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Closing the Vacancies Act's Biggest Loophole

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The Constitution assigns an important vetting role to the Senate: the authority to provide advice and consent to the appointment of federal officers. Recognizing that this process takes time, Congress has granted the president the authority to temporarily bypass the Senate by selecting stop-gap acting officers during vacancies. Over the last two decades, however, presidents of both parties have increasingly exploited a loophole in the Vacancies Act to turn temporary acting officers into de facto permanent officers. Eliminating this loophole is necessary to restore the proper role of the Senate in the appointment process. With a few key amendments to the Vacancies Act, Congress can achieve an appropriate balance between accountability and efficiency in the federal appointments process.

THE VACANCIES ACT: A BRIEF OVERVIEW

The Constitution requires, as a default rule, that officers of the United States must be nominated by the president and confirmed by the Senate.[1] The Constitution allows only one potential exception to this default rule: if an officer is merely an "inferior officer," Congress may waive Senate consent.[2] But Congress is not *required* to choose this alternative: for many inferior offices, Congress has chosen to stick with the default rule and require Senate consent.

Obtaining Senate consent takes time. That means that when an office becomes vacant—especially when that vacancy is unexpected—the office can remain vacant for a lengthy period. For that reason, Congress has created a procedure for temporarily filling vacancies without Senate consent. This procedure has been implemented via a series of statutes known as Vacancies Acts, the first of which was enacted in 1792 and the most recent in 1998.[3]

Although these acts have varied in significant ways, they have mostly shared two key similarities. The first is a limitation on the length of time a person may serve as an unconfirmed acting officer.[4] The second is a limitation on the pool of people who may be selected to serve as acting officers.[5]

The restrictions on who can serve as an acting officer and how long they can serve are the core limitations that the

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Vacancies Act places on the executive branch. If the act did not place these limits, the executive branch would hardly ever chafe at following the procedures of the Vacancies Act. But if that were the case, the executive branch would also hardly ever have an incentive to nominate people for permanent positions rather than using the Vacancies Act.[6] Thus, Congress and the executive branch have, for decades, engaged in a tug-of-war, with Congress attempting to give the limitations real bite and the executive branch attempting to soften that bite.[7] The Federal Vacancies Reform Act of 1998 (FVRA) represents the most recent skirmish in that tug-of-war.

THE PROBLEM: THE FEDERAL VACANCIES REFORM ACT'S ENFORCEMENT MECHANISM ONLY APPLIES TO NONDELEGABLE DUTIES

The enactors of the FVRA knew that the key to making it an effective check on the executive branch was meaningful enforcement.[8] In an attempt to give real teeth to the Vacancies Act's limitations, Congress created an enforcement mechanism that invalidates an illegal acting officer's work. When an office is vacant, the FVRA mandates that "an action taken by any person who is not [either a validly serving acting officer or the head of the agency] in the performance of any function or duty of [the] vacant office . . . shall have no force or effect."[9] The purpose of this enforcement mechanism was to encourage compliance with the time limits and appointment restrictions of the act. The intention was that if a purported acting officer stayed in office past the deadline or lacked the required qualifications, that officer's actions could be challenged in court and invalidated.[10]

But in the years since the FVRA was passed in 1998, this enforcement mechanism has not encouraged compliance as effectively as expected. That is because only actions that qualify as the performance of a "function or duty of a vacant office" can be invalidated, and the act adopts an exceedingly narrow definition of "function or duty." The FVRA defines a "function or duty" as "any function or duty of the applicable office that" is established by statute or regulation and required by such statute or regulation "to be performed by the applicable officer (and only that officer)."[11] The parenthetical "(and only that officer)" term has been interpreted to mean that if a duty is delegable (i.e., if it can be assigned to someone else), it doesn't qualify as a "function or duty" for purposes of the FVRA and is thus exempt from the enforcement mechanism.[12]

Six years after the FVRA was passed, the DC Circuit adopted an extremely broad view as to which powers were delegable. The court held that when a statute sets out an officer's authorities, "subdelegation to a subordinate federal officer . . . is presumptively permissible absent affirmative evidence of a contrary congressional intent."[13] This presumption is why the executive branch has been able to aggressively argue that nearly every power held by nearly every federal official is subdelegable and thus exempt from the FVRA. And when a power of a vacant office is exempt from the act, that power can be performed by anyone without fear of invalidation.

Professor Nina Mendelson has explained that the executive branch has exploited this loophole to "effectively create[] a new class of pseudo-acting officials subject to neither time nor qualifications limits."[14] These pseudo-acting officials are selected without using the FVRA and are usually not eligible to serve under the FVRA, either because they lack the required qualifications or because the act's time limit has run out. These officials are typically delegated all of a vacant office's duties and thus are called officials "performing the duties of [fill in Senate-confirmed position]."[15] These pseudo-acting officials have the same power as FVRA-compliant acting officers but with none of the tenure or qualification restrictions.[16]

The use of these pseudo-acting officials is widespread. In September 2020, the Constitutional Accountability Center identified 21 positions where the time limits of the FVRA had run out and officials were self-described on agency websites as "performing the duties" (or equivalent language) of the position.[17] Professor Anne Joseph O'Connell has also identified at least 73 positions that had no confirmed or acting officer in April 2019, noting that for each of them "the functions of the vacant position presumably were delegated to someone."[18] In other words, the positions were presumably filled by pseudo-acting officials.

The widespread use of this maneuver means that FVRA deadlines have been increasingly ignored. As O'Connell notes, "in the first year of an Administration, one sees a lot of 'acting' titles on agency websites. After the Act's time limits run out, one sees 'performing the functions of [a particular vacant office]' language instead."[19] This loophole also means that those who could never win Senate confirmation can

nonetheless wield the power of an office indefinitely as a pseudo-acting official.[20]

These pseudo-acting officials wield important power. During the Obama administration, Vanita Gupta lead the Civil Rights Division in the Department of Justice for nearly two years as a pseudo-acting official, bringing several enforcement actions during that span.[21] During the Trump administration, "numerous Federal Register notices of both proposed and final rules" were signed by pseudo-acting officials.[22]

So long as the use of pseudo-acting officials under this "delegable duties exception" is widespread, alterations to the tenure or qualification requirements in the FVRA will not get to the heart of the problem. Even if the act were amended so that its time limits were shortened or the minimum qualifications to be named an acting officer were raised, the delegable duties exception would still allow the executive branch to bypass the FVRA entirely. So long as that loophole persists, changing the time limits and qualification requirements will make little practical difference.

THE ORIGIN OF THE PROBLEM: THE FEDERAL VACANCIES REFORM ACT'S DRAFTING HISTORY

How did such a large loophole find its way into the Vacancies Act? Fortunately, we know the answer, thanks to scholar Stephen Migala, who has made the behind-the-scenes drafting memos from the FVRA's Senate committee process easily accessible.[23] This history shows that there is a significant difference between how Congress expected the delegable duties exception to operate and how it has actually operated.

The FVRA was primarily drafted by the office of Republican senator Fred Thompson. But the delegable duties exception was not in Thompson's early drafts. Originally, *all* of a vacant office's duties were subject to the enforcement mechanism, meaning that an action performing *any* of an office's duties was subject to invalidation if performed by an invalid acting officer.[24] To allow the work of an office to continue even when there was no valid acting officer, Thompson proposed that the head of an agency be allowed to perform a vacant office's duties whenever the office was without a valid acting officer.[25]

But the Senate Democrats were concerned that the sheer number of duties assigned to various offices might overwhelm the bandwidth of an agency head. They worried that government duties could go unperformed if an agency head did not have enough hours in the day to carry out all the duties of every office lacking a confirmed or acting officer.[26]

That's why Democrats pushed for the delegable duties exception. They believed that "the legal duties of [a vacant] office should still be performed" even when there was no valid acting officer. They worried that the enforcement mechanism would make it "more difficult, if not impossible, to carry out the duties and functions of an office."[27] For example, they feared whether, "in the absence of a U.S. Attorney, the Attorney General may have to appear in court in his stead?"[28]

But crucially, no one on either side argued that *none* of a vacant office's duties should fall to the agency head. Senators on both sides expected that even with a delegable duties exception, the enforcement mechanism would still mean that "the head will have to sign more paperwork."[29] Senate Democrats consistently argued that the delegable duties exception would allow a necessary division of labor between the agency head and subdelegatees: "Paperwork can get signed by an agency head, but what about policy setting or rule writing or program operations that goes on under some office?"[30] They insisted on the delegable duties exception so that the latter types of functions, those lower-level functions that were routinely subdelegated in the normal course, could continue to be performed by subdelegatees. It is those lower-level duties, besides final approval ("paperwork signing"), that they feared an agency head would not be able to handle alone.

At a key meeting between Thompson and Democratic senator John Glenn, the delegable duties exception was agreed to in principle. Its expected application was illustrated with the example of a vacant office with the duty to "develop policy": "Even though *the agency head would have to sign off on a final policy* while that position was vacant; the agency head would not also have to develop the policy" (emphasis added).[31] A nearly identical example was provided again in a portion of the bill's Senate Report authored by five committee Democrats.[32] And Thompson, when introducing the bill on the Senate floor, described the exception as applying to "the routine functions of the office."[33]

As this drafting history shows, no one anticipated that final decisionmaking authority to sign off on final agency actions would be routinely interpreted as subdelegable and thus exempt from FVRA enforcement. What changed? The

DC Circuit ruled that all statutory authority is presumptively subdelegable in 2004, six years after the FVRA was passed.[34] After that, the executive branch began consistently arguing that the authority to take even final agency action is presumptively subdelegable and thus presumptively exempt from FVRA enforcement. That is the origin of today's widespread use of pseudo-acting officials.

THE SOLUTION: SHIFT THE ENFORCEMENT MECHANISM TO APPLY TO ALL REVIEWABLE AGENCY ACTIONS, RATHER THAN ALL NONDELEGABLE DUTIES

How could the FVRA be amended so as to curtail the scope of the delegation loophole and encourage permanent nominations? Is it possible to create a meaningful division of labor between the agency head and other subordinates when performing the duties of a vacant office? The answer lies in an aspect of the FVRA that did not receive much attention during its drafting: the limitation of enforcement to the invalidation of "actions."

In Thompson's first draft, the threat of invalidation was limited to "any action taken by" an improperly serving acting officer in "the exercise of an official duty" of the office.[35] In order to allay their fears that this could grind agencies to a halt, Senate Democrats immediately focused on narrowing the scope of the latter portion of the clause—the definition of an "official duty." Ironically, however, both sides lost sight of the fact that, by limiting enforcement to the invalidation of "actions," the clause already had a narrowed scope that would have prevented these fears of agency paralysis from coming true, even without the delegable duties exception.

The limitation to "actions" in Thompson's first draft remained in the FVRA through its final passage. The act invalidates any "action taken by" an invalidly serving acting officer "in the performance of any function or duty of" the vacant office.[36] The FVRA borrows the same definition of "action" that is found in the Administrative Procedure Act.[37] That definition, in turn, provides that "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[38]

The fears of administrative paralysis were misplaced because no matter how the FVRA defines a "function or duty," most of the routine functions of an office are not "agency actions" and thus cannot be invalidated by the act.[39] Drafting an internal deliberative memo on a policy question for a superior to review, for example, would not qualify as an "action."[40] Thus, fears that the enforcement mechanism could (without a delegable duties exception) require the agency head to take over routine tasks such as "program operations" or appearances in court were unfounded, because neither would qualify as an agency action.

Simply deleting the exception for delegable duties from the FVRA would thus bring the scope of the enforcement mechanism more in line with what the act's drafters expected—the functions and duties shifted to the agency head would be limited to decisions to take "agency actions," which as the drafters colloquially put it, generally means "signing paperwork" and making a discrete decision on behalf of the agency. This change could be accomplished by changing the FVRA's definition of a "function or duty" from any duty "required" by statute or regulation "to be performed by the applicable officer (*and only that officer*) [emphasis added]" to any duty "assigned" by statute or regulation "to be performed by the applicable officer," period.

In addition, there is a further practical limitation on the type of actions that can be invalidated, a limitation that makes it even more difficult for the FVRA to invalidate routine functions. The act does not create a cause of action providing for judicial review of agency actions that are invalid under its enforcement mechanism. Instead, unless some other statute grants review of the particular type of action at issue, judicial review of an FVRA violation is available only under the general grant of review found in the Administrative Procedure Act. That means, in general, that a lawsuit can only be brought to challenge a *final* agency action.[41] And since a legal challenge is the only means of implementing the FVRA's enforcement mechanism, a nonfinal action that can't be challenged in court is effectively exempt from the act's enforcement.

Simply amending the FVRA to eliminate the delegable duties exception would thus achieve an enforcement mechanism with bite that assigns a small but meaningful subset of the functions of a vacant office to the agency head alone when there is no valid acting officer: those functions that qualify as actions and that can be challenged in court. In practice, such actions will generally be limited to final

actions,[42] actions that are necessary antecedents of later final actions,[43] actions that can be collaterally attacked during enforcement proceedings, or actions that are important enough for Congress to have created a specific cause of action allowing them to be reviewed in court.

Thus, by hinging enforcement on the reviewability of an action, such an enforcement mechanism would determine whether a duty is shifted to the agency head by looking to a doctrine that is closely aligned with a duty's importance and effect on the general public. This would make a far more sensible dividing line than the current one that is defined by a duty's delegability, which under the current *U.S. Telecom* doctrine, now has little to do with a duty's importance.

AVOIDING UNINTENDED CONSEQUENCES

While this change would come close to achieving the compromise the FVRA drafters desired, one further tweak is necessary to avoid an unintended negative consequence. Although the delegable duties exception opened up an enormous unintended loophole, it also served to prevent one potential glitch. One further amendment is necessary to ensure that deleting the delegable duties exception does not unintentionally create that glitch.

Sometimes a function is explicitly assigned to multiple officials by a statute or regulation. Without the delegable duties exception, the FVRA would mandate a result that would serve neither accountability nor efficiency. That problematic result is that if one office is vacant and not filled by an acting officer, any other official (except for the agency head) who is assigned some of the same functions as the vacant office would be prevented from exercising those functions. Although the delegable duties exception has morphed into an enormous exception encompassing even duties never actually delegated prior to a vacancy, some provision is necessary so that other officials who have already been assigned some of the same functions as a vacant office can continue to exercise them.

How can this be achieved without reopening the loophole that would otherwise be closed by eliminating the delegable duties exception? The most straightforward solution is to alter the portion of the enforcement mechanism limiting the performance of agency actions to the agency head, creating an additional allowance for the exercise of such authority by other offices that already possessed that authority prior to the vacancy.

This could be achieved by amending the FVRA's subsection 3348(b)(2) as follows:

> (2) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office), only the *following* ~~head of such Executive agency~~ may *take any agency action in the performance of* ~~perform~~ any function or duty of such office:~~.~~
>
> > *(A) the head of such Executive agency;*
> > *(B) a person who serves in an office which has been assigned that same function or duty by statute; or*
> > *(C) a person who serves in an office which has been assigned that same function or duty by regulation, if*
> > > *(i) the applicable regulation was in effect on the date 180 days preceding the date on which the vacancy occurs and has been in effect continuously from that date to the date the function or duty is performed by the person who serves in that office; and*
> > > *(ii) the function or duty was performed at least once by the person serving in that office during the period beginning 545 days preceding the date on which the vacancy occurs and ending 180 days preceding the date on which the vacancy occurs, and that performance did not occur during a prior vacancy in the applicable office.*

What would this amendment accomplish? First, the new subsection (b)(2)(A) would allow the agency head to take any agency action in the performance of the functions and duties of a vacant office, just as the current FVRA allows. But in addition, the new subsections (b)(2)(B) and (b)(2)(C) would allow other positions that had been assigned the same function or duty as the vacant office to continue taking agency actions in the performance of that function or duty. These two subsections would apply to functions or duties assigned by statutes and regulations, respectively, but the

latter would also include caveats so that this new provision does not itself become a new loophole.

For functions and duties assigned by regulations (which include delegations), the new subsections (b)(2)(C)(i) and (b)(2)(C)(ii) would require that the authority must have been both assigned to the particular office and actually exercised at least 180 days before the vacancy. This would disqualify both last-minute subdelegations[44] and pretextual subdelegations that are made much earlier but only invoked when a vacancy arises.[45]

The effect of this new subsection is that the functions taken on by an agency head would be no more than what the officer in the now-vacant position actually performed alone. If an authority was shared with and performed by other officials, those other officials would be allowed to continue shouldering their load.

By shifting the enquiry from duties that are potentially subdelegable to duties that are actually performed by other officials, this approach would better achieve the balance that the FVRA's drafters sought. The preexisting division of labor would define the added burden on an agency head, who would never be asked to take on more functions than the previous occupant of a vacant office was actually able to perform alone.

CONCLUSION

The changes described above would be a vast improvement to the FVRA's current enforcement mechanism. They would achieve the goal of creating an enforcement mechanism that encourages permanent nominations by means of some inconvenience to an agency without ratcheting that inconvenience up to such a level that it creates agency paralysis. With the delegation loophole closed, the Vacancies Act would finally achieve the balance that Congress intended: a text that cannot be exploited to install unconfirmed acting officers indefinitely, but that also provides enough alternatives to ensure that the work of an office continues even if it is vacant for a lengthy period.

NOTES

1. U.S. Const. Art. II, § 2, cl. 2.

2. U.S. Const. Art. II, § 2, cl. 2.

3. See *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 935–36 (2017) (recounting the history of these statutes).

4. See *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 935–36 (2017) (recounting how the maximum tenure of acting appointments was set at six months in 1795, shortened to 10 days in 1868, and then lengthened to 30 days in 1891, 120 days in 1988, and 210 days in 1998).

5. The Vacancies Act currently limits the eligible pool of acting officers to three options: the "first assistant" to the vacant office; anyone serving in a Senate-confirmed position; or any federal employee who has served at least 90 days in a job at the top of the civil service payscale. See 5 U.S.C. § 3345(a)(1); (a)(2); (a)(3).

6. See "Federal Vacancies Reform Act of 1998," S. Rept. 105-250, p. 7: "If the purpose of the Vacancies Act is to limit the President's power to designate temporary officers, a position requiring Senate confirmation may not be held by a temporary appointment for as long as the President unilaterally decides."

7. See Morton Rosenberg, "The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative," Congressional Research Service, 1998, pp. 2–4 (recounting the history of disagreements between the executive branch and Congress leading up to 1998).

8. See, for example, 144 Cong. Rec. S11,028, statement of Senator Thurmond, September 28, 1998: "Because there is no consequence if the Vacancies Act is violated today, the Executive Branch simply ignores it. [An enforcement mechanism] is essential for the Act to be followed in the future."

9. 5 U.S.C. § 3348(d)(1).

10. See "Federal Vacancies Reform Act of 1998," pp. 19–20: "The Committee expects that litigants with standing to challenge purported agency actions taken in violation of these provisions will raise non-compliance with this legislation in a judicial proceeding challenging the lawfulness of the agency action."

11. 5 U.S.C. § 3348(a)(2).

12. See, for example, *Stand Up for California! v. U.S. Dept. of Interior*, 298 F. Supp. 3d 136, 150 (D.D.C. 2018).

13. *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004).

14. Nina Mendelson, "The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?," *Administrative Law Review* 72, no. 4. (2020): 533, 605.

15. Anne Joseph O'Connell, "Acting Agency Officials and Delegations of Authority," Administrative Conference of the United States, 2019, p. 63.

16. See O'Connell, "Acting Agency Officials and Delegations of Authority," p. 28: "If the duties of the . . . position are not exclusive to that job . . . an acting official and an official performing the delegated functions have the same authority, although they have different titles. . . . The main difference is that delegations can operate far longer than acting officials can serve."

17. Becca Damante, "At Least 15 Trump Officials Do Not Hold Their Positions Lawfully," *Just Security*, September 17, 2020.

18. See O'Connell, "Acting Agency Officials and Delegations of Authority," p. 19; see also Mendelson, "Permissibility of Acting Officials," p. 541: "Even if an office appears 'empty,' with neither a Senate-confirmed nor an acting official, someone often purports to exercise its authority."

19. O'Connell, "Acting Agency Officials and Delegations of Authority," p. 11.

20. See O'Connell, "Acting Agency Officials and Delegations of Authority," p. 29: "In some cases, delegations appear to substitute for nominations."

21. See, for example, "Order Denying Motion to Dismiss," *United States v. Village of Tinley Park* (N.D. Ill. filed July 17, 2017), ECF Doc. #55, p. 4.

22. Mendelson, "Permissibility of Acting Officials," p. 562.

23. Stephen Migala, "The Vacancies Act and an Acting Attorney General," *Georgia State University Law Review* 36 (2020): 699.

24. See Migala, "The Vacancies Act and an Acting Attorney General," p. A-11.

25. See Migala, "The Vacancies Act and an Acting Attorney General," p. A-26.

26. See Migala, "The Vacancies Act and an Acting Attorney General," pp. A-31, A-40: "Presumably many statutes or regulations vest numerous duties in each officer, making it potentially very onerous to require the Department head to perform all of those duties in the case of a vacancy."

27. Migala, "The Vacancies Act and an Acting Attorney General," p. A-31.

28. Migala, "The Vacancies Act and an Acting Attorney General," p. A-27.

29. Migala, "The Vacancies Act and an Acting Attorney General," p. A-27.

30. Migala, "The Vacancies Act and an Acting Attorney General," p. A-52.

31. Migala, "The Vacancies Act and an Acting Attorney General," p. A-53.

32. See additional views at "Federal Vacancies Reform Act of 1998," p. 31.

33. 144 Cong. Rec. S6,414, statement of Senator Thompson, June 16, 1998.

34. *U.S. Telecom*, 359 F.3d at 565.

35. Migala, "The Vacancies Act and an Acting Attorney General," p. A-11.

36. 5 U.S.C. § 3348(d)(1).

37. 5 U.S.C. § 3348(a)(1).

38. 5 U.S.C. § 551(13).

39. The FVRA does provide that when an office is vacant and there is no valid acting officer, "only the head of such Executive agency may perform any function or duty of such office," and this command is not limited to agency actions. 5 U.S.C. § 3348(b)(2). But this hortatory clause of the act appears to be toothless because it does not define when the performance of a function or duty is subject to invalidation. Nonetheless, I propose that this subsection should be amended for clarity so that it, too, is explicitly limited to agency actions. This is achieved by my proposed edit to the act's section 3348(b)(2), which is laid out in the section "Avoiding Unintended Consequences" of this briefing paper.

40. See Anne Joseph O'Connell, quoted in Jen Kirby, "A Top Official at the Justice Department Is Resigning. The Federal Vacancies Act Has a Solution for That," *Vox*, February 9, 2018. (Anne Joseph O'Connell: "How you challenge Vacancies Act violations is pretty tricky. . . . [I]n general, it can be hard to find an actual action, even though they may be doing things, but it might not come in a particular concrete action; it

might be giving advice or whatever.").

41. See *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 61–62 (2004): "Where no other statute provides a private right of action, the 'agency action' complained of must be '*final* agency action'" (emphasis in original); see also Mendelson, "Permissibility of Acting Officials," p. 598 (noting that "judicial review provides only a very limited check" on the actions of unconfirmed officials and that judicial review "typically is available only for final agency actions, such as rulemaking or adjudication").

42. The Supreme Court has held that an action is "final" if it "mark[s] the consummation of the agency's decisionmaking process" and is an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

43. See, for example, *SW General v. NLRB*, 796 F.3d 67, 72 (D.C. Cir. 2015), affirmed, 137 S. Ct. 929 (2017) (invalidating a final National Labor Relations Board order because the antecedent complaint [a non-final agency action] was issued in violation of the FVRA).

44. See Mendelson, "Permissibility of Acting Officials," p. 605 (suggesting that Congress might "deem permissible narrow delegations of individual authorities if accomplished significantly prior to the vacancy").

45. As Bob Bauer and Jack Goldsmith have noted, "limit[ing] delegations to those in place when the vacancy arises[] . . . might create perverse incentives to over-delegate in the first place[.]" Bob Bauer and Jack Goldsmith, *After Trump: Reconstructing the Presidency* (Washington: Lawfare Press, 2020), p. 329. Limiting delegations instead to those in place and *exercised* long before the vacancy arises would significantly limit the likelihood of delegations motivated solely by FVRA concerns.