IN DEFENSE OF "ACTINGS"

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I.
INTRODUCTION

Two years into his first administration, President Donald Trump forced Attorney General Jeff Sessions out of office.[1] At the time, sources differed on the proper characterization of the change in personnel—was Sessions fired, or did President Trump merely request his resignation?[2] In the end, the distinction probably would not have

* J.D. 2024, New York University School of Law; A.B. 2018, Brown University. I am indebted to the guidance of Emma Kaufman, Noah Rosenblum, Barry Friedman, and all the participants in the Furman Academic Scholars Program in the conception of this Note. I would also like to thank the staff of the Annual Survey for shepherding me through the production process.

1. Peter Baker, Katie Benner & Michael D. Shear, *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. Times (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html [https://perma.cc/2SVW-AD93].

2. *Compare Trump Fires Attorney General Jeff Sessions*, BBC (Nov. 8, 2018), https://www.bbc.com/news/world-us-canada-46132348 [https://perma.cc/LG42-AG6S] (stating "US Attorney General Jeff Sessions has been fired by President Donald

made a difference,[3] and whether a requested resignation amounts to a firing is a semantic game that need not be resolved now. At any rate, Trump had long complained about Sessions' decision to recuse himself from the Mueller investigation,[4] and the forced resignation (or firing) immediately drew comparisons to the infamous "Saturday Night Massacre" under Richard Nixon.[5] Once again—it at least appeared—a corrupt President had tried to influence an investigation into their campaign activities.

The circumstances of Sessions' departure also thrust the relatively obscure acting officials into the spotlight. Instead of letting Deputy Attorney General Rod Rosenstein perform the duties of the now-vacant office, Trump tapped Matthew Whitaker, a career employee and Sessions' chief of staff, to serve as the acting Attorney General.[6] The appointment immediately engendered controversy, with critics calling it unconstitutional and the Department of Justice stepping up to defend the President.[7] Eventually, Trump nominated and the Senate confirmed William Barr for the vacancy, but Whitaker

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Trump"), *with* Devlin Barrett, Matt Zapotosky & Josh Dawsey, *Jeff Sessions Forced Out as Attorney General*, Wash. Post (Nov. 7, 2018, 7:01 PM), https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-resigns-at-trumps-request/2018/11/07/d1b7a214-e144-11e8-ab2c-b31dcd53ca6b_story.html [https://perma.cc/4WWT-KG23] (stating "Attorney General Jeff Sessions resigned"). The New York Times alternated between saying Trump "fired" Sessions and that Sessions "delivered his resignation letter to the White House." Baker et al., *supra* note 1.

3. Contemporary OLC guidance stated that the legal effect would have been the same whether or not Sessions had resigned. *See* Designating an Acting Att'y Gen., 42 Op. O.L.C., slip op. at 4 n.1 (Nov. 14, 2018) [hereinafter Acting Att'y Gen.], https://www.justice.gov/olc/file/2018-11-14-acting-ag/dl [https://perma.cc/FT7F-S7JB].

4. Julia Ainsley, *President Trump Has Replaced Sessions. Here's What That Means for the Mueller Probe.*, NBC News (Nov. 7, 2018, 5:03 PM), https://www.nbcnews.com/politics/justice-department/president-trump-has-replaced-ag-sessions-here-s-what-means-n933676 [https://perma.cc/S8EA-EXRA].

5. Walter M. Shaub, Jr., *This Is the Saturday Night Massacre*, Slate (Nov. 14, 2018, 3:55 PM), https://slate.com/news-and-politics/2018/11/jeff-sessions-firing-saturday-night-massacre-matthew-whitaker.html [https://perma.cc/73M3-WADQ].

6. Baker et al., *supra* note 1.

7. *See, e.g.*, Neal K. Katyal & George T. Conway III, Opinion, *Trump's Appointment of the Acting Attorney General Is Unconstitutional*, N.Y. Times (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/opinion/trump-attorney-general-sessions-unconstitutional.html [https://perma.cc/C28Y-VPBB]; Will Baude, *Who Is Lawfully the Attorney General Right Now?*, Reason: The Volokh Conspiracy (Nov. 10, 2018, 3:48 PM), https://reason.com/volokh/2018/11/10/who-is-lawfully-the-attorney-general-rig/ [https://perma.cc/4GLV-K47S]; Charlie Savage, *Justice Dept. Defends Legality of Trump's Appointment of Acting Attorney General*, N.Y. Times (Nov. 14, 2018), https://www.nytimes.com/2018/11/14/us/politics/matthew-whitaker-justice-dept-trump.html [https://perma.cc/D8RU-HEB9]. Justice Department officials argued that

performed the extensive duties of Attorney General for over three months.[8]

Whitaker's tenure as Attorney General was far from the only acting official-related controversy during the first Trump Administration. At one point—shortly after the Sessions saga—"the Departments of Defense and Interior, the Environmental Protection Agency (EPA), and the Social Security Administration (SSA) were all" led by interim, unconfirmed officials.[9] A vacancy in the Consumer Financial Protection Bureau a year earlier resulted in two competing acting directors, only one of whom was tapped by the President, who each claimed to be the rightful leader of the agency.[10] Later in 2019, due to opposition from Republican Senators, President Trump appointed former Virginia Attorney General Ken Cuccinelli to a newly created position in the Department of Homeland Security so that he could serve as acting Director of U.S. Citizenship and Immigration Services (USCIS).[11] And the list goes on.[12]

The sheer volume of Trump-era controversies surrounding acting officials attracted particular notoriety, but his administration's use of acting officials was hardly without precedent. "President Obama . . . submitted far fewer agency nominations in his final two years than other recent two-term Presidents, turning instead to acting leaders and delegated authority in many important agency positions."[13] To name just one example: after the director of the Bureau of Alcohol, Tobacco, Firearms and Explosives stepped down in 2015, President Obama studiously avoided submitting a nominee to fill the vacancy. As a result, an unconfirmed career deputy led the agency

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the appointment complied with the terms of the Federal Vacancies Reform Act (FVRA) and the Appointments Clause. *See* Acting Att'y Gen., *supra* note 3, at 1.

8. David Shortell, *William Barr Confirmed as Attorney General*, CNN (Feb. 14, 2019, 1:44 PM), https://www.cnn.com/2019/02/14/politics/william-barr-senate-confirmation-vote/index.html [https://perma.cc/9JM5-SUYU].

9. Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 Admin. L. Rev. 533, 535–36 (2020).

10. Katie Rogers, *2 Bosses Show Up to Lead the Consumer Financial Protection Bureau*, N.Y. Times (Nov. 27, 2017), https://www.nytimes.com/2017/11/27/us/politics/cfpb-leandra-english-mulvaney.html [https://perma.cc/XV52-CELN].

11. Ted Hesson, *Cuccinelli Starts as Acting Immigration Official Despite GOP Opposition*, Politico (June 10, 2019, 2:59 PM), https://www.politico.com/story/2019/06/10/cuccinelli-acting-uscis-director-1520304 [https://perma.cc/6S75-K5KV].

12. *See, e.g.*, Aaron Blake, *Trump's Government Full of Temps*, Wash. Post (Feb. 21, 2020, 6:30 AM), https://www.washingtonpost.com/politics/2020/02/21/trump-has-had-an-acting-official-cabinet-level-job-1-out-every-9-days [https://perma.cc/5D8D-A4FB].

13. Anne Joseph O'Connell, *Actings*, 120 Colum. L. Rev. 613, 623 (2020).

for four years.[14] Trump's affection for his "actings" may have garnered the most headlines, but he was by no means the first President to rely on temporary leadership.

The increasing awareness of the pervasiveness of acting officials—and their potential for abuse—has spurred more scholarly engagement with the phenomenon. Commentators have focused on how the President can leverage these temporary appointments to evade the Senate confirmation process.[15] The few commentators have generally questioned whether the appointment of acting officials—at least for some high-level positions—is unconstitutional.[16] Some critics of the Trump-era reliance on acting officials labeled the practice antidemocratic,[17] and limitations on acting service were included as one element of the proposed Protecting Our Democracy Act during the 117th Congress.[18] Scholars and several Supreme Court Justices have characterized the Senate confirmation process as an essential safeguard,[19] implicitly arguing that any attempt to

14. *Id.* at 635.

15. *See id.* at 667 (describing how acting officials can "operate[] as a workaround to the constitutionally prescribed process that splits authority between the two political branches"); Mendelson, *supra* note 9, at 541–42 (cataloging similar concerns).

16. *See, e.g.*, Baude, *supra* note 7; Katyal & Conway, *supra* note 7; Joshua L. Stayn, Note, *Vacant Reform: Why the Federal Vacancies Reform Act of 1998 Is Unconstitutional*, 50 Duke L.J. 1511, 1513 (2001); Brannon P. Denning, *Article II, the Vacancies Act and the Appointment of "Acting" Executive Branch Officials*, 76 Wash. U. L.Q. 1039, 1040–41 (1998); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1514–17 (2005) (defending the appointment of acting officials as "deriv[ing] from [Congress's] constitutional authority to define the duties of the offices it creates"); E. Garrett West, Note, *Congressional Power over Office Creation*, 128 Yale L.J. 166, 210 (2018) (presenting a similar defense of Congress's authority to provide for the appointment of acting officials).

17. *See, e.g.*, Nicholas Bornstein, *Unconfirmed and Unaccountable: Trump's Embrace of Acting Agency Heads Erodes Democracy*, Democratic Erosion Consortium (Feb. 13, 2019), https://www.democratic-erosion.com/2019/02/13/unconfirmed-and-unaccountable-trumps-embrace-of-acting-agency-heads-erodes-democracy-by-nicholas-bornstein/ [https://perma.cc/A4JJ-ETJD] ("Allowing these acting officials to serve for extended periods erodes American democracy . . . .").

18. H.R. 5314, 117th Cong. §§ 901–02 (2021).

19. *See, e.g.*, David M. Driesen, *Appointment and Removal*, 74 Admin. L. Rev. 421, 469 (2022) ("[T]he Framers recognized that concentrating too much control over officials in the President could lead to the establishment of an autocracy . . . ."); Denning, *supra* note 16, at 1041 ("By involving the Senate in the appointment of executive and judicial officers, the Framers intended to provide a check on the power of the Executive."); NLRB v. Noel Canning, 573 U.S. 513, 570, 578–79 (2014) (Scalia, J., concurring) (describing Senate confirmation as a protection against despotism); NLRB v. SW Gen., Inc., 580 U.S. 288, 317 (2017) (Thomas, J., concurring) (arguing the Framers "recognized the serious risk for abuse and corruption posed by permitting one person to fill every office").

circumvent the process—using acting officials or otherwise—raises grave concerns for our constitutional order.

Relatively underdiscussed in the literature is the impact of acting officials on democracy, a consideration that could help inform a more functional evaluation of the phenomenon. Professor Anne Joseph O'Connell, probably the foremost expert on acting officials, has argued that in terms of accountability, "acting officials are hard to defend."[20] However, the fact that acting officials are less accountable *to the Senate* does not mean they are less accountable *to the public*. Professor Nina A. Mendelson, in another extensive analysis of acting officials, allows that acting officials could increase the accountability of the executive branch.[21] Mendelson, however, ultimately equivocates, concluding that "[b]ypassing confirmation has conflicting effects on . . . democratic responsiveness" since it depreciates "the substantial democratic contribution of the Senate."[22]

These critiques take the Senate's supposed "substantial democratic contribution" for granted, a stance that seems more grounded in an idealistic vision of American governance than in contemporary political realities. This Note posits that in many circumstances, acting officials increase the responsiveness and democratic accountability of the executive branch, a lesson that counsels against increasing the Senate's power in this area. In an extreme scenario of democratic breakdown, actings could ensure the President's ability to vindicate their democratic mandate without unnecessarily centralizing the activities of the administrative state under the executive's personal control. Furthermore, the case of acting officials suggests that the appointment process is the best way for the President to bring their democratic bona fides to bear on the machinery of government and that supporting expansive presidential power in this area does not require embracing the imperial presidency in its most extreme form.

The realities of modern government make it difficult to imagine a world where acting officials are no longer part of the presidential toolbox. The proliferation of Senate-confirmed positions and the growing size of the bureaucracy make it impossible to fill every vacancy expediently, especially when a presidential election necessitates a turnover in the political oversight of the executive branch. Moreover, with rising partisan polarization and the increasing unrepresentativeness of our political institutions, acting officials could

20. O'Connell, *supra* note 13, at 701.

21. *See* Mendelson, *supra* note 9, at 591 ("[O]fficials may operate the agencies more consistently with presidential preferences and, presumably, with public preferences expressed in the electoral process.").

22. *Id.* at 591–92.

also serve as a potential safety valve in the event of an intractable interbranch standoff.

Reformers ignore these possibilities at their peril. Although it is understandable that commentators have coalesced around proposals designed to crack down on the use of acting officials, given the recency bias engendered by Trump-era controversies, there are tradeoffs in both directions. Blithe assumptions about the Senate's supposed democratic pedigree should not go unexamined. The ill effects of Senate malapportionment and partisan gerrymandering mean that we do not live in a perfect democracy with perfectly functioning institutions—we have to take our politics as they come, at least in the short term. A more nuanced consideration of acting official's democratic imprimatur counsels for a more flexible approach. This is not to say, of course, that the Senate confirmation process serves no purpose whatsoever, just that it is not at all clear that it furthers the cause of democratic accountability.

The argument proceeds as follows: Part II examines the rise of "actings," detailing the history of their use and describing the Federal Vacancies Reform Act (FVRA), the current vacancies statute that applies to most executive branch offices. The Part will conclude by examining some of the controversies associated with the FVRA. Part III discusses the permissibility of acting officials from the standpoint of democracy, developing a more nuanced description of American democracy to help shed light on the proper balance of Senate and presidential power in this area before considering the possibilities of Senate recalcitrance and extreme partisan polarization. Considering this analysis, Part IV offers a few recommendations about proposed reforms to the FVRA and concludes by discussing the unitary executive theory in light of the connection between acting officials, democratic accountability, and presidential appointments more broadly.

II.
THE RISE OF ACTINGS

For all the recent consternation it has engendered, the phenomenon of actings is almost as old as the Republic itself.[23] Congress first addressed the subject during George Washington's presidency,

23. *See* O'Connell, *supra* note 13, at 625; Valerie C. Brannon, Cong. Rsch. Serv., R44997, The Vacancies Act: A Legal Overview 1 (14th ver. 2022) ("Congress has long provided that individuals who were not appointed to that office may *temporarily* perform the functions of that office."); Doolin Sec. Sav. Bank v. Off. of Thrift Supervision, 139 F.3d 203, 209–10 (D.C. Cir. 1998) (offering a history of acting officials since 1792).

enacting a statute in 1792 that allowed the President to direct "any person or persons" to perform the duties of vacant offices in the early executive departments.[24] Deployment of acting officials was hardly uncommon during the first few decades of American political life—a recent opinion by the Department of Justice's Office of Legal Counsel cataloged over 160 instances prior to 1860 in which non-Senate-confirmed functionaries assumed the duties of important executive branch offices.[25] A post-Civil War statute, for the first time, limited the permissible pool of acting officeholders[26] and was amended at various points until the last major overhaul in 1998.[27] While the history of vacancies statutes suggests some tension between Congress and the President as to the acceptability of acting officials,[28] the remarkable consistency of the practice indicates long-standing interbranch acquiescence to their use, at least as a general principle.[29]

A. The FVRA

The push-and-pull between Congress and the President with respect to acting officials culminated in the passage of the current vacancies statute: the FVRA. The statute governs the appointment of acting officials to most of the approximately 900 executive branch offices that require Senate confirmation,[30] the so-called "PAS

24. Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281 (repealed 1868). *See also Doolin*, 139 F.3d at 209–10 (discussing the circumstances surrounding the passage of the 1792 statute).

25. Acting Att'y Gen., *supra* note 3, at 2.

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

27. Christopher D. Johnson, Note, *Too Much "Acting," Not Enough Confirming: The Constitutional Imbalance Between the President and Senate Under the Federal Vacancies Reform Act*, 105 Cornell L. Rev. 2023, 2028 (2020); O'Connell, *supra* note 13, at 625–26.

28. *See* NLRB v. SW Gen., Inc., 580 U.S. 288, 294 (2017) ("During the 1970s and 1980s, interbranch conflict arose over the [then-current] Vacancies Act.").

29. *See id.* at 293 (recognizing that "Congress has long accounted for" vacancies in positions that normally require Senate confirmation).

30. By last official count, there are 936 such offices. S. Comm. on Homeland Sec. & Governmental Affs., 118th Cong., United States Government Policy & Supporting Positions, app. at 212 (Comm. Print 2024). In addition to the FVRA, a number of agencies have their own succession statutes that provide for specific procedures. *See* O'Connell, *supra* note 13, at 636. The FVRA is supposed to be the "exclusive means" of designating acting officials, unless an agency-specific statute "expressly" displaces it. 5 U.S.C. § 3347(a). The existence of an alternate statute, however, does not mean that the President cannot use the FVRA, and there is some controversy about the interaction between the FVRA and agency succession statutes. *See* Brannon, *supra* note 23, at 20–25.

positions."[31] Originally enacted in response to "perceived massive noncompliance" with earlier statutes, the FVRA further expanded the pool of potential acting officials while imposing harsher penalties for noncompliance.[32] The FVRA comes into play when an officer in a PAS position "dies, resigns, or is otherwise unable to perform the functions and duties of the office."[33] In the event of such a vacancy, the statute identifies three different methods of filling it temporarily, subject to the President's discretion.[34]

The first and default option is for the "first assistant" to the vacant office to step in and assume its duties.[35] In this scenario, the FVRA functions automatically, without any intervention by the President or another executive branch official, and the Supreme Court has described it as the "default rule."[36] However, the simplicity of this first provision is somewhat misleading since the FVRA does not define what counts as a "first assistant," and other statutes or regulations do not always designate a "first assistant" for a given PAS office.[37] As such, the identity of the "first assistant" for a given position is sometimes subject to debate.[38]

As an alternative to the default rule, the FVRA allows "the President (and only the President)"[39] to designate someone from two other categories of officials to take on the acting role. The first option is to pick an officer who already holds a PAS position to temporarily fulfill the vacancy.[40] A recent example occurred when President Trump tapped Mick Mulvaney, the Senate-confirmed Director of the Office of Management and Budget, to serve as the acting head of the

31. *SW Gen.*, 580 U.S. at 292 (describing this commonly accepted terminology). The FVRA does not apply to any agency headed by a multimember leadership team and exempts government corporations, Article I courts, and the Government Accountability Office. O'Connell, *supra* note 13, at 627. This does not mean that these entities have no access to temporary leadership—they may be governed by specific succession statutes or provisions that allow prior officeholders to remain in power until a successor is confirmed. *Id.* at 627 n.64.

32. O'Connell, *supra* note 13, at 626.

33. 5 U.S.C. § 3345(a).

34. § 3345(a)(1)–(3). For additional summaries of the FVRA's provisions, *see generally* O'Connell, *supra* note 13, at 625–36; Johnson, *supra* note 27, at 2028–34; Mendelson, *supra* note 9, at 548–53.

35. § 3345(a)(1).

36. *SW Gen.*, 580 U.S. at 293.

37. Brannon, *supra* note 23, at 10–11.

38. *Id.*

39. § 3345(a)(2)–(3). The quoted language is identical in both subsections.

40. § 3345(a)(2).

Consumer Financial Protection Bureau.[41] There is no requirement that the acting official come from the same agency as the vacancy, although that is typically the case.[42]

Second, the President may designate another "officer or employee" to serve in the acting capacity, so long as they have worked in the agency for at least ninety days during the year prior to the vacancy and they are paid at the GS-15 level or above.[43] Officials drawn from this pool of potential actings may be career civil servants or political appointees,[44] but in each case, they perform the duties of a PAS position without ever having obtained Senate confirmation.[45] Crucially for the purpose of this Note, Presidents disproportionately rely on this last method of filling vacancies at the beginning of an administration, "when there are few first assistants and confirmed officials."[46] In these cases, the operation of the FVRA represents the clearest conflict between the respective constitutional roles of the Senate and the President when it comes to staffing an administration since the Senate will have had no opportunity to evaluate an official who is performing the duties of a Senate-confirmed post.

In addition to identifying the candidate pools for acting officers, the FVRA imposes time limits on their tenure.[47] Actings may serve "for no longer than 210 days beginning on the date the vacancy occurs;"[48] for vacancies at the beginning of an administration, the period is extended to 300 days.[49] In the event the President makes a nomination for the vacant position, then the acting can remain in the role during the pendency of the nomination; if the Senate rejects the nomination or it is withdrawn, then a second 210-day clock starts running at that time.[50] As others have noted,[51] these time limits are hardly a significant restriction on the President's deployment of

41. Victoria Guida, *Trump Taps Mulvaney to Head CFPB, Sparking Confusion Over Agency's Leadership*, Politico (Nov. 24, 2017, 4:45 PM), https://www.politico.com/story/2017/11/24/richard-cordray-successor-cfpb-leandra-english-259612 [https://perma.cc/EQ34-KCAT].

42. *See* O'Connell, *supra* note 13, at 629.

43. § 3345(a)(3).

44. *See* O'Connell, *supra* note 13, at 648.

45. *See* Johnson, *supra* note 27, at 2031 (observing that the third FVRA process "doubles as a largely unobstructed path for the President to evade the constitutional prescription that the Senate confirm Executive Branch nominees").

46. O'Connell, *supra* note 13, at 629.

47. § 3346.

48. § 3346(a)(1).

49. § 3349a(b).

50. § 3346(a)(2)–(b)(1).

51. *See, e.g.*, Johnson, *supra* note 27, at 2032 (describing the FVRA's time limits as "eminently lenient"); Mendelson, *supra* note 9, at 549 (arguing the FVRA

acting officials and are more generous than previous iterations of the vacancies statute.[52] Moreover, the interaction between the typical time limit and the one applicable when there's a pending nomination means that an acting official could effectively serve for over two years.[53] The tenure of an acting official has, at times, rivaled or even surpassed that of their Senate-confirmed counterparts.[54]

In exchange for these longer tenures, the FVRA imposes stronger limits on acting officials than previous statutes, a tradeoff that likely motivated the legislation.[55] While the Act itself doesn't provide a mechanism to remove an acting official once the time limits are exceeded,[56] it specifies that certain actions performed by noncompliant officers shall have "no force or effect."[57] Injured parties, however, must sue to strike down any such actions, and there have been few reported cases that cite this section of the statute.[58] Equitable doctrines like the de facto officer doctrine may, in practice, render this enforcement mechanism "much more porous than generally believed."[59]

Acting officials, while prominent, are not the end of the story when it comes to executive branch vacancies. Despite ostensible restrictions in the FVRA, "many functions and duties are regularly delegated to lower-level officials when vacancies arise, particularly after the Act's time limits for acting service have expired."[60] This workaround has allowed the same official to continue performing

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gives "substantial flexibility" to Presidents due to, in part, the "long" time periods); O'Connell, *supra* note 13, at 630.

52. *Compare* 5 U.S.C. § 3346 (providing for a 210-day limit), *with* Act of July 23, 1868, ch. 227, § 3, 15 Stat. 168, 168 (10-day limit), *and* Act of Feb. 6, 1891, ch. 113, 26 Stat. 733 (30-day limit).

53. O'Connell, *supra* note 13, at 630–31. An acting official could serve the default 210-day period, during the pendency of a nomination, a second 210-day period, during the pendency of a second nomination, and then for a final 210-day period. *Id.*

54. *See, e.g.*, *id.* at 650 tbl.7 (showing that the tenure of some acting EPA officials was longer than that of confirmed officeholders occupying the same position).

55. *See id.* at 632 ("The Act thus offered something to both the White House (longer time limits) and Congress (harsh penalties once they expired).").

56. *See* Brannon, *supra* note 23, at 15–16.

57. 5 U.S.C. § 3348(d)(1).

58. *See* O'Connell, *supra* note 13, at 632.

59. Taylor Nicolas, Note, *Modern Vacancies, Ancient Remedy: How the De Facto Officer Doctrine Applies to Vacancies Act Violations (And How It Should)*, 74 Stan. L. Rev. 687, 692 (2022).

60. O'Connell, *supra* note 13, at 634. Although the FVRA purports to prevent the delegation of an office's exclusive duties, "[m]ost, and in many cases all, the responsibilities performed by a [Senate-confirmed] officer will not be exclusive, and the Act permits non-exclusive responsibilities to be delegated to other appropriate

the duties of a vacant office, even after the FVRA time limits have expired.[61] In the lower ranks of the federal bureaucracy, the duties of vacant positions are likely delegated twice as often as those performed by an acting official.[62]

B. Quantifying the Phenomenon

The Trump Administration, as discussed, attracted considerable attention for its reliance on actings,[63] but the Obama and Bush Administrations faced similar criticism.[64] Most observers expected the Biden Administration to employ the tool,[65] a prediction that has been vindicated. At the time of this writing, many key positions in the executive branch remain unfilled, even though President Biden's first term is over halfway done.[66] In the summer of 2023, administration officials increasingly recognized that acting officials could be a helpful tool to avoid tense confirmation battles, even with a Democratic Senate majority.[67]

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officers and employees in the agency." Guidance on Application of Fed. Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 72 (1999) [hereinafter FVRA Guidance].

61. O'Connell, *supra* note 13, at 634–35.

62. *Id.* at 655.

63. *See supra* text accompanying notes 1–12.

64. *See, e.g.*, Darren Samuelsohn, *Obama's Vanishing Administration*, Politico (Jan. 5, 2016, 5:13 AM), https://www.politico.com/story/2016/01/obamas-vanishing-administration-217344 [https://perma.cc/PQ76-3QQ8]; Philip Shenon, *Interim Heads Increasingly Run Federal Agencies*, N.Y. Times (Oct. 15, 2007), https://www.nytimes.com/2007/10/15/washington/15interim.html [https://perma.cc/Q8BM-XEHT]; O'Connell, *supra* note 13, at 637–38 (describing concern about acting officials in those Administrations); Mendelson, *supra* note 9, at 538 (noting that "the Trump Administration's use of acting officials has hardly been unique").

65. *See* Mendelson, *supra* note 9, at 538 (predicting that President Biden would "undoubtedly rely upon acting officials as well"); Anne Joseph O'Connell, *Waiting for Confirmed Leaders: President Biden's Actings*, Brookings Inst. (Feb. 4, 2021), https://www.brookings.edu/research/president-bidens-actings/ [https://perma.cc/78WT-5VAQ] (describing the Biden Administration's initial slate of actings).

66. *Biden Political Appointee Tracker*, Wash. Post, https://www.washingtonpost.com/politics/interactive/2020/biden-appointee-tracker (last visited Jan. 5, 2022) [https://perma.cc/8L63-8B34] (identifying at least 300 PAS positions without a Senate-confirmed occupant as of January 2022); *see also* Fatima Hussein et al., *Biden Agency Vacancies to Drag on White House Priorities*, Associated Press (Feb. 22, 2022, 12:06 AM), https://apnews.com/article/joe-biden-coronavirus-pandemic-health-business-executive-branch-473c0e65d77d558e0b30b0c035a487e7 [https://perma.cc/7FN6-GB3Z].

67. *See* Burgess Everett, Jennifer Haberkorn & Daniella Diaz, *The Surprising Corner of the Senate That's Sinking Biden Nominees*, Politico (June 12, 2023, 4:30 AM), https://www.politico.com/news/2023/06/12/biden-nominees-commerce-committee-00101132 [https://perma.cc/NM37-WHKU].

Reliable statistics on the number of acting officials in any given administration are difficult to find, a paucity that likely "derives largely from the absence of centrally collected data on acting agency leaders."[68] In a study of cabinet-level vacancies from the Reagan Administration through the beginning of 2020, Professor O'Connell found that nearly half of cabinet secretaries were unconfirmed.[69] While "[a]ll modern Presidents have relied heavily on acting officials," President Trump alone "used more acting secretaries than confirmed secretaries."[70] Although acting officials in cabinet positions typically had short tenures, twenty-two (across different administrations) served for at least one hundred days.[71]

Many acting secretaries during the first Trump Administration, but not all, were the deputy secretary (the "first assistant")[72] or otherwise occupied a PAS office.[73] The Trump Administration relied on twelve acting secretaries who were never confirmed to any position, while the Obama Administration used three such officials.[74] In comparison, the George W. Bush and the Clinton Administrations did not use any.[75] These unconfirmed actings are far more common in lower-level vacancies.[76] To help shed light on the scope of the phenomenon in the lower ranks of the bureaucracy, O'Connell analyzed vacancies in the Environmental Protection Agency.[77] In some instances, acting officials occupied PAS positions in the EPA for longer

68. O'Connell, *supra* note 13, at 639 & n.143 (citing NLRB v. Noel Canning, 573 U.S. 513, 545 (2014) ("The Congressional Research Service is 'unaware of any official source of information tracking the dates of vacancies in federal offices.'")).

69. *See id.* at 645 ("45.8% percent of cabinet secretaries in this period were not confirmed or recess appointed . . . .").

70. *Id.* at 643. O'Connell's research counted acting officials in the Trump Administration until January 19, 2020. President Trump continued to rely on actings throughout 2020. *See, e.g.*, Charlie Savage & Eric Schmitt, *He Sidestepped Pompeo and Got Slapped Down. Now He's the New Pentagon Chief.*, N.Y. Times (Nov. 11, 2020), https://www.nytimes.com/2020/11/11/us/politics/christopher-miller-pentagon-shabab.html [https://perma.cc/2SGP-BP95] (describing the selection of Christopher C. Miller as Acting Secretary of Defense); Carrie Johnson, *Who is Jeffrey Rosen, New Acting Attorney General?*, NPR (Dec. 15, 2020, 3:51 PM), https://www.npr.org/2020/12/15/946827318/who-is-jeffrey-rosen-new-acting-attorney-general [https://perma.cc/66XW-J3UZ] (describing Jeffrey Rosen's selection as Acting Attorney General).

71. O'Connell, *supra* note 13, at 645–46.

72. 5 U.S.C. § 3345(a)(1).

73. *See* O'Connell, *supra* note 13, at 648 tbl.5.

74. *Id.*

75. *Id.*

76. *Id.* at 648.

77. *See id.* at 649–52.

than confirmed ones,[78] and there was greater reliance on unconfirmed employees.[79]

The research to date demonstrates the importance of acting officials to the functioning of the federal bureaucracy,[80] as well as a growing reliance on unconfirmed officials in the roles. The result is that "we regularly face the specter of missing Senate-confirmed officials in the agencies."[81] Professor Nina Mendelson argues that the growing prominence of acting officials should be understood as part of presidential administrations' move "toward 'politicizing' agencies as a means of policy control by '[p]opulat[ing] the bureaucracy with politically responsive actors.'"[82] President Trump himself seemed to express an affection for his actings due to the greater flexibility they afforded him in pursuing his agenda.[83] Given these developments, it's hardly surprising that the rise of actings has engendered some backlash.

C. Angst About Actings

Before the Trump Administration controversies, the use of acting officials and the FVRA attracted relatively little attention.[84] Observers, however, have long recognized several open legal questions in its application.[85] First, commentators have questioned whether a first assistant can be appointed after a vacancy arises, thereby stepping into the vacant role under the automatic operation of the default provision.[86] Although this process complies with

78. *See id.* at 650 tbl.7.

79. O'Connell, *supra* note 13, at 650 ("There have been more acting than confirmed leaders in all three positions.").

80. *See id.* at 651 (arguing that the "case study also shows . . . acting officials play critical roles in the federal bureaucracy").

81. Mendelson, *supra* note 9, at 540.

82. *Id.* at 545 (quoting David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 Geo. Wash. L. Rev. 1095, 1102 (2008)).

83. *See* John T. Bennett, *Frustrated by "My Generals," Trump Turns to "My Actings,"* Roll Call (Jan. 14, 2019, 5:05 AM), https://rollcall.com/2019/01/14/frustrated-by-my-generals-trump-turns-to-my-actings/ [https://perma.cc/JY84-J799] ("But I sort of like 'acting.' It gives me more flexibility.").

84. *See* Richard E. Levy, *Presidential Power in the Obama and Trump Administrations*, J. Kan. Bar Ass'n, Sept. 2018, at 46, 54 (characterizing the FVRA as "an obscure statute").

85. *See, e.g.*, O'Connell, *supra* note 13, at 667–82 (describing questions of statutory interpretation with respect to the FVRA); Brannon, *supra* note 23, at 20–29 (cataloging "evolving legal issues" with the FVRA).

86. *See* Johnson, *supra* note 27, at 2033 ("The first [open question] . . . is whether someone can become the acting officer on account of being the first assistant if

the text of the statute, critics charge that this loophole allows the President to take advantage of existing vacancies to install officials they otherwise may not be able to get confirmed. Another open question is whether the President may take advantage of the FVRA after removing an official from office.[87] The first issue arose with respect to President Trump's selection of Ken Cuccinelli to serve as acting Director of USCIS;[88] the second has not been directly confronted, although the possibility was referenced in OLC guidance about designating former Attorney General Jeff Sessions' replacement.[89] Scholars have also discussed uncertainty about the interaction between the FVRA and agency-specific succession statutes.[90]

Most relevant to this Note, however, is that the FVRA raises unsettled constitutional questions.[91] The Appointments Clause details requirements for the selection of so-called "Officers of the United States"—most officers must be appointed by the President and confirmed by the Senate.[92] Senate confirmation is required for principal officers, while Congress may vest the appointment of "inferior [o]fficers . . . in the President alone, in the Courts of Law, or in the Heads of Departments."[93] Doctrinally, the distinction between inferior and principal officers is evolving; although some positions, like cabinet secretaries, are indisputably principal officers, the

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that person took on the first assistant title after the vacancy occurred."). The OLC initially opined that a potential acting official had to occupy the first assistant post at the time of the vacancy, *see* FVRA Guidance, *supra* note 60, at 63–64, but later reversed its position, *see* Designation of Acting Assoc. Att'y Gen., 25 Op. O.L.C. 177, 179 (2001). *See generally* O'Connell, *supra* note 13, at 675–79 (discussing this issue).

87. *See* Johnson, *supra* note 27, at 2034 ("One of the other questions the FVRA leaves unanswered is whether the FVRA can be used to . . . fill a vacancy caused by presidential removal."). *See generally* O'Connell, *supra* note 13, at 672–75 (discussing this issue).

88. *See supra* text accompanying note 11.

89. *See* Acting Att'y Gen., *supra* note 3, at 4 n.1 ("Even if Attorney General Sessions had declined to resign and was removed by the President, he still would have been rendered 'otherwise unable to perform the functions and duties of the office' for purposes of section 3345(a).").

90. *See, e.g.*, O'Connell, *supra* note 13, at 667–71 (analyzing such concerns); Brannon, *supra* note 23, at 20–25 (same).

91. *See, e.g.*, Brannon, *supra* note 23, at 29–33 (describing how "[s]ome have questioned whether the Vacancies Act is consistent with the U.S. Constitution's Appointments Clause, at least with respect to particular types of acting service").

92. U.S. Const. art. II, § 2, cl. 2.

93. *Id.*; *see also* United States v. Arthrex, Inc., 594 U.S. 1, 11–13 (2021) (quoting U.S. Const. art. II, § 2, cl. 2) (explaining the Appointments Clause and the distinction between principal and inferior officers).

distinction grows blurrier the further one travels down the bureaucratic hierarchy.[94]

Because the FVRA allows functionaries who have never been confirmed by the Senate to perform the duties of principal officers, some, including Justice Thomas, have argued that such appointments may violate the Appointments Clause.[95] The problem most obviously arises in the third pool of potential acting officials,[96] but the first assistants from the default provision are not always Senate-confirmed either.[97] And even when the acting official occupies a different Senate-confirmed position, it's not obvious why that alleviates any constitutional concerns associated with shuffling political appointees from position to position—there's no reason that confirmation as the Secretary of Housing and Urban Development, for example, should allow a given officer to serve as acting Secretary of Defense, even if the FVRA would allow that absurd scenario.

The Supreme Court has only squarely addressed the permissibility of acting service once, holding in *United States v. Eaton* that the inferior officer is not "transformed into the superior and permanent official" by assuming the duties of the principal officer.[98] This resolution, however, has not held up well over time; Professor Mendelson argues that "the *Eaton* Court's apparent focus on the impermanent nature of an acting official's service obscures other

94. *See* Mendelson, *supra* note 9, at 568–69 ("While the Constitution clearly requires Senate confirmation for principal officers, we lack needed clarity on *which* executive officers are principal officers."). An additional wrinkle is that Senate confirmation is the default for *all* officers, not just principal ones, *see* Edmond v. United States, 520 U.S. 651, 660 (1997), so the correspondence between PAS positions and principal officers is not necessarily one-to-one.

95. *See, e.g.*, NLRB v. SW Gen., Inc., 580 U.S. 288, 313 (2017) (Thomas, J., concurring) ("Appointing principal officers under the FVRA, however, raises grave constitutional concerns because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate."); Stayn, *supra* note 16, at 1513, 1536–37; Katyal & Conway, *supra* note 7; Baude, *supra* note 7; Denning, *supra* note 16, at 1040–41.

96. *See* 5 U.S.C. § 3345(a)(3).

97. The Deputy Director of the CFPB, for example, is "appointed by the Director"—so must be an inferior officer—and is empowered to "serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5).

98. United States v. Eaton, 169 U.S. 331, 343 (1898). Legal scholars have justified the FVRA on similar grounds. *See, e.g.*, Rappaport, *supra* note 16, at 1515 (defending the appointment of acting officials as "deriv[ing] from [Congress's] constitutional authority to define the duties of the offices it creates"); West, *supra* note 16, at 219–20 (citing *Eaton*, 169 U.S. at 343) (presenting a similar defense to provide for the appointment of acting officials).

meaningful issues."[99] The tenure of acting officials is not always that temporary in modern practice,[100] and the Supreme Court has expressly evaluated the nature of the duties exercised by a government official when determining whether they count as a principal officer for Appointments Clause purposes.[101] Plus, if a subordinate position in the bureaucracy is the hallmark of inferior officers, as suggested by the Court, then the temporary nature of acting service does not account for the fact that acting Cabinet-level officials have no supervisor other than the President.[102]

In light of this constitutional concern, commentators have argued that the FVRA concentrates too much power in the President at the Senate's expense.[103] While the conventional wisdom once held that Presidents uniformly prefer to install confirmed officials,[104] at times, they may "find an acting official appealing . . . to empower someone whose policy commitments and loyalties more closely resemble [theirs] than the Senate's."[105] Acting officials, therefore, have

99. Mendelson, *supra* note 9, at 573. Mendelson notes that the *Eaton* Court confronted "relatively unusual facts" in a "consular vacancy in a far-flung land" that are not easily generalizable to the modern phenomenon of acting officials. *Id.*

100. As discussed, the FVRA could allow acting service in excess of two years. *See supra* Section II.A.

101. *See, e.g.*, United States v. Arthrex, Inc., 594 U.S. 1, 17 (2021) (noting that the Court's precedents require "an appraisal of how much power an officer exercises free from control by a superior"); Jennifer Mascott & John F. Duffy, *Executive Decisions After* Arthrex, 2021 Sup. Ct. Rev. 225, 227 (describing *Arthrex* as turning on the "distribution of decisional power between principal officers and the mass of lower-level officials"); Mendelson, *supra* note 9, at 571–73 (describing this doctrinal development). Moreover, "an acting official is traditionally understood to possess the full powers of the office for the duration of the appointment"—the temporary nature of their service is far from the only relevant factor. *Id.* at 573.

102. *See Arthrex*, 594 U.S. at 13 ("An inferior officer must be 'directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" (quoting Edmond v. United States, 520 U.S. 651, 663 (1997))); Mendelson, *supra* note 9, at 572 (observing that an unconfirmed acting official "is subject to no greater formal supervision" than a principal officer that has been duly appointed and confirmed).

103. *See, e.g.*, Johnson, *supra* note 27, at 2044 ("[T]he FVRA allows the President to sidestep the Senate 'Advice and Consent' requirement in the Appointments Clause.").

104. *See* Mendelson, *supra* note 9, at 545–46 ("Political scientists have long assumed that Presidents prefer to promptly nominate individuals to fill vacancies in Senate-confirmed offices." (citing Christina M. Kinane, Control Without Confirmation: The Politics of Vacancies in Presidential Appointments 5 (Nov. 14, 2019) (unpublished manuscript), https://harris.uchicago.edu/files/kinane_harris_2019.pdf [https://perma.cc/4ZLM-KYLW])).

105. *Id.* at 546.

the potential to serve as a potent tool in Presidents' efforts to effect greater control over the executive branch.[106]

Concentrating the President's power in this way and disregarding the Senate's check on appointments have led to charges that contemporary use of acting officials is antidemocratic.[107] On this account, the Senate confirmation process constitutes a crucial bulwark against autocracy,[108] and any deviation from this constitutional requirement should be viewed with suspicion. In light of these arguments, alongside salient examples of perceived Trump-era exploitation of the FVRA, it is hardly surprising that observers and legislators have advocated for greater limits on presidential deployment of acting officials.[109]

This knee-jerk reaction to Trump-driven controversies, however, takes for granted that tilting the balance of power in this area back towards the Senate is an obvious solution. Such arguments, however, rely on an antiquated, romanticized vision of checks and balances and American democracy that doesn't withstand much scrutiny. The rise of partisan politics and the Senate's unrepresentativeness have undermined the assumptions of the Framers' design.[110] And whatever the flaws of the contemporary Presidency, it is equally difficult to argue that the Senate confirmation process is an unalloyed good, particularly in terms of democratic responsiveness, again because of the overrepresentation of smaller states. By considering how acting officials can advance democracy and accountability, we can better evaluate potential reforms to the FVRA and reflect on the larger project of ensuring democratic accountability throughout the executive branch.

III.
ACTING OFFICIALS AND DEMOCRACY

The phenomenon of acting officials represents perhaps the starkest example of the tension between the President and the Senate (and Congress more broadly), but this tension recurs throughout

106. *See id.* at 547 ("[A] presidential strategy to politicize agencies—to bring agency leadership preferences closer to those of the President—might well include reliance on acting officers in preference to Senate-confirmed individuals.").

107. *See supra* note 17 and accompanying text.

108. *See supra* note 19 and accompanying text.

109. *E.g.*, Johnson, *supra* note 27, at 2048–57; O'Connell, *supra* note 13, at 707–27; Mendelson, *supra* note 9, at 601–06; Bornstein, *supra* note 17; *see also* H.R. 5314, 117th Cong. §§ 901–02 (2021) (proposing stricter limits on the use of acting officials).

110. *See infra* Section III.B.

contemporary separation of powers controversies.[111] As is common in this area of doctrine, acting officials are a manifestation of the conflict between congressional power and the President's obligation to "take Care that the Laws be faithfully executed."[112] Defenders of executive power frequently point to the Take Care Clause as a source of authority, although other scholars doubt the provision has any substantive content.[113] Even if we could, there's no need to resolve this debate now—it's obvious that executive branch vacancies impede the President's role under the Take Care Clause, whether or not it's characterized as an obligation or a duty.[114] Ultimately, "the Constitution does not speak directly to the permissibility of an unconfirmed acting official serving in a Senate-confirmed position[;]"[115] a formalist approach to the controversy does not help resolve this tension.

One possible way to settle this and other separation of powers controversies is with reference to the value of democracy. Professor Peter M. Shane has posited that "the motivating value most appropriate to guiding current interpretation of the constitutional presidency is democracy."[116] The Supreme Court itself has arguably adopted such a functionalist approach in its appointments and removal jurisprudence,[117] although its democratic theorizing leaves something to be desired. In particular, the Court "stress[es] the democratic powers of the President" in removal cases while privileging "the

111. *See* Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371, 376 (2022) (discussing the "question of the balance between legislative and executive power in the . . . administrative state"); Driesen, *supra* note 19, at 423–24.

112. U.S. CONST. art. II, § 3; *see also* Johnson, *supra* note 27, at 2039 ("In particular, appointments made pursuant to the Appointments Clause are defined in part by the tension between the Senate's 'Advice and Consent' duty and the President's mandate to 'take Care that the Laws be faithfully executed.'" (footnote omitted)); Mendelson, *supra* note 9, at 543–44 (arguing that a complete analysis of acting officials must consider "the Take Care and Vesting Clauses").

113. *See* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 235–38, 241–43, 262 (2020) (providing an overview of the contours of this debate and principally addressing the Vesting Clause).

114. *See, e.g.*, Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 935–46 (2009) (discussing how agency vacancies can impede agency functioning); Alexander I. Platt, Note, *Preserving the Appointments Safety Valve*, 30 YALE L. & POL'Y REV. 255, 284–86 (2011).

115. Mendelson, *supra* note 9, at 574.

116. PETER M. SHANE, DEMOCRACY'S CHIEF EXECUTIVE 142 (2022).

117. *See* Driesen, *supra* note 19, at 424 (observing that "the Court frequently employs functional arguments to help resolve cases coming before it" in this area); Emerson, *supra* note 111, at 373 (arguing that "[t]he conservative Justices explicitly reinforce their criticism of administrative agencies with normative judgments").

competing democratic claims of Congress" in nondelegation cases, all without recognizing "that a fair accounting of democratic impacts requires consideration of both."[118] Because both institutions' claims to democratic legitimacy are flawed at best, we must move beyond the Court's overly simplistic theorizing to adjudicate this interbranch competition. This Part seeks to develop a more nuanced conception of democracy in the context of acting officials.

A. Two Facets of Democracy

A comprehensive analysis of democracy and the wide range of values it encompasses is far beyond the scope of this Note, but a good place to start is by considering "both the electoral and deliberative sides" of our "hybrid democracy."[119] Evaluating the respective roles of the Senate and the President in this light can help determine the proper balance between the Senate's role in confirmation and the President's take care obligation.

1. Responsiveness

First and foremost, democracy connotes responsive government. According to political scientist Robert Dahl, "responsiveness of the government to the preferences of its citizens" is one of democracy's "key characteristic[s]."[120] This conception of democracy primarily coincides with the electoral side of our government: the reliability of relatively frequent, free, and fair elections undergirds the system of responsive government.[121] By ensuring accountability of government officials and providing avenues for citizen participation, elections are the primary legitimating force in democratic governance.[122]

But regular elections are not the whole story. After all, the volume of policy decisions required in a modern state overwhelms the ability to tie the entire enterprise to an individual voter's periodic trip to the ballot box, and, as has been painstakingly documented, elections and legislatures do not always afford the equality of political power that we might hope for.[123] Given the shortcomings of the election-focused approach, political scientists in the latter half of the

118. Emerson, *supra* note 111, at 413.
119. Shane, *supra* note 116, at 142.
120. Robert A. Dahl, Polyarchy 1 (1971).
121. Robert A. Dahl, *What Political Institutions Does Large-Scale Democracy Require?*, 120 Pol. Sci. Q. 187, 188 (2005).
122. *See* Shane, *supra* note 116, at 143.
123. *See id.*

twentieth century began to conceptualize our system of government as something more than just "electoral democracy."[124]

2. Deliberation

One such response was the notion of "deliberative democracy." In this conception of democracy, "the citizenry would reason, or deliberate, *through* their representatives"[125] instead of deciding amongst themselves in a form of undiluted direct democracy. Elected legislators could rely on their expertise and take advantage of collective, institutionalized deliberation in the form of the legislative process, tools that were unavailable to the citizen masses. In this framework, elections would supply the necessary linkage to ensure that the elected officials reflect the values of the people.[126] This goal of deliberation helps account for many elements of our constitutional design, including the bicameral Congress, the federal judiciary, and the agencies of the executive branch.[127]

Conveniently for our purposes, the President and the Senate can be associated with these two fundamental aspects of American democracy. The President represents our "most democratic and politically accountable official" who is "elected by the entire Nation."[128] Presidential elections, notwithstanding the inanities of the process, are the closest thing Americans get to a national plebiscite. The Senate, on the other hand, almost perfectly embodies the Framers' vision for deliberative democracy.[129]

Of course, all this tells us is that the Senate and the President both have claims to democratic legitimacy, even if they reflect different aspects of our hybrid democracy. This discussion, without more, does not help resolve the competition between the two institutions. Implicit in the foregoing analysis, however, is that both institutions embody these values perfectly. Considering their shortcomings goes a long way to elucidating the proper balance between the two in this area.

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124. *Id.* at 144.

125. Joseph M. Bessette, The Mild Voice of Reason 1 (1994).

126. *Id.* at 2.

127. Shane, *supra* note 116, at 144.

128. Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 224 (2020).

129. *See* Bessette, *supra* note 125, at 3 (observing that "Congress was designed to be the principal locus of deliberation in American national government"). Professor Mendelson also points to the Senate's status as a forum for deliberation as one aspect of its "substantial democratic contribution." Mendelson, *supra* note 9, at 591–92.

B. Imperfect Institutions

To begin, the President's claim to perfect responsiveness is at least more nuanced than Chief Justice Roberts's description of the office suggests. While the President usually claims a majority of the popular vote, that is obviously not always the case.[130] Contrary to popular belief, however, the Electoral College does not seriously overweight the influence of small states; instead, it tilts the playing field towards whichever states just happen to be electorally competitive.[131] The partisan valence of this erratic bias tends to change over time—as recently as 2012, the Democratic Party enjoyed an advantage.[132]

Moreover, the Senate fares far worse when it comes to democratic responsiveness. Not only does the systematic small-state bias lead to wildly disproportionate voting power—in spite of the constitutional mandate for equal voting in other contexts[133]—it also privileges white voters at the expense of minority communities.[134] The upshot of these structural limitations is that the Senate has the largest right-wing bias of a legislative chamber in any consolidated democracy.[135] These electoral flaws, combined with the chamber's staggered terms, make it difficult to invoke Senate election results as a barometer of the country's mood—in 2018, Democrats actually lost Senate seats despite winning the concurrent House elections by a wide margin.[136] The Senate filibuster and other countermajoritarian

130. Emerson, *supra* note 111, at 414.

131. *See* Nate Cohn, *The Electoral College's Real Problem: It's Biased Toward the Big Battlegrounds*, N.Y. Times (Mar. 22, 2019), https://www.nytimes.com/2019/03/22/upshot/electoral-college-votes-states.html [https://perma.cc/CLK2-DCQD].

132. *See* Nate Silver, *Will the Electoral College Doom the Democrats Again?*, FiveThirtyEight (Nov. 14, 2016, 2:59 PM), https://fivethirtyeight.com/features/will-the-electoral-college-doom-the-democrats-again/ [https://perma.cc/34CH-BXJA].

133. *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964). The *Reynolds* Court itself recognized the conflict between the logic of its voting jurisprudence and the institutional design of the Senate. *See id.* at 574.

134. Matthew Yglesias, *American Democracy's Senate Problem, Explained*, Vox (Dec. 17, 2019, 11:40 AM), https://www.vox.com/policy-and-politics/2019/12/17/21011079/senate-bias-2020-data-for-progress [https://perma.cc/V68U-7KH6].

135. *See Upper Legislative Houses Tend to Be Biased and Malapportioned*, The Economist (Mar. 14, 2023), https://www.economist.com/graphic-detail/2023/03/14/upper-legislative-houses-tend-to-be-biased-and-malapportioned [https://perma.cc/M5RA-CZ5B].

136. Jonathan Martin & Alexander Burns, *Democrats Capture Control of House; G.O.P. Holds Senate*, N.Y. Times (Nov. 6, 2018), https://www.nytimes.com/2018/11/06/us/politics/midterm-elections-results.html [https://perma.cc/F4U8-JUMZ].

procedural devices only heighten this disparity.[137] The Senate's flaws as a representative institution are, of course, inherent to our constitutional design, but keeping them in mind counsels against aggrandizing the Senate's power in the name of democracy.

Viewed from the standpoint of deliberative democracy, the Senate's unrepresentativeness is not necessarily disqualifying. After all, one of the points of such deliberation is "to check or moderate unreflective popular sentiments," no matter how widely held.[138] But the compounding effects of the Senate's unequal representation—and particularly the impact on minority voters—suggests that there is no guarantee the institution remains "rooted in popular interests and inclinations,"[139] a necessary component for the workings of deliberative democracy.

Even setting aside the question of representativeness, the Senate's quality as a venue for deliberative democracy is hardly unassailable. Complaints about the supposed decline of the Senate have become something of a Washington tradition for current and former members,[140] and the rise of partisan polarization has fomented gridlock and transformed legislative dynamics on Capitol Hill.[141] As other scholars have argued, this increased partisanship undermines the logic of the institutional checks and balances that define the Constitution.[142] Under a unified government, it's questionable whether the Senate and the Congress as a whole represent a meaningful check on the President. Conversely, under divided government, the Senate increasingly pursues knee-jerk obstruction at any cost, a far cry from any idea of good faith deliberation.

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137. David R. Mayhew, Yale Univ., James Madison Lecture: Supermajority Rule in the U.S. Senate (Aug. 30, 2002), *in* 36 PS 31, 31 (2003).

138. Bessette, *supra* note 125, at 1.

139. *Id.* at 2.

140. *See, e.g.*, Olympia J. Snowe, Opinion, *Olympia Snowe: Why I'm Leaving the Senate*, Wash. Post (Mar. 1, 2012, 8:47 PM), https://www.washingtonpost.com/opinions/olympia-snowe-why-im-leaving-the-senate/2012/03/01/gIQApGYZlR_story.html [https://perma.cc/6F8B-J4SK]; Evan Bayh, Opinion, *Why I'm Leaving the Senate*, N.Y. Times (Feb. 20, 2010), https://www.nytimes.com/2010/02/21/opinion/21bayh.html [https://perma.cc/BKY8-P2RU]; George Packer, *The Empty Chamber*, New Yorker (Aug. 2, 2010), https://www.newyorker.com/magazine/2010/08/09/the-empty-chamber [https://perma.cc/6XX3-XB8S] (collecting complaints from then-Senators).

141. *E.g.*, David R. Jones, *Party Polarization and Legislative Gridlock*, 54 Pol. Rsch. Q. 125 (2001); *see also* The U.S. Senate: From Deliberation to Dysfunction (Burdett A. Loomis ed., 2012).

142. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2312–16 (2006).

In light of these developments, it's no wonder that "the politics of executive branch appointments is . . . becoming even more dysfunctional."[143] While historically presidential nominees routinely reached the floor and enjoyed unanimous confirmation votes, the process has grown more divisive over the past few decades.[144] In many cases, a recalcitrant Senate (or a fraction thereof) appears motivated more by policy disagreements than by substantive objections to the qualifications of a given nominee.[145] The inanities of Senate procedure, with anonymous holds and majority-party control of the agenda, also make it very easy to quash nominations without the public accountability of a formal up-or-down vote.[146] These strictures necessarily imply a status quo bias, and at worst could serve to cripple the functioning of the entire federal government.[147] In anticipation of such a crisis, some commentators have even suggested that the President should be able to install nominees without an affirmative vote from the Senate, at least in some circumstances.[148]

As a worst-case scenario, consider a President who enters office with a healthy Electoral College and popular vote majority but faces a Senate controlled by the opposite party. Given the Senate's structural bias, such a divergence is increasingly plausible—according to analysts, Democrats could win fifty-one percent of the overall popular vote and lose seven Senate seats.[149] At the state level, this dire scenario is already playing out—the Wisconsin Senate, for example,

143. Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 942 (2013).

144. Alvin Chang, *Partisanship of Cabinet Confirmations Is Rising. But Trump's Picks Are Still Different*, VOX (Feb. 7, 2017, 8:10 AM), https://www.vox.com/policy-and-politics/2017/2/7/14523808/trump-cabinet-partisan-confirmation [https://perma.cc/Y2P9-LJDE].

145. Stephenson, *supra* note 143, at 942.

146. *Id.* at 947–48.

147. *See id* at 948.

148. *See id.* at 942 (arguing "it is not at all clear that the Senate must affirmatively vote in favor of a nominee in order to provide the required advice and consent"); Lyle Denniston, *Constitution Check: Could Obama Bypass the Senate on Garland Nomination?*, NAT'L CONST. CTR.: CONST. DAILY BLOG (Apr. 12, 2016), https://constitutioncenter.org/blog/constitution-check-could-obama-bypass-the-senate-on-garland-nomination [https://perma.cc/E66V-NQVY].

149. Ezra Klein, Opinion, *David Shor Is Telling Democrats What They Don't Want to Hear*, N.Y. TIMES (Oct. 8, 2021), https://www.nytimes.com/2021/10/08/opinion/democrats-david-shor-education-polarization.html [https://perma.cc/7X9X-8CZL] (describing the 2022 elections); *see also* Ed Kilgore, *2024 Looks Very Dark for Senate Democrats*, N.Y. MAG. (Jan. 29, 2023), https://nymag.com/intelligencer/2023/01/democrats-enter-perilous-2024-senate-landscape.html [https://perma.cc/NM8V-4X9U] (describing the daunting Senate math for Democrats in the 2024 elections).

has refused to confirm nearly 180 gubernatorial appointees, despite the incumbent governor's fairly comfortable reelection.[150]

To be sure, an obstructionist Senate represents an extreme case, but the inexorable march towards partisan polarization makes it all the more plausible. Reforming the FVRA to crack down on acting officials without recognizing this possibility could end up doing more harm than good, removing a sort of pressure release valve that could help defuse an irreconcilable conflict between the two institutions. Contemplating this extreme also underscores the vital role that the appointment power serves for democratic accountability in the executive branch and suggests that Senate confirmation alone does not add much to the equation.

Additionally, it's worth remembering that in selecting acting officials, the President acts pursuant to congressional authorization, including acquiescence from the more democratic House of Representatives. This is not a question of unilateral presidential action in the face of ambiguity or opposition by the legislative branch.[151]

In short, if democracy is something we care about, it's not obvious that acting officials represent much of an affront to it. Scholarly laments about circumventing the Senate confirmation process depend on a clichéd perception of American democracy that bears little resemblance to contemporary political dynamics. With respect to the responsive or electoral side of American democracy, the President clearly has an upper hand when compared to the Senate. Likewise, the Senate's questionable quality as a locus of deliberative democracy does little to compensate for its growing unrepresentativeness. With further partisan polarization, the prospect of an obstructionist majority is all too plausible, highlighting the possibility that acting officials could serve as a sort of pressure release valve in such a conflict. Some flexibility here is desirable—as Justice Oliver Wendell Holmes Jr. once wrote, "[T]he machinery of government would not work if it were not allowed a little play in its joints."[152]

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150. Sarah Lehr, *Gov. Tony Evers Is Starting His Second Term, But Nearly 180 of His Appointees Remain Unconfirmed*, Wisc. Pub. Radio (Jan. 3, 2023), https://www.wpr.org/gov-tony-evers-second-term-appointees-unconfirmed-gop-senate [https://perma.cc/R8JN-Y29E].

151. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

152. Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931).

IV.
IMPLICATIONS

Presidential reliance on acting officials could actually serve to increase the responsiveness of the federal government, illustrating how the appointment process is a vital mechanism for linking the machinery of administration to the democratic mandate of the President. Considering the need for acting officials in the context of a recalcitrant, unrepresentative Senate underscores the connection between democratic legitimacy and executive branch personnel. This Part will focus first on how the insights of the foregoing analysis should inform efforts to reform the FVRA before turning to a discussion of presidential authority over appointments in the context of the unitary executive theory.

A. FVRA Reforms

Recent discussion about acting officials has, understandably, focused on the perceived excesses of the Trump Administration, even though every recent President has employed them. Inattention to the democratic imprimatur of acting officials, however, threatens to shift the balance of power too far back to the Senate, with predictable consequences given increased partisan polarization and the increasing unrepresentativeness of the institution.

1. Types

One commonly proposed reform concerns the third pool of potential acting officials: officers or employees at the GS-15 level or above who have held their position for at least ninety days.[153] Several commentators have called for excising or severely limiting the applicability of this provision entirely,[154] largely because this would "increase the likelihood that the official pressed into acting service has been appointed pursuant to the Appointments Clause in the past."[155] If the permissible pool of acting officials is limited to those that already occupy PAS positions, then this solution would seem to obviate any Appointments Clause-related concerns with acting officials.

153. 5 U.S.C. § 3345(a)(3).

154. *See, e.g.*, Johnson, *supra* note 27, at 2051–53; O'Connell, *supra* note 13, at 712–14; Walter Dellinger & Marty Lederman, *Initial Reactions to OLC's Opinion on the Whitaker Designation as "Acting" Attorney General*, Just Sec. (Nov. 15, 2018), https://www.justsecurity.org/61483/initial-reactions-olc-opinion-whitaker-designation-acting-attorney-general [https://perma.cc/9RFR-UGHM] (restricting the statute with an exigency requirement).

155. Johnson, *supra* note 27, at 2052.

Limiting the pool in this way, however, does not necessarily solve the problem. Not every "first assistant"—the default acting official[156]—is necessarily Senate-confirmed, and the division between principal and inferior officers is evolving and doctrinally unstable.[157] The availability of career civil service employees as potential acting officials also increases the likelihood that the acting officials have superior expertise in the agency's subject matter, which is by no means guaranteed if the President just directs another PAS official—possibly from another agency entirely—to step in.[158]

Plus, eliminating the third category of acting officials threatens to hobble the transition from one administration to another. The greatest need for acting officials likely comes at the beginning of an administration, "when there are few first assistants and confirmed officials" to draw upon.[159] Restricting the flexibility of appointment could saddle an incoming administration with holdovers that may be actively hostile to the new President's agenda, which undoubtedly frustrates the democratic responsiveness of the executive branch.

A possible compromise would be to limit the permissibility of non-confirmed acting officials to the start of a presidential administration, which is when they are most common anyway.[160] The current version of the FVRA already recognizes that the dawn of a new administration is a special period when it comes to staffing an administration.[161] This period is also when the conflict between a President and an obstructionist Senate is most problematic in terms of democratic legitimacy. Overall, however, the problem of democratic responsiveness counsels towards preserving flexibility in this area.

2. Tenures

Commentators have also frequently proposed limiting the tenures of acting officials, which have been characterized as overgenerous. One suggestion is to limit the initial tenure of acting service

156. 5 U.S.C. § 3345(a)(1).

157. *See supra* note 94 and accompanying text.

158. *See* Johnson, *supra* note 27, at 2052 ("In many cases, officials who satisfy these two requirements, by dint of their extensive experience in the affected agency and well-honed expertise on its area of work, not only may be qualified to serve in the vacated position; they also may be the best choice under the circumstances."); Nina A. Mendelson, *The Uncertain Effects of Senate Confirmation Delays in the Agencies*, 64 Duke L.J. 1571, 1599 (2015).

159. O'Connell, *supra* note 13, at 629.

160. *Cf. id.* ("[T]his category is not [currently] restricted to the early months of a new President's term . . . .").

161. *See* 5 U.S.C. § 3349a(b) (providing for longer acting tenures at the beginning of an administration).

from the current 210 days to just sixty;[162] another proposes a limit of thirty to forty days.[163] Stricter limits, the argument goes, would reduce the temptation for Presidents to sidestep the confirmation process entirely.

Many of these proposals, however, ignore the "empirical realities" about the dysfunction of the modern confirmation process,[164] which only stand to get worse under the scenarios contemplated in this Note. There was a reason, after all, that Congress extended the limits in the first place—it is hardly unprecedented for vacancies to last longer than the limits envisioned, even in the current version of the FVRA.[165]

Given the concerns about Senate obstructionism, one possible reform would be to do away with the overall time limits on acting service entirely. This does not necessarily imply that acting tenures must be limitless; instead, acting service should be directly tied to the submission of a nomination. After the initial grace period (necessary to vet potential nominees), acting service should only extend while a nomination is pending in the Senate. If a nomination is withdrawn or rejected, the President should have another short period—perhaps thirty days—to submit another nomination and extend the period of acting service. This proposal would recognize the realities of a contentious nomination process while preserving the incentive to submit nominees.

3. Other Constraints

The Act's limits, even if generous, on the identity and tenure of acting officials represent a real constraint on unbridled presidential authority. Apart from the formal limits, scholars have documented drawbacks to overreliance on acting officials, ranging from an inability to execute policy programs to negative impacts on agency employees' performance and morale,[166] even if they are preferable to leaving important positions unfilled. And as the Trump-era controversies demonstrate, acting officials are hardly free from scrutiny. The Senate confirmation process is not the sole political check

162. Johnson, *supra* note 27, at 2055–57.

163. Mendelson, *supra* note 9, at 602.

164. O'Connell, *supra* note 13, at 715. O'Connell observes that the modern-day appointments process takes a considerable amount of time, with nominations often languishing in the machinery of the Senate for hundreds of days. *See id.*

165. *Id.* at 715–16.

166. *Id.* at 696–98.

against poor quality appointments.[167] The practical and political costs associated with acting officials serve as another check against abuse of the phenomenon.

As a final consideration, relying on acting officials is preferable to the alternative of delegating the powers of the vacant office elsewhere in the agencies, which greatly reduces transparency. Most FVRA reform proposals have recognized this tension, noting that cracking down on acting officials increases pressure to rely on delegation.[168] This potential workaround illustrates how Presidents may seek to implement their agenda even without the assistance of their preferred personnel, straying perilously close to a vision of the executive branch where it is really the President—not the statutorily authorized officers—calling the shots.[169] Preserving some flexibility regarding appointments likely ameliorates the impulse to concentrate all decision-making authority in the President.

B. Acting Officials and Unitary Executives

The discussion in Part III demonstrates how acting officials (and presidential appointments in general) serve as a vital link between the President's popular mandate and the functioning of the federal government. Even without the involvement of the Senate, presidential appointments have a strong democratic imprimatur. The nation elects the President with the expectation that they will appoint officials to occupy the important posts of government, and it is equally understood that the President will receive the credit (or blame) for their performance in office.[170] Vacancies severely impede executive branch agencies' ability to carry out their mandates and therefore undermine the President's duty under the Take Care Clause, which underscores the need for flexibility in this area, particularly in the face of Senate obstructionism. Given the realities of contemporary politics, the case for presidential power is arguably "at its apex" when it comes to appointments.[171]

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167. *See* Mendelson, *supra* note 9, at 597 ("Even without the Senate confirmation process, the President's political accountability might deter poor quality acting appointments.").

168. *See* O'Connell, *supra* note 13, at 724 (arguing "restricting delegation is also required to incentivize nominations").

169. For an overview of this strong version of the unitary executive theory, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 549–50 (1994).

170. Stephenson, *supra* note 143, at 948.

171. *Id.* at 949.

Recognizing the President's superior claim to democratic legitimacy in this area, however, does not necessarily justify the most expansive vision of presidential power. It is worth emphasizing that the FVRA does not apply to independent agencies,[172] and the history of acting officials suggests that there is congressional acquiescence by both chambers to the practice. Of course, proponents of such maximalist views frequently justify their conceptions on similar grounds,[173] but it does not necessarily follow that expansive control over personnel should imply totalizing authority over the entire executive branch. The Take Care Clause, after all, implies that other officials will perform the work of executing; the President is left with a passive, supervisory role.[174] Maximal control over appointments is still consistent with this conception of the President as an overseer of administrative activity.

Underscoring the links between democratic responsiveness, the President, and administrative personnel also points towards a more holistic account of political control of the executive branch. Professor Cristina Rodríguez stresses that "the advent of a new presidential administration brings into office not just a new Chief Executive, but a whole set of political actors . . . who perform much of the work of bringing into being new interpretations of the law and the policy initiatives that flow from those innovations."[175] This layer of political officials "create[s] venues for democratic politics and agitation to inform administration and policymaking."[176] The totalizing focus on the Presidency obscures the importance of this work and indicates how vindicating presidential power over personnel does not inherently lead to excessive presidentialism.

This vision of political control in the executive branch does require an "appetite for some centralization and high-level direction

172. *See* O'Connell, *supra* note 13, at 627.

173. *See, e.g.*, Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 Ark. L. Rev. 23, 48–70, 81–86 (1995); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2331–46 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 85–106 (1994).

174. Gillian E. Metzger, *The Constitutional Duty To Supervise*, 124 Yale L.J. 1836, 1875–76 (2015); *see also* Peter L. Strauss, Response, *A Softer Formalism*, 124 Harv. L. Rev. F. 55, 60 (2011) ("[T]he passive voice of the Take Care Clause, hidden between [their] (not that important) responsibilities to receive ambassadors and to commission officers, confirms that the President is not the one whose direct action is contemplated.").

175. Cristina M. Rodríguez, Foreword, *Regime Change*, 135 Harv. L. Rev. 1, 73–74 (2021).

176. *Id.* at 75.

within the administrative state."[177] But under current political conditions, a degree of presidentialism is probably here to stay.[178] The President's institutional advantages in ensuring oversight are undeniable, so observers frequently called for greater presidential involvement in response to the perceived ills of administration.[179] Since the President ultimately bears responsibility for the workings of the entire bureaucracy, there will be an irresistible impulse to vindicate their electoral mandate by influencing the work of the executive branch. Channeling this power through the supervisory vision of presidential control creates an internal check and mitigates the danger of an autocratic, imperial presidency.

To be sure, this democratic account of presidential power is hardly an originalist view. Despite the Supreme Court's intimation to the contrary,[180] the Framers sought to shield the Presidency from popular control, rejecting a proposal that the office should be directly elected.[181] But it is notable that the emergence of the President as a popular, democratic figure in the Jacksonian era coincided with a recognition of the office's potential to legitimize the work of administration.[182] President Jackson's "political program to democratize administration through rotation in office" represented a radical departure from the Federalist-era model of rule by local notables, heralding a revolution in the growth and development of administrative law.[183] Then, as now, accountable personnel were the key to the administration's democratic legitimacy, not necessarily the President's personal control over the machinery of the state. Progressive– and New Deal–era reformers similarly looked to the President as a legitimating force,

177. *Id.* at 70.

178. *See* Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 726 (2016).

179. *See, e.g.*, Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1409–14 (1975); Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 461–63 (1979).

180. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 224 (2020) ("[T]he Framers made the President the most democratic and politically accountable official in Government.").

181. *See* CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY 132–34 (1923) (describing convention debates about the method of selecting the President); MCCONNELL, *supra* note 113, at 54–56 (same).

182. *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 147–50 (2012) (detailing the political developments of the Jacksonian era).

183. *See id.* at 149–50.

concomitant with the early development of the modern administrative bureaucracy.[184]

Alternatives to this personnel-focused conception of political control have their own shortcomings. Legislative solutions appear lacking—the federal government is simply too large for robust legislative oversight. In the wake of the New Deal, Congress attempted to reassert control over the new regulatory state, but "promises of improved oversight proved more significant than the actual results."[185] Reforms like the Administrative Procedure Act "worked little change in administrative practice,"[186] and the procedural rigor of contemporary administrative practice has not ensured popular legitimacy.[187] Ultimately, "these diffuse forms of popular participation will not be enough to ensure that government and its capacities evolve to address the demands of politics and our world."[188] These failures help explain why reformers concerned with democratic legitimacy repeatedly return to the question of political control and why "[u]nwinding [the President's] institutional advantage seems a fanciful proposition."[189]

V.
CONCLUSION

Recent discussion about the FVRA and acting officials have centered on the need to constrain the phenomenon, no doubt in light of a recency bias occasioned by the many Trump-era controversies. The impulse to restrict the use of acting officials, while understandable, threatens to create another problem—insisting on the Senate's virtues requires turning a blind eye to modern political dysfunction. Because of the strong link between acting officials and the President's democratic responsiveness, acting officials represent something of a pressure release in times of extreme partisan polarization. Obstructing presidential appointees stands to severely impede the machinery of government, and in such an extreme

184. *See generally* Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 Colum. L. Rev. 1 (2022).

185. Joanna L. Grisinger, The Unwieldy American State: Administrative Politics Since the New Deal 11 (2012).

186. *Id.* at 11–12.

187. *See* Nicholas Bagley, *The Procedure Fetish*, 118 Mich. L. Rev. 345, 349 (2019) (arguing that while "[p]roceduralism has a role to play in preserving legitimacy and discouraging capture, . . . it advances those goals more obliquely than is commonly assumed and may exacerbate the very problems it aims to address").

188. Rodríguez, *supra* note 175, at 71.

189. *Id.* at 76.

scenario, something will have to give way eventually. Embracing a strong version of presidential power over appointments need not entail an unthinking acceptance of the unitary executive theory in its strongest form; instead, recognizing appointments as a mechanism for vindicating the President's superior democratic mandate helps highlight a less centralized conception of political control in the executive branch.