S.W. General: The Court Reins In Unilateral Appointments

*Thomas A. Berry**

N.L.R.B. v. S.W. General, Inc.[1] represents the latest round in the long-running dispute over when and how the president can bypass the Senate in appointing executive-branch officers. Unlike the last Supreme Court case on this topic, *N.L.R.B. v. Noel Canning*,[2] this case concerned only statutory interpretation questions, not constitutional ones. Nonetheless, *S.W. General* is an important clarification of the law that governs acting officers, a law that will likely return to the Court before much longer.

This article will explore both the context of the statutory dispute and the future implications the decision may hold. First, I will give a brief history of the Appointments Clause and the various iterations of the Vacancies Act. That history culminates with the passage of the Federal Vacancies Reform Act (FVRA) in 1998, the statute at issue in *S.W. General*. Second, I will work through both the majority and dissenting opinions in *S.W. General*. This account will explain how the core of the disagreement came down to whether a single canon of interpretation—that reference to one thing in a class excludes all others (known by its Latin name *expressio unius*)—should have been applied.

Finally, after this rundown of the case itself, I will move on to examining three unsettled questions raised by the decision. First, what retroactive effect might it have on the actions of past acting officers

*College of Public Interest Law Fellow, Pacific Legal Foundation; former legal associate, Cato Institute. He contributed to an amicus brief filed by Cato in support of SW General at the Supreme Court, though his name could not appear on the brief because he was not yet a member of the bar. See Brief of Cato Institute as Amicus Curiae Supporting Respondent, N.L.R.B. v. S.W. General, Inc., 137 S. Ct. 929 (2017).

[1] 137 S. Ct. 929 (2017).

[2] 134 S. Ct. 2550 (2014).

who, we now know, were serving illegally? Second, how might the Court's final interpretation of one section of the FVRA affect *another* unsettled question regarding another important section of that same law? And third, are there constitutional problems with the FVRA itself (as suggested in a concurrence by Justice Clarence Thomas) that could arise in a future legal challenge?

I. Background

A. The Appointments Clause and the Vacancies Act

During the Constitutional Convention, there was a serious debate over the best method of appointment to both executive-branch offices and judicial positions. "One group of delegates, led by James Wilson, Nathaniel Gorham, Alexander Hamilton, and Gouverneur Morris, favored control of appointments by a strong executive. The opposing camp, led by Charles Pinckney, Luther Martin, George Mason, Roger Sherman, Oliver Ellsworth, and John Rutledge, favored legislative control of the appointment process."[3]

Each method had its passionate critics. In opposition to a plan that would have had the legislature select federal judges, James Wilson declared that "[e]xperience shewed the impropriety of such appointm[ents] by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences."[4] On the other side, Roger Sherman argued against unilateral presidential appointments and in favor of senatorial appointments. The Senate, he contended, "would be composed of men nearly equal to the Executive, and would of course have on the whole more wisdom."[5] For this reason, he believed the Senate "would bring into their deliberations a more diffusive knowledge of characters."[6] And finally, Sherman predicted that "[i]t would be less easy for candidates to intrigue with [the Senate], than with the Executive Magistrate."[7]

Eventually, as with many other aspects of the Constitution, the two sides reached a compromise that was acceptable to both. The

[3] Adam J. White, Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry, 29 Harv. J. L. & Pub. Pol'y 103, 110–11 (2005).

[4] 1 The Records of the Federal Convention of 1787, at 119 (Max Farrand ed., 1911).

[5] 2 The Records of the Federal Convention of 1787, at 43 (Max Farrand ed., 1911).

[6] *Id.*

[7] *Id.*

president would select each nominee, but those nominees would only be installed in office after obtaining the "advice and consent" of the Senate.[8] Gouverneur Morris touted the strength of this dual-role system: "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security."[9] On September 17, 1787, the convention approved the final version of the Appointments Clause when the delegates approved the final draft of the Constitution, giving us the system of executive-branch appointment we retain today:

> [The President] shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.[10]

But soon after, during George Washington's very first term, the executive branch confronted a problem that those at the convention never explicitly considered: what to do if an office unexpectedly falls vacant while the Senate is in session (when the Recess Apointments Clause cannot be invoked). Should the duties of that office go unperformed until a new nominee wins Senate confirmation, or could a system of temporary "acting" appointments somehow solve this problem? In 1792, the Second Congress chose the latter course, enacting a law declaring that in the case of a vacancy in any office

> whose appointment is not in the head [of that office's department], . . . it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons at his discretion to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease.[11]

[8] The phrase "advice and consent" was first put before the convention in a proposal by the Committee on Compromise on September 4, 1787. See *id.* at 498–99.

[9] *Id.* at 539.

[10] U.S. Const. art. II, § 2, cl. 2.

[11] Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281.3.

Three years later, the statute was amended so that "no one vacancy shall be supplied, in manner aforesaid, for a longer term than six months."[12]

This was the state of the law until 1868, when the first comprehensive "Vacancies Act" was passed.[13] This law expanded the number of offices that could be filled by acting officers, but also eliminated the power of the president to appoint "any persons" he wished. First assistants to an officer became the default acting-officer appointees, with presidential discretion to appoint instead someone currently serving in another Senate-confirmed office. Additionally, the Vacancies Act lowered the maximum tenure of acting officials dramatically, from six months to only 10 days.

The Vacancies Act was amended several times over the subsequent decades, but the core structure remained the same.[14] Eventually, however, a series of conflicts between the president and the Senate over temporary appointments convinced Congress that a major reform was needed. The result was the Federal Vacancies Reform Act (FVRA) of 1998,[15] the statute at issue in *S.W. General*.

The FVRA addressed two major flaws that had emerged in the Vacancies Act. First, when acting officers overstayed their time limitation, there were few practical consequences. The actions taken by an invalid acting officer still had the force of law, until—if push came to shove—a court found that the officer had overstayed his tenure. As a result, acting service beyond the time limitations in the act was widespread.[16] And to make matters worse, the U.S. Court of Appeals for the D.C. Circuit held in 1998 that even if an acting officer were found by a court to have served improperly, any subsequent legitimate officer could simply "ratify" the actions taken

[12] Act of Feb. 13, 1795, ch. 21, 1 Stat. 415.

[13] Act of July 23, 1868, ch. 227, 15 Stat. 168–69.

[14] The most significant changes were a steady lengthening of the tenure of acting officers. See Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision, 139 F.3d 203, 210 (D.C. Cir. 1998) (describing how the tenure of acting appointments was lengthened to 30 days in 1891 and then to 120 days in 1988).

[15] 5 U.S.C. § 3345 et seq.

[16] "[D]uring 1998 some 20% of the 320 advice and consent positions in the departments were being filled by temporary designees, most of whom had served beyond the 120-day limitation period of the Act." Morton Rosenberg, Congressional Research Service Report for Congress, The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative 1 (1998).

by the prior illegitimate acting officer, retroactively making those actions legally sound.[17]

Second, dozens of "delegation" statutes had proliferated over the decades, giving cabinet secretaries wide leeway to assign the duties of their departments to whomever they wished. As a result, those who were ineligible for appointment as acting officers under the terms of the Vacancies Act were frequently "delegated" the title and duties of precisely the same office, meaning the act's restrictions had become largely toothless.[18]

The FVRA attempted to solve these two problems by creating much more serious consequences for unauthorized acting service: with limited exceptions, actions taken by illegitimate acting officers were legally void and could not be retroactively "ratified" by later legitimate officers.[19] Further, the FVRA clarified that the delegation powers given to the cabinet secretaries could *not* be used to appoint acting officers.[20]

In addition to these two marquee changes, the FVRA also targeted the practice of giving nominees a "head start" in their job before Senate confirmation. With limited exceptions, the FVRA banned appointing the same person as both an acting officer and the nominee for Senate confirmation to be the permanent officer in the same position. It is a dispute over the extent of those limited exceptions that would lead to the *S.W. General* litigation.

[17] See Doolin, 139 F.3d at 212–14.

[18] The most high-profile instance of this maneuver, which helped to precipitate passage of the FVRA, was the delegation of power from the attorney general to Bill Lann Lee, making him acting assistant attorney general for the Civil Rights Division far longer than the time limitations of the Vacancies Act allowed. See Steven J. Duffield & James C. Ho, The Illegal Appointment of Bill Lann Lee, 2 Tex. Rev. L. & Pol. 335 (1998).

[19] See 5 U.S.C. § 3348(d)(1)–(2) ("An action taken by any person who is not acting [in compliance with the FVRA] shall have no force or effect" and "may not be ratified."). The legislative record makes clear that this change was a direct response to *Doolin*. See, e.g., 144 Cong. Rec. S6414 (stating that the FVRA "impose[s] a sanction for noncompliance," thereby "[o]verruling several portions of [*Doolin*]"); S. Rep. No. 105-250, at 5 ("The Committee . . . finds that th[e ratification] portion of [*Doolin*] demands legislative response.").

[20] See 5 U.S.C. § 3347.

B. Background of the S.W. General *Litigation*

When an ambulance company in Arizona entered into a dispute with its employees about annual bonuses, they likely did not anticipate that this would ultimately lead to the resolution of a textual debate that had lasted nearly two decades.

The ambulance company in question, S.W. General, had ceased paying certain "longevity bonuses" to its longer-tenured employees after the collective bargaining agreement that established those bonuses expired in December 2012. The employees believed that until the next collective bargaining agreement was put in place, they were entitled to continue receiving the bonuses under federal law.[21] And so in January 2013, as occurs in dozens of cases every year, the National Labor Relations Board (NLRB) issued a formal complaint alleging unfair labor practices.[22] Although the complaint was issued by a regional officer, all such complaints are filed under the authority of the general counsel of the NLRB, which is a Senate-confirmed position.[23]

At the time the complaint was issued, however, there was no Senate-confirmed general counsel. Instead, a longtime NLRB lawyer named Lafe Solomon was serving as the *acting* general counsel. Solomon believed himself to be validly serving pursuant to the FVRA, but S.W. General's response to the complaint alleged that he was not, and that the complaint was therefore unauthorized.[24] To understand S.W. General's argument, we have to get into the textual weeds.

The FVRA provides three alternate means to become an acting officer, which are referred to by their subsection numbers: (a)(1), (a)(2), and (a)(3). First, under subsection (a)(1), the "first assistant" to a vacant position can become an acting officer by default, immediately upon the vacancy occurring.[25] The term "first assistant" is never defined in the act itself, but most Senate-confirmed offices have a "deputy" or "assistant" who is designated by statute as the "first assistant" for FVRA purposes.

[21] Specifically, their claim was under sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (5).

[22] See S.W. General, Inc. v. N.L.R.B., 796 F.3d 67, 72 (D.C. Cir. 2015).

[23] See 29 U.S.C. § 153(d).

[24] See S.W. General, 796 F.3d at 72.

[25] See 5 U.S.C. § 3345(a)(1).

Second, under subsection (a)(2), the president can choose any currently serving Senate-confirmed officer from any part of the executive branch to serve as the acting officer.[26]

Third and finally, under subsection (a)(3), the president can choose any employee *in the same department as the vacancy* to serve as the acting officer, provided that the employee's job is at the highest of the 15 levels in the civil service pay scale (an indication that the job has management-level responsibilities) and that the employee held that job for at least 90 days during the previous year.[27] Unlike those appointed under (a)(2), those appointed under (a)(3) are not required to have held Senate-confirmed positions.

When Ronald Meisberg resigned as NLRB general counsel in June 2010, Lafe Solomon was appointed acting general counsel under subsection (a)(3).[28] He had been director of the NLRB's Office of Representation Appeals for the previous 10 years, and thus met both the tenure and salary requirements.[29] He was ineligible for appointment under (a)(2) because his job was not a Senate-confirmed position, and ineligible under (a)(1) because he was not the first assistant to the general counsel.

Six months later, in January 2011, the president nominated Solomon to be the permanent general counsel.[30] This brings us to the part of the FVRA's text that is disputed: the so-called "disqualification clause," also referred to by its subsection number (b)(1). The core of the controversy boiled down to this single question: did this clause disqualify Solomon from serving as the acting general counsel from the moment he was nominated for the permanent position? The disqualification clause reads as follows:

> Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if-
>
> (A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person-

[26] See 5 U.S.C. § 3345(a)(2).

[27] See 5 U.S.C. § 3345(a)(3).

[28] See S.W. General, 796 F.3d at 71.

[29] See *id.* at 73.

[30] See *id.* at 71.

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.[31]

There is no dispute that Solomon had never served as first assistant and thus met the criterion of (A)(i). Further, there is no dispute that the president had submitted Solomon's nomination for the permanent position, thus meeting the criterion of (B). Instead, the dispute is what meaning, if any, to give to the first three words (often called the preamble) of this section: "Notwithstanding subsection (a)(1)."

Does this preamble mean the entire disqualification clause applies *only* to acting officers who received that position under (a)(1)? If so, Solomon was not disqualified, since he received his position as acting officer under (a)(3), not (a)(1). Alternatively, is the purpose of the preamble only to *emphasize* that the disqualification applies to the otherwise-automatic elevation of the first assistant? In that case, the disqualification would likewise apply to the two other (not emphasized) categories of (a)(2) and (a)(3), and Solomon would have been disqualified from the moment he was nominated for the permanent position.

Soon after the FVRA was passed, the Office of Legal Counsel (OLC) weighed in on this textual question. In a lengthy guidance on the effects of the FVRA, OLC took the former position, that the disqualification clause applies only to subsection (a)(1).[32] Even though OLC gave no hint of the reasoning that led to this conclusion, the executive branch took this recommendation into practice. This, presumably, is why President Barack Obama nominated Solomon for the permanent position without fear of disqualifying him as the acting officer.

But OLC opinions are not binding on the judicial branch, and until *S.W. General* this textual question had rarely been confronted in the courts.[33] An administrative law judge and the NLRB itself both

[31] 5 U.S.C. § 3345(b)(1).

[32] See Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 64 (1999).

[33] Before *S.W. Gene*ral, only two federal district courts had examined the question. Both found that the disqualification clause applied to all three subsections. See Hooks

declined to address S.W. General's FVRA argument, and both ruled against S.W. General on the underlying labor-law issue.[34] S.W. General then appealed to the D.C. Circuit, which became the first court of appeals to grapple with this FVRA question.[35]

In August 2015, a unanimous three-judge panel of the D.C. Circuit agreed with S.W. General's textual argument. The court held that the "notwithstanding" preamble served only as a clarification, not as a limitation on the clause's overall scope.[36] The government asked the Supreme Court to take the case for review, which it did in June 2016. And that is how a dispute over just three words reached the U.S. Supreme Court.

II. The *S.W. General* Decision

On March 21, 2017, the Supreme Court ruled by a vote of 6–2 that the notwithstanding clause does *not* limit the reach of subsection (b)(1), and that Solomon was therefore ineligible for acting service and unauthorized to issue the complaint against S.W. General. Chief Justice John Roberts wrote the majority opinion, joined by Justices Anthony Kennedy, Clarence Thomas, Stephen Breyer, Samuel Alito, and Elena Kagan. Justice Sonia Sotomayor wrote a dissenting opinion, joined by Justice Ruth Bader Ginsburg. In addition, Justice Thomas wrote a concurring opinion, focusing not on the statutory interpretation question but on a constitutional issue that may be presented in a future case. In this section, I will summarize the competing statutory arguments of the majority and dissenting opinions. I will reserve a discussion of Justice Thomas's concurrence for a later section on the future implications of the case.[37]

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v. Remington Lodging & Hospitality, LLC, 8 F. Supp. 3d 1178, 1187–89 (D. Alaska 2014); Hooks v. Kitsap Tenant Support Servs., Inc., No. 13-cv-5470, 2013 WL 4094344, at *2 (W.D. Wash. Aug. 13, 2013).

[34] See S.W. General, 796 F.3d at 72 (citing 360 N.L.R.B. No. 109 (2014)).

[35] After the D.C. Circuit issued its opinion but before the Supreme Court ruled on the appeal, the Ninth Circuit likewise held that the disqualification clause applied to all three subsections. See Hooks v. Kitsap Tenant Support Servs., Inc., 816 F.3d 550, 558–59 (9th Cir. 2016).

[36] See S.W. General, 796 F.3d at 78.

[37] See *infra* notes 95–113 and accompanying text.

A. The Majority Opinion

The core of the majority's reasoning was that the reference to (a)(1) can be fully explained by (a)(1)'s unique structure as a default rule, *not* by a desire to limit the scope of the disqualification. "The phrase '[n]otwithstanding subsection (a)(1)' does not limit the reach of (b)(1), but instead clarifies that the prohibition applies even when it conflicts with the default rule that first assistants shall perform acting duties."[38]

Several pieces of evidence led the Court to this conclusion. First was the implausibility of the government's textual argument when considering two crucial words coming *after* the "notwithstanding" preamble: "person" and "section." The prohibition begins with the phrase "a person may not serve," which, as the Court noted, naturally means that the prohibition "applies to any 'person.'"[39] Such broad language would be inapt if the prohibition applied to only first assistants, since "[i]mportant as they may be, first assistants are not the only 'person[s]' of the bunch."[40] And the prohibition continues with the phrase "as an acting officer for an office under this section," which would naturally mean that the prohibition applies to the *whole* section. But (a)(1) is only a subsection within a larger section that identifies all three types of acting officers. As the Court observed, "[w]hen Congress wanted to refer only to a particular subsection or paragraph, it said so."[41] For this reason, the Court reasoned that the prohibition refers "to the entire section—§3345—which subsumes all of the [three] ways a person may become an acting officer."[42] The Court bolstered this reasoning with the use of comparative textualism, which looks to see how the same words are used in other parts of the same law. The Court found that in each of the other instances where "person" and "section" were used, they referred to all *three* types of acting officers.[43]

[38] S.W. General, 137 S. Ct. at 938.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 939.

[42] *Id.*

[43] See *id.* (noting that a later section of the law specifies how long "the *person* serving as an acting officer as described under *section* 3345 may serve in the office," and that still another clause refers to actions "taken by any *person* who is not acting under *section* 3345, 3346, or 3347") (emphasis added by the Court).

The Court then turned to another familiar textual question: did Congress have alternate means of expression available besides this broad language—words that would have unambiguously limited the disqualification to subsection (a)(1)? And the answer to that question was yes: "Replacing 'person' with 'first assistant' would have done the trick. So too would replacing 'under this section' with 'under subsection (a)(1).'"[44] As the Court has held in previous statutory interpretation cases, forgoing a "readily available and apparent alternative" strongly suggests that Congress meant the words it chose to have their natural meaning.[45]

With this broad meaning as the clear winner in everything *after* the preamble, the Court then turned to an analysis of the preamble itself—the only part of the clause that, in the government's view, pointed in the opposite direction. First, the Court noted that if the preamble were meant to *limit the scope* of the clause, then the choice of the word "notwithstanding" would have been inapt, because "[t]he ordinary meaning of 'notwithstanding' is 'in spite of,' or 'without prevention or obstruction from or by.'"[46] A notwithstanding clause is thus meant to *settle a conflict* between two provisions, not to *narrow the applicability* of a provision.[47] And the notwithstanding clause of (b)(1) does settle a conflict, because subsection (a)(1) flatly states that a first assistant "shall" become the acting officer in the event of a vacancy. The disqualification clause creates a new exception that conflicts with "shall;" in other words, it tells us that the "shall" in (a)(1) does not actually always mean "shall."[48]

But this explanation still leaves one puzzle: both subsections (a)(2) and (a)(3) *also* describe situations in which a person (seemingly without exception) can become the acting officer. This means that logically speaking, the disqualification clause conflicts with those two

[44] *Id.*

[45] *Id.* (quoting Knight v. Commissioner, 552 U.S. 181, 188 (2008)).

[46] *Id.* (quoting Webster's Third New International Dictionary 1545 (1986); Black's Law Dictionary 1091 (7th ed. 1999)).

[47] "In statutes, the word [notwithstanding] 'shows which provision prevails in the event of a clash.'" *Id.* (quoting Antonin Scalia & Brian Garner, Reading Law: The Interpretation of Legal Texts 126–27 (2012)).

[48] See *id.* ("[The preamble] confirms that the prohibition on acting service applies even when it conflicts with the default rule that the first assistant shall perform acting duties.").

subsections as well. Yet the notwithstanding clause singles out only (a)(1). How should we explain this singling out, and is it meaningful to the operation of the FVRA? That is the major question on which the majority and dissent split, and it is the question the Court turned to in the remainder of its textual analysis.

1. The Notwithstanding Clause and the *Expressio Unius* Doctrine

The core of the government's argument was that "singling out subsection (a)(1) carries a negative implication: that 'Congress did not intend Subsection (b)(1) to override the alternative mechanisms for acting service in Subsections (a)(2) and (a)(3).'"[49] This is an application of an interpretive doctrine holding that what is *not* said can sometimes be as meaningful as what *is* said. That doctrine is known by its Latin name: *Expressio unius est exclusio alterius*, "'expressing one item of [an] associated group or series excludes another left unmentioned.'"[50] We use this general rule to make inferences in daily life: "If a sign at the entrance to a zoo says 'come see the elephant, lion, hippo, and giraffe,' and a temporary sign is added saying 'the giraffe is sick,' you would reasonably assume that the others are in good health."[51]

But *expressio unius* is not an absolute rule, and context determines whether it should be decisive. As Karl Llewellyn observed more than 60 years ago, the natural "parry" to the *expressio unius* canon is that in some statutes "[t]he language may fairly comprehend many different cases where some only are expressly mentioned by way of example."[52] The difficult work is determining, from context, whether a particular case has been singled out only for the purpose of example, or instead for the purpose of excluding the unmentioned cases.

In the majority's view, there is one very good reason to believe (a)(1) was singled out only for emphasis: singling out one potential conflict for explicit clarification would be expected if that conflict "was

[49] *Id.* at 939–40 (quoting NLRB Reply Brief 3).

[50] *Id.* at 940 (quoting Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 80 (2002)) (alterations in original).

[51] *Id.*

[52] Karl Llewellyn, Remarks on the Theory of Appellate Decisions and the Rules or Canons about How Statutes Are to Be Construed, 3 Vand. L. Rev. 395, 405 (1950).

particularly difficult to resolve, or was quite likely to arise."[53] As an illustration, the Court gave an everyday example of such a situation:

> Suppose a radio station announces: "We play your favorite hits from the '60s, '70s, and '80s. Notwithstanding the fact that we play hits from the '60s, we do not play music by British bands." You would not tune in expecting to hear the 1970s British band "The Clash" any more than the 1960s "Beatles." The station, after all, has announced that "we do not play music by British bands." The "notwithstanding" clause just establishes that this applies even to music from the '60s, when British bands were prominently featured on the charts. No one, however, would think the station singled out the '60s to convey implicitly that its categorical statement "we do not play music by British bands" actually did not apply to the '70s and '80s.[54]

In the Court's view, *expressio unius* would be inappropriate when interpreting the FVRA for the same reason that it would be inappropriate when interpreting this radio advertisement. Just as the '60s differ from the other two decades in quantity of British bands, so does (a)(1) differ from the other two subsections in an important respect: "Adding 'notwithstanding subsection (a)(1)' makes sense because (a)(1) conflicts with (b)(1) in a unique manner. The former is mandatory and self-executing: The first assistant 'shall perform' acting duties."[55] By contrast, "subsections (a)(2) and (a)(3) just say that the President 'may direct'" persons to perform acting duties.[56] "The natural inference, then, is that Congress left these provisions out of the 'notwithstanding' clause because they are different from subsection (a)(1), not to exempt [them] from the broad prohibition" of the disqualification clause.[57]

This argument against the *expressio unius* canon likely determined the Court's decision, because the government relied almost exclusively on *expressio unius* for its textual case. Once the Court rejected *expressio unius*, it was almost certain to affirm the D.C. Circuit's

[53] S.W. General, 137 S. Ct. at 940.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 940–41.

reading and rule for S.W. General. But for good measure, the Court did not stop there, instead adding a few miscellaneous arguments to further bolster the case for a broad reading of the disqualification clause.

2. Structural and Extra-Textual Arguments

The Court's main structural arguments centered on a section of the FVRA that I have not yet mentioned: subsection (b)(2).

The disqualification clause is an exception to the president's general power to appoint acting officers. But in typical congressional fashion, the FVRA was also written with an *exception to the exception*, specifying a particular circumstance in which someone who would otherwise be disqualified by the clause may nonetheless serve. Subsection (b)(2) is that exception to the exception. It applies only if three criteria, listed separately, are all met. First, that "such person is serving as the first assistant to" the vacant office.[58] Second, that "the office of such first assistant is" itself a Senate-confirmed office.[59] And third, that "the Senate has approved the appointment of such person to such [first assistant] office."[60]

It is the first of these three criteria that provides further evidence that the disqualification clause applies more broadly than just the first assistants of (a)(1). For if it did not, "there would be no need to state the requirement . . . that 'such person is serving as the first assistant.'"[61] If everyone who might be disqualified necessarily served as a first assistant, this "makes the first requirement [for the exception to disqualification] superfluous."[62] This is a result that those on the Court "typically try to avoid."[63]

The other structural point made in the majority opinion is a rebuttal of an argument made in the dissent. But since the premise of that argument is more fully laid out in the dissent, I will reserve it for the upcoming discussion of the dissenting opinion.[64]

[58] 5 U.S.C. § 3345(b)(2)(A).

[59] 5 U.S.C. § 3345(b)(2)(B).

[60] 5 U.S.C. § 3345(b)(2)(C).

[61] S.W. General, 137 S. Ct. at 941.

[62] *Id.*

[63] *Id.* (citing Williams v. Taylor, 529 U.S. 362, 404 (2000)).

[64] See *infra* notes 74–78 and accompanying text.

The Court devoted the remainder of the opinion to a short discussion of extra-textual evidence.[65] But before it did so, it made clear that these factors would not be determinative: "The text is clear, so we need not consider this extra-textual evidence."[66] The Court declined to give weight to the legislative statements and drafting histories through which the two sides attempted to prove congressional intent, noting that "[w]hat Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators."[67] And finally, the Court dismissed the OLC opinion on which the executive branch had long relied, since both OLC and a similar Government Accountability Office report "paid the matter little attention" and "made conclusory statements about subsection (b)(1), with no analysis."[68]

With the interpretive work done, applying the FVRA to Solomon's case took only a single paragraph. Since he had been ineligible to serve from the time he was nominated for the permanent position in 2011, the order he purported to issue against S.W. General in 2013 was invalid, and therefore vacated.[69]

B. The Dissenting Opinion

Justice Sotomayor's disagreement with the majority can be easily summarized: whereas the majority believed *expressio unius* was inapplicable to this case, the dissent believed it was determinative. The dissent summarized its own argument:

> A notwithstanding clause identifies a potential conflict between two or more provisions and specifies which provision will prevail. Under the familiar *expressio unius est exclusio alterius* interpretive canon, the choice to single out subsection (a)(1)—and only subsection (a)(1)—in this notwithstanding clause strongly suggests that the prohibition reaches, and conflicts with, subsection (a)(1), and only subsection (a)(1).[70]

[65] See S.W. General, 137 S. Ct. at 941–43.

[66] *Id.* at 942.

[67] *Id.* (citing Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79 (1998)).

[68] *Id.* at 943.

[69] *Id.* at 943–44.

[70] *Id.* at 950 (Sotomayor, J., dissenting).

How did Justice Sotomayor reach the opposite conclusion as to whether *expressio unius* is applicable? At the heart of determining whether that canon should apply is the task of finding plausible explanations for *why* the legislature neglected to list the omitted examples. And while one explanation is present here—that the word "shall" appears only in (a)(1)—others are absent.

Most important, the number of other subsections with which (b)(1) might conflict are neither too *numerous* nor too *unpredictable* to expect drafters to list them. Indeed, the dissent emphasized how easy it would have been to name them all in a single sentence by doing so itself: "The omission of any reference to subsections (a)(2), (a)(3), and (c)(1), in spite of the parallel potential for conflict with those subsections, suggests that the omission was a 'deliberate choice, not inadvertence.'"[71] Because referencing the other subsections would have been just as easy as writing that sentence, the dissent concluded that "the clause's specific reference to subsection (a)(1) and only subsection (a)(1) strongly supports reading the attached prohibition to limit only subsection (a)(1)."[72]

Further, Justice Sotomayor found the presence of "shall" in (a)(1) and only (a)(1) to be an unconvincing explanation. As she pointed out, curtailing the default rule of (a)(1) and curtailing the presidential appointment powers of (a)(2) and (a)(3) both alter the operation of those respective subsections. The distinction between an automatic appointment and a conditional appointment "makes no difference when asking whether a conflict between subsections (b)(1) and (a)(1) would be harder to resolve without guidance than a conflict between subsection (b)(1) and the other subsections."[73]

The dissent then turned to a structural argument based on a clause that I have not yet discussed: subsection (c)(1). "Under subsection (c)(1), the President may designate a person whose term in an office has expired and who has been nominated to a subsequent term to serve as

[71] *Id.* (quoting Bruesewitz v. Wyeth LLC, 562 U.S. 223, 232–33 (2011)).

[72] *Id.* at 951 (citing Preseault v. ICC, 494 U.S. 1, 13–14 (1990)).

[73] *Id.* What the majority could have written in response is that the project of interpretation is not to find whether (b)(1) *actually* conflicted with (a)(1) more than it did with the other subsections, but instead whether it would have *seemed to the drafters* to have done so. In other words, a plausible account for a legislative drafting decision need not assume that legislative drafters are perfectly rational in the distinctions they draw.

the acting official."[74] In other words, (c)(1) deals with the particular situation where a vacancy arises not by death, illness, resignation, or firing, but instead by the expiration of an officer's term in office. In that situation, a *fourth* type of person becomes eligible for appointment as an acting officer, beyond the first assistant of (a)(1), the Senate-confirmed officer of (a)(2), and the high-ranking employee of (a)(3). This fourth type of person is the very person whose term has just expired, *provided that* the person has been nominated by the president for an additional term.

Here is the question: does the disqualification clause apply to acting officers appointed under (c)(1)? If it does, then the scope of (c)(1) is actually vastly smaller than it appears. By definition, those appointed acting officer under (c)(1) have also been nominated for the permanent position, meeting one of the criteria for disqualification under (b)(1). So unless an appointee somehow served as first assistant for 90 days and then subsequently started *and finished* a term as the officer lasting 275 days or less (thereby ensuring that the 90 days fell within the last 365), that appointee could not actually take advantage of (c)(1).[75] Therefore, if the disqualification clause applies to (c)(1), it would disqualify *nearly everyone* who could otherwise be appointed the acting officer under (c)(1).

This makes it much more likely that (b)(1) does *not* apply to (c)(1). But if it does not apply, that raises a problem for the majority's argument. If the "notwithstanding" clause is only a point of clarification and does not limit the broad meanings of "person" and "section," why should (b)(1) *not* apply to the acting officers appointed under (c)(1)? In other words, how can a principled line be drawn so that the clause applies to the (unmentioned) subsections (a)(2) and (a)(3) but not to the (similarly unmentioned) subsection (c)(1)?

For the majority, a separate canon of interpretation solves this problem, and determines that the disqualification clause should *not* apply to (c)(1): "'[I]t is a commonplace of statutory construction that the specific governs the general.'"[76] Even if the notwithstanding

[74] *Id.*

[75] See *id.* at 951–52 ("It is unlikely, even implausible, that a person who serves out a set term will have served as the first assistant to her own office during the year before her term expired.").

[76] *Id.* at 941 (majority op.) (quoting RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012)) (alterations in original).

clause were not in the statute at all—in which case both sides agreed that (b)(1) would apply to (a)(1), (a)(2), and (a)(3)—this canon would provide a reason to think (b)(1) does *not* apply to (c)(1). In the majority's view, "[t]he general prohibition on acting service by nominees yields to the more specific authorization allowing officers up for reappointment to remain at their posts."[77]

For the dissent, however, this line of reasoning undermined the breadth that the majority otherwise wished to give the words "person" and "section": "The Court's reasoning on this point undercuts its opening claim that the words 'person' and 'under this section' in subsection (b)(1) must refer to 'anyone who performs acting duties under the FVRA.'"[78] In the dissent's view, by relying heavily on the plain meaning of the words after the preamble, the majority inadvertently proved too much.

Finally, Justice Sotomayor concluded with a survey of legislative history and other extra-textual evidence, arguing that they too pointed toward a narrower reading of (b)(1).[79] But the majority's approach made the details of these disputes over competing floor statements inconsequential. *S.W. General* was unabashedly won and lost on purely textualist grounds. And this in itself, beyond the details of the case and the outcome of the textual analysis, should be a source of encouragement for many.

III. After *S.W. General*: Unanswered Questions

A. Retroactivity

After the *S.W. General* ruling, we can say two things with certainty. First, the NLRB order against S.W. General has been vacated. And second, no *future* acting officer appointed under (a)(2) or (a)(3) can serve in violation of (b)(1). But this leaves a crucial unanswered question: what is the status of past legal actions, made any time in the 19 years between passage of the FVRA and *S.W. General*, that we now know were illegitimate because taken by acting officers violating (b)(1)? What is the retroactive effect, if any, of the *S.W. General* decision?

The short answer, most likely, is very little. The D.C. Circuit briefly addressed this question in concluding its opinion:

[77] *Id.*

[78] *Id.* at 952 (Sotomayor, J., dissenting) (quoting *id.* at 938 (majority op.)).

[79] See *id.* at 953–54.

> Finally, we emphasize the narrowness of our decision. . . . [W]e do not expect [this decision] to retroactively undermine a host of NLRB decisions. We address the FVRA objection in this case because the petitioner raised the issue in its exceptions to the ALJ decision as a defense to an ongoing enforcement proceeding. We doubt that an employer that failed to timely raise an FVRA objection—regardless whether enforcement proceedings are ongoing or concluded—will enjoy the same success.[80]

During oral argument at the Supreme Court, Justice Kagan asked the government's lawyer, Acting Solicitor General Ian Gershengorn, whether he agreed with the D.C. Circuit's suggestion. Gershengorn expressed more concern than the D.C. Circuit:

> It does subject the past officials to substantial uncertainty. In truth, we don't know exactly the extent of it, because we don't know when we'll have defenses of waiver. . . . I'm in a tough position, because I don't want to argue too hard against defenses that we're going to want to assert later. But I do think what Judge [Karen] Henderson [author of the D.C. Circuit opinion] was talking about in particular was the NLRB situation . . . . We have not gone back and catalogued all of the potential ramifications, but we do think that with over 100 officials [appointed in the same manner as Solomon] over the course of 20 years, the effects of this are really quite significant.[81]

Whether Gershengorn's fears were well-founded is an open question, one that will only be resolved if and when the actions of these 100-odd officers are actually challenged in court. But it is telling that neither the majority nor dissenting opinion even mentioned this issue, a sign that the justices may have reached the unanimous conclusion that the D.C. Circuit was likely correct on the lack of retroactive repercussions.

*B. The Acting Service of "*Ex Post *Appointee" First Assistants*

Interpreting a complex statute is a bit like solving a crossword puzzle. As the answer to one question is filled in, that answer

[80] S.W. General, 796 F.3d at 82–83 (citing 29 U.S.C. § 160(e); Andrade v. Lauer, 729 F.2d 1475, 1499 (D.C. Cir. 1984)).

[81] Transcript of Oral Arg. at 17–19, N.L.R.B. v. S.W. General, Inc., 137 S. Ct. 929 (2017).

constrains the available solutions to other questions. And just as an early mistake in a crossword puzzle can lead to a cascade of errors, so can one false interpretation lead to other mistakes of interpretation in the same statute. The Supreme Court's decision reveals that this is exactly what happened in an OLC opinion nearly 20 years ago.

Consider this scenario: A Senate-confirmed officer unexpectedly leaves office while her first assistant position is vacant. The president would like to appoint Mr. Smith to serve as the acting officer, beginning immediately. Mr. Smith has never before served in government, however, and so is ineligible for appointment as the acting officer under either subsection (a)(2) or (a)(3). But the president takes advantage of the simultaneous vacancy in the first-assistant position and appoints Smith as the first assistant (which requires neither prior government service nor Senate confirmation), and then Smith is immediately elevated, becoming the acting officer under subsection (a)(1).

Intuitively, such a maneuver seems to be against the spirit of the FVRA. Most first-assistant positions may be filled by *anyone*, with no requirement of prior governmental service of any kind. But if anyone may become an acting officer by appointment as first assistant *after* a vacancy occurs (when the president knows that the appointee will automatically thus become the acting officer), the FVRA's limitations on who is eligible to be appointed under subsections (a)(2) and (a)(3) become almost meaningless. That is, whenever a first assistant position is vacant, the de facto prerequisites for appointment to serve as the acting officer become only whatever prerequisites are placed upon appointment to that office's *first assistant* position. Since Congress would not likely have created the detailed restrictions on service under subsections (a)(2) and (a)(3) if it intended this workaround, the practice of elevating *ex post* first assistants is in severe tension with the purpose of the law.

But this purposive argument does not settle the textual question. The text of subsection (a)(1) itself reads: "If an officer . . . dies, resigns, or is otherwise unable to perform the functions and duties of the office– the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity."[82] The answer to whether a first assistant appointed *after* a vacancy arises can be elevated to acting officer depends on

[82] 5 U.S.C. § 3345(a)(1).

whether the phrase "first assistant to the office of such officer" includes first assistants appointed *after* a vacancy arises. The courts have never settled that question, but OLC has staked an opinion on it. *S.W. General* has now seriously called that OLC opinion into doubt.

In its initial 1998 guidance after the passage of the FVRA, OLC advised that someone appointed first assistant after a vacancy occurred could *not* become the acting officer:

> Question 13. If someone is designated to be first assistant after the vacancy occurs, does that person still become the acting officer by virtue of being the first assistant?
>
> Answer. While the Vacancies Reform Act does not expressly address this question, we believe that the better understanding is that you must be the first assistant when the vacancy occurs in order to be the acting officer by virtue of being the first assistant.[83]

In a 2001 opinion, however, OLC changed its mind:

> Having now specifically considered the question in light of both the Act's text and structure, we conclude that our initial understanding was erroneous. . . . Given the Act's text and structure, we now believe that the better understanding is that an individual need not be the first assistant when the vacancy occurs in order to be the acting officer by virtue of being the first assistant.[84]

OLC gave two arguments in support of its reversal. But of these two arguments, one depended entirely on the premise that the Supreme Court rejected in *S.W. General*.

OLC's argument centered around a conflict that its initial interpretation would have created with the disqualification clause at issue in *S.W. General*. Recall that a person is disqualified from serving as acting officer if he is nominated for the permanent position *and* "during the 365-day period preceding the date of the [vacancy], such person did not serve in the position of first assistant to the office of such

[83] 23 Op. O.L.C. at 63–64.

[84] 25 Op. O.L.C. 177, 179, 181 (2001).

officer."[85] In explaining the problem caused by this second requirement, OLC implicitly assumed that the disqualification clause applies only to acting officers appointed under (a)(1). That is why OLC argued that this second requirement

> [would be] meaningless if an individual who was not the first assistant when the vacancy occurred is already flatly prohibited from serving in an acting capacity pursuant to subsection (a)(1), as we previously concluded. Indeed, [the requirement] was necessary only if an individual who becomes first assistant after a vacancy occurs could otherwise serve in an acting capacity pursuant to subsection (a)(1). If [this requirement] is to be given operative effect, which it must, our initial understanding of subsection (a)(1) must give way.[86]

If we assume that the disqualification clause applies only to subsection (a)(1), then OLC's argument makes sense. If the disqualification clause is limited to the universe of those who might become acting officers under (a)(1), then that universe seemingly must include people who never served for a moment as first assistants *before* the vacancy. Otherwise, the number of people actually disqualified by this portion of the disqualification clause would be a null set; every (a)(1) acting officer appointed for the permanent position would have previously served as first assistant, and therefore would be immune from this type of disqualification.[87]

But after *S.W. General*, we now know that the disqualification clause applies to those who become acting officers under subsections (a)(2) and (a)(3) as well. As a result, this textual problem has disappeared. The number of those who become acting officers under (a)(1) having served no time as first assistant prior to the vacancy could indeed be zero. That is because the portion of the disqualification clause at issue is targeted exclusively at those acting officers

[85] 5 U.S.C. § 3345(b)(1)(A)(i).

[86] 25 Op. O.L.C. at 180.

[87] This does not mean the *entire* disqualification clause would be a dead letter. The clause also disqualifies those appointed to the permanent position who "served in the position of first assistant to the office of such officer for less than 90 days" during the preceding year. 5 U.S.C. § 3345(b)(1)(A)(ii). The problem that OLC identified is that this would be left as the *only* portion of the disqualification clause to ever have operative effect.

who obtained that position through (a)(2) or (a)(3), and who therefore likely had not served as the first assistant prior to the vacancy.[88]

One of the two justifications for OLC's position has thus been entirely eliminated by the *S.W. General* decision. But OLC did give one additional textual argument, which is now likely to be at the center of any future litigation on this question.

In replacing the Vacancies Act with the FVRA, Congress amended the wording used in what is now subsection (a)(1). Instead of promoting the "first assistant to the officer" who died or resigned, the FVRA instead promotes "the first assistant to the *office*" of the officer who died or resigned.[89] OLC reasoned that the phrase that had formerly been used, the "first assistant to the officer who resigned," would naturally describe only one person, the first assistant at the time of the original vacancy. By *not* using that phrase, and instead choosing the broader phrase "first assistant *to the office* of the officer who resigned," the drafters of the FVRA would seem to have intended the language to have a broader scope. Building on this premise, OLC assumed that the only way to give the clause a broader scope was to include people holding the office of first assistant not just when the original Senate-confirmed officer resigned, but also at any time thereafter.[90]

But this argument is flawed as well, because a close reading of legislative history reveals a different reason for this broader language. The language was not changed to allow a first assistant to fill a vacancy immediately upon being appointed. Instead, it was most likely changed to deal with a different specific contingency.

Suppose that Mr. Jones is serving as an acting officer pursuant to the FVRA and Mr. Smith is later appointed as his first assistant. Sometime later, Acting Officer Jones dies or resigns as acting officer. In this situation, where Smith became first assistant *after* Jones began serving as acting officer, may Smith succeed to acting officer under (a)(1)? In other words, may one acting officer be succeeded by *another* acting officer under (a)(1)? The floor statements of Senator

[88] Splitting the disqualification clause into two subsections thus makes perfect sense: the portion disqualifying those who had never served as first assistants is targeted at (a)(2) and (a)(3) appointees, while the portion disqualifying those who had served as first assistants for less than 90 days is targeted at (a)(1) appointees.

[89] 5 U.S.C. § 3345(a)(1) (emphasis added).

[90] See 25 Op. O.L.C. at 179–80.

Fred Thompson (a sponsor of the FVRA) indicate that the broader language was meant to resolve *this* question (and only this question) in the affirmative. Describing the final version of the FVRA on the Senate floor, Senator Thompson said:

> The term "first assistant to the office" is incorporated into [the FVRA] rather than "first assistant to the officer." This change is made to "depersonalize" the first assistant. Questions have arisen concerning who might be the vacant officer's first assistant if the acting officer dies or if the acting officer resigns while a permanent nomination is pending. The term "first assistant to the officer" has been part of the Vacancies Act since 1868, however, and the change in wording is not intended to alter case law on the meaning of the term "first assistant."[91]

This statement suggests that when an *acting* officer leaves that role through death or resignation, she should be succeeded by the first assistant to the office *at that moment*, not by the person who was the first assistant at the time of the original vacancy. In other words, the "depersonalization" was meant to ensure that the first assistant to not only the original Senate-confirmed officer, but also to subsequent *acting* officers, would be eligible to become acting officer under subsection (a)(1).[92] But it does nothing to suggest that a first assistant appointed when an office is filled with *neither* a permanent officer *nor* an acting officer may immediately be elevated to acting officer.

After *S.W. General*, OLC's 2001 guidance rests on very shaky footing. Nonetheless, because of that guidance, elevating *ex post* first assistants to acting officer has been the practice of the executive branch

[91] 144 Cong. Rec. S12,822 (daily ed. Oct. 21, 1998).

[92] This understanding accords with Senator Thompson's similar statement in the Senate report that "[a]n acting officer may die or resign. *In that event*, the first assistant, if there *is* one, or a new presidential designee of a Senate-confirmed officer may become the acting officer." Comm. on Gov'tal Affairs, 105th Cong., S. Rep. No. 105-250, at 14 (1998) (emphasis added).

for three administrations.[93] After *S.W. General*, a challenge to this practice is likely not far off.[94]

C. Justice Thomas's Concurrence: Is the FVRA Constitutional?

S.W. General was a statutory interpretation case, and neither side raised a constitutional argument. But that did not stop Justice Thomas, in a concurrence, from flagging a serious constitutional concern with the FRVA itself, one that may well arise in a future case.

Thomas's concurrence began with a persuasive originalist argument that the Constitution's Appointments Clause applies to acting officers just as much as permanent ones: "Around the time of the framing, the verb 'appoint' meant '[t]o establish anything by decree,' or '[t]o allot, assign, or designate.' When the President 'direct[s]' a person to serve as an acting officer, he is 'assign[ing]' or 'designat[ing]' that person to serve as an officer."[95] For this reason, Thomas concluded that "[w]hen the President 'direct[s]' someone to serve as an officer pursuant to the FVRA, he is 'appoint[ing]' that person as an 'officer of the United States' within the meaning of the Appointments Clause."[96]

[93] To give just one example, this maneuver was recently used to install someone with no prior government experience as the acting assistant attorney general (AAG) for the Office of Civil Rights in the Department of Justice. When the prior acting AAG Molly Moran resigned, ACLU lawyer Vanita Gupta appears to have been appointed principal deputy AAG and acting AAG *simultaneously* on October 20, 2014, *after* Moran's resignation. I have not found any evidence that Moran remained acting AAG until moments after Gupta had officially become principal deputy AAG. See Department of Justice Press Release, Attorney General Holder Announces Vanita Gupta to Serve as Acting Assistant Attorney General for the Civil Rights Division (Oct. 15, 2014), https://www.justice.gov/opa/pr/attorney-general-holder-announces-vanita-gupta-serve-acting-assistant-attorney-general-civil ("Gupta begins at the department on Monday, Oct. 20.").

[94] The D.C. Circuit opinion in *S.W. General* (but not the Supreme Court's) briefly waded into this very question. Citing OLC's first (and later renounced) position, the D.C. Circuit noted that "[a]lthough we do not decide its meaning today, subsection (a)(1) may refer to the person who is serving as first assistant *when the vacancy occurs*." S.W. General, 796 F.3d at 76 (citing 23 Op. O.L.C. at 64) (emphasis in original).

[95] S.W. General, 137 S. Ct. at 946 (Thomas, J., concurring) (citations omitted).

[96] *Id.* (alterations in original). There is, however, an original-practice argument that could be used to rebut Thomas's original-meaning argument. The Second Congress, which comprised many of the same people who had ratified the Constitution itself, passed an act granting the president the unilateral power to appoint acting officers, including for principal positions. See *supra* note 12 and accompanying text. This sug-

Here is the problem: The Appointments Clause only allows Congress to vest an appointment in "the president alone" if the appointee is an "inferior officer."[97] Principal officers must be confirmed by the Senate, and many of the positions that can be filled under the FVRA—most obviously cabinet secretaries—are indisputably principal officers.[98] How, then, could the FVRA's method of unilateral appointment to acting service in these principal positions comply with the Appointments Clause?

One possible solution is that the time limits the FVRA places on acting service might "downgrade" principal officers to inferior officers. A Senate-confirmed cabinet secretary is indisputably a principal officer. But an acting secretary, who knows that by law she may only serve while someone else is nominated to replace her (plus a seven-month grace period), is in a more constrained situation, perhaps one so constrained as to make her "inferior."[99]

Justice Thomas, however, quickly rejected this possibility. The fact that acting officers are appointed temporarily "does not change the analysis," Thomas argued, because "the structural protections of the Appointments Clause [cannot] be avoided based on such trivial distinctions."[100] As Thomas pointed out, the tolling of the FVRA's time limit during the pendency of a permanent nomination means that there is no hard upper limit to how long acting officers can theoretically serve. Lafe Solomon himself, because of the lengthy period of time his own nomination was stalled in the Senate, "served

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gests that many of those who originally enacted the Appointments Clause did not consider it a bar to the unilateral appointment of acting principal officers. The most likely explanation for this is that they did not believe the Appointments Clause applied to acting appointments at all.

[97] U.S. Const. art. II, § 2, cl. 2.

[98] Thomas devoted the bulk of his concurrence to an analysis of whether Solomon's position—general counsel of the NLRB—is itself a principal officer position. See S.W. General, 137 S. Ct. at 946–48 (Thomas, J., concurring). Thomas concluded that the position is likely a principal one. *Id*. at 948. This particular question, though, is not relevant to the broader question of the FVRA's constitutionality.

[99] In the Cato amicus brief co-authored by Ilya Shapiro, Trevor Burrus, and myself, we suggested this potential solution without examining the question in depth. See Brief of Cato Institute as Amicus Curiae Supporting Respondent at 5 n.2, N.L.R.B. v. S.W. General, Inc., 137 S. Ct. 929 (2017).

[100] S.W. General, 137 S. Ct. at 946 n.1 (Thomas, J., concurring).

for more than three years in an office limited by statute to a 4-year term."[101]

Further, even a hard upper limit on acting service would not necessarily change the analysis. Although the Supreme Court held in 1988 that "limited tenure" is one factor indicating that an officer is inferior,[102] the Court held nine years later that an inferior officer is one "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[103] Whether time limits can make a position inferior depends on whether the later categorical test has fully replaced the earlier multifactor test, a question that the Supreme Court has never resolved.[104]

There is an additional argument by which the FVRA might be partially saved, however. When an acting officer is appointed under (a)(2), that acting officer has, by definition, already been confirmed by the Senate to some other executive-branch position. Subsection (a)(2) thus allows the president to unilaterally grant a new title (and with it, new powers and duties) to someone who has already been confirmed by the Senate to wield other powers. And in 1994, the Supreme Court held that another statute with a similar operation did not violate the Appointments Clause.

In *Weiss v. United States*, the Court examined a statute that allowed the Judge Advocate General of each branch of the armed forces to unilaterally appoint commissioned officers of the United States to be military trial judges in their respective branches.[105] Such officers would then hold the position of military judge "for a period of time

[101] *Id.*

[102] See Morrison v. Olson, 487 U.S. 654, 672 (1988).

[103] Edmond v. United States, 520 U.S. 651, 660 (1997).

[104] Justice Thomas, for his part, does believe that the later case overruled the earlier, and that the later is the correct test: "Although we did not explicitly overrule *Morrison* in *Edmond*, it is difficult to see how *Morrison*'s nebulous approach survived our opinion in *Edmond*. *Edmond* is also consistent with the Constitution's original meaning and therefore should guide our view of the principal-inferior distinction." S.W. General, 137 S. Ct. at 947 n.2 (Thomas, J., concurring). For a fuller discussion of this question, see Nick Bravin, Note, Is *Morrison v. Olson* Still Good Law? The Court's New Appointments Clause Jurisprudence, 98 Colum. L. Rev. 1103 (1998).

[105] 510 U.S. 163 (1994). The only limitation on which officers the Judges Advocate General could choose to appoint was that they must have been members of a state or federal bar.

[the Judge Advocate General] deems necessary or appropriate, and then they may be reassigned to perform other duties."[106]

As a preliminary matter, the Court agreed "that a military judge is an 'officer of the United States'" for purposes of the Appointments Clause.[107] But the position of a commissioned officer, from which all military judges were selected, was one requiring presidential nomination and Senate confirmation, meaning every military judge had already gone through this process once. The question, then, was whether the Appointments Clause "require[d] a second appointment before military officers may discharge the duties of such a judge."[108] The Court held that it did not.

The Court's reasoning on this point was obscure. In an 1893 case, the Court had held that when a statute grants a *particular* Senate-confirmed officer new duties, those duties must be "germane" to the office already held if they are to be performed without a second Senate confirmation.[109] In *Weiss*, the Court suggested that because Congress was not selecting particular military trial judges via statute but instead leaving their selection up to someone else, even this germaneness test may not be necessary to pass constitutional scrutiny.[110] Yet the Court then assumed, *arguendo*, that the germaneness test did apply (likely because there was unspoken disagreement among the justices in the majority as to whether it should apply) and found that the duties of a military trial judge passed this test anyway.[111]

Like the statute in *Weiss*, the FVRA's subsection (a)(2) allows someone (in this case the president) to temporarily grant the duties of a new office to a person who has already received Senate confirmation to another office. Even if the appointment of acting principal officers under (a)(1) and (a)(3) is constitutionally suspect, their appointment under (a)(2) may well survive a future challenge (especially if the duties of the acting office are "germane" to the office previously held

[106] *Id.* at 176.

[107] *Id.* at 173.

[108] *Id.* at 176.

[109] Shoemaker v. United States, 147 U.S. 282, 300–01 (1893).

[110] Weiss, 510 U.S. at 174.

[111] *Id.* at 174–76.

by the appointee). This would preserve at least one method of temporarily filling the highest ranks of government.[112]

These questions will form the fault lines of future litigation if, as Justice Thomas predicted, "[c]ourts inevitably will be called upon to determine whether the Constitution permits the appointment of principal officers pursuant to the FVRA without Senate confirmation."[113]

Conclusion

The dangers of the *expressio unius* canon are obvious: if applied incorrectly, a congressional attempt to strengthen the force of a provision through emphasis can result in precisely the *opposite* effect, weakening the provision by limiting it to only the example singled out.[114] In everyday language, we frequently single out particular examples for clarity and emphasis. But the *expressio unius* canon presents legislative drafters who wish to add such clarity with a dilemma: emphasizing one provision risks eliminating others. For this reason, the canon should only be applied if context shows that there is no real risk of undermining the intended breadth of a provision, a risk that was obviously present in *S.W. General*.

It's possible that in 50 years *S.W. General* will be remembered more as a useful citation in opposition to the *expressio unius* canon than it will for its effect on the presidential appointment power—though both aspects of the case are certainly important. As the title

[112] Thomas himself does not consider this possibility, discussing neither *Weiss* nor *Shoemaker* in his concurrence. This may be because Thomas focused on whether the Constitution barred Solomon's appointment in particular, and Solomon himself was appointed under (a)(3), not (a)(2).

[113] S.W. General, 137 S. Ct. at 949 (Thomas, J., concurring).

[114] Perhaps the most infamous occurrence of this was in *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979). There, the Court held that Title VII of the 1964 Civil Rights Act did not ban employers from engaging in affirmative-action programs, even though the act flatly made it illegal for any employer "to deprive any individual of employment opportunities . . . because of such individual's race." See *id.* at 199 n.2. The *Weber* Court latched onto a clarifying provision "that nothing contained in Title VII 'shall be interpreted to *require* any employer . . . to grant preferential treatment . . . to any group because of the race'" of its members. *Id.* at 205–06 (emphasis added by the Court). The Court then stringently applied *expressio unius* to this provision, reasoning that "[t]he section does *not* state that 'nothing in Title VII shall be interpreted to *permit*' voluntary affirmative efforts to correct racial imbalances. The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action." *Id.* at 206 (emphasis in original).

of this article suggests, the Supreme Court has indisputably reined in the power of the president to bypass the Senate in appointing acting officers. But to the extent that *S.W. General* may also rein in the *expressio unius* canon itself, that will be a less-anticipated but just as welcome result.