have fill a vacancy[120] confuse the lessons learned in *Myers v. United States*.[121] In *Myers*, the U.S. Supreme Court stated that Congress can "prescrib[e] . . . reasonable and relevant qualifications and rules of eligibility of appointees,"[122] if "the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation."[123]

Section 3345 falls well within the *Myers* framework. First, it merely prescribes qualifications, that is, eligible acting officers must either be: a first assistant, previously confirmed by the Senate, or a GS-15 employee. Second, the President not only has a choice between any of these categories, but within each category there are several people from whom she or he can select. I recognize that among first assistants the choice may be limited (though broadened by depersonalizing the term),[124] but among previous Senate-approved officials there are approximately 1,000 people from whom to choose,[125] and of the 1.8 million full-time federal employees some 77,400 (4.3%) are GS-15s.[126] This hardly limits the President's selection to the point of legislative designation.

This still leaves Justice Thomas's contention that the FVRA gives the President unilateral appointment authority in violation of the Appointments Clause. One possible solution here would be to avoid the constitutional issue altogether and distinguish acting officers as inferior officers.[127] Inferior officers can be appointed by the President alone if Congress elects to use the Exceptions

---

[120] *See* Stayn, *supra* note 25, at 1513 ("The Act violates Article II by allowing the Senate unilaterally to nominate and confirm or reject individuals whom the President has not actually nominated . . . .").

[121] 272 U.S. 52 (1926).

[122] *Id.* at 129.

[123] *Id.* at 128.

[124] *See supra* Section II.A.

[125] *See Senate Confirmation FAQ*, SLATE (Jan. 16, 2001, 11:57 AM), https://slate.com/news-and-politics/2001/01/senate-confirmation-faq.html (noting that about 1,000 people require Senate approval). Granted, not all of these positions are filled, but the choice is far from constrained.

[126] *See Federal Workforce*, PARTNERSHIP FOR PUB. SERV. (2014), https://ourpublicservice.org/wp-content/uploads/2014/04/abd589d0e0dcd9336101e81858a0d2f6-1399994024.pdf (noting that as of 2013 there were 1.8 million full-time federal employees, and 4.3% of those employees were categorized as GS-15).

[127] *See* Berry, *supra* note 23, at 176 ("One possible solution is that the time limits the FVRA places on acting service might 'downgrade' principal officers to inferior officers.").

Clause.[128] The theory is that an "acting [officer] who knows that by law [she or he] may only serve while someone else is nominated to replace [her or him]" is therefore more constrained so as to make them an inferior officer.[129] But as Justice Thomas pointed out in *SW General*,[130] this constraint is artificial because acting officers can serve for most of a President's term.[131]

To quash constitutional concerns, the FVRA should be amended to strictly prohibit the filling of self-created vacancies caused by terminations, thereby forcing the President to seriously contemplate removing officials—knowing that she or he could not simply replace them with an acting officer. This prohibition, combined with my other proposals, would increase continuity in the Executive Branch by reducing the number of vacancies. Additionally, it would provide a cascade of other benefits, such as a reduction in subdelegation of tasks, increased transparency, and increased political accountability. Admittedly, this proposal does not fully resolve Justice Thomas's formalistic opposition to acting officers stepping into the shoes of principal officers, but it does partially curtail circumvention of the Appointments Clause and preserves the spirit of the FVRA, which is a functional compromise.[132] To be sure, only Justice Thomas has proffered such a formalistic view on the FVRA, but with the additions of Justices Gorsuch and Kavanaugh, it is possible more Justices could join in his sentiment.[133] Should Justice Thomas's position prevail, not all

---

[128] *See* U.S. CONST. art. II, § 2, cl. 2 ("[B]ut 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.").

[129] Berry, *supra* note 23, at 176; *see also infra* note 146.

[130] *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 946 n.1 (2017) (Thomas, J., concurring) ("I do not think the structural protections of the Appointments Clause can be avoided based on such trivial distinctions.").

[131] *See* 144 CONG. REC. S12,823 (daily ed. Oct. 21, 1998) (statement of Sen. Thompson) (noting that § 3346(a) creates an unlimited time limit exception for acting officers filling a vacancy due to sickness); *see also supra* Part I.

[132] *See* Amy Howe, *Opinion Analysis: Court Limits "Acting" Appointments to Fill Vacancies*, SCOTUS BLOG (Mar. 22, 2017, 6:34 AM), http://www.scotusblog.com/2017/03/opinion-analysis-court-limits-acting-appointments-fill-vacancies/ (noting that the U.S. Supreme Court views the text of the FVRA as a compromise between the legislature and the President); *see also* Kirby, *supra* note 7 ("And so what the 1998 Vacancies Act did was try to broker a compromise to allow the executive branch to staff these important jobs, but put a limit on it to protect the Senate's prerogative of confirmation in these positions.").

[133] *See infra* note 202 and accompanying text.

would be lost because § 3345(a)(2) allows the President to appoint acting officers who have already been confirmed by the Senate.[134]

Related to terminations is the issue of vacancies created through forced resignations, and—due to complexity—these should remain viable vacancies under the FVRA. Some advocate that forced resignations, or constructive dismissals, are really just terminations by another name because they are involuntary.[135] If this is true, then, under my proposal, such resignations *would* preclude the President from filling the subsequent vacancy. But constructive dismissal is difficult to prove[136] and is generally only a viable cause of action if an employee was coerced to resign due to harassment or discrimination.[137] And unlike in the typical employer-employee context, forced resignations for PAS officers are more likely to stem from political pressures that arise from changes in administrations and disagreements over policy matters rather than claims of harassment and discrimination.[138] Moreover, it is often difficult to distinguish between voluntary and truly forced resignations.[139] In the context of PAS officers, forced resignations

---

[134] *See* Berry, *supra* note 23, at 177 (discussing that § 3345(a)(2) "allows the [P]resident to unilaterally grant a new title (and with it, new powers and duties) to someone who has already been confirmed by the Senate").

[135] *See* Daniel Lublin, *Some Resignations Are Terminations in Disguise*, GLOBE & MAIL (Apr. 14, 2017), https://www.theglobeandmail.com/report-on-business/careers/leadership-lab/some-resignations-are-terminations-in-disguise/article34346477/ ("Some resignations are actually terminations in disguise."); Andrew Restuccia, *Did Shulkin Get Fired or Resign? This is Why it Matters*, POLITICO (Mar. 31, 2018, 10:50 AM), https://www.politico.com/story/2018/03/31/did-shulkin-get-fired-or-resign-veterans-492877 ("Washington often wraps firings in the verbal cloak of a resignation . . . .").

[136] *See* Crystal L. Norrick, Note, *Eliminating the Intent Requirement in Constructive Discharge Cases:* Pennsylvania State Police v. Suders, 47 WM. & MARY L. REV. 1813, 1813–14 (2006) (noting that the U.S. Supreme Court has yet to answer whether one must prove employer intent or what an "official act" by an employer is); Cathy Shuck, Comment, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 BERKLEY J. EMP. & LAB. L. 401, 413–15 (2002) (discussing the unresolved circuit split on proving employer intent).

[137] *See* Shuck, *supra* note 136, at 402 ("[A]nti-discrimination laws do not literally prohibit employers from coercing an employee into quitting by making the employee's work life miserable[, but b]ecause such conduct would clearly violate the intent of the statutes, courts have developed the doctrine of constructive discharge.").

[138] *See* Jan Diehm & Sam Petulla, *Who Has Left Trump's Administration and Orbit?*, CNN (July 6, 2018), https://www.cnn.com/interactive/2017/08/politics/trump-admin-departures-trnd/ (noting that Obama appointees resigned shortly after President Trump took office and that appointees such as John Feeley, former U.S. Ambassador to Panama, resigned due to "differences with the Trump administration").

[139] *See id.* (listing several people, such as Michael Short, former Assistant Press Secretary, who resigned but under unclear circumstances).

over policy matters and presidential transitions, while greatly pressured, are not involuntary like in a discrimination or harassment context. Mere political pressure does not transform a resignation into a "termination in disguise" because PAS officers have the option to stand their ground and force termination.[140] Therefore, these "forced resignations" are essentially voluntary resignations. And because they are resignations, they are permissible under § 3345(a).

But like a game of Whac-a-Mole, with every solution up pops another problem. By removing the President's ability to fill a self-created vacancy and by restricting the subdelegation of duties, an opportunity arises for a President to hinder the administrative state by simply not nominating a permanent replacement.[141] But the FVRA already has a built-in release valve for such a scenario: recall the default option is that the first assistant to the office steps in when a vacancy occurs.[142] This means that if the President does not act then the first assistant automatically steps in.

The real problem ensues at the end of the statutory tolling period. The FVRA could be amended to impose a consequence when a President refuses to nominate a permanent replacement pursuant to the deadline in § 3346. The amendment would establish an additional timeline for a President to submit a nomination, but failure to nominate a permanent nominee within the prescribed timeline would result in a department head appointing a senior careerist (GS-15),[143] making him or her an interim officer.[144] This

---

[140] *See* Kara Scannell, *Former DOJ Chief Sally Yates on Being Fired by Trump*, FIN. TIMES (Aug. 11, 2017), https://www.ft.com/content/a3de8f4c-7b8d-11e7-ab01-a13271d1ee9c (discussing former U.S. Attorney General Sally Yates's decision not to resign in the face of President Trump's travel ban).

[141] *See* O'Connell, *supra* note 51, at 938–43 ("The absence of appointed agency leaders fosters agency inaction. If agencies are missing important managers, they will make fewer policy decisions.").

[142] *See* 5 U.S.C. § 3345(a)(1) (1998) ("[T]he first assistant to the office of such officer shall perform the functions and duties of the office . . . .").

[143] For instance, assume there is a vacancy for Assistant Secretary for Acquisition at the Department of the Air Force. The Under Secretary for the Air Force would then appoint a GS-15 to be the interim Assistant Secretary for Acquisition. *See* CHRISTOPHER M. DAVIS & MICHAEL GREENE, CONG. RESEARCH SERV., RL30959, PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS 7 (2017) (listing the hierarchy of positions within the Department of the Air Force).

[144] *See Trump Can't Run the Government with Temps*, BLOOMBERG (Dec. 29, 2017, 8:00 AM), https://www.bloomberg.com/view/articles/2017-12-29/trump-can-t-run-the-government-with-temps (suggesting that for PAS positions created by Congressional statute a career civil servant should fill the position after the deadline passes).

would operate similarly to vacancies in U.S. Attorney positions.[145] But unlike acting officers appointed during the statutory 210-day tolling period, these interim officers would be true inferior officers with limited duties, strict tenure periods. Further, they would be tasked with keeping the agency in a state of status quo.[146] Under an interim officer's purview, the agency could continue to promulgate any rules currently undergoing notice and comment at the time the vacancy occurred, as well as pursue enforcement actions under current regulations. But the agency would be prohibited from rescinding or creating new rules, and they could not suspend enforcement actions altogether. They would also be shielded with "for cause" removal, where possible.[147] To further entice the President to make speedier nominations, less deference could be given to decisions made under these interim officers because they are generally "less [politically] accountable to both the White House and Congress than normal appointees."[148]

This proposal creates several benefits. First, it forces the President to nominate permanent officers by encumbering his or her ability to hinder the administrative state simply from inaction. Rather, it would take affirmative presidential action to nominate a permanent individual to make significant changes at an agency level—a decision which entails some breadth of political accountability. And, because many PAS positions are "created by congressional statute," this proposal would likewise encourage the President to "work with Congress to identify which high-level jobs are no longer necessary,"[149] rather than give the President carte blanche authority to decide this unilaterally. Moreover, the President would not be left without tools at his disposal to control

---

[145] *See* Kirby, *supra* note 7 (explaining that for U.S. Attorney vacancies exceeding the 120-day tolling period the "district court in which the US attorney position is located can choose an interim US attorney until a person is confirmed").

[146] *See* United States v. Eaton, 169 U.S. 331, 344 (1898) ("Because the [acting] officer is charged with the performance of the duty of the [PAS officer] for a limited time, and under special and temporary conditions, he is not thereby transformed into the superior and permanent official.").

[147] This would not be possible for positions where the interim officer would enjoy dual "for cause" protection. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492 (2010) ("We hold that the dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers.").

[148] O'Connell, *supra* note 51, at 944.

[149] *Trump Can't Run the Government with Temps*, *supra* note 144.

the administrative state, such as initiating hiring freezes, pay freezes, and sequestration.[150]

A second, perhaps hidden benefit of my proposal is that it keeps executive agencies running during prolonged vacancies in arguably better fashion than they would under traditionally appointed PAS officers. Senior careerists generally have more expertise because, as civil servants,[151] they have worked their way up through an agency over the span of several years, gaining tactical experience, operational competence, and strategic vision.[152]

2. Restricting Subdelegations and Defining "Functions or Duties."

The second proposal is to further define and restrict the subdelegation of functions and duties. Section 3348 of FVRA should be amended to clarify and define additional functions and duties that cannot be subdelegated aside from those established by other statutes and regulations.

First, "non-official acts," such as advisory letters and general policy statements should be classified as functions and duties and restricted from subdelegation. Recall that noncompliant acting officers can have a profound effect on regulated entities without taking action with the force of law.[153] This change would extend the void ab initio doctrine to "non-official acts" carried out by noncompliant acting officers and alleviate some standing issues

---

[150] *See* Carten Cordell, *How the Obama Administration Shaped the Federal Workforce*, FED. TIMES (Dec. 5, 2016), https://www.federaltimes.com/management/2016/12/05/how-the-obama-administration-shaped-the-federal-workforce/ (discussing sequestration and pay freezes under President Obama); Brian Naylor, *State of Federal Workforce: Low*, NPR (Jan. 28, 2018), https://www.npr.org/2018/01/28/581118791/state-of-the-federal-workforce-low (discussing President Trump's hiring freeze during the first three months of his administration).

[151] *See* Kirby, *supra* note 7 ("If you're someone who's a proponent of expertise in these critical positions, you're going to favor actings drawn from that third category of senior careerist.").

[152] *See, e.g.*, *Levels of Air Force Leadership*, CURTIS E. LEMAY CTR. (Aug. 8, 2015), https://www.doctrine.af.mil/Portals/61/documents/Volume_2/V2-D10-Levels-Leadership.pdf (discussing the Air Force leadership structure model). Most agencies utilize an annual review process which tracks employee competence and leadership abilities over time. *See* GEN. SERVS. ADMIN., HRM 9430.2, GSA ASSOCIATE (EMPLOYEE) PERFORMANCE PLAN AND APPRAISAL SYSTEM 8–9 (2017) (noting that GSA employees are annually evaluated based on critical elements including: leadership, organizational performance, and work assignments).

[153] *See supra* Section.III.A.3.

because now there would be an actual action (with an accompanying FVRA violation) to challenge.[154]

Second, any private outsourcing decisions should be considered a "function or duty" and restricted from subdelegation, as this would help fend off agency-capture concerns.[155] This threat may seem distant as private outsourcing is currently under a moratorium,[156] but such a ban could easily be lifted, allowing private contractors to once again pierce the veil of government functions or duties.[157] While agency capture cannot be completely thwarted by this proposal, it would limit the effectiveness of *this* form of capture should Congress lift the ban.

Additionally, restricting subdelegation would increase agency transparency and political accountability. Rather than burying duties behind a smokescreen, citizens and regulated entities would be better informed and equipped to understand who the key decision makers are at respective agencies. In turn, this creates amplified political accountability[158] and empowers interested parties to apply pressure on these officials for actions they disfavor by requesting hearings or investigations from Congress or encouraging favorable actions by petitioning Congress for increased funding to carry out additional or related actions.[159]

---

[154] *See, e.g.*, Stand Up for California! v. United States DOI, 298 F. Supp. 3d 136, 143 (D.D.C. 2018) (holding no FVRA violation existed because without "affirmative language precluding delegation . . . [o]n the regulation's plain text, then, delegation by the Secretary to a subordinate . . . seems 'presumptively permissible'" (quoting U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004))); Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 420 (D. Conn. 2008) (denying plaintiff's subdelegation FVRA challenge because acknowledgement decisions were not "exclusively" assigned to the Secretary of the Interior and therefore could be delegated).

[155] *See* discussion *supra* Section.III.A.2.

[156] *See* Charles S. Clark, *House Rejects Outsourcing of Federal Jobs in Vote to Block Revival of Circular A-76*, GOV'T EXEC. (July 28, 2017), https://www.govexec.com/contracting/2017/07/house-rejects-outsourcing-federal-jobs-vote-block-revival-circular-76/139829/ (discussing the seven-year moratorium on A-76 studies which outsource government jobs to private contractors).

[157] *See* Frederico Bartels, *Renewing OMB Circular A-76 Competitions: Savings and Greater Effectiveness*, HERITAGE FOUND. (Aug. 2, 2018), https://www.heritage.org/defense/report/renewing-omb-circular-76-competitions-savings-and-greater-effectiveness (arguing that A-76 studies should be reimplemented).

[158] *See* Nou, *supra* note 92, at 502 (citing Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 903 (2007)) ("[T]ransparency enables monitors . . . to become aware of the real power brokers within an agency and invest their resources accordingly.").

[159] This is now even easier with the advent of sites like Change.org. *See* Joseph Marks, *Now You Can Petition Some Members of Congress Directly*, NEXTGOV (Oct. 23, 2013), https://www.nextgov.com/emerging-tech/2013/10/online-petition-site-offers-lawmakers-

Others have suggested less severe alternatives, such as publicly memorializing subdelegations.[160] But this solution presents its own challenges and would likely do little to solve the transparency problem. For example, it would impose increased strain and cost on agencies to update and maintain a database accessible to the public. And with more data comes more room for error and increased difficulty in tracking who the true decision makers are. Indeed, such a system already exists in the federal procurement arena[161] and is not only costly to the taxpayer[162] but the information is not always correct.[163] Restricting subdelegation of functions and duties may be strong medicine, but it is cheaper to implement and more effective at increasing agency transparency and political accountability. Plus, duties that cannot be subdelegated can always be assumed by a higher authority.[164]

3. Giving the FVRA Enforcement Teeth.

Of course, my proposals are futile without adding meaningful enforcement provisions. As I discuss in Section III.A.3, the primary FVRA enforcement techniques are through administrative proceedings and litigation. But more prophylactic measures, by way of removal provisions, are needed to curb litigation and save judicial resources. Therefore, the FVRA needs to be given teeth, in what I call the "FVRA with bite."

---

official-pages/72440/ (discussing the benefits of increased transparency and ability to communicate with Congress directly through Change.org).

[160] *See* Nou, *supra* note 92, at 502 ("Another strategy agency heads can use to make their subdelegations more credible is to make them more transparent . . . [by] publicly memorialz[ing them].").

[161] *See, e.g.*, FEDERAL PROCUREMENT DATA SYSTEM, https://www.fpds.gov/fpdsng_cms/index.php/en/ (last visited Oct. 20, 2019).

[162] *See* Eleni Martin, *GSA Awards $24 Million Contract to Global Computer Enterprises for Federal Procurement Data System Next Generation*, U.S. GEN. SERVS. ADMIN. (reporting that in 2003 the government awarded a seven-year contract valued at approximately $24.3 million dollars to develop and operate FPDS).

[163] *See* MOSHE SCHWARTZ ET AL., CONG. RESEARCH SERV., R44010, DEFENSE ACQUISITIONS: HOW AND WHERE DOD SPENDS ITS CONTRACTING DOLLARS 1 (2018) ("Decisionmakers should be cautious when using . . . data from FPDS . . . [because i]n some cases, the data itself may not be reliable. In some instances, a query for particular data may return differing results, depending on the parameters and timing.").

[164] *See supra* text accompanying note 61.

a. Removing Incentives to Stay Past the Statutory Tolling Period.

The first enforcement fang aims at disincentivizing acting officers from staying past the statutory tolling period. One suggestion is to ban acting officers from drawing a salary past the tolling period.[165] This may cause some acting officers to step down, assuming they would actually feel the pecuniary sting. And if it does not entice them to do so, it would at least result in a monthly savings to taxpayers of $12,816 to $17,558 per officer, per month, for each noncompliant acting officer.[166]

But at salary ranges of $153,800 to $210,700 per annum,[167] it is doubtful that acting officers rely solely on their salary for income generation.[168] Therefore, a much more venomous bite is required. Acting officers should be precluded from participating in the stock market for the duration of their tenure. And at the time they are appointed, they should be required to place their investments and substantial assets into a blind trust, just like a permanent appointee would.[169] Further, they should be required to file an additional financial disclosure statement (OGE-450) within five days of assuming office, and the Office of Government Ethics should execute an ethics agreement.[170] These requirements would allow the DOJ,[171] and the agency,[172] to bring action directly against the acting

---

[165] *See Trump Can't Run the Government with Temps*, *supra* note 144 ("Banning acting officials from drawing a salary . . . might do the trick.").

[166] *See* OFFICE OF PERS. & MGMT., Salary Table No. 2018-EX, https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2018/EX.pdf (last visited Oct. 13, 2019) (listing the executive schedule compensation scale).

[167] *Id.*

[168] *See* Jam Micheal McDonald, *How Do People of Different Income Levels Invest?*, RATE HUB (Oct. 6, 2015), https://www.ratehub.ca/blog/how-do-people-of-different-income-levels-invest/ ("[I]nvestors with incomes of $75,000 or higher are far more likely to pick the stock market to . . . [invest], compared to lower income groups . . . [who are] far more disposed to savings accounts.").

[169] *See* JACK MASKELL ET AL., CONG. RESEARCH SERV., RS21656, THE USE OF BLIND TRUSTS BY FEDERAL OFFICIALS 4 (2003) (citing 5 C.F.R. § 2634.605(c)(2)(iii)(B)) ("In the executive review process, an 'ethics agreement' may be entered into whereby the official, to avoid ethical and conflicts issues with respect to particular assets, agrees to certain remedial action, including the transfer of assets to a qualified blind trust, as an alternative to divestiture or to specific recusal or disqualification agreements.").

[170] *See id.* (noting that these precautions are required for PAS officers).

[171] *See* 5 U.S.C. app. § 104(a)(1) (2007) ("The Attorney General may bring civil action . . . .").

[172] *See* U.S. OFFICE OF GOV'T ETHICS, https://www.oge.gov/web/278eguide.nsf/content/for+ethics+officials+document~1.06:+failure+to+file+and+falsification+penalties (last visited Oct. 20, 2019) (citing 5 U.S.C. app. § 104(c) (2007); 5 C.F.R. § 2634.701(d)) ("An agency may take any appropriate action against

officer if she or he failed to file or falsified the OGE-450, subjecting the acting officer to civil and criminal penalties.[173] By affecting the finances of acting officers, these provisions would incentivize them to step down at the end of the tolling period.

As an added incentive, and to thwart agency capture concerns, acting officers should be precluded from accepting employment and compensation from "covered private employers," or regulated entities of the agency, for a set time period. Such rules already exist for government attorneys[174] and procurement officials;[175] this proposal would merely extend the principle to acting officers. The preclusion period would be multiplied by the amount of time the acting officer remained past the tolling period.[176] For example, assume the base preclusion period to seeking or accepting employment from a covered private employer is one year, and for each month the acting officer remains an additional six months is added to the period. Acting officer *X*, stays three months past the tolling period. Therefore, *X* would be precluded from seeking or obtaining employment from a covered private employer for two and a half years.

I concede that removing some of these incentives might cause potential acting officers to decline temporary appointments. For government employees aspiring to move into Senior Executive Service (SES) positions, however, the experience gained as an acting officer could be vital because SES candidates "must demonstrate that they have experience/competence in all five [Executive Core Qualifications] (ECQs),"[177] the second of which is leadership. And

---

employees who have not filed or who have filed a false, incomplete or late report . . . [and] [a]gency action does not, however, preclude action by the Department of Justice.").

[173] *See* 5 U.S.C. § 104(a)(1)–(2)(B) (2007) (noting that the civil penalty amount can range up to $50,000, and criminal penalties include fines and/or imprisonment for not more than one year).

[174] *See* MODEL RULES OF PROF'L CONDUCT r. 1.11(a)(2) (AM. BAR ASS'N 2018) (barring government attorneys from representing private clients in connection with a matter in which the lawyer participated personally and substantially as a public officer).

[175] *See* Procurement Integrity Act, 48 C.F.R. § 3.104–3(d) (2014) (restricting procurement officials from receiving compensation from covered private contractors for a period of one year).

[176] The exact time periods are not of import here, but Congress could utilize a formula to calculate the preclusion period on an individual basis, where b = base period, and y = number of months served past the tolling period. Thus, resulting in an equation: $b + 6\ mo.(y) = total\ preclusion\ period$.

[177] OFFICE OF PERSONNEL MGMT., https://www.opm.gov/policy-data-oversight/senior-executive-service/faqs/ (last visited Nov. 14, 2019); *see also* OFFICE OF PERSONNEL MGMT.,

the increased salary, perks, and post-government employment opportunities that accompany SES positions would likely entice enough people to comply with my proposal.[178]

b. Broadening Standing, Relaxing Issue Exhaustion, and Introducing a Quo Warranto *Provision.*

Disincentivizing acting officers from staying past the tolling period may not be enough. Therefore, a second fang is needed to complete the "FVRA with bite." Because the primary enforcement mechanism for the FVRA is through administrative proceedings and litigation,[179] more should be done to broaden standing, relax issue exhaustion, and empower the public to bring FVRA challenges through a *quo warranto* provision.

First, standing under the FVRA should be broadened. By further defining nondelegable functions or duties to include "non-actions"[180] and beneficial actions,[181] Congress could rein in noncompliant acting officers. This expansion of the definition would draw a firm line in the sand, making anything stemming from a noncompliant acting officer void ab initio. And combined with the salary withdrawal provision, blind trust requirement, mandatory ethics agreement, and private-employer preclusion provision, acting officers may be more apt to resign their post because now there would be little to no incentive to stay. Additionally, these changes would enable regulated entities to bring suit even in cases where beneficial or Pareto efficient actions were taken. With enough legal

---

GUIDE TO SENIOR EXECUTIVE SERVICE QUALIFICATIONS 13 (2012), https://www.opm.gov/policy-data-oversight/senior-executive-service/reference-materials/guidetosesquals_2012.pdf (noting an example of how serving as an Acting Director can meet the second ECQ: "Leading People").

178 *See OPM Reports on Why SES Members Leave Government*, FEDWEEK (Sept. 13, 2017), https://www.fedweek.com/issue-briefs/opm-reports-ses-members-leave-government/ (reporting that "[o]ver half of the departing [senior] executives indicated they would be working for increased pay" and that 63 percent of those surveyed were planning on working in non-government positions).

179 *See supra* note 102 and accompanying text.

180 *See supra* Section II.B.2.

181 *See supra* note 105 and accompanying text. Given the difficulty of proving standing for "beneficial acts," Congress would likely need to mirror the False Claims Act (FCA) and amend the FVRA to treat "beneficial acts" conducted by noncompliant acting officers as meeting the requisite standing requirements. *See* Thomas R. Lee, Note, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543, 548 (1990) (describing how courts have acknowledged "there [is] no constitutional prohibition to [a] realtor's suing, under a statutory grant of standing").

exposure, this might prompt the legislature,[182] and media, to apply additional pressure on the President to forcefully remove noncompliant acting officers.

Second, issue exhaustion should be relaxed under the FVRA. Under various statutes,[183] where a regulated entity is required to first adjudicate via an administrative proceeding and fails to timely bring up an FVRA violation, that claim will be precluded if the suit proceeds to judicial review—unless it can be justified by extraordinary circumstances.[184] For example, a defense claim of *ultra vires*, which challenges the agency's authority to act, would qualify as an extraordinary circumstance.[185] This strict interpretation has allowed enforcement proceedings to continue even where the acting officer was ultimately found to be noncompliant, and his actions void ab initio, as was the case with NLRB Acting General Counsel Lafe Solomon.[186] Such a result seems an absurd waste of judicial resources. But challenges to the exhaustion doctrine concerning FVRA claims have proven unsuccessful in at least the Third and D.C. Circuits when the agency had someone else who was eligible to bring the enforcement

---

[182] *See* BRANNON, *supra* note 5, at 19–20 (citing *Hearing on Lacking a Leader: Challenges Facing the SSA After over 5 Years of Acting Commissioners*, H. COMM. ON WAYS & MEANS (Mar. 7, 2018), https://waysandmeans.house.gov/event/hearing-lacking-leadership-challenges-facing-ssa-5-years-acting-commissioners/) (noting that the Vacancies Act may be enforced by the political process, and in March of 2018 resulted in a hearing for Acting SSA Commissioner Nancy Berryhill—who stepped down as a result).

[183] *See, e.g.*, 29 U.S.C. § 160(e) (2006) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of 'extraordinary circumstances.'").

[184] *See, e.g.*, 1621 Route 22 W. Operating Co. v. NLRB, 825 F.3d 128, 140 (3d Cir. 2016) (citing 29 U.S.C. § 160(e) (2012)) ("[I]f the Board was acting unlawfully in considering a complaint brought by an improperly serving Acting General Counsel, its actions were no more *ultra vires* than if the Board had misapplied the NLRA. We consider both sorts of claims under the strictures of that statute, including the exhaustion bar of § 10(e). Again, that bar permits consideration of arguments not raised before the Board only when late consideration can be justified by 'extraordinary circumstances.'").

[185] *See* Advanced Disposal Servs. E., Inc. v. NLRB, 820 F.3d 592, 600 (3d Cir. 2016) ("We hold, therefore, that a challenge which goes to the composition of the NLRB, and thus implicates its authority to act, constitutes an 'extraordinary circumstance' under § 160(e).").

[186] *See* Marquez Bros. Enters. v. NLRB, 650 F. App'x 25, 27 (D.C. Cir. 2016) ("Because petitioner's challenge is not 'based on the agency's lack of authority to take any action at all,' as was the case in *SSC Mystic*, but instead attacks the service of a single officer, our typical NLRA exhaustion doctrine applies . . . ."). But Solomon was eventually held to be serving in violation of the FVRA. *See supra* note 18 and accompanying text.

action in place of the noncompliant officer.[187] Therefore, it is unlikely that a solution for this issue will come from the courts, nor should it. If Congress is serious about protecting the separation of powers, it has an opportunity to exempt claim exhaustion for FVRA violations, either in organic acts or in the FVRA. This change would allow courts to efficiently resolve judicial review of enforcement actions much earlier and would again put pressure on agencies to remove noncompliant acting officers because their enforcement effectiveness would be jeopardized if an underlying FVRA violation was present. At the very least, it would require enforcement actions to be brought by a compliant officer.

Last, Congress should amend the FVRA to add a *quo warranto* provision allowing private citizens and regulated entities to bring suit for violations. Short of physically removing a noncompliant acting officer, such a provision would serve as the proverbial last line of defense. Litigants have already attempted to make *quo warranto* arguments against some actings,[188] and after all, Congress' intent was to empower litigants to monitor agency compliance with the FVRA.[189] A *quo warranto* provision would do just that. With numerous states employing similar provisions, there are ample examples to draw from.[190] And such a provision is already present in the D.C. Code.[191]

Congress could apply the D.C. Code to the FVRA, with some slight alterations. First, the jurisdictional reach would need to be broadened nationwide. Second, the U.S. Attorney in the district where the noncompliant acting officer's primary office is located

---

[187] *See* United States v. Peters, No. 6:17-CR-55-REW-HAI-2, 2018 WL 6313534, at *5 (E.D. Ky. Dec. 3, 2018) (holding that even if Acting Attorney General Mathew Whitaker's appointment violated the FVRA "no relief" could be granted because the prosecution of the defendant was properly subdelegated to "a qualified United States Attorney"); *see also* cases cited *supra* notes 184, 186.

[188] *See, e.g.*, Memorandum in Reply to Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction, English v. Trump, No. 1:17-cv-02534-TJK (D.D.C. Dec. 12, 2017), ECF No. 44 (arguing that the plaintiff was limited to a *quo warranto* claim against Mick Mulvaney).

[189] *See* S. REP. NO. 105-250, at 19–20 (1998) ("The Committee expects that litigants with standing to challenge purported agency actions taken in violation of these provisions will raise noncompliance with this legislation in a judicial proceeding challenging the lawfulness of the agency action.").

[190] *See, e.g.*, CAL. CODE REGS. tit. 11, § 1-11 (2018) (discussing *quo warranto* proceedings).

[191] *See* D.C. CODE §§ 16-3501–03 (1970) (providing for a *quo warranto* provision).

would institute the proceeding, or on relation of a third person.[192] This would remove the burden from the U.S. Attorney's Office (USAO) for the District of Columbia.

The appeal of a *quo warranto* provision embedded in the FVRA is three-fold. First, it would force noncompliant acting officers to appear in court to defend themselves. This outcome alone may force them to step down. And even if they fail to appear, "the court may proceed to hear proof . . . and render judgement accordingly."[193] Second, if the acting officer was found to be noncompliant with the FVRA (i.e., guilty of "unlawfully hold[ing] or exercis[ing] an office"),[194] then she or he would be financially liable to the relator for the costs of litigation and would have a court order ousting him or her from office. Third, if the relator prevails, they could subsequently sue for damages,[195] providing an incentive for plaintiff's firms to represent entities and private parties with FVRA claims where the USAO declines to institute proceedings.

For those concerned about a flood of litigation or frivolous suits, the D.C. Code comes equipped with a stop gap measure. The relator would be required to post a bond to cover the costs of litigation. If the relator loses, she or he would be forced to incur the associated costs.[196] This puts the relator's money where his or her mouth is. Moreover, if the USAO declines to pursue the suit, the relator would be required to petition the court to issue the writ.[197] This process creates a viable backstop for any frivolous claims.

IV. CONCLUSION

The FVRA was a modest step in the right direction, but it failed to fix many of the chief concerns its drafters set out to correct.

---

[192] Assistant U.S. Attorneys within the Affirmative Civil Enforcement (ACE) division who specialize in similar qui tam suits would be well positioned to handle this type of litigation. *See* U.S. DEP'T OF JUST., https://www.justice.gov/usao-ndga/civil-division (last visited Oct. 15, 2019) (discussing the responsibilities of ACE attorneys).

[193] D.C. CODE § 16-3543 (1970).

[194] *Id.* § 16-3545.

[195] *Id.* § 16-3548.

[196] *See id.* § 16-3502 ("The writ may not be issued . . . until the relator files a bond with sufficient surety . . . conditioned on the payment by him of all costs incurred in the prosecution of the writ if costs are not recovered from and paid by the defendant.").

[197] *See id.* § 16-3503 ("If the Attorney General or United States attorney refuses to institute a quo warranto proceeding on the request of a person interested, the interested person may apply to the court . . . to have the writ issued.").

Overtly complicated,[198] riddled with ambiguities,[199] and lacking support due to sparse case law,[200] it is no wonder that Presidents are either confused by the Act or seek to manipulate it.[201] But with a growing conservative bench, more likely to employ a formalistic view,[202] the FVRA may soon be in jeopardy of being invalidated. Such a result would prove disastrous, causing diminished agency accountability, confusion, and increased agency inaction.[203]

The statutory reforms this Note proposes would give the FVRA a fighting chance to survive a constitutional challenge and bring the Act in line with the intent of its drafters. By removing the ability to fill self-created vacancies, restricting and defining subdelegation of duties, and giving the FVRA bite through meaningful enforcement provisions, perhaps the FVRA will live on to serve its useful purpose. The reforms proposed here neither constitute a one-size-fits-all approach, nor close the other existing loopholes in the FVRA.[204] They also do not fully resolve the other elephant in the room—Senate confirmation delays.[205] But, by implementing the changes I have proposed, the federal government would move one step closer to a permanent solution to what should have been a temporary problem.

---

198 *See* Kirby, *supra* note 7 ("The Vacancies Act is so complicated, that you go to the public and people would be like, huh?").

199 *See* Ogrysko, *supra* note 20 (noting the FVRA suit against VA Acting Secretary Robert Wilkies "once again revives a series of so far unanswered questions about the Vacancy Act").

200 *See supra* note 30 and accompanying text.

201 *See supra* notes 65–66 and accompanying text.

202 *See* ANDREW NOLAN & CAITLAIN DEVEREAUX LEWIS, CONG. RESEARCH SERV., R45293, JUDGE BRETT M. KAVANAUGH: HIS JURISPRUDENCE AND POTENTIAL IMPACT ON THE SUPREME COURT 104 (noting Justice Kavanaugh has applied a "general formalist approach toward separation-of-power issues"); Jonathan H. Adler, *What Do Justices Gorsuch and Justice Breyer Have in Common?*, VOLOKH CONSPIRACY (Jun. 22, 2018, 10:38 AM), https://reason.com/volokh/2018/06/22/what-do-justices-gorsuch-and-justice-bre (noting that Justice Gorsuch is a textualist, originalist, and formalist).

203 *See* O'Connell, *supra* note 51, at 938–46 (discussing the consequences of vacant offices).

204 *See supra* note 23 and accompanying text.

205 *See* O'Connell *Staffing*, *supra* note 118 (discussing a trend of increasing Senate confirmation delays).