Complicated Confirmations: Why Congress Must Amend the Federal Vacancies Reform Act to Simplify the Senate Confirmation Process

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I. INTRODUCTION

Disagreement and debate have been at the forefront of American politics since the presidency of George Washington. However, in recent years, a particularly divisive political dilemma has emerged in American government regarding presidential nominations. Upon entering office on Inauguration Day, the President must fill an entire government of vacant positions with Executive Branch nominations. Thereafter, the United States Senate controls the confirmation process of almost all Officers of the United States. Under the Standing Rules of the Senate, any senator can delay the confirmation process of a nominee.[1] As a result, nearly a year and a half into the Trump presidency, "more than half of the six hundred and fifty-six most critical positions" remained vacant, largely due to senators in the minority requiring lengthy votes on non-controversial nominees.[2] As of early 2019, almost half of Senate-confirmed positions remained unfilled in numerous agencies.[3]

This slow confirmation process is not exclusive to the Trump administration. Many Executive Branch nominations of previous

1. Specifically, these delays result from the long-standing Senate rule allowing any senator to object to ending debate on a nomination, which then requires a cloture vote prior to a final vote on confirmation. *See* STANDING RULES OF THE SENATE VII, S. DOC. NO. 113–18, at 5 (2013).

2. Evan Osnos, *Trump vs. the "Deep State*,*"* THE NEW YORKER (May 14, 2018), http://www.newyorker.com/magazine/2018/05/21/trump-vs-the-deep-state. Osnos notes that "[s]ome of the vacancies are deliberate," as President Trump has intentionally opted not to fill some of these positions. *Id.* However, by and large, most of these delays are the result of the Senate rules that have allowed Democratic senators to slow down the process.

3. *See* Juliet Eilperin, Josh Dawsey & Seung Min Kim, *'It's Way Too Many': As Vacancies Pile Up in Trump Administration, Senators Grow Concerned*, WASH. POST (Feb. 4, 2019), https://www.washingtonpost.com/national/health-science/its-way-too-many-as-vacancies-pile-up-in-trump-administration-senators-grow-concerned/2019/02/03/c570eb94-24b2-11e9-ad53-824486280311_story.html?noredirect=on ("The Partnership for Public Service, which has tracked nominations as far back as 30 years, estimates that only 54 percent of Trump's civilian executive-branch nominations have been confirmed, compared with 77 percent under President Barack Obama at the same point in his administration.").

administrations faced similar setbacks and partisan stalling.[4] Nevertheless, the slower confirmation pace of the Trump administration's nominees as compared to previous administrations underscores a disturbing partisan trend that will likely remain in place regardless of which political party controls the White House.

These unprecedented partisan delays ultimately raise larger constitutional questions. The Appointments Clause, under Article II of the Constitution, governs the appointment and confirmation process and confers broad authority to the President of the United States to nominate and appoint officers with the advice and consent of the United States Senate.[5] Article II specifically designates three types of appointments that the President may make: (1) the appointment of "Ambassadors, other public Ministers and Consuls, Judges . . . and all other Officers of the United States";[6] (2) the appointment of "inferior Officers";[7] and (3) recess appointments.[8] Outside of the plain language of Article II, the President may appoint Executive Branch officials to serve on an "acting" basis until a permanent replacement is appointed and confirmed, and Congress has most recently granted that presidential authority to nominate acting officers through its passage of the Federal Vacancies Reform Act of 1998 ("FVRA").[9] The FVRA, however, presents several significant challenges to executive power.

Section 3345(b)(1) of the FVRA prohibits any person who has been nominated to fill the vacant office permanently from serving as an acting officer if, during the year before the vacancy arose, that person did not serve in the position of first assistant to the office or served

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4. *See infra* Section II.A.2.

5. *See* U.S. CONST. art. II, § 2, cl. 2. ("He shall have Power, by and with the Advice and Consent of the Senate . . . [to] nominate . . . [and] appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . .").

6. *Id.*

7. *Id.*

8. U.S. CONST. art. II, § 2, cl. 3. The Constitution authorizes a President may make a recess appointment without the confirmation process while the Senate is in recess, and the appointment expires at the conclusion of that session of Congress. *Id.* ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.").

9. Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349(d).

in the position of first assistant to the office for less than ninety days.[10] Although the text of the FVRA does not specifically define "first assistant," a first assistant is generally "a career official with knowledge of the office or a Senate-confirmed individual, and the Committee believes that the routine functions of the office should be allowed to continue for a limited period of time by that one person."[11] As a result of this provision, the FVRA significantly restricts the presidential power to nominate officers to Executive Branch positions by limiting when a President may nominate acting officers and who that acting officer may be.

The FVRA is excessively restrictive and burdensome on the presidential ability to nominate and appoint officers, especially in times of intense political division—best illustrated by the numerous delays of the confirmation of presidential nominations.[12] Moreover, the Act is flawed in three substantial ways. First, the FVRA is unconstitutional because it violates the Faithful Execution Clause of Article II, which states that the President must "take Care that the laws be faithfully executed."[13] The FVRA's limitations and restrictions on executive power prevent the President from faithfully executing the laws of the United States. Second, the FVRA is also unconstitutional because it violates principles of separation of powers,[14] as indicated by the legislative intent of the Framers of the Constitution.[15] Finally, section 3345(b)(1) of

10. *Id.* § 3345(b)(1) ("[A] person may not serve as an acting officer . . . if during the 365-day period preceding the date of death, resignation, or beginning of inability to serve, such person did not serve in the position of first assistant to the office of such officer; or served in the position of first assistant to the office of such officer for less than 90 days . . . .").

11. S. REP. NO. 105–250, at 12 (1998).

12. *See infra* Section II.A.

13. U.S. CONST. art. II, § 3. This clause may also be referred to as the "Take Care Clause."

14. *See infra* Section II.B. The principles of the separation of powers doctrine contemplate that the three branches of government operate independently, with each branch serving as a "check and balance" to the other branches' powers. In the context of the Appointments Clause, separation of powers concerns arise where a statute "ha[s] the potential to impair the constitutional functions assigned to one of the branches." Morrison v. Olson, 487 U.S. 654, 675–76 (1988).

15. Hamilton and other Framers of the Constitution wrote extensively of the importance of the need for the Executive Branch and the Senate to play separate and

the FVRA poses an unnecessary and counterproductive statutory limitation by prohibiting a President from nominating any person who has been nominated to fill the vacancy permanently from serving as an acting officer where that person did not serve in the position of first assistant to the office during the year the vacancy arose.[16]

The purpose of this Note is to contend that the President of the United States is the primary source of power in the area of presidential appointments, drawing from the plain language of Article II and its jurisprudence. Consequently, this Note will argue that the FVRA is an unconstitutional restriction of that presidential appointment power and should be amended to ease some of those restrictions. Part II explores the history and background of the issues relating to stalled presidential nominations and the FVRA. Section A of Part II presents a historical overview of the confirmation process in the Senate and the evolution of its increasing polarization. Section B briefly summarizes relevant principles of executive power granted under Article II of the Constitution and explains the Framers' legislative intent behind their granting that authority. Section C articulates the relevant provisions of the FVRA. Then, Section D discusses a recent Supreme Court case relevant to the FVRA. Part III presents three arguments that the FVRA is flawed and demonstrates how amending one particular provision of the statute can remedy the constitutional issues and impact the political dilemma discussed in Part A. Finally, Part IV offers several concluding remarks.

II. HISTORY AND BACKGROUND

A. An Overview of the Confirmation Process and its Polarization

The current state of the confirmation process in the Senate is the culmination of both long-standing Senate rules that have allowed for the use of delay tactics and decades of partisan strife over nominations. Thus, a historical overview of these aspects of American government serves as a useful backdrop to the various challenges that arise under the FVRA.

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distinct roles in the appointment process. *See, e.g.*, THE FEDERALIST NOS. 66, 77 (Alexander Hamilton).

16. 5 U.S.C. § 3345(b)(1); *see, e.g.,*THE FEDERALIST NOS. 66, 77 (Alexander Hamilton).

1. Senate Rules and the Confirmation Process

The rules of the Senate provide a vehicle for the minority party to delay the confirmation process of presidential nominations, although recent changes to the rules have slightly eased the process for the majority party. The Appointments Clause of the United States Constitution confers to the President the power to nominate and appoint Officers of the United States with the "Advice and Consent of the Senate."[17] However, this executive power vested by the Appointments Clause is hampered by a Senate procedural maneuver known as a "hold," which has been frequently utilized in recent years.[18] Under this procedure, an individual senator may significantly increase the amount of time that the Senate must dedicate to the confirmation of a given nominee by placing a "hold"—or delay—on that nomination.[19] The Rules of the Senate specifically provide that "no motion to proceed to the consideration of any [nomination] . . . shall be entertained . . . unless by unanimous consent."[20] In other words, if any senator objects to the motion to proceed, the Senate must first vote to invoke cloture (i.e., a procedure to end debate) on the nomination before proceeding to a final confirmation vote.[21] Therefore, this rule effectively allows a single senator

17. U.S. CONST. art. II, § 2, cl. 2.

18. *See* STANDING RULES OF THE SENATE VII, S. DOC. NO. 113–18, at 5 (2013).

19. *See* Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 CONN. L. REV. 1041, 1045 (2011) ("A single Senator cannot defeat a motion for cloture, but he or she can delay action through a device known as a hold[, which]. . . is essentially a threat to filibuster.").

20. STANDING RULES OF THE SENATE VII, S. DOC. NO. 113–18, at 5 (2013). A motion passes by "unanimous consent" where all 100 Senators are in agreement on moving forward with that motion. *See Unanimous Consent*, UNITED STATES SENATE, https://www.senate.gov/reference/glossary_term/unanimous_consent.htm, (last visited Dec. 18, 2020).

21. *See* Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 944 (2013) ("Excessive Senate obstructionism is made possible because the Senate's institutional rules give a minority of senators the ability to block an appointment without a formal vote."). When the Senate votes to invoke cloture, it votes to ensure that "debate shall be brought to a close." STANDING RULES OF THE SENATE XXII, S. DOC. NO. 113–18, at 16 (2013). Typically, cloture votes require 60 votes to pass, *see id.*, although in 2019 the Senate majority changed the vote needed to a simple majority requirement. *See infra* notes 25–26 and accompanying text. Some scholars have argued that the filibuster should be removed altogether. *See, e.g.*, Martin B. Gold & Dimple Gupta,

to commandeer the confirmation process entirely by forcing two votes—a vote to end debate on the nomination, followed by a final confirmation vote—for any given nominee, including nominees that are non-controversial and those that would certainly be confirmed in a full Senate vote.

A time-consuming confirmation process in the Senate can result in a severe lack of legislative productivity, especially in the early days of a presidency. After a new President is inaugurated, "[f]illing the cabinet is just the tip of vacancies" that the Senate must confirm.[22] The Senate must also dedicate significant time to the confirmation of various Officers of the United States, including deputy secretaries, undersecretaries, assistant secretaries, and general counsels of the various agencies and cabinet positions.[23] These numerous vacancies throughout the federal bureaucracy ultimately require the Senate to "eat up valuable legislative time while the majority goes through the process for invoking cloture" on each individual nominee.[24]

As a result of the increasingly strenuous confirmation process, both Democrats and Republicans in recent years have opted to change the Senate rules to accelerate the process. In 2013, the Senate—in part because of increasing nomination disputes and lengthy votes—used the "nuclear option,"[25] changing the vote requirement to end debate on all Executive Branch nominations and most judicial nominations from a 60-vote threshold to a simple majority requirement.[26] In 2019, the

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The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster, 28 HARV. J.L. & PUB. POL'Y 205, 210 (2004) (arguing for the Senate "majority to establish a new Senate precedent on ending filibusters"). This Note does not seek such a rule change; rather, it will argue that reforming the FVRA is the best approach to solve the current political-nominations dilemma.

22. Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 916 (2009).

23. *See id.* at 917.

24. Bruhl, *supra* note 19, at 1045.

25. The term "nuclear option" was first used in this context by then-Majority Leader Trent Lott, who was concerned about "the threat of filibuster . . . on some of President Bush's judicial nominees." William Safire, *Nuclear Options*, N.Y. TIMES (Mar. 20, 2005), https://www.nytimes.com/2005/03/20/magazine/nuclear-options.html.

26. *See* 159 CONG. REC. S8414–15 (daily ed. Nov. 21, 2013) (statement of Sen. Reid) (arguing that "simple fairness" required a change to the Senate rules regarding presidential nominations "to make Washington work again").

Senate majority again utilized the nuclear option to change the confirmation process by limiting "the amount of floor debate allowed before a final confirmation vote for lower-level executive and judicial nominees."[27] In spite of these rule changes, the confirmation process in the Senate remains very difficult for many nominees, and there are various examples of those difficulties that have been displayed throughout recent presidencies.

2. An Evolution of Divisiveness in Recent Confirmation Battles

In addition to Senate rules allowing for the stalling of the confirmation process, contentious confirmation battles that have occurred under several recent presidencies have also resulted in political stalemate regarding executive branch nominations. One noteworthy instance occurred during the Clinton administration in the late-1990s. President Clinton's nominee to head the Department of Justice's Civil Rights Division, Bill Lann Lee, sparked substantial outcry from Republicans over concerns regarding Lee's views on affirmative action.[28] Clinton initially considered making a recess appointment,[29] but he ultimately decided to appoint Lee as Acting Assistant United States Attorney General for the Civil Rights Division without Senate confirmation in 1997.[30] Importantly, this appointment was the catalyst for the

27. Heather Ba & Terry Sullivan, *Why Does It Take so Long to Confirm Trump's Appointments?*, WASH. POST (Apr. 24, 2019, 5:00 AM), https://www.washingtonpost.com/politics/2019/04/24/why-does-it-take-so-long-confirm-trumps-appointments/. This Note places significant emphasis on the fact that many nominations are stalled because of the amount of floor debate that is required as a result of senators placing a "hold" on various nominations. Thus, while this recent change to the Senate rules will accelerate the confirmation process, obstructionism will likely still remain in the Senate regardless of this change. This Note proposes a solution to this larger problem in Section III.D.

28. John M. Broder, *Clinton, Softening Slap at Senate, Names 'Acting' Civil Rights Chief*, N.Y. TIMES (Dec. 16, 1997), https://www.nytimes.com/1997/12/16/us/clinton-softening-slap-at-senate-names-acting-civil-rights-chief.html?searchResultPosition=6; *see also infra* note 84 for further discussion on the Lee nomination and its effect on the culmination of Congress' passage of the FVRA.

29. *See supra* note 8.

30. Broder, *supra* note 28.

passage of the FVRA in 1998.[31] In particular, Lee's appointment led to the passage of the FVRA because, once the Senate Judiciary Committee denied Lee a full Senate vote, President Clinton instructed "the Attorney General to appoint Lee as 'Acting' Assistant Attorney General for Civil Rights by delegating those responsibilities to him, planning for him to serve beyond the Vacancies Act's time limits."[32] While the Lee nomination process was certainly contentious for its time, confirmation disputes in subsequent presidencies became increasingly vitriolic.

The George W. Bush administration is known as an era of divisive partisan debates over various matters, and presidential nominations were no exception. One example occurred when the Senate, in the latter part of President Bush's second term, had still not confirmed many of Bush's judicial and executive branch nominations. Specifically, by February 2008, over 180 of Bush's nominees had not been confirmed by the Senate—160 of which were non-judicial nominees.[33] Of those nominations, 30 had been waiting for over a year to receive a final confirmation vote in the Senate, and 9 had waited over 2 years for a vote.[34] Although these nomination delays of the Bush years were the result of the Senate Democratic *majority* holding up multiple nominations, they are nevertheless indicative of the need for the reform of the

31. *See* Joshua L. Stayn, Note, *Vacant Reform: Why the Federal Vacancies Reform Act of 1998 Is Unconstitutional*, 50 DUKE L.J. 1511, 1518–20 (2001) (discussing the effect that the Lee nomination had on the eventual passage of the FVRA).

32. Brief for Morton Rosenberg as Amicus Curiae Supporting Plaintiffs' Motion for Preliminary Injunction, L.M.-M. v. Cuccinelli, 442 F.Supp.3d 1 (2020) (No. 1:19–cv–2676) ("Things came to a head in 1997, when the Senate Judiciary Committee refused to refer Bill Lan Lee, President Clinton's nominee to head the Office of Civil Rights, to a floor vote. . . . That action produced public outcry and calls to amend the Vacancies Act to explicitly prohibit such presidential end-arounds.") (citing Broder, *supra* note 28; Stewart M. Powell, *Lee Wins Civil Rights Job Despite GOP Block: President Dodges Senate Opposition and Names L.A. Lawyer to Post on an Acting Basis*, S.F. EXAM'R, Dec. 15, 1997, at A1). *See supra* notes 79–84 and accompanying text for a full discussion and greater context on presidential violations of the FVRA's predecessor, the Vacancies Act, and why Congress resorted to enacting the FVRA.

33. Press Release, Office of the Press Secretary, The White House, Fact Sheet: Senate Must Act on Nominations to Federal Courts and Agencies (Feb. 7, 2008), https://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080207-9.html.

34. *Id.*

FVRA to allow a President to have more flexibility in filling executive branch vacancies, which will be discussed in great detail below.

As partisan divisions further increased in America, the Obama administration likewise faced nomination hurdles in the Senate. President Obama nominated Loretta Lynch to be Attorney General in the fall of 2014, with her nomination eventually being confirmed over five months later in "one of the nation's most protracted cabinet-level confirmation delays."[35] In fact, the Lynch confirmation took longer than any other Attorney General nominee except for two other nominees from the Wilson and Reagan administrations.[36] This confirmation delay is particularly significant given the fact that "historically the Senate has moved swiftly, and generally deferentially, with respect to the President's top-level appointments (such as cabinet secretaries)."[37] President Obama also faced significant headwinds when he nominated Lafe Solomon to be General Counsel of the National Labor Relations Board, which ultimately culminated in a 2017 Supreme Court ruling.[38]

3. The Trump Administration's Dilemma

While the confirmation difficulties of the Clinton, Bush, and Obama presidencies contributed in shaping the current political climate for presidential nominations, it is the Senate rule allowing minority-party senators to place a hold on nominations that ultimately set the stage for the Trump administration's political dilemma.[39] By February

35. Jennifer Steinhauer, *Senate Confirms Loretta Lynch as Attorney General After Long Delay*, N.Y. TIMES (Apr. 23, 2015), https://www.nytimes.com/2015/04/24/us/politics/loretta-lynch-attorney-general-vote.html.

36. *Id.* Probably the most high-profile nomination dispute during the Obama Administration occurred in 2016 when the Senate majority refused to consider President Obama's nominee for Associate Justice of the Supreme Court, Merrick Garland. *See* Emmarie Huetteman, *Two Republican Senators Revoke Support for Garland Hearings*, N.Y. TIMES (Apr. 2, 2016), https://www.nytimes.com/2016/04/03/us/politics/2-republican-senators-revoke-support-for-garland-hearings.html. That nomination does not directly relate to the problems outlined in this Note because judicial nominations are not covered under the FVRA. However, the Garland nomination certainly added to the partisan disagreements over nominations that continued into the Trump Administration.

37. Stephenson, *supra* note 21, at 943–44.

38. *See infra* Section II.D.

39. *See supra* notes 19–21 and accompanying text for explanation of this rule.

2019—over two years into the Trump presidency—most cabinet-level agencies had numerous vacancies; as an example, just "41 percent of the Interior and Justice departments' Senate-confirmed posts [were] filled, and just 43 percent of such positions [were] filled at the Labor Department."[40] While it is important to note that the White House at that point had still not taken the steps to nominate 150 out of the 705 Senate-confirmed positions,[41] many of the vacancies were due to the Senate's failure to consider them for a vote in a timely fashion. In the first two years of the Trump administration, the Senate held 128 cloture votes on judicial and executive branch nominees, compared to the average of *eight* cloture votes that were held during the same time period for the previous three presidencies.[42] Further, the Senate Rules Committee noted that if cloture votes continued to be forced on nominees going forward at the same rate as they were during the previous two years, it would take over five years for all of the administration's judicial and executive branch nominations—many of which are non-controversial, bipartisan nominees—to be confirmed.[43] Despite the 2019 rules change that shortened the post-cloture debate time from thirty hours to two hours,[44] there were 103 nominations awaiting a floor vote as of November 2020.[45]

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40. Eilperin, Dawsey & Kim, *supra* note 3.

41. *Id.*

42. *See* Press Release, United States Senate Committee on Rules and Administration, Senators Blunt, Langford Resolution to Reduce Needless Delays for Senate-Confirmed Nominees Passes Rules Committee (Feb. 13, 2019), https://www.rules.senate.gov/news/majority-news/senators-blunt-lankford-resolution-to-reduce-needless-delays-for-senate-confirmed-nominees-passes-rules-committee ("For the previous three presidents, there was an average of eight cloture votes in the first two years of a president's term. However, in the first two years of the Trump Administration, cloture was filed on 148 of President Trump's nominees (62 Judicial and 86 Executive) in the 115th Congress, and the Senate was forced to hold 128 cloture votes. This has slowed nominations to a glacial pace in the Senate.").

43. *Id.*

44. *See supra* note 27 and accompanying text; Dave Beaudoin, *From 30 Hours to 2—What You Need to Know About the Nuclear Option Change This Week*, BALLOTPEDIA NEWS (Apr. 5, 2019), https://news.ballotpedia.org/2019/04/05/from-30-hours-to-2-what-you-need-to-know-about-the-nuclear-option-change-this-week/.

45. *See Pending Nominations on the Executive Calendar (Civilian)*, UNITED STATES SENATE, (last visited Dec. 18, 2020), https://www.senate.gov/pagelayout/legislative/one_item_and_teasers/nom_cal_civ.htm.

Partisan divisions over presidential nominations in the Senate appear to be at their highest to date, and there are no concrete plans to reform the institutional Senate rules that make these delays possible. As a result, if past presidencies are any indication of what is to come in the future with presidential nominations in Senate, the current political dilemma is not likely to disappear anytime soon, regardless of which individual or political party occupies the White House going forward.

B. Article II Jurisprudence

The extensive challenges of the confirmation process in the Senate raise several underlying constitutional issues. While the current state of the confirmation process makes it very difficult for a President to fill vacancies in his government, an examination of Article II of the United States Constitution reveals that the Framers intended to grant extensive powers to the President in this area,[46] which contradicts how the government is currently operating with respect to nominations. Additionally, contemporaneous writings at the time of the Constitution's drafting indicate the Framers' intent to give great deference to the President in the context of filling vacancies in his government.[47]

1. The Grant of Broad Authority to the Executive Under Article II

The language of Article II, along with recent Supreme Court case law,[48] suggests that the Framers of the Constitution intended to grant extensive powers to the executive in the area of appointing officers to the federal government. Article II's Vesting Clause at the outset vests the powers of the Executive Branch in the President.[49] In addition to its vesting of authority in the executive, Article II also serves the purpose—under the Appointments Clause—of allowing the President to assign some of his power to the various agencies and cabinet-level positions by appointing "with the Advice and Consent of the Senate . . . Officers of the United States."[50] The Appointments Clause

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

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

48. *See infra* Section II.D.

49. U.S. CONST. art. II, § 1, cl. 1. ("The executive Power shall be vested in a President of the United States of America.").

50. U.S. CONST. art. II, § 2, cl. 2.

"establishes that the Constitution comprehends that the President might see to the execution of [the] laws by subordinates rather than execute them himself."[51] For purposes of the Appointments Clause, an "Officer of the United States" includes "any appointee exercising significant authority pursuant to the laws of the United States."[52] Likewise, Executive Branch officials appointed by the President are known as "principal officers."[53]

The removal power is relevant in the context of presidential appointments because it further exhibits the extent of executive power that the Framers intended to give the President in this area.[54] While neither the Appointments Clause nor the Constitution at large specifically mentions a power to remove officers, the United States Supreme Court has determined that such authority exists.[55] The removal power is indicative of the presidential authority to see that the laws are faithfully executed.[56]

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51. Dina Mishra, *An Executive-Power Non-Delegation Doctrine for the Private Administration of Federal Law*, 68 VAND. L. REV. 1509, 1523 (2015).

52. Buckley v. Valeo, 424 U.S. 1, 126 (1976).

53. *Id.* at 132.

54. Myers v. United States, 272 U.S. 52, 122 (1926) (articulating that "[t]he power of removal is incident to the power of appointment"). Not only does this case provide useful insight into the removal power and its larger indication of executive power under Article II, *Myers* also serves as an important source of information regarding the separation of powers doctrine and its role regarding the Appointments Clause and Article II generally.

55. *See generally Myers*, 272 U.S. 52 (holding that the President alone has the power to remove officers of the United States).

56. *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492–93 (2010) ("Article II confers on the President 'the general administrative control of those executing the laws.' It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President . . . [and he] must have some 'power of removing those for whom he cannot continue to be responsible.'" (quoting *Myers*, 272 U.S. at 164, 117)); *see also* Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935) (articulating that the President cannot remove an officer of an independent federal agency except for the reasons that Congress provides by statute); Bowsher v. Synar, 478 U.S. 714, 726 (concluding that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of laws except by impeachment"). All of these cases stand for the proposition that the President has the power to remove Officers of the United States, just as he has the general authority under Article II to appoint them—subject to certain limitations. In the broader context of this Note, these cases and the removal power serve as an important indicator of the expansive powers granted to the President in this area under Article II.

As explained in the aforementioned Supreme Court doctrine on the removal power,[57] Article II confers broad authority to the President through the Faithful Execution Clause.[58] It specifically provides that the President must "take Care that the Laws be faithfully executed."[59] In other words, because the President "is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication . . . was that as part of his executive power he should select those [officers] who were to act for him under his direction in the execution of the laws."[60] In effect, the President is not expected to faithfully execute the laws alone; rather, it can be reasonably inferred that the language of the Take Care Clause permits the President to appoint officers to his government to help in that execution.[61] In fact, Article II's vesting of power in the President "was essentially a grant of the power to execute the laws."[62] Consequently, the Take Care Clause plays a vital role in shaping a President's broad authority to nominate and appoint officers to the federal government, as well as allowing the bureaucracy to operate more efficiently and effectively through the use of subordinates.

2. Contemporaneous Writings of the Framers

The legislative intent of the Framers—best illustrated in *The Federalist Papers*—also reveals the broad executive authority that is granted under Article II and the Appointments Clause. In the area of presidential appointments, the Framers placed particular emphasis on the importance of adhering to the doctrine of separation of powers, which stresses the need to provide safeguards against one branch of government encroaching into the realm of another.[63] The Supreme

57. *See* cases cited *supra* note 56.

58. U.S. CONST. art. II, § 3.

59. *Id.*

60. *Myers*, 272 U.S. at 117.

61. *See id.* (stating that the President "alone and unaided [cannot] execute the laws. He must execute them by the assistance of subordinates.").

62. *Id.*

63. *See* Morrison v. Olson, 487 U.S. 654, 693 (1988) ("[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers 'as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" (citing Buckley v. Valeo, 424 U.S. 1, 122 (1976))).

Court has also underscored how "fundamental" these principles of separation of powers are in American government.[64]

Volumes 76 and 66 of *The Federalist Papers* provide useful insight into the Framers' mindset regarding presidential authority and the role of separation of powers in this area.[65] Alexander Hamilton indicated in his writings that the Senate's advice and consent role should be used sparingly to reject a nominee:

> Vesting primary responsibility in the President would provide for responsibility and freedom from regional bias, while Senate consent would provide security from personal attachment. Hamilton's language implies that Senate rejection of the President's nominee would not be a regular occurrence: . . . "It is . . . not very probable that [a] nomination would often be overruled."[66]

Thus, Hamilton made clear in his works that it would *not* be in the regular practice for the Senate to frequently reject a President's nominees. In fact, Hamilton's writings in *The Federalist Papers* suggest that the Senate's rejection of nominees should only occur in certain unique circumstances.[67] Throughout *The Federalist Papers*, Hamilton warned of a tyrannical President, and—regarding appointments—he stated that the Senate's role should primarily be aimed at preventing "the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."[68] Hamilton believed that only in those exceptional situations should the Senate reject a President's nominee; otherwise, it can be reasonably

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64. *See, e.g.*, Nat'l Mut. Ins. v. Tidewater Transfer Co., 337 U.S. 582 (1949) ("The doctrine of separation of powers is fundamental in our system. It arises, however, not from . . . [a] single provision of the Constitution, but because 'behind the words of the constitutional provisions are postulates which limit and control.'" (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 323 (1934))).

65. *See, e.g.*, THE FEDERALIST NOS. 76, 66 (Alexander Hamilton).

66. Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J. L. & PUB. POL'Y 103, 127–28 (2005) (citing THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

67. THE FEDERALIST NO. 76 (Alexander Hamilton) (Library of Congress), https://guides.loc.gov/federalist-papers/text-71-80#s-lg-box-wrapper-25493468.

68. *Id.*

inferred from Hamilton's language that the President's nominees should be given great deference.

Hamilton also contended that the Senate's role in the appointments process is *not* to select the nominee itself; rather, the Constitution authorizes the President alone to nominate officers.[69] In *Federalist No. 66*, Hamilton states that "[t]here will . . . be no exertion of choice on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves choose, they can only ratify or reject the choice of the President."[70] This statement by Hamilton adequately articulates the important point that the Senate has an enumerated and limited role in the appointments process. It furthers the notion that, under principles of separation of powers, the Framers intended the Executive Branch to be the primary arbiter of appointments and that the President must play the controlling hand in the process.

The writings of Thomas Jefferson and others also indicate a clear emphasis that the Framers put on the importance of separation of powers in the realm of the appointments process. Jefferson, who was Secretary of State at the time, wrote that "[t]he Constitution itself . . . gives the *nomination* . . . to the President, the *appointment* to him and the Senate jointly, [and] the *commissioning* to the President."[71] Thus, the Framers had the obvious intention of distinguishing between the President's and the Senate's roles in the process and specifically gave the President greater authority.

Chief Justice Marshall noted in *Marbury v. Madison* that both the nomination and appointment processes are "completely voluntary"

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69. *See id.* (stating that "one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment").

70. THE FEDERALIST NO. 66 (Alexander Hamilton) (Library of Congress) (emphasis omitted), https://guides.loc.gov/federalist-papers/text-61-70.

71. Thomas Jefferson, Jefferson's Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), *in* 16 THE PAPERS OF THOMAS JEFFERSON 378, 379 (Julian P. Boyd ed., 1961), https://founders.archives.gov/documents/Jefferson/01-16-02-0215. Jefferson and Hamilton, while frequently at odds with each other throughout their political careers, appeared to share common ground in this area of executive power and presidential appointments under Article II.

on the part of the President.[72] A primary concern of the Framers in this area "was to ensure accountability while avoiding tyranny. Hence, they gave the undiluted power of the nomination to the President so that the initiative of choice would be a single individual's responsibility[.]"[73] A more recent Supreme Court decision adequately summarizes the Framers' intentions in this area:

> The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political. Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch. The Appointments Clause not only guards against this encroachment but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.[74]

Thus, it is clear that the Framers intended for the President to be the primary decision maker with respect to appointing officers to the federal bureaucracy.[75] The FVRA, however, has proved to be a significant barrier to the Framers' intentions of having the President act as the primary authority in this area.

C. The Federal Vacancies Reform Act

The difficulties of the Senate confirmation process and the role of Article II in the appointments process demonstrate rising conflict in

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72. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 155 (1803). Marshall's statements in *Marbury* serve as an early example of Supreme Court precedent which evidences notions of separation of powers in the context of presidential appointments.

73. John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 639 (1993). In this article, the author makes particular note of another Framer's statements on the appointment power—Gouverneur Morris, who was "one of the [Constitutional] Convention's most outspoken advocates of executive prerogative and consolidated government." *Id.* at 640.

74. Freytag v. Comm'r, 501 U.S. 868, 878 (1991) (citing Mistretta v. United States, 488 U.S. 361, 382 (1989)).

75. See *supra* note 15 for discussion on the role of separation of powers principles and the relationship between the Senate and the Executive Branch in the area of nominations and appointments.

American government. Likewise, these difficulties also raise important questions concerning a flawed federal statute—the FVRA—and its role in the political dilemma described in Section II.A of this Note.[76] Although the Appointments Clause is ultimately the governing source of law in the area of presidential appointments, certain circumstances in American government have allowed Congress to intervene in the area of appointing temporary officers to Executive Branch positions. Most recently, Congress intervened in this area by enacting the Federal Vacancies Reform Act, which granted the President the authority to appoint Executive Branch officials to serve in acting roles until a permanent replacement can be nominated and confirmed.[77]

Congress enacted the FVRA in large measure to deal with post-Watergate abuses of the appointment process by the Executive Branch.[78] The Vacancies Act,[79] which was the FVRA's predecessor originally enacted in 1868, expanded the number of positions that a President could fill with acting officers, but "[w]ith that expansion came new constraints."[80] The Vacancies Act was passed with the intent to prevent the Executive Branch from evading the Senate confirmation process, and it limited Presidents by only allowing them to appoint first assistants or other Senate-confirmed officers as acting officers.[81] During the 1970s and 1980s, presidential administrations largely bypassed the Vacancies Act by allowing agencies to assign increasing power to subordinates within those agencies.[82] Disputes over interagency

76. *See supra* Section II.A.

77. Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349(d).

78. Brief for Morton Rosenberg as Amicus Curiae Supporting Plaintiffs' Motion for Preliminary Injunction, L.M.-M. v. Cuccinelli, 442 F.Supp.3d 1 (2020) (No. 1:19–cv–2676).

79. Act of July 23, 1868, ch. 227, 15 Stat. 168, 169.

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

81. Stayn, *supra* note 31, at 1516.

82. MORTON ROSENBERG, CONG. RESEARCH SERV., 98–892A, THE NEW VACANCIES ACT: CONGRESS ACTS TO PROTECT THE SENATE'S CONFIRMATION PREROGATIVE 2–3 (1998) ("[S]ince 1973, DOJ has taken the position that the Vacancies Act only 'provides one [possible] method for filling certain positions on an interim basis,' and that some departments and agencies, including DOJ, 'have statutory authority to assign duties and powers of positions on a temporary basis outside the Vacancies Act.'" (quoting MORTON ROSENBERG, CONG. RESEARCH SERV., VALIDITY OF DESIGNATION OF BILL LANN LEE AS ACTING ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS 9, 17 (1998) (alteration in original))).

appointments of temporary officers continued into the 1990s,[83] and those conflicts came to a culmination after President Clinton nominated Bill Lann Lee to head the Civil Rights Division of the Department of Justice.[84] Congress at that point realized the Vacancies Act needed to be revised.

By 1998, Congress had enacted the FVRA as a revision to the Vacancies Act to resolve the appointments disputes of the previous decades. The FVRA may be invoked where "an officer of an Executive agency . . . whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office. . . ."[85] The FVRA classifies three types of government officials that the President can nominate to serve as acting officers: (1) the first assistant to the vacant office; (2) any person serving in a different office requiring presidential appointment and Senate confirmation; and (3) a senior official within the same agency.[86] The FVRA also places a time limitation on how long acting officials may serve, stating that the acting officer may not serve for "longer than 210 days beginning on the date the vacancy occurs."[87]

Importantly, the FVRA prohibits any person who has been nominated to fill the vacant office permanently from serving as an acting officer if—during the year before the vacancy arose—that person did

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83. *Id.* at 4.

84. Brannon P. Denning, *Article II, the Vacancies Act and the Appointment of "Acting" Executive Branch Officials*, 76 WASH. U. L.Q. 1039 (1998). After nominating Lee in 1997, President Clinton received significant criticism from Republican senators due to concerns over Lee's positions on race-based preferences and affirmative action. *Id.* While Clinton briefly considered appointing Lee via a recess appointment, the President ultimately decided to appoint Lee as Acting Assistant Attorney General for Civil Rights. *Id.* When Senator Orrin Hatch voiced his concerns about Lee's appointment to the Department of Justice, the White House claimed that the Attorney General had "broad powers to fill any and all vacancies at the Department of Justice that . . . superseded the Vacancies Act and its statutory time limit." *Id.* at 1040.

85. 5 U.S.C. § 3345(a).

86. *Id.* §§ 3345(a)(1)–(3). Section 3345(a)(1), which states that the first assistant steps up to serve in the vacant position as an acting officer, is the default rule. The President is allowed to depart from this default rule, however, and appoint acting officers if they belong to the other two classes of individuals enumerated in subsections (2) and (3).

87. *Id.* § 3346(a)(1).

not serve in the position of first assistant to the office or only served in the position of first assistant to the office for less than 90 days.[88] In the context of the current political situation, this provision means that a President's nominee must wait for months—and in some cases a year or more—before being confirmed and may not serve in an acting role until the Senate moves on his or her nomination, unless that person meets the statutory requirements of subsection (b)(1)(A). As an example, when President Trump nominated Jeff Sessions to be United States Attorney General, Trump could *not* appoint Sessions as Acting Attorney General until Sessions was confirmed by the Senate because he was not a "first assistant" at the Department of Justice.[89] Thus, this provision has significant ramifications on the confirmation process of presidential nominees because it denies the President greater authority to appoint officers who were also nominated to their position permanently to an acting role until they are confirmed to the position by the Senate.

D. An In-Depth Look at the FVRA: NLRB v. SW General, Inc.

The United States Supreme Court most recently and thoroughly examined the FVRA in its 2017 decision in *NLRB v. SW General, Inc*.[90] Following the resignation of the General Counsel of the National Labor Relations Board ("NLRB"), President Obama appointed Lafe Solomon, a senior employee at the NLRB, to serve as Acting General

88. *Id.* § 3345(b)(1)(A)(ii).

89. As previously mentioned, the default rule is that a first assistant to the office may only be appointed under the FVRA, unless the individual meets one of the other exceptions in subsections (2) and (3). 5 U.S.C. § 3345(a)(1)–(3). Thus, in the hypothetical, Sessions could not be appointed as Acting Attorney General by the President because he does not fall into one of the three classes laid out by the statute. Notably, the United States District Court for the District of Columbia ruled that the Trump Administration had in fact violated the FVRA for this very same reason by appointing Ken Cuccinelli as Acting Director of the United States Citizenship and Immigration Services. L.M.-M. v. Cuccinelli, C.A. 442 F.Supp.3d 1, 25 (D.D.C. 2020) (concluding that because Cuccinelli was not a first assistant to the office and "did not hold another PAS position at the time of his designation and had not previously served as an officer or employee of the Department of Homeland Security," he was serving in violation of the FVRA).

90. 137 S. Ct. 929 (2017).

Counsel.[91] Six months later, President Obama nominated Solomon to be permanent General Counsel, but the Senate did not confirm him and instead confirmed a different nominee.[92] Thereafter, SW General asserted that Solomon was serving as Acting General Counsel in violation of subsection(b)(1) of the FVRA.[93]

With Chief Justice Roberts writing for the majority, the Court made two significant determinations. First, the Court concluded that Solomon was in fact serving as Acting General Counsel in violation of subsection (b)(1) because he was considered "a person who has been nominated for a vacant PAS office" and was, thus, prohibited from serving in an acting capacity.[94] Second, subsection (b)(1) of the FVRA applies equally to *both* first assistants (who assume the acting role automatically) and persons who are nominated by the President from the same or another agency (i.e., all other categories of officers under the FVRA).[95] The NLRB had previously contended that subsection (b)(1) should *only* apply to first assistants, which would mean that Solomon had properly served as Acting General Counsel.[96]

Dissenting, Justice Sotomayor made several key contentions, relying heavily on principles of statutory construction. Justice Sotomayor first contended on statutory construction grounds that the FVRA's limitations under section 3345(b)(1) only apply to first assistants under the interpretive canon of *expressio unius est exclusio alterius*.[97] That principle states that to express or include one thing in a series implies the exclusion of the others.[98] Justice Sotomayor noted that "the '[n]otwithstanding subsection (a)(1)' clause in the FVRA's limitation . . . singles out the category of first assistants as the sole

91. *Id.* at 937.

92. *Id.*

93. 5 U.S.C. §§ 3345(a)(1)–(3).

94. *SW General*, 137 S. Ct. at 943–44. The Court refers to any office that requires both presidential appointment and Senate confirmation as a "PAS office." *Id.* at 935.

95. *Id.*

96. *Id.* at 933.

97. *Id.* at 950 (Sotomayor, J. dissenting).

98. *Id.* at 940 (majority opinion).

target of that limitation."[99] Under that interpretive canon, the FVRA's limitation only applied to first assistants in Sotomayor's view.

Justice Sotomayor presented another argument that, under section 3345(b)(1), presidents began "violating the FVRA almost immediately after its enactment."[100] Further, she stated that the Senate's "silence in the face of a decade-plus practice of giving subsection (b)(1) a narrow reach casts serious doubt on the broader interpretation" of the FVRA.[101] Because the Executive Branch began violating this provision almost immediately with no congressional response,[102] Justice Sotomayor suggested that the FVRA should be construed narrowly and, in particular, that this provision should apply as it has been enforced: only to first assistants.[103]

III. ANALYSIS

American government undoubtedly faces severe challenges and partisan divisions in the area of presidential nominations. The FVRA on its face offers a President the ability to temporarily maneuver around such setbacks in the confirmation process by appointing "acting" officers until the nominee is confirmed.[104] However, given the current political environment, the FVRA presents significant limitations to executive power and the ability to fill vacancies. Specifically, the FVRA is flawed in three significant ways. First, the FVRA is unconstitutional because it violates the Faithful Execution Clause by impeding the President's abilities to appoint subordinates to see that the laws are faithfully executed. Second, the Act is unconstitutional on the grounds that

99. Leading Case, NLRB v. SW General, Inc., 131 HARV. L. REV. 353, 357 (2017) (citing *SW General*, 137 S. Ct. at 950 (Sotomayor, J. dissenting)).

100. *SW General*, 137 S. Ct. at 953 (Sotomayor, J. dissenting).

101. *Id.* at 954. Specifically, since the FVRA's enactment in 1998, "the Senate has received over 100 nominations of persons who continued to serve in an acting capacity after their nomination but had not satisfied the conditions in subsection (b)(1)." *Id.*

102. *See, e.g.*, 2B SUTHERLAND STATUTORY CONSTRUCTION § 49:9 (7th ed. 2010) (describing the doctrine of legislative inaction). The doctrine of legislative inaction is what Justice Sotomayor specifically describes here in her dissent. "Courts have found that legislative inaction following a contemporaneous and practical interpretation is evidence of an intent to adopt such interpretation." *Id.*

103. Leading Case, *supra* note 99, at 357.

104. 5 U.S.C. § 3345.

it violates separation of powers principles and goes against the legislative intent of the Framers of the Constitution. Finally, regardless of the FVRA's constitutionality, section 3345(b)(1) of the FVRA is still flawed because it poses a counterproductive and illogical statutory limitation. In light of its flaws, amending the FVRA to a form that is less restrictive on executive power would ultimately allow for an expedited process for confirming nominees with fewer partisan delays and setbacks.

A. The Faithful Execution Clause

In the area of presidential appointments, Article II guarantees executive power in certain realms of American government and is generally deferential to presidential authority. At the same time, however, the Constitution also inherently allows for the delegation of some of that authority to execute the laws through presidential appointments—as laid out in the Appointments Clause.[105] Under Article II Section 1, the Constitution broadly vests executive authority in the President of the United States.[106] Consequently, the Appointments Clause under Article II Section 2 permits individuals to be appointed by the President "with the Advice and Consent of the Senate . . . [as] Officers of the United States."[107] Such appointments under Article II also allow the president to fulfill his constitutional duty "to take Care that the Laws be *faithfully executed*."[108] The Framers' inclusion of the Faithful Execution Clause, therefore, indicates their understanding that the President himself cannot be reasonably expected to solely ensure that the laws are "faithfully executed"; rather, they understood that the appointment power could be used as a vehicle to allow the President to most efficiently execute the law.[109] Moreover, a restraint on the presidential ability to appoint officers is likewise a restraint on the President's abilities under the Faithful Execution Clause.

The FVRA unconstitutionally violates the Faithful Execution Clause by placing undue restrictions and burdens on the presidential authority to appoint "Officers of the United States" to vacant positions

105. U.S. CONST. art. II, § 2, cl. 2.
106. U.S. CONST. art. II, § 1, cl. 1.
107. U.S. CONST. art. II, § 2, cl. 2.
108. U.S. CONST. art. II, § 3 (emphasis added).
109. *See supra* notes 57–62 and accompanying text.

in government.[110] Because it is the President's constitutional obligation to see that the laws be faithfully executed, "the reasonable implication, even in the absence of express words, was that as part of his executive power *he should select* those who were to act for him under his direction in the execution of the laws."[111] The FVRA states that any person who has been nominated to fill the vacant office permanently is prohibited from serving as an acting officer if—during the year before the vacancy arose—that person did not serve in the position of first assistant to the office or served in the position of first assistant to the office for less than ninety days.[112] The language of the FVRA, given the current political climate, cannot reasonably coincide with the powers of the executive under Article II.

Section 3345(b)(1) of the FVRA conflicts textually with the language of the Faithful Execution Clause under Article II. The Appointments Clause makes clear that the President alone has the authority to *select* nominees to appoint to vacant offices,[113] and the Faithful Execution Clause furthers the importance and necessity of such executive power to appoint subordinates to help in the execution of laws.[114] Thus, because a portion of the President's role under Article II includes the delegation of authority to subordinate officers, and the present political situation frequently prevents the President's selected appointees from being confirmed due to partisan tactics in the Senate,[115] the President is unable to appoint his selection in an acting capacity under the current version of the FVRA.

By prohibiting a President from appointing the permanent nominee for a vacant office to be an acting officer for that same office, the FVRA in reality infringes on a President's ability to execute the laws

110. *See* Myers v. United States, 272 U.S. 52, 264–65 (1926) (Brandeis, J. dissenting) ("There is not a word in the Constitution which in terms authorizes Congress to limit the President's freedom of choice in making nominations for executive offices.").

111. *Myers*, 272 U.S. at 117 (emphasis added).

112. *See* 5 U.S.C. § 3345(b)(1).

113. *See* U.S. CONST. art. II, § 2, cl. 2. (stating that the President alone "shall have the power . . . [to] appoint . . . Officers of the United States.").

114. *See* U.S. CONST. art. II, § 3 (stating that the President "shall take Care that the Laws be faithfully executed, *and shall Commission* all the Officers of the United States" (emphasis added)).

115. *See supra* Section II.A.

through subordinates pursuant to the Appointments and Faithful Execution Clauses.[116] By allowing the Senate to prevent the President from having his nominee confirmed or even appointed to the position in an acting capacity, the FVRA unconstitutionally infringes on the President's constitutional mandate to see that the laws are faithfully executed.

B. The FVRA and Separation of Powers Principles

The legislative intent of the Framers of the Constitution—specifically regarding principles of separation of powers—indicates that they intended to bestow clear deference and extensive authority to the President in the area of presidential appointments.[117] With respect to the appointment process and the role of the Legislative and Executive Branches, the Framers clearly suggested that the President was intended to be the controlling force in the process with the Senate serving a lesser role.[118] Thus, any law that poses a limitation on the presidential appointment power is also unconstitutionally violative of separation of powers principles and the intentions of the Framers in that area.

The FVRA cannot be reasonably construed as consistent with separation of powers principles and the language of the Framers concerning this issue. Although the Senate is tasked with its Advice and Consent role,[119] the President should still be given wide discretion and deference in utilizing his appointment power—as granted under Article II and explained by the writings of the Framers.[120] Ultimately, the Senate should only use its Advice and Consent role in circumstances where, as Hamilton described, the nominee is exceptional in nature, meaning he or she is one "of unfit character[] from State prejudice, from family connection, from personal attachment, or from a view to popularity."[121] Where there is an "exertion of choice on the part of the

116. *See* 5 U.S.C. § 3345(b)(1) (limiting the individuals that a President may appoint to serve as an acting officer).

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

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

119. U.S. CONST. art. II, § 2, cl. 2.

120. *See supra* notes 69–71 and accompanying text.

121. THE FEDERALIST NO. 76 (Alexander Hamilton) (Library of Congress) (emphasis omitted), https://guides.loc.gov/federalist-papers/text-71-80.

Senate,"[122] there should be a facilitated process for the President to fill vacancies with acting officers of his choice until the Senate chooses to act on that nominee. However, the current version of the FVRA poses a limitation on the Framers' intent to have the Executive Branch be the primary arbiter of appointments pursuant to separation of powers principles by prohibiting certain nominees from serving in an acting capacity until they are confirmed pursuant to the provisions of section 3345(b)(1).[123]

Section 3345(b)(1) runs contrary to the importance of the notion of separate branches of government that the Framers emphasized so heavily.[124] A provision that effectively limits a President's choice of nominees is unconstitutional pursuant to these principles. The Framers "gave the undiluted power of the nomination to the President so that the initiative of choice would be a single individual's responsibility," and any law or provision that conflicts with their intentions is invalid under these principles.[125] Rather, if the FVRA allowed the President to appoint the permanent nominee to the position to an acting capacity until he or she is confirmed, the law would then further the intentions and desires of the Framers in terms of maintaining separate branches of government. In its current form, the FVRA severely limits the presidential appointment power as intended by the Framers and, therefore, is unconstitutional in violation of separation of powers.

C. Impracticality of the FVRA

Aside from arguments of constitutionality, the FVRA is also illogical and impractical. In light of the current challenges with nominations in the Senate, an evaluation of the FVRA from a practical point of view is useful. Recent Supreme Court doctrine—specifically articulated through Justice Sotomayor's dissent—provides instructive legal analysis of the FVRA's challenges, particularly those of section 3345(b)(1) and its application.[126] Even aside from Justice Sotomayor's

122. THE FEDERALIST NO. 66 (Alexander Hamilton) (Library of Congress), https://guides.loc.gov/federalist-papers/text-61-70.

123. *See* 5 U.S.C. § 3345(b)(1).

124. *See, e.g.*, Jefferson, *supra* note 71, at 378–79.

125. McGinnis, *supra* note 73, at 639.

126. NLRB v. SW Gen., Inc., 137 S. Ct. 929, 949–54 (2017) (Sotomayor, J., dissenting).

insight in *SW General*,[127] the FVRA on its face is still an arbitrary statutory limitation that poses substantial concerns and restrictions on Article II authority.

In its 2017 decision, the United States Supreme Court in *NLRB v. SW General, Inc.* considered the validity of President Obama's appointment of Lafe Solomon to be Acting General Counsel to the NLRB.[128] Per Chief Justice Roberts, the Court determined first that Solomon's serving as Acting General Counsel violated subsection (b)(1) because he was considered "a person who has been nominated for a vacant PAS office" and therefore was barred from serving in the acting role.[129] The Court also ruled that the limitations prescribed under subsection (b)(1) of the FVRA applies equally to both first assistants, who assume the role as a default rule, and individuals from the same or another agency who are nominated by the President, which includes all other categories of officers under the FVRA.[130] In her dissent in *SW General*, Justice Sotomayor made several arguments—both from a statutory construction perspective and from a practical perspective—that subsection (b)(1) of the FVRA should be applied narrowly and that the provision applies only to "first assistants."[131]

Building on Justice Sotomayor's commentary on subsection (b)(1), the FVRA on its face poses an arbitrary statutory limitation under subsection (b)(1). It is illogical to prohibit a person who is nominated by the president to be the permanent nominee to the vacant position from also serving in an acting capacity until they are confirmed where they have been previously confirmed by the Senate to another position. It logically follows that a nominee who has already been confirmed once by the Senate would be acceptable to serve in an acting role as well. Even in circumstances where the nominee has not been confirmed by the Senate, it is still within a president's prerogative to nominate that person to serve in an acting capacity until he or she is confirmed. Therefore, subsection (b)(1) arbitrarily limits the president's authority as vested under Article II and ultimately slows the process of confirmation in the Senate significantly.

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127. *See supra* notes 97–103 and accompanying text.

128. 137 S. Ct. 929, 937 (2017); *see supra* Section II.D.

129. *SW General*, 137 S. Ct. at 943–44; *see supra* Section 11.D.

130. *SW General*, 137 S. Ct. at 935.

131. *See supra* Section II.D.

D. Solutions

The constitutional and practical challenges that the Federal Vacancies Reform Act presents are substantially related to the problems that the current administration and past presidencies have dealt with in the context of the appointment process and Senate delays. Past administrations have attempted to utilize the controversial vehicle of recess appointments,[132] which occur when the Senate is out of session, in order to fill vacant offices with nominees.[133] However, the use of recess appointments is by no means the best avenue of recourse in this area. On the contrary, amending the FVRA is the best manner to remedy nominations process and could produce the crucially needed political change that is required in the Senate.

Congress must now take the necessary steps to amend the FVRA. Before the Senate can take any of the actions on a nomination described in Section II.A, the nomination must first be reported out of committee favorably.[134] In other words, the "appropriate committee" of jurisdiction must hold a confirmation hearing for that nominee, and a majority of committee members must vote to advance the nomination to a full Senate vote.[135] Only after the committee has reported a nomination favorably do the issues presented in Section II.A arise.

Rather than prohibiting an individual who has been nominated to the vacant position permanently from serving in an acting capacity unless they meet the necessary requirements of a "first assistant,"[136] the FVRA should be amended to authorize the President to appoint any individual who has been nominated to the vacant position permanently to serve in an acting capacity, so long as that individual has been reported out of committee favorably. This amendment would alleviate the Faithful Execution Clause violations that the FVRA in its current form presents by giving the President greater flexibility in appointing subordinates *of his choice*, thus ensuring the faithful execution of the laws in accordance with the President's goals.[137] The amendment

132. *See supra* note 29.

133. *See* Stephenson, *supra* note 21, at 945.

134. STANDING RULES OF THE SENATE XXXI, S. DOC. NO. 113–18, at 44 (2013).

135. *Id.*

136. 5 U.S.C. § 3345(b)(1).

137. *See supra* Section III.A. This amendment would further the notion that—as Justice Brandeis stated in his dissent in *Myers*—Congress should not pass any law

would also resolve the problem that Justice Sotomayor noted in *SW General* by eliminating the "first assistant" distinction altogether in this context.[138] Finally, the amendment would also be consistent with separation of powers principles because it would give the President primary discretion in appointing acting officers while still requiring that the Senate exercise its Advice and Consent role by requiring that the individual be reported out of committee first.[139]

In the broader political context, addressing these problems that the FVRA presents would have two beneficial implications. First, by amending the FVRA to include a greater class of nominees that may be appointed acting officers until they are confirmed to the position permanently, the President would have a means of implementing more acting officers to his or her government where there are obstructive behavior and delay tactics in the Senate. This is a particularly important implication because, regardless of which political party controls the Executive Branch going forward, Senate obstructionism will likely remain given the increasingly heated divide between the parties.[140] Second, amending the FVRA would allow for substantially more clarity in this confused area of government functionality. The FVRA was initially enacted in part to remedy political divisions experienced under the Clinton administration surrounding the appointment of acting officers.[141] However, Congress's passage of the Act ultimately created more problems than solutions. Addressing these various problems with the FVRA would be a useful first step in providing clarity in the area of presidential nominations.

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that seeks "to limit the President's freedom of choice in making nominations for executive offices." 272 U.S. 52, 264–65 (1926) (Brandeis, J., dissenting).

138. *See supra* Section II.D. In *SW General*, Justice Sotomayor's main disagreement with the majority opinion involved whether the FVRA's limitations outlined in § 3345(b)(1) should apply only to first assistants. 137 S. Ct. 929, 950 (2017) (Sotomayor, J., dissenting).

139. In particular, by first requiring that the Senate committee vote to advance the nominee to a full Senate vote, this amendment would avoid "the danger of one branch's aggrandizing its power at the expense of another branch." Freytag v. Comm'r, 501 U.S. 868, 878 (1991). It would also allow the Senate to exercise its Advice and Consent role under Article II while still giving the President the ability to make his own choice.

140. *See supra* Section II.A.

141. *See supra* notes 22–24.

IV. CONCLUSION

The United States government faces significant partisan divisions, and the increasingly polarized confirmation process is only a microcosm of the divisions that exist throughout the nation. While it was enacted with the goal of alleviating tensions in the appointments process, the FVRA in its current form poses serious underlying constitutional violations that are overly restrictive and run counter to Article II and the Framers' intentions. It is clear that, through slight reform of the FVRA, Congress may remedy these concerns and finally allow the Executive Branch to faithfully execute the laws as the Framers intended.