

ARTICLES

MAKING APPOINTMENT THE MEANS OF PRESIDENTIAL REMOVAL OF OFFICERS OF THE UNITED STATES

by
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This Article examines the relationship between appointment and removal of officers of the United States, focusing on the administrations of Andrew Jackson, Andrew Johnson, Richard Nixon, and Donald Trump. These administrations' use of appointment and removal underlines the potential tension between political removal accomplished without Senate approval of a successor and the Constitution's goal of securing the rule of law.

To remedy these issues, this Article proposes that Congress pass a statute forbidding presidential removal of an agency head (and other Senate-approved appointees) until the President nominates a qualified successor or until the Senate confirms a successor. Integrating Appointments Clause compliance into the removal mechanism would formalize the constitutional custom at the Founding, and further the constitutional project of keeping the Republic intact.

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INTRODUCTION

In July of 2020, President Donald Trump sent irregular paramilitary forces to Portland, Oregon in response to looting and attacks on the city’s federal buildings.¹ Those forces, according to both news accounts and federal court rulings, went beyond protecting federal property.² They attacked peaceful protestors and journalists and arrested citizens for no apparent reason, terrifying them by scooping them up in unmarked vans and holding them for hours without explanation.³

Many of the people making up this newly mustered federal paramilitary force came from components of the Department of Homeland Security (DHS), such as

¹ See Chris McGreal, *Federal Agents Show Stronger Force at Portland Protests Despite Order to Withdraw*, GUARDIAN (July 30, 2020, 9:23 PM), <https://www.theguardian.com/us-news/2020/jul/30/federal-agents-portland-oregon-trump-troops>.

² See *Don’t Shoot Portland v. City of Portland*, 465 F. Supp. 3d 1150, 1153–54 (D. Or. 2020); John Ismay, *A Navy Veteran Had a Question for Feds in Portland. They Beat Him in Response.*, N.Y. TIMES (July 20, 2020), <https://www.nytimes.com/2020/07/20/us/portland-protests-navy-christopher-david.html>; Jonathan Levinson & Conrad Wilson, *Federal Law Enforcement Use Unmarked Vehicles to Grab Protesters Off Portland Streets*, OR. PUB. BROAD. (July 16, 2020, 7:46 PM), <https://www.opb.org/news/article/federal-law-enforcement-unmarked-vehicles-portland-protesters/>.

³ *Index Newspapers v. City of Portland*, 480 F. Supp. 3d 1120, 1142–46 (D. Or. 2020) (discussing evidence that police attacked journalists and legal observers); Katie Shepherd & Mark Berman, *‘It Was Like Being Preyed Upon’: Portland Protesters Say Federal Officers in Unmarked Vans Are Detaining Them*, WASH. POST (July 17, 2020), <https://www.washingtonpost.com/nation/2020/07/17/portland-protests-federal-arrests/>.

U.S. Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), and U.S. Customs and Border Protection (CBP).⁴ The heads of DHS and these component agencies are “Officers of the United States.”⁵ Accordingly, the Constitution requires that the President appoint them only with the consent of the Senate.⁶ But Trump never sought Senate approval for any of these agencies’ heads before the agencies they led participated in the Portland deployment.⁷ Almost all of the people leading this paramilitary operation on American soil were improperly appointed.⁸

⁴ See Marissa J. Lang, Josh Dawsey, Devlin Barrett & Nick Miroff, *Operation Diligent Valor: Trump Showcased Federal Power in Portland, Making a Culture War Campaign Pitch*, WASH. POST (July 24, 2020), https://www.washingtonpost.com/national/portland-protests-operation-diligent-valor/2020/07/24/95f21ede-cce9-11ea-89ce-ac7d5e4a5a38_story.html/; Ben Fox, *Top Homeland Security Official Defends Response to Protests*, OR. PUB. BROAD. (Sept. 9, 2020, 10:37 AM), <https://www.opb.org/article/2020/09/09/bc-us-homeland-security-portland-protests-1st-ld-writethru/>.

⁵ See U.S. CONST. art. II, § 2, cl. 2; CHRISTOPHER M. DAVIS & MICHAEL GREENE, CONG. RSCH. SERV., RL30959, PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS 1, 22–46 (2017).

⁶ See U.S. CONST. art. II, § 2, cl. 2.

⁷ See, e.g., Betsy Woodruff Swan & Daniel Lippman, *ICE Chief Tangles with White House over Political Appointees*, POLITICO (May 6, 2020, 4:30 AM), <https://www.politico.com/news/2020/05/06/ice-chief-appointees-white-house-239564> (showing that Trump never nominated Matthew Albence, the nominal ICE head at the time of the Portland invasion, to be head of ICE). President Trump did nominate two of Albence’s predecessors to become the directors of ICE, Thomas Homan and Ronald Vitiello. Trump, however, withdrew both of these nominations, even though the Senate seemed likely to confirm Vitiello. See Priscilla Alvarez, Geneva Sands, Kaitlan Collins, Jeremy Diamond & Jim Acosta, *Trump Suddenly Pulls ICE Nominee to Go with Someone ‘Tougher’*, CNN (Apr. 5, 2019, 5:14 PM), <https://edition.cnn.com/2019/04/05/politics/ice-director-nomination-pulled/index.html> (discussing withdrawal of Vitiello); *Fifteen Nominations and One Withdrawal Sent to the Senate Today*, WHITE HOUSE (May 15, 2018), <https://trumpwhitehouse.archives.gov/presidential-actions/fifteen-nominations-one-withdrawal-sent-senate-today> (mentioning withdrawal of Honan).

⁸ See Complaint at 3–4, 16–17, 27–33, *Don’t Shoot Portland v. Wolf*, No. 1:20-cv-02040 (D.D.C. dismissed Nov. 15, 2021), 2020 WL 4334857; see also Deanna El-Mallaway, Christine Kwon & Rachel Homer, *Trump Can’t Lawfully Use Armed Forces to Sway the Election: Understanding the Legal Boundaries*, JUST SECURITY (Sept. 23, 2020), <https://www.justsecurity.org/72500/trump-cant-lawfully-use-armed-forces-to-sway-the-election-understanding-the-legal-boundaries/> (claiming that the Portland invasion also violated statutory limits). On the President’s power to deploy armed forces domestically in time of emergency, see WILLIAM C. BANKS & STEPHEN DYCUS, *SOLDIERS ON THE HOME FRONT: THE DOMESTIC ROLE OF THE AMERICAN MILITARY* (2016); U.S. CONST., art. IV, § 4; cf. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827) (recognizing the President’s authority as commander in chief to “call forth” a state militia in an emergency).

Trump substituted unilaterally chosen allies for Senate-approved officials by coupling abuse of his removal authority—removal aimed at undermining implementation of law the President is obliged to faithfully execute—with a failure to nominate a successor to the person removed. He secured the removal of the former head of DHS, Kirstjen Nielsen, reportedly because she opposed Trump’s asylum policies,⁹ which federal courts subsequently found illegal.¹⁰ He then replaced her, unilaterally, with Kevin K. McAleenan, who likewise resisted some of Trump’s legally problematic immigration policies.¹¹ So, Trump secured his resignation and appointed Chad Wolf in his place.¹²

Trump demanded the resignation of the head of USCIS, who enjoyed Senate support and had proclaimed both a dedication to the rule of law and lack of malice to immigrants.¹³ The Trump administration replaced the USCIS director with former Virginia Attorney General Ken Cuccinelli, who almost surely did not enjoy enough support among Republican Senators to obtain Senate confirmation.¹⁴

When Trump unilaterally made McAleenan head of DHS, Trump removed him from his Senate-confirmed post as head of CBP and replaced McAleenan with Acting CBP directors.¹⁵ The administration forced out the first of these directors,

⁹ See Anne Joseph O’Connell, *Actings*, 120 COLUM. L. REV. 613, 621 (2020).

¹⁰ See *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020) (affirming a preliminary injunction against an anti-asylum policy enacted after Nielsen’s resignation); *Al Otro Lado v. Wolf*, 952 F.3d 999, 1010–14 (9th Cir. 2020) (finding that the “Acting” Secretary has not made a strong showing on the legal merits of another anti-asylum policy).

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

¹² O’Connell, *supra* note 9, at 622 n.41.

¹³ Matthew Choi & Anita Kumar, *Citizen and Immigration Services Chief Resigns*, POLITICO (May 24, 2019, 6:46 PM), <https://www.politico.com/story/2019/05/24/immigration-cisna-cuccinelli-trump-1344956>.

¹⁴ See *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 7–8 (D.D.C. 2020) (explaining the machinations that put Cuccinelli in the office); Ted Hesson, *Cuccinelli Starts as Acting Immigration Official Despite GOP Opposition*, POLITICO, <https://www.politico.com/story/2019/06/10/cuccinelli-acting-uscis-director-1520304> (June 10, 2019, 2:59 PM). Trump never nominated an ICE Director, relying on a series of acting officials to carry out his immigration policies, including family separation. See Christina M. Kinane, *Control Without Confirmation: The Politics of Vacancies in Presidential Appointments*, 115 AM. POL. SCI. REV. 599 (2021).

¹⁵ See Stephan Dinan, *Kevin McAleenan Confirmed as U.S. Customs and Border Protection Chief*, WASH. TIMES (Mar. 19, 2018), <https://www.washingtontimes.com/news/2018/mar/19/kevin-mcaleenan-confirmed-us-customs-and-border-pr/>; Frank Miles, *Kevin McAleenan, New Acting DHS Boss, Has Long Record in Border Security*, FOX NEWS (Apr. 8, 2019), <https://www.foxnews.com/politics/new-acting-homeland-security-head-well-respected-longtime-border-officer> (noting that Trump moved McAleenan from the direct position at CPB to head of DHS in spite of administration doubts that he could win Senate confirmation for the DHS job); Geneva Sands & Priscilla Alvarez, *John Sanders on Why He Left After Two and a Half Months as*

John P. Sanders, who had humanitarian concerns about the administration's policies at the border.¹⁶ His successor, Mark Morgan, became Acting Commissioner of CBP after Sanders left, and helped carry out the Portland deployment.¹⁷ Few if any of the officials leading a liberty threatening paramilitary action against American citizens over the objection of local elected officials had gone through the process set out in the Constitution for selecting the Officers of the United States. Trump arguably undermined the rule of law by removing Senate-confirmed officials who had some loyalty to the law and putting in their place officials whose actions suggest more loyalty to the President than to the law and the Constitution.

The Oregon paramilitary case illustrates a general point: Broad unfettered presidential removal authority can undermine the Senate's ability to provide a check on executive branch appointments.¹⁸ Removing appointees whom the Senate helped select prevents officers who have earned the Senate's approval from exercising any authority. If the President has the authority to arbitrarily remove an official the Senate confirms when the official defies an illegal presidential order, the Senate's role in appointment can become a sham. The Senate's authority exists to ensure that the

Acting CBP Commissioner, CNN, <https://www.cnn.com/2019/07/11/politics/border-chief-john-sanders/index.html> (July 11, 2019, 6:56 AM) (noting that John P. Sanders became acting chief of CBP when McAleenan became the Acting Director of DHS, but left after less than three months).

¹⁶ See Zolan Kanno-Youngs & Maggie Haberman, *'A Constant Game of Musical Chairs' Amid Another Homeland Security Shake-Up*, N.Y. TIMES (June 25, 2019), <https://www.nytimes.com/2019/06/25/us/politics/mark-morgan-ice-cbp.html> (reporting that White House officials directed McAleenan to replace Sanders with somebody who better reflected the administration's priorities); Sands & Alvarez, *supra* note 15 (reporting that the death of a teenager in migrant facilities, squalid conditions at those facilities, and racist Facebook posts by border patrol agents contributed to Sanders's humanitarian concerns).

¹⁷ See Zolan Kanno-Youngs & Michael Tackett, *Trump Names Mark Morgan, Former Head of Border Patrol, to Lead ICE*, N.Y. TIMES (May 5, 2019), <https://www.nytimes.com/2019/05/05/us/politics/trump-ice-mark-morgan.html>. Morgan claims he was forced out of the Border Patrol at the beginning of the Trump administration. See Elliot Spagat & Alicia A. Caldwell, *Border Patrol Chief Says He's Been Forced Out*, AP NEWS (Jan. 26, 2017), <https://apnews.com/article/1552a2a8859e49318fbf4f940eab5926>. Morgan regained Trump's favor through frequent appearances on Fox News promoting the administration's harsh and often illegal policies. Kanno-Youngs & Haberman, *supra* note 16; Roque Planas, *How Fox News Anointed Trump's New Border Chief*, HUFF. POST, https://www.huffpost.com/entry/mark-morgan-fox-news-ice-trump_n_5cdc6551e4b066205c60a2ba (June 25, 2019) (noting that Morgan appeared on Fox News 80 times before getting his old job back).

¹⁸ See Kinane, *supra* note 14, at 600 (explaining that a vacancy offers the President an "opportunity to circumvent the Senate").

principal officers of the government have sufficient independence to faithfully execute the law, even when the President wants to evade or defy it.¹⁹ Removal of a Senate-approved officer, and replacement with a unilaterally chosen successor or a delegation of authority to others favored by the President, can undermine the rule of law.²⁰

This Article examines the relationship between appointment and removal, which scholars and the Supreme Court generally treat as separate matters.²¹ Further, it offers a valuable idea for resolving the tension between unfettered removal and meaningful compliance with the Appointments Clause—requiring compliance with the Appointments Clause as the mechanism for removal. Congress may pass a statute forbidding presidential removal of an agency head (and other Senate-approved appointees) until the President nominates a qualified successor or until the Senate confirms a successor. The appendix provides draft texts of legislation implementing this proposal.

Under this proposal, the President's removal authority remains unfettered, as the President can remove an official for any reason. But the *means* of removal becomes restricted to ensure compliance with the Appointments Clause. This may seem like a new idea, but integrating Appointments Clause compliance into the removal mechanism simply formalizes the constitutional custom at the Founding. For that reason (and some others), the Supreme Court should accept a tie-in to the Appointments process, even though a Senate confirmation trigger (as opposed to a presidential nomination trigger) stands in some tension with its removal jurisprudence.

Trump's abuse of removal authority to replace law abiding subordinates with more pliant officials has contributed to renewed scholarly interest in a related problem, how to regulate presidential designation of "acting" officials—the officers a President appoints unilaterally after a Senate-confirmed appointee leaves office.²²

¹⁹ See generally David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 *FORDHAM L. REV.* 71, 84–86 (2009) (showing that the Oath Clause requires federal officials to refuse to carry out illegal orders).

²⁰ Cf. *NLRB v. Noel Canning*, 573 U.S. 513, 541 (2014) (recognizing that a broad interpretation of the President's authority to make Recess Appointments "might permit a President to avoid Senate confirmation as a matter of course").

²¹ Cf. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1983 (2021) (a rare case in which the Court declares that the principles in removal cases support the "principles that guide" the Court to its result in this Appointments Clause case); Ben Miller-Gootnick, Note, *Boundaries of the Federal Vacancies Reform Act*, 56 *HARV. J. LEGIS.* 459 (2019) (analyzing legislative history and court opinions to conclude that the Federal Vacancies Reform Act of 1998 does not empower the President to appoint interim officials when that President created the vacancies); Justin C. Van Orsdol, Note, *Reforming Federal Vacancies*, 54 *GA. L. REV.* 297 (2019) (arguing that "self-created vacancies via termination violate the Appointments Clause").

²² See, e.g., Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 *ADMIN. L. REV.* 533 (2020); O'Connell, *supra* note 9.

The literature on acting appointments incidentally exposes the tension between authority to fire an official for political reasons and preserving the Senate's role in appointments.²³ This Article draws on the acting officials literature primarily to discuss whether statutes regulating appointment of acting officials can adequately address the tension between a political removal authority and safeguarding the Senate's role in appointments.

This combined approach to appointment and removal helps us better engage in the constitutional project of keeping a Republic intact. The Supreme Court has recognized that the Appointments Clause aims to prevent “despotism.”²⁴ I have shown in a recent article and book that elected authoritarian leaders often obtain unfettered removal authority and then fire neutral experts and political opponents, replacing them with supporters willing to undermine the rule of law.²⁵ These new officials then help entrench the authoritarian regime in power by punishing enemies of the regime and protecting often corrupt regime supporters.²⁶ This approach has played a key role in the destruction of democracy in Turkey, Hungary, and many other countries.²⁷ Yet, the Supreme Court's decision in *Seila Law LLC v. Consumer Financial Protection Bureau* precludes adequately constraining abusive removal of

²³ See Mendelson, *supra* note 22, at 550 n.81 (stating that the FVRA does not “address whether the President may designate an acting official to fill a vacancy caused by presidential firing”); O'Connell, *supra* note 9, at 672–75 (discussing the issue of using the FVRA to fill vacancies the President creates through removal); Van Orsdol, *supra* note 21, at 308–09 (suggesting that permitting a President to appoint a temporary officer to fill a vacancy he created through removal may violate the Appointments Clause).

²⁴ See *Noel Canning*, 573 U.S. at 525, 570, 578–79 (responding to Justice Scalia's characterization of the Senate's appointments role as a “critical protection against ‘despotism’” by agreeing that the separation of powers protects liberty); *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991) (characterizing the “power of appointment to offices” as “the most insidious and powerful weapon of eighteenth-century despotism” (quoting GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 143 (1969))); see also *Weiss v. United States*, 510 U.S. 163, 184, 190 (1994) (Souter, J., concurring) (viewing Senate consent as a check on “the exercise of arbitrary power”).

²⁵ DAVID M. DRIESEN, *THE SPECTER OF DICTATORSHIP: JUDICIAL ENABLING OF PRESIDENTIAL POWER* (2021) [hereinafter DRIESEN, *SPECTER OF DICTATORSHIP*]; David M. Driesen, *The Unitary Executive Theory in Comparative Context*, 72 HASTINGS L.J. 1 (2020) [hereinafter Driesen, *Unitary Executive Theory*].

²⁶ Many of the appointments made after removal were only unilateral in essence, not formally. That is, a Parliament effectively controlled by the authoritarian leader approved all of his appointees because of lock step voting by an authoritarian party. The authoritarian party also sometimes eliminated supermajority requirements for key appointments to facilitate these approvals.

²⁷ See Driesen, *Unitary Executive Theory*, *supra* note 25, at 29–41.

officials, as it held that Congress may not constitutionally limit the President's authority to remove the sole head of an agency by prohibiting arbitrary, or even malign, removal decisions.²⁸

I will not belabor the autocracy point in this Article. But the importance of this concern with democracy loss leads me to put abuse of removal power to avoid statutory and constitutional constraints at the center of my analysis of the tension between an unrestricted removal authority and the Appointments Clause, rather than the more common problem of removal to effectuate legitimate policy changes not undermining individual liberty or the law. The Framers, in the words of Justice Marshall, designed the Constitution to address the “*crises of human affairs*,”²⁹ and Congress should legislate with an eye to helping the constitutional system survive the stresses that can impair democracy and the rule of law.

The problem of removal undermining appointment helps explain the existence of a well understood doctrine at the Founding—that the body (or bodies) making an appointment has the power to unwind it.³⁰ This parallelism doctrine governed in one of the leading models for the federal Constitution, New York's Constitution, which gave both removal and appointment authority to an executive council while vesting executive power in the governor and charging him to “take care that the laws are faithfully executed.”³¹ The parallelism doctrine may explain why Alexander Hamilton (from New York) maintained in the Federalist Papers that the Constitu-

²⁸ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2198–201, 2206 (2020) (suggesting a rule of unrestricted removal authority for the single directors of an executive branch agency); *accord Collins v. Yellen*, 141 S. Ct. 1761, 1783–87 (2021) (applying a rule on unrestricted removal authority to directors of executive branch agencies to the head of an agency that does not regulate private conduct).

²⁹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

³⁰ *See Myers v. United States*, 272 U.S. 52, 119, 126 (1926) (characterizing the principle that “the power of removal . . . was incident to the power of appointment” as “well approved”). *See, e.g., id.* at 110, 118 (noting that, under the Articles of Confederation, Congress exercised the powers of appointment and removal and that the British Crown exercised both removal and appointment authority); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839) (commending the rule that the power of removal was incident to the power of appointment as being “sound”); *Reagan v. United States*, 182 U.S. 419 (1901); *Shurtleff v. United States*, 189 U.S. 311, 314–15 (1903); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 33 (2021) (suggesting that a rule that absent a municipal charter “an appointer can remove an incumbent officer simply by appointing a replacement” may explain the “dictum that the power to remove an officer is ‘an incident’ of the power to appoint”). The *Myers* Court evaded the principle's implication that the Senate must have a veto over removal by creating a rule that the Senate's advice and consent role should be strictly construed. *Myers*, 272 U.S. at 118 (citing Madison's post-ratification statements).

³¹ N.Y. CONST. of 1777, art. XIX; Driesen, *supra* note 19, at 97 & n.144.

tion only permits the President to remove a Senate-approved official from the government with the Senate's consent.³² This Article's analysis shows that this very old parallelism doctrine has a strong logical basis. To permit unilateral and unfettered presidential removal, it turns out, can make the Appointments Clause a nullity when its constraints are most needed, that is, when a President seeks to escape the law's strictures. The Court's decision in *Myers v. United States*³³ precludes adopting Hamilton's position on removal and the Constitution's language prohibits removing the Senate from the confirmation process. So, the Court is not likely to solve the problem of removal authority undercutting the Appointments Clause's effectiveness by restoring parallelism between appointment and removal. Nevertheless, the dilemma that the parallelism principle reveals remains constitutionally important.

This Article's first Part explains how a political removal authority can interfere with the Senate's authority over appointments. It begins with a brief review of the constitutional landscape with respect to appointment and removal. It tells the interference story primarily by explaining the role political removal, followed by unilateral appointment in tension with the Appointments Clause, has played in wresting legal authority from Senate-approved officials following the law, and giving it to officials chosen to facilitate evasion or defiance of the law. This account focuses on the administrations of Andrew Jackson, Andrew Johnson, Richard Nixon, and Donald Trump. The story of these Presidents' use of appointment and removal does not provide a representative sample of American practice, but rather underlines the potential tension between political removal accomplished without Senate approval of a successor and the Constitution's goal of securing the rule of law. On the other hand, this Part also exposes a problem that will bring my proposal into question—the problem of the Senate undermining laws passed by previous congresses by failing to properly fulfill its duty to advise and consent to the nomination of competent and conscientious appointees.³⁴

The second Part discusses federal statutes, most prominently the Federal Vacancies Reform Act (FVRA), and their role in checking evasion of the Senate's advice and consent function.³⁵ The problem of the President using removal to undermine

³² THE FEDERALIST NO. 77 (Alexander Hamilton).

³³ 272 U.S. 52.

³⁴ See O'Connell, *supra* note 9, at 698–99 (noting that Presidents of both parties have put officials whom the Senate would not confirm in acting roles).

³⁵ See *id.*; Brannon P. Denning, *Article II, The Vacancies Act and the Appointment of "Acting" Executive Branch Officials*, 76 WASH. U. L.Q. 1039 (1998); Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913 (2009); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1514–17 (2005); Joshua L. Stayn, Note, *Why the Federal Vacancies Reform Act of 1998 is Unconstitutional*, 50 DUKE L.J. 1511, 1513 (2001); E. Garrett West, Note, *Congressional Power Over Office Creation*, 128 YALE L.J. 166, 173–74 (2018).

the Appointments Clause arose at a time when federal statutes authorizing temporary appointments did not expressly permit making a temporary appointment to fill a vacancy that the President creates through removal, and FVRA itself probably does not do so. As a result, FVRA does not offer a promising avenue for solving the problem of removal to evade the Appointments Clause. In any event, this Part shows that authorization of temporary appointments through FVRA has proven ineffective when most needed and exposes dilemmas in its enforcement. It acknowledges that FVRA amendments can help but explains why they cannot, in the end, solve the Appointments Clause dilemma created by allowing a President to freely undo a Senate confirmation of an officer whom the President has nominated.

The third Part provides a constitutional defense of the proposal and analyzes its policy merits. It shows that this proposal reflects a constitutional custom that prevailed for more than a hundred years beginning with the nation's founding. The Court generally allows longstanding custom dating from the founding era to gloss the Constitution.³⁶ It also shows that the Appointments, Take Care, and Necessary and Proper clauses all support this proposal. It then addresses the Court's precedent. The Court's removal jurisprudence does not preclude this proposal, as a requirement to comply with the Appointments Clause does not provide any substantive restraint on the removal power—leaving the President free to remove law abiding officers for any reason or no reason at all. I argue that this proposal's historical pedigree should overcome its potential tension with the Court's recent holding that the President must have an unfettered right to remove an agency head, in light of the evasion problem developed earlier. The Court has not considered the relationship between appointment and removal and never intended to allow the President's removal authority to subvert the Senate's role in appointments. Furthermore, the reform serves the Founders' goal of avoiding despotism, which an autocratic President can create by using the removal power to appoint pliant officials (to paraphrase Hamilton) willing to do his bidding absent effective constraint. On the other hand, the inflexibility of this remedy can interfere with the executive branch's proper functioning when the Senate abuses its advice and consent function to insist on the appointment of officers not dedicated to the rule of law. This Part closes with a discussion of the proposal's strengths and weaknesses. It concludes that Congress should adopt this proposal to make Appointments Clause compliance the required procedure for removal with respect to a limited number of important offices.

³⁶ See generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

I. REMOVAL UNDERMINING THE APPOINTMENTS CLAUSE

This Part begins with a brief sketch of the constitutional background. It continues by recounting examples in our history of Presidents abusing removal authority to avoid the constraint of reliance on a Senate-approved officer in hopes of evading the law's purposes, covering up crimes, improperly tilting election results, or broadly undermining the rule of law. It concludes by noting that the Senate sometimes abuses its advice and consent role to facilitate efforts to undermine existing laws passed by previous congresses with which it disagrees.

A. *Removal and Appointment: Constitutional Background*

The Appointments Clause provides that the President shall nominate “Officers of the United States” subject to the “Advice and Consent” of the Senate.³⁷ The Constitution, however, contains two exceptions to the rule that the Senate must approve official appointments. First, Congress may authorize the President, the head of a department, or the courts to appoint “inferior Officers” unilaterally.³⁸ Second, the Recess Appointments Clause authorizes the President to “fill up all Vacancies” occurring during a Senate recess, but terminates those temporary appointments at the end of the following session.³⁹ Thus, the President generally has no express constitutional authority to appoint the government’s top officials without the Senate’s approval if the Senate is in session when a vacancy arises.⁴⁰

As the Supreme Court has recognized, the Constitution denies the President the authority to unilaterally appoint the chief officers of the government in order to avoid “despotism.”⁴¹ Hamilton explained that the Senate’s advice and consent role would discourage the President from nominating personal allies or those “possessing the necessary . . . pliancy to render them the obsequious instruments of his pleasure.”⁴² Personal allies might obey a President’s request or order to take actions entrenching him in power rather than faithfully executing the laws. Hamilton also explained that the requirement of Senate consent would encourage nomination of competent officials.⁴³

³⁷ U.S. CONST. art. II, § 2, cl. 2.

³⁸ *Id.*

³⁹ *Id.* cl. 3.

⁴⁰ See *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 948–49 (2017) (Thomas, J., concurring) (arguing that the FVRA may violate the Constitution, because it acts as a waiver of the express provisions of the Appointments Clause).

⁴¹ *Freytag v. Comm’r*, 501 U.S. 868, 883 (1991) (referring to a unilateral appointment power as the “most insidious and powerful weapon of eighteenth century despotism” (quoting WOOD, *supra* note 24, at 143)).

⁴² THE FEDERALIST NO. 76 (Alexander Hamilton).

⁴³ See *id.*

The Constitution contains but one Removal Clause, which authorizes the Senate to remove government officials upon impeachment by the House for high crimes and misdemeanors.⁴⁴ Prior to the Constitution's adoption, Hamilton explained to those considering its ratification that the President could only remove officials with the Senate's consent.⁴⁵ This "doctrine maintained with great earnestness by the Federalist," as Joseph Story put it, can be supported in two ways.⁴⁶ The customary constitutional rule that the power of removal follows the power of appointment justifies the doctrine.⁴⁷ Some members of the First Congress, however, justified a Senate role in removal by arguing that the Constitution's Removal Clause provides the exclusive method of removing an officer.⁴⁸

The First Congress debated the question of whether the Constitution authorized removal outside the impeachment context, and most thought that it did.⁴⁹ But the congressmen debating the issue, many of whom helped frame the Constitution or participated in the ratification debates, took conflicting positions on who should have this removal authority.⁵⁰ Some Congressmen stuck to the position Hamilton took before ratification—that the Senate must consent to removals—but interpreted it as authorizing bilateral removal outside the impeachment context.⁵¹ They based this argument on the "traditional rule . . . that the removal power mirrored the appointment power."⁵² Others thought that the President had a constitutional right to remove executive officers unilaterally, the position of modern proponents

⁴⁴ See U.S. CONST. art. I, § 3, cls. 6–7.

⁴⁵ THE FEDERALIST NO. 77 (Alexander Hamilton).

⁴⁶ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION §§ 1538–39 (5th ed. 1994).

⁴⁷ See *Myers v. United States*, 272 U.S. 52, 119 (1926) (describing the "constitutional principle" that "appointment carried with it the power of removal").

⁴⁸ See Brief of Jed H. Shugerman as Amicus Curiae Supporting Court-Appointed Amicus Curiae at 7, *Collins v. Yellen*, 141 S. Ct. 1761 (2021) (Nos. 19-422 & 19-563) (stating that a "small number of representatives" in the First Congress viewed impeachment as the sole means of removing officers).

⁴⁹ *Id.*

⁵⁰ See *Bowsher v. Synar*, 478 U.S. 714, 723–24 & n.3 (1986) (noting that many members of that Congress helped frame the Constitution and listing the members of the First Congress who attended the Philadelphia Convention); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989); Edward S. Corwin, *Tenure of Office and Removal Power Under the Constitution*, 27 COLUM. L. REV. 353 (1927); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006).

⁵¹ Brief of Jed H. Shugerman as Amicus Curiae Supporting Court-Appointed Amicus Curiae, *supra* note 48, at 7 (stating that a "substantial number of representatives" believed that removal requires Senate consent).

⁵² *Id.*

of the unitary executive theory.⁵³ Still others thought that Congress could decide whom to entrust with non-impeachment removal authority under the Necessary and Proper Clause.⁵⁴

The Supreme Court held that the Senate could not prevent the President from unilaterally removing an executive officer by requiring the Senate's consent to removal in *Myers v. United States*, relying, in part, on a heavily disputed reading of the debates in the First Congress.⁵⁵ A few years later, the Court held that Congress could nevertheless limit the *grounds* for presidential removal, at least for officers that exercise quasi-judicial and quasi-executive functions.⁵⁶ In *Morrison v. Olson*, the Supreme Court held that Congress may protect an independent counsel charged with prosecuting high level wrongdoing from arbitrary removal by only permitting removal for cause, even though the independent counsel performed an executive function.⁵⁷ In *Seila Law*, however, the Supreme Court held that the President must have authority to fire the single head of a government agency (as opposed to a member of a commission heading an agency) for political reasons or no reason at all.⁵⁸ While for-cause removal suffices to allow a President to “take Care that the Laws be faithfully executed,”⁵⁹ *Seila Law*'s political removal authority authorizes the President to fire officials in order to advance his policies even when they squarely conflict with

⁵³ *Id.* (identifying a “fourth group” in the First Congress as supporters of mandatory presidential removal authority).

⁵⁴ *See id.* (identifying a “third group” as believing that Congress could specify the locus of removal authority).

⁵⁵ *See Myers v. United States*, 272 U.S. 52, 109–17 (1926) (reading the debates in 1789 as establishing the President's right to remove officials unilaterally); *cf.* Casper, *supra* note 50 (disputing Justice Taft's reading of the 1789 debate); Corwin, *supra* note 50 (same).

⁵⁶ *See Humphrey's Ex'r v. United States*, 295 U.S. 602, 626–29 (1935) (repudiating broad statements in *Myers* and stating that *Myers* does not justify giving the President unfettered removal authority over officers exercising quasi-judicial and quasi-legislative authority).

⁵⁷ *See Morrison v. Olson*, 487 U.S. 654, 692–93 (1988) (holding that the for-cause removal provision in the Independent Counsel Act does not impermissibly interfere with the President's duty to “ensure the faithful execution of the laws”).

⁵⁸ *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (invalidating for-cause removal protection for the head of the Consumer Financial Protection Bureau).

⁵⁹ U.S. CONST. art II, § 3; *see Morrison*, 487 U.S. at 692–93 (suggesting that for-cause removal protections for the independent counsel allow removal for misconduct or incompetence); *Bowsher v. Synar*, 478 U.S. 714, 729 (1986) (explaining that a for-cause removal provision authorizes removal for “actual or perceived transgressions of the legislative will”); David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. (forthcoming 2022) (noting that faithless law execution is grounds for removal under typical for-cause removal provisions); Manners & Menand, *supra* note 30, at 6, 8 (explaining that the authority to remove officers for “neglect of duty” or “malfeasance” traditionally connotes a right to remove officers not faithfully executing the laws).

applicable law, thereby allowing him to undermine the rule of law.⁶⁰ In any case, the Court has squarely repudiated a ban on presidential removal without Senate consent and has recently gone further by limiting the use of for-cause removal protection.⁶¹

The Appointments Clause jurisprudence often addresses the exceptions to the advice and consent requirement. The *Myers* Court strongly suggested that Congress may determine which officials constitute inferior officers—who may be appointed by the President unilaterally, department heads, or the courts, rather than approved by the Senate.⁶² Recent cases, however, favor judicial supremacy in configuring the scope of the inferior officers exception to the rule requiring Senate confirmation, but have employed varying definitions of an inferior officer.⁶³ The Court sometimes defines an inferior officer as an official with relatively narrow responsibilities but, in its most recent cases, defines an inferior officer as an official subject to a superior's control and direction.⁶⁴

The Senate sometimes has blocked recess appointments by holding periodic *pro forma* sessions when not engaging in substantive business, and the Court has approved this practice.⁶⁵ The Court has further cabined the Recess Appointments Clause by holding that recess appointments can only occur during a recess of “substantial length.”⁶⁶ Accordingly, a President seeking to unilaterally control appointment of officers in defiance of the Constitution may often have to rely on removal of Senate-approved officials, followed by unilateral appointment or delegation of a fired officials' duties, rather than upon his recess appointment authority.

⁶⁰ Cf. *Free Ent. v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 502 (2010) (stating that a for-cause removal provision does not authorize removal for mere disagreement with the President).

⁶¹ Cf. *Seila Law LLC*, 140 S. Ct. at 2198 (generally recognizing that Congress may provide for-cause removal protection for inferior officers and members of multimember commissions).

⁶² See *Myers*, 272 U.S. at 162, 173–74 (suggesting that Congress may determine that an officer is inferior and may enlarge the civil service through legislation).

⁶³ See *Edmond v. United States*, 520 U.S. 651, 661 (1997) (acknowledging that the Court's cases “have not set forth an exclusive criterion for distinguishing between principal and inferior officers”).

⁶⁴ See, e.g., *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1980 (2021) (defining an inferior officer as one “directed and supervised” by presidentially appointed officers (quoting *Edmond*, 520 U.S. at 663)); *Free Ent.*, 561 U.S. at 510–11 (defining an inferior officer as a subordinate); *Edmond*, 520 U.S. at 662 (same); *Morrison*, 487 U.S. at 671–72 (holding that a special counsel with “limited duties” and jurisdiction is an inferior officer even though “she possesses a degree of independent discretion”).

⁶⁵ See *NLRB v. Noel Canning*, 573 U.S. 513, 519 (2014) (concluding that pro-forma sessions of the Senate can block recess appointments); *Mendelson*, *supra* note 22, at 554 (noting that the *Noel Canning* ruling makes it easy to “block recess appointments” and that the Senate did so during the August 2017 recess).

⁶⁶ See *Noel Canning*, 573 U.S. at 527, 539 (finding a recess of less than ten days too short to be of “substantial length”).

In another line of cases, the Court has stopped Congress from assuming a unilateral appointment authority or requiring that its own members assume various posts that are not purely within the legislative branch.⁶⁷ The Court, however, has done nothing to check the President from assuming appointment authority to people the government with partisan supporters or White House officials whom the Senate might not approve, although the lower courts have disapproved of appointments violating the FVRA and other statutes governing acting appointees.⁶⁸

B. *Evading Senate Confirmation*

The problem with removal potentially interfering with the Senate's role in appointments has played a role in important challenges to the rule of law undergirding our democracy. At important moments in our history when a President wished to defy or evade legal restraints, he has removed government officials committed to rule of law values and replaced them with people not approved by the Senate and willing to subvert the law. This problem played a role in four of the five presidential impeachment cases in the nation's history, and it became a ground for impeachment in two of them (counting Nixon's resignation under threat of impeachment). This problem also figured in one incident triggering a rare censure resolution.

1. *Andrew Jackson*

President Andrew Jackson abused his removal and appointment authority to defy the law respecting the National Bank of the United States. Jackson opposed the National Bank, but it enjoyed significant support in Congress. Congress passed

⁶⁷ See, e.g., *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276–77 (1991) (forbidding Congress from populating a Board of Review regulating D.C. airports with its own members); *Buckley v. Valeo*, 424 U.S. 1, 118–43 (1976) (invalidating creation of an electoral commission consisting of appointees selected by Congress and some of its officers).

⁶⁸ See, e.g., *Behring Reg'l Ctr. LLC v. Wolf*, No. 20-cv-09263-JSC, 2021 WL 2554051 (N.D. Cal. June 22, 2021) (holding that “acting” Homeland Security Secretary Kevin McAleenan was improperly appointed); *Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 123 (E.D.N.Y. 2020) (holding that the acting head of DHS was not lawfully appointed); *Casa de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928, 950–57 (D. Md. 2020) (finding that the plaintiffs were likely to succeed in showing that Trump's appointment of acting DHS heads violated requirements for the order of succession); *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520 (N.D. Cal. 2020) (same); *L.L.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 23 (2020) (holding that the acting head of UCSIS was not properly appointed).

a bill renewing the Bank in 1832, but Jackson vetoed it, arguing that it was unconstitutional.⁶⁹ But the 1832 veto did not immediately abolish the Bank because the previous unexpired law establishing it remained in effect until 1836.⁷⁰

Unable to obtain legislation promptly terminating the Bank, Jackson decided to destroy the Bank by removing executive branch officials faithfully executing the law just after his second term began in 1832.⁷¹ Jackson asked the Secretary of Treasury, Louis McClane, about removing the federal deposits that sustained the Bank.⁷² McClane suggested that he would not do so, as he considered the request illegal.⁷³ So, Jackson transferred him to the Department of State and installed a known bank critic, William Duane, as Secretary of the Treasury.⁷⁴ William Duane, however, likewise considered the request illegal and refused to remove the deposits.⁷⁵ So, Jackson removed him too and installed Attorney General Roger Taney (who later became a Supreme Court Justice and helped precipitate a civil war with the *Dred Scott* decision) in his stead.⁷⁶ Jackson chose Taney because he was the only cabinet member who clearly favored removing the deposits, and Taney promptly withdrew them once put at the head of the Treasury Department.⁷⁷ Jackson not only used his removal authority to oust officials dedicated to following a law of which he disapproved, he also evaded Senate confirmation proceedings for Treasury Secretary by appointing Taney while Congress was in recess.⁷⁸

This incident triggered a censure supported by arguments from Daniel Webster, Joseph Story, and Henry Clay, asserting that Jackson had acted tyrannically by abusing his removal authority to subvert the will of Congress, a claim echoed by

⁶⁹ Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control Over National Financial Policy, 1787 to 1867*, 87 GEO. WASH. L. REV. 1299, 1356 (2019); cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425 (1819) (holding that the Constitution authorizes creation of the National Bank).

⁷⁰ ROBERT V. REMINI, *ANDREW JACKSON AND THE BANK WAR* 109 (1967).

⁷¹ See ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 98 (1945) (explaining that Jackson wished to terminate the Bank and conceived of the plan of withdrawing federal deposits).

⁷² DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA 1815–1848*, at 387–90 (2007).

⁷³ REMINI, *supra* note 70, at 113–15 (discussing McClane’s response to Jackson’s suggestion in detail).

⁷⁴ *Id.* at 115; HOWE, *supra* note 72, at 387.

⁷⁵ REMINI, *supra* note 70, at 122–24.

⁷⁶ See *id.* at 124.

⁷⁷ *Id.* at 118, 125 (discussing the cabinet members’ position and how Taney arranged for the removal of the deposits).

⁷⁸ See HOWE, *supra* note 72, at 388 (noting that by making an “interim appointment” of Taney Jackson allowed him to “take over immediately without waiting for Senate confirmation”); cf. REMINI, *supra* note 70, at 118 (noting Duane’s position that Jackson should not remove the deposits during the congressional recess).

numerous constitutional scholars at the time.⁷⁹ The Senate also rejected the appointment of Taney as Secretary of the Treasury,⁸⁰ but could not do so rapidly enough to avoid evasion of the law by an improperly appointed officer. The objective of the replacement of officials without Senate consent was not to secure faithful execution of the law, but to replace those with a strong sense of duty to properly execute the law with an official who would use executive power to undermine the law's core purpose.⁸¹

2. Andrew Johnson

More thorough abuse of removal and appointment authority took place under President Andrew Johnson and led to his impeachment. Johnson used removal and appointment as tools to defeat the operation of the laws governing reconstruction after the Civil War.

Johnson, an avowed white supremacist, followed a policy of allowing leaders of the confederacy to assume positions of prominence in state governments being created in the vanquished South, while doing little or nothing to protect freed slaves, including many union soldiers, from murders and even massacres tolerated or carried out by southern governments.⁸² The Republicans obtained veto-proof majorities in the midterm election of 1866, likely because of Johnson's failure to protect blacks (and for that matter, loyal Republican whites) in the South from terrorism.⁸³

⁷⁹ WILLIAM R. EVERDELL, *THE END OF KINGS: A HISTORY OF REPUBLICS AND REPUBLICANS* 209 (2000) (discussing the attitude of constitutional scholars); HOWE, *supra* note 72, at 387–90 (noting that the Senate censured Jackson for improperly firing two subordinates); SCHLESINGER, *supra* note 71, at 106–07, 110 (quoting Clay as characterizing Jackson's effort to manipulate appointments to remove the bank deposits as a "revolution" concentrating "all power in one man," characterizing Webster as charging Jackson with "despotism," and quoting Story as saying, "[t]hrough we live under the form of a republic we are in fact under the absolute rule of a single man").

⁸⁰ REMINI, *supra* note 70, at 141–42.

⁸¹ *See id.* at 126 (explaining that the removal of government funds from the National Bank represented Jackson's "lunge to kill the Bank outright"); HOWE, *supra* note 72, at 388–90 (characterizing Jackson as ordering "an officer to break the law" and violating "the spirit, [and] perhaps the letter, of the law").

⁸² On white supremacy, see, for example, BRENDA WINEAPPLE, *THE IMPEACHERS: THE TRIAL OF ANDREW JOHNSON AND THE DREAM OF A JUST NATION* 83 (2019) (quoting Johnson as saying "this is a country for white men, and, by God, as long as I am president it shall be a government for white men"). On Johnson's policy, see, for example, *id.* at 71–73 (discussing profligate pardoning of confederates); *id.* at 80–83 (discussing Johnson's failure to protect black citizens from violence in the South); WILLIAM H. REHNQUIST, *GRAND INQUESTS* 206 (1992) (explaining that a mob killed 40 and wounded 100 black and white Republicans holding a state constitutional convention after Johnson signaled that the federal government "would not interfere with the [state's] civil authorities").

⁸³ WINEAPPLE, *supra* note 82, at 171.

Congress exercised its constitutional authority to determine the course of reconstruction through legislation by extending and strengthening the Freedmen Bureau Act and passing the First Civil Rights Act months before the 1866 election and by enacting reconstruction acts afterwards.⁸⁴ The reconstruction acts established a policy of military reconstruction, which granted voting rights to the freed slaves and used the occupying Union armies to protect freed blacks and other unionists from attacks.⁸⁵ They also required states to guarantee equal protection of the laws as a condition for readmission to the union.⁸⁶ Johnson vetoed the reconstruction legislation, but Congress overrode his vetoes.⁸⁷

Johnson used removal of officials as a tool to suppress dissent and to prevent faithful implementation of the laws governing reconstruction, “replacing Freedmen’s Bureau officials with flunkies, sacking over a thousand postmasters, and discharging federal employees in the Treasury office who didn’t agree with him.”⁸⁸ In order to avoid the sort of presidential subversion that had occurred with respect to the Freedmen’s Bureau, Congress passed the Tenure of Office Act on the same day that it overrode Johnson’s veto of the first Reconstruction Act, to safeguard its implementation.⁸⁹

The Tenure of Office Act forbade the removal of cabinet officers appointed during the appointing President’s term plus one month without the Senate’s consent.⁹⁰ Johnson, however, continued to abuse his removal authority repeatedly in an effort to dictate policy now at odds with the law and firmly repudiated by the “People of the United States” as then constituted in the 1866 election. For example, Johnson replaced generals implementing the reconstruction legislation with “men willing to prevent blacks from voting, running for office, serving on juries, or riding in the front of a streetcar.”⁹¹

⁸⁴ See Howard C. Westwood, Book Review, 80 COLUM. L. REV. 204, 206–07 (1980) (reviewing DONALD G. NIEMAN, *TO SET THE LAW IN MOTION—THE FREEDMEN’S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865–1868* (1979)) (explaining that Congress overrode Johnson’s second veto of a bill to extend the Freedmen’s Bureau’s life and specify its powers); Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982).

⁸⁵ WINEAPPLE, *supra* note 82, at 194–95, 199, 202–03.

⁸⁶ *Id.* at 194–95.

⁸⁷ *Id.* at 196–99, 202–03.

⁸⁸ *Id.* at 184–85.

⁸⁹ Tenure of Office Act, ch. 154, 14 Stat. 430 (1867) (passed on Mar. 2, 1867; repealed 1887); An Act to Provide for the More Efficient Government of the Rebel States (First Reconstruction Act), ch. 153, 14 Stat. 428 (1867) (passed on Mar. 2, 1867).

⁹⁰ Tenure of Office Act § 1.

⁹¹ See WINEAPPLE, *supra* note 82, at 214–25. The replacing of generals even excited fears of a coup. See *id.* at 218 (discussing the views of Carl Schurz and the editor of the *Boston Daily Advertiser*, George Templeton Strong).

The most famous case of abusive removal and appointment involved War Secretary Edwin Stanton, a holdover from the Lincoln cabinet committed to implementing the law.⁹² Johnson wanted to replace Stanton with a War Secretary willing to substitute Johnson's policy for the law's policy on reconstruction. General William Tecumseh Sherman, after consulting with General Ulysses S. Grant, advised Johnson to replace Stanton with an appointee likely to win Senate approval, General Jacob Dolson Cox.⁹³ Johnson, however, ultimately replaced Stanton with a more pliant and unqualified official, Adjutant General Lorenzo Thomas.⁹⁴

Johnson's determined resistance to faithfully implementing the reconstruction laws capped by the effort to replace Stanton with a person whom the Senate would never approve led to his impeachment by a vote of 126 to 47.⁹⁵ The first article of impeachment cited his violation of the Tenure of Office Act by removing Stanton.⁹⁶ The second article flagged his appointment of Thomas without the Senate's advice and consent.⁹⁷ The final impeachment article charged Johnson with firing Stanton for the purpose of preventing "the execution" of the First Reconstruction Act.⁹⁸ The majority of Senators agreed with the House's impeachment decision, but the Senate acquitted him, falling one vote shy of the two-thirds vote required for removal.⁹⁹

Johnson's decision during the impeachment proceeding to compromise his evasion of the Appointments Clause apparently played a role in saving Johnson from removal. Johnson agreed to nominate John Schofield as Secretary of War, a person who, unlike Thomas, Senators regarded as qualified and conscientious.¹⁰⁰ General

⁹² See *id.* at 208–09, 249–51 (noting that Stanton had “formally stated that he would obey the Reconstruction Acts”).

⁹³ See *id.* at 235.

⁹⁴ See *id.* at 249.

⁹⁵ See *id.* at 258–62.

⁹⁶ Articles of Impeachment, Mar. 4, 1868, reprinted in WINEAPPLE, *supra* note 82, app. B, at 431, art. 1.

⁹⁷ *Id.* at 432, art. 2.

⁹⁸ See *id.* at 438, art. 11 (accusing Johnson of “unlawfully devising and contriving . . . means . . . to prevent the execution of an act entitled ‘An Act to provide for the more efficient government of the Rebel States,’ passed March 2, 1867”).

⁹⁹ See REHNQUIST, *supra* note 82, at 233–35 (explaining that the Senate voted 35 to 19 for removal).

¹⁰⁰ See *id.* at 247 (suggesting that assurances that the President would nominate “a successor to Stanton . . . who was satisfactory to” wavering Republicans was of “some importance”). Several other possible causes have also been suggested for the loss of a key vote. See, e.g., *id.* at 246–47 (suggesting that fears of President Pro Tempore of the Senate Ben Wade succeeding to the presidency may have influenced the outcome); WINEAPPLE, *supra* note 82, at 383 (finding a lot of “circumstantial evidence” of bribery but no firm proof).

Grant, a war hero who supported faithful implementation of the reconstruction legislation, won the next election.¹⁰¹ Thus, an effort to check abusive removal in order to preserve the Senate's role in appointments helped restore the rule of law in the federal government.

3. *Richard Nixon*

The Watergate scandal demonstrated the potential utility of at-will presidential removal authority, combined with appointment evading Senate advice and consent, in subverting not just the rule of law, but fair elections.¹⁰² President Richard Nixon and his associates apparently decided to tilt the electoral playing field in his favor by trying to get dirt on the political opposition—ordering burglaries of political opponents.¹⁰³ In response to discovery of a break-in of the Democratic National Committee's office in the Watergate complex, Attorney General Elliott Richardson appointed a special counsel to investigate.¹⁰⁴ Nixon responded to this threat of uncovering his administration's crimes in the same way that Jackson and Johnson had responded to threats to their ability to unilaterally create policies at odds with the law then in force, by securing the removal of law-abiding subordinates in order to have more pliant officials serve in their vacated posts. Nixon ordered Attorney General Richardson to fire the special counsel.¹⁰⁵ Richardson refused and resigned in protest.¹⁰⁶ Nixon then ordered his successor, William French Smith, to fire the special counsel.¹⁰⁷ Smith likewise refused and resigned.¹⁰⁸ Nixon, however, found an “obsequious instrument[] of his pleasure” (in Hamilton's words) in

¹⁰¹ RON CHERNOW, GRANT 614, 625–26 (2017) (noting “Grant's boldness” in upholding radical reconstruction and the role blacks' support played in his victory).

¹⁰² I am using the term Watergate scandal to encompass not only the Watergate break-in itself, but also the cover-up and other similar scandals investigated around the same time.

¹⁰³ See, e.g., GARRETT M. GRAFF, WATERGATE: A NEW HISTORY 37, 64–70, 80–84 (2022) (discussing Nixon's orders to burglarize the Brookings Institution and Daniel Ellsberg's psychiatrist's office). A recent history claims that we still do not know who ordered the Watergate break-in itself. See *id.* at 678. But two of the central players, Howard Hunt and James McCord, were Nixon associates. See *id.* (identifying Hunt and McCord as central players in the Watergate break-in). E. Howard Hunt was an ex-CIA officer who Nixon tapped to carry out a burglary of the Brookings Institution. See *id.* at 63–64. James McCord was the head of security for the Republican National Committee to Re-Elect the President. *Id.* at 105. Jed Magruder, who was also involved in planning the Watergate break-in, was an aide to White House Chief of Staff, Bob Haldeman. *Id.* at 9, 144, 145 n. (suggesting that Magruder either ordered the break-in or conveyed Attorney General John Mitchell's order to carry out the burglary to Liddy).

¹⁰⁴ BOB WOODWARD AND CARL BERNSTEIN, THE FINAL DAYS 61 (1976).

¹⁰⁵ *Id.* at 24, 70.

¹⁰⁶ *Id.* at 70.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

Ruckelshaus's successor, Robert Bork, who agreed to fire the special counsel.¹⁰⁹ But the Justice Department regulations governing the special counsel office only authorized for-cause removal, and a federal District Court judge held Bork's firing of the special counsel illegal.¹¹⁰ Thus, judicial enforcement of a for-cause removal provision helped vindicate the rule of law.

The reaction to the "Saturday Night Massacre"—the firing of Richardson and Ruckelshaus—led to increased support for impeachment.¹¹¹ The House Judiciary Committee drafted articles of impeachment that made Nixon's "interference" with the Department of Justice one part of the basis for impeaching him, and Nixon resigned to avoid almost certain impeachment and removal.¹¹²

One might argue that the Watergate story does not illustrate the problem of combining removal with unilateral appointment, as Ruckelshaus and Bork assumed office automatically under the DOJ succession statute.¹¹³ But Nixon did not formally nominate Ruckelshaus or Bork for Attorney General. As a result, the Senate never had an opportunity to inquire whether a new Attorney General would stand up to Nixon to vindicate the law and to refuse to allow an appointment of an official who would not.¹¹⁴ In other words, Nixon's removal of Attorneys General automatically defeated the Appointments Clause by triggering a statute authorizing succession of officers without Senate approval of a new Attorney General.

More importantly, this case, like the Jackson case, shows that a President with political removal authority can simply remove as many officials as necessary in order to secure illegal conduct from subordinates, unless some lower ranking official enjoys protection from abusive removal.

4. *Donald Trump*

President Donald Trump evaded the Senate confirmation process by firing officials and then replacing them with "acting" appointees more often than any of his

¹⁰⁹ *Id.* at 70–71; THE FEDERALIST NO. 76 (Alexander Hamilton) (explaining that the Constitution aimed to prevent appointment of "obsequious instruments" of presidential "pleasure").

¹¹⁰ *Nader v. Bork*, 366 F. Supp. 104, 109–11 (D.D.C. 1973).

¹¹¹ See WOODWARD & BERNSTEIN, *supra* note 104, at 113 (noting that House members drew up articles of impeachment after the firing of Richardson and Ruckelshaus).

¹¹² H.R. REP. NO. 93-1305, at 4 (1974); Frederick M. Lawrence, *In Memoriam: Archibald Cox and the Genius of Our Institutions*, 85 B.U. L. REV. 356, 356–57 (2005) (explaining that Nixon's firing of three DOJ employees led to his resignation).

¹¹³ See Lois Reznick, Comment, *Temporary Appointment Power of the President*, 41 U. CHI. L. REV. 146, 146 n.5 (1973) (explaining that the Vacancy Act "clearly authorized" the Bork appointment).

¹¹⁴ See *id.* (noting that Congress had made a promise that the Attorney General would not "unduly interfere[] with" the Special Prosecutor a "condition of his confirmation").

somewhat recent predecessors.¹¹⁵ Indeed, Anne Joseph McConnell tells us that prior to Trump, “[f]irings or forced resignations of top officials” rarely occurred.¹¹⁶ “[B]etween 1945 and the start of President Trump’s Administration,” she writes, “twelve Presidents fired a total of nineteen cabinet secretaries.”¹¹⁷ Furthermore, Trump’s effort to wrest Appointments power from the Senate by firing officials it had approved and substituting his own people was deliberate. He admitted publicly that he liked the “flexibility” provided by appointing acting officials unilaterally rather than conforming to Appointments Clause constraints.¹¹⁸ He also often evaded FVRA constraints in order to enhance this “flexibility.” Nina Mendelson has explained that two thirds of the way through Trump’s administration, about one third of the “key” posts in his administration were not filled by Senate-confirmed officials.¹¹⁹ As of September 2021, President Joe Biden’s record in filling key posts with Senate-confirmed officials is only slightly better than Trump’s, but Biden has not engaged in extensive removal of officials dedicated to the rule of law in order to create more vacancies to fill with acting appointees.¹²⁰

The flexibility Trump obtained by replacing the heads of DHS and its immigration authorities with acting officials lacking Senate confirmation facilitated not only an attack on individual liberty in Portland, but also a host of illegal actions on the immigration front.¹²¹ Federal courts enjoined or struck down policies enacted

¹¹⁵ See O’Connell, *supra* note 9, at 643 (explaining that Trump alone had “used more acting secretaries than confirmed secretaries”); Van Orsdol, *supra* note 21, at 299 (stating that “over 200 key executive branch positions requiring . . . Senate confirmation [sat] vacant” late in the Trump administration’s second year). The data on sub-cabinet positions that have been studied also show that Trump evaded Senate confirmation much more often than his predecessors. O’Connell, *supra* note 9, at 650–54 (providing data for the Environmental Protection Agency and the Federal Aviation Administration).

¹¹⁶ O’Connell, *supra* note 9, at 672.

¹¹⁷ *Id.*

¹¹⁸ See *id.* at 617.

¹¹⁹ See Mendelson, *supra* note 22, at 539 (citing *Tracking How Many Key Positions Trump Has Filled So Far*, WASH. POST., <https://www.washingtonpost.com/graphics/politics/trump-administration-appointee-tracker/database/> (Jan. 15, 2021, 3:52 PM)).

¹²⁰ See *Biden Political Appointee Tracker*, WASH. POST., <https://www.washingtonpost.com/politics/interactive/2020/biden-appointee-tracker/> (May 9, 2022, 9:19 AM).

¹²¹ See, e.g., *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021) (affirming a 2018 injunction of a Trump asylum policy); *Pangea Legal Servs. v. Dep’t of Homeland Sec.*, 512 F. Supp. 3d 966, 972–77 (N.D. Cal. 2021) (enjoining a rule establishing new categories of crimes as triggering a bar on asylum because the Acting Secretary of Homeland Security lacked authority to approve it); *Order Granting Temporary Restraining Order*, Nat’l Immigrant Just. Ctr. v. Exec. Off. for Immigr. Rev., No. 1:21-cv-00056-RBW (D.D.C. Jan. 14, 2021) (No. 21-56) (enjoining rule creating hurdles for asylum seekers); *Make the Road N.Y. v. Pompeo*, 475 F. Supp. 3d 232, 270–72 (S.D.N.Y. 2020) (rejecting immigration applications based on insurance status is unlawful); *Clerveaux v. Searls*, 397 F. Supp. 3d 299, 304 (W.D.N.Y. 2019) (determining that holding alien for 17 months in DHS custody without review of eligibility for release violated

by the officials Trump put in place unilaterally after firing somewhat principled Senate-approved officials, reversing the Trump administration in 90% of the cases brought to federal court.¹²²

Trump often combined replacement of prominent officials doing their duties with presidential Twitter attacks denigrating these officials.¹²³ In this way, Trump secured replacement of somewhat principled officials with less principled officials while simultaneously signaling to all government officials that they must choose obedience to the President over obedience to the law.¹²⁴ We may have seen the consequences of this intimidation in the waning days of his administration when the head of the FBI declined to appear publicly to ask for the public's help in investigating the attack on the Capitol.¹²⁵ While media pundits and even some law enforcement officials criticized him for this, the FBI Director may have felt that he had to remain silent to avoid dismissal.¹²⁶

Trump fired officials who reported information about his administration's failure to abide by ethical and legal restraints, even when applicable law required the reports.¹²⁷ Specifically, he fired numerous inspectors general who might expose corruption in his administration, evading the Appointments Clause by replacing them

due process rights); *Jimenez v. Cronen*, 317 F. Supp. 3d 626, 634–35 (D. Mass. 2018) (determining that holding aliens in ICE detention for four months without opportunity to be heard violated due process rights).

¹²² See Bethany A. Davis Noll, “*Tired of Winning*”: *Judicial Review of Regulatory Policy in the Trump Era*, 73 ADMIN. L. REV. 353, 390 (2021) (showing that the Trump administration lost 90% of its immigration cases in federal court). See, e.g., *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901 (2020) (vacating decision to rescind the Deferred Action for Childhood Arrivals program); *Cap. Area Immigrants’ Rts. Coal. v. Trump*, 471 F. Supp. 3d 25, 31–32 (D.D.C. 2020) (finding rule categorically disqualifying asylum seekers at southern border unlawful); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 339–41 (D.D.C. 2018) (stopping individualized parole determinations for asylum seekers to promote “deterrence” held unlawful).

¹²³ See, e.g., Missy Ryan, Dan Lamothe, Paul Sonne & Josh Dawsey, *Trump Fires Defense Secretary Mark Esper*, WASH. POST (Nov. 9, 2020), https://www.washingtonpost.com/national-security/defense-secretary-mark-esper-fired-trump/2020/11/09/9b7cbcbc-a5b9-11ea-8681-7d471bf20207_story.html; see also David E. Sanger & Nicole Perloth, *Trump Fires Christopher Krebs, Official Who Disputed Election Fraud Claims*, N.Y. TIMES (Nov. 17, 2020), <https://www.nytimes.com/2020/11/17/us/politics/trump-fires-christopher-krebs.html>.

¹²⁴ See, e.g., Kanno-Youngs & Haberman, *supra* note 16.

¹²⁵ See Katie Benner, Zolan Kanno-Youngs & Adam Goldman, *Amid Riot Chaos, Some National Security Leaders Are Absent from View*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/us/politics/capitol-riot-national-security-officials.html>.

¹²⁶ See *id.*

¹²⁷ See Del Quentin Wilber, *He Was Told to Be Independent, and Trump Fired Him for It*, L.A. TIMES (Jan. 11, 2021, 5:00 AM), <https://www.latimes.com/world-nation/story/2021-01-11/he-was-told-to-be-independent-and-trump-fired-him-for-it>.

with acting appointees.¹²⁸ Firing officials for complying with disclosure requirements not only undermines the rule of law, it undermines political accountability through elections by keeping information about an administration's conduct from the voters.¹²⁹

Shortly after he lost the 2020 election, Trump replaced the Secretary of Defense with an official whom the Senate had not approved.¹³⁰ Replacement of a Secretary of Defense late in an administration is very unusual.¹³¹ The Secretary of Defense initially failed to fulfill requests to deploy National Guard troops to defend the Capitol from the insurrection.¹³² Despite plans to have a "Quick Reaction Force" available, National Guard troops did not arrive until more than five hours

¹²⁸ ROBERT BAUER & JACK GOLDSMITH, AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY 323 (2020); Jen Kirby, *Trump's Purge of Inspectors General, Explained*, VOX (May 28, 2020, 5:20 PM), <https://www.vox.com/2020/5/28/21265799/inspectors-general-trump-linick-atkinson>. See, e.g., *Interview of Steve A. Linick Before the H. Comm. on Foreign Affs., H. Comm. On Oversight and Reform & S. Comm. on Foreign Rel.*, 116th Cong. 26, 29–30 (2020) (explaining that, before being fired, a close associate of Secretary of State Mike Pompeo "tried to bully" Inspector General Linick into abandoning an investigation of misuse of State Department resources and his role in an arms deal with Saudi Arabia); Sam Mintz, *Democrats Blast Removal of Acting DOT Inspector General*, POLITICO (May 19, 2020), <https://www.politico.com/news/2020/05/19/democrats-blast-removal-of-acting-dot-inspector-general-268611> (noting that Inspector General Behm was fired after beginning an investigation of allegations that Secretary of Transportation Elaine Chao gave preferential treatment to Kentucky, represented by her husband, Senator Mitch McConnell); Pranshu Verma & Edward Wong, *Another Inspector General Resigns Amid Questions About Pompeo*, N.Y. TIMES, <https://www.nytimes.com/2020/08/05/us/politics/inspector-general-pompeo-state.html> (Aug. 25, 2020).

¹²⁹ Cf. HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION 2 (2015) (explaining that executive branch accountability depends upon a free flow of information about the executive branch to those who can check it); David M. Driesen, *Political Removal and the Plebiscitary Presidency: An Essay on Seila Law, LLC v. Consumer Financial Protection Board*, 76 N.Y.U. ANN. SURV. AM. L. 707, 719–20, 726–27 (2021) (explaining that *Seila Law* relies on democratic accountability to justify political removal authority but that the Court potentially has impaired the flow of information about the executive branch to the public).

¹³⁰ Rebecca Shabad & Carol E. Lee, *Trump Tweets that Defense Secretary Mark Esper Has Been 'Terminated'*, NBC NEWS, <https://www.nbcnews.com/politics/politics-news/trump-tweets-defense-secretary-mark-esper-has-been-terminated-n1247138> (Nov. 9, 2020, 5:18 PM); Helene Cooper, Eric Schmitt & Maggie Haberman, *Trump Fires Mark Esper, Defense Secretary Who Opposed Use of Troops on U.S. Streets*, N.Y. TIMES, <https://www.nytimes.com/2020/11/09/us/politics/esper-defense-secretary.html> (Nov. 11, 2020).

¹³¹ See Cooper et al., *supra* note 130; see also Shabad & Lee, *supra* note 130.

¹³² Memorandum from David S. Soldow, Exec. Sec'y of the Off. of the Sec'y of Def. to Off. of the Sec'y of Def. 2–3 (Jan. 10, 2021) (showing that an hour and a half elapsed between the time Mayor Bowser requested deployment of the National Guard to turn back the Capitol invasion and Miller's decision to authorize backup forces).

after the invasion of the Capitol spurred a request for help.¹³³ Thus, we can see that using removal as a tool to temporarily replace Senate-confirmed officials can threaten the Republic's survival. It can enable the President to replace a responsible official who will defend the nation from a presidential coup with an ally who will not. The failure to promptly deploy the National Guard, or worse, to order it to support an insurgency, could have resulted in the murders of members of Congress and the Vice President and the overthrow of democratic government. The *in terrorem* effect of removal followed by unilateral appointment of lackeys provides a powerful weapon in undermining the rule of law.

Furthermore, both the story of the Capitol Hill insurrection and the Jackson and Nixon cases show that even temporary control of a key post by an official who has not been approved by the Senate for that position can have drastic consequences. Jackson's Secretary of Treasury rapidly destroyed the National Bank. Nixon's appointment of Bork quickly ended the special prosecutor's tenure. And a non-Senate-confirmed Secretary of Defense can attempt a coup in a day.

Both of Trump's impeachments involved removal of officials to put in place people not approved by the Senate. A whistleblower complaint about Trump withholding military assistance from Ukraine to induce its President to announce a corruption investigation of Joe Biden's son triggered his first impeachment.¹³⁴ Subsequently, Trump apparently fired Inspector General Michael Atkinson precisely because he complied with his legal obligation to disclose whistleblower complaints to Congress.¹³⁵ And Trump humiliated Alexander Vindman, a proud ex-army officer by firing him summarily after he testified in Trump's impeachment hearing.¹³⁶ Trump's propensity to fire those who crossed him underlay an effort, not always successful, to try to prevent numerous government officials from testifying against him.¹³⁷ Trump's removal of the Secretary of Defense and replacement with a defense

¹³³ See *id.* at 3 (explaining that national guard did not arrive until 5:40 PM); Memorandum from Christopher C. Miller, Acting Sec'y of Def., to Ryan McCarthy, Sec'y of the Army (Jan. 4, 2021) (discussing authorization of a "Quick Reaction Force" in advance of the demonstration).

¹³⁴ See H.R. Res. 755, 116th Cong. 2–5 (2019).

¹³⁵ See Michael K. Atkinson, Former Inspector Gen. of the Intel. Cmty., Statement on His Removal from Office (Apr. 5, 2020), <https://int.nyt.com/data/documenthelper/6865-atkinson-statement-on-removal/339e56bc31e7c607c4b9/optimized/full.pdf>.

¹³⁶ Eric Schmidt & Helene Cooper, *Army Officer Who Clashed with Trump Over Impeachment Is Set to Retire*, N.Y. TIMES (July 7, 2020), <https://www.nytimes.com/2020/07/08/us/politics/vindman-trump-ukraine-impeachment.html>; *Trump Defends Firing Impeachment Witness Alexander Vindman*, BBC (Feb. 8, 2020), <https://www.bbc.com/news/world-us-canada-51408704>.

¹³⁷ See Matt Zapposky, *Why Trump Can't Stop All Witnesses from Testifying in Congress's Impeachment Inquiry*, WASH. POST (Oct. 11, 2019), https://www.washingtonpost.com/national-security/why-trump-cant-stop-all-witnesses-from-testifying-in-congresss-impeachment-inquiry/2019/10/11/823c9608-ec2f-11e9-85c0-85a098e47b37_story.html (noting that Trump "has

chief not approved by the Senate may have paved the way for the Capitol insurrection that led to his second impeachment, as the unilaterally appointed Secretary of Defense failed to timely defend the Congress from attack. Even if the explanation for the failure to defend the Capitol lies elsewhere, the Capitol Hill insurrection points to the danger temporary replacement of Senate-confirmed officials might pose in the future. But evasion of Senate confirmation can undermine the law when not accompanied by removal (albeit less thoroughly than a program using removal to frighten conscientious officials across the board).¹³⁸

C. *The Problem of Senate Abdication of Duty*

The Framers established a Senate role in appointments to make sure that the President nominates people of merit likely to properly enforce the laws. The Senate, however, has not always played its assigned role.¹³⁹ As party loyalty has largely replaced fidelity to Congress as an institution in the Senate, partisan considerations frequently take over.¹⁴⁰ When the President's party controls the Senate, it may approve nominees selected to undermine the law based on the notion that the President should be entitled to "his own man." Conversely, a Senate controlled by a President's opponents may refuse to approve well-qualified nominees to thwart effective implementation of the laws.¹⁴¹ This latter problem strengthens the case for allowing evasion of the Senate's advice and consent role either through recess appointments or by authorizing unilateral temporary appointments even after removal.¹⁴² It can prove difficult to distinguish these illegitimate abuses of advice and

tried to stymie" congressional investigators' efforts to obtain information, including by blocking "advisers from testifying").

¹³⁸ See Mendelson, *supra* note 22, at 555.

¹³⁹ BAUER & GOLDSMITH, *supra* note 128, at 325 (discussing the "danger" of a "recalcitrant Senate" blocking "effective governance" by refusing to confirm nominees).

¹⁴⁰ See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2368 (2006).

¹⁴¹ See Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 942 (2013) (noting that "a desire to impair the Executive's ability to function" motivates refusal to approve nominees in "many cases"). See generally Mendelson, *supra* note 22, at 540 (suggesting that "Senate recalcitrance in considering a nomination" might create a vacancy that a President wants to fill outside the advice and consent process); Stayn, *supra* note 35, at 1511 (claiming that ideologically "charged" Senators sometimes without consent "for reasons that have nothing to do with the nominee" (quoting *A Tyrannous Minority*, THE ECONOMIST (Jan. 8, 1998), <https://www.economist.com/usa/1998/01/08/a-tyrannous-minority>)).

¹⁴² See Mendelson, *supra* note 22, at 591 (explaining that broad use of acting officials may safeguard democracy "against an obstructionist Senate"). See generally Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1610 (2015) (arguing that political polarization prompts "political innovation").

consent power from legitimate disagreement about the qualifications of officials and their legally appropriate policy preferences.¹⁴³

II. THE FEDERAL VACANCIES REFORM ACT AND OTHER STATUTES AUTHORIZING ACTING TEMPORARY APPOINTMENTS

This Part explains how the FVRA and other statutes authorizing temporary appointments have failed to adequately resolve the tension between retaining political removal authority and safeguarding the Senate's role in appointments, and why improvement of the FVRA will likely fail to resolve the problem. Since the time of the Adams Administration, Congress has authorized many temporary appointments by statute in the event of a sudden vacancy, even when the Senate is in session.¹⁴⁴ The primary vehicle for this is now the FVRA. Notwithstanding the tension between temporary unilateral appointments of principal officers and constitutional text, the Supreme Court has approved a limited authority to temporarily fill a sudden vacancy not caused by the President himself. In *United States v. Eaton*, the Court allowed for presidential appointment of a "vice-consul" to temporarily perform the work of a consul too ill to perform his duties, even though the Constitution requires Senate approval of a consul.¹⁴⁵ To justify this pragmatic result (the vacancy in *Eaton* occurred in Bangkok before the advent of airplanes), the Court created a legal fiction that a person performing the duties of a consul under "special and temporary conditions" is not a consul, but a vice-consul.¹⁴⁶ It rationalized this temporary appointment by stating that the Constitution would otherwise bar any delegation of a superior officer's power to a subordinate "under any circumstances or exigency."¹⁴⁷ This passage does not write a blank check for evasion of Senate consent through delegation of important duties to inferior officials, but it does leave an open question about precisely what exigencies might justify avoiding the advice and consent requirement through delegation and for how long.¹⁴⁸

¹⁴³ See, e.g., Mendelson, *supra* note 22, at 554–55 (explaining that it was unclear whether the Senate's reluctance to approve President Obama's nominee to the post of Assistant Administrator for Water at the EPA reflected general recalcitrance).

¹⁴⁴ See *id.* at 581–83 (discussing the FVRA's predecessors).

¹⁴⁵ *United States v. Eaton*, 169 U.S. 331, 342–43 (1898).

¹⁴⁶ See *id.* at 343.

¹⁴⁷ See *id.*

¹⁴⁸ Accord Mendelson, *supra* note 22, at 578 (explaining that *Eaton* "fails to provide adequate guidance on *which* circumstances" make appointment of an acting official "permissible"); cf. Van Orsdol, *supra* note 21, at 311–13 (discussing problems with delegation after a vacancy arises, in lieu of proper appointment of a replacement).

The FVRA's predecessor statutes did not clearly authorize acting appointments in the wake of removal.¹⁴⁹ Moreover, several commentators and Justice Thomas suggest that the Constitution does not permit unilateral temporary appointments to vacancies that the President creates.¹⁵⁰ Hence, the problem of removal facilitating evasion of the Appointments Clause arose without any explicit authority to make an interim appointment after a removal. For that reason, the FVRA amendment seems like an unpromising avenue for addressing the problem of removal undermining the Appointments Clause. Authorizing appointments of acting officials in the wake of removal will only make the problem of presidential removal, followed by failure to nominate a successor in order to undermine the law, worse.¹⁵¹

The FVRA itself probably does not authorize a President to appoint an acting official when he creates the vacancy by removing an official for political reasons.¹⁵² It only authorizes an acting appointment when an official “dies, resigns, or is otherwise unable to perform the functions and duties of the office.”¹⁵³ This last phrase appears to refer to a disability of some kind, like a serious illness, not to removal.

¹⁴⁹ See *Doolin Sec. Sav. Bank v. Off. of Thrift Supervision*, 139 F.3d 203, 207 (D.C. Cir. 1998) (finding that the original Vacancies Act contemplates only vacancies created through “death, resignation, illness or absence”).

¹⁵⁰ See *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 948–49 (2017) (Thomas, J., concurring) (stating that the FVRA may violate the Constitution); Van Orsdol, *supra* note 21, at 308–09 (suggesting that allowing unilateral appointment of officials to fill vacancies that the President himself created violates the Appointments Clause); Stayn, *supra* note 35, at 1513 (finding the FVRA unconstitutional).

¹⁵¹ Robert Bauer and Jack Goldsmith suggest that the Take Care Clause authorizes the President to make temporary appointments in the absence of a statute. BAUER & GOLDSMITH, *supra* note 128, at 325; see John C. Roberts, *The Struggle Over Executive Branch Appointments*, 2014 UTAH L. REV. 725, 726. The Take Care Clause, however, creates a duty. The Constitution specifies the method of appointment and, therefore, it does not appear appropriate to infer a presidential power in some tension with the Appointments Clause from this duty. See Ronald J. Krotoszynski, Jr. & Atticus DeProspero, *Squaring a Circle: Advice and Consent, Faithful Execution, and the Vacancies Reform Act*, 55 GA. L. REV. 731, 743 (2021) (pointing out that allowing “Take Care” appointments would “zero out” the Appointments Clause). The history of the statutes authorizing temporary appointments and the custom of making appointment the mechanism of removal suggest that the President’s power to make temporary appointments, if constitutional, comes from Congress, not directly from the Constitution. The Horizontal Sweeping Clause—which authorizes congressional regulation of the executive branch of government—provides the source of congressional authority for the FVRA and its predecessors. See U.S. CONST. art. I, § 8, cl. 18. In any case, since Bauer and Goldsmith concede that that the President’s authority is defeasible by Congress, their position, even if adopted by the courts, does not prevent a legislative bar on temporary appointments in the wake of removal.

¹⁵² See Mendelson, *supra* note 22, at 550 n.81 (stating that the FVRA does not address the issue); Miller-Gootnick, *supra* note 21, at 461 (arguing that the FVRA does not permit the President to temporarily fill vacancies he himself created without Senate approval).

¹⁵³ 5 U.S.C. § 3345(a).

Even if the FVRA is constitutional and could be read to allow temporary appointees to replace officers the President has fired, appointment of temporary appointees after removal clearly facilitates at least temporary, and sometimes important, evasion of the Appointments Clause procedure. The FVRA recognizes the problem of acting appointments generally defeating the Appointments Clause and limits the duration and extent of evasions of the Appointments Clause.

This cabining has not worked very well.¹⁵⁴ Presidents have failed to comply with FVRA limits on the duration of temporary appointments.¹⁵⁵ Trump defied law designating particular officials as the proper acting officials by putting others in places of authority.¹⁵⁶ But some administrations have disabled offices from functioning by not nominating successors or naming acting officials.¹⁵⁷ In addition, administrations have evaded the Appointments Clause procedures by simply delegating the functions of the departed officials to others.¹⁵⁸

The FVRA does provide an important check on despotism by stating that improperly serving officials' actions have "no force or effect."¹⁵⁹ The federal courts relied on this provision to invalidate a number of actions taken by improperly appointed officials during the Trump administration, and a lawsuit challenging Trump's deployment of paramilitary forces to Portland, Oregon sought remedies based on this provision as well.¹⁶⁰

¹⁵⁴ See Krotoszynski & DeProspero, *supra* note 151, at 741 (characterizing the FVRA as an "abject failure"); Van Orsdol, *supra* note 21, at 303, 305 (discussing FVRA loopholes that make it a "paper tiger" and arguing for various reforms to make it more effective); *cf.* O'Connell, *supra* note 9, at 667 (describing the Vacancy Act as a measure to ensure that Senate-approved officials fill temporary vacancies, but characterizing it as a "workaround" with respect to the Appointments Clause).

¹⁵⁵ See O'Connell, *supra* note 9, at 626 (noting that most acting appointees by the late 1990s served for longer periods than the Vacancies Act allows (citing MORTE ROSENBERG, CONG. RSCH. SERV., NO. 98-892, THE NEW VACANCIES ACT: CONGRESS ACTS TO PROTECT THE SENATE'S CONFIRMATION PREROGATIVE 1 (1998))); Stayn, *supra* note 35, at 1518 (discussing the failure of President Nixon and subsequent Presidents to comply with the Vacancies Act).

¹⁵⁶ See, e.g., *Casa de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928, 950–57 (D. Md. 2020) (finding that the plaintiffs were likely to succeed in showing that Trump's appointment of acting DHS heads violated requirements for the order of succession).

¹⁵⁷ See Mendelson, *supra* note 22, at 546 (noting that Presidents leave offices vacant when they want to contract policy); O'Connell, *supra* note 9, at 627–28 (discussing cases where vacancies have stopped an agency from functioning).

¹⁵⁸ See Mendelson, *supra* note 22, at 558–62 (explaining how subdelegation can evade FVRA restraints); O'Connell, *supra* note 9, at 633–35 (discussing the use of this technique and the Vacancies Act's limited efficacy in preventing it).

¹⁵⁹ 5 U.S.C. § 3348(d)(1).

¹⁶⁰ See, e.g., *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 29 (D.D.C. 2020) (appointment of the "Acting" Director of USCIS violated FVRA); *Bullock v. Bureau of Land Mgmt.*, 489 F. Supp. 3d 1112, 1128–30 (D. Mont. 2020) (appointment of the "Acting" BLM Director violated

While this restraint is important, it does not provide a cure all. First of all, justiciability doctrines often prevent courts from enforcing this restraint.¹⁶¹ In particular, if an administration decides to abuse its power to infringe liberty, the courts cannot intervene before the liberty abuse occurs, except perhaps if government officials announce their plans.¹⁶² Thus, for example, the challenges to the authority of the officials leading the Portland paramilitary action only became possible after the paramilitary forces had attacked and arrested citizens. Second, the goal of the Constitution's Appointments and Take Care clauses (which requires the President to "take Care that the Laws be faithfully executed") involve securing, not stopping, proper execution of the laws.¹⁶³ Disabling actions prevents abuses of legal authority and extra-legal actions based on no legal authority, but it does not secure faithful law execution. Furthermore, law execution sometimes plays important roles in keeping a democracy intact by suppressing insurrection, protecting national security, or prosecuting corrupt supporters of a regime undermining democracy.¹⁶⁴

Several commentators have proposed reforms to the FVRA, some of which might address the problem of Presidents evading the advice and consent requirement by removing officials and then replacing them with unilaterally chosen officials.¹⁶⁵ The most straightforward reform would make explicit the now implicit bar on appointment of an acting official to fill a vacancy the President created through removal of a political appointee.¹⁶⁶ But even this strong medicine would not protect us from delegation of the officers' functions to presidentially preferred officials, or

FVRA); *see also* Complaint, *supra* note 8, at 16–17; O'Connell, *supra* note 9, at 632 n.98 (collecting cases through 2019).

¹⁶¹ *See* Mendelson, *supra* note 22, at 598 (explaining that judicial review is generally not available for many important decisions, including "agency reorganization, resource allocation . . . prioritization decisions, [or] decisions not to enforce"); O'Connell, *supra* note 9, at 658 (noting that justiciability doctrines may prevent litigation of various questions about mechanisms undermining the Senate advice and consent function).

¹⁶² *See generally* Clapper v. Amnesty Int'l, 568 U.S. 398, 410–14 (2013) (holding that potential surveillance targets have no standing to challenge the constitutionality of government surveillance practices when they cannot prove that the government is spying on them).

¹⁶³ U.S. CONST. art. II, § 3; *cf.* Mendelson, *supra* note 22, at 575–76 (arguing that the Appointments Clause must permit some use of acting officials in light of the importance of the Take Care Clause's expectation of a functioning government).

¹⁶⁴ *See* DRIESEN, SPECTER OF DICTATORSHIP, *supra* note 25, at 151–56 (defining national security as defense of democracy).

¹⁶⁵ *See, e.g.,* BAUER & GOLDSMITH, *supra* note 128, at 326–31 (proposing reducing presidential flexibility in choosing acting top officials, limiting delegation authority, shortening acting officials' terms, and facilitating enforcement); Mendelson, *supra* note 22, at 544 (proposing short time frames for acting appointees, a preference for Senate-approved deputy secretaries, and limits on delegation of authority).

¹⁶⁶ *See* Van Orsdol, *supra* note 21, at 318 (proposing to amend the FVRA to "strictly prohibit the filling of self-created vacancies caused by terminations").

from use of political removal to prevent an agency from carrying out legal duties.¹⁶⁷ And a problem would remain in distinguishing voluntary resignation from removing officials by pressuring them to resign, because the FVRA does apply to resignations.¹⁶⁸ A prohibition on delegation would prove extremely difficult to enforce and would not prevent a President from disabling action by firing somebody and not filling a vacant office at all. One commentator likened FVRA reform to “a game of Whac-a-Mole” because every solution creates a new problem.¹⁶⁹ Once political removal is permitted, enforcing the Appointments Clause becomes a challenge. This would be a less serious problem if only for-cause removal was permitted, as that would generally ensure that removal served the goal of furthering rather than thwarting proper execution of the law.

More fundamentally, the Capitol insurrection suggests that replacing a Senate-confirmed official with a presidentially chosen official for a very brief period can produce a grave danger to the Republic. While FVRA reform should occur and will have some positive effects outside the removal context, it cannot solve the fundamental problem, which has arisen without clear statutory authority for acting appointees to fill vacancies that the President himself created.

III. EVALUATING THE PROPOSAL TO MAKE SENATE APPROVAL OF A SUCCESSOR THE MEANS OF POLITICAL REMOVAL OF KEY OFFICIALS

This Part evaluates the proposal to make compliance with the Appointments Clause the mechanism for removing key government officials without cause. It begins by explaining that this proposal codifies a longstanding practice that began in the George Washington Administration. Such constitutional custom provides strong evidence of this practice’s constitutionality.¹⁷⁰ It then explains that the Appointments, Take Care, and Necessary and Proper clauses all support the proposal. It then examines this proposal’s fit with the Supreme Court’s precedent on removal. And it closes with an evaluation of the proposal’s policy merits.

¹⁶⁷ *Contra id.* (arguing that a prohibition on appointing an acting official would somehow limit subdelegation).

¹⁶⁸ *See id.* at 319 (taking an ambiguous position on forced resignation because of difficulties of proof).

¹⁶⁹ *Id.* at 320.

¹⁷⁰ *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (stating that a “systematic, unbroken, executive practice” not questioned by Congress may provide “a gloss on ‘executive Power’”); Bradley & Morrison, *supra* note 36.

A. *Constitutional Custom Supporting the Proposal*

The Supreme Court treats longstanding executive branch practice acquiesced to by Congress as evidence of that practice's constitutionality.¹⁷¹ Daniel Webster said in 1832 that no President ever removed an official except by means of securing Senate approval for a successor.¹⁷² Furthermore, the dissent in *Myers*, uncontradicted by the majority, suggests that this practice of removal by appointment persisted at least until the date of the *Myers* decision.¹⁷³ That statement seems improbable today, in light of recent experience with presidential removal, but it basically proves true. Indeed, President George Washington established the custom of appointment serving as the mechanism of removal, and it continued for more than a hundred years.¹⁷⁴

Webster and Brandeis, of course, did not mean that those being removed learned of their removal from news reports or records of the Senate's proceedings.¹⁷⁵ Rather, they explained, Presidents who wished to replace an existing official would inform the official that the President would be seeking the approval of a successor and that the official would lose his office upon confirmation of the successor.¹⁷⁶

Presidents in the Early Republic were extremely reluctant to remove officers approved by the Senate lest they be perceived as attacking the government.¹⁷⁷ This was especially true in the very early years; something like the stable administration

¹⁷¹ See, e.g., *NLRB v. Noel Canning*, 573 U.S. 513, 524–25 (2014) (putting “significant weight upon historical practice”).

¹⁷² See *Myers v. United States*, 272 U.S. 52, 260 (1926) (Brandeis J., dissenting) (stating that “[i]n all the removals which have been made, they have generally been effected simply by making other appointments” (quoting 4 DANIEL WEBSTER, *THE WORKS OF DANIEL WEBSTER* 189 (7th ed. 1853))); see also 3 ROBERT V. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN DEMOCRACY*, 1833–45, at 101 (1984) (noting that before Jackson “[n]o . . . President had ever dismissed a cabinet officer”).

¹⁷³ See *Myers*, 272 U.S. at 259–60, 259 n.28 (Brandeis, J., dissenting) (claiming that an “administrative practice” consistent with a Senate role in removal existed from the Founding until 1926, and describing Webster’s statement and forms used to effectuate removal via appointment as evidence of the shape of the practice). The *Myers* majority claims that Webster had inconsistent positions on the President’s removal power. See *id.* at 151–52. But the majority does not dispute Webster’s and Brandeis’ claim that the *method* of removal was through appointment of a successor and characterizes Webster as a “great . . . expounder of the Constitution.” *Id.* at 151.

¹⁷⁴ See *infra* notes 181–185 and accompanying text.

¹⁷⁵ Cf. *Manners & Menand*, *supra* note 30, at 34 n.187 (explaining that at common law, notice was required before an officer could be removed).

¹⁷⁶ See *Myers*, 272 U.S. at 261 (Brandeis, J., dissenting) (discussing the custom of notifying an incumbent that he will be removed by the appointment of a successor).

¹⁷⁷ Cf. MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 53 (2000) (explaining that Presidents prior to Jackson were unsure about whether they had constitutional authority to remove officers appointed by their predecessors).

sought by the Framers occurred, with Presidents even keeping on their predecessors' cabinet members.¹⁷⁸ When a President wished to replace a cabinet member needed in another post or remove an incompetent or politically disloyal cabinet member from the government altogether, the President generally replaced him by nominating a replacement to the Senate.¹⁷⁹ Moreover, our early Presidents almost never even removed cabinet members, except for cause.¹⁸⁰

Washington established the custom of removing officers through the appointment of successors. While Washington never removed a cabinet officer for political reasons, he had to reshuffle his cabinet to deal with resignations. After President Thomas Jefferson resigned, Washington wanted Attorney General Edmund Randolph to succeed Jefferson as Secretary of State, which required not only Senate consent to Randolph's new appointment, but also his removal from his old post.¹⁸¹ Washington effectuated Randolph's removal from the Attorney General post by securing Senate approval for his successor, William Bradford.¹⁸² Randolph, however, voluntarily resigned from his Secretary of State post after Washington and his cabinet asked him to explain evidence that he had accepted a bribe.¹⁸³ Because the Senate was in recess, Thomas Pickering, the Secretary of War, filled in as Secretary of State and Secretary of War following Randolph's resignation.¹⁸⁴ Washington relieved Pickering of his War Department duties by securing the approval of a successor to his War Department post, James McHenry, thereby allowing Pickering to focus on his State Department responsibilities.¹⁸⁵

While subsequent Presidents sometimes removed cabinet members from the government, they generally did so by nominating a successor, and usually only to

¹⁷⁸ *Id.* (stating that John Adams retained Washington's cabinet "in full" even though "three of the four cabinet officers had no personal allegiance to Adams").

¹⁷⁹ See *Myers*, 272 U.S. at 259–61 (Brandeis, J., dissenting) ("In all the removals which have been made, they have generally been effected simply by making other appointments." (quoting WEBSTER, *supra* note 172, at 189)).

¹⁸⁰ See STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* 72 (1993) (noting the "common understanding" that Presidents would only remove executive officers "for just cause").

¹⁸¹ Dice Robins Anderson, *Edmund Randolph*, in 2 *THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY* 97, 100–01 (Samuel Flagg Bemis ed., 1963).

¹⁸² S. EXEC. JOURNAL, 3d Cong., 8th Sess. 147 (1794).

¹⁸³ Anderson, *supra* note 181, at 152–54 (describing the course of events and noting that Washington described Randolph's resignation as "voluntarily and unexpectedly offered"); Robert D. Arbuckle, *Edmund Randolph: A Reappraisal*, W. PA. HIST. MAG., Jan. 1978, at 61, 65. While some have interpreted Randolph's resignation as a removal, if so, it was a removal for cause. See 2 PAGE SMITH, *JOHN ADAMS* 1030 (1963).

¹⁸⁴ Henry J. Ford, *Timothy Pickering*, in 2 *THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY*, *supra* note 181, at 163, 167.

¹⁸⁵ See S. EXEC. JOURNAL, 4th Cong., 11th Sess. 198 (1796).

address incompetence or to promote a cabinet member.¹⁸⁶ President James Madison, however, dismissed Postmaster General Gideon Granger, a Jefferson holdover. He did so primarily because Granger threatened the political neutrality of government service delivery, by firing Postmasters and making controversial appointments for political reasons.¹⁸⁷ Even though Granger was a holdover, his dismissal did not meet with wholesale acquiescence. It excited debate in Congress in which Madison was accused of monarchism and the near passage of a bill seeking disclosure of Madison's reasons for removal in the Senate.¹⁸⁸

This dismissal, however, was controversial because it looked like a discharge for political reasons, not because it violated Webster's rule. Granger stayed on until his successor obtained Senate approval—strong evidence that the founding constitutional custom did not permit political removal except through appointment of a successor.¹⁸⁹ This custom generally prevailed at least up until the time of the *Myers* decision in 1926.¹⁹⁰

¹⁸⁶ See, e.g., S. EXEC. JOURNAL, 6th Cong., 17th Sess. 353 (1800) (showing that Adams nominated Secretary of State Pickering's successor on May 12, 1800); Ford, *supra* note 184, at 240–41 (showing that Hamilton requested Pickering's resignation on May 10, but that when Pickering refused two days later, on May 12, Hamilton discharged him); S. EXEC. JOURNAL, 13th Cong., 35th Sess. 346–51 (1813) (nominating Secretary of Treasury Albert Gallatin as envoy to Great Britain and Russia following recess appointment); S. EXEC. JOURNAL, 13th Cong., 37th Sess. 621–26 (1814) (nominating Gallatin as envoy to France in place of William H. Crawford, who would subsequently be nominated Secretary of War); cf. Charles C. Tansill, *Robert Smith*, in 3 THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY 151, 195 (Samuel Flagg Bemis ed., 1963) (showing that Madison did not accept the incompetent Robert Smith's resignation until he had secured James Monroe's consent to serve pursuant to a recess appointment); S. EXEC. JOURNAL, 15th Cong., 40th Sess. 95 (1817) (approving Richard Rush at the end of his term as Attorney General as Minister to Great Britain and William Wirt to succeed him as Attorney General); S. EXEC. JOURNAL, 20th Cong., 50th Sess. 616 (1828) (moving Adam's Secretary of War James Barbour to the post of Minister to Great Britain through confirmation to the new post and confirmation of his successor the next day).

¹⁸⁷ CARL RUSSELL FISH, THE CIVIL SERVICE AND THE PATRONAGE 29, 41–42, 44 (1905) (discussing Postmaster Granger's policy of removing Federalist postmasters); Letter from James Madison to Thomas Jefferson (Feb. 13, 1814), <https://founders.archives.gov/documents/Jefferson/03-07-02-0121> (discussing Granger's appointment of Leib as Postmaster in Philadelphia).

¹⁸⁸ See 27 ANNALS OF CONG. 13th Cong., 1st Sess., 1764–65 (1814) (likening Madison to the British monarch because Madison interfered with the department head's choice of appointees by removing him).

¹⁸⁹ S. EXEC. JOURNAL, 13th Cong., 36th Sess. 499, 511 (1814) (showing that the Senate approved Return J. Meigs, Granger's successor, on March 17, 1814); BIOGRAPHICAL DIRECTORY OF THE UNITED STATES EXECUTIVE BRANCH, 1774–1989, at 151 (Richard Sobel ed., 1990) (showing that Granger's last day in office was the same day, March 17, 1814).

¹⁹⁰ See, e.g., Message from Rutherford B. Hayes to United States Senate (Dec. 11, 1877), reprinted in 7 MESSAGES AND PAPERS OF THE PRESIDENTS: 1789–1897, at 481 (James D. Richardson ed., 1898); S. EXEC. JOURNAL, 26th Cong., 1st Sess. 240, 246–47 (1840) (removing

The major deviation from the spirit of this custom under Jackson triggered a censure and its abandonment under Johnson triggered an impeachment. Jackson nominally conformed to the custom of removal through appointment as he sought to change Treasury Secretaries to destroy the national bank. He appointed successors to the people he was removing on the day of removal.¹⁹¹ On the other hand, he relied on the Recess Appointments Clause to make these appointments unilaterally in these cases and in many others.¹⁹² By timing the removal and appointment to make them occur during a recess, he evaded compliance with the requirement of Senate consent for appointments. He furthered this evasion by waiting until the last week of the ensuing session to formally nominate Taney for the Treasury post, more than a year after his unilateral Recess appointment of Taney.¹⁹³ Thus, Jackson used removal to evade the Appointments Clause requirement that the Senate confirm the Secretary of the Treasury by abusing the Recess Appointments Clause. While the Constitution authorizes unilateral recess appointments, it does so to ensure that unavoidable vacancies “that may happen during the Recess of the Senate” do not

Henry D. Gilpin from his post as Solicitor of the Treasury by elevating him to the Attorney General position and obtaining approval of his successor and removing Matthew Birchard from his post as Solicitor General of the Land Office by elevating him to the vacated Solicitor of the Treasury post, and appointing a new Solicitor General for the Land Office); S. EXEC. JOURNAL, 20th Cong., Spec. Sess. 8 (1829) (replacing the Secretary of War by appointment of a successor); S. EXEC. JOURNAL, 25th Cong., 2d Sess. 144–45 (1838) (replacing the Attorney General by appointment of a successor); S. EXEC. JOURNAL, 26th Cong., 1st Sess. 240 (1840) (nominating officials to replace those who had resigned or whose term was about to expire). Presidents James K. Polk and Millard Fillmore did not remove cabinet officials, but when they accepted high officials’ resignations, they made them effective only when a replacement could be appointed. *See, e.g.*, 2 JAMES K. POLK, THE DIARY OF JAMES K. POLK 121 (Milo Milton Quaife ed., 1910); S. EXEC. JOURNAL, 31st Cong., 1st Sess. 121 (1850) (discussing a reshuffling of the cabinet in which resignations took effect upon appointment of replacements). While John Tyler likewise did not remove cabinet members from office, many resigned in response to policy decisions they disapproved of and Tyler broke custom by allowing those resignations to take effect before appointment of a successor. *See, e.g.*, S. EXEC. JOURNAL, 28th Cong., 1st Sess. 193 (1843); S. EXEC. JOURNAL, 28th Cong., 1st Sess. 349 (1844) (nominating George Bibb to Secretary of the Treasury on June 15, 1844, more than a month after John Canfield Spencer’s resignation from the post); Randolph G. Adams, *Abel Parker Upshur*, in 5 THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY 67, 86 (Samuel Flagg Bemis ed., 1963) (showing that Tyler waited more than a month to appoint Upshur to succeed Daniel Webster as Secretary of State in the wake of Webster’s resignation on May 8, 1843).

¹⁹¹ *See* HOWE, *supra* note 72, at 387–88 (stating that Jackson replaced Treasury Secretary McClane with William Duane on June 1, and then replaced Duane with Taney on September 23).

¹⁹² *See* S. MANUAL, S. DOC. NO. 107-1, at 1146 (2001) (detailing Jackson’s numerous recess appointments, including those of Taney and Duane as Treasury Secretaries).

¹⁹³ S. EXEC. JOURNAL, 23d Cong., 1st Sess. 426 (1834) (nominating Taney on June 23).

thwart the nation's business, not to provide a tool for the President to avoid the need to nominate officials acceptable to the Senate.¹⁹⁴

Johnson defied the custom altogether as he sought to evade his responsibility to faithfully execute the law governing reconstruction. He removed Stanton by unilaterally appointing Thomas as interim War Secretary when the Senate was in session, thereby evading the Appointments Clause procedure without relying on the Recess Appointments Clause.¹⁹⁵ Furthermore, Thomas was an alcoholic whom the Senate should not, and ultimately did not, confirm for such an important post.¹⁹⁶ As mentioned previously, Johnson was profligate in removing Senate-confirmed officials in order to undermine reconstruction, thereby making the Senate effort to safeguard the rule of law by confirming conscientious nominations null and void. But the custom of appointment by removal was restored promptly as soon as Johnson left office.¹⁹⁷

With respect to officers of the United States below the cabinet level, the custom of only removing through appointment generally prevailed as well (with exceptions under Johnson and perhaps Jackson). Presidents customarily removed officials by submitting a form indicating that the incumbent would be removed upon the Senate's confirmation of a successor. Justice Brandeis's dissent in *Myers* provides a table

¹⁹⁴ U.S. CONST. art. II, § 2, cl. 3; see *NLRB v. Noel Canning*, 573 U.S. 513, 523–24 (2014) (explaining that Senate confirmation was intended to be the “norm” and that the recess appointments should not be routine).

¹⁹⁵ See REHNQUIST, *supra* note 82, at 215–16 (explaining that the removal of Stanton in favor of Lorenzo Thomas occurred on February 21, 1868, and that the Senate actively resisted immediately). Johnson had earlier suspended Stanton and installed Ulysses S. Grant as an interim appointee. *Id.* at 213–14. Stanton regained the office when the Senate disapproved his suspension in January, setting the stage for the removal through the unconstitutional appointment of Thomas. *Id.* at 215.

¹⁹⁶ See WINEAPPLE, *supra* note 82, at 249 (describing Thomas as incompetent and “loyal . . . [to] his alcohol”).

¹⁹⁷ See, e.g., LOUIS A. COOLIDGE, ULYSSES S. GRANT 325–27, 388–89 (1922) (showing that Grant had requested Hoar's resignation from the post of Attorney General); Letter from Ulysses S. Grant to Ebenezer R. Hoar (June 15, 1870), in 20 THE PAPERS OF ULYSSES S. GRANT 170 (John Y. Simon ed., 1995) (accepting Hoar's resignation at “the appointment and qualification of your successor”); Letter from Ulysses S. Grant to Benjamin H. Bristow (June 19, 1876), in 27 THE PAPERS OF ULYSSES S. GRANT 136 (John Y. Simon ed., 2005) (accepting Secretary Bristow's resignation effective on June 20, 1876); S. EXEC. JOURNAL, 44th Cong., 1st Sess. 184 (1876) (confirming Bristow's successor Lot M. Morrill on June 21, 1876); *id.* at 244 (removing Taft from the War Department by appointing his War Department successor, James Cameron, on the same day and removing Pierrepoint from his Attorney General post by confirming Taft as the new Attorney General); *id.* at 279 (indicating that President Grant nominated James N. Tyner as Postmaster General to succeed Marshall Jewell on July 11, 1879, with the appointment confirmed on July 12, 1879); 27 THE PAPERS OF ULYSSES S. GRANT, *supra* note 197, at 184 (stating the President Grant requested the resignation of Postmaster General Marshall Jewell on July 11, 1879).

documenting nearly 5,000 presidential removals effectuated through such a form.¹⁹⁸ Thus, the practice of removal by appointment was very pervasive and longstanding, lasting much longer than one hundred years.

The Supreme Court jurisprudence suggests that such long-established constitutional custom dating back to the Founding should prove well-nigh dispositive. The Court has repeatedly held that executive branch custom to which Congress has consistently acquiesced can gloss the Constitution.¹⁹⁹ A practice lasting over a hundred years provides an unusually strong case for accepting the constitutionality of a practice.²⁰⁰ The Court's originalist bent supports giving strong weight to founding era custom.²⁰¹ Older cases such as *McCulloch v. Maryland* and *Myers v. United States* likewise support giving weight to founding era custom.²⁰²

Furthermore, Congress not only acquiesced in the executive branch practice of appointing through removal, it also actively supported the custom and resisted the

¹⁹⁸ *Myers v. United States*, 272 U.S. 52, 259–60 n.28 (1926) (Brandeis, J., dissenting). See, e.g., *Parsons v. United States*, 167 U.S. 324, 325 (1897) (quoting a letter from President Cleveland removing a U.S. Attorney in Alabama “to take effect upon the appointment and qualification of your successor”); *Shurtleff v. United States*, 189 U.S. 311, 312 (1903) (quoting a letter from President McKinley removing an appraiser “to take effect upon the appointment and qualification of your successor”).

¹⁹⁹ See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (noting that “long-continued practice, known to and acquiesced in by Congress” creates a presumption that Congress has consented to the practice (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915))); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (giving “great weight” to “[l]ong settled and established practice”); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (stating that “[d]eeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them”); *Bradley & Morrison*, *supra* note 36, at 418 (noting that the Supreme Court has “endorsed the significance of . . . practice-based ‘gloss’”).

²⁰⁰ Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) (indicating the question of the National Bank's constitutionality could “scarcely be considered as an open question” even though the President and Congress established the Bank just 28 years before the decision); *The Pocket Veto Case*, 279 U.S. at 690 (affording “great regard” to a custom of “at least twenty years duration”).

²⁰¹ See *Alden v. Maine*, 527 U.S. 706, 743–44 (1999) (treating “early congressional practice” as “weighty evidence of the Constitution's meaning” (quoting *Printz v. United States*, 521 U.S. 898, 905 (1996))); *Bradley & Morrison*, *supra* note 36, at 424–25 (noting that strict originalists are likely to give weight to founding era practice).

²⁰² *Myers*, 272 U.S. at 175 (giving weight to “the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions”); *McCulloch*, 17 U.S. (4 Wheat.) at 401–02 (considering the question of the National Banks constitutionality “scarcely . . . open” in part because it was passed upon by the First Congress and cabinet).

occasional attempts to break with it.²⁰³ In particular, the Senate in numerous instances approved nominations after being informed that the current occupant's "appointment will expire" as soon as the new appointee assumes office, thus implementing removal by appointment with the President's cooperation.²⁰⁴ Much of the relevant congressional custom here, of course, is the Senate custom, not necessarily that of Congress as a whole, as only the Senate confirms nominations of officeholders. But other branches of Congress also acted to repudiate departures from the custom, as exemplified by the House's impeachment of Johnson. In addition, the executive branch practice in this case embraced a limitation on presidential power, rather than claiming new powers in a self-interested way, making the practice still more worthy of respect than in other cases. One might say that the executive branch practice is a statement against interest.²⁰⁵ So, the case for this custom establishing a gloss on the Constitution is especially strong.

The precedent also establishes that a custom need not be completely consistent to be entitled to weight. For example, the legislation approving the National Bank lapsed for a period of years, and Justice Marshall still considered the custom almost dispositive.²⁰⁶ The modern Supreme Court endorsed the same point in *NLRB v. Noel Canning* when it accepted the idea that a break during a session of Congress can be considered a "recess," triggering an opportunity for unilateral presidential appointment, even though intrasession breaks were rare for a long time and Congresspeople had not always approved of appointments during these breaks.²⁰⁷ Not only did Congress acquiesce to the executive branch practice of removal through appointment, it insisted the practice continue by censuring or impeaching the two

²⁰³ Cf. Bradley & Morrison, *supra* note 36, at 448 (finding inference of congressional assent to traditional practice enhancing presidential power from "congressional silence" problematic).

²⁰⁴ See, e.g., S. EXEC. JOURNAL, 20th Cong., Spec. Sess. 8 (1829) (replacing the Secretary of War and other officeholders by confirmation of a successor); S. EXEC. JOURNAL, 25th Cong., 2d Sess. 144–45 (1838) (approving the nomination of Felix Grundy to take effect on the date of Benjamin Butler's resignation as Attorney General); S. EXEC. JOURNAL, 13th Cong., 36th Sess. 470–71 (1814) (approving Madison's nomination of George Campbell to replace Albert Gallatin as Secretary of the Treasury while simultaneously removing Gallatin by appointing him to a diplomatic post); S. EXEC. JOURNAL, 6th Cong., 17th Sess. 353–54 (1800) (considering and approving President Adams nomination of John Marshall to replace Pickering, removed hours before Marshall's nomination, as Secretary of State and Samuel Dexter to replace Marshall as Secretary of War).

²⁰⁵ Cf. *Williamson v. United States*, 512 U.S. 594, 598–600 (1994) (explaining that "statement against interest" exception to the hearsay rule allows statements that do not serve the interests of the speaker to be admitted because they are deemed more reliable than statements advancing her interest).

²⁰⁶ See *McCulloch*, 17 U.S. (4 Wheat.) at 402 (noting that for a period "[t]he original act" establishing the National Bank "was permitted to expire").

²⁰⁷ *NLRB v. Noel Canning*, 573 U.S. 513, 524–33 (2014) (putting weight on a very uneven record of historical practice).

nineteenth century Presidents who did not conform to it in letter and in spirit. And it responded to Johnson's gross disregard by passing a statute (the first of several) going beyond the removal-by-appointment custom to require Senate consent to removal. The fact that early statutes governing temporary vacancies did not explicitly bar removals without appointment does not matter. The custom was so well established that there was no need for such a statutory provision at that time. There is ample evidence that Congress consistently supported the constitutional custom of removal by appointment, and affirmative legislation has never been a requirement of the jurisprudence of constitutional custom.

The tendency of more recent Presidents to ignore the original understanding by removing cabinet officers before nominating their successors does not undercut the constitutional custom prevailing at the Founding. The more recent practice suggests no repudiation of the historical custom. No President or Congress has ever suggested that removing an officer through appointment of a successor violates the Constitution. Current practice might weaken a case that the Constitution requires the President to follow the older practice even if Congress has authorized or tolerated a more liberal regime. But it cannot plausibly weaken the case that Congress may constitutionally codify the clearly constitutional practice prevailing at the Founding. The historical practice suggests that Congress should be able to legislate to reestablish the constitutional custom at the Founding with respect to the mechanism of removal.

B. Text, Structure, and Function

The Appointments Clause, the Take Care Clause, and the Necessary and Proper Clause support the constitutionality of Congress conditioning removal upon compliance with the Appointments Clause. Start with the Appointments Clause.

The Appointments Clause lacks an enforcement mechanism to force the President to nominate high officials. The removal-through-appointment proposal provides a useful, and at times essential, means of enforcing the presidential duty to submit nominations of well-qualified individuals. Without nomination of a well-qualified successor, the Appointments Clause becomes a dead letter.

A determined President can utterly defeat the effectiveness of the Appointments Clause through removal unless constrained by an appointments-through-removal approach. The Appointments Clause aims to ensure that the principal officers yielding executive power obtain the Senate's advice and consent. Unless constrained somehow, a President could remove every official approved by the Senate the day after they obtain Senate confirmation and completely defeat the Appointments Clause's principal aim, even while complying with its letter. The fact that a President generally waits to remove officials until they act against his wishes does not defeat the structural argument. It just means that the President defeats the Appointments Clause's intended effect after a period of time, at least when he fails to

promptly nominate a successor. The existence of the Recess Appointments Clause does not defeat this argument. The Recess Appointments Clause was intended to provide a means of keeping the government running when unanticipated resignations, death, or illness occurred during a Senate recess.²⁰⁸ It was not intended as an end run around the main procedure of Senate advice and consent, as the Supreme Court recognized in *Noel Canning*.²⁰⁹

The Take Care Clause also supports the proposal. The Take Care Clause, as many analysts have noted, establishes a presidential duty to “take Care that the Laws be faithfully executed.”²¹⁰ But the history recounted above shows that Presidents sometimes remove officials and then fail to nominate a qualified successor (or any successor at all) precisely in order to evade the constitutional duty to faithfully execute the law.²¹¹ I have argued elsewhere that the Constitution’s text and structure show that the procedural mechanisms provided in the Constitution, including the Appointments Clause and the Oath Clause (which requires all executive branch officials to swear an oath to obey the Constitution, not the President) aim to ensure a rule of law supported by faithful law execution throughout the executive branch.²¹² The Supreme Court has likewise recognized that the Appointments Clause seeks to provide a check on the President and prevent appointment of personal allies of dubious merit.²¹³ Indeed, it has recognized that it aims to constrain presidential abuse of his power and even despotism.²¹⁴ Precedent going back to 1689 recognizes that

²⁰⁸ *NLRB v. Noel Canning*, 573 U.S. 513, 523 (2014) (stating that the Recess Appointments Clause seeks to accommodate the “President’s continuous need for” assistance with the Senate early practice of “meeting for a single brief session each year”).

²⁰⁹ *See id.* at 524 (interpreting the Appointments Clause as “not offering the President the authority to routinely avoid the need for Senate confirmation”).

²¹⁰ *See* U.S. CONST. art. II, § 3; Driesen, *supra* note 19, at 83–84 (explaining the sort of duty the Take Care Clause imposed upon the President); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1834, 1836 (2016) (acknowledging that the Take Care Clause “seems to impose upon the President some sort of duty”).

²¹¹ *See generally* DRIESEN, SPECTER OF DICTATORSHIP, *supra* note 25, at 143–44 (urging the Supreme Court to take the possibility of bad faith presidential action more seriously than it has in its recent separation of powers jurisprudence).

²¹² *See* Driesen, *supra* note 19, at 81–88.

²¹³ *See Noel Canning*, 573 U.S. at 523 (2014) (describing the Appointments Clause as an “excellent check upon a spirit of favoritism in the President”); *Edmond v. United States*, 520 U.S. 651, 659 (1997) (noting that the Appointments Clause is designed to “curb Executive abuses of the appointment power”).

²¹⁴ *See Freytag v. Comm’r*, 501 U.S. 868, 868 (1991) (referring to a unilateral appointment power as the “most insidious and powerful weapon of eighteenth century despotism” (quoting WOOD, *supra* note 24, at 143)); *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 948 (2017) (Thomas, J., concurring) (noting that the Framers “recognized the serious risk for abuse and corruption posed by permitting one person [the President] to fill every office in the Government” (citing THE FEDERALIST NO. 76, at 510 (Alexander Hamilton) (Jacob E. Cooke ed., 1961))); *Weiss v. United States*, 510 U.S. 163, 184, 186 (1994) (Souter, J., concurring) (explaining that the Appointments

provisions authorizing only for-cause removal provide incentives for faithful law execution.²¹⁵ The proposal helps prevent the use of removal authority to defeat, partly through evasion of the Appointments Clause, faithful execution of the law.

Finally, the Constitution's Necessary and Proper Clause authorizes Congress to make laws "necessary and proper for carrying into Execution . . . Powers vested . . . in the Government of the United States, or in any Department or Officer thereof."²¹⁶ Since the President is a part of the government and an officer of the United States, this section authorizes Congress to regulate the President and the rest of the executive branch.²¹⁷ Given the express constitutional delegation of this broad sweeping power to Congress, the Court should accept a proposal aimed at enforcing the Appointments Clause and guarding against faithless law execution, which can sometimes play a role in defeating democracies.

C. Precedent

Recent precedent on removal creates no barrier to this proposal. *Seila Law* holds that the President's ability to remove the sole directors of government agencies must remain unrestricted by for-cause removal protection.²¹⁸ But my proposal does not limit the grounds of removal at all. It leaves the President free to remove cabinet members or others covered by the legislation for political reasons. It just requires him to do so through compliance with the Appointments Clause.

Myers, which is more relevant, does not prohibit this proposal either, but it does present some challenges. Recall that *Myers* held that Congress may not condition presidential removal on the Senate's consent to the removal. Literally, the appointments mechanism for removal does not do that. It gives Congress no say in

Clause aims to prevent presidential wrongdoing and to check "arbitrary power" (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting))).

²¹⁵ See *Manners & Menand*, *supra* note 30, at 35–45 (explaining how a widely followed seventeenth century English case and early American legislators, courts, and constitutional drafters allowing for-cause removal and other penalties for malfeasance and neglect of duty aided "faithful execution" of the laws); see also *id.* at 45–52 (discussing the nineteenth century adoption of inefficiency as grounds for removal to combat patronage-related abuse).

²¹⁶ U.S. CONST. art. I, § 8, cl. 18.

²¹⁷ See *Oregon v. Mitchell*, 400 U.S. 112, 124 n.7 (1970) (explaining that the Necessary and Proper Clause provides power for Congress to ensure that the President and other national officers "represent their national constituency as responsively as possible"); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 432–33 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI, *as recognized in* *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 97–98 (1984) (noting that the Necessary and Proper Clause authorizes Congress to limit the number of judges a President may nominate).

²¹⁸ See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (holding that allowing removal only for "inefficiency, neglect, or malfeasance violates the separation of powers").

removal, but simply requires that compliance with the Appointments Clause serve as the *procedural mechanism* for removal.

Nevertheless, the appointments mechanism does create the possibility that the Senate might interfere with the President's removal authority by refusing to consent to the appointment of a qualified successor committed to the rule of law as a means of freezing the incumbent in place. That possibility raises questions about the proposal's consistency with *Myers*, which allows the President to remove officials unilaterally in order to ensure proper administration of the laws.

The Supreme Court, however, should not let a theoretical possibility defeat a mechanism designed to reconcile its removal jurisprudence with the Appointments Clause. First of all, that the Senate may abuse its authority does not mean that it will. The Senate usually accepts responsible presidential nominations even when the President tries to remove somebody the Senate has faith in. Thus, we saw that the Senate declined to remove Johnson from office, in spite of a removal attempt that majorities in both the House and Senate considered a "high Crime or Misdemeanor," when the President ultimately agreed to appoint a respected successor.²¹⁹ Second, striking down an Appointments Clause trigger statute on its face may permit a President to evade the Appointments Clause, as our less law-abiding Presidents have in the past. The Court should not reject a procedural mechanism for removal that in no way limits the grounds for removal on its face and requires no Senate consent to the removal. So, in a facial challenge to the proposal, the precedent favors upholding it. It enjoys strong customary support and conflicts with none of the relevant precedent.

If the Senate abuses the procedure to reject a well-qualified nominee for the purpose of thwarting removal of a favored officer, however, that decision would conflict with *Myers*. The Court would be justified in rejecting such an application of the procedure, but not its mere existence.

The Senate may also interfere with the President's removal authority by declining to act on the nomination of a well-qualified successor. As Matthew Stephenson has explained in detail, the Court may properly imply consent to a nomination from a failure to vote on the nomination.²²⁰ The case for doing this becomes especially strong when the record suggests that the Senate has declined to act based on a desire to interfere with the President's removal authority, rather than from a desire to thwart an inappropriate nomination. The Supreme Court has not adopted Stephenson's proposal because it has not had any occasion to do so. But if the Senate failed to act on a nomination to thwart a removal, the Court could narrowly accept the proposal in cases where the failure to consider a nomination interfered with the President's removal authority. Or it could legitimately validate the removal even if

²¹⁹ See WINEAPPLE, *supra* note 82, at 262, 366, 387.

²²⁰ See Stephenson, *supra* note 141, at 946.

it did not wish to adopt Stephenson's removal. Neither approach requires it to invalidate a "removal-by-appointment" statute on its face.

Congress can avoid the constitutional difficulty *Myers* creates by making nomination of a successor the removal trigger rather than Senate consent to the appointment. This makes Senate abuse of the Appointments Process to thwart removal impossible, and therefore should pose no serious constitutional issue. But this version of the proposal provides a less effective check on presidential evasion of the Appointments Clause through removal than a requirement of Senate consent. The President can avoid the advice and consent function by nominating a poorly qualified nominee or a nominee determined to subvert the law, whom the Senate should not approve.

If Congress chooses to use a nomination trigger, it could address that problem, at least partially, by making nomination of a "well-qualified" successor the trigger for removal, not just any successor. But enforcing this "well-qualified" component of a removal trigger poses a challenge. The judiciary might find that a case requiring judicial evaluation of a nominee's qualifications presents a political question that it ought not resolve.²²¹ On the other hand, a court could decide this by taking testimony from experts in the relevant field and examining the qualifications of past office holders. Congress could require the Merit Systems Protection Board to make this determination, subject to judicial review under the arbitrary and capricious standard.²²² That would bring greater expertise to the judgment and avoid putting judges in a difficult position.

This well-qualified appointee trigger does not impose a for-cause removal constraint on the President in defiance of *Seila Law*. The President remains free to remove an incumbent without cause. But the President's implicit obligation to put forward well-qualified nominees, as the Framers intended, becomes explicit if the President uses the nomination to remove an incumbent.

D. Policy

A requirement that Presidents effectuate political removal through compliance with the Appointments Clause generally represents good policy, but the proliferation of posts requiring Senate confirmation makes it only practicable if applied very selectively. Congress should probably focus this mechanism on a limited number of top officials where continual governance through Senate-confirmed officials is especially important. The proliferation of posts requiring Senate approval probably con-

²²¹ See generally *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498–2508 (2019) (finding a political question when judicially manageable standards appeared somewhat lacking in a politically charged context).

²²² See *infra* Appendix, Draft Bill with a Nomination Trigger § 5.

tributed to the decline in the custom of removal through appointment. The Congress can revive this custom most effectively by not applying the revival to so many posts that it challenges the President's ability to make timely nominations and the Senate's ability to process confirmation decisions reasonably quickly.

So, Congresspeople considering this proposal should think carefully about what posts it should apply to. It would be especially important to use this mechanism for offices posing the greatest potential threat to liberty, such as the Attorney General and the Secretary of Homeland Security. In those areas, a unilateral appointee placed in those offices by a corrupt President could do a lot of damage, sometimes very quickly.

This proposal may trigger concerns about empowering the Senate to keep outgoing officeholders in place against the wishes of an incoming administration.²²³ Congress could provide an exception for removing holdovers early in an administration, but this should not prove necessary and has some dangers associated with it. A holdovers exception should not prove necessary, because the custom of resignation of outgoing officials is pretty well entrenched, especially with respect to most high-level posts.²²⁴ Furthermore, if the Senate abused its authority by disapproving a nominee in hopes of freezing a holdover in place, the courts could invalidate that application under *Myers*. The President could seek a declaratory judgment indicating that her removal was legal despite the statutory prohibition on removal without appointment, and a court could respond by holding that the statute could not be applied to a case where the Senate abused its advice and consent role to interfere with the President's removal authority. The prospect of judicial review should discourage the abuse. Furthermore, a holdovers exception might prove dangerous in some cases. Some high-level officers, such as the Director of the FBI, have long terms precisely to avoid having the politics of an incoming administration control their activities.²²⁵ Application of a holdover exception to such posts could create opportunities not only to circumvent the Appointments Clause, but also to subvert liberty and the Republic.

One problem that may arise, however, involves the need for quick removal if an officer proves so dangerous that removal must occur immediately. The procedure

²²³ See O'Connell, *supra* note 9, at 675 (noting that if the President cannot fire officials he inherits, the prior administration could control his administration).

²²⁴ Cf. Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 563–64 (2003) (discussing the practice of entrenching political appointees by putting them in civil service positions before a new President arrives).

²²⁵ See Andrew Kent, Susan Hennessey & Matthew Kahn, *Why Did Congress Set a Ten-Year Term for the FBI Director?*, LAWFARE (May 17, 2017, 4:45 PM), <https://www.lawfareblog.com/why-did-congress-set-ten-year-term-fbiw-director> (explaining that the FBI Director's current ten-year term "acts as a check on presidential power" and limits "political interference in FBI investigations").

of presidential nomination and Senate approval makes such occurrences exceedingly rare. For example, Madison waited for proper appointment of a successor even when curing gross incompetence leading to the sacking of the Capitol during the War of 1812.²²⁶ By contrast, this Article has discussed many instances where quick removal serves as a means of subverting the law. In the unlikely event that an official's ongoing dangerous misconduct cannot be cured by any measure other than removal, it is very likely that the President and the Senate would quickly agree on a successor.

Another problem involves the difficulty of determining when a removal has occurred. When a President wants to remove an official for political reasons, he frequently does so not by removing her outright but by requesting the officer's resignation (or hinting that it would be welcome). When an officer resigns, it can prove difficult to determine whether she simply wished to leave or the President removed her. Still, a simple ban on political removal without compliance with the Appointments Clause serves rule of law values even if it does not apply to resignations. This ban would empower an official faced with a demand to resign because she refused to comply with an illegal order, for example, to refuse, and force the President to proceed by nominating a successor, rather than cooperate in a scheme to subvert the law.²²⁷

But such a ban would work better if it also applied to resignation sought by the President, even though some factual inquiry and judgment would prove necessary when an official resigned. Congress could require that a resignation that ensues after a President or his designees express disapproval of an applicant's performance, or otherwise suggest that she should leave, be treated as a dismissal.²²⁸

The avoidance of the despotism problem should loom large in assessing this proposal's merits. The Supreme Court should defer to Congress if it adopts such a proposal, as the Court lacks the political skills needed to assess what is necessary to protect the Senate's role in appointments. This proposal is most appropriate for very

²²⁶ See GAILLARD HUNT, *THE LIFE OF JAMES MADISON* 329 (1902) (suggesting that Secretary of the Navy, Paul Hamilton, resigned "probably on a hint from Madison"). Secretary of War, William Eustis, also resigned because he understood that the public opinion regarding the conduct of the war required it. *See id.* at 328. Madison expressed dissatisfaction with John Armstrong, widely viewed as responsible for the destruction of Washington, D.C. in 1814. *Id.* at 334. Madison, however, refused to accept Armstrong's proffered resignation. *Id.* Armstrong resigned anyway and blamed his resignation on intrigue aimed at encouraging James Monroe to replace him. *Id.*

²²⁷ Cf. WINEAPPLE, *supra* note 82, at 250–51 (discussing Stanton's refusal to leave office to make room for the improper appointment of Thomas).

²²⁸ The evidence needed to establish that a resignation was in fact a dismissal should not be subject to executive privilege. Executive privilege protects advice given to the President, not the President's expression of displeasure to a subordinate. *See United States v. Nixon*, 418 U.S. 683, 706 (1974) (grounding executive privilege in the "President's need for complete candor and objectivity from advisers").

high-ranking officers with responsibilities that make their abuse a serious potential threat to liberty or, in difficult times, to the Republic's survival.

CONCLUSION

Politically motivated removal can subvert the Appointment Clause's goal of having officials approved by the Senate carry out the law. It can serve the purpose of undermining the rule of law and democracy, especially when it functions as a means to the end of putting a lackey in office to evade the law or the Constitution. Congress should consider adopting the proposal to make compliance with the Appointments Clause the mechanism for political removal in important cases, thereby selectively emulating the practice established at the Founding, while taking into account the problems posed by the proliferation of offices requiring Senate approval.

APPENDIX

Draft Bill with a Senate Confirmation Trigger

The Protect the Appointments Clause Act

Findings

Sec. 1. Congress finds that:

- (a) Presidents have sometimes abused their power by removing officials appointed by the President and confirmed by the Senate from their post and then failing to comply with the Appointments Clause by promptly nominating a successor.
- (b) Removing a Senate-appointed official prevents an official whom the President has nominated and the Senate has approved from exercising government authority, an outcome in tension with the Appointments Clause.
- (c) When the President removes a person from an important office for political reasons and then fails to promptly nominate a successor, officials whom the President has not nominated and the Senate has not approved end up exercising that office's authority, in contravention of the Appointments Clause's purpose and sometimes other laws.
- (d) Presidential removal tends to lead to evasion of the Appointments Clause when Presidents choose to remove an official to undermine a law that they are charged with faithfully administering.
- (e) Many Presidents, beginning with George Washington, removed officials by securing Senate approval for successors to officers of United States who had resigned or been removed. This constitutional custom helped secure compliance with the Appointments Clause.

Purpose and Policy

Sec. 2. This Act aims to fulfill the intent of the Framers and Ratifiers of the Constitution by requiring a restoration of the constitutional custom ensuring that key officers of the United States exercising the authority of the United States be appointed according to the procedures provided in the Constitution. It is the intent of the Congress that at all times only key officials who have been nominated by the President and approved by the Senate for the post they occupy exercise the authority of the federal government.

Definition of Key Officials

Sec. 3. The following officials are “key officials” for purposes of this statute: the Secretary of Defense, the Attorney General, the Director of the Federal Bureau of Investigation, the Secretary of the Department of Homeland Security, the Commissioner of United States Customs and Border Protection, the Director of United States Citizenship and Immigration Services, the Director of United States Immigration and Customs Enforcement, the Director of the United States Marshals Service, [insert others].

Procedure for Removing Key Officials

Sec. 4. Whenever the President wishes to exercise statutory or constitutional authority to remove a key official from office, he must do so by nominating a successor. The Senate’s consent to the successor’s nomination shall remove the incumbent key official from office. Any other means of removal of a key official shall have no force and effect. Nothing in this statute shall limit the grounds for presidential removal of key officials.

Draft Bill with a Nomination Trigger

The Protect the Appointments Clause Act

Findings

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President has not nominated and the Senate has not approved end up exercising that office's authority, in contravention of the Appointments Clause's purpose.

- (d) Presidential removal tends to lead to evasion of the Appointments Clause when Presidents choose to remove an official to undermine a law that they are charged with faithfully administering.
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Procedure for Removing Key Officials

Sec. 4. Whenever the President wishes to exercise statutory or constitutional authority to remove a key official from office, he must do so by nominating a successor. The nomination of a well-qualified successor to a key official being removed shall have the legal effect of removing the incumbent key official from office. Any other means of removal of key officials shall have no force and effect. Nothing in this statute shall limit the grounds for presidential removal of key officials.

Optional Additional Protection Against Removal Through Nomination of Unqualified Successors

[Sec. 5. When the President nominates an official to displace a key official under section 4, the Merit Systems Protection Board [hereinafter the Board] shall determine whether the nominee is well-qualified for the position for which she has been nominated within fourteen days of the date of nomination. That determination shall be conveyed to the President and to the President Pro Tempore of the Senate.

- (a) In making this determination, the Board shall consider:
 - (1) The qualifications and experience needed for this position.
 - (2) The qualifications and experience of prior Senate-confirmed occupants of these positions.
 - (3) The likelihood of Senate confirmation for a person with such qualifications.
- (b) In making this determination, the Board shall not consider:
 - (1) The desirability of retaining the person displaced by this nomination.
 - (2) The qualifications of the person being displaced.
 - (3) Any other matter related to the President's exercise of his removal authority.

Sec. 6. The President's nomination of a well-qualified successor to a key official shall effectively remove the incumbent on the date that the Board determines that the President has nominated a well-qualified replacement if the President indicates that he wishes to remove the incumbent at the time of the successor's nomination.

Sec. 7. Even if the Board has determined that the President has not nominated a well-qualified successor, the Senate's approval of the successor considered unqualified by the merit system protection board shall effectuate the removal of the incumbent.

Sec. 8. Any decision that the President's nominee is well-qualified shall not be subject to judicial review.

Sec. 9. The nominated successor may appeal a Board determination that she is not well-qualified to the District Court of the District of Columbia. The Court may overturn this decision if it is arbitrary and capricious or contrary to law.]