SYMPOSIUM: ENSURING DEMOCRATIC ACCOUNTABILITY IN THE ADMINISTRATIVE STATE

The Constitutionality of Acting Principal Officers: Can *Eaton* and *Edmond* Be Reconciled?

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TABLE OF CONTENTS

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INTRODUCTION

The selection of Matthew Whitaker to be acting attorney general in 2018 directed unprecedented attention toward a previously little-studied constitutional question. Whitaker was a relatively obscure figure in the Department of Justice, and he was not serving in a Senate-confirmed position at the time of his selection. How could it be constitutional for someone the Senate had neither vetted nor approved to lead the Department of Justice?[1]

Yet challenges to the constitutionality of Whitaker's service all failed in court.[2] Whitaker's service seemed in clear tension with basic constitutional principles, but courts felt bound by a century-old precedent to uphold it. That unusual state of affairs is the subject of this Article.

First, Part I provides general background on the Appointments Clause and the Vacancies Acts. Next, Part II examines whether, under the leading *modern* Appointments Clause cases, the Senate must confirm some acting officers. Part III then examines the nineteenth-century case that has bound lower courts to uphold acting service like Whitaker's, despite the reasoning of the more recent modern precedents. Finally, Part IV discusses whether these competing precedents can be reconciled and, if not, whether there are practical solutions to the pragmatic problems that may arise from discarding the older precedent and unifying Appointments Clause jurisprudence under the modern approach.

I. BACKGROUND ON THE APPOINTMENTS CLAUSE AND THE VACANCIES ACTS

As a default rule, the Constitution requires that "Officers of the United States" must be nominated by the president and confirmed by the Senate.[3] The Constitution allows only one potential exception to this default rule: if an officer is merely an "inferior officer," Congress may vest the power to appoint that inferior officer in the president alone, the head of a department, or a court of law.[4] In such instances, Senate consent is unnecessary; the inferior officer can take office immediately upon his or her selection. However, when an officer is *not* an inferior officer (i.e., when an officer is a "principal" officer),[5] Senate consent is

1. *See, e.g.*, Neal K. Katyal & George T. Conway III, *Trump's Appointment of the Acting Attorney General Is Unconstitutional*, N.Y. TIMES (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/opinion/trump-attorney-general-sessions-unconstitutional.html [https://perma.cc/96DD-NSZB].

2. *See, e.g.*, United States v. Smith, 962 F.3d 755, 764–65 (4th Cir. 2020).

3. U.S. CONST. art. II, § 2, cl. 2.

4. *Id.*

5. The phrase "principal officer" does not appear in the Appointments Clause itself, but it has been adopted by courts to refer to officers who are not "inferior." *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 670–71 (1988) ("The initial question is, accordingly, whether appellant is an 'inferior' or a 'principal' officer."). The phrase "principal officer" appears in two other clauses of the Constitution, which is the likely origin for the adoption and use of the term in the Appointments Clause context. *See* U.S. CONST. art. II, § 2, cl. 1 ("The President . . . may require the Opinion, in writing, of the principal Officer in each

necessary. Likewise, when an officer is inferior but Congress has *not* chosen to vest that officer's appointment in one of the three alternative options, Senate consent remains necessary.

Since obtaining Senate consent takes time,[6] when an office becomes vacant—especially when that vacancy is unexpected—the office can remain vacant for a lengthy period. In recognition of this problem, the Constitution includes one procedure for temporarily bypassing the Senate confirmation process: for "all Vacancies that may happen during the Recess of the Senate," the President has the power to fill the vacant office temporarily without Senate consent.[7] The Framers included this clause in the Constitution understanding that when the Senate is in recess, there would likely be delays before the senators could assemble and vote on a nominee.[8]

The Constitution is silent, however, as to the delays in confirmation that occur even when the Senate is *not* in recess.[9] Still, even when the Senate is assembled, vetting and voting take time.[10] For that reason, soon after George Washington took office and the new federal government began to operate, Congress created a new procedure for temporarily filling vacancies to supplement the Recess Appointments Clause.

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of the executive Departments"); U.S. CONST. amend. XXV, § 4 (referring to "a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide").

6. Over the years, the Senate confirmation process has taken more and more time. *See* Anne Joseph O'Connell, *Staffing Federal Agencies: Lessons from 1981–2016*, BROOKINGS INST. (Apr. 17, 2017), https://www.brookings.edu/research/staffing-federal-agencies-lessons-from-1981-2016/ [https://perma.cc/T22Q-KDZ9]. And because of increased Senate scrutiny, the time it takes for presidents to even *make* a nomination has also increased. *See* 144 Cong. Rec. S11027 (Sept. 28, 1998) (statement of Sen. Carl Levin) ("Increasingly adversarial confirmation proceedings have required that background investigations and other steps in the vetting process are more thorough and lengthy."). Additionally, some nominations are rejected, which adds yet more time until someone is eventually confirmed. *See* Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645, 1660 (2015) ("Of all nominations received by the Senate from 1981 to 2014, 22.9 percent failed.").

7. U.S. CONST. art. II, § 2, cl. 3.

8. *See* THE FEDERALIST NO. 67 (Alexander Hamilton) (explaining that the Recess Appointments Clause was included in the Constitution "as it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay"); *see also* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1489 (2005) ("[T]he Recess Appointments Clause was designed to allow the President to fill vacancies on his own when a recess prevented the Senate from confirming a nominee . . . .").

9. *See* Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533, 541–42 (2020) ("[Is] such presidential reliance upon acting officials constitutional? The Appointments Clause . . . specifically authorizes unilateral presidential appointments to [Senate-confirmed] positions in the so-called 'Recess Appointment Clause,' . . . but otherwise does not speak expressly to this question.").

10. *See id.* at 580–81 ("[P]erhaps those considering the Appointments Clause ought to have anticipated deaths or misconduct among officials coupled with a less-than-instantaneous nomination and confirmation process. Nonetheless . . . Senate delay or inaction . . . [was] apparently unanticipated during the Convention . . . .").

However, this procedure has never been added to the Constitution through the amendment process; instead, it has been implemented via a series of statutes.[11] The first of these statutes was enacted in 1792[12] and the most recent in 1998.[13] These Acts have come to be called "Vacancies Acts."[14] Although the Vacancies Acts have varied in significant ways, they have largely shared five core similarities.

First, the Vacancies Acts have applied only to vacancies in positions that require Presidential appointment and Senate consent ("PAS" positions)[15] to be filled on a permanent basis.[16] These Acts have not extended to positions that do not require Senate consent, because a streamlined procedure to fill such positions is unnecessary.[17]

The second unifying theme is that the Vacancies Acts have all allowed positions to be filled temporarily *without* Senate consent.[18] The Acts thus allow acting officers to begin performing their duties immediately. This is the key intended benefit of these Acts; they allow the work of the vacant office to continue during the delay caused by Senate consideration of a permanent nominee.[19]

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11. *See* NLRB v. SW Gen., Inc., 580 U.S. 288, 293–96 (2017) (recounting the history of these statutes).

12. Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281. Garrett West suggests that the prototype for the Vacancies Acts can be found even earlier. The 1789 acts establishing the original departments allowed the assistant secretaries to "have the charge and custody of the records" during a vacancy. E. Garrett West, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 213 (2018).

13. Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349.

14. *See* Stephen Migala, *The Vacancies Act and an Acting Attorney General*, 36 GA. ST. U. L. REV. 699, 706 (2020) ("Vacancies acts have existed in one form or another since 1792.").

15. *See* 144 Cong. Rec. S11032 (Sept. 28, 1998) (statement of Sen. John Glenn) ("[T]he Vacancies Act governs the temporary filling of what we call 'advise and consent' or PAS positions (Presidentially-appointed, Senate-confirmed) in the Executive Branch.").

16. *See, e.g.*, Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281 (limiting the offices that may be filled to the heads of the three cabinet departments and "any officer of either of the said departments whose appointment is not in the head thereof"); Act of July 23, 1868, ch. 227, §§ 1; 2, 15 Stat. 168 (limiting the offices that may be filled to the head of any department, chief of any bureau, or "any officer thereof, except commissioner of patents, whose appointment is not in the head of any executive department"); 5 U.S.C. § 3345(a) (limiting the offices that may be filled to any "officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate").

17. On some occasions, people have been installed in positions not requiring Senate consent and nonetheless given an "acting" designation. One recent example is "Acting White House Chief of Staff" Mick Mulvaney, who served under that title from January 2019 to March 2020. *See* Nancy Cook & Adam Cancryn, *'Acting' in name only: Mulvaney staffs up West Wing*, POLITICO (Jan. 11, 2019), https://www.politico.com/story/2019/01/11/mick-mulvaney-acting-chief-staff-1098627 [https://perma.cc/9B43-42YY]. In such instances, use of the term "acting" is for reasons other than legal, since officers can be installed in such offices permanently at will. *See id.* ("'By keeping the "acting" title, he gives himself an out in case things go south,' said a Republican close to the White House."). The scope of this Article is limited to "acting" officers who serve in positions that normally require Senate confirmation.

18. *See, e.g.*, Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281 (vesting the choice of acting officer in the President alone); 5 U.S.C. § 3345(a)(2)–(3) (vesting the right to select someone other than the vacant office's first assistant to serve as acting officer in "the President (and only the President)").

19. *See* S. REP. NO. 105-250, at 5 (1998) [hereinafter SENATE REPORT] ("[S]ince the President lacks any inherent appointment authority for government officers, legislation authorizing some non-Senate

The third unifying theme is that those who fill positions via this procedure, without Senate consent, have been referred to by some moniker or descriptor that distinguishes them from those who fill the same positions permanently following Senate consent. In 1792, Congress described the persons selected under the Act's procedures as "perform[ing] the duties of the said respective offices" rather than as occupying the offices themselves.[20] In 1868, Congress once again described the persons selected as "perform[ing] the duties of the office."[21] Most recently, in the Federal Vacancies Reform Act of 1998, Congress described such persons as "perform[ing] the functions and duties of the office temporarily in an acting capacity,"[22] and further referred to those persons with the shorthand phrase "serving as an acting officer."[23]

The fourth, nearly unanimous similarity has been a limitation on the length of time a person may serve as an acting officer. Every version of the Vacancies Act has had a time limit except the very first one passed in 1792.[24]

The fifth and final similarity, though one with not quite as lengthy a pedigree, is a limitation on the pool of people who may be selected to serve as acting officers. Although the 1792 and 1795 Acts allowed the president "to authorize any person" to serve as an acting officer,[25] the 1868 Vacancies Act introduced limitations that have remained in some form ever since. In 1868, acting officers were limited to "the first or sole assistant" of an executive department, the "deputy" of a vacant office, the "chief clerk" of a bureau, or other persons serving in a Senate-confirmed position.[26] In 1998, Congress similarly limited the eligible pool of acting officers to "the first assistant to the office of such officer," Senate-confirmed officers, or officers who have served for at least 90 days during the past year in a position in the same agency as the vacancy at a salary "equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule."[27]

Of these five characteristics, the latter two are the most consequential. The Vacancies Act's limitations on *who* can serve and *how long* they can serve as acting officers are its core limitations on the executive branch.[28] If the Vacancies Act did not limit who can serve and how long they can serve as acting officers,

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confirmed persons to perform the functions and duties of vacant offices is necessary if the government's operations are to be performed.").

20. Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281.

21. Act of July 23, 1868, ch. 227, § 3, 15 Stat. 168.

22. 5 U.S.C. § 3345(a)(1)–(a)(3).

23. *Id.* § 3346(a). For ease of discussion, I will refer to these persons as "acting officers" for the rest of this Article, regardless of the particular statute under which they served.

24. *See* NLRB v. SW Gen., Inc., 580 U.S. 288, 293–96 (2017) (recounting how the 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).

25. Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281; Act of Feb. 13, 1795, ch. 21, 1 Stat. 415.

26. Act of July 23, 1868, ch. 227, §§ 1–3, 15 Stat. 168.

27. 5 U.S.C. §§ 3345(a)(1)–(a)(3).

28. *See* CONG. RSCH. SERV., R44997, THE VACANCIES ACT: A LEGAL OVERVIEW 10 (2022) [hereinafter CRS, *Legal Overview*] ("The Vacancies Act creates two primary types of limitations on

the executive branch would hardly ever chafe at following the procedures of the 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.[29] Thus, Congress and the executive branch have for decades engaged in a tug-of-war, with Congress attempting to give the "who and how long" limitations real bite and the executive branch attempting to soften that bite.[30]

But even with the Vacancies Act's limitations, the Act still presents a constitutional question. If, in some instances, an acting officer is in fact a *principal* officer, and if that acting officer has not received Senate advice and consent to any position, then that acting officer is serving in violation of the Constitution.[31] No matter how many limitations a statute may place on a given position, service as a principal officer is only permissible after confirmation by the Senate (unless the president makes a recess appointment). The next Part will examine whether at least some acting officers are principal officers under the Supreme Court's modern approach.

II. THE CONSTITUTIONAL STATUS OF ACTING OFFICERS

A. Are Some Acting Officers "Officers of the United States"?

The Supreme Court's current test for whether a person is a constitutional officer, or "Officer of the Unites States," involves two prongs. First, "an individual must occupy a 'continuing' position established by law[.]"[32] And second, an individual must "exercis[e] significant authority pursuant to the laws of the United States[.]"[33]

Do acting officers satisfy these two criteria? First, whether a particular acting officer exercises "significant authority" is a case-by-case question. As the

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acting service: it limits (1) the classes of people who may serve as an acting officer, and (2) the time period for which they may serve.") (footnotes omitted).

29. *See* SENATE REPORT, *supra* note 19, at 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."); *see also* 144 CONG. REC. 11,024 (daily ed. Sept. 28, 1998) (statement of Sen. Robert Byrd) ("It is precisely that time restriction on the filling of these vacant positions that is, I believe, the linchpin of this issue. Without that barrier, . . . no President need ever forward a nomination to the U.S. Senate.").

30. *See* Morton Rosenberg, CONG. RSCH. SERV., R98-892 (1998) at 2–4 (recounting the history of disagreements between the executive branch and Congress leading up to 1998). *See also* Migala, *supra* note 14, at 703 n.6, App. A at A-69 (statement of Sen. Fred Thompson) ("In many instances, [acting officials] have served more than 120 days without a nomination having been submitted to the Senate. Some persons are serving as acting officials who do not satisfy the statutory conditions for acting officials. . . . Obviously, no enforcement mechanism has effectively made the administration adhere to the act.").

31. I discuss below the constitutional status of acting officers who are principal officers and who have been confirmed by the Senate to some *other* position. *See infra* Part IV.B.

32. Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018) (quoting United States v. Germaine, 99 U.S. 508, 511 (1879)).

33. Buckley v. Valeo, 424 U.S. 1, 126 (1976).

Supreme Court has admitted, the "significant authority" standard "is no doubt framed in general terms[.]"[34] To the extent this rule has been fleshed out since it was first articulated in 1976, it has only been through the relatively small number of decisions that have drawn various lines regarding whether a particular authority is or is not "significant."[35] It is thus difficult to define in the abstract what characterizes "significant authority."

Nonetheless, it is certain that at least some acting officers (and likely most) exercise "significant authority." Every PAS position can be filled by an acting officer, and the PAS positions include, by constitutional necessity, every principal officer. The PAS positions also include many inferior officers for whom Congress has made the choice not to waive Senate consent. Although it is possible that some PAS positions may not possess the significant authority necessary to be officers at all, it is certain that a good deal of them do. And by the Vacancies Act's own terms, acting officers possess all the same authority as their permanent, Senate-confirmed counterparts.[36] If a position exercises significant authority when it is filled by a Senate-confirmed officer, it also exercises significant authority when it is filled by an acting officer.

Further, any acting officer whose service leads to a dispute in the courts is almost certain to exercise significant authority. Lawsuits are brought not to challenge the service of an acting officer in general, but rather to invalidate particular *actions* taken by an acting officer.[37] And because the costs of litigation are only justified when the stakes are high, actions challenged in court will usually be the agency's last word. Thus, those acting officers whose actions are challenged in court are likely to have exercised either *final* decision-making authority or, at the very least, decision-making authority to take actions that end up being the agency's final word on the matter.[38] And the Supreme Court has held that such "last-word capacity" is sufficient to confer significant authority.[39]

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34. *Lucia*, 138 S. Ct. at 2051.

35. *See* West, *supra* note 12, at 220 ("[T]he Court has addressed the distinction [between officers and non-officers] only infrequently[,] . . . and modern decisions have been especially sparse."); *see also* Bandimere v. Sec. & Exch. Comm'n, 844 F.3d 1168, 1173–74 (10th Cir. 2016) (listing positions that have been held to be officers by the Supreme Court both before and after *Buckley*).

36. *See* 5 U.S.C. § 3345(a) (authorizing acting officers to "perform the functions and duties of the vacant office"); *see also* Acting Officers, 6 Op. O.L.C. 119, 120 (1982) ("An acting officer is vested with the full authority of the officer for whom he acts."); ANNE JOSEPH O'CONNELL, ADMIN. CONFERENCE OF THE U.S., ACTING AGENCY OFFICIALS AND DELEGATIONS OF AUTHORITY 4 (2019) [hereinafter O'Connell, ACUS Report] ("Acting officials generally have the same authority as confirmed leaders.").

37. *See* SENATE REPORT, *supra* note 19, at 19–20 ("The Committee expects that litigants with standing to challenge purported agency actions taken in violation of these provisions will raise noncompliance with this legislation in a judicial proceeding challenging the lawfulness of the agency action."); *see also* CRS, *Legal Overview*, *supra* note 28, at 15 ("The most direct means to enforce the Vacancies Act is through private suits in which courts may nullify noncompliant agency actions.").

38. *See* NLRB v. SW Gen., Inc., 580 U.S. 288, 314–315 (2017) (Thomas, J., concurring) (explaining why a position with final authority "in respect of the investigation of charges and issuances of complaints" is very likely a constitutional officer).

39. In *Lucia*, the Court considered whether SEC administrative law judges (ALJs) possessed significant authority. Although the ALJs at issue could not make any *unreviewable* decisions, they could

The next question, and a more difficult one, is whether acting officers occupy "continuing" positions established by law. This requirement is a separate one, distinct from the "significant authority" requirement. Some officials may exercise significant authority but not occupy a continuing position, and those officials do not qualify as officers of the United States. As Jennifer Mascott has explained: "Both under the Articles of Confederation and during the First Congress, there was a category of contractors or other nonofficer persons whom officers hired for services outside the Article II appointment process. Therefore, one additional requirement for federal officer status appears to be responsibility for ongoing duties."[40] The defining characteristic of these non-officer contractors was that they were "hired to perform discrete services."[41] And these services were not necessarily menial. In some cases, "government officials conducted discrete high-level diplomatic missions without being commissioned as foreign affairs officers."[42]

Besides this historical evidence, there is also evidence in the Constitution's text that only those with ongoing duties are officers. "The Constitution refers to an office as something that one 'holds' and 'enjoys' and in which one 'continues,' and these descriptions suggest that an office has some duration and ongoing duties."[43]

In drafting the text of the 1792 Vacancies Act, Congress seemed to take pains to avoid describing acting officers as actually "holding" their offices. Instead, these officials were "authorize[d] . . . to perform the duties of the said respective offices." This phrasing suggests that at the time of the law's enactment, Congress may have viewed an "authorization" under the Act as an assignment to temporarily perform a discrete set of duties for the purposes of caretaking. Congress perhaps viewed such an assignment as distinct from holding an office, and thus, as more akin to early non-officer contractors.

The original 1792 Vacancies Act applied to cabinet-level positions including the Secretaries of State, War, and the Treasury, and there is thus no doubt that it authorized acting appointments to principal-office positions. While not determinative of the constitutional question, the fact that one of the earliest Congresses

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make decisions that went *unreviewed*. Just like the Supreme Court, which may decline to grant certiorari in a case and thus make the circuit court decision the last word, the SEC likewise could decline to grant review of any ALJ decision and thus make that ALJ decision the last word. And the Court held that this *capacity* to have the last word in some instances gave the ALJs significant authority. *See Lucia*, 138 S. Ct. at 2054 (citations omitted) ("[T]he SEC can decide against reviewing an ALJ decision at all. And when the SEC declines review (and issues an order saying so), the ALJ's decision itself 'becomes final' and is 'deemed the action of the Commission.' . . . That last-word capacity makes this an *a fortiori* case: . . . the Commission's ALJs must be [officers] . . . .").

40. Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 534 (2018).

41. *Id*. at 535.

42. *Id*. at 535–36.

43. Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 101 (2007).

believed this to be consistent with the Appointments Clause is certainly relevant.[44]

However, it is equally relevant that Congress revisited and amended the Act just three years later, in 1795, to add a six-month time limit.[45] One potential explanation for this quick revision is that Congress was more comfortable viewing acting officers as occupying a "non-continuing" position when there was a firm end date for their duties. After all, even if the *intent* was for acting officers to serve only as caretakers, the lack of a time limit in the original version of the Act made acting officers functionally indistinguishable from their Senate-confirmed counterparts.

Did this new time limit and firm end date for acting service make acting officers "non-continuing" and thus not officers of the United States at all? Not necessarily. The concept of "non-continuing" is not just about duration of service, but also about the scope of an official's duties. Most of the "non-continuing" positions found in early U.S. history were contracted "to perform particular tasks" such as "the building of lighthouses" and "apprais[ing] the value of certain goods."[46] Summing up early cases, the Office of Legal Counsel (OLC) has described non-continuing positions as assignments of "special work; special purposes; a special, specific, single, or particular controversy or case; a special commission; specified claims; local or limited work; and extraordinary or emergency exigencies."[47] They were, in other words, the types of jobs that we might hire a one-time contractor for today—jobs where the terms for a successful completion of duties could be set in advance.

Acting officers in principal offices, such as cabinet positions, do not appear to meet this definition. Even if their time is limited, the scope of their duties is not. For that reason, both OLC and Mascott agree that time limits alone would not make *every* position non-continuing for the purposes of the Appointments Clause. Using a hypothetical example that somewhat echoes how the Vacancies

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44. *See, e.g.*, Myers v. United States, 272 U.S. 52, 175 (1926) ("[A] contemporaneous legislative exposition of the Constitution, when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions."); Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 774–75 (2008) ("The practices of the First Congress are often considered to be of extra importance in constitutional interpretation because they reflect the understanding of the Framers and the public at the time of the Founding."); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 61–62 (2019) ("[I]t may be possible 'to derive evidence about the meaning of a text by consulting the interpretations of those who have the familiarity with the relevant context and linguistic conventions,' that is to say, the framing generation.") (quoting John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 86 n.334 (2001)).

45. *See* Rop v. Fed. Hous. Fin. Agency, 50 F.4th 562, 581 n.5 (6th Cir. 2022) (Thapar, J., concurring in part and dissenting in part) ("Only when [the original cabinet members] began retiring between December 31, 1793, and January 1795 did Congress have to seriously confront the problem of transitions. And when it did, it enacted a six-month limit."), *cert. denied*, 2023 WL 3937607 (U.S. June 12, 2023) (No. 22-730).

46. Mascott, *supra* note 40, at 535.

47. Officers of the United States Within the Meaning of the Appointments Clause, *supra* note 43, at 112.

Act functions in practice, OLC has observed that "the position of Attorney General presumably still would be an office if Congress provided for it to expire each year but reauthorized it annually."[48]

But even if there is some room for debate as to whether the position is "continuing" in the case of acting officers with *firm* time limits, such limits do not exist for acting officers today. The two most recent versions of the Vacancies Act, enacted in 1988 and 1998, have allowed for indefinite tolling of the time limit on acting service during the pendency of up to two nominations for the permanent position (with the deadline reset after up to two nominations fail).[49]

Acting officers today thus have no firm end date, since this tolling provision can extend an acting officer's tenure indefinitely while a nomination languishes in the Senate. In practice, this has allowed acting officers to serve not just for the modern time limit of 210 days, but in some cases for several years.[50] Because acting officers now have no firm end date, they are even more likely to qualify as "continuing" now than they were prior to 1988.[51]

We can thus say with a high degree of confidence that an acting officer whose tenure does not have an expiration date and whose functions include decision-making authority to take an action with at least "last-word capacity" is a constitutional officer. And both of these facts will likely hold true for any acting officers whose actions are challenged in court.

B. Are Some Acting Officers "Principal" Officers?

Once it is established that a person is an officer in the constitutional sense, the next question is *which* of the two types of officer: principal or inferior? If an officer is merely an "inferior officer," Congress may vest the appointment of that inferior officer in the president alone, the head of a department, or a court of law.[52] The Vacancies Act is a statute passed by Congress, and it vests appointments in

48. *Id.* at 113. *See also* Mascott, *supra* note 40, at 535 ("It is hard to imagine, for example, that it would be constitutional to bypass Appointments Clause requirements by hiring a string of cabinet secretaries to serve only temporary terms, week after week, and claiming that Senate consent is unnecessary because the position is not ongoing.").

49. Presidential Transitions Effectiveness Act, Pub. L. No. 100-398, § 7(b), 102 Stat. 985, 988 (1988) (codified as amended at 5 U.S.C. § 3346(a)(2)).

50. *See, e.g.*, NLRB v. SW Gen., Inc., 580 U.S. 288, 313 n.1 (2017) (Thomas, J., concurring) (noting that an acting officer had "served for more than three years in an office limited by statute to a 4-year term").

51. James Heilpern has argued that a position should be "considered to be continuous as long as it is 'capable of persisting beyond [an individual's] incumbency.'" James A. Heilpern, *Acting Officers*, 27 GEO. MASON L. REV. 263, 272 (2019) (quoting EDWARD S. CORWIN, THE PRESIDENT: OFFICE & POWERS 1787–1957, at 86 (4th rev. ed. 1964)). Heilpern relies on early evidence that the term "office" referred to any position "distinct from the person holding it." Given that one acting officer can succeed another under the Vacancies Act without the establishment of a new position or contract, an acting officer position would likely qualify as "continuing" under Heilpern's definition as well.

52. U.S. CONST. art. II, § 2, cl. 2.

the president, so it complies with the terms of this exception when an acting officer is merely inferior.[53]

To understand whether (at least some) acting officers are principal officers, it is necessary to examine the Supreme Court's modern cases on the principal/inferior divide in some depth. The modern test for whether an officer is principal or inferior was set out by the Supreme Court in the 1997 case *Edmond v. United States*.[54] In that decision, the Supreme Court held that the term "inferior officer" generally "connotes a relationship with some higher ranking officer or officers below the President."[55] Thus, the Court held that "'inferior officers' are officers whose work is directed and supervised at some level by" PAS officers.[56]

In *Edmond*, the Court identified three factors that weighed in favor of its holding that the officer at issue in that case was indeed "directed and supervised" and therefore inferior: (1) the reviewability of the officer's decisions by a superior; (2) the direct oversight of the officer by a superior; and (3) the power of a superior to remove the officer from office at will.[57] Ever since *Edmond*, the crucial unanswered question has been how these three factors interact with each other, especially when they weigh in different directions. Is any one factor more fundamental than the other two? Should courts rule for whichever side wins two out of three? Or should courts attempt to weigh all factors equally in some kind of multi-factor balancing test?[58]

Although the Supreme Court has not answered this question directly, it gave some indication of the answer in the recent case *United States v. Arthrex*, in which the Court applied the *Edmond* test to find that administrative patent judges (APJs) are principal officers.[59]

Arthrex was the first case to reach the Supreme Court on the principal/inferior divide since *Edmond*, making it a prime opportunity to clarify *Edmond*'s test.

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53. There is one potential wrinkle, which is that the Vacancies Act is structured such that the "first assistant" to a vacant office *automatically* becomes the acting officer unless the president selects a different eligible person. 5 U.S.C. § 3345(a)(1). In those instances where the president does not act and the first assistant becomes the acting officer automatically, the first assistant's ascension to the acting officer position is technically not via "appointment" at all. Nonetheless, in practice first assistants only become acting officers due to the president's choice not to select an alternative. Whether that is sufficient to consider first assistants as effectively "appointed" for the purposes of the inferior officer clause is an open question, but Congress could eliminate any concerns by amending the statutory text to make first assistants formally chosen as acting officers via presidential appointment, like all other acting officers.

54. 520 U.S. 651 (1997).

55. *Id.* at 661–62.

56. *Id.* at 663.

57. *Id.* at 662–65.

58. The D.C. Circuit has somewhat fleshed out these three factors into a formal three-prong test, but has not given more weight to any single prong. The D.C. Circuit has framed the three factors as: (1) whether the work of the officer is subject to substantial oversight by PAS officers, (2) whether the officer is removable without cause, and (3) whether the officer's decisions are reversible or correctable by another officer or entity within the Executive Branch. *See* Intercollegiate Broad. Sys. v. Copyright Royalty Bd., 684 F.3d 1332, 1338 (D.C. Cir. 2012).

59. 141 S. Ct. 1970 (2021).

The APJs at issue in *Arthrex* had the power to issue decisions that were not reviewable by a superior, *and* APJs could not be removed from federal service by a superior except for good cause. Thus, both the "non-reviewability" factor and the "non-removability" factor were implicated by the APJs' statutory scheme, presenting an ideal chance to address which factor, if any, takes precedence.

While *Arthrex* did not provide an explicit answer, the opinion strongly suggested that the reviewability of an officer's decision is the most important of the three *Edmond* factors.

The biggest clue toward the Supreme Court's thinking lies in the contrast between the remedy chosen by the Supreme Court and the remedy chosen by the Federal Circuit in its decision below. The Federal Circuit had found the APJs to be insufficiently supervised and therefore principal officers, a holding that the Supreme Court affirmed. But as a remedy, the Federal Circuit had made APJs *removable at will* from federal service while *retaining* the APJs' ability to issue final and non-reviewable decisions. The resulting scheme, in the Federal Circuit's view, rendered the APJs sufficiently supervised so as to be inferior officers.[60]

But the Supreme Court declined to adopt the Federal Circuit's "removability" remedy. Instead, the Court substituted an alternative "reviewability" remedy of its own, rendering decisions of the APJs *reviewable* by the PTO director while *retaining* the APJs' protection from at-will removal. The plurality opinion expressly declined to endorse the Federal Circuit's conclusion that removability alone would establish sufficient supervision. Instead, the plurality held that reviewability is the more straightforward remedy "regardless whether the Government is correct that at-will removal by the Secretary [of Commerce] would cure the constitutional problem."[61] Indeed, the plurality went so far as to say that APJs appear to be inferior officers "in every respect save the insulation of their decisions from review within the Executive Branch," a strong suggestion that removability is unlikely to be the determinative factor in the Appointments Clause inquiry.[62]

At the very least, the Court's choice of remedy suggested that the Court was more confident that *reviewability* provides sufficient supervision than it was that *removability* provides sufficient supervision. And this suggestion is bolstered by reasoning found elsewhere in the Court's opinion. In unsuccessfully arguing that APJs were already sufficiently supervised so as to be inferior, the government had noted that because the PTO director selects which APJs will sit on three-person adjudicatory panels, the director could, in theory, decide never to assign a particular APJ to any panel ever again. The government argued that this would

60. Arthrex, Inc. v. Smith & Nephew, Inc., 941 F.3d 1320, 1337 (Fed. Cir. 2019), *vacated and remanded*, 141 S. Ct. 1970 (2021).

61. *Arthrex*, 141 S. Ct. at 1987 (plurality op.).

62. *Id*. at 1986.

effectively "remove" that APJ from their adjudicatory duties, meaning that a *de facto* at-will removal power already existed.

The Court rejected this argument, however, noting that "reassigning an APJ to a different task going forward gives the Director no means of countermanding the final decision already on the books."[63] But that reasoning applies *just as much* to any potential power to remove APJs at will from federal service altogether, the remedy chosen by the Federal Circuit. Such a power would likewise fall short of allowing the director to "countermand[]" any "final decision already on the books." In other words, the Court's explanation for why the government's *de facto* removal argument fell short of demonstrating sufficient supervision can be extrapolated into a broader argument for why removability *in general* is not enough, on its own, to create sufficient supervision.

And a final indicator of the Court's inclination can be found in the Court's recounting of Appointments Clause history, where the Court explained that it had "indicated in early decisions that adequate supervision entails review of decisions issued by inferior officers."[64] Once again, there is no suggestion in this portion of the opinion that the power to remove an officer *after* a decision would, on its own, serve as a sufficient alternative to the power to *review* that decision.[65]

Arthrex thus strongly suggests that removability without reviewability is insufficient supervision to make an officer inferior. Even oversight combined with the power to remove at will may not be enough to overcome the fundamental fact that an officer with the last word for the executive branch inherently possesses a level of independence that is hard to square with "inferior" status.[66]

What do *Edmond* and *Arthrex* indicate as to whether at least some acting officers may be principal officers? Crucially, the reviewability of an acting officer's actions is identical to the reviewability of the actions of a Senate-confirmed officer in the same position. That is because the Vacancies Act grants acting officers all of the "functions and duties" of an office.[67] If a permanent officer's functions include unreviewable authority, an acting officer temporarily filling that position will possess exactly the same unreviewable authority. Under *Edmond* and

63. *Id.* at 1982.

64. *Id.* at 1983.

65. The closest the *Arthrex* Court came to a positive reference to removability was in its comparison of APJs with members of the Labor Department's Benefits Review Board, who likewise have final decision-making authority despite lacking Senate confirmation. The Court tepidly noted that such members are "potentially distinguishable" from APJs because they "appear to serve at the pleasure of the appointing department head." *Id.* at 1984. That is hardly a ringing endorsement that the BRB members are in fact inferior officers and that their method of appointment is in fact constitutional.

66. *See also* Ronald J. Krotoszynski, Jr. & Atticus DeProspo, *Squaring a Circle: Advice and Consent, Faithful Execution, and the Vacancies Reform Act*, 55 GA. L. REV. 731, 777 (2021) ("Essentially, if an officer has the authority to render final policy decisions within an agency or department, free and clear of the direction or supervision of another officer within that agency, the officer holds a 'principal'—rather than an 'inferior'—office.").

67. 5 U.S.C. § 3345(a).

Arthrex, the analysis of what is likely the most important prong will thus always be the same for acting and permanent officers.

The only one of the three prongs that could *potentially* differ between Senate-confirmed officers and their acting counterparts is removability. While some PAS positions have statutory protections from at-will removal, "The Vacancies Act is . . . silent on whether any [statutory] removal restrictions extend to acting officials."[68] If in fact those protections do not extend to acting officers, then some positions could *potentially* be subject to removal by a superior (other than the president) when filled by an acting officer but not when filled by a Senate-confirmed officer. Nonetheless, *Arthrex* strongly suggests that even if this were the case for some positions, and some acting officers in those positions were indeed removable at will, any unreviewable authority placed in those positions would mean that those acting officers would still be unsupervised for the purposes of the *Edmond* test.

C. The Constitutional Status of Subdelagatee "Pseudo-Actings"

Before moving on to consider the crucial nineteenth-century exception to the *Edmond* approach, one other form of temporary officer is worth addressing. These are subdelegatees who perform the functions and duties of a vacant office without Senate confirmation—just like acting officers—but who do so via subdelegations of authority rather than via the Vacancies Act.

When an office is vacant, the Vacancies Act 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."[69] Congress's purpose in enacting this provision was that if a purported acting officer stayed in office past the Vacancies Act's deadline or lacked the Act's required qualifications, that officer's actions could be challenged in court and invalidated.[70]

But in the years since the most recent version of the Vacancies Act was passed in 1998 (the first version to include this provision), this enforcement mechanism has not incentivized compliance as intended. That is because only actions that qualify as the performance of a "function or duty of a vacant office" can be invalidated under this provision, and the Vacancies Act adopts an exceedingly narrow definition of "function or duty." The Vacancies Act 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)."[71] The parenthetical "(and only that officer)" has been interpreted to mean that if a duty is delegable (i.e., if it can be

68. Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV 613, 690 (2020) [hereinafter O'Connell, *Actings*].

69. 5 U.S.C. § 3348(d)(1).

70. *See* SENATE REPORT, *supra* note 19, at 19–20.

71. 5 U.S.C. § 3348(a)(2).

assigned to someone else), it doesn't qualify as a "function or duty" for purposes of the Vacancies Act and is thus exempt from this enforcement mechanism.[72]

Six years after the 1998 Vacancies Act was passed, the D.C. Circuit adopted a broad view as to which powers are subdelegable. 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."[73] 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 this enforcement provision of the Vacancies Act. And the executive branch has further argued that if a power is exempt from this enforcement provision, that power can be performed by anyone without fear of invalidation.

As Professor Nina Mendelson has explained, the executive branch has exploited this loophole to "effectively create[] a new class of pseudo-acting officials subject to neither time nor qualifications limits."[74] These pseudo-acting officials are selected without using the Vacancies Act and are usually not eligible to serve under the Vacancies Act, either because they lack the Vacancies Act's required qualifications or because the Vacancies Act's time limit has run out. They are typically delegated all of a vacant office's duties and thus called officials "performing the duties of [fill in Senate-confirmed position]."[75] These pseudo-actings have all the same power as Vacancies Act-compliant acting officers, but with none of the tenure or qualification restrictions.[76]

The use of these pseudo-actings is widespread. In September 2020, the Constitutional Accountability Center identified 21 positions where the time limits of the Vacancies Act had run out and officials were self-described on agency websites as "performing the duties" (or equivalent language) of the position.[77] 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."[78] In other words, the positions were presumably filled by pseudo-actings.

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

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

74. Mendelson, *supra* note 9, at 605.

75. O'Connell, ACUS Report, *supra* note 36, at 63.

76. As Professor O'Connell explains, "[i]f 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." *Id.* at 28.

77. Becca Damante, *At Least 15 Trump Officials Do Not Hold Their Positions Lawfully*, JUST SEC. (Sept. 17, 2020), https://www.justsecurity.org/72456/at-least-15-trump-officials-do-not-hold-their-positions-lawfully [https://perma.cc/WB3K-ZRKJ].

78. O'Connell, ACUS Report, *supra* note 36, at 19; *see also* Mendelson, *supra* note 9, at 541 ("[E]ven if an office appears 'empty,' with neither a Senate-confirmed nor an acting official, someone often purports to exercise its authority.").

The widespread use of this maneuver means that Vacancies Act deadlines have been increasingly ignored. As Professor O'Connell notes, "[i]n 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."[79] 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.[80]

These pseudo-actings 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, bringing several enforcement actions during that span.[81] During the Trump Administration, pseudo-actings signed "numerous Federal Register notices of both proposed and final rules."[82]

Given the widespread use of subdelegation to fill vacant offices without invoking the Vacancies Act, the constitutional status of subdelegatees exercising the powers of vacant offices is perhaps as important as the constitutional status of acting officers. To answer whether at least some subdelegatees are principal officers, we must ask exactly the same questions as we did for acting officers.

First, are subdelegatees officers of the United States at all? For the same reason that many acting officers exercise significant authority, many subdelegatees (and all whose actions are likely to be challenged in court) exercise significant authority. Just as the Vacancies Act provides the functions and duties of an office by statutory operation, subdelegatees receive those same duties by intra-agency delegation.

The more difficult question is whether subdelegatees "occupy a 'continuing' position established by law[.]"[83] Subdelegatees typically receive their duties through an internal agency document rather than from a statute or a notice-and-comment rule.[84] But that is not a bar to finding that subdelegatees' duties are "established by law." As the D.C. Circuit held, "it would seem anomalous if the Appointments Clause were inapplicable to positions extant in the bureaucratic hierarchy, and . . . assigned 'significant authority,' merely because neither Congress nor the executive branch had formally created the positions."[85] Likewise, at least

79. O'Connell, ACUS Report, *supra* note 36, at 11.

80. *See id.* at 29 ("In some cases, delegations appear to substitute for nominations.").

81. *See, e.g.*, United States v. Village of Tinley Park, No. 16 C 10848 (N.D. Ill. July 17, 2017) (order denying motion to dismiss), at 4.

82. Mendelson, *supra* note 9, at 562.

83. Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018) (quoting United States v. Germaine, 99 U.S. 508, 511 (1879)).

84. *See* Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 478 (2017) ("[A]gencies like the Consumer Product Safety Commission . . . delegate authority but memorialize it only in internal agency documents."); *id.* at 502 ("[T]he EPA records the bulk of its internal delegations in a Delegations Manual hosted on an internal server.").

85. Tucker v. C.I.R., 676 F.3d 1129, 1133 (D.C. Cir. 2012) (citing, inter alia, Officers of the United States Within the Meaning of the Appointments Clause, *supra* note 43, at 117); *see also* United States v. Mouat, 124 U.S. 303, 307–08 (1888) (including "regulations of the navy" in a list of laws that might have potentially established an officer position). In *Lucia*, the ALJs at issue had been subdelegated all of

in instances where the subdelegation has no explicit end date, the subdelegated functions likely qualify as "continuing."[86]

Thus, many subdelegatees are likely officers, but are any principal officers (at least under the *Edmond*/*Arthrex* approach)? How are subdelegatees likely to fare under the *Edmond* three-prong test? As to removability, subdelegatees can typically have any of their subdelegated *functions* removed at will and without cause, which the executive branch has argued is the functional equivalent of removal from *office* at will and without cause.[87] However, subdelegatees are often members of the civil service who, unlike political appointees, cannot be removed from their *employment* at will.[88] It is an open question whether the capacity to remove a *function* from an officer but not to outright fire that officer constitutes adequate supervision.[89]

The next prong, whether a subdelegatee's actions are reversible by a superior, will also depend on the particular nature of the subdelegated functions. In *Edmond*, the Supreme Court stressed that the official at issue in that case "ha[d] no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers," which was one reason the Court found that the official was an inferior officer.[90] But the various subdelegated powers challenged in court evidence that this will not always hold true for subdelegatees. The

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their authority pursuant to a regulation that allows the SEC to make such subdelegations. *See Lucia*, 138 S. Ct. at 2049 (citing 17 C.F.R. § 201.110). The court-appointed amicus defending the constitutionality of the ALJs conceded that they "occupy continuing positions in the federal government established by law[.]" Brief for Court-Appointed Amicus Curiae in Support of the Judgment Below at 18, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17–130). The Court agreed, holding that the ALJs did indeed hold continuing positions and noting that all parties "agree[d] on that point." *See Lucia*, 138 S. Ct. at 2053.

86. *See* O'Connell, *Actings*, *supra* note 68, at 683 (footnote omitted) ("[D]elegations are not time-limited by statute, unlike acting officials under the Vacancies Act. Agencies may restrict delegations, but they can always extend the deadlines. These factors suggest that professionals who exercise delegated authority may be considered officers for Appointments Clause purposes."). Since a subdelegation is not a contract and may be shifted from one subdelegatee to another, a subdelegatee would likely occupy a "continuing" position under James Heilpern's definition as well.

87. *See* Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Partial Summary Judgment and in Support of Government's Cross-Motion for Partial Summary Judgment at 30, Moose Jooce v. FDA, 2020 U.S. Dist. LEXIS 23322 (D.D.C. Feb. 11, 2020) (1:18cv00203CRC) [hereinafter *Moose Jooce* Government Brief] (legal brief filed by the FDA representing that FDA staff manual guides may be amended "at any time" by the issuing authority and arguing that this amending power amounted to a functional removal power); *see also* O'Connell, ACUS Report, *supra* note 36, at 61 (noting that subdelegation orders without time limits "can be repealed at any time, assuming proper process (typically a decision by the agency head, which may include a vote of commissioners or board members in an independent agency)").

88. *See* 5 U.S.C. §§ 7541–7543; *see also id.* § 2302(a)(2) (limiting the conditions under which "a career appointee position in the Senior Executive Service" may be "transfer[red], or reassign[ed]").

89. In a case decided prior to the Supreme Court's *Arthrex* decision, a federal judge in the D.C. District Court held that a supervisor's power to revoke a subdelegation of unsupervised authority "at will, immediately and without notice or comment, guarantees that [the supervisor] retains ultimate powers of direction and supervision." *In re Grand Jury Investigation*, 315 F. Supp. 3d 602, 628 (D.D.C. 2018). The argument that removal of functions constitutes a supervisory power equivalent to the power to fire is stronger if *all* of an officer's significant authorities can be removed at will, which would often be the case for those exercising the powers of a PAS office via subdelegation.

90. *See* Edmond v. United States, 520 U.S. 651, 664–65 (1997).

subdelegatees are frequently given non-reviewable final decision-making authority.[91]

Even when subdelegatees are delegated unreviewable authority, however, the question remains whether it matters that such authority could be revoked. In litigation challenging one such subdelegation of rulemaking power,[92] the government argued that a subordinate's status as a properly-supervised inferior officer "turns on all of her superiors' supervisory authority—not only their self-imposed restraints, but also their ability to lift those restraints."[93] The government stressed that the superior *could have* altered the terms of the subdelegation at any time to make final rules contingent on the superior's approval before they took effect. That mere potential, the government argued, amounted to adequate supervision because every rule issued by the subordinate was *effectively* issued by permission of the superior.

In the wake of *Arthrex*, however, similar arguments from the government will face significant challenges. Prior to *Arthrex*, *Edmond* had described it as "significant" that the officer at issue had "no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers."[94] In *Edmond*, that lack of "power . . . unless permitted" derived from the statutory ability of executive-branch superiors to review each individual decision of the officer at issue. *Edmond* left open whether a lack of "power . . . unless permitted" could *also* be established solely by the ability of superiors to *institute* a system of review in the future, should they begin to lose faith in the decisions of the subordinate.

But *Arthrex* strongly suggests that the mere *potential* to institute review in the future is not sufficient supervision. *Arthrex*'s reasoning focused squarely on the *present* lack of formal review for each particular APJ decision. The fact that a superior might influence a decision behind the scenes is no substitute for formal review, the Court explained, because even if successful, "such machinations blur the lines of accountability demanded by the Appointments Clause. The parties are left . . . [without] a transparent decision for which a politically accountable

91. *See, e.g.*, Stand Up for California! v. U.S. Dep't of Interior, 298 F. Supp. 3d 136, 142 (D.D.C. 2018) (subdelegation of "authority to make a final fee-to-trust decision"); Crawford-Hall v. United States, 394 F. Supp. 3d 1122, 1132 (C.D. Cal. 2019) (subdelegation of "authority to issue final decisions on appeals of [Bureau of Indian Affairs] decisions"); Bullock v. U.S. Bureau of Land Mgmt., 489 F. Supp. 3d 1112, 1122 (D. Mont. 2020) (subdelegation of authority to deny protests for proposed planning decisions, with such denials serving as "the final decision of the US Department of the Interior"); Schaghticoke Tribal Nations v. Kempthorne, 587 F. Supp. 2d 389, 397, 420 (D. Conn. 2008) (subdelegation of "authority to make tribal acknowledgment decisions," including the issuance of a "Reconsidered Final Determination").

92. Full disclosure: In my prior job I was one of the Pacific Legal Foundation attorneys representing the plaintiffs in the early stages of that litigation.

93. *Moose Jooce* Government Brief, *supra* note 87, at 20.

94. *Edmond*, 520 U.S. at 664–65.

officer must take responsibility."[95] Additionally, the fact that an APJ might be punished in various ways for a decision, including through the loss of future decision-making assignments, was inadequate because this gave the superior "no means of countermanding the final decision already on the books."[96]

Arthrex's focus on formal review rather than behind-the-scenes influence suggests that the *threat* of instituting review or revoking rulemaking power is no substitute for a system of formalized rule-by-rule review. Until such review is actually instituted, a superior who has used subdelegation to give rulemaking power to a subordinate can plausibly avoid responsibility for each particular rule issued by that subordinate. And similar to the threat of reassigning APJs, the threat of revoking or limiting a subdelegation gives "no means of countermanding" any final rules issued before the threat is implemented.

The key holding of *Arthrex* is that when it comes to final executive-branch decisions, the buck needs to stop with someone nominated by the president and confirmed by the Senate. Whether the buck was passed *voluntarily* does not change that analysis. If anything, courts going forward are likely to be even *more* skeptical when the executive branch itself has chosen to "blur the lines of accountability demanded by the Appointments Clause."[97]

Finally, whether a subdelegatee is subject to "substantial oversight" is probably the hardest question to consider in the abstract; it will depend on the agency structure and a subdelegatee's particular place in that hierarchy.[98] But one general observation can be made: subdelegation occurs when one officer position in the standard agency hierarchy is "missing"—i.e., when one position is vacant and not filled by any acting officer. Most commonly, the agency head occupies level "1" at the top of the agency hierarchy, the missing officer would occupy level "2" below the agency head, and the subdelegatee occupies level "3" below the level of the missing officer. Thus, when a subdelegation occurs, it is typically during a period when the subdelegatee's immediate superior is missing, meaning there is a less close relationship than normal between the subdelegatee and the next highest superior (*e.g.*, a gap between levels 1 and 3 instead of the usual gap between levels 2 and 3). This might suggest that subdelegatees are less likely to be adequately supervised than a typical agency official.[99]

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95. United States v. Arthrex, 141 S. Ct. 1970, 1982 (2021).

96. *Id.*

97. *Id.*

98. In addition, the level of supervision might depend on whether courts themselves strictly police such subdelegations and limit their scope of authority. Ronald J. Krotoszynski, Jr. and Atticus DeProspo have argued that if the powers of unconfirmed officials occupying principal officer positions "are limited to those essential or necessary to perform the President's Take Clare Clause duties—with judicial assessment of whether an exercise of a particular power was in fact essential or necessary," then such officials "would actually be 'inferior'" because the scope of their authority would be strictly limited and supervised by the Article III courts[.]" Krotoszynski & DeProspo, *supra* note 66, at 746–47.

99. *But see id.* at 811–12 & n.350 (arguing that the subdelegation of a particular function "should not necessarily render the person performing a discrete duty a principal officer . . . because such an

As this discussion has shown, whether a subdelegatee is a principal or inferior officer under the *Edmond* test will vary from case to case, turning on the nature of the subdelegated functions, the procedure for reviewing the subdelegatee's decisions, the procedure for either revoking the subdelegation or firing the subdelegatee, and the day-to-day supervision of the subdelegatee.[100] But just as for acting officers, it is likely that subdelegatees who exercise the delegated powers of a position that is itself a principal office will *themselves* satisfy the *Edmond* test.

In sum, both formal acting officers and informal pseudo-actings will often meet the *Edmond* test for principal-officer status. This fact seemingly presents a major constitutional problem, because acting officers and subdelegatees often serve without Senate confirmation. But, as the next Part will examine, a nineteenth-century Supreme Court case throws a wrinkle in this question and seemingly creates a major exception to the *Edmond* rule, one that has so far insulated unconfirmed acting officers and unconfirmed pseudo-actings from constitutional challenge.

III. *UNITED STATES V. EATON*

It might seem, to this point, that the question whether some acting officers are principal officers is an easy question. And if *Edmond* and *Arthrex* were the only precedents on the inferior/principal officer divide, that might well be true. But one case makes the question much more difficult, and that is the case that those who argue acting officers cannot be principal officers rely on almost exclusively.[101] That case is *United States v. Eaton*.[102]

A diplomat named Sempronius Boyd was in Bangkok serving in the Senate-confirmed position of "minister resident and consul-general of the United States to Siam" (roughly equivalent to the modern-day position of Ambassador to Thailand). But in 1892, Boyd had fallen seriously ill and left Bangkok to travel back to America where he attempted to recuperate.[103] Normally during such absences, the duties of a consul would be carried out by a vice-consul, a position appointed by the Secretary of State. But the recently appointed vice-consul, coincidentally Sempronius Boyd's son Robert Boyd, had not yet completed his paperwork nor arrived in Siam.[104] For that reason, Sempronius Boyd tapped a missionary named Lewis Eaton to serve as the acting vice-consul general until

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assignment is limited in scope, limited in temporal duration, and performed by someone who is subject to supervision within the relevant department or agency").

100. *Accord id.* at 748 ("[S]ome delegations could, in theory, raise Appointments Clause problems if the scope of authority being delegated renders the holder a 'principal' officer because the scope of the accumulated delegated responsibilities exceeds those typical of an inferior officer and the performance of these duties is not otherwise subject to supervision by someone else within the department or agency.").

101. *See, e.g.*, Stephen I. Vladeck, *Whitaker May Be a Bad Choice, but He's a Legal One*, N.Y. TIMES (Nov. 9, 2018).

102. 169 U.S. 331 (1898).

103. *Id.* at 332.

104. *Id.* at 340.

Robert Boyd could assume his duties; this appointment was then approved by the Secretary of State.[105] Eaton continued to serve in this acting role until Robert Boyd arrived in Bangkok to take over as vice-consul.[106]

Later, a dispute arose between Eaton and the estate of the deceased Sempronius Boyd over who was entitled to the salary for the consul position at various times, a dispute in which the United States became involved. The United States took the position that Eaton had not been lawfully appointed and was not entitled to the salary he claimed, and this salary dispute is how the constitutional question reached the Supreme Court.

Taking Eaton's side, the Supreme Court held that Eaton's service had complied with both the relevant statutes and the Constitution and that he was entitled to the salary he claimed.[107] Relevant to the focus of this Article, the Court rejected an argument of the United States (ironically inverting the normal posture of modern litigation in which it is the United States *defending* the ability of unconfirmed officers to serve) that the very position of a non-Senate-confirmed vice-consul was unconstitutional because a "vice-consul is a consul within the meaning of" the Constitution.[108]

The Appointments Clause explicitly lists "Ambassadors, other public Ministers and Consuls," and "Judges of the supreme Court" as positions that are *not* inferior officers, so if a vice-consul were functionally a consul, Senate confirmation would be required and appointment by the Secretary of State would not be sufficient.[109] Remarkably, the government's brief seemed to anticipate the rule that *Edmond* would set down a century later, that inferior officers must be subordinate to some other officer. The brief argued that any position with the full power to act as consul (which the vice-consul general was entitled to do during vacancies in the office of consul general) must be a principal officer because the Constitution "recognizes no distinction of greater and inferior among ambassadors, consuls, and judges of the Supreme Court. . . . There is no inferior officer *among* them—there may be inferior officers *to* them."[110]

But the Supreme Court rejected this argument, reasoning that even though vice-consuls sometimes performed the duties of consuls during vacancies, they were nonetheless still only inferior officers. In the key passage, the Court held that "Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official."[111] The Court

105. *Id*. at 339.

106. *Id*. at 332–33.

107. *Id*. at 352.

108. Appellant's Brief at 13, United States v. Eaton, 169 U.S. 331 (1898). Although not made explicit in the brief of the United States and not at issue in the dispute, this argument would have seemingly invalidated *Robert* Boyd's service as vice-consul general during the period when there was no consul general, since Robert Boyd had also been appointed without Senate confirmation.

109. U.S. CONST. art. II, § 2, cl. 2.

110. Appellant's Brief at 13–14, United States v. Eaton, 169 U.S. 331 (1898).

111. *Eaton*, 169 U.S. at 343.

relied not on the original meaning of the word "inferior" for this holding, but rather on a functionalist and pragmatic argument. The Court predicted that holding vice-consuls to be principal officers "would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered."[112] The Court also relied on historical practice, noting that a statute had allowed vice-consuls to be appointed without Senate consent for more than forty years, which "sustain[s] the theory that a vice-consul is a mere subordinate official[,] and we do not doubt its correctness."[113]

Today, with both *Eaton* and *Edmond* on the books and seemingly both good law, the constitutional status of acting officers is in a strange limbo.[114] *Edmond*'s reasoning strongly suggests that at least some acting officers—those who act in positions that have no superior but the president—are principal officers. Yet *Eaton* held that a temporary officer in a position that would normally require Senate consent is *not* necessarily a principal officer. The Supreme Court has not yet attempted to reconcile these two rules, but *Edmond* and *Arthrex* both passingly cite *Eaton* as good law without mentioning this tension.[115] For that reason, lower courts reviewing challenges to acting service in principal positions have unanimously held that *Eaton* still controls and requires holding acting officers to be inferior officers who do not require Senate consent.[116]

Can *Eaton* and *Edmond* be reconciled? Can a principled rule be found that can justify an exception to *Edmond*'s requirement for supervision? Or must one of these two precedents be discarded? And if *Eaton* is discarded, will government efficiency necessarily suffer? The next and final Part of this Article will consider these key questions.

IV. SHOULD *EATON* BE RECONCILED WITH *EDMOND*, OR SHOULD ONE BE OVERRULED?

A. Can Post-Enactment Practice Justify Eaton*'s Holding?*

With *Eaton* still on the books, the key unanswered doctrinal question is whether there is a limit past which courts should no longer consider acting service "special and temporary."[117] Lower courts applying *Eaton* have so far declined to

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112. *Id.*

113. *Id.* at 344.

114. *Eaton* was not the only pre-*Edmond* Appointments Clause case whose reasoning *Edmond* called into question but whose holding *Edmond* declined to overrule. *See* Nick Bravin, Note, *Is* Morrison v. Olson *Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103 (1998); Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233, 258–68 (2008).

115. *See* Edmond v. United States, 520 U.S. 651, 661 (1997); United States v. Arthrex, 141 S. Ct. 1970, 1985 (2021).

116. *See, e.g.*, Rop v. Fed. Hous. Fin. Agency, 50 F.4th 562, 574 (6th Cir. 2022), *cert. denied*, 2023 WL 3937607 (U.S. June 12, 2023) (No. 22-730); Arthrex, Inc. v. Smith & Nephew, Inc., 35 F.4th 1328, 1333–35 (Fed. Cir. 2022); United States v. Smith, 962 F.3d 755, 764–65 (4th Cir. 2020).

117. *See* Mendelson, *supra* note 9, at 587 ("'Temporary' implies some time limitation on service, but the Court has supplied no details or meaningful rationale."); *see also id.* at 571 (describing "*Eaton*'s

set a maximum upper time limit for how long acting service in a principal office may last without violating the Appointments Clause.[118] Scholarship has mostly focused not on whether *Eaton* should remain good law at all, but rather whether a principled constitutional line can be drawn to give some limit to how long "special and temporary" service can last before a "temporary" position may no longer be considered inferior. Scholarly proposals include: just under the length of a recess appointment;[119] 120 days plus the pendency of a single nomination;[120] ten days or slightly more;[121] and six months.[122] In one of the only judicial opinions to engage the question at length, Judge Amul Thapar of the Sixth Circuit has concluded that the two most plausible answers are either six months "with maybe a little more 'under special and temporary conditions'" or the amount of time left "until the current Senate expires."[123]

These attempts to define a dividing line have focused mainly on *post*-enactment practice, usually finding rules based on the deadlines used in earlier versions of the Vacancies Act.[124] The Office of Legal Counsel, in a 2018 opinion defending the legality of Whitaker's acting appointment, also relied almost exclusively on post-enactment practice.[125] Pointing to the various iterations of the Vacancies Act, that opinion argued that "Since 1792, Congress has repeatedly legislated on the assumption that temporary service as a principal officer does not require Senate confirmation."[126] Pointing to appointments actually made under those acts, the opinion also noted that "Not only did Congress authorize the Presidents

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reasoning that the acting official is inferior because the appointment is 'special and temporary'" as "unsatisfying").

118. *See, e.g.*, *Rop*, 50 F.4th at 580 n.4 (declining to invalidate an action taken by an acting officer who had served nearly three years in a principal office and holding that "the Constitution permits Congress to choose" the maximum tenure for acting officers); *but see* NLRB v. SW Gen., Inc., 580 U.S. 288, 313 n.1 (2017) (Thomas, J., concurring) (suggesting that holding the powers of an office for three years is too long for that service to be "special and temporary").

119. *See* West, *supra* note 12, at 217–18 (arguing that any appointment lasting longer than a recess appointment could potentially last, which is just under two years, is no longer "special and temporary").

120. *See* Mendelson, *supra* note 9, at 602 (arguing, based on the established practice of prior Vacancies Acts, that the Constitution should be interpreted to limit acting cabinet-level service to 30–40 days plus the pendency of a nomination, and acting lower-level service to 120 days plus the pendency of a nomination).

121. *See* Krotoszynski & DeProspo, *supra* note 66, at 781–82 & n.217 (arguing that *Eaton*'s applicability should be limited to periods of acting service that are too short to engage the full policymaking powers of the position, and that under this approach acting service lasting ten days or fewer "should be presumptively constitutional").

122. *See* Andrew Hyman, *Old English Law Indicates that "Six Months" Is the Maximum Necessary and Proper Constitutional Limit on Tenure of Acting Cabinet Secretaries*, ORIGINALISM BLOG (Nov. 16, 2018), https://originalismblog.typepad.com/the-originalism-blog/2018/11/old-english-law-indicates-that-six-months-is-the-maximum-necessary-and-proper-constitutional-limit-o.html [https://perma.cc/VMF5-FE7R] (arguing that the cutoff should be—you guessed it—six months).

123. *Rop*, 50 F.4th at 581–82 (Thapar, J., concurring in part and dissenting part).

124. One exception is Hyman, *supra* note 122, which looks not only to the 1795 Vacancies Act but also to pre-enactment English Law to find a tradition of a six-month limit.

125. *See* Steven A. Engel, Assistant Att'y Gen., Office of Legal Counsel, *Designating an Acting Attorney General: Memorandum for Emmet T. Flood, Counsel to the President*, 9–13 (Nov. 14, 2018).

126. *Id.* at 7.

to select officials to serve temporarily as acting principal officers, but Presidents repeatedly exercised that power to fill temporarily the vacancies in their administrations that arose from resignations, terminations, illnesses or absences from the seat of government."[127]

But post-enactment practice is of limited relevance to questions of constitutional interpretation, especially when the constitutional text at issue has an unambiguous original meaning. The Supreme Court has recently admonished that courts must "guard against giving postenactment history more weight than it can rightly bear."[128] The Court has stressed that "to the extent later history contradicts what the text says, the text controls."[129] The key question, then, is whether the text itself is ambiguous enough that post-enactment practice can aid in interpretation. If a constitutional provision is ambiguous, then "a governmental practice [that] has been open, widespread, and unchallenged since the early days of the Republic . . . should guide our interpretation of [the] ambiguous constitutional provision."[130] But "postratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text."[131]

The post-enactment history of the Vacancies Acts and the appointments made under them are thus only relevant if the meaning of "inferior officers" is ambiguous enough to potentially encompass temporary officers who have no superior but the president. Whether one believes such ambiguity exists will largely depend on how convincing one finds Justice Antonin Scalia's majority opinion in *Edmond* and his dissenting opinion in *Morrison v. Olson*,[132] which in many respects foreshadowed the reasoning of *Edmond*.

Edmond's textual argument contrasted the Framers' choice of the word "inferior" with another potential option that they did not choose: the word "lesser." *Edmond* suggested that if the Framers had intended to refer broadly to any officer

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127. *Id*. at 9.

128. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022).

129. *Id*. at 2137; *see also* Baude, *supra* note 44, at 13–14 ("The first premise of liquidation is an indeterminacy in the meaning of the Constitution. If first-order interpretive principles make the meaning clear in a given context, there is no need to resort to liquidation."); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 53 n.209 (2020) ("The modern Supreme Court's most famous rejection of a [historical] gloss argument was in *INS v. Chadha*, 462 U.S. 919 (1983), where the Court held that a 'legislative veto' provision was unconstitutional despite a longstanding congressional practice of including such provisions in legislation, in large part because the Court perceived the relevant constitutional text to be clear.").

130. *Bruen*, 142 S. Ct. at 2137 (quoting NLRB v. Noel Canning, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in judgment)).

131. *Id*. (quoting Heller v. District of Columbia, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)). Further, relying on post-enactment practice risks becoming "an adverse-possession theory of executive authority," which endorses a power as constitutional only because "Presidents have long claimed the powers in question, and the Senate has not disputed those claims with sufficient vigor." Nat'l Labor Relations Bd. v. Noel Canning, 573 U.S. 513, 570 (2014) (Scalia, J., concurring in judgment).

132. 487 U.S. 654 (1988).

of a formally lower rank or less significant power, they would have used the word "lesser" rather than "inferior."[133]

This textual argument, on its own, is potentially vulnerable to dispute. As Justice Clarence Thomas pointed out in his recent dissenting opinion in *Arthrex*, none other than James Madison apparently used the word "lesser" rather than "inferior" when the Framers were debating the Appointments Clause. "If Madison understood the two terms to be interchangeable," Thomas reasoned, then "perhaps this Court should too."[134]

Although *Edmond* put great weight on the fine distinction between these two words, *Edmond* did not represent Justice Scalia's full textualist argument on this point. Some of his arguments were more fleshed out in his *Morrison* dissent (presumably because he was then writing only for himself), and the textualist "inferior vs. lesser" argument was one of those fleshed out arguments.

In his *Morrison* dissent, Justice Scalia explained that the choice of the word "inferior" was significant because the word "inferior" appears elsewhere in the Constitution, which allows interpreters to use comparative textualism. "At the only other point in the Constitution at which the word 'inferior' appears, it plainly connotes a relationship of subordination. Article III vests the judicial power of the United States in 'one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'"[135] If an "inferior court" must be functionally subordinate to the Supreme Court rather than merely formally lower in rank (a view, Scalia noted, that finds support in Federalist 81), then an "inferior officer" must carry the same connotation for the executive branch.[136]

This comparative textualism argument has yet to be convincingly rebutted. Justice Thomas's *Arthrex* dissent briefly entertains the possibility that inferior officers need only be inferior to the *president*, not inferior to some other officer *besides* the president like a department head. But Justice Thomas admits that this understanding is inconsistent with the linguistic practices of the First Congress, which designated the heads of departments as principal officers, not inferior officers. Thomas himself seems more sympathetic to the theory that "inferior officers encompass all officers except for the heads of departments."[137] Even that expansive interpretation would not explain how temporary heads of departments can be inferior.[138]

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133. Edmond v. United States, 520 U.S. 651, 663 (1997).

134. United States v. Arthrex, 141 S. Ct. 1970, 2010 (2021) (Thomas, J., dissenting).

135. *Morrison*, 487 U.S. at 719 (Scalia, J., dissenting).

136. *Id*. at 720.

137. *Arthrex*, 141 S. Ct. at 2008 (Thomas, J., dissenting).

138. For further discussion of the points of disagreement between Justice Thomas and the *Edmond* test, *see* Thomas Berry, U.S. v. Arthrex*: Exploring Justice Thomas's Call to Reexamine* Edmond, YALE J. ON REG.: NOTICE & COMMENT (Part 1 July 9, 2021; Part 2 July 12, 2021), https://www.yalejreg.com/nc/u-s-v-arthrex-exploring-justice-thomass-call-to-reexamine-edmond-1/ [https://perma.cc/ZSJ3-UAJP] [Part 1]; https://www.yalejreg.com/nc/u-s-v-arthrex-exploring-justice-thomass-call-to-reexamine-edmond-2/ [https://perma.cc/BDS2-CXZF] [Part 2].

If "inferior officer" does mean subordinate to a department head in just the same way that "inferior courts" are subordinate to the Supreme Court, then granting inferior officers temporary immunity from department-head review is as textually implausible as granting a federal district-court judge temporary immunity from Supreme Court review. It would seem clearly unconstitutional to grant a district-court judge a six-month period during which all of his decisions could not be reviewed by the Supreme Court, because for that limited time he would in no sense be inferior to the Supreme Court. If "inferior" means the same thing for executive-branch officers as it does for judges, then granting time-limited immunity from supervision to inferior executive-branch officers is similarly implausible.[139]

Further, even if the meaning of "inferior officer" *is* ambiguous and potentially open to settlement through post-enactment practice, the post-enactment history itself may not endorse *Eaton*'s holding as clearly as OLC and some scholars believe. That is because there is strong evidence that early practice *usually* (but not always) avoided using unconfirmed acting officers to fill principal offices after resignation or death. Presidents instead generally reserved the use of unconfirmed acting officers in principal offices to cases of sickness or absence (when a Senate-confirmed principal officer was formally still in office).[140] Indeed, the brief of the United States in *Eaton* attempted to make this distinction, contrasting vice-consuls who act as consuls during vacancies with other officials "who are subordinate or deputy consuls—aids to and instruments in the hands of the real consul and employees of his own acting in his name *in his absence*."[141]

When resignation or death resulted in an office being entirely *vacant*, presidents were much more likely to choose a temporary officer who was already

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139. A 2003 OLC opinion argued that the *Edmond* opinion did not mean to set out the *only* categorical definition for the meaning of "inferior officers," given the opinion's use of the qualifier "generally speaking." *See* Designation of Acting Director of the Office of Management & Budget, 27 Op. O.L.C. 121, 124 (2003). But *Edmond* may well have used that softening phrase to mean only that it was using general terms like "relationship" rather than more specific and legalistic terms: "Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President." Notably, the *Edmond* opinion did *not* use any such softening or hedging language when introducing its operative rule: "[W]e think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who [are PAS]."

140. *See* Heilpern, *supra* note 51, at 283–84 (arguing that the *Eaton* precedent should be "limited in application to instances where there [is] no real vacancy . . . but rather a temporary need for someone to pinch hit while the incumbent [is] sick or traveling"); Thomas Berry, *Is Matthew Whitaker's Appointment Constitutional? An Examination of the Early Vacancies Acts*, YALE J. ON REG.: NOTICE & COMMENT (Nov. 26, 2018), https://www.yalejreg.com/nc/is-matthew-whitakers-appointment-constitutional-an-examination-of-the-early-vacancies-acts-by-thomas-berry/ [https://perma.cc/QB64-A8Y7] [hereinafter Berry, *Whitaker's Appointment*] (same); Walter Dellinger & Marty Lederman, *Initial Reactions to OLC's Opinion on the Whitaker Designation as "Acting" Attorney General*, JUST SEC. (Nov. 15, 2018), https://www.justsecurity.org/61483/initial-reactions-olc-opinion-whitaker-designation-acting-attorney-general [https://perma.cc/2XMA-EYHK] (suggesting that *Eaton* should be limited to situations where no Senate-confirmed official is available in an agency to serve as the acting principal officer).

141. Appellant's Brief at 14, *United States v. Eaton*, 169 U.S. 331 (1898) (emphasis added).

serving in some other *Senate-confirmed* role.[142] And as will be explained in the next section, there is a relevant constitutional difference between acting officers who have been confirmed by the Senate to *some* position and those who have not been confirmed by the Senate to *any* position. The practice of appointing unconfirmed acting officers as temporary cabinet members after a death or resignation was infrequent enough that it likely fell short of the "course of authoritative, deliberate and continued decisions" necessary to establish a constitutional precedent through executive-branch practice.[143]

In addition, without any record of constitutional debate accompanying the early versions of the Vacancies Act, we do not have any evidence that their enactment represented an affirmative decision by the Framing generation that acting cabinet officers are inferior officers. As Will Baude has explained, James Madison's theory of fixing ambiguous constitutional meaning through "liquidation" applied only when there was an open and explicit constitutional debate:

> [I]t was not enough for Madison that the practice be one of sheer political will; it must also be one of constitutional interpretation. . . . Madison specified that the practice must be 'deliberate' or the result of 'a subject of solemn discussion in Congress.' In an extended analogy between judicial precedent and liquidation (there called 'legislative precedents'), Madison described judicial precedents as binding 'when formed on due discussion and consideration,' being 'an exposition of the law publicly made' and 'deliberately sanctioned by reviews and repetitions,' and argued that legislative precedents were analogous. Thus, he said elsewhere, 'Legislative precedents' were 'entitled to little respect' when they were 'without full examination & deliberation.'[144]

Without any record of such deliberation over the constitutionality of the early Vacancies Acts, we simply don't know why or whether the members of the early Congresses viewed these provisions as consistent with the Appointments Clause. It is possible that they viewed the temporary performance of an office's duties as akin to a contract and thus not as holding any office at all,[145] in which case the enactment of these laws bears no weight on the meaning of "inferior" in "inferior officer." It is also possible that the constitutional problem simply did not occur to anyone at the time because it was not raised. Neither scenario would be enough to

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142. *See* Berry, *Whitaker's Appointment*, *supra* note 140 ("[T]he [OLC] opinion states that at least 110 [unconfirmed] chief clerks temporarily led the Departments of State, War, and Treasury between 1809 and 1860[.] . . . Of the 93 that I could identify, 80 were acting heads serving during travel or sickness, and only 13 were *ad interim* [serving during a vacancy]. By not differentiating these two types of temporary service, the opinion gives the impression that non-Senate-confirmed officials were appointed to lead departments after a death or resignation far more frequently than actually occurred.").

143. Baude, *supra* note 44, at 16 (quoting Letter from James Madison to Nicholas P. Trist (Dec. 1831), *in* 9 THE WRITINGS OF JAMES MADISON 477 (Gaillard Hunt ed., 1910)).

144. *Id.* at 17–18 (citations omitted).

145. The lack of a firm time limit under the modern Vacancies Act makes this argument much less plausible than it may have been under the 1795 and later Vacancies Acts. *See supra* notes 40–51 and accompanying text.

outweigh Justice Scalia's reasoned textual interpretation in *Edmond* and *Morrison*.

It remains the case, then, that no plausible textual alternative has yet been put forward to challenge the *Edmond* interpretation of "inferior" as meaning subordinate. Yet this interpretation leads to a rule that would likely require overruling *Eaton* and invalidating the service of unconfirmed acting officers in principal positions. Does this mean that faithfully following the Constitution's original meaning requires, as the *Eaton* Court feared, seriously hindering the operations of the government when vacancies unexpectedly arise in principal offices?

Not necessarily. If *Eaton* is overruled, there is a solution that would both allow the government to deal with unexpected vacancies in principal office positions *and* comply with *Edmond*. That solution relies on two cases that have not received enough discussion in the Vacancies Act context: *Shoemaker v. United States*[146] and *Weiss v. United States*.[147]

B. Shoemaker*,* Weiss*, and a Constitutionally Sound Approach to Acting Officers*

Both *Shoemaker* and *Weiss* were about Senate consent, and specifically about what the Senate reasonably understands itself to be doing when it confirms someone to an office. *Shoemaker* established the principle that when the Senate confirms someone to an office, the Senate is on notice that by virtue of new statutes, the office may naturally acquire new powers that are *of the same general nature* as the ones the office currently holds. *Shoemaker* held that so long as an office is given new duties that are reasonably in line with what would be expected for that office—what the Supreme Court called new duties "germane" to the office—no new Senate confirmation vote is required for the person holding that office.[148]

Weiss took the *Shoemaker* doctrine a step further. What if a Senate-confirmed officer is *selected* by a superior to take on new duties temporarily, such as a military officer being selected to serve for a term as a military judge? Is a new Senate confirmation vote required when such new duties are granted? The Supreme Court, by analogy to the reasoning of *Shoemaker*, once again held no. Just as the Senate is on notice that an officer may acquire new statutory duties germane to the office, so is it also on notice that an officer may be temporarily detailed with new assignments that are germane to the office.[149]

Under the *Shoemaker*/*Weiss* line of reasoning, the selection of a Senate-confirmed officer in a department to temporarily act as a different principal officer in that same department is likely constitutional. For example, the Senate is on notice when it confirms the deputy attorney general or solicitor general that future circumstances might require those officers to temporarily take on the duties of the

146. 147 U.S. 282 (1893).
147. 510 U.S. 163 (1994).
148. *Shoemaker*, 147 U.S. at 300–01.
149. *Weiss*, 510 U.S. at 176.

attorney general, as they have in the past. That is why, unlike in the case of Matthew Whitaker, there was no serious constitutional controversy when Sally Yates or Dana Boente each served as acting attorney general early in the Trump Administration; each had already been confirmed by the Senate to serve in other DOJ positions.

Using *Shoemaker* and *Weiss* to fill unexpected vacancies in principal offices is fundamentally different from using *Eaton* to do so. While *Eaton* creates an atextual exception to the rule that only Senate-confirmed officers may exercise unsupervised power, *Shoemaker* and *Weiss* recognize that it is in the nature of officeholding that sometimes officeholders accrue new power. Thus, acting appointments under *Shoemaker* and *Weiss* are not really appointments at all; they are additional duties added to the portfolio of someone who has already received the Senate consent necessary to exercise the independent authority of a principal office. Relying solely on Senate-confirmed officers to temporarily fill principal offices would ensure that the Senate has vetted and approved everyone serving at the top level of government, even during vacancies. And ensuring that all acting cabinet members have been confirmed by the Senate to *some* position would go a long way toward preventing the elevation of "unfit characters" that the Appointments Clause was designed to guard against.[150]

C. How Congress Can Creatively Solve the Practical Problems with Overruling Eaton

One of the three types of officials eligible to serve as an acting officer under the Vacancies Act is an official holding a Senate-confirmed position.[151] If the Supreme Court overruled *Eaton*, these acting officers would still be able to serve in principal positions, at least within their own departments, where the duties they assume would likely be "germane" to the duties of the office to which they were confirmed.

The most common pragmatic argument against overruling *Eaton* is that it would create difficulties in finding acting cabinet secretaries during presidential transitions, especially when the White House is changing parties.[152] It is customary for most Senate-confirmed officials to resign at the end of a presidential administration, thus potentially leaving a new president few Senate-confirmed options to serve as acting secretaries. For example, only two of the 15 acting cabinet secretaries at the start of the Biden administration were Senate-confirmed

150. *See* THE FEDERALIST NO. 76 (Alexander Hamilton) (predicting that the Senate's confirmation power "would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters").

151. 5 U.S.C. § 3345(a)(2).

152. *See, e.g.*, Anne Joseph O'Connell, *Waiting for Confirmed Leaders: President Biden's Actings*, BROOKINGS INST. (Feb. 4, 2021), https://www.brookings.edu/research/president-bidens-actings/ [https://perma.cc/574Z-CT5D] (noting that presidents naturally choose unconfirmed career officials as acting cabinet secretaries rather than confirmed officials from the previous administration because it is "easier to find a senior agency worker aligned with the new administration's priorities than an appointee chosen by a president of the opposing party").

holdovers from the Trump administration; the rest were non-Senate-confirmed career civil servants.[153]

But this problem is not insurmountable. There is no reason that the Senate cannot vet and confirm some already-serving career civil servants for the specific purpose of granting them eligibility to serve as acting cabinet members. Congress can and should create new Senate-confirmed titles that allow presidents to nominate career civil servants to be confirmed for this additional eligibility. This action would ensure that vetted and accountable caretaker acting secretaries are always available, of a wide enough range of political persuasion to be acceptable to both parties.

Vetting and confirming more career employees in more departments would create a larger stock of choices for presidents of both parties to act as principal officers when vacancies in principal offices unexpectedly arise. Just as importantly, it would mean the Senate would once again play a meaningful role in the process of selecting *everyone* who serves in a principal position, whether permanently or as an acting officer. And such acting appointments would comply with both the purpose and the letter of the Appointments Clause.

Further, even if the Supreme Court declines to overrule *Eaton*, Congress could amend the Vacancies Act itself to limit eligibility to serve as acting cabinet-level officers (and acting officers in other principal officer positions) to those who have already been confirmed by the Senate to a position within that same department. This would have the effect of Congress placing the same limitation on the executive branch that the Supreme Court would if it overruled *Eaton*. If Congress chooses to create more Senate-confirmed career positions for the purpose of serving as caretaker acting principal officers, it would be natural to reform the Vacancies Act at the same time, to ensure that the executive branch uses such Senate-confirmed officials for their intended purpose.

Overruling *Eaton*—or amending the Vacancies Act to achieve the same effect—doesn't have to lead to a breakdown in government functionality. Like most seemingly insurmountable problems, solving this one just requires a little creativity.

CONCLUSION

Lower courts are currently bound to follow *Eaton*'s holding. But compared to modern textualist and originalist decisions, *Eaton*'s reasoning is not persuasive. *Eaton* fails to engage with the meaning of the word "inferior," and its holding is apparently based more on pragmatic concerns than constitutional text. The fact that neither scholars nor courts can coalesce on a concrete length of time past which *Eaton*'s exception no longer applies strongly suggests that its exception lacks a principled grounding in the Constitution in the first place. While

153. *See* Thomas A. Berry, *Are 13 Current Cabinet Members Unconstitutional?*, CATO: CATO AT LIBERTY (Jan. 21, 2021), https://www.cato.org/blog/are-13-current-cabinet-members-unconstitutional [https://perma.cc/L9U3-K5HS].

Edmond's rule is clear and textually-grounded, *Eaton*'s exception to the rule is vague and its origin is unclear.

So long as *Eaton* remains good law, presidents will be able to fill cabinet positions with unconfirmed officers, a practice at odds with *Edmond* and with the original meaning of the Appointments Clause. If the Supreme Court's lack of appetite to overrule *Eaton* arises from pragmatic concerns, those concerns should not be determinative. The federal government can stock itself with enough Senate-confirmed career officials to fill every possible vacancy among the principal offices. The Supreme Court should recognize that *Eaton* is a relic of a different constitutional era. The federal government will survive bringing the constitutional law of acting officers into the twenty-first century.