

NOTE

BOUNDARIES OF THE FEDERAL VACANCIES REFORM ACT

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I. INTRODUCTION

The Federal Vacancies Reform Act of 1998 (“FVRA”) authorizes the president to temporarily fill Senate-confirmed positions when the prior officeholder “dies, resigns, or is otherwise unable to perform the functions and duties of the office.”¹ Does the FVRA apply when the officeholder was fired?

The FVRA was once a “rather obscure area of the law.”² Unprecedented personnel turmoil in the Trump Administration, however, has thrust it into the national spotlight.³ The President has to date fired three cabinet secretaries—Secretary of State Rex Tillerson,⁴ Secretary of Veterans’ Affairs David Shulkin,⁵ and Secretary of Defense James Mattis⁶—and replaced them with acting officers ostensibly under FVRA authority.⁷ Yet the interpretive

¹ 5 U.S.C. § 3345(a) (2012).

² 144 CONG. REC. 22,518 (1998) (statement of Sen. Dick Durbin (D-Ill.) (“I think what we have found is that rarely do we visit this rather obscure area of the law, the Vacancies Act.”)).

³ The appointment of Acting Attorney General Matthew Whitaker has been the most high-profile recent example, but personnel turnover in the Trump Administration has broadly created more acting officials in the first fourteen months of an administration than at any point since the FVRA’s passage. *See, e.g.*, Tamara Keith, *Trump Cabinet Turnover Sets Record Going Back 100 Years*, NPR (Mar. 19, 2018, 5:00 AM), <https://www.npr.org/2018/03/19/594164065/trump-cabinet-turnover-sets-record-going-back-100-years> [perma.cc/CS5R-85DN]; Denise Lu & Karen Yourish, *The Turnover at the Top of the Trump Administration Is Unprecedented*, N.Y. TIMES (updated Feb. 28, 2019), <https://www.nytimes.com/interactive/2018/03/16/us/politics/all-the-major-firings-and-resignations-in-trump-administration.html> [perma.cc/QTB9-A7P3].

⁴ Nicole Gaouette, Kaitlan Collins & Dan Merica, *Trump Fires Tillerson, Taps Pompeo as Next Secretary of State*, CNN (Mar. 13, 2018, 2:36 PM), <https://www.cnn.com/2018/03/13/politics/rex-tillerson-secretary-of-state/index.html> [perma.cc/E2XH-CT4G].

⁵ Emily Stewart, *David Shulkin Says He Was Fired. The White House Says He Quit.*, VOX (Apr. 2, 2018, 12:40 PM), <https://www.vox.com/policy-and-politics/2018/4/2/17188096/david-shulkin-va-veterans-affairs-fired-quit> [perma.cc/2Z9D-T5TH] (discussing how details of Shulkin’s exit could have implications for whether or not the FVRA applies).

⁶ On January 2, 2019, President Trump told the press that he had “essentially” fired Defense Secretary James Mattis. Maggie Haberman, *Trump Says Mattis Resignation Was ‘Essentially’ a Firing, Escalating His New Front Against Military Critics*, N.Y. TIMES (Jan. 2, 2019), <https://www.nytimes.com/2019/01/02/us/politics/trump-mattis-defense-secretary-generals.html> [perma.cc/YEU5-3GJ4]. Given that Mattis had resigned effective February 28, 2019, his January 1 exit is best characterized as removal by the President. *See* Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 23, 2018, 11:46 AM), <https://twitter.com/realDonaldTrump/status/1076881816462737408> [perma.cc/WDB4-GTV4] (“I am pleased to announce that our very talented Deputy Secretary of Defense, Patrick Shanahan, will assume the title of Acting Secretary of Defense starting January 1, 2019.”). The Department of Defense has its own succession statute, but, as discussed in Part II.B.1. *infra*, that statute was amended in 2014 to mirror the language of the FVRA. It now reads “The Deputy Secretary shall act for, and exercise the powers of, the Secretary when the Secretary *dies, resigns, or is otherwise unable to perform the functions and duties of the office.*” 10 U.S.C. § 132(b) (2012) (emphasis added).

⁷ In none of these cases did the President articulate the authority under which he appointed the acting official. *See, e.g.*, *United States v. Valencia*, No. 5:17-CR-882-DAE(1)(2), 2018 WL 6182755, at *7 (W.D. Tex. Nov. 27, 2018) (“As there has been no official order, all the Court can examine regarding the length of the appointment or designation are the President’s tweets.”). President Trump has also told reporters he “like[s] ‘acting.’” because it gives him

question of whether the Act applies to removal has found conflicting answers the few times it has come up.⁸ On November 14, 2018, for instance, the Office of Legal Counsel (“OLC”) determined the FVRA would apply when the president fired the previous officeholder.⁹ Two weeks later, a federal judge concluded in dicta that the Act would *not* apply in that situation.¹⁰ This Note aims to clarify this critical, yet disputed, boundary of the FVRA.

This Note argues that the FVRA does not authorize the president to temporarily fill vacancies created by firing the prior officeholder. To arrive there, it examines the Act’s text and structure, its historical context, its legislative history, and relevant OLC and judicial opinions. It finds the Act is best read as encompassing vacancies created by the outgoing officer’s decisions or circumstances but does not reach those forced by the president.

This Note finds such a result sensible but suboptimal. This interpretation laudably prevents a president from circumventing the Senate’s constitutional advice and consent role by firing a Senate-confirmed official only to install an unconfirmed replacement. But it also creates a policy problem. It leaves no mechanism for the president to temporarily replace most fired officers, even under urgent circumstances. Congress, this Note concludes, should respond by authorizing the president to temporarily replace a fired officer with the officer’s “first assistant,” but not with officials otherwise eligible for appointment under the FVRA. Such an amendment would protect the Senate’s advice and consent role while allowing the relevant agency to function until a permanent replacement took office.

The argument unfolds as follows. Part II examines whether the current FVRA reaches presidential removal. It begins with close analysis of the Act’s text and structure, and then turns to the Act’s historical context, its legislative history, and subsequent interpretations by OLC and the courts. Part III considers how Congress might improve the FVRA, weighing the policy values behind the Act and proposing an amendment to better constellate those values. Part IV concludes.

“more flexibility.” Felicia Sonmez, *Trump Says He’s ‘in No Hurry’ to Replace Acting Cabinet Members*, WASH. POST (Jan. 6, 2019), https://www.washingtonpost.com/politics/trump-says-hes-in-no-hurry-to-replace-acting-cabinet-members/2019/01/06/afac5fea-11e4-11e9-b6ad-9cfd62dbb0a8_story.html?utm_term=.fc627428ca1d [perma.cc/2BLA-D7SC].

⁸ Commentators have floated the question in popular media, but it has not yet received thorough scholarly treatment. *See, e.g.*, John E. Bies, *If the Attorney General Is Fired, Who Acts as Attorney General?*, LAWFARE (July 29, 2017, 5:06 PM), <https://www.lawfareblog.com/if-attorney-general-fired-who-acts-attorney-general> [perma.cc/E2VM-ZVDV]; Marty Lederman, *Who Might Replace Rod Rosenstein and What Would It Mean for the Mueller and SDNY Investigations?: A Deep Dive*, JUST SEC. (Sep. 26, 2018), <https://www.justsecurity.org/54809/replace-rod-rostein/> [perma.cc/SYL2-YXX2]; Steve Vladeck, *The Three Sessions Succession Scenarios*, JUST SEC. (July 15, 2017), <https://www.justsecurity.org/43477/sessions-succession-scenarios/> [perma.cc/ML6L-EN4B].

⁹ *See* Designating an Acting Attorney General, 42 Op. O.L.C. ___, at *4 n.1 (2018), <https://www.justice.gov/olc/file/1112251/download> [perma.cc/JXK6-YN3X].

¹⁰ *See Valencia*, 2018 WL 6182755, at *4.

II. INTERPRETING THE FVRA

The FVRA responds to a puzzle as old as the Republic: that of balancing the formal rules of the Constitution with the functional realities of day-to-day governance. Formally, the Appointments Clause requires that principal officers only be appointed with the advice and consent of the Senate.¹¹ Yet since the nation's founding, Congress has recognized the need to keep the mechanisms of government running while the Senate considers a president's nominees. To that end, the Second Congress passed a Vacancies Act authorizing the president to temporarily appoint acting officials.¹² Subsequent Congresses retained and developed this statutory scheme.¹³

Congress passed the predecessor act to the FVRA—the Vacancies Act—in 1868.¹⁴ Among other things, the Vacancies Act authorized the President to temporarily replace an officer “in case of the death, resignation, absence, or sickness” of the officer.¹⁵ During the 1970s and 1980s, however, presidents grew increasingly bold with their use of the Vacancies Act, and even began to flout its text.¹⁶ Indeed, by 1998, about twenty percent of all principal officers served on an acting basis without Senate confirmation; many served beyond the 120-day limit authorized by statute.¹⁷ In one particularly provocative case, President Clinton appointed an Acting Attorney General for the Civil Rights Division from outside government—after the Senate rejected his nomination to the permanent position.¹⁸ “Perceiving a threat to the Senate’s advice and consent power,” Congress replaced the Vacancies Act with the FVRA in 1998.¹⁹

This Part considers whether the FVRA is best read as applying to firings. It begins by examining the text and structure of the Act itself.²⁰ It then analyzes how the FVRA’s historical setting informs our understanding of that text, focusing in particular on agency succession statutes in place at the FVRA’s enactment. It next turns to the FVRA’s legislative history and complicates the narrative that the Act’s legislative history supports applying the Act to firings. This Part concludes by surveying subsequent constructions of

¹¹ U.S. CONST. art. II, § 2, cl. 2. (providing that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States”).

¹² See Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281.

¹³ See Act of July 23, 1868, ch. 227, § 15 Stat. 168, 168–69 (codified as amended at 5 U.S.C. § 3345 (2012)); see also MORTON ROSENBERG, CONG. RESEARCH SERV., 98-892, THE NEW VACANCIES ACT: CONGRESS ACTS TO PROTECT THE SENATE’S CONFIRMATION PREROGATIVE 2–4 (1998).

¹⁴ Act of July 23, 1868, ch. 227, § 1, 15 Stat. at 168–69.

¹⁵ *Id.* at 168 (providing that the first assistant of such an officer will perform the officer’s duties unless the President directs otherwise).

¹⁶ See *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017); ROSENBERG, *supra* note 13, at 2–4.

¹⁷ See *SW Gen.*, 137 S. Ct. at 936; ROSENBERG, *supra* note 13, at 1.

¹⁸ See *SW Gen.*, 137 S. Ct. at 936; ROSENBERG, *supra* note 13, at 1.

¹⁹ *SW Gen.*, 137 S. Ct. at 936.

²⁰ See, e.g., *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (noting that for “any question of statutory interpretation, our analysis begins with the plain language of the statute”).

the Act by OLC and the courts. These interpretive tools together suggest the Act is best read as applying only when the vacancy is caused by the departing officer or by circumstance, and does not apply when the vacancy is forced into existence by presidential removal.

A. Text and Structure

Two sections of the FVRA relate to the Act's applicability to removal. The key textual hook comes in § 3345(a). There, Congress wrote the Act applies when an officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office."²¹ The term-expiration language in § 3345(c)(2) also bears on the Act's reach, by specifying another circumstance that would activate the FVRA.²² This Part examines both sections and considers how they inform our understanding of the Act's applicability to firings.

1. Section 3345(a)

Section 3345(a) of the FVRA dictates the Act applies when an officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office."²³ The question at the heart of this Note is whether "otherwise unable" includes presidential removal.

The *ejusdem generis* canon counsels reading "otherwise unable" as reaching only other inabilities of the same basic kind as death or resignation. That canon captures a straightforward intuition about the way we use language: When a catch-all follows a list of terms, that catch-all extends only to other terms of the same kind as those listed.²⁴ The canon does not end the inquiry, as Congress may draft redundantly to ensure the inclusion of certain terms.²⁵ But it does offer a useful starting point, as the listed terms intuitively contextualize the language that follows. Here, "otherwise unable" in the FVRA is thus best understood as only reaching inabilities that share the same fundamental character as the listed terms ("dies" and "resigns").

The essential characteristic that "dies" and "resigns" share is that both are *uncontrollable* inabilities to serve from the president's perspective. The president cannot choose whether his officers die or resign. However, he can

²¹ 5 U.S.C. § 3345(a).

²² *Id.* § 3345(c)(2).

²³ *Id.* § 3345(a).

²⁴ *See, e.g.,* *Yates v. United States*, 135 S. Ct. 1074, 1087 (2015) (finding statutory catch-all "or tangible object" only extended to other objects of the same kind as those listed previously); *McBoyle v. United States*, 283 U.S. 25, 26 (1931) (finding statutory catch-all "or any other self-propelled vehicle" only extended to other vehicles of the same kind as those listed previously).

²⁵ *See, e.g.,* *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 445–46 (1995) (Souter, J., dissenting) (stating that "Congress could sensibly have seen some practical value in the redundancy" and thus its "inelegance may be forgiven").

choose to fire them—creating an inability to serve of a fundamentally different type from those created by the officer’s decision or circumstance.²⁶ In particular, vacancies created by the very official with the power to fill them activate concerns about the Senate’s advice and consent role that remain largely dormant in the two cases listed in the Act, where the president does not create the vacancy.²⁷ The *ejusdem generis* canon thus suggests a reading that extends “otherwise unable” only to vacancies of the same type as those listed. Here, that most naturally means other unexpected vacancies, not vacancies created by the official with the power to fill them.

This reading can be critiqued on two fronts. First, one might argue the relevant common characteristic between “dies” and “resigns” is the resultant vacancy, regardless of how that vacancy comes to be. That argument turns on how broadly we define the two terms’ essential common characteristic. This Note finds in Part II.B. that the Act’s historical context augurs for a narrow reading. But even on semantic grounds, the terms “dies” and “resigns” most naturally share the core element of being outside the president’s control. Had Congress intended to cover all cases of removal with the “otherwise unable” language, as the broader read suggests, Congress would not have needed to list two narrower examples.²⁸ It instead could have simply specified the Act applied to *all* vacancies and settled the matter. Indeed, as Part II.B.2. finds, Congress had used such broader language to refer to vacancies in nearly every other agency secession statute in place prior to the FVRA. The enumerated terms share various common characteristics, but their key interpretive commonality is the lack of presidential control over the creation of the vacancy.

This interpretation also raises concerns about superfluity. Specifically, “otherwise unable” might seem to do little work if limited to cases similar to the listed terms.²⁹ What type of vacancy, after all, is like death or resignation but is neither?³⁰ Yet examples abound: strokes, heart attacks, or other instances of temporary physical incapacitation represent just a few. Incarceration of a principal official could be another, where their absence prevents her from performing the duties of their office. Inability also reaches recusal short of resignation. At least four federal circuit courts, for instance, have held the term “disability” includes judicial recusal under the Federal Rules

²⁶ See Steve Vladeck, *The Federal Vacancies Reform Act and the VA: A Study in Uncertainty and Incompetence*, LAWFARE (May 28, 2018, 11:25 AM), <https://www.lawfareblog.com/federal-vacancies-reform-act-and-va-study-uncertainty-and-incompetence> [perma.cc/B8WE-FADK].

²⁷ See *infra* Part III.A.1.

²⁸ See *Yates*, 135 S. Ct. at 1086 (“Had Congress intended the latter all-encompassing meaning, we observed, it is hard to see why it would have needed to include the examples at all.”).

²⁹ See, e.g., *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (noting “the Court will avoid a reading which renders some words altogether redundant”).

³⁰ Cf. *Yates*, 135 S. Ct. at 1089 (Alito, J., concurring) (asking “what is similar to a ‘record’ or ‘document’ but yet is not one?”).

of Civil Procedure.³¹ One could similarly imagine an officer temporarily recusing themselves from office without resigning—a circumstance “otherwise unable” naturally captures.

These circumstantial disabilities, however, are fundamentally dissimilar from vacancies created by presidential removal. The phrase “otherwise unable” thus can have independent force without reaching beyond its natural contextual bounds. And a faithful textual read does not read into a context-dependent catch-all broad executive power of a foundationally different kind than that which Congress authorized in its enumerated list. The best semantic read of § 3345(a) thus cabins application of “otherwise unable” to instances rooted in the officer’s circumstances, not those created by the president.

2. Section 3345(c)(2)

Section 3345(c)(2) bolsters this interpretation. “For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d,” Congress wrote, “the expiration of a term of office is an inability to perform the functions and duties of such office.”³² There, Congress singled out expiration of a term of office as an inability to perform the functions and duties of the office. Two semantic principles illustrate why this section indicates the Act does not apply to removal: the presumption against superfluity and the *expressio unius* canon.

The presumption against superfluity supports a narrow read of § 3345(a). Had Congress understood inability to encompass any vacancy in the office, its language would automatically—indeed, perhaps principally—include expiration of a term. In other words, § 3345(c)(2) becomes entirely superfluous if “otherwise unable” includes any time an office becomes vacant. Courts seek to construct statutes so as to avoid superfluity out of respect for Congress’s draftsmanship. “[T]he Court will avoid a reading which renders some words altogether redundant.”³³ Superfluity is not dispositive, as Congress might have included the section to protect term expiration as a particularly important instance of inability to serve.³⁴ Nonetheless,

³¹ See *In re Grand Jury Investigation*, 315 F. Supp. 3d 602, 665–66 (D.D.C. 2018) (giving examples), *aff’d*, 916 F.3d 1047 (D.C. Cir. 2019); see also *In re United States*, 614 F.3d 661, 662 (7th Cir. 2010) (“The term ‘other disability’ in Rule 25(a) includes disability by reason of recusal.”); *United States v. Hall*, 171 F.3d 1133, 1153 (8th Cir. 1999) (determining that Rule 25(a) applies where “the trial judge recuses himself or herself”); *United States v. Sartori*, 730 F.2d 973, 976 (4th Cir. 1984) (same); *Bennett v. United States*, 285 F.2d 567, 572 (5th Cir. 1960) (concluding that a trial judge properly had recused himself where the judge “appear[ed] to have had knowledge of the fact that appellant was using his name in order to obtain affidavits from certain witnesses in order to support his motion for a new trial”).

³² 5 U.S.C. § 3345(c)(2) (2012).

³³ *Gustafson*, 513 U.S. at 574.

³⁴ See, e.g., *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 445–46 (1995) (Souter, J., dissenting) (explaining that “Congress could sensibly have seen some practical value in the redundancy” and thus its “inelegance may be forgiven”); see also *Abbe R. Gluck & Lisa*

the presumption against superfluity counsels against reading “otherwise unable” as reaching any case of vacancy.

The *expressio unius* canon further suggests a narrow interpretation. This canon captures the commonsense semantic principle that including certain items in a list, but excluding others that are “members of a group or series” with those included, creates a “sensible inference that the term left out must have been meant to be excluded.”³⁵ Here, the drafters explicitly included term expiration as the sole case of an “inability” that did not result from something intrinsic to the departing officer’s decisions or personal circumstances. Congress’s singling-out of one extrinsic inability for inclusion elsewhere in the Act creates a sensible inference that similar excluded incapacities—namely, firings—do not fall within the scope of the statute. On *expressio unius* logic, § 3345(c)(2) indicates Congress contemplated that “inability to perform” would not encompass all vacancies. The express inclusion of one inability not relevant to the departing officer’s personal circumstances implies the exclusion of others, particularly given that absent that exclusion the clause would become completely superfluous.

None of these semantic tools definitely settles the question. The canons are no more than linguistic rules of thumb that aid in interpreting Congress’s words. On balance, however, this analysis suggests the text of the FVRA is best read as not reaching presidential removal.

B. Historical Context

The text of the FVRA cannot be read in isolation. Three historical points contextualize Congress’s drafting of the 1998 Act. First, and perhaps most importantly, the thirty-five agency succession statutes in place in 1998 illustrate the legislative context within which Congress acted, clarifying Congress’s linguistic choices. Second, the text of the preceding Vacancies Act highlights the baseline against which Congress acted, and is revealing of both things Congress changed and things it did not. Finally, the 1990 holding of the U.S. District Court for the District of Columbia in *Olympic Federal Savings & Loan Ass’n v. Director, Office of Thrift Supervision*³⁶ offered the drafting Congress guidance on how courts would interpret its language. These three contextual cues further clarify Congress’s semantic choices in the FVRA.

Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 934–36 (2013).

³⁵ *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). For instance, Professor Geoffrey Miller notes the phrase “All cats born on or after January 1, 1989 shall be vaccinated for feline leukemia” intuitively suggests that cats born before that date need not be vaccinated. JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 286 (3d ed. 2017) (citing Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1196).

³⁶ 732 F. Supp. 1183 (D.D.C. 1990), *appeal dismissed and remanded on other grounds*, 903 F.2d 837 (D.C. Cir. 1990).

1. Statutory Context

Perhaps most revealing are the existing agency succession statutes Congress referenced in drafting the FVRA, which used uniformly broader language than Congress selected for the Act itself. When Congress passed the FVRA in 1998, thirty-five agencies had their own succession statutes authorizing a second official—typically the first official’s deputy—to assume that official’s duties under specified conditions.³⁷ The Senate committee report specifically pointed to these statutes and discussed them at some length.³⁸ The committee was therefore aware of how previous Congresses had written previous agency vacancy acts and drafted its language with those statutes in mind.³⁹

That historical context is key. If Congress purposely selected a narrower phrasing over broader alternatives, that choice should be given effect. “The fact that [Congress] did not adopt [a] readily available and apparent alternative strongly supports” the conclusion that the section only applies to the expressly listed terms.⁴⁰ Examining these agency statutes thus represents a useful piece of context for understanding what Congress’s words mean.

To that end, this Part surveys the thirty-five relevant replacement statutes listed in the committee report.⁴¹ These statutes are the ones Congress was specifically aware of as it drafted the FVRA, and which it pointed to in its committee report.

Of the thirty-five statutes in the committee report, *all but one* used language that referred generally to a vacancy in the relevant office.⁴² Indeed, all but two even distinguished vacancy from absence or disability. The near-uniform use of broader language in those existing succession statutes creates the logical inference that Congress deliberately selected narrower language in the FVRA in order to cover only a subset of vacancies.

Take three examples. First, consider the Federal Aviation Administration statute, which dictated that “[t]he Deputy Administrator acts for the Administrator when the Administrator is absent or unable to serve, *or when the office of the Administrator is vacant.*”⁴³ That statute explicitly distinguished inability to serve from vacancy of office. If “unable to serve” cov-

³⁷ See S. REP. NO. 105–250, at 15–17 (1998). The Committee Report refers to forty-one statutes in place at the drafting of the legislation, and notes that the bill retains forty. The Report’s list skips from number twenty-five to number twenty-eight, so in total it only lists thirty-eight statutes. Three of those statutes provide for agencies to issue their own succession regulations, and thus are not probative of congressional intent. I list the remaining thirty-five statutes in Table 1.

³⁸ See *id.*

³⁹ *Id.*; see also *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (“We assume that Congress is aware of existing law when it passes legislation.”).

⁴⁰ *Knight v. Comm’r*, 552 U.S. 181, 188 (2008).

⁴¹ See *supra* note 37; see also S. REP. NO. 105–250, at 15–17 (1998).

⁴² For the lone exception, see 44 U.S.C. § 304 (1998) (providing for appointment of a temporary Public Printer to lead the Government Printing Office).

⁴³ 49 U.S.C. § 106(I) (1998) (emphasis added).

ered every case where the office were vacant, the vacancy provision would be hopelessly redundant.⁴⁴

Second, the Secretary of Labor statute specifically listed “removal from office” alongside death, resignation, absence, and sickness as a criterion that would trigger application.⁴⁵ In that statute, Congress thus distinguished removal from office from other conditions that would trigger application of the Vacancies Act. That Congress saw fit to specifically include removal from office in one statute—and excluded it from the FVRA—suggests Congress might not have intended the FVRA to apply to removal from office.

Finally, the Department of Defense statute applied at the time to any situation where “the Secretary is disabled or there is no Secretary of Defense.”⁴⁶ There, as in the other succession statutes, Congress dictated the statute would apply any time there was no Secretary. Yet in 2014, Congress amended that language to read: “The Deputy Secretary shall act for, and exercise the powers of, the Secretary when the Secretary dies, resigns, or is otherwise unable to perform the functions and duties of the office.”⁴⁷ That alteration suggests daylight between general vacancy and the FVRA’s enumerated list, given the commonsense principle that a “change of [statutory] language is some evidence of a change of purpose.”⁴⁸ The prior statute applied any time the office was vacant; the change suggests Congress understood the subsequent version applied only under more limited circumstances.

TABLE 1: AGENCY SUCCESSION STATUTES IN PLACE IN 1998

Agency (Act and Year Enacted)	Statutory Language (emphasis added)
Administrator, Drug Enforcement Administration (Reorg. Plan No. 2 of 1973, 5 U.S.C. app. § 1 (1973).)	“[D]uring the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator.”
Administrator, Environmental Protection Agency (Inspector General Act, 5 U.S.C. app. § 1 (1988).)	“[D]uring the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator.”
Administrator, Federal Aviation Administration (Aviation Safety Commission Act of 1986, 49 U.S.C. § 106(i) (1992).)	“[W]hen the Administrator is absent or unable to serve, or when the office of the Administrator is vacant. ”
Administrator, General Services Administration (Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 751(c) (1986).)	“[D]uring the absence or disability of the Administrator and . . . in the event of a vacancy in the office of Administrator.”
Administrator, National Oceanic and Atmospheric Administration (Reorg. Plan No. 4 of 1970, 5 U.S.C. app. § 1 (1970).)	“[D]uring the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator.”

⁴⁴ See, e.g., *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (“[T]he Court will avoid a reading which renders some words altogether redundant.”).

⁴⁵ 29 U.S.C. § 552 (1998).

⁴⁶ 10 U.S.C. § 132(b) (1998) (this version was effective Sept. 7, 1962 to Dec. 18, 2014).

⁴⁷ *Id.*; Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 2926, 128 Stat. 3292, 3468 (2014).

⁴⁸ *Johnson v. United States*, 225 U.S. 405, 415 (1912).

Administrator, Small Business Administration (Small Business Act, 15 U.S.C. § 633(b)(1) (1992).)	“[D]uring the absence or disability of the Administrator or in the event of a vacancy in the office of the Administrator.”
Archivist, National Archives and Records Administration (National Archives and Records Administration Act, 44 U.S.C. § 2103(c) (1992).)	“ In the event of a vacancy in the office of the Archivist”
Attorney General (Judiciary and Judicial Procedure, 28 U.S.C. § 508(a) (1992).)	“ In case of a vacancy in the office of Attorney General, or of his absence or disability”
Attorney General (Judiciary and Judicial Procedure, 28 U.S.C. § 508(b) (1992).)	“When by reason of absence, disability, or vacancy in office , neither the Attorney General nor the Deputy Attorney General is available”
Chairman, Joint Chiefs of Staff (Armed Forces, 10 U.S.C. § 154(d) (1992).)	“ When there is a vacancy in the office of Chairman or in the absence or disability of the Chairman, the Vice Chairman acts as Chairman”
Chairman, Joint Chiefs of Staff (Armed Forces, 10 U.S.C. § 154(e) (1992).)	“ When there is a vacancy in the offices of both Chairman and Vice Chairman or in the absence or disability of both the Chairman and the Vice Chairman, or when there is a vacancy in one such office and in the absence or disability of the officer holding the other”
Chief Judge, Court of Veterans Appeals (Veterans’ Benefits, 38 U.S.C. § 7254(d) (1992).)	“ In the event of a vacancy in the position of chief judge of the Court, the associate judge senior in service on the Court shall serve as acting chief judge”
Chief of Naval Operations (Goldwater-Nichols Dept. of Defense Reorg. Act of 1986, 10 U.S.C. § 5035(d)(2) (1986).)	“ When there is a vacancy in the office of Chief of Naval Operations or during the absence or disability of the Chief of Naval Operations . . . or (2) if there is a vacancy in the office of the Vice Chief of Naval Operations or the Vice Chief of Naval Operations is absent or disabled”
Chief of Staff of the Air Force (Goldwater-Nichols Dept. of Defense Reorg. Act of 1986, 10 U.S.C. § 8034(d)(2) (1986).)	“ When there is a vacancy in the office of Chief of Staff or during the absence or disability of the Chief of Staff . . . or (2) if there is a vacancy in the office of the Vice Chief of Staff or the Vice Chief of Staff is absent or disabled”
Chief of Staff of the Army (Goldwater-Nichols Dept. of Defense Reorg. Act of 1986, 10 U.S.C. § 3034(d)(2) (1986).)	“ When there is a vacancy in the office of Chief of Staff or during the absence or disability of the Chief of Staff . . . or (2) if there is a vacancy in the office of the Vice Chief of Staff or the Vice Chief of Staff is absent or disabled”
Commandant of the Marine Corps (Goldwater-Nichols Dept. of Defense Reorg. Act of 1986, 10 U.S.C. § 5044(d)(2) (1986).)	“ When there is a vacancy in the office of Commandant of the Marine Corps, or during the absence or disability of the Commandant . . . or (2) if there is a vacancy in the office of the Assistant Commandant of the Marine Corps or the Assistant Commandant is absent or disabled”
Commissioner, Social Security Administration (Social Security Act, 42 U.S.C. § 902(b)(4) (1994).)	“ [I]n the event of a vacancy in the office of the Commissioner.”
Comptroller General (General Accounting Office Personnel Amendments Act of 1988, 31 U.S.C. § 703(c)(2) (1988).)	“[W]hen the Comptroller General is absent or unable to serve or when the office of Comptroller General is vacant. ”

Director, Office of Management and Budget (Money and Finance, 31 U.S.C. § 502(f) (1992).)	“[W]hen the Director and Deputy Director are absent or unable to serve or when the offices of Director and Deputy Director are vacant. ”
Director, U.S. Arms Control and Disarmament Agency (Arms Control and Disarmament Act, 22 U.S.C. § 2563 (1964).)	“[D]uring his absence or disability or during a vacancy in said office.”
General Counsel, Department of the Treasury (Coinage Act, 31 U.S.C. § 301(f)(1) (1965).)	“[W]hen the General Counsel is absent or unable to serve or when the office of General Counsel is vacant. ”
General Counsel, National Labor Relations Board (National Labor Relations Act, 29 U.S.C. § 153(d) (1959).)	“ In case of vacancy in the office of the General Counsel”
President, Export-Import Bank (Export-Import Bank Act of 1945, 12 U.S.C. § 635a(b) (1997).)	“[D]uring the absence or disability of or in the event of a vacancy in the office of President”
Public Printer, Government Printing Office (Public Printing and Documents, 44 U.S.C. § 304 (1968).)	“In case of the death, resignation, absence, or sickness of the Public Printer, the Deputy Public Printer shall perform the duties of the Public Printer”
Secretary of Defense (Armed Forces, 10 U.S.C. § 132(b) (1962).)	“[W]hen the Secretary is disabled or there is no Secretary of Defense. ”
Secretary of Education (Dept. of Education Organization Act, 20 U.S.C. § 3412(a)(1) (1985).)	“During the absence or disability of the Secretary, or in the event of a vacancy in the office of the Secretary”
Secretary of Energy (Dept. of Energy Organization Act, 42 U.S.C. § 7132(a) (1977).)	“[D]uring the absence or disability of the Secretary or in the event the office of Secretary becomes vacant. ”
Secretary of Labor (An Act Relating to the Retirement of Certain Justices and Judges in the Various Territories and Possessions, 29 U.S.C. § 552 (1986).)	“The Deputy Secretary shall (1) in case of the death, resignation, or removal from office of the Secretary, perform the duties of the Secretary”
Secretary of Transportation (Mayfield Act, 49 U.S.C. § 102(c)(2) (1983).)	“[W]hen the Secretary is absent or unable to serve or when the office of Secretary is vacant. ”
Secretary of the Treasury (Coinage Act, 31 U.S.C. § 301(c)(2) (1965).)	“[W]hen the Secretary is absent or unable to serve or when the office of Secretary is vacant. ”
Secretary of Veterans Affairs (Dept. of Veterans Affairs Codification Act, 38 U.S.C. § 304 (1991).)	“[D]uring the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary. ”
Special Counsel, Immigration-Related Unfair Employment Practices (Immigration and Nationality Act, 8 U.S.C. § 1324b(c)(1) (1994).)	“ In the case of a vacancy in the office of the Special Counsel”
United States Attorney (Judiciary and Judicial Procedure, 28 U.S.C. § 546(a)–(d) (1948).)	“[F]or the district in which the office of United States attorney is vacant. ”
United States Marshal (Anti-Drug Abuse Act of 1988, 28 U.S.C. § 562(a)–(b) (1988).)	“ In the case of a vacancy in the office of a United States marshal”

Congress was aware of alternate phrasing it could have used to cover any vacancy in the office because nearly every agency statute it had passed up to that point used just that phrasing. Indeed, the Senate committee report specifically pointed to thirty-four such statutes.⁴⁹ “In these statutes the Con-

⁴⁹ See S. REP. NO. 105-250, at 15–17 (1998).

gress has provided a detailed ordering of authority in the event of a vacancy, and thus must it be presumed to know how to provide for that contingency”⁵⁰ But Congress did not use that general language to cover any vacancy with the FVRA. It instead listed a subset of vacancies, not including removal, to which the Act would apply. That fact suggests a narrower reach for the FVRA.

2. *Preceding Vacancies Act*

Congress drafted the FVRA to replace the prior Vacancies Act, in response to presidential practice that increasingly ignored the Act’s text.⁵¹ That former Vacancies Act, in place since 1868, helps illuminate the reach of the subsequent FVRA.

The Vacancies Act in place in 1998, when Congress passed the FVRA, read as follows:

When the head of an Executive agency (other than the General Accounting Office) or military department *dies, resigns, or is sick or absent*, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.⁵²

The four triggering conditions of death, resignation, sickness, or absence had remained unchanged since 1868 and specifically excluded presidential removal.⁵³ That narrow list of circumstances comported with Congress’s broader statutory scheme, which jealously guarded the Senate’s confirmation role.⁵⁴ Other provisions, for instance, limited the duration of time temporary assignees could hold office, language that appeared in all vacancies legislation since 1795.⁵⁵ Congress thus had historically offered a short, enumerated list of vacancies the president could fill, consistent with its broader purpose of constraining the executive from using the Act to circumvent the Senate’s confirmation role.

Congress changed that language with the FVRA. It replaced “or is sick or absent” with “or is otherwise unable,” capturing situations beyond its four enumerated categories. That change can be viewed in two ways. On one read, Congress broadened its language in a major move away from the prior Vacancies Act, and courts should give effect to Congress’s change of direc-

⁵⁰ *Williams v. Phillips*, 360 F. Supp. 1363, 1370 (D.D.C. 1973).

⁵¹ See ROSENBERG, *supra* note 13, at 2–4.

⁵² 5 U.S.C. § 3345 (1998) (emphasis added) (in place from August 17, 1988 to October 21, 1998).

⁵³ *Id.*; see also Act of July 23, 1868, ch. 227, § 1, 15 Stat. 168, 168 (codified as amended at 5 U.S.C. § 3345 (2012)).

⁵⁴ See ROSENBERG, *supra* note 13, at 5 (noting “Congress’ historic attention to the protection of the Senate’s confirmation prerogative”).

⁵⁵ *Id.*; see also Act of Feb. 13, 1795, ch. 21, 1 Stat. 415, 415.

tion. On the other, Congress simply merged the third and fourth terms (“or is sick or absent”) into one slightly broader category. That view finds the change better read as a minor expansion, closer to one of the “purely technical” modifications to the Vacancies Act.⁵⁶

These arguments turn on divergent conceptions of congressional intent. These claims are hard to assess, particularly for a statute as technical and multifaceted as the FVRA. Yet to the extent the prior Act evinces congressional intent, it most naturally suggests a narrow read of the “otherwise unable” language.

Since Congress passed its first Vacancies Act in 1792, the Act had consistently listed only four cases where the Act applied: death, resignation, sickness, or absence.⁵⁷ Congress’s aim in passing the 1998 FVRA was not to broaden this longstanding language. Instead, as scholars have documented, Congress acted to respond to a perceived threat of presidential encroachment on the Senate’s advice and consent role.⁵⁸ Expanding the reach of the triggering condition was simply not responsive to the mischief Congress sought to remedy with the FVRA.

Nowhere in the thirty-nine-page Senate Governmental Affairs Committee Report did Congress say anything about broadening this language.⁵⁹ Indeed, aside from passing mention by Senator Fred Thompson (R-Tenn.)—addressed at length in Part II.C.1.—nowhere in the more than two hours of floor debate did a single member mention any change to these four enumerated conditions.⁶⁰ Had Congress intended to overhaul the reach of its Act, unchanged for more than 100 years, it surely would have mentioned that change at least *once*—but it did not.⁶¹

⁵⁶ 144 CONG. REC. 27497 (1998) (statement of Sen. Fred Thompson (R-Tenn.)).

⁵⁷ See Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281.

⁵⁸ See *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 936 (2017); ROSENBERG *supra* note 13, at 6; see also Patrick Hein, *In Defense Of Broad Recess Appointment Power: The Effectiveness Of Political Counterweights*, 96 CALIF. L. REV. 235, 272 (2008) (“The Reform Act sought to ‘bring[] to an end a quarter-century of obfuscation, bureaucratic intransigence, and outright circumvention’ through three primary amendments. First, the Reform Act was intended to prevent another seemingly illegal appointment like Lee’s by stating explicitly that the Vacancies Act is the exclusive statutory means for temporarily filling vacant advice and consent positions in the executive branch, unless Congress explicitly legislates otherwise. Second, the Reform Act broadened the Vacancies Act’s applicability by creating a third category of individuals who may serve in an acting capacity. Finally, the Reform Act provided the President with more time to nominate a permanent replacement by increasing the length of an acting appointment to 210 days.”).

⁵⁹ See S. REP. NO. 105-250 (1998) (discussing the Act’s purpose, its legislative history, and many of its core provisions).

⁶⁰ See 144 CONG. REC. 22,507–26 (1998).

⁶¹ See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017) (finding “in any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant”); *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 131 (2005) (noting that “as a general matter of statutory interpretation, Congress’ failure to discuss an issue during prolonged legislative deliberations may itself be probative”).

Courts have found that changes in statutory meaning should be given some effect.⁶² Indeed, this Note employed that principle in its analysis of the Department of Defense succession statute.⁶³ That principle, however, is “not an infallible guide to legislative intent, and cannot overcome more persuasive evidence.”⁶⁴ Here, Congress’s overall interest in protecting the Senate’s confirmation role, its centuries-long practice of retaining an enumerated list of vacancies, and its silence regarding what would have been a transformational change suggest “otherwise unable” is best understood as a semantic clarification rather than a substantive expansion.⁶⁵

In sum, then, the FVRA changed Congress’s historic language of “dies, resigns, or is sick or absent” to “dies, resigns, or is otherwise unable.” But the fact of that prior phrase, unchanged for more than 100 years, contextualizes our read of “otherwise unable.”

3. *Judicial Notice*

Finally, when Congress passed the FVRA in 1998, it acted under guidance from the courts on how its language would be interpreted. That guidance informed the context in which Congress wrote the statute, and shapes how we should understand its semantic choices.

In *Olympic Federal*, decided in 1990, the court considered whether the predecessor Vacancies Act applied if the resigning officer was himself improperly appointed.⁶⁶ The plaintiff, Olympic Federal, claimed the then-acting director of the Office of Thrift Supervision had been unlawfully appointed. Olympic Federal argued the acting director’s predecessor had himself been unlawfully appointed and the Vacancies Act did not authorize replacement of an unlawfully appointed officer.⁶⁷ The court agreed, holding that the prior director did not lawfully serve as “an officer of a bureau of an Executive department” and his resignation thus could not trigger application of the Vacancies Act.⁶⁸

In so holding, the court articulated a narrow construction of the Vacancies Act. It traced the history of the Act and concluded that “Congress has been on notice for more than 100 years that the Vacancies Act has generally been interpreted as giving the President authority to designate officers only when the statute’s express terms are satisfied.”⁶⁹ Given that longstanding

⁶² See *Johnson v. United States*, 225 U.S. 405, 415 (1912).

⁶³ See *supra* Part II.B.1.

⁶⁴ *McElroy v. United States*, 455 U.S. 642, 650 n.14 (1982) (quoting *United States v. Dickerson*, 310 U.S. 554, 561 (1940)).

⁶⁵ *Cf. id.* (finding “Congress intended nothing by the change in language” between the 1919 Dyer Act and the 1934 National Stolen Property Act).

⁶⁶ *Olympic Fed. Sav. & Loan Ass’n v. Dir., Office of Thrift Supervision*, 732 F. Supp. 1183, 1185 (D.D.C. 1990).

⁶⁷ *Id.* at 1186.

⁶⁸ *Id.* at 1194.

⁶⁹ *Id.* at 1196.

tradition of narrow interpretation, wrote the court, Congress should have “word[ed] the statute differently” had it “wanted to give the President general power to fill vacancies.”⁷⁰ Therefore, absent a general grant from Congress to fill vacancies, the president may only fill those vacancies specifically enumerated in the statute. Indeed, as the court concluded:

Congress has been on notice for more than a century that the Vacancies Act is generally strictly and narrowly interpreted. If Congress intended the Act to serve a more general purpose—to allow the President to fill any vacancy, however created—as the government contends, Congress has had ample opportunity to amend the statute to give effect to that intent.⁷¹

Granted, the committee report did not cite *Olympic Federal*, and the case did not come up in floor debate. Congress was nonetheless at least on constructive notice of the unbroken line of precedent, spanning a century, that the decision canvassed. “Congress,” the court wrote, “has been on notice for more than a century that the Vacancies Act is generally strictly and narrowly interpreted.”⁷² Courts interpret statutes based on the understanding that “when Congress enacts statutes, it is aware of relevant judicial precedent.”⁷³ Even if Congress did not consider this specific case, then, Congress was on notice—at least constructively—of the body of precedent the case summarized.

Olympic Federal thus left Congress at least on (albeit weak) constructive notice that the FVRA would be construed strictly and narrowly, unless Congress gave the president a clear grant of replacement authority. Congress did not give the president such a grant. It retained an enumerated list, a list that courts will “strictly and narrowly” interpret.⁷⁴

Historical context leaves three broad takeaways. First, the drafting Senate committee noted thirty-five existing statutes that provided agency-specific succession guidance—all but one of which used broad language that referred generally to any “vacancy” in the office. Second, the longstanding baseline of the former Act applied only to four enumerated cases: death, resignation, sickness, or absence. Finally, Congress was on notice, and had been for more than 100 years, that its Act would be narrowly applied absent a clear grant of authority to the president to fill any vacancy. Those historical points further suggest reading “otherwise unable” as not reaching Presidential removal.

⁷⁰ *Id.*

⁷¹ *Id.* at 1198.

⁷² *Id.*

⁷³ *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010); *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (“We assume that Congress is aware of existing law when it passes legislation.”).

⁷⁴ *Olympic Federal*, 732 F. Supp. at 1198.

C. Legislative History

The FVRA's legislative history represents one of the most-cited sources for the proposition that the Act applies to firings. OLC in particular has focused on a floor statement by Senator Thompson in its three memos on the topic,⁷⁵ as has the provision's limited academic attention.⁷⁶ Given the legislative history's central role in debates about the FVRA, it merits attention even for legislative history skeptics.

This Part finds the Act's legislative history has been understandably, but seriously, misconstrued. The legislative record is far more muddled than its treatment to date suggests. And circumstantial factors indicate the legislative history might not be particularly useful in this case.

Three points on the bill's legislative history prove particularly important. First, the oft-cited floor statements of Senators Thompson and Byrd are far less probative than many observers suggest. Second, the Senate committee report's silence on the Act's reach indicates Congress did not understand the Act to make major changes to that provision. And finally, behind-the-scenes haggling around the Act dilutes the value of its legislative history.

1. Floor Statements

Proponents of applying the FVRA to firings cite as their primary evidence a floor statement by Senator Thompson, the bill's chief sponsor.⁷⁷ Indeed, Senator Thompson's floor statement represents the only textual evidence cited by OLC.⁷⁸ This Part thus gives it a relatively thorough examination.

Analysis of Senator Thompson's floor statement to date has glossed over three key points. First, the Senator's statement does not clearly state the Senator believed the Act applied to firings. Second, Senator Robert Byrd (R-W. Va.) immediately offered a contradictory interpretation. And third, both

⁷⁵ See Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 61 (1999); Designating an Acting Director of the Bureau of Consumer Financial Protection, 41 Op. O.L.C. ___, at *4 (2017); Designating an Acting Attorney General, 42 Op. O.L.C. ___, at *3 n.1 (2018).

⁷⁶ See, e.g., Scott Bomboy, *A Look at the Vacancies Reform Act*, CONST. CTR. (Sept. 26, 2018), <https://constitutioncenter.org/blog/a-look-at-the-vacancies-reform-act> [<https://perma.cc/W9BT-B5D3>]; Marty Lederman, *Who Might Replace Rod Rosenstein and What Would it Mean for the Mueller and SDNY Investigations?: A Deep Dive*, JUST SEC. (Sept. 26, 2018), <https://www.justsecurity.org/54809/replace-rod-rostein/> [<https://perma.cc/BFJ9-FGNH>]; Anne Joseph O'Connell (@AJosephOConnell), TWITTER, (Sept. 24, 2018, 9:13 AM), <https://twitter.com/AJosephOConnell/status/1044258617648537605> [<https://perma.cc/WK7V-PFEB>].

⁷⁷ See, e.g., *Guidance on Application of Federal Vacancies Reform Act*, 23 Op. O.L.C. at 61; *Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. at *4; *Designating an Acting Attorney General*, 42 Op. O.L.C. at *3 n.1; see also Anne Joseph O'Connell (@AJosephOConnell), TWITTER, (Sept. 24, 2018, 9:13 AM), <https://twitter.com/AJosephOConnell/status/1044258617648537605> [<https://perma.cc/WK7V-PFEB>].

⁷⁸ See *infra* Part II.D.1.

Senators' remarks came *after* the House had already passed the bill, vastly diluting their import.

a. Semantic Meaning

In his October 21st floor statement, Thompson said, in full relevant part:

For instance, the *Doolin* court stated that the current language of the Vacancies Act does not apply when the officer is fired, and for similar reasons, it might not apply when the officer is in jail if he does not resign. To make the law cover all situations when the officer cannot perform his duties, the "unable to perform the functions and duties of the office" language was selected.⁷⁹

Senator Thompson's comments most naturally suggest the Senator understood the Act as applying when an officer was fired. Another plausible read, however, would conclude that Senator Thompson was arguing the Act should apply when an imprisoned officer refused to resign, not when an officer was fired. *Doolin*, the case Senator Thompson rested his comparison on, did not refer to *either* removal or jailing.⁸⁰ That opinion merely noted the Act applied when its express provisions were met. "[T]he statute," wrote the court, "contemplates only the death, resignation, illness or absence of someone appointed to the position by the President."⁸¹ Thompson's remark thus seems too obtuse to stand alone as clear evidence of legislative intent.

b. Immediate Context

Yet assuming Senator Thompson was arguing the bill would apply to firings, Senator Byrd immediately contradicted him.⁸² In floor remarks immediately following Senator Thompson, Senator Byrd said:

Section 3345 applies when an officer dies, resigns, or is otherwise unable to perform the functions and duties of the office (the latter provision covers, inter alia, sickness or absence, which are listed in current law, or expiration of a term of office). Should *one of these situations* arise, the officer's position may *then* be filled temporarily.⁸³

Senator Byrd's floor statement, by contrast, spoke with some detail to how the Senator understood the Act's scope. Senator Byrd invoked the lan-

⁷⁹ 144 CONG. REC. 27,496 (1998).

⁸⁰ *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 207 (D.C. Cir. 1998).

⁸¹ *Id.*

⁸² Senator Thompson had previously noted that Senator Byrd "is really in many ways the author of this legislation." 144 CONG. REC. 22,507 (1998).

⁸³ 144 CONG. REC. 27,498 (1998) (emphasis added).

guage of the prior Act by referring to “sickness or absence.” His “inter alia” left open the possibility of the Act applying in other circumstances, but nowhere did Byrd mention removal as such a circumstance. Indeed, the Senator added a separate example: expiration of a term of office, included in § 3345(c)(2).⁸⁴ And in the next sentence, Byrd emphasized he understood the Act only applied in the listed circumstances—only if “one of these situations” arises does the Act “then” apply.⁸⁵ Senator Byrd’s statement suggests the Senator did not contemplate the Act’s application to firings, and instead viewed its language as a narrow application of enumerated terms.

The two floor statements are thus “awash.”⁸⁶ One Senator offered a broad interpretation of the text; another Senator shared a narrower interpretation. Indeed, the Supreme Court articulated strikingly similar concerns about this colloquy between Senators Thompson and Byrd in *NLRB v. SW General, Inc.*⁸⁷ In that case, Senator Thompson made a floor statement about a different section of the Act, but the Court noted that “Senator Byrd—the very next speaker—offered a contradictory account.”⁸⁸ These floor statements, the Court continued, were “a good example of why floor statements by individual legislators rank among the least illuminating forms of legislative history.”⁸⁹

Here, as in *SW General*, Senator Thompson suggested a broad interpretation of the FVRA; and here, as in *SW General*, Senator Byrd immediately followed with a narrower interpretation. Reading the two statements together undercuts the narrative that Senator Thompson’s floor statement proves the Act applies to removal.

c. Legislative Posture

Most importantly, both Senators’ remarks came *after* the House had passed the bill.

A bit of procedural context proves valuable. After numerous Senators introduced vacancy reform bills in early 1998, Senator Thompson proposed S. 2176. That bill included the “dies, resigns, or is otherwise unable” language at issue here.⁹⁰ S. 2176 came to the Senate floor on September 28, 1998 for debate and a cloture vote, “otherwise unable” language and all.⁹¹ “This legislation here today is the result of months of study, months of discussion, and months of difficult negotiation,” said Senator Byrd in describ-

⁸⁴ See *supra* II.A.2.

⁸⁵ See *supra* II.A.2.

⁸⁶ *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 77 (D.C. Cir. 2015), *aff’d*, 137 S. Ct. 929 (2017) (finding that, with regards to the Senators’ comments about a different provision of the FVRA, “the floor statements are a wash”).

⁸⁷ See 137 S. Ct. at 942–43.

⁸⁸ *Id.*

⁸⁹ *Id.* at 943.

⁹⁰ ROSENBERG, *supra* note 13, at 6–7.

⁹¹ 144 CONG. REC. 22,507 (1998).

ing the bill.⁹² Senators hotly debated the legislation: for at least two hours, Senators Thompson and Byrd, Senator Carl Levin (D-Mich.), Senator Strom Thurmond (R-S.C.), Senator Dick Durbin (D-Ill.), and Senator Joe Lieberman (D-Conn.) all spoke at length, questioned each other, and thoroughly unpacked the bill.⁹³

Yet at no point during that extended September 28th debate did a single Senator mention firings. Senator Thompson spoke for upwards of half an hour, and did not once mention the “otherwise unable” language—which was in the draft bill at the time. The triggering vacancy language came up only once, in comments by Senator Byrd. Senator Byrd opened his remarks by summarizing the old Vacancies Act, and nowhere indicated that the new Act went beyond the old Act’s language.⁹⁴ No senator mentioned the words “fire,” “fired,” or “unable” over the two hours.⁹⁵

After that “extended debate,”⁹⁶ the cloture motion failed by a fifty-three to thirty-eight vote.⁹⁷ “[I]ntense negotiations between the Senate sponsors and Administration officials” ensued, and a compromise FVRA was included in the FY1999 Omnibus Appropriations Act.⁹⁸ The FVRA inside that omnibus bill used identical “otherwise unable” language to what appeared in S. 2176, the bill Senators had debated for hours. That consolidated appropriations bill, with the FVRA inside it, passed the House on October 20th and the Senate on October 21st.⁹⁹

Yet Senators Thompson and Byrd’s floor statements, made just before the Senate vote on the consolidated appropriations bill, came on October 21st—*after* the House had already passed the bill.¹⁰⁰ House members who voted for the bill had no notice that Senator Thompson understood the language to include firings; nowhere in the two-plus hours of debate on September 28th had any senator noted such an important broadening in the Act’s language. Indeed, Senator Thompson presented his statement as discussing “subsequent changes” to the bill after the failed cloture vote.¹⁰¹ Yet the “dies, resigns, or is otherwise unable” language was identical to the pre-cloture version. Senator Thompson’s comments on that section did not pertain to subsequent changes to the bill, but rather to sections he could have addressed in the earlier debate before the House vote.

That circumstance echoes *Continental Can Co. v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund*,¹⁰² where

⁹² *Id.* at 22,512.

⁹³ *Id.* at 22,507–26.

⁹⁴ *Id.* at 22,510.

⁹⁵ *Id.* at 22,507–26.

⁹⁶ ROSENBERG, *supra* note 13, at 8.

⁹⁷ 144 CONG. REC. 22,526 (1998).

⁹⁸ ROSENBERG, *supra* note 13, at 8.

⁹⁹ *Id.*

¹⁰⁰ 144 CONG. REC. 27,496–99 (1998).

¹⁰¹ *Id.* at 27,496.

¹⁰² 916 F.2d 1154 (7th Cir. 1990).

Senator David Durenberger (R-Minn.) made a remark about his interpretation of a statutory provision after a bill had passed the House but before it passed the Senate.¹⁰³ There, as here, the Senator's remarks represented the first time any Senator had suggested a counterintuitive meaning for the statutory provision.

Judge Easterbrook dismissed the Senator's comments. "That is why statements after enactment do not count," he wrote.¹⁰⁴ "It is easy to announce intents and hard to enact laws; the Constitution gives force only to what is enacted."¹⁰⁵ Because Senator Durenberger's comments came after the House vote, they "could not have influenced anyone in the House and probably did not come to the attention of anyone in the Senate"—rendering them non-probative.¹⁰⁶

Senator Thompson's floor statement also came after the House had already passed the bill, and to give it credence would similarly seem to undermine the House's constitutional role. "The text of the statute did not the private intent of the legislators, is the law," as Judge Easterbrook wrote: "Because language is an exercise in shared understanding, one Senator's idiosyncratic meaning does not count."¹⁰⁷ Here, textual analysis suggests the phrase "otherwise unable" does not apply to firings, and one Senator's belated interpretation cannot change that text.

Contrary to suggestions by OLC and others, then, Senator Thompson's floor statement does not provide much support for applying the FVRA to firings. First, the Senator's specific meaning is itself relatively obtuse. Second, Senator Byrd immediately contradicted Senator Thompson after his remarks, further muddying the waters. Finally, and most importantly, that dialogue came *after* the House had already passed the bill, rendering it non-probative. Senator Thompson's statement cannot overcome the textual and historical evidence that "otherwise unable" does not apply to firings.

2. *Committee Report*

The Senate Governmental Affairs Committee Report represents the most useful piece of legislative history on the FVRA.¹⁰⁸ And in its thirty-nine pages, the report does not mention the Act's application to firings.

The report does note the FVRA applies "when any of those factual situations arises, regardless of how the situation is characterized."¹⁰⁹ On first pass, that language might suggest including removal—when an officer is fired, regardless of how it is characterized, the officer cannot lawfully ex-

¹⁰³ *Id.* at 1156–57.

¹⁰⁴ *Id.* at 1157.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1158.

¹⁰⁷ *Id.* at 1157.

¹⁰⁸ *See, e.g.*, 144 CONG. REC. 27,496 (1998) (Sen. Thompson noting the "legislative history of the bill is largely described in the Committee report").

¹⁰⁹ S. REP. NO. 105-250, at 12.

cute the functions of the office. Yet that sentence is immediately qualified by an example, which implies a narrower meaning. “For instance,” the committee notes, “the Vacancies Act would apply in situations such as *Doolin*, when the first acting director of the Office of Thrift Supervision was purportedly designated [as acting director] . . . in the director’s ‘absence.’”¹¹⁰ That example indicates “otherwise unable” was understood to apply to situations where the official lacks *physical* ability to carry out his duties (situations like absence), regardless of how *that* factual situation arises.

The report elsewhere implies there are types of vacancies the Act does not reach. It refers at times to “a vacancy to which this legislation applies,” indicating the Act applies to some vacancies but not others.¹¹¹ Granted, in § 3349(c) the Act lists certain offices to which the legislation does not apply.¹¹² But this reference to a *vacancy* (rather than an *office*) to which the Act applies naturally admits of a reading where the Act does not apply to all vacancies, even in offices otherwise within the purview of the Act.

The committee report is therefore ambiguous as to how it understands the “otherwise unable” language—and it does not address the question of firings at all. Given what a noteworthy departure that change would be from the 100 years of precedent surveyed in *Olympic Federal*, the committee’s silence militates against applying the FVRA to removal.

3. Concerns with the FVRA’s Legislative History

Moreover, circumstantial factors around the FVRA’s legislative history should give pause to legislative history proponents and skeptics alike. The FVRA resulted from lengthy negotiation between members of Congress, with multiple draft bills competing for favor.¹¹³ Indeed, the final Act was “a compromise measure” that followed “intense negotiations” between congressional leaders and the White House.¹¹⁴ This process of legislative compromise creates doubt about the probity of the Act’s legislative history.

Courts are not privy to the “intense negotiations” that produced the Act’s text, and thus aim to respect the compromises legislators made along the way to enactment.¹¹⁵ Particularly given the extensive wrangling that produced the FVRA, courts should be skeptical of relying too heavily on abstract notions of legislative intent when interpreting the Act.¹¹⁶ Senators here

¹¹⁰ *Id.*

¹¹¹ *Id.* at 18.

¹¹² See 5 U.S.C. § 3349(c) (2012).

¹¹³ ROSENBERG, *supra* note 13, at 8.

¹¹⁴ *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017) (citing ROSENBERG, *supra* note 13, at 8).

¹¹⁵ *Id.*; see also John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2417 (2003) (“The reality is that a statutory turn of phrase, however awkward its results, may well reflect an unrecorded compromise or the need to craft language broadly or narrowly to clear the varied veto gates encountered along the way to enactment.”).

¹¹⁶ *SW Gen.*, 137 S. Ct. at 942.

compromised to pass a complex, technical bill—and a single Senator, after pushing the most ambitious proposal, then offered comments on the bill *after* the other chamber had already passed it. It is difficult to imagine less reliable legislative history, regardless of how one feels about legislative history in general. The FVRA’s oft-cited legislative history thus holds limited probative value, and cannot counter the historical and textual cues that indicate the bill is best read as not applying to firings.

D. Subsequent Constructions

Subsequent analysis of the Act’s application to firings has been brief and inconclusive. OLC has addressed the question in three memos, and has concluded the FVRA does apply when an officer was fired. Yet in November 2018, a federal judge in *United States v. Valencia*¹¹⁷ concluded (in dicta) the opposite: that the FVRA does not apply when an officer was fired.¹¹⁸ Though brief, the OLC memos and the *Valencia* opinion highlight competing approaches to interpreting the FVRA.

1. Office of Legal Counsel

OLC has three times addressed the FVRA’s scope: in 1999, 2017, and 2018 memos.¹¹⁹ In all three memos, OLC concluded the FVRA does apply when an officer is fired. Those three memos rest exclusively on Senator Thompson’s floor statement, on each other, and on appeals to public policy.

First, in 1999 OLC released a guidance Q&A document on application of the FVRA. In that document OLC considered the following question: “When does an office become ‘vacant’ for purposes of the Vacancies Reform Act?”¹²⁰ In answering, OLC first noted the language’s coverage was “unspecified in the Act” but elaborated that “[i]n floor debate, Senators said, by way of example, that an officer would be ‘otherwise unable to perform the functions and duties of the office’ if he or she were fired, imprisoned, or sick.”¹²¹ In support of that proposition, OLC cited Senator Thompson’s floor statement—which, as discussed above, offers at most weak support. It also inexplicably cited Senator Byrd, who most definitely did *not* say that. In four brief sentences, OLC indicated the Act would apply to firings, but recognized the language raised unanswered questions.

¹¹⁷ No. 5:17–CR–882–DAE(1)(2), 2018 WL 6182755 (W.D. Tex. Nov. 27, 2018).

¹¹⁸ *Id.* at *4.

¹¹⁹ Designating an Acting Attorney General, 42 Op. O.L.C. __ (2018); Designating an Acting Director of the Bureau of Consumer Financial Protection, 41 Op. O.L.C. __ (2017); Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60 (1999).

¹²⁰ Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 61 (1999).

¹²¹ *Id.*

OLC next addressed the issue in a 2017 memo on designating an acting head of the Consumer Financial Protection Bureau.¹²² There, OLC took a firmer position: “In our view,” OLC wrote, “an officer is ‘unable to perform the functions and duties of the office’ during both short periods of unavailability, such as a period of sickness, and potentially longer ones, such as one resulting from the officer’s removal (which would arguably not be covered by the reference to ‘resign[ation]’).”¹²³ On that view, the relevant question is the officer’s “unavailability,” a term apparently used to encompass removal. In support, OLC cited only its prior 1999 document and referenced “statements by Senators Thompson and Byrd.”¹²⁴

OLC most recently addressed firings in a footnote to its 2018 memo on designating an acting Attorney General.¹²⁵ OLC argued that Attorney General Sessions had resigned within the meaning of the Act, but that “[e]ven if Attorney General Sessions had declined to resign and was removed by the President, he still would have been rendered ‘otherwise unable to perform the functions and duties of the office’ for purposes of section 3345(a).”¹²⁶ OLC offered two arguments for its interpretation.¹²⁷ First, it cited the prior 1999 and 2017 memos, and the floor statements in particular. But second, OLC made a policy argument. “[A]ny other interpretation,” it argued, “would leave a troubling gap in the ability to name acting officers.”¹²⁸

This policy argument bears elaboration. In effect, OLC suggests the statute must apply to removals because the alternative would unduly limit the president’s power to appoint acting officers. Specifically, if the statute did not apply, the president could not appoint a temporary replacement even if he fired the officer for “concerns over national security, corruption, or other workplace misconduct.”¹²⁹ Commentators have suggested similar concerns about hamstringing a president’s ability to replace fired officers.¹³⁰

This Note addresses the policy argument more fully in Part III. For now, suffice it to mention that this policy argument and its subsidiaries represent the primary challenge to the interpretation this Note finds to be the Act’s most natural reading. Indeed, this policy argument and the Senator Thompson floor statement represent the only evidence OLC cites in support of its argument.

¹²² Designating an Acting Director of the Bureau of Consumer Financial Protection, 41 Op. O.L.C. ___, at *4 (2017).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Designating an Acting Attorney General, 42 Op. O.L.C. ___, at *4 n.1 (2018).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See, e.g., Anne Joseph O’Connell (@AJosephOConnell), TWITTER, (Sept. 24, 2018, 9:13 AM), <https://twitter.com/AJosephOConnell/status/1044258619208826880> [<https://perma.cc/9A8T-9QWB>] (“And what about a bad apple in a PAS job? If the person refuses to resign (and impeachment takes time), what would happen to the job’s duties if they were non-delegable and could not be performed, except by an acting (confirmations take time too)?”).

As an interpretive matter, the Supreme Court has recognized that “[v]ague notions of a statute’s basic purpose are inadequate to overcome the words of its text.”¹³¹ The Court will only deviate from statutory text in the “rare and exceptional circumstances” where “application of the statute as written will produce a result demonstrably at odds with the intentions of its drafters.”¹³² Observers do not claim (nor could they) that excluding firings would be demonstrably at odds with the intention of the FVRA. They only argue the Act sometimes produces clumsy results. But Congress may choose clumsy results in specific cases, particularly if they align with its broader statutory scheme. The FVRA represents a carefully struck balance between protecting the Senate’s advice and consent role and ensuring the effective administration of government. Arguments that the FVRA may produce counterintuitive results thus lack force absent an argument that Congress could not possibly have intended those results in its balance between accountability and efficiency.¹³³ OLC makes no such argument.

In short, OLC has three times concluded the Act would apply to firings. Yet OLC has based its conclusion entirely on three pieces of evidence: Senator Thompson’s floor statement; its own previous memos, citing that floor statement; and a policy argument about congressional intent. First, the floor statement represents weak evidence at best, and certainly does not outweigh the textual, historical, and purposive arguments this Note has covered. Second, OLC’s own analysis, while forceful, cannot alone transform the meaning of a statutory provision. Finally, the policy argument elides the delicate balance the Act strikes between efficiency and accountability. None are sufficient to overcome the meaning of the Act’s text.

2. Judicial Decisions

Case law interpreting the FVRA is scarce.¹³⁴ The only opinion to date that directly addresses whether the FVRA applies to firings is *United States v. Valencia*, a November 2018 opinion from the Western District of Texas.¹³⁵ In dicta, the court concluded precisely the opposite of what OLC found, illustrating the dispute surrounding this boundary of the FVRA.

¹³¹ *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 661 (2016) (internal punctuation omitted) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993)).

¹³² *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (internal quotations omitted).

¹³³ See *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)) (“It is well established that when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”).

¹³⁴ See Deborah F. Buckman, Annotation, *Federal Vacancies Reform Act of 1998 (FVRA)*, 5 U.S.C.A. §§ 3345 *et. seq.*, 32 A.L.R. Fed. 3d Art. 4 (2018) (“Only a few courts and decisions have addressed the provisions of the Federal Vacancies Reform Act.”).

¹³⁵ *United States v. Valencia*, No. 5:17–CR–882–DAE(1)(2), 2018 WL 6182755 (W.D. Tex. Nov. 27, 2018).

In *Valencia*, the court denied a motion to dismiss by a defendant charged with theft, wire fraud, and money laundering.¹³⁶ The defendant argued Acting Attorney General Whitaker lacked authority to prosecute him, claiming the Department of Justice's succession statute superseded the FVRA and that Whitaker's appointment was thus unlawful.¹³⁷ The court dismissed the motion, finding, among other things, that Whitaker's appointment was valid under the FVRA.¹³⁸

In dicta, the court explicitly denied the applicability of the FVRA to presidential removal. The court wrote:

Had Sessions chosen to refuse to resign the President could have exercised his authority to fire him, *which would make the statute inapplicable*. As Sessions did resign voluntarily, the FVRA, which applies when the previous officeholder "dies, resigns, or is otherwise unable to perform the functions and duties of the office," 5 U.S.C. § 3345, does apply.¹³⁹

Here, the court apparently rejected OLC's logic and concluded the Act would not apply if the President had fired Sessions. The court offered no legal argument to support its conclusion, and appears to rely exclusively on the plain text of the Act. The court's dicta therefore holds limited persuasive value, as we cannot trace exactly how the court arrived at its conclusion. But its conclusion, and the fact that the court evidently considered that conclusion self-evident, does contrast with OLC's interpretation. While only one opinion from a single district court, *Valencia* does suggest at least some judicial skepticism with OLC's approach.

III. IMPROVING THE FVRA

This Note has thus far argued that the FVRA is best read as not reaching firings, based on the Act's text and structure, historical context, and legislative history. This Part finds this interpretation to be normatively preferable as well, because it better balances the formal requirements of the Constitution with functional realities of modern governance. Moreover, where the language leads to undesirable policy outcomes, Congress can and should act to remedy those outcomes.

This Part first observes that applying the Act to firings would improperly intrude on important constitutional values. It then discusses functional policy objections to this interpretation. It concludes by proposing an amendment that better calibrates constitutional values with modern practice, by

¹³⁶ *Id.* at *1.

¹³⁷ *Id.* at *2.

¹³⁸ *Id.* at *1.

¹³⁹ *Id.* at *4 (emphasis added).

applying the FVRA to firings while limiting the President's appointment discretion in cases of removal.

A. Normative Values

In broad strokes, reading the FVRA as excluding firings would have two policy effects. On one hand, it would protect the Senate's constitutional advice and consent role by ensuring the president could not both create and unilaterally fill vacancies. On the other, it would obstruct efficient governance by hampering the president from staffing the government while the Senate considered a permanent nominee. This Part considers both effects in turn.

1. Constitutional Values and Avoidance

Congress balanced two values with the FVRA: respect for the Senate's advice and consent role in our constitutional system and a pragmatic understanding that efficient governance sometimes necessitates appointment of acting officials. As the Court noted in *NLRB v. SW General*, "The Senate's advice and consent power is a critical structural safeguard of the constitutional scheme."¹⁴⁰ In allowing the temporary appointment of acting officials, however, Congress recognized that (in Justice Holmes's words) "the machinery of government would not work if it were not allowed a little play in its joints."¹⁴¹ The tension between the formal role of the Senate and the functional realities of modern governance lies at the heart of the FVRA.

In addressing this tension, the FVRA necessarily raises constitutional questions.¹⁴² The FVRA is an unabashedly functionalist statute, designed to allow the president leeway with the formal rules of advice and consent while the Senate considers a nominee. This Note does not wade into the academic debate over the constitutionality of the FVRA.¹⁴³ Its claim is far more modest: that applying the FVRA to firings would raise particularly acute constitutional concerns that can be avoided by giving the Act what this Note has found to be its best semantic read.

Allowing a president to fill the seats of principal officers with officials not confirmed by the Senate, even temporarily, arguably undermines the constitutional value of advice and consent. Neal Katyal and George Conway

¹⁴⁰ *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017) (quoting *Edmond v. United States*, 520 U.S. 651, 659 (1997)).

¹⁴¹ *Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 501 (1931).

¹⁴² See, e.g., *SW Gen.*, 137 S. Ct. at 949 (Thomas, J., concurring) ("Courts inevitably will be called upon to determine whether the Constitution permits the appointment of principal officers pursuant to the FVRA without Senate confirmation.").

¹⁴³ See generally, e.g., Patrick Hein, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 CALIF. L. REV. 235 (2008); Joshua L. Stayn, *Vacant Reform: Why the Vacancies Reform Act of 1998 Is Unconstitutional*, 50 DUKE L. J. 1511 (2001).

have gone so far as to argue the temporary appointment of a non-Senate-confirmed official “betray[s] the entire structure of our charter document.”¹⁴⁴ Justices of the Supreme Court have also been sensitive to these fears. Most particularly, Justice Thomas wrote a concurrence in *SW General* to emphasize concern with how the Court had, by his lights, sidelined the constitutional issue in favor of bureaucratic efficiency.¹⁴⁵ “We cannot,” Justice Thomas wrote, “cast aside the separation of powers and the Appointments Clause’s important check on executive power for the sake of administrative convenience or efficiency.”¹⁴⁶ The Appointments Clause, according to the Justice, cannot be reduced to an “empty formality.”¹⁴⁷ It must serve its constitutional role as a check on executive power.

That constitutional concern is particularly acute with regard to firings. The president cannot control whether her subordinates die, resign, or become physically unable to perform the duties of their office—but she can fire them. Allowing the president to unilaterally fire a Senate-confirmed official and then choose a temporary replacement without Senate confirmation, presents a categorically more serious constitutional concern than that of allowing a president to fill chance vacancies. Finding this power in the FVRA could thus represent a constitutionally impermissible infringement on the Senate’s advice and consent power.¹⁴⁸

Constitutional avoidance counsels reading the FVRA as not applying to firings if fairly possible. Where a plausible read would not implicate serious constitutional concerns—as here—courts prefer the non-problematic read:

When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.¹⁴⁹

Reading the FVRA as excluding firings represents the best interpretation of the Act, even absent the constitutional concern. The seriousness of the constitutional issue represents a normative consideration that further militates against applying the FVRA to firings.

¹⁴⁴ Neal K. Katyal & George T. Conway III, *Trump’s Appointment of the Acting Attorney General Is Unconstitutional*, N.Y. TIMES, Nov. 8, 2018, at A31, <https://www.nytimes.com/2018/11/08/opinion/trump-attorney-general-sessions-unconstitutional.html> [perma.cc/PTT5-D A5G].

¹⁴⁵ *SW Gen.*, 137 S. Ct. at 948 (Thomas, J., concurring).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Indeed, President Trump has said that he likes “acting” officials because they give him “more flexibility.” See Felicia Sonmez, *Trump Says He’s ‘in No Hurry’ to Replace Acting Cabinet Members*, WASH. POST (Jan. 6, 2019), https://www.washingtonpost.com/politics/trump-says-hes-in-no-hurry-to-replace-acting-cabinet-members/2019/01/06/afac5fea-11e4-11e9-b6ad-9cfd62dbb0a8_story.html?utm_term=.fc627428ca1d [perma.cc/2BLA-D7SC].

¹⁴⁹ *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

2. Policy Outcomes

This interpretation of the FVRA does raise practical policy concerns.¹⁵⁰ Three such concerns are particularly salient: the administrability of determining whether an officer was fired, the problematic result of limiting the president's ability to fire a "bad apple" in a Senate-confirmed position, and the potential for obstruction of presidential transitions.¹⁵¹ While valid, these fears are insufficient to overcome the contrary textual and historical evidence.

First, some scholars raise concerns about the administrability of such an interpretation. If the FVRA did not apply to firings, they argue, courts would be in the impossible business of determining what counts as firing. Drawing the line between, for example, resignations under pressure (e.g. Sessions) and resignations that precipitated early terminations (e.g. Mattis) might seem like a thorny task for courts, and one from which they should steer clear.¹⁵²

On closer examination, however, perhaps this line is clearer than it first seems. As the *Valencia* court noted, officers always have the choice to simply not resign and force the president's hand.¹⁵³ *Valencia* pointed to former U.S. Attorney Preet Bharara as one example. When Bharara refused President Trump's request for his resignation, Trump fired him.¹⁵⁴ Courts could simply hold that any time an official resigned, even if at a president's urging, that resignation would not rise to the level of removal.¹⁵⁵ But if an officer remained in their office until the president involuntarily removed them, that removal would be a firing outside the scope of the FVRA. There will always be marginal cases, but that standard seems abundantly workable.

Second, others raise concerns about the "bad apples" problem. This charge, articulated by OLC and others, suggests interpreting the FVRA as excluding firings would problematically hamstring presidents from removing officers. If a president fired an officer, goes the argument, departmental functions dependent on that officer would screech to a halt until a new of-

¹⁵⁰ Anne Joseph O'Connell (@AJosephOConnell), TWITTER, (Sept. 24, 2018, 9:13 AM), <https://twitter.com/AJosephOConnell/status/1044258621863845888> [perma.cc/TG6E-TAYE].

¹⁵¹ Anne Joseph O'Connell (@AJosephOConnell), TWITTER, (Sept. 24, 2018, 9:13 AM), <https://twitter.com/AJosephOConnell/status/1044258619208826880> [perma.cc/9A8T-9QWB].

¹⁵² Anne Joseph O'Connell (@AJosephOConnell), TWITTER, (Sept. 24, 2018, 9:13 AM), <https://twitter.com/AJosephOConnell/status/1044258618403565568> [perma.cc/U9A5-ZFAY].

¹⁵³ *United States v. Valencia*, No. 5:17-CR-882-DAE(1)(2), 2018 WL 6182755, at *4 (W.D. Tex. Nov. 27, 2018).

¹⁵⁴ *Id.* at *4 n.4 (citing Maggie Haberman & Charlie Savage, *U.S. Attorney Preet Bharara Says He Was Fired After Refusing to Quit*, N.Y. TIMES, Mar. 12, 2017, at A1, <https://www.nytimes.com/2017/03/11/us/politics/preet-bharara-us-attorney.html> [perma.cc/TEK2-QTBG]).

¹⁵⁵ See also Michael C. Dorf, *Whitaker's Appointment is Despicable and Possibly Criminal, but is it Unconstitutional?*, DORF ON L., <http://www.dorfonlaw.org/2018/11/whitakers-appointment-is-despicable-and.html> [<https://perma.cc/VDB2-5PZP>] ("[A] bright-line rule that presumes formal resignations are actual resignations seems much more administrable than a standard that looks behind stated reasons for signs of pressure from above.").

ficer were confirmed. Here, a distinction between for-cause removal and not-for-cause removal becomes particularly salient. In effect, the “bad apples” problem suggests the threat of bureaucratic impasse would hamstring a president’s ability to fire officers for cause.

Within constitutional bounds, however, Congress has the prerogative to balance efficiency and accountability as it sees fit.¹⁵⁶ When the president removes a Senate-confirmed official, the Senate might reasonably look to reassert its role in replacing that official. Congress has the prerogative to legislate with an eye toward protecting its confirmation role, even if that means a slower policymaking process. Congress may amend the FVRA to lessen that inefficiency, and Part III.B. below proposes such an amendment. But interpretively, it seems entirely sensible that the Senate would seek to re-assert its advice and consent role when the president fires an official it had confirmed. This result thus lies well within the bounds of what Congress plausibly could have intended with the FVRA.

Finally, some raise concerns over presidential transition periods. Cabinet secretaries and other senior-level officials traditionally resign at the end of an administration to let the incoming president choose new officers.¹⁵⁷ But we might reasonably fear that, as our politics grow increasingly fractious, an outgoing administration’s officials might break this norm and refuse to resign. In that scenario, the outgoing administration could impermissibly gum up the works for the incoming administration, leaving the president without authority to appoint an acting cabinet. Presidents should be free to select officials sympathetic to their policy goals during presidential transitions, reflecting the incoming president’s national mandate.¹⁵⁸

This concern is reasonable, and the below legislative proposal accommodates it. But it also seems unclear that concerns over a full-scale effort to thwart a presidential transition are plausible enough to alter the meaning of otherwise contrary statutory language. Even if that situation came to pass, it seems reasonable the Court might treat it as the “expiration of a term” as provided in § 3345(c)(2). Moreover, the fact that a future hypothetical might

¹⁵⁶ See, e.g., *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004) (“Our unwillingness to soften the import of Congress’ chosen words even if we believe the words lead to a harsh outcome is longstanding.”).

¹⁵⁷ See Press Release, Office of the Press Sec’y, The White House, *FACT SHEET: Facilitating a Smooth Transition to the Next Administration* (Nov. 10, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/11/10/fact-sheet-facilitating-smooth-transition-next-administration> [<https://perma.cc/5GHF-HGFY>] (“In support of the well-respected principle that the incoming President selects her or his own team, the President has asked appointees to submit resignation letters effective no later than the inauguration of the new President.”); see also Ann Compton, *Do Cabinet Secretaries Get the Boot at Term’s End?*, ABC News (Nov. 8, 2012), <https://abcnews.go.com/blogs/politics/2012/11/do-cabinet-secretaries-get-the-boot-at-terms-end/> [perma.cc/VV2Z-ZJMT] (describing how “resignation letters are considered an unwritten requirement at the end of any president’s second term”).

¹⁵⁸ Cf. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring) (“A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”).

create problematic outcomes “does not, in and of itself, render a straightforward application of the language absurd.”¹⁵⁹ The below legislative proposal responds to this concern by giving the president increased latitude to replace fired officials within the first ninety days of a new administration. Nonetheless, such a hypothetical cannot alone alter the meaning of statutory text.

The FVRA thus balances important formal constitutional values against the practical impacts of those values. Congress has the prerogative to strike that balance within the parameters of the Constitution. Indeed, Congress always has the right to err on the side of staying well within the bounds of constitutional guidance—even where the results “seem clumsy, inefficient, [or] even unworkable.”¹⁶⁰ By cabining application of the FVRA to cases of death, resignation, or other similar cases of inability to serve, Congress has struck a normatively reasonable balance between constitutional values and the realities of modern governance. The next Section articulates an amendment to the FVRA that could further improve that balance.

B. Legislative Proposal

This Note has argued the FVRA is properly interpreted as not applying to vacancies created by presidential removal. While this interpretation is both positively and normatively preferable to the alternative, both readings of the current statutory text do have drawbacks. In particular, the interpretation this Note finds most plausible does circumscribe the president’s ability to temporarily fill vacancies in executive agencies. This limitation is preferable to the alternative, which would allow the president to create vacancies he then fills with unconfirmed officers. Nonetheless, an amendment to the FVRA could both clarify questions about the Act’s applicability and mitigate problems with the policy consequences of this interpretation.

Proposed Amendment

(Note: proposed additions are in **bold**.)

5 U.S.C. § 3345 — Acting Officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, **is removed**, or is otherwise unable to perform the functions and duties of the office—

¹⁵⁹ Pub. Citizen v. U.S. Dep’t of Justice, 491 U.S. 440, 472 (1989) (Kennedy, J., concurring).

¹⁶⁰ INS v. Chadha, 462 U.S. 919, 959 (1983).

...
(4) Notwithstanding paragraphs (2) and (3), if the vacancy arises through removal by the President more than 90 days after the beginning of a Presidential term of office, paragraph (1) shall provide the exclusive means of temporarily filling the vacancy under this section.

5 U.S.C. § 3348 — Vacant Office

...
 (b) Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347, if an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, **is removed**, or is otherwise unable to perform the functions and duties of the office—

This amendment makes three primary changes. First, the amendment partly extends the FVRA to apply to firings. This Note has argued the Act does not currently apply to firings, and on this read the amendment represents a substantive change. For those who believe the Act as currently written applies to firings, this amendment would at least clarify an unsettled interpretive question—after all, a federal judge found the Act did not apply to firings.¹⁶¹

Yet the amendment immediately qualifies that extension by limiting the president to appointing only the first assistant in cases of removal. This provision prevents the president from firing a Senate-confirmed official and installing one of the hundreds, if not thousands, of other eligible officers he could appoint—including many not confirmed to any post by the Senate. It recognizes the unique constitutional concerns removal presents, and the heightened interest the Senate retains in protecting its advice and consent role when an officer is fired. The amendment therefore limits the president to allowing the deputy to temporarily exercise the duties of the office until a permanent replacement is confirmed.

Some might argue this provision unduly trammels the president's authority to appoint officers, on either constitutional or policy grounds.¹⁶² These concerns, however, seem misplaced. The president does not have unbounded constitutional authority to appoint acting officials, and Congress may limit those appointments as it sees fit. When the president fires an official, Congress may rightly be concerned with protecting its institutional role in the appointment process. If the president wishes to temporarily appoint an

¹⁶¹ See *United States v. Valencia*, No. 5:17-CR-882-DAE(1)(2), 2018 WL 6182755 (W.D. Tex. Nov. 27, 2018).

¹⁶² See, e.g., Stayn, *supra* note 143.

acting official without the Senate's approval, the Senate has the prerogative to limit that appointment. This statutory scheme would also put presidents on notice that deputies to principal officers would assume those offices if the officer were fired, and presidents then could appoint deputies with that fact in mind.¹⁶³ Presidents, in short, may only appoint acting officials where authorized by Congress—and Congress may properly limit the scope of its authorization.

Finally, the amendment accommodates concerns about presidential transition by giving presidents discretion to replace principal officers fired within ninety days of a presidential transition with any officer otherwise eligible for appointment under the FVRA. This clause ensures the president's ability to set the policy direction for their new administration, while preserving the Senate's advice and consent role.

These changes better calibrate the balance between constitutional values and practical concerns. They preserve the Senate's role as a "structural safeguard of the constitutional scheme,"¹⁶⁴ while allowing "the machinery of government . . . a little play in its joints."¹⁶⁵ In so doing, they represent the next iteration of Congress's incomplete work to improve the FVRA.

IV. CONCLUSION

The FVRA is best read as allowing the president to temporarily appoint an acting official where the prior officeholder dies, resigns, or otherwise becomes unexpectedly (from the president's perspective) unable to perform the functions and duties of the office. On that read, the president cannot appoint an acting official to replace an officer she has fired. While that interpretation is preferable to the alternative, it leaves policy challenges Congress should address through legislation. In so doing, Congress can improve the balance between constitutional values and efficient governance that defines the federal appointments scheme.

¹⁶³ The Senate would also approve principal deputies knowing that acting as the principal was one of their job duties. *See* *Weiss v. United States*, 510 U.S. 163, 176 (1994); *Shoemaker v. United States*, 147 U.S. 282, 300–01 (1893).

¹⁶⁴ *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017) (quoting *Edmond v. United States*, 520 U.S. 651, 659 (1997)).

¹⁶⁵ *Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 501 (1931).

