Making Appointment the Means of Presidential Removal of Officers of the United States

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President Trump frequently removed Senate approved officials and substituted unilaterally chosen subordinates who took actions undermining the rule of law. He was not the first President to use this approach. This paper shows that Andrew Jackson, Andrew Johnson, and Richard Nixon also used this tactic to undermine legal constraints on the Presidency. The Supreme Court, however, endorsed an absolute presidential right to remove heads of government agencies for political reasons in Seila Law LLC v. Consumer Financial Protection Bureau, *without even considering political removal's potential to undermine the Appointments Clause.*

This paper analyzes the relationship between political removal and the Appointments Clause. The Supreme Court and legal scholars analyze removal and appointments as wholly separate topics, but politically motivated removal can serve as a means of avoiding compliance with the Appointments Clause, which guards against autocracy by making sure that only Senate approved officials run federal government departments. This paper analyzes the relationship between appointments and removal and proposes a legislative change—requiring that compliance with the Appointments Clause become the means of removing key top officials for political reasons. While this may seem like a novel proposal, it merely codifies the practice at the Founding, which continued for more than 100 years interrupted only by conduct that triggered censure or impeachment. This paper explains how political removal has served as a tool undermining the law and analyzes this proposal's constitutionality and desirability.

This paper shows that making compliance with Appointments Clause procedure the mechanism of removal does not limit the grounds of removal, thus keeping faith with the Supreme Court's removal precedent, but does provide an important check on abuses of presidential power. The proposal also enjoys strong support in the constitutional custom at the founding. The paper closes with some analysis of the costs and benefits of this policy and ways of calibrating the proposal to enhance its efficacy. An appendix provides draft statutory language implementing the proposal.

INTRODUCTION

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

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

[2] *See* Don't Shoot Portland v. Portland, 465 F.Supp.3d 1150, 1153–54 (D. Or. 2020); *see* John Ismay, *A Navy Veteran Had a Question for Feds in Portland. They Beat Him in Response.*, N.Y. TIMES, Jul. 20, 2020; *see* Jonathan Levinson & Conrad Wilson, *Federal Law Enforcement Use Unmarked Vehicles to Grab Protesters Off Portland Streets*, OR. PUBLIC BROADCASTING (Jul. 16, 2020), https://www.opb.org/news/article/federal-law-enforcement-unmarked vehicles-portland-protesters/.

[3] Index Newspapers v. Portland, 480 F.Supp. 3d 1120,1142-46 (D. Oregon 2020) (discussing evidence that police attacked journalists and legal observers); Katie Shepherd & Mark Berman, "*It Was Like Being Preyed Upon": Portland Protestors Say Federal Officers in Unmarked Vans are Detaining Them*, WASH. POST, July 17, 2020.

Many of the people making up this newly mustered federal paramilitary force came from components of the Department of Homeland Security (DHS), such as U.S. Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), and U.S. Customs and Border Protection (CBP).[4] The heads of DHS and these component agencies are "Officers of the United States."[5] Accordingly, the Constitution requires that the President appoint them only with the consent of the Senate.[6] But President Trump never sought Senate approval for any of these agencies' heads before the agencies they led participated in the Portland deployment.[7] Almost all of the people leading this paramilitary operation on American soil were improperly appointed.[8]

The President substituted unilaterally chosen allies for Senate-approved officials by coupling abuse of his removal authority with a failure to nominate a successor to the person removed. He secured the removal of the former head of DHS, Kirstjen Nielsen, reportedly because

[4] *See* Marissa J. Land et al., *Operation Diligent Valor: Trump Showcased Federal Power in Portland, Making a Culture War Campaign Pitch*, WASH. POST, Jul. 24, 2020; *see* Ben Fox, *Top Homeland Security Official Defends Response to Protests*, OR. PUB. BROADCASTING (Sep. 9, 2020, 1:37pm), https://www.opb.org/article/2020/09/09/bc-us-homeland-security-portland-protests-1st-ld-writethru/.

[5] *See* U.S. CONST. art. II, § 2, cl. 2; CHRISTOPHER M. DAVIS & MICHAEL GREENE, CONG. RESEARCH SERV., PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS, S. REP. NO. RL30959, at 35–41 (2017).

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

[7] *See, e.g.*, Betsy Woodruff Swan, *ICE Chief Tangles with White House over Political Appointees*, POLITICO (May 6, 2020) (showing that Trump never nominated Matthew Albence, the nominal ICE head at the time of the Portland invasion, to be head of ICE). President Trump did nominate two of Albence's predecessors to become the director of ICE, Thomas Honan and Ronald Vitiello. Trump, however, withdrew both of these nominations, even though the Senate seemed likely to confirm Vitiello. *See* Priscilla Alvarez, *Trump Suddenly Pulls ICE Nominee to go with Someone 'Tougher*,' CNN, Apr. 5, 2019 (discussing withdrawal of Vitiello); *Fifteen Nominations and One Withdrawal Sent to the Senate Today*, THE WHITE HOUSE, May 15, 2018 (mentioning withdrawal of Honan).

[8] *See* WILLIAM C. BANKS & STEPHEN DYCUS, SOLDIERS ON THE HOME FRONT: THE DOMESTIC ROLE OF THE AMERICAN MILITARY (2016); U.S. CONST., art. IV, § 4; *see also* Deanna El-Mallaway et al., *Trump Can't Lawfully Use Armed Forces to Sway the Election: Understanding the Legal Boundaries*, Just Security Blog, September 25, 2020, https://www.justsecurity.org/72500/trump-cant-lawfully-use-armed-forces-to-sway-the-election-understanding-the-legal-boundaries/ (claiming that the Portland invasion also violated statutory limits); Don't Shoot Portland v. Wolf, Case No. 1:20-cv-02040 ¶¶ 17-20; 63-70; 125-51 (filed July 27, 2020, D.D.C.); *cf.* Martin v. Mott, 25 U.S. (12 Wheat) 19 (1827).

she opposed the President's asylum policies,[9] which federal courts subsequently found illegal[10]. He then replaced her, unilaterally, with Kevin K. McAleenan, who likewise resisted some of Trump's legally problematic immigration policies.[11] So, Trump secured his resignation and appointed Tom Wolf in his place.[12] Trump demanded the resignation of the head of USCIS, who enjoyed Senate support and had proclaimed both a dedication to the rule of law and lack of malice to immigrants.[13] The Trump administration replaced the USCIS director with former Virginia Governor Ken Cuccinelli, who almost surely did not enjoy enough support among Republican Senators to obtain Senate confirmation.[14] When Trump unilaterally (and illegally) made McAleenan head of DHS, the President removed him from his Senate-confirmed post as head of CBP and replaced McAleenan with Acting CBP directors.[15] The administration forced out the first of these directors, John P. Sanders, who had humanitarian concerns about the administration's policies.[16] His successor, Mark Morgan, became Acting Commissioner of CBP after Sanders left

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

[10] *See* East Bay Sanctuary Covenant v. Barr, 964 F.3d 832 (9th Cir. 2020) (affirming a preliminary injunction against an anti-asylum policy enacted after Nielsen's resignation); Al Atro Lado v. Wolf, 952 F.3d 999, 1010-1014 (9th Cir. 2020) (finding that the "Acting" Secretary has not made a strong showing on the legal merits of another anti-asylum policy).

[11] *See* Zolan Kanno-Youngs, Maggie Haberman, & Michael D. Shear, *Kevin McAleenan Resigns as Acting Homeland Security Secretary*, N.Y. TIMES, Oct. 11, 2019.

[12] O'Connell, at supra note 9, at 622 n. 41.

[13] Matthew Choi & Anita Kumar, *Citizen and Immigration Services Chief Resigns* POLITICO (May 24, 2019).

[14] *See* L.M.-M. v. Kenneth T. Cuccinelli II, 442 F. Supp. 3d 1, 7-8 (D.D.C. 2020) (explaining the machinations that put Cuccinelli in the office); Ted Hesson, *Cuccinelli Starts as Acting Immigration Official Despite GOP Opposition*, POLITICO, June 10, 2019. Trump never nominated an ICE Director, relying on a series of acting officials to carry out his immigration policies, including family separation. *See* Christine M. Kinane, *Control Without Confirmation: The Politics of Vacancies in Presidential Appointments* (unpublished Ph.D. dissertation, 2019).

[15] *See* Stephan Dinan, *Senate Approves Trump's Border Chief*, WASH. TIMES, Mar. 19, 2018, https://www.washingtontimes.com/news/2018/mar/19/kevin-mcaleenan-confirmed-us-customs-and-border-pr/. Frank Miles, *Kevin McAleenan, New Acting DHS boss, has long record in Border Security*, FOX NEWS, Apr. 7, 2018, https://www.foxnews.com/politics/new-acting-homeland-security-head-well-respected-longtime-border-officer (noting that Trump moved McAleenan from the Direct position at CPB to head of DHS in spite of administration doubts that he could win Senate confirmation for the DHS job); Geneva Sands & Priscilla Alvarez, *John Sanders on Why he Left after two and a half months as CBP Commissioner*, CNN, July 11, 2019, https://www.cnn.com/2019/07/11/politics/border-chief-john-sanders/index.html (noting that John P. Sanders became acting chief of CBP when McAleenan became the Acting Director of DHS, but left after less than three months).

[16] See Zolan Kanno-Youngs & Maggie Haberman, *A Constant Game of Musical Chairs amid another Homeland Security Shake-up*, N.Y. TIMES, June 25, 2019, https://www.nytimes.com/2019/06/25/us/politics/mark-morgan-ice-cbp.html?searchResultPosition=11 (reporting that White House officials directed McAleenan to replace Sanders with

and helped carry out the Portland deployment.[17] Few if any of the officials leading a liberty threatening paramilitary action against American citizens over the objection of local elected officials had gone through the process set out in the Constitution for selecting the Officers of the United States. President Trump arguably undermined the rule of law by removing Senate confirmed officials with some loyalty to the law and putting in place officials whose actions suggest more loyalty to the President than to the law and the Constitution.

The Oregon paramilitary case illustrates a general point: Broad unfettered presidential removal authority can undermine the Senate's ability to provide a check on executive branch appointments. Removing appointees whom the Senate helped select prevents officers who have earned the Senate's approval from exercising any authority. If the President has the authority to arbitrarily remove an official the Senate confirms when the official defies an illegal presidential order, the Senate's role in appointment can become a sham. The Senate's authority exists to ensure that the principal officers of the government have sufficient independence to faithfully execute the law, even when the President wants to evade or defy it.[18] Removal of a Senate-approved officer and replacement with a unilaterally chosen successor or a delegation of authority to others favored by the President can undermine the rule of law.[19]

somebody who better reflected the administration's priorities); Sands & Alvarez, *supra* note 15 (reporting that the death of a teenager in migrant facilities, squalid conditions at those facilities, and racist Facebook posts by border patrol agents contributed to Sanders' humanitarian concerns).

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

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

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

This article examines the relationship between appointment and removal, which scholars and the Supreme Court generally treat as separate matters.[20] And it offers a valuable idea for resolving the tension between unfettered removal and meaningful compliance with the Appointments Clause—requiring compliance with the Appointments Clause as the mechanism for removal. Congress may pass a statute forbidding presidential removal of an agency head (and other Senate approved appointees) until the President nominates a qualified successor or until the Senate confirms a successor. The appendix provides draft texts of legislation implementing this proposal.

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

President Trump's abuse of removal authority to replace law abiding subordinates with more pliant officials has contributed to renewed scholarly interest in a related problem, how to regulate presidential designation of "acting" officials—the officers who a President appoints unilaterally after a Senate-confirmed appointee leaves office.[21] The literature on acting appointments incidentally exposes the tension between authority to fire an official for political reasons and preserving the Senate's role in appointments.[22] This article draws on the acting

[20] *Cf.* Ben Miller-Gootnick, Note, *Boundaries of the Federal Vacancies Reform Act,* 56 HARV. J. ON LEGIS. 459 (2019); Justin C. Van Orsdol, Note, *Reforming Federal Vacancies,* 54 GA. L. REV. 297 (2019) (arguing that "self-created vacancies violate the Appointments Clause").

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

[22] *See* Mendelsohn, supra note 21, at 550 n. 81 (stating that the FVRA does not "address whether the President may designate an acting official to fill a vacancy caused by presidential firing"); O'Connell, *supra* note 9, at 672-75

officials literature primarily to discuss whether statutes regulating appointment of acting officials can adequately address the tension between a political removal authority and safeguarding the Senate's role in appointments.

This combined approach to appointment and removal helps us better engage in the constitutional project of keeping a Republic intact. The Supreme Court has recognized that the Appointments Clause aims to prevent "despotism."[23] I have shown in a recent article and book that elected authoritarian leaders often obtain unfettered removal authority and then fire neutral experts and political opponents, replacing them with supporters willing to undermine the rule of law.[24] These new officials then help entrench the authoritarian regime in power by punishing enemies of the regime and protecting often corrupt regime supporters.[25] This approach has played a key role in the destruction of democracy in Turkey, Hungary, and many other countries.[26] Yet, the Supreme Court's decision in *Seila Law LLC v. Consumer Financial Protection Bureau* precludes adequately constraining abusive removal of officials, as it held that Congress may not constitutionally limit the President's authority to remove agency heads by prohibiting arbitrary, or even malign, removal decisions.[27]

(discussing the issue of using the FVRA to fill vacancies the President creates through removal); Van Orsdol, *supra* note 20, at 308-09 (suggesting that permitting a President to appoint a temporary officer to fill a vacancy he created through removal may violate the Appointments Clause).

[23] *See Noel Canning*, 573 U.S. at 525, 570, 578-79 (responding to Justice Scalia's characterization of the Senate's appointments role as a "critical protection against despotism" by agreeing that the separation of powers protects liberty); Freytag v. C.I.R., 501 U.S. 868, 883 (1991) (characterizing the "power to appoint officers" as "the most insidious and powerful weapon of 18th century despotism"); *see also* Weiss v. United States, 510 U.S. 163, 184 (1994) (Souter, J., concurring) (viewing Senate consent as a check on "the exercise of arbitrary power").

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

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

[26] *See* Driesen, *supra* note 24, at 29-41.

[27] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2198-2200 (2020) (suggesting a rule of unrestricted removal authority for the single directors an executive branch agency).

I will not belabor the autocracy point in this article. But the importance of this concern with democracy loss leads me to put abuse of removal power to avoid statutory and constitutional constraints at the center of my analysis of the tension between an unrestricted removal authority and the Appointments Clause, rather than the more common problem of removal to effectuate legitimate policy changes not undermining individual liberty or the law. The Framers, in the words of Justice Marshall, designed the Constitution to address "the *crises* of human affairs,"[28] and Congress should legislate with an eye to helping the constitutional system survive the stresses that can impair democracy and the rule of law.

The problem of removal undermining appointment helps explain the existence of a well understood doctrine at the founding—that the body (or bodies) making an appointment has the power to unwind it.[29] This parallelism doctrine governed in one of the leading models for the federal Constitution, New York's Constitution, which gave both removal and appointment authority to an executive council while vesting executive power in the governor and charging him to "take care that the law be faithfully executed."[30] The parallelism doctrine may explain why Alexander Hamilton (from New York) maintained in the Federalist Papers that the Constitution only permits President to remove a Senate-approved official from the government with the Senate's consent.[31] This Article's analysis shows that this very old parallelism doctrine has a strong logical basis. To permit unilateral and unfettered presidential removal, it turns out, can make the

[28] M'Cullogh v. Maryland, 17 U.S. 316, 415 (1819)
[29] *See* Myers v. United States, 272 U.S. 52, 119, 126 (1926) (characterizing the principle that "the power of removal . . . was incident to the power of appointment" as "well approved"); *see, e.g., id.* at 110, 118 (noting that under the Articles of Confederation Congress exercised the powers of appointment and removal and that the British Crown exercised both removal and appointment authority); Ex Parte Hennen, 38 U.S. 230, 259 (1839); Reagan v. United States, 182 U.S. 419 (1901); Shurtleff v. United States, 189 U.S. 311, 315 (1903). The *Myers* Court evaded the principle's implication that the Senate must have a veto over removal by creating a rule that the Senate's advice and consent role should be strictly construed. *Myers*, 272 U.S. at 118 (citing Madison's post-ratification statements).
[30] Driesen, *supra* note 18, at 97.
[31] THE FEDERALIST NO. 77.

Appointments Clause a nullity when its constraints are most needed, i.e., when a President seeks to escape the law's strictures. The Court's decisions preclude adopting Hamilton's position on removal and the Constitution's language prohibits removing the Senate from the confirmation process. So, the Court is not likely to solve the problem of removal authority undercutting the Appointments Clause's effectiveness by restoring parallelism between appointment and removal. Nevertheless, the dilemma that the parallelism principle reveals remains constitutionally important.

This article's first part explains how a political removal authority can interfere with the Senate's authority over appointments. It begins with a brief review of the constitutional landscape with respect to appointment and removal. It tells the interference story primarily by explaining the role political removal followed by unilateral appointment in tension with the Appointments Clause has played in wresting legal authority from Senate-approved officials following the law and giving it to officials chosen to facilitate evasion or defiance of the law. This account focuses on the administrations of Andrew Jackson, Andrew Johnson, Richard Nixon, and Donald Trump. The story of these Presidents' use of appointment and removal does not provide a representative sample of American practice, but rather underlines the potential tension between political removal accomplished without Senate approval of a successor and the Constitution's goal of securing a rule of law. On the other hand, this part also exposes a problem that will bring my proposal into question—the problem of the Senate undermining laws passed by previous congresses by failing to properly fulfill its duty to advise and consent to the nomination of competent and conscientious appointees.[32]

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

The second part discusses federal statutes, most prominently the Federal Vacancies Reform Act (FVRA), and their role in checking evasion of the Senate's advice and consent function.[33] The problem of the President using removal to undermine the Appointments Clause arose at a time when federal statutes authorizing temporary appointments did not permit making a temporary appointment to fill a vacancy that the President creates through removal, and FVRA itself probably does not do so. As a result, FVRA does not offer a promising avenue for solving the problem of removal to evade the Appointments Clause. In any event, this part shows that authorization of temporary appointments through FVRA has proven ineffective when most needed and exposes dilemmas in its enforcement. It acknowledges that FVRA amendments can help but explains why they cannot in the end solve the Appointments Clause dilemma created by allowing a President to freely undo a Senate confirmation of an officer whom the President has nominated.

The third part provides a constitutional defense of the proposal and analyzes its policy merits. It shows that this proposal reflects a constitutional custom that prevailed for more than a hundred years beginning with the nation's founding. The Court generally allows longstanding custom dating from the founding era to gloss the Constitution.[34] It also addresses the Court's precedent. The Court's removal jurisprudence does not preclude this proposal, as a requirement to comply with the Appointments Clause does not provide any substantive restraint on the removal power—leaving the President free to remove law abiding officers for any reason or no reason at all. I argue that this proposal's historical pedigree should overcome its potential tension with the

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

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

Court's recent holding that the President must have an unfettered right to remove an agency head, in light of the evasion problem developed earlier. The Court has not considered the relationship between appointment and removal and never intended to allow the President's removal authority to subvert the Senate's role in appointments. Furthermore, the reform serves the Founders' goal of avoiding despotism, which an autocratic President can create by using the removal power to appoint pliant officials (to paraphrase Hamilton) willing to do his bidding absent effective constraint. On the other hand, the inflexibility of this remedy can interfere with the executive branch's proper functioning when the Senate abuses its advice and consent function to insist on the appointment of officers not dedicated to the rule of law. This part closes with a discussion of the proposal's strengths and weaknesses. It concludes that that Congress should adopt this proposal to make Appointments Clause compliance the required procedure for removal with respect to a limited number of important offices.

I. REMOVAL UNDERMINING THE APPOINTMENTS CLAUSE

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

A. REMOVAL AND APPOINTMENT: CONSTITUTIONAL BACKGROUND

The Appointments Clause provides that the President shall nominate "officers of the United States" subject to the "advice and consent" of the Senate.[35] The Constitution, however, contains

[35] U.S. CONST., art II, § 2, cl. 2.

two exceptions to the rule that the Senate must approve official appointments. First, Congress may authorize the President, the head of a department, or the courts to appoint "inferior officers" unilaterally.[36] Second, the Recess Appointments Clause authorizes the President to "fill up vacancies" occurring during a Senate recess, but terminates those temporary appointments at the end of the following session.[37] Thus, the President generally has no express constitutional authority to appoint the government's top officials without the Senate's approval if the Senate is in session when a vacancy arises.[38]

As the Supreme Court has recognized, the Constitution denies the President the authority to unilaterally appoint the chief officers of the government in order to avoid "despotism."[39] Alexander Hamilton explained that the Senate's advice and consent role would discourage the President from nominating personal allies or those "possessing the necessary . . . pliancy to render them obsequious instruments of his pleasure."[40] For personal allies might obey a President's request or order to take actions entrenching him in power rather than faithfully executing the laws. Hamilton also explained that the requirement of Senate consent would encourage nomination of competent officials.[41]

The Constitution contains but one Removal Clause, which authorizes the Senate to remove government officials upon impeachment by the House for high crimes and misdemeanors.[42] Prior to the Constitution's adoption, Alexander Hamilton explained to those considering its ratification

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[36] Id.
[37] Id., cl. 3.
[38] *See* NLRB v. SW General, Inc., 137 S. Ct. 929, 948-949 (2017) (Thomas J., concurring) (arguing that the FVRA may violate the Constitution, because it acts as a "waiver" of the express provisions of the Appointments Clause).
[39] Freytag v. Commissioner, 501 U.S. 868, 883 (1991) (referring to a unilateral appointment power as the "most insidious and powerful weapon of 18th Century despotism") (quotation omitted).
[40] THE FEDERALIST NO. 76.
[41] *See* ID.
[42] *See* U.S. CONST., art. I, § 3, cls. 6-7.

that the President could only remove officials with the Senate's consent.[43] This "old federalist doctrine" (as Joseph Story called it) can be supported in two ways.[44] The customary constitutional rule that the power of removal follows the power of appointment justifies the doctrine.[45] Some members of the First Congress, however, justified a Senate role in removal by arguing that the Constitution's Removal Clause provides the exclusive method of removing an officer.[46]

The First Congress debated the question of whether the Constitution authorized removal outside the impeachment context and most thought that it did.[47] But the congressmen debating the issue, many of whom helped frame the Constitution or participated in the ratification debates, took conflicting positions on who should have this removal authority.[48] Some Congressmen stuck to the position Hamilton took before ratification—that the Senate must consent to removals—but interpreted it as authorizing bilateral removal outside the impeachment context.[49] They based this argument on the "traditional rule that the removal power mirrors the appointment power."[50] Others thought that the President has a constitutional right to remove executive officers unilaterally, the position of modern proponents of the unitary executive theory.[51] Still others thought that Congress

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[43] THE FEDERALIST NO. 77.
[44] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 1538–39 (5th ed. 1994).
[45] *See* Myers v. United States, 272 U.S. 52, 119 (1926) (describing the "constitutional principle" that "appointment carried with it the power of removal").
[46] *See* Brief of Amicus Curiae, Jed H. Shugerman, 13, Collins v. Mnuchin, 938 F.3d 553 (5th Cir. 2019) (Nos. 19-422 & 19-563) (stating that a "small number of representatives" in the First Congress viewed impeachment as the sole means of removing officers).
[47] *Id.*
[48] *See* Bowsher v. Synar, 478 U.S. 714, 723-24 & n. 3 (1985) (noting that many members of that Congress helped frame the Constitution and listing the members of the First Congress who attended the Philadelphia Convention). Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WILLIAM & MARY L. REV. 211 (1989).*;* Edward S. Corwin, *Tenure of Office and Removal Power Under the Constitution*, 27 COLUM. L. REV. 353 (1927)*;* Saikrishna B. Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006).
[49] Shugerman, *supra* note 46 (stating that a "substantial number of representatives" believed that removal requires Senate consent).
[50] *Id.*
[51] *Id.* (identifying a "fourth group" in the First Congress as supporters of mandatory presidential removal authority).

could decide whom to entrust with non-impeachment removal authority under the Necessary and Proper Clause.[52]

The Supreme Court held that the Senate could not prevent the President from unilaterally removing an executive officer by requiring the Senate's consent to removal in *Myers v. United States*, relying, in part, on a heavily disputed reading of the debates in the First Congress.[53] A few years later, the Court held that the Congress could nevertheless limit the *grounds* for presidential removal, at least for officers that exercise quasi-judicial and quasi-executive functions.[54] In *Morrison v. Olson*, the Supreme Court held that Congress may protect an independent counsel charged with prosecuting high level wrongdoing from arbitrary removal by only permitting removal for cause, even though the independent counsel performed an executive function.[55] Last term, however, the Supreme Court held that the President must have authority to fire the head of a government agency for political reasons or no reason at all.[56] So, the Court has squarely repudiated a ban on presidential removal without Senate consent and has recently gone further by limiting the use of for-cause removal protection.[57]

The Appointments Clause jurisprudence often addresses the exceptions to the advice and consent requirement. The *Myers* Court strongly suggested that Congress may determine which officials constitute inferior officers—who may be appointed by the President unilaterally,

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[52] *See id.* (identifying a "third group" as believing that Congress could specify the locus of removal authority).
[53] *See* Myers v. United States, 272 U.S. 52, 109-17 (1926) (reading the debates in 1789 as establishing the President's right to remove officials unilaterally); *cf.* Casper, *supra* note 48 (disputing Justice Taft's reading of the 1789 debate); Corwin, *supra* note 48 (same).
[54] *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 626-29 (1935) (repudiating broad statements in *Myers* and stating that *Myers* does not justify giving the President unfettered removal authority over officers exercising quasi-judicial and quasi-legislative authority).
[55] *See* Morrison v. Olson, 487 U.S. 654, 692-93 (1988) (holding that the for cause removal provision in the Independent Counsel Act does not impermissibly interfere with the President's duty to "ensure the faithful execution of the laws.").
[56] *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020) (invalidating for cause removal protection for the head of the CFPB).
[57] *Cf. id.* at 2198 (generally recognizing that Congress may provide for cause removal protection for inferior officers and members of multimember commissions).

department heads, or the courts— rather than approved by the Senate.[58] Recent cases, however, favor judicial supremacy in configuring the scope of the inferior officers exception to the rule requiring Senate confirmation, but have employed varying definitions of an inferior officer.[59] The Court sometimes defines an inferior officer as an official with relatively narrow responsibilities and at other times as an official subject to a superior's control and direction.[60]

The Senate sometimes has blocked recess appointments by holding periodic *pro forma* sessions when not engaging in substantive business and the Court has approved this practice.[61] The Court has further cabined the Recess Appointments Clause by holding that recess appointments can only occur during a recess of "substantial length".[62]Accordingly, a President seeking to unilaterally control appointment of officers in defiance of the Constitution may often have to rely on removal of Senate approved officials followed by unilateral appointment or delegation of a fired officials' duties, rather than upon his recess appointment authority.

In another line of cases, the Court has stopped Congress from assuming a unilateral appointments authority or requiring that its own members assume various posts that are not purely within the legislative branch.[63] The Supreme Court, however, has done nothing to check the President from assuming appointment authority to people the government with partisan supporters

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[58] *See Myers*, 272 U.S. at 162, 173-74 (suggesting that Congress may determine that an officer is inferior and may enlarge the civil service through legislation).
[59] *See* Edmond v. United States, 520 U.S. 651, 661 (1997) (acknowledging that the Court's cases "have not set forth an exclusive criterion for distinguishing between principal and inferior officers").
[60] *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 461 U.S. 477, 510-11 (2010) (defining an inferior officers as a subordinate); *Edmond*, 520 U.S. at 662 (same); *Morrison*, 487 U.S. at 671-72 (holding that a special counsel with "limited duties" and jurisdiction is an inferior officer even though "she possesses a degree of independent discretion").
[61] *See* NLRB v. Noel Canning, 573 U.S. 513, 519 (2014) (concluding that pro-forma sessions of the Senate can block recess appointments); Mendelsohn, *supra* note 21, at 554 (noting that the *Noel Canning* ruling makes it easy to "block recess appointments" and that the Senate did so during the August 2017 recess).
[62] *See Noel Canning*, 573 U.S. at 517, 538 (finding a recess of less than 10 days too short to be of "substantial length").
[63] *See, e.g.*, Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 510 U.S. 252, 276 (1991) (forbidding Congress from populating a Board of Review regulating D.C. airports with its own members); Buckley v. Valeo, 424 U.S. 1, 118-143 (1976) (invalidating creation of an electoral commission consisting of appointees selected by Congress and some of its officers).

or White House officials whom the Senate might not approve, although the lower courts have disapproved of appointments violating the FVRA and other statutes governing acting appointees.[64]

B. EVADING SENATE CONFIRMATION

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

1. *Andrew Jackson*

Andrew Jackson abused his removal and appointment authority to defy the law respecting the National Bank of the United States. Andrew Jackson opposed the National Bank, but it enjoyed significant support in Congress. Congress passed a bill renewing the bank in 1832, but Jackson vetoed it, arguing that it was unconstitutional.[65] But the 1832 veto did not immediately abolish the bank, because the previous unexpired law establishing it remained in effect until 1836.[66]

Unable to obtain legislation promptly terminating the bank, President Jackson decided to remove executive branch officials faithfully executing the law to help him destroy the bank just

[64] *See, e.g.*, Batalla Vidal v. Wolf, 501 F. Supp. 3d 117, 123 (E.D.N.Y. 2020) (holding that the Acting head of DSHS was not lawfully appointed); Casa de Maryland, Inc. v. Wolf, 486 F.Supp. 3d 928, 950-57 (D. Md. 2020) (finding that the plaintiffs were likely to succeed in showing that Trump's appointment of acting DSHS heads violated requirements for the order of succession); Immigrant Resource Center v. Wolf, 491 Supp. 3d 520 (N.D. Cal. 2020) (same); L.L.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 23 (2020) (holding that the acting head of UCSIS was not properly appointed).

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

[66] ROBERT V. REMINI, ANDREW JACKSON AND THE NATIONAL BANK WAR 109 (1967)

after his second term began in 1832.[67] Jackson asked the Secretary of Treasury, Louis McClane, about removing the federal deposits that sustained the bank.[68] McClane suggested that he would not do so, as he considered the request illegal.[69] So, Jackson transferred him to the Department of State and installed a known bank critic, William Duane, as Secretary of the Treasury.[70] William Duane, however, likewise considered the request illegal and refused to remove the deposits.[71] So, Jackson removed him too and installed Attorney General Roger Taney (who later became a Supreme Court Justice and helped precipitate a civil war with the *Dred Scott* decision) in his stead.[72] Jackson chose Taney because he was the only cabinet member who clearly favored removing the deposits, and Taney promptly withdrew them once put at the head of the Treasury Department.[73] Jackson not only used his removal authority to oust officials dedicated to following a law he disapproved of, he also evaded Senate confirmation proceedings for Treasury Secretary by appointing Taney while Congress was in recess.[74]

This incident triggered a censure supported by Daniel Webster, Joseph Story, and Henry Clay's arguments that President Jackson had acted tyrannically by abusing his removal authority to subvert the will of Congress, a claim echoed by numerous constitutional scholars at the time.[75]

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[67] *See* ARTHUR M. SCHLESINGER JR., THE AGE OF JACKSON 98 (1945) (explaining that Jackson wished to terminate the bank and conceived of the plan of withdrawing federal deposits).
[68] DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT, THE TRANSFORMATION OF AMERICA 1815-1848 387-90 (2007).
[69] REMINI, *supra* note 66, at 113-15 (discussing McClane's response to Jackson's suggestion in detail).
[70] ID. at 115; HOWE, *supra* note 68, at 387.
[71] REMINI, *supra* note 66, at 122-24.
[72] *See* ID. at 124.
[73] ID. at 118, 125 (discussing the cabinet members' position and how Taney arranged for the removal of the deposits).
[74] *See* HOWE, supra note 70, at 388 (noting that by making an "interim appointment" of Taney Jackson allowed him to "take over immediately without waiting for Senate confirmation"); *cf.* REMINI, *supra* note 66, at 118 (noting Duane's position that Jackson should not remove the deposits during the congressional recess).
[75] WILLIAM R. EVERDELL, THE END OF KINGS: A HISTORY OF REPUBLICS AND REPUBLICANS 209 (2000) (discussing the attitude of constitutional scholars); HOWE, *supra* note 68, at 387-90 (noting that the Senate censured President Jackson for improperly firing two subordinates); SCHLESINGER, *supra* note 67, at 106-07, 110 (quoting Clay as characterizing Jackson's effort to manipulate appointments to remove the bank deposits as a "revolution" concentrating "all power in one man," characterizing Webster as charging Jackson with "despotism," and quoting Story as saying, "though we live under the form of a Republic we are in fact under the absolute rule of a single man").

The Senate also rejected the appointment of Taney as Secretary of the Treasury.[76] But it could not do so rapidly enough to avoid evasion of the law by an improperly appointed officer. The objective of the replacement of officials without Senate consent was not to secure faithful execution of the law, but to replace those with a strong sense of duty to properly execute the law with an official who would use executive power to undermine the law's core purpose.[77]

2. *Andrew Johnson*

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

Andrew Johnson, an avowed white supremacist, followed a policy of allowing leaders of the confederacy to assume positions of prominence in state governments being created in the vanquished South, while doing little or nothing to protect freed slaves, including many union soldiers, from murders and even massacres tolerated or carried out by southern governments.[78] The Republicans obtained veto-proof majorities in the midterm election of 1866, likely because of Johnson's failure to protect blacks (and for that matter, loyal Republican whites) in the South from terrorism.[79]

Congress exercised its constitutional authority to determine the course of reconstruction through legislation by extending and strengthening the Freedmen Bureau Act and passing the First

[76] REMINI, *supra* note 66, at 141-42.
[77] *See* ID. at 126 (explaining that the removal of government funds from the National Bank represented Jackson's "lunge to kill the Bank outright"); HOWE, *supra* note 70, at 388, 390 (characterizing Jackson as ordering "an officer to break the law" and violating "the spirit, and perhaps the letter, of the law").
[78] On white supremacy, *see e.g.* BRENDA WINEAPPLE, THE IMPEACHERS 83 (2019) (quoting Johnson as saying "this is a country for white men, and, by God, as long as I am president it shall be a government of white men"). On Johnson's policy, *see* ID. at 71-73 (discussing profligate pardoning of confederates) & 80-83 (discussing Johnson's failure to protect black citizens from violence in the South); *see, e.g.*, WILLIAM REHNQUIST, GRAND INQUESTS 206 (explaining that a mob killed 40 and wounded 100 black and white Republicans holding a state constitutional convention after Johnson signaled that the federal government "would not interfere with the" state's "civil authorities").
[79] WINEAPPLE, *supra* note 78, at 171.

Civil Rights Act months before the 1866 election and by enacting reconstruction acts afterwards.[80] The reconstruction acts established a policy of military reconstruction, which granted voting rights to the freed slaves and used the occupying Union armies to protect freed blacks and other unionists from attacks.[81] They also required states to guarantee equal protection of the laws as a condition for readmission to the union.[82] President Johnson vetoed the reconstruction legislation, but Congress overrode his vetoes.[83]

President Johnson used removal of officials as a tool to suppress dissent and to prevent faithful implementation of the laws governing reconstruction, "replacing Freedmen's Bureau officials with flunkies, sacking over a thousand postmasters, and discharging Treasury officials who disagreed with him."[84] In order to avoid the sort of presidential subversion that had occurred with respect to the Freedmen's Bureau, Congress passed the Tenure of Office Act on the same day that it overrode President Johnson's veto of the first Reconstruction Act to safeguard its implementation.[85]

The Tenure of Office Act forbade the removal of cabinet officers appointed during the appointing President's term plus one month without the Senate's consent.[86] Johnson, however, continued to abuse his removal authority repeatedly in an effort to dictate policy now at odds with the law and firmly repudiated by the People of the United States as then constituted in the 1866 election. For example, Johnson replaced generals implementing the reconstruction legislation with

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[80] *See* Howard C. Westwood, *To Set the Law in Motion: The Freedmen's Bureau and the Legal Rights of Blacks, 1865-1868*, 80 COLUM. L. REV. 204, 206-07 (1980) (explaining that Congress overrode Johnson's second veto of a bill to extend the Freedmen's Bureau's life and specify its powers); Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-1982).
[81] WINEAPPLE, supra note 78, at 194-95, 199, 202-203.
[82] ID. at 194-95.
[83] ID. at 196-99, 202-203.
[84] ID. at 184-85.
[85] Tenure of Office Act, 14 Stat. 430 (1867) (passed on Mar. 2, 1867); An Act to Provide for the More Efficient Government of the Rebel States (First Reconstruction Act), 39th Cong., 14 Stat. 428 (1867) (passed on Mar. 2, 1867).
[86] Tenure of Office Act, § 1.

"men willing to prevent blacks from voting, running for office, serving on juries, or riding in the front of a streetcar."[87]

The most famous case of abusive removal and appointment involved War Secretary Edwin Stanton, a holdover from the Lincoln cabinet committed to implementing the law.[88] Johnson wanted to replace Stanton with a War Secretary willing to substitute Johnson's policy for the law's policy on reconstruction. General William Tecumseh Sherman, after consulting with General Ulysses S. Grant, advised President Johnson to replace Stanton with an appointee likely to win Senate approval, General Jacob Dolson Cox.[89] Johnson, however, ultimately replaced Stanton with a more pliant and unqualified official, Adjutant General Lorenzo Thomas.[90]

President Johnson's determined resistance to faithfully implementing the reconstruction laws capped by the effort to replace Stanton with a person whom the Senate would never approve led to his impeachment by a vote of 126 to 47.[91] The first article of impeachment cited his violation of the Tenure of Office Act by removing Stanton.[92] The second article flagged his appointment of Thomas without the Senate's advice and consent.[93] The final impeachment article charged Johnson with firing Stanton for the purpose of preventing "the execution" of the First Reconstruction Act.[94] The majority of Senators agreed with the House's impeachment decision, but the Senate acquitted him, falling one vote shy of the 2/3 vote required for removal.[95]

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[87] *See* WINEAPPLE, *supra* note 78, at 214-25. The replacing of generals even excited fears of a coup. *See* ID. at 218 (discussing the views of Carl Schurz and the editor of the Boston Daily Advertiser).
[88] *See* ID. at 208-09 (noting that Stanton had "formally stated that he would obey the Reconstruction Acts").
[89] *See* ID. at 235.
[90] *See* ID. at 249
[91] *See* ID. at 258-62.
[92] ID. at 431, Appendix B, art. 1.
[93] ID., art. 2.
[94] *See* ID., art. 11 (accusing Johnson of "unlawfully devising and contriving. . . means . . . to prevent the execution of . . . An act to provide for the more efficient government of the Rebel States, passed March 2, 1867") (internal quotation marks omitted).
[95] *See* REHNQUIST, *supra* note 78, at 233-35 (explaining that the Senate voted 35 to 19 for removal).

President Johnson's decision during the impeachment proceeding to compromise his evasion of the Appointments Clause apparently played a role in saving Johnson from removal. Johnson agreed to nominate John Schofield as Secretary of War, a person who, unlike Thomas, Senators regarded as qualified and conscientious.[96] General Grant, a war hero who supported faithful implementation of the reconstruction legislation, won the next election. [97] Thus, an effort to check abusive removal in order to preserve the Senate's role in appointments helped restore the rule of law in the federal government.

3. *Richard Nixon*

The Watergate scandal demonstrated the potential utility of at-will presidential removal authority combined with appointment evading Senate advice and consent in subverting not just the rule of law, but fair elections. Richard Nixon decided to tilt the electoral playing field in his favor by trying to get dirt on the political opposition, ordering a burglary to get documents from the Democratic National Committee housed in the Watergate complex and tax audits of his opponents.[98] In response to evidence of the Watergate break-in, Attorney General Elliott Richardson appointed a special counsel to investigate.[99] President Nixon responded to this threat of uncovering his crimes in the same way that Presidents Jackson and Johnson had responded to threats to their ability to unilaterally create policies at odds with the law then in force, by securing the removal of law-abiding subordinates in order to have more pliant officials serve in their vacated

[96] *See* REHNQUIST, *supra* note 78, at 247 (suggesting that assurances that the President would nominate "a successor to Stanton. . . who was satisfactory to" wavering Republicans was of "some importance"). Several other possible causes have also been suggested for the loss of a key vote. *See, e.g.*, REHNQUIST, *supra* note 78, at 246-47 (suggesting that fears of President Pro Tempore of the Senate Ben Wade succeeding to the presidency may have influenced the outcome); WINEAPPLE, *supra* note 78, at 383 (finding a lot of "circumstantial evidence" of bribery but no firm proof).
[97] RON CHERTOW, GRANT 614, 625-26 (Kindle ed. 2018) (noting "Grant's boldness" in upholding radical reconstruction and the role blacks' support played in his victory).
[98] BOB WOODWARD & CARL BERNSTEIN, THE FINAL DAYS 83 (1976).
[99] ID. at 61.

posts. Nixon ordered Attorney General Richardson to fire the special counsel.[100] Richardson refused and resigned in protest.[101] Nixon then ordered his successor, William Ruckelshaus, to fire the special counsel.[102] Ruckelshaus likewise refused and resigned.[103] President Nixon, however, found an "obsequious instrument[] of his pleasure" (in Hamilton's words) in Ruckelshaus' successor, Robert Bork, who agreed to fire the special counsel.[104] But the Justice Department regulations governing the special counsel office only authorized for-cause removal, and a federal District Court judge held Bork's firing of the special counsel illegal.[105] Thus, judicial enforcement of a for-cause removal provision helped vindicate the rule of law.

The reaction to the "Saturday night massacre"—the firing of Richardson and Ruckelshaus—led to increased support for impeachment.[106] The House Judiciary Committee drafted articles of impeachment that made Nixon's "interference" with the Department of Justice one part of the basis for impeaching him and Nixon resigned to avoid almost certain impeachment and removal.[107]

One might argue that the Watergate story does not illustrate the problem of combining removal with unilateral appointment, as Ruckelshaus and Bork assumed office automatically under the DOJ succession statute.[108] But the President did not formally nominate Ruckelshaus or Bork for Attorney General. As a result, the Senate never had an opportunity to inquire whether a new

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[100] ID. at 24.
[101] ID. at 70.
[102] ID.
[103] ID.
[104] ID. at 70-71; THE FEDERALIST No. 76 (Hamilton) (explain that the Constitution aimed to prevent appointment of "obsequious instruments" of presidential "pleasure").
[105] Nader v. Bork, 366 F. Supp. 104, 109-10 (D.D.C. 1973).
[106] *See* WOODWARD & BERNSTEIN, *supra* note 98, at 113 (noting that House members drew up articles of impeachment after the firing of Richardson and Ruckelshaus).
[107] House Judiciary Committee, Articles of Impeachment, art. 2, item 5 (July 27, 1974); Frederick M. Lawrence, *In Memoriam: Archibald Cox and the Genius of Our Institutions,* 85 B.U. L. Rev. 356, 356-57 (2005) (Nixon's firing of three DOJ employees led to his resignation)
[108] *See* Lois Reznick, *Temporary Appointment Power of the President,* 41 U. CHI. L. REV. 146, 146 n. 5 (1973) (explaining that the Vacancy Act "clearly authorized" the Bork appointment).

Attorney General would stand up to Nixon to vindicate the law and to refuse to allow an appointment of an official who would not.[109] In other words, Nixon's removal of Attorneys General automatically defeated the Appointments Clause by triggering a statute authorizing succession of officers without Senate approval of a new Attorney General.

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

4. *Donald Trump*

Donald Trump evaded the Senate confirmation process by firing officials and then replacing them with "acting" appointees more often than any of his somewhat recent predecessors.[110] Indeed, Anne Joseph McConnell tells us that prior to Trump, "firings or forced resignations of top officials" rarely occurred.[111] "Between 1945 and the start of Trump administration," she writes, "Twelve Presidents fired a total of nineteen cabinet secretaries."[112] Furthermore, Trump's effort to wrest Appointments power from the Senate by firing officials it had approved and substituting his own people was deliberate. He admitted publicly that he liked the "flexibility" provided by appointing acting officials unilaterally rather than conforming to Appointments Clause constraints.[113] He also often evaded FVRA constraints in order to enhance

[109] *See id.* (noting that Congress had made a promise that the Attorney General would not "unduly interfere" with the Special Prosecutor a "condition of his confirmation").
[110] *See* O'Connell, *supra* note 9, at 643 (explaining that Trump alone had "used more acting secretaries than confirmed secretaries"); Van Orsdol, *supra* note 20, at 299 (stating that "over 200 key executive branch positions requiring . . . Senate confirmation" sat "vacant" late in the Trump administration's second year). The data on sub-cabinet positions that have been studied also show that Trump evaded Senate confirmation much more often than his predecessors. O'Connell, *supra* note 9, at 650-54 (providing data for EPA and the FAA).
[111] O'Connell, *supra* note 9, at 672.
[112] *Id.*
[113] *See id.* at 617.

this "flexibility." Nina Mendelsohn has explained that two thirds of the way through Trump's administration, about one third of the "key posts" in his administration were not filled by Senate confirmed officials.[114]

The flexibility Trump obtained by replacing the heads of DSHS and its immigration authorities with acting officials lacking Senate confirmation facilitated not only an attack on individual liberty in Portland, but also a host of illegal actions on the immigration front.[115] Federal courts enjoined or struck down policies enacted by the officials Trump put in place unilaterally after firing somewhat principled Senate approved officials.[116]

Trump often combined replacement of prominent officials doing their duties with presidential Twitter attacks denigrating these officials.[117] In this way, Trump secured replacement of somewhat principled officials with less principled officials while simultaneously signaling all government officials that they must choose obedience to the President over obedience to the law.[118] We may have seen the consequences of this intimidation in the waning days of his administration when the head of the FBI declined to appear publicly to ask for the public's help in investigating

[114] *See* Mendelsohn, *supra* note 21, at 539.

[115] *See* Pangea Legal Services v. Dep't of Homeland Sec., 2021 WL 75756 (N.D. Cal. Jan. 8, 2021) (finding illegal a rule establishing new categories of crimes as triggering a bar on asylum); National Immigrant Justice Ctr. v. Exec. Office for Immigration Review, No. 21-00056 (D.D.C. Jan. 14, 2021) (enjoining rule creating hurdles for asylum seekers); Make the Road N.Y. v. Pompeo, 475 F.Supp.3d 232, 270–72 (S.D.N.Y. 2020) (rejecting immigration applications based on insurance status is unlawful); Clerveaux v. Searls, 397 F.Supp.3d 299, 304 (W.D.N.Y. 2019) (holding alien for 17 months in DHS custody without review of eligibility for release violated due process rights); Jimenez v. Cronen, 317 F.Supp.3d 626, 633 (D. Mass. 2018) (holding aliens in ICE detention for four months without opportunity to be heard violated due process rights).

[116] *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901 (2019) (vacating decision to rescind the Deferred Action for Childhood Arrivals program); Capitol Area Immigrants' Rights Coal. v. Trump, 471 F.Supp.3d 25, 31 (D.D.C 2020) (finding rule categorically disqualifying asylum seekers at southern border unlawful); Damus v. Nielsen, 313 F.Supp.3d 317, 339-41 (D.D.C. 2018) (stopping individualized parole determinations for asylum seekers to promote 'deterrence' held unlawful).

[117] *See, e.g.*, Missy Ryan, *Trump Fires Defense Secretary Mark Esper*, WASH. POST, Nov. 9, 2020; *see also* David E. Sanger & Nicole Perlroth, *Trump Fires Christopher Krebs, Official Who Disputed Election Fraud Claims*, N.Y. TIMES, Nov. 17, 2020.

[118] *See, e.g.*, Kanno-Youngs & Haberman, *supra* note 16.

the attack on the capitol.[119] While media pundits and even some law enforcement officials criticized him for this, he may have felt that he had to remain silent to avoid dismissal.[120]

President Trump fired officials who reported information about his administration's failure to abide by ethical and legal restraints, even when applicable law required the reports.[121] Specifically, he fired numerous inspectors general who might expose corruption in his administration, evading the Appointments Clause by replacing them with acting appointees.[122] Firing officials for complying with disclosure requirements not only undermines the rule of law, it undermines political accountability through elections by keeping information about an administration's conduct from the voters.

Shortly after he lost the 2020 election, President Trump replaced the Secretary of Defense with an official whom the Senate had not approved.[123] Replacement of a Secretary of Defense late in an administration is very unusual.[124] The Secretary of Defense initially failed to fulfill requests to deploy National Guard troops to defend the capitol from the insurrection.[125] Despite plans to have a "quick reaction force" available, national guard troops did not arrive until more than five hours after the invasion of the capitol spurred a request for help.[126] Thus, we can see that using

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[119] *See* Katie Benner, Zolan Kanno-Youngs & Adam Goldman, *Amid Riot Chaos, Some National Security Leaders Are Absent From View*, N.Y. TIMES, Jan. 12, 2021.
[120] *See id*.
[121] *See* Del Quentin Wilber, *He Was Told to be Independent, and Trump Fired Him For It*, L.A. TIMES, Jan. 11, 2021.
[122] ROBERT BAUER & JACK GOLDSMITH, AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY 323 (Kindle Ed. 2020); Jen Kirby, *Trump's Purge of Inspectors General, Explained*, VOX, May 28, 2020. Trump has since fired many other inspectors general. *Id.* Pranshu Verma & Edward Wong, *Another Inspector General Resigns Amid Questions about Pompeo*, N.Y. TIMES, August 25, 2020.
[123] Rebecca Shabad & Carol E. Lee, *Trump Tweets that Defense Secretary Mark Esper has Been 'terminated,'* NBC News (Nov. 9, 2020), https://www.nbcnews.com/politics/politics-news/trump-tweets-defense-secretary-mark-esper-has-been-terminated-n1247138; Helene Cooper, Eric Schmitt & Maggie Haberman, *Trump Fires Mark Esper, Defense Secretary Who Opposed Use of Troops on U.S. Streets*, N.Y. TIMES, Nov. 9, 2020.
[124] *See* Shabad & Lee, *supra* note 123.
[125] Memorandum from David S. Soldow, Exec. Sec'y of the Office of the Sec'y of Def. to Office of the Sec'y of Def. (Jan. 10, 2021) (showing that an hour and a half elapsed between the time Mayor Bowser requested deployment of the National Guard to turn back the capitol invasion and Miller's decision to authorize backup forces).
[126] *See* id. (explaining that national guard did not arrive until 5:40 p.m.); Memorandum from Christopher C. Miller, Acting Sec'y of Def., to Ryan McCarthy, Sec'y of the Army (Jan. 4, 2021) (discussing authorization of a "quick reaction" force in advance of the demonstration).

removal as a tool to replace Senate confirmed officials temporarily can threaten the Republic's survival. The failure to promptly deploy the National Guard, or worse, to order it to support an insurgency, could have produced the murder of members of Congress and the Vice-President and the overthrow of democratic government. The *in terrorem* effect of removal followed by unilateral appointment of lackeys provides a powerful weapon in undermining the rule of law.

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

Both of Trump's impeachments involved removal of officials to put in place people not approved by the Senate. A whistleblower complaint about Trump's withholding military assistance from Ukraine to induce its President to announce a corruption investigation of Joe Biden's son triggered his first impeachment.[127] Trump apparently fired Michael Atkinson precisely because he complied with his legal obligation to disclose whistleblower complaints to Congress. And he humiliated Andrew Vindeman, a proud ex-marine by firing him summarily after he testified in Trump's impeachment hearing.[128] Trump's propensity to fire those who crossed him underlay an effort, not always successful, to try to prevent numerous government officials from testifying against him.[129] President Trump's removal of the Secretary of Defense and replacement with a defense chief not approved by the Senate may have paved the way for the capitol insurrection that

[127] *See* H. Res. 755, 116th Cong., 1st Sess., art. I.
[128] Eric Schmidt & Helene Cooper, *Army Officer Who Clashed with Trump Fired Him for it,* L.A. TIMES, Jan. 11, 2021.
[129] *See* Matt Zapotosky, *Why Trump Can't Stop all Witnesses from Testifying in Congress's Impeachment Inquiry,* WASH. POST, Oct. 11, 2019 (noting that Trump "has tried to stymie" congressional investigators' efforts to obtain information, including by blocking "advisers from testifying").

led to his second impeachment, as the unilaterally appointed Secretary of Defense failed to timely defend the Congress from attack. And even if the explanation for the failure to defend the capitol lies elsewhere, the Capitol Hill insurrection points to the danger temporary replacement of Senate confirmed officials might pose in the future. But evasion of Senate confirmation can undermine the law when not accompanied by removal (albeit it less thoroughly than a program using removal to frighten conscientious officials across the board). [130]

C. THE PROBLEM OF SENATE ABDICATION OF DUTY

The Framers established a Senate role in appointments to make sure that the President nominates people of merit likely to properly enforce the laws. The Senate, however, has not always played its assigned role.[131] As party loyalty has largely replaced fidelity to Congress as an institution in the Senate, partisan considerations frequently take over.[132] When the President's party controls the Senate, it may approve nominees selected to undermine the law based on the notion that the President should be entitled to "his own man." Conversely, a Senate controlled by a President's opponents may refuse approval of well qualified nominees to thwart effective implementation of the laws.[133] This latter problem strengthens the case for allowing evasion of the Senate advice and consent role through recess appointments or by authorize temporary appointments even after removal.[134] It can prove difficult to distinguish these illegitimate abuses

[130] *See* Mendelson, *supra* note 22, at 555.
[131] BAUER & GOLDSMITH, *supra* note 122, at 325 (discussing the "danger" of a "recalcitrant Senate" blocking "effective governance" by refusing to confirm nominees).
[132] *See generally* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, not Powers,* 119 HARV. L. REV. 2312, 2368 (2006)
[133] *See* Matthew C. Stephenson, *Can the President Appoint Principle Executive Officers Without a Senate Confirmation Vote?,* 122 YALE L. J. 940, 942 (2013) (noting that "a desire to impair the Executive's ability to function" motivates refusal to approve nominees in "many cases"); *see generally* Mendelsohn, *supra* note 21, at 540 (suggesting that "Senate recalcitrance in considering a nomination" might create a vacancy that a President wants to fill outside the advice and consent process); Stayn, *supra* note 33, at 1511 (claiming that ideologically "charged" Senators sometimes withhold consent "for reasons that have nothing to do with the nominee").
[134] *See* Mendelson, *supra* note 22, at 591 (explaining that broad use of acting officials may safeguard democracy "against an obstructionist Senate"); *see generally* Gilliam E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide,* 64 DUKE L. J. 1607, 1610 (2015) (arguing that political polarization prompts "political innovation").

of advice and consent power from legitimate disagreement about the qualifications of officials and their legally appropriate policy preferences.[135]

II. The Federal Vacancies Reform Act and other Statutes Authorizing Acting Temporary Appointments

This part explains how the FVRA and other statutes authorizing temporary appointments have failed to adequately resolve the tension between a political removal authority and safeguarding the Senate's role in appointments, and why improvement of the FVRA will likely fail to resolve the problem. Since the time of the Adams administration, Congress has authorized many temporary appointments by statute in the event of a sudden vacancy, even when the Senate is in session.[136] The primary vehicle for this is now the FVRA. Notwithstanding the tension between temporary unilateral appointments of principal officers and constitutional text, the Supreme Court has approved a limited authority to temporarily fill a sudden vacancy not caused by the President himself. In *United States v. Eaton,* the Court allowed for presidential appointment of a "vice consul" to temporarily perform the work of a consul too ill to perform his duties, even though the Constitution requires Senate approval of a consul.[137] To justify this pragmatic result (the vacancy occurred in Bangkok before the advent of airplanes), it created a legal fiction that a person performing the duties of a consul under "temporary and extraordinary conditions" is not a consul, but a vice-consul.[138] It rationalized this temporary appointment by stating that otherwise the Constitution would bar any delegation of a superior officer's power to a subordinate "under any circumstances or exigency."[139] This passage does not write a blank check for evasion of Senate

[135] *See, e.g.*, Mendelson, *supra* note 22, at 554-55 (explaining that it was unclear whether the Senate's reluctance to approve President Obama's nominee to the post of Assistant Administrator for Water at EPA reflected general recalcitrance).
[136] *See id.* at 581-83 (discussing the FVRA's predecessors).
[137] United States v. Eaton, 169 U.S. 331, 343 (1898).
[138] *See id.*
[139] *See id.*

consent through delegation of important duties to inferior officials, but it does leave an open question about precisely what exigencies might justify avoiding the advice and consent requirement through delegation and for how long.[140]

FVRA's predecessor statutes clearly did not authorize acting appointments in the wake of removal.[141] And several commentators and Justice Thomas suggest that the Constitution does not permit unilateral temporary appointments to vacancies that the President himself created.[142] Hence, the problem of removal facilitating evasion of the Appointments Clause arose without any explicit authority to make an interim appointment after a removal. For that reason, FVRA amendment seems like an unpromising avenue for addressing the problem of removal undermining the Appointments Clause. Authorizing appointments of acting officials in the wake of removal will only make things worse.[143]

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[140] *Accord* Mendelson, *supra* note 22, at 578 (explaining that *Eaton* "fails to provide adequate guidance on *which* circumstances" make appointment of an acting official "permissibile") (emphasis in original); *cf.* Van Orsdol, *supra* note 20, at 311-13 (discussing problems with delegation after a vacancy arises in lieu of proper appointment of a replacement).

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

[142] *See* NLRB v. SW General, Inc., 137 S. Ct. 929, 948-949 (2017) (Thomas J., concurring) (stating that the FVRA may violate the Constitution); Van Orsdol, *supra* note 20, at 308-09 (suggesting that allowing unilateral appointment of officials to fill vacancies that the President himself created violates the Appointments Clause); Stayn, *supra* note 33, at 1513 (finding the FVRA unconstitutional).

[143] Robert Bauer and Jack Goldsmith suggest that the Take Care Clause authorizes the President to make temporary appointments in the absence of a statute. BAUER & GOLDSMITH, supra note 122, at 325; *see* John C. Roberts, *The Struggle Over Executive Branch Appointments*, 2014 UTAH L. REV. 725, 726. The Take Care Clause, however, creates a duty. The Constitution specifies the method of appointment and therefore it does not appear appropriate to infer a presidential power in some tension with the Appointments Clause from this duty. *See* Ronald J. Krotoszynski, Jr., & Atticus DeProspo, *Squaring a Circle: Advice and Consent, Faithful Execution, and the Vacancies Reform Act,* 55 GEORGIA L. REV. 731, 743 (2021) (pointing out that allowing "Take Care" appointments would "zero out" the Appointments Clause). The history of the statutes authorizing temporary appointments and the custom of making appointment the mechanism of removal suggest that the President's power to make temporary appointments, if constitutional, comes from Congress, not directly from the Constitution. The Horizontal Sweeping Clause—which authorizes congressional regulation of the executive branch of government—provides the source of congressional authority for the FVRA and its predecessors. *See* U.S. CONST. art. I, § 8, cl. 18. In any case, since Bauer and Goldsmith concede that that the President's authority is defeasible by Congress, their position, even if adopted by the courts, does not prevent a legislative bar on temporary appointments in the wake of removal.

The FVRA itself probably does not authorize a President to appoint an acting official when he creates the vacancy by removing an official for political reasons.[144] It only authorizes an acting appointment when an official "dies, resigns, or is otherwise unable to perform the functions and duties of his office."[145] This last phrase appears to refer to a disability of some kind, like a serious illness, not to removal.

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

This cabining has not worked very well.[146] Presidents have failed to comply with FVRA limits on the duration of temporary appointments.[147] President Trump defied law designating particular officials as the proper acting officials by putting others in places of authority.[148] But some administrations have disabled offices from functioning by not nominating successors or

[144] *See* Mendelsohn, *supra* note 21, at 550 n. 81 (stating that the FVRA does not address the issue); Miller-Gootnick, *supra* note 20, at 461 (arguing that the FVRA does not permit the President to temporarily fill vacancies he himself created without Senate approval).
[145] 5 U.S.C. § 3345(a) (2018).
[146] *See* Krotozynski, *supra* note 143, at 741(characterizing the FVRA as an "abject failure"); Van Orsdol, *supra* note 20, at 303, 305 (discussing FVA loopholes that make it a "paper tiger" and arguing for various reforms to make it more effective); *cf.* O'Connell, *supra* note 9, at 667 (describing the Vacancy Act as a measure to ensure that Senate approved officials fill temporary vacancies, but characterizing it as a "workaround" with respect to the Appointments Clause).
[147] *See* O'Connell, *supra* note 9, at 626 (most acting appointees by the late 1990s served for longer periods than the Vacancies Act allows); Stayn, *supra* note 33, at 1518 (discussing the failure of President Nixon and subsequent Presidents to comply with the Vacancies Act).
[148] *See, e.g.*, Casa de Maryland, Inc. v. Wolf, 486 F.Supp. 3d 928, 950-57 (D. Md. 2020) (finding that the plaintiffs were likely to succeed in showing that Trump's appointment of acting DSHS heads violated requirements for the order of succession).

naming acting officials.[149] In addition, administrations have evaded the Appointments Clause procedures by simply delegating the functions of the departed officials to others.[150]

The FVRA does provide an important check on despotism by stating that improperly serving officials' actions have "no force or effect."[151] The federal courts relied on this provision to invalidate a number of actions taken by improperly appointed officials during the Trump administration, and a lawsuit challenging President Trump's deployment of paramilitary forces to Portland, Oregon sought remedies based on this provision as well.[152]

While this restraint is important, it does not provide a cure all. First of all, justiciability doctrines often prevent courts from enforcing this restraint.[153] In particular, if an administration decides to abuse its power to infringe liberty, the courts cannot intervene before the liberty abuse occurs, except perhaps if government officials announce their plans.[154] Thus, for example, the challenges to the authority of the officials leading the Portland paramilitary action only became possible after the paramilitary forces had attacked and arrested citizens. Second, the goal of the Constitution's Appointments and Take Care Clauses (which requires the President to Take Care that the Law be Faithfully Executive) involves securing, not stopping, proper execution of the

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

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

[151] 5 U.S.C. § 3348(d)(1) (2012).

[152] *See, e.g.*, L.M.-M. v. Kenneth T. Cuccinelli II, 442 F. Supp. 3d 1, 29 (D.D.C. 2020) (appointment of the "Acting" Director of USCIS violated FVRA); Bullock v. Bureau of Land Mgmt. (BLM)., 489 F.Supp. 3d 1112, 1128-30 (D. Mont. 2020) (appointment of the "acting" BLM Director violated FVRA); *see also* Compl., *Don't Shoot Portland et al. v. Chad Wolf et al* ¶¶ 62-68 (D.D.C., filed July 27, 2020); O'Connell, *supra* note 9, at 632 n. 98 (collecting cases through 2019).

[153] *See* Mendelson, *supra* note 22, at 558 (explaining that judicial review is generally not available for many important decisions, including "agency reorganization, resource allocation, . . . prioritization decisions, or decisions not to enforce"); O'Connell, supra note 9, at 658 (noting that justiciability doctrines may prevent litigation of various questions about mechanisms undermining the Senate advice and consent function).

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

laws.[155] Disabling actions prevents abuses of legal authority and extra-legal actions based on no legal authority, but it does not secure faithful law execution. Furthermore, law execution sometimes plays important roles in keeping a democracy intact, by suppressing insurrection, protecting national security, or prosecuting corrupt supporters of a regime undermining democracy.[156]

Several commentators have proposed reforms to the FVRA, some of which might address the problem of Presidents evading the advice and consent requirement by removing officials and then replacing them with unilaterally chosen officials.[157] The most straightforward reform would make the implicit bar on appointment of an acting official to fill a vacancy the President had created through removal of a political appointee explicit.[158] But even this strong medicine would not protect us from delegation of the officers' functions to presidentially preferred officials or from using political removal to prevent an agency from carrying out legal duties.[159] And a problem would remain in distinguishing voluntary resignation from removing officials by pressuring them to resign, because the FVRA does apply to resignations.[160] A prohibition on delegation would prove extremely difficult to enforce and would not prevent a President from disabling action by firing somebody and not filling a vacant office at all. One commentator likened FVRA reform to

[155] *Cf.* Mendelsohn, *supra* note 21, at 575-76 (arguing that the Appointments Clause must permit some use of acting officials in light of the importance of the Take Care Clause's expectation of a functioning government).
[156] *See* DRIESEN, *supra* note 24, at 151-56 (defining national security as defense of democracy).
[157] *See, e.g.*, BAUER & GOLDSMITH, *supra* note 122, at 326-31 (proposing reducing presidential flexibility in choosing acting top officials, limiting delegation authority, shortening acting officials' terms, and facilitating enforcement); Mendelsohn, *supra* note 21, at 544 (proposing short time frames for acting appointees, a preference for Senate approved deputy secretaries, and limits on delegation of authority).
[158] *See* Van Orsdol, *supra* note 20, at 318 (proposing to amend the FVRA to "strictly prohibit the filling of self-created vacancies caused by terminations").
[159] *Contra id.* (arguing that a prohibition on appointing an acting official would somehow limit subdelegation).
[160] *See id*. at 319 (taking an ambiguous position on forced resignation because of difficulties of proof).

"a game of Whack-a-Mole" because every solution creates a new problem.[161] Once political removal is permitted, enforcing the Appointments Clause becomes a challenge.

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

III. Evaluating the Proposal to Make Senate Approval of a Successor the Means of Political Removal of Key Officials

This part evaluates the proposal to make compliance with the Appointments Clause the mechanism for removing key government officials without cause. It begins by explaining that this proposal codifies a longstanding practice that began in the George Washington administration. Such constitutional custom provides strong evidence of this practice's constitutionality.[162] It then examines its fit with the Supreme Court's precedent on removal. And it closes with an evaluation of the proposal's policy merits.

A. Constitutional Custom Supporting the Proposal

The Supreme Court treats longstanding executive branch practice acquiesced in by Congress as evidence of that practice's constitutionality.[163] Daniel Webster said in 1832 that no President ever removed an official except by means of securing Senate approval for a successor.[164]

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[161] Id. at 320.

[162] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurther, J., concurring) (stating that a "systematic, unbroken executive practice" not questioned by Congress may provide "a gloss on 'executive power'"); Bradley & Morrison, *supra* note 34.

[163] *See, e.g.,* NLRB v. Noel Canning, 573 U.S. 513, 524-5 (2014) (putting "significant weight upon historical practice").

[164] *See* Myers v. United States, 272 U.S. 52, 260 (1926) (Brandeis J., dissenting) (stating that that "in all the removals that have been made, they have generally been effect simply by making other appointments") (quoting Daniel Webster); *see also* Robert V. Remini, The Life of Andrew Jackson 291 (2011) (before Jackson, "no . . . President had ever dismissed a cabinet officer.").

Furthermore, the dissent in *Myers,* uncontradicted by the majority, suggests that this practice of removal by appointment persisted at least until the date of the *Myers* decision.[165] That statement seems improbable today, in light of recent experience with presidential removal, but it basically proves true. Indeed, George Washington established the custom of appointment serving as the mechanism of removal and it continued for more than a hundred years.

Webster and Brandeis, of course, did not mean that those being removed learned of their removal from news report or records of the Senate's proceedings. Rather, they explained, Presidents who wished to replace an existing official would inform the official that the President would be seeking the approval of a successor and that he would lose his office upon confirmation of the successor.[166]

Presidents in the Early Republic were extremely reluctant to remove officers approved by the Senate lest they be perceived as attacking the government.[167] Especially in the very early years, something like the stable administration sought by the Farmers occurred, with Presidents even keeping on their predecessors' cabinet members.[168] When a President wished to replace a cabinet member needed in another post or remove an incompetent or politically disloyal cabinet member from the government altogether, the President generally replaced him by nominating a replacement

[165] *See Myers*, 272 U.S. at 259-260 & n. 28 (Brandeis, J., dissenting) (claiming that an "administrative practice" consistent with a Senate role in removal existed from the founding until 1926, and describing Webster's statement and forms used to effectuate removal via appointment as evidence of the shape of the practice). The *Myers* majority claims that Webster had inconsistent positions on the President's removal power. *See id.* at 151-52. But the majority does not dispute Webster's and Brandeis' claim that the *method* of removal was through appointment of a successor and characterizes Webster as a "great . . expounder of the Constitution." *Id.* at 151.

[166] *See id.* at 261 (Brandeis, J., dissenting) (quoting Daniel Webster) (discussing the custom of notifying an incumbent that he will be removed by the appointment of a successor).

[167] *Cf.* MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS 53 (2000) (explaining that Presidents prior to Jackson were unsure about whether they had constitutional authority to remove officers appointed by their predecessors).

[168] ID. (stating that Adams retained George Washington's cabinet "in full" even though "three of the four cabinet officers had no personal allegiance to Adams").

to the Senate.[169] Moreover, our early Presidents almost never removed even cabinet members except for cause.[170]

George Washington established the custom of removing officers through appointment of successors. While Washington never removed a cabinet officer for political reasons, he had to reshuffle his cabinet to deal with resignations. After Thomas Jefferson resigned, Washington wanted Attorney General Edmund Randolph to succeed Jefferson as Secretary of State, which required not only Senate consent to Randolph's new appointment, but also his removal from his old post. Washington effectuated Randolph's removal from the Attorney General post by securing Senate approval for his successor, William Bradford.[171] Randolph, however, voluntarily resigned from his Secretary of State post after George Washington and his cabinet asked him to explain evidence that he had accepted a bribe.[172] Because the Senate was in recess, Thomas Pickering, the Secretary of War, filled in as Secretary of State and Secretary of War following Randolph's resignation.[173] Washington relieved Pickering of his War Department duties by securing the approval of a successor to his War Department post, James McHenry, thereby allowing Pickering to focus on his State Department responsibilities.[174]

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

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[169] *See Myers*, 272 U.S. at 259-61 (Brandeis, J., dissenting) ("In all of the removals which have been made, they have generally they have generally been effected by making another appointment").
[170] *See* STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON 72 (2003) (noting the "common understanding" that Presidents would only remove executive officers "for just cause").
[171] S. EXEC. JOURNAL, 3rd Cong., 8th Sess. 147 (1794).
[172] Dice Robins Anderson, *Edmund Randolph Secretary of State*, *in* 2 THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY 152-54 (Samuel Flagg Bemis, ed., 1963) [hereinafter SECRETARIES OF STATE] (describing the course of events and noting that Washington described Randolph's resignation as "voluntarily and unexpectedly offered"); Robert D. Arbuckle, *Edmund Randolph: A Reappraisal*, W. PA. HIST.: 1918-2018, HISTORICAL NOTES & DOCUMENTS 61, 65 (1978). While some have interpreted Randolph's resignation as a removal, if so, it was a removal for cause. *See* 2 PAGE SMITH, JOHN ADAMS 1030 (1963).
[173] Henry J. Ford, *Timothy Pickering Secretary of State*, *in* SECRETARIES OF STATE, *supra* note 172, at 167.
[174] *See* S. EXEC. JOURNAL, 4th Cong., 11th Sess. 198 (1796).

promote a cabinet member.[175] James Madison, however, dismissed one Jefferson holdover, Gideon Granger, Jefferson's Postmaster General. He did so primarily because Granger threatened the political neutrality of government service delivery, as he fired Postmasters and made controversial appointments for political reasons.[176] Even though Granger was a holdover, his dismissal did not meet with wholesale acquiescence. It excited debate in Congress in which Madison was accused of monarchism and the near passage of a bill seeking disclosure of Madison's reasons for removal in the Senate.[177]

This dismissal, however, was controversial because it looked like a discharge for political reasons, not because it violated Webster's rule. Granger stayed on until his successor obtained Senate approval—strong evidence that the founding constitutional custom did not permit political removal except through appointment of a successor.[178] This custom generally prevailed at least up until the time of the *Myers* decision in 1926. [179]

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[175] *See, e.g.*, S. EXEC. JOURNAL, 6th Cong., 17th Sess. 353 (1800) (showing that Adams nominated Secretary of State Pickering's successor on May 12, 1800); Ford, *supra* note 173, at 240–41 (showing that Hamilton requested Pickering's resignation on May 10 but that when Pickering refused two days later, on May 12, Hamilton discharged him); S. EXEC. JOURNAL, 13th Cong., 37th Sess. 530 (1814) (Gallatin); ID. at 623 (Crawford); *cf.* Charles C. Tansill, *Robert Smith Secretary of State*, *in* 3 SECRETARIES OF STATE, *supra* note 172, at 195 (showing that President Madison did not accept the incompetent Robert Smith's resignation until he had secured James Monroe's consent to serve pursuant to a recess appointment); S. EXEC JOURNAL, 15th Cong., 40th Sess. 95, 98 (1817) (approving Richard Rush at the end of his term as Attorney General as Minister to Great Britain and William Wirt to succeed him as Attorney General); S. EXEC. JOURNAL, 20th Cong., 50th Sess. 612, 616 (1828) (moving Adam's Secretary of War James Barbour to the post of Minister to Great Britian through confirmation to the new post and confirmation of his successor the next day).

[176] 1896 U.S. Civ. Serv. Commission Rep. 13, at 41-42 (suggesting that Granger fired postmasters who served as editors of Federalist Party newspapers, but not those who served as Republican newspapers, on conflict of interest grounds); Letter from James Madison to Thomas Jefferson (Feb. 13, 1814), *Founders Online*, NATIONAL ARCHIVES, https://founders.archives.gov/documents/Jefferson/03-07-02-0121_(discussing Granger's appointment of Leib as Postmaster in Philadelphia).

[177] *See* 27 ANNALS OF CONG. 1441–42, 13th Cong., 1st Sess. (1814) (likening Madison to the British monarch because Madison interfered with the department head's choice of appointees by removing him).

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

[179] *See, e.g.*, Message from Rutherford B. Hayes to United States Senate (Dec. 11, 1877), *reprinted in* 10 MESSAGES AND PAPERS OF THE PRESIDENTS 4433 (James D. Richardson ed., 1897); S. EXEC. JOURNAL, 26th Cong. 1st Sess. 240, 246-47 (1840) (removing Henry D. Gilpin from his post as Solicitor of the Treasury by elevating him to the Attorney General position and obtaining approval of his successor and removing Matthew Birchard from his post as Solicitor

The major deviation from the spirit of this custom under President Jackson triggered a censure and its abandonment under President Andrew Johnson triggered an impeachment. Jackson nominally conformed to the custom of removal through appointment as he sought to change Treasury Secretaries to destroy the national bank. He appointed successors to the people he was removing on the day of removal.[180] On the other hand, he relied on the Recess Appointments Clause to make these appointments unilaterally in these cases and in many others.[181] By timing the removal and appointment to make them occur during a recess he evaded compliance with the requirement of Senate consent for appointments. He furthered this evasion by waiting until the last week of the ensuing session to formally nominate Taney for the Treasury post, more than a year after his unilateral Recess appointment of Taney.[182] Thus, Johnson used removal to evade the Appointments Clause requirement that the Secretary of the Treasury be Senate confirmed through the device of abusing the Recess Appointments Clause.

Andrew Johnson defied the custom altogether as he sought to evade his responsibility to faithfully execute the law governing reconstruction. He removed Stanton by unilaterally

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General of the Land Office by elevating him to the vacated Solicitor of the Treasury post and appointing a new Solicitor General for the Land Office); S. EXEC. JOURNAL, 25th Cong., Spec. Sess. 14 (1837) (replacing the Secretary of War by appointment of a successor); S. EXEC. JOURNAL, 25th Cong. 1st Sess. 135, 137 (1838) (reshuffling more of the cabinet by appointment of successors for officers being removed in order to get a promotion). Presidents Polk and Fillmore did not remove cabinet officials, but when they accepted high officials' resignations they made them effective only when a replacement could be appointed. *See, e.g.*, 2 JAMES K. POLK, THE DIARY OF JAMES K. POLK 121 (Milo Milton Quaife, ed., 1910); S. EXEC. JOURNAL, 31st Cong., 1st Sess. 121 (1850) (discussing a reshuffling of the cabinet in which resignations took effect upon appointment of replacements). While John Tyler likewise did not remove cabinet members from office, many resigned in response to policy decisions they disapproved of and Tyler broke custom by allowing those resignations to take effect before appointment of a successor. *See, e.g.*, S. EXEC. JOURNAL, 28th Cong. 1st Sess. 193 (1843); *See, e.g.*, S. EXEC. JOURNAL, 28th Cong. 1st Sess. 193 (1843); S. EXEC. JOURNAL, 28th Cong., 1st Sess. 349 (1844) (nominating George Bibb to Secretary of the Treasury on June 15, 1844, more than a month after John Canfield Spencer's resignation from the post); Randolph G. Adams, A*bel Parker Upshur Secretary of State*, *in* 5 SECRETARIES OF STATE, *supra* note 173, at 65, 86 (showing that Tyler waited more than a month to appoint Upshur to succeed Daniel Webster as Secretary of State in the wake of Webster's resignation on May 8, 1843).

[180] *See* HOWE, *supra* note 68, at 387 (stating that Jackson replaced Treasury Secretary McClane with William Duane on June 1 and then replaced Duane with Taney on September 23).

[181] *See* U.S. Senate Manual, 107th Cong., S. Doc. No. 107-1, at 1451 (detailing Jackson's numerous recess appointments, including those of Taney and Duane as Treasury Secretaries).

[182] SENATE EXEC. J., 22nd Cong., 1st Sess. 426 (1834) (nominating Taney on June 23).

appointing Thomas as interim War Secretary when the Senate was in session, thereby evading the Appointments Clause procedure without relying on the Recess Appointments Clause.[183] Furthermore, as mentioned previously, Thomas was an alcoholic whom the Senate should not confirm for such an important post, and it never did.[184] As mentioned previously, Johnson was profligate in removing Senate confirmed officials in order to undermine reconstruction, thereby making the Senate effort to safeguard the rule of law by confirming conscientious nominations null and void. But the custom of appointment by removal was restored promptly as soon as Johnson left office.[185]

With respect to officers of the United States below the cabinet level, the custom of only removing through appointment generally prevailed as well (with exceptions under Johnson and perhaps Jackson). Presidents customarily removed officials by submitting a form indicating that the incumbent would be removed upon the Senate's confirmation of a successor. Brandeis' dissent in *Myers* provides a table documenting some 5,000 presidential removals effectuated through such

[183] *See* REHNQUIST, *supra* note 78, at 215-216 (explaining that the removal of Stanton in favor of Lorenzo Thomas occurred on February 21, 1868 and that the Senate actively resisted immediately). Johnson had earlier suspended Stanton and installed Ulysses S. Grant as an interim appointee. ID. at 212-213. Stanton regained the office when the Senate disapproved his suspension in January, setting the stage for the removal through the unconstitutional appointment of Thomas. ID. at 215.

[184] *See* WINEAPPLE, *supra* note 78, at 320-22, 341 (describing Thomas as incompetent and "loyal to his alcohol");

[185] *See, e.g.*, LOUIS A. COOLIDGE, ULYSSES S. GRANT 325–27, 388-89 (centenary ed. 1922) (showing that Grant had requested Hoar's resignation from the post of Attorney General); Letter from Ulysses S. Grant to Ebenezer R. Hoar (June 15, 1870), in 20 PAPERS OF ULYSSES S. GRANT (PUSG) 170 (John Y. Simon et al., eds. 1995) (Grant accepting Hoar's resignation "when the appointment and qualification of your successor"); Letter from Ulysses S. Grant to Benjamin H. Bristow (June 19, 1876), *in* 27 PUSG 136 (John Y. Simons et al., eds. 2003) (accepting Secretary Bristow's resignation effective on June 20, 1876); S. EXEC. JOURNAL, 44TH Cong. 1st Sess. 260 (1876) (confirming Bristow's successor Lot M. Morrill on June 21, 1876); id. at 244 (removing Taft from the War Department by appointing his War Department successor, James Cameron, on the same day and removing Pierrepont from his Attorney General post by confirming Taft as the new Attorney General); id. at 279 (indicating that President Grant nominated James N. Tyner as Postmaster General to succeed Marshall Jewell on July 11, 1879 with the appointment confirmed on July 12, 1879); 27 PUSG 184 (stating the President Grant requested the resignation of Postmaster General Marshall Jewell on July 11, 1879).

a form.[186] Thus, the practice of removal by appointment was very pervasive and longstanding, last much longer than one hundred years.

McCullogh v. Maryland suggests that a constitutional custom dating back to the founding should prove well-nigh dipositive. *McCullogh* considered the question of the constitutionality of the National Bank "scarcely . . . open" even though the Congress and the President established the bank just twenty-eight years before the decision.[187] By contrast the custom of refraining from removing top officials except through compliance with the Appointments Clause reigned for more than 100 years (interrupted, arguably, by Jackson and, clearly, by Andrew Johnson).[188]

The Court's originalist bent supports giving strong weight to founding era custom.[189] *McCullogh* also establishes that a custom need not be completely consistent to be entitled to weight. For, the legislation approving the bank lapsed for a period of years, and Marshall still considered the custom almost dispositive.[190] The modern Supreme Court endorsed the same point in *NLRB v. Noel Canning.* when it accepted the idea that a break during a session of Congress can be considered a "recess" triggering an opportunity for unilateral presidential appointment, even though intrasession breaks were rare for a long time and Congressmen had not always approved of appointments during these breaks.[191] Not only did Congress acquiesce in the executive branch

[186] Myers v. United States, 272 U.S. 52, 259-60 n. 28 (1926); *see, e.g.,* Parsons v. United States, 167 U.S. 324, 325 (1897) (quoting a letter from President Cleveland removing a U.S. Attorney in Alabama "to take effect upon the appointment and qualification of your successor"); Shurtleff v. United States, 189 U.S. 311, 312 (1903) (quoting a letter from President McKinley removing an appraiser "to take effect upon the appointment and qualification of your successor").
[187] McCullogh v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819); *see also* The Pocket Veto Cases, 279 U.S. 655, 689 (1929) (affording "great regard" to a custom of "at least twenty years duration").
[188] *See* HOWE, *supra* note 68, at 388 (noting that Jackson removed Duane as Secretary of Treasury in 1833).
[189] *See* Alden v. Maine, 527 U.S. 706, 743-44 (1999) (treating "early congressional practice" as "weighty evidence of the Constitution's meaning"); Bradley & Morrison, *supra* note 34, at 424-25 (noting that strict originalists are likely to give weight to founding era practice).
[190] *See McCullogh*, 17 U.S. at 402 (noting that for a period "the original act" establishing the national bank "was permitted to expire").
[191] NLRB v. Noel Canning, 573 U.S. 513, 524-33 (2014) (putting weight on a very uneven record of historical practice).

practice of removing through appointment, it insisted it continue by censuring or impeaching the two 19th century Presidents who did not conform to it in letter and in spirit.

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

B. PRECEDENT

Recent precedent on removal creates no barrier to this proposal. *Seila Law* holds that the President's ability to remove the sole directors of government agencies must remain unrestricted by for-cause removal protection.[192] But my proposal does not limit the grounds of removal at all. It leaves the President free to remove cabinet members or others covered by the legislation for political reasons. It just requires him to do so through compliance with the Appointments Clause.

Myers, which is more relevant, does not prohibit this proposal either, but it does present some challenges. Recall that *Myers* held that Congress may not condition presidential removal on the Senate's consent to the removal. Literally, the appointments mechanism for removal does not

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

do that. It gives Congress no say in removal, but simply requires that compliance with the Appointments Clause serve as the *procedural mechanism* for removal.

Nevertheless, it does create the possibility that the Senate might interfere with the President's removal authority by refusing to consent to the appointment of a qualified successor committed to the rule of law as a means of freezing the incumbent in place. That possibility raises questions about the proposal's consistency with *Myers.*

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

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

The Senate may also interfere with the President's removal authority by declining to act on the nomination of a well-qualified successor. As Mathew Stephenson has explained in detail, the Court may properly imply consent to a nomination from a failure to vote on the nomination.[193] The case for doing this becomes especially strong when the record suggests that the Senate has declined to act based on a desire to interfere with the President's removal authority, rather than from a desire to thwart an inappropriate nomination.

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

If Congress chooses to use a nomination trigger, it could address that problem, at least partially, by making nomination of a "well qualified" successor the trigger for removal, not just any successor. But enforcing this "well-qualified" component of a removal trigger poses a challenge. The judiciary might find that a case requiring judicial evaluation of a nominee's qualifications presents a political question that it ought not resolve.[194] On the other hand, a court could decide this by taking testimony from experts in the relevant field and examining the qualifications of past office holders. Congress could require the Merit Systems Protection Board to make this determination, subject to judicial review under the arbitrary and capricious

[193] *See* Stephenson, *supra* note 133, at 946.
[194] *See generally* Rucho v. Common Cause, 139 S. Ct. 2484, 2498-2508 (2019) (finding a political question when judicially manageable standards appeared somewhat lacking in a politically charged context).

standard.[195] That would bring greater expertise to the judgment and avoid putting judges in a difficult position.

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

C. POLICY

A requirement that Presidents effectuate political removal through compliance with the Appointments Clause generally represents good policy, but the proliferation of posts requiring Senate confirmation makes it only practicable if applied very selectively. Congress should probably focus this mechanism on a limited number of top officials where continual governance through Senate-confirmed officials is especially important. The proliferation of posts requiring Senate approval probably contributed to the decline in the custom of removal through appointment. The Congress can revive this custom most effectively by not applying the revival to so many posts that it challenges the President's ability to make timely nominations and the Senate's ability to process confirmation decisions reasonably quickly.

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

[195] *See* Appendix, Draft Bill with a Nomination Trigger § 5, *infra.*

This proposal may trigger concerns about empowering the Senate to keep outgoing officeholders in place against the wishes of an incoming administration.[196] Congress could provide an exception for removing holdovers early in an administration, but this should not prove necessary and has some dangers associated with it. A holdovers exception should not prove necessary, because the custom of resignation of outgoing officials is pretty well entrenched, especially with respect to most high-level posts. Furthermore, if the Senate abused its authority by disapproving a nominee in hopes of freezing a holdover in place, the courts could invalidate that application under *Myers*. That prospect should discourage the abuse. Furthermore, a holdovers exception might prove dangerous in some cases. Some high-level officers, such as the Director of the FBI, have long terms precisely to avoid having the politics of an incoming administration control their activities. Application of a holdover exception to such posts could create opportunities not only to circumvent the Appointments Clause, but also to subvert liberty and the Republic.

One problem that may arise, however, involves the need for quick removal if an officer proves so dangerous that removal must occur immediately. The procedure of presidential nomination and Senate approval makes such occurrences exceedingly rare, and President Monroe waited for proper appointment of a successor even when curing gross incompetence leading to the sacking of the capitol during the War of 1812.[197] By contrast, this article has discussed many instances where quick removal serves as a means of subverting the law. In the unlikely event that

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

[197] *See* GAILLARD HUNT, THE LIFE OF JAMES MADISON 339 (1902) (suggesting that Secretary of the Navy, Paul Hamilton, resigned "probably on a hint from Madison"). Secretary of War, William Eustis, also resigned because he understood that the public opinion regarding the conduct of the war required it. *See* ID. at 328. Madison expressed dissatisfaction with John Armstrong, widely viewed as responsible for the destruction of Washington, D.C. in 1814. ID. at 334. Madison, however, refused to accept Armstrong's proffered resignation. ID. Armstrong resigned anyway and blamed his resignation on intrigue aimed at encouraging James Monroe to replace him. ID.

an official's ongoing dangerous misconduct cannot be cured by any measure other than removal, it is very likely that the President and the Senate would quickly agree on a successor.

Another problem involves the difficulty of determining when a removal has occurred. When a President wants to remove an official for political reasons, he frequently does so not by removing her outright but by requesting the officer's resignation (or hinting that it would be welcome). When an officer resigns, it can prove difficult to determine whether she simply wished to leave or the President removed her. Still, a simple ban on political removal without compliance with the Appointments Clause serves rule of law values even if it does not apply to resignations. This ban would empower an official faced with a demand to resign because she refused to comply with an illegal order (for example) to refuse and force the President to proceed by nominating a successor rather than cooperate in a scheme to subvert the law.[198] But such a ban would work better if it also applied to resignation sought by the President, even though some factual inquiry and judgment would prove necessary when an official resigned.

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

This proposal is most appropriate for very high-ranking officers with responsibilities that make their abuse a serious potential threat to liberty or, in difficult times, to the Republic's survival.

CONCLUSION

Politically motivated removal can subvert the Appointment Clause's goal of having officials approved by the Senate carry out the law. It can serve the purpose of undermining the rule of law and democracy, especially when it functions as a means to the end of putting a lackey in

[198] *Cf.* WINEAPPLE, *supra* note 78, at 250-51 (discussing Stanton's refusal to leave office to make room for the improper appointment of Thomas).

office to evade the law or the Constitution. Congress should consider adopting the proposal to make compliance with the Appointments Clause the mechanism for political removal in important cases, thereby selectively emulating the practice established at the Founding, while taking into account the problems posed by the proliferation of offices requiring Senate approval.

Appendix

Draft Bill With a Senate Confirmation Trigger

The Protect the Appointments Clause Act

Findings

Sec.1. Congress finds that:

(a) Presidents have sometimes abused their power by removing officials appointed by the President and confirmed by the Senate from their post and then failing to comply with the Appointments Clause by promptly nominating a successor.

(b) Removing a Senate-appointed official prevents an official whom the President has nominated and the Senate has approved from exercising government authority, an outcome in tension with the Appointments Clause.

(c) When the President removes a person from an important office for political reasons and then fails to promptly nominate a successor, officials whom the President has not nominated and the Senate has not approved end up exercising that office's authority, in contravention to the Appointment's Clause's purpose and sometimes other laws.

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

(e) Many Presidents beginning with George Washington removed officials by securing Senate approval for successors to officers of United States who had resigned or been removed. This constitutional custom helped secure compliance with the Appointments Clause.

Purpose and Policy

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

Definition of Key Officials

Sec. 3. The following officials are "key officials" for purposes of this statute: The Secretary of Defense, the Attorney General, the Director of the Federal Bureau of Investigation, the Secretary of the Department of Homeland Security, The Commissioner of United States Customs and Border Protection, The Director of United States Citizenship and Immigration Services, The

Director of United States Immigration and Customs Enforcement, the Director of the U.S. Marshalls Service (insert others).

Procedure for Removing Key Officials

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

Draft Bill with a Nomination Trigger

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Procedure for Removing Key Officials

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Optional Additional protection against removal through nomination of unqualified successors

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

(a) In making this determination, the Board shall consider:

(1) The qualifications and experience needed for this position.

(2) The qualifications and experience of prior Senate-confirmed occupants of these positions.

(3) The likelihood of Senate confirmation for a person with such qualifications.

(b) In making this determination, the Board shall not consider:

(1) The desirability of retaining the person displaced by this nomination.

(2) The qualifications of the person being displaced.

(3) Any other matter related to the President's exercise of his removal authority.

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

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

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

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