No. 18-496

IN THE

Supreme Court of the United States

BARRY MICHAELS,

Petitioner,

v.

JEFFERSON B. SESSIONS III,
ATTORNEY GENERAL OF THE UNITED STATES,
AND THOMAS E. BRANDON, AS DEPUTY DIRECTOR,
HEAD OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF MOTION TO SUBSTITUTE

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REPLY IN SUPPORT OF THE MOTION TO SUBSTITUTE

This is a constitutional crisis. It is a constitutional crisis even if we are distracted from and dulled to it. Article II of the Constitution requires that principal officers including the Attorney General be confirmed by the Senate. For the first time in the Nation's history, the President has forced out a principal officer and replaced him with a non-confirmed appointee, indeed refusing to submit him or anyone else for confirmation. That hand-picked successor was best known for his views that the Department of Justice should limit or shut down an active criminal investigation into whether the President and his campaign colluded with a foreign power and obstructed justice. That appointee now controls the investigation. The President made the appointment in a fashion calculated to prevent the Constitution's enforcement, because the Special Counsel leading the investigation is barred by law from raising the issue and because it will be mooted before any other case can reach the Court. *See* Part II, *infra*.

The President has gone well past disheartening tweets. This is a power grab. It is a power grab designed to protect the President personally by evading the authority and responsibility of the Senate and this Court under the Constitution. Yes, the Court can blink at that reality, decline to act, and move on. But history will regret that it did. The Nation is thankful not merely for a judiciary that forcefully articulates its independence and neutrality, but even more so for one that adapts to the circumstances as required to protect our liberty by responding to assaults on the separation of powers.

This Court has held, in terms, that it will decide an Appointments Clause challenge in the first instance — without a ruling by a lower court, indeed even where the claim has been forfeited — because it is foundational to the separation of powers. *Freytag v. Comm'r*, 501 U.S. 868, 879 (1991). The Court should apply that principle here, promptly set the Motion for argument and, after due consideration, grant it.

I. This Court Has The Power To Grant The Motion To Substitute.

The Government's first argument is frivolous. It says that the Court *cannot* grant the Motion. So, for example, even if the Government conceded that the President acted illegally and that Mr. Rosenstein is the Acting Attorney General as a matter of law, the Court would be forbidden to substitute him. That is obviously wrong. There is no merit to the Government's assertions that (a) the Court's Rules require it to accept without question the President's contested assertion of who lawfully holds the office, and (b) the Constitution forbids the Court to act because petitioner has not suffered any Article III injury from the substitution of Mr. Whitaker.

a. Just as the Court's Rules don't allow the Government to designate an incorrect successor, they don't preclude this Court from granting a Motion to Substitute to correct an error. The relevant Rule provides that "any successor in office is automatically substituted as a party." Sup. Ct. R. 35.3; *see* Gov't Mem. in Opp. 4 (Mem.). But "automatically" is an adverb that modifies "substituted" — *i.e.*, it describes the *process* of substitution. The antecedent question is "who is the successor?"

The Court certainly could have written a Rule that made the President's designation definitive: "Upon designation of the appointing authority, any successor in

office is automatically substituted." But it didn't; in fact, it didn't give the act of appointment (or even the Government's views) priority at all. Instead it calls on "[t]he parties" to "notify the Clerk in writing of any such successions." Sup. Ct. R. 35.3.

In the great majority of cases, of course, a court doesn't adjudicate substitution because it isn't contested. But in the rare case that it is, this Court is not required to just accept the Government's representation and ignore the issue. In fact, multiple individuals can claim simultaneously to hold an office. Courts have to resolve such disputes, and they properly do so in the context of a motion to substitute. *See, e.g.*, *Glassroth v. Houston*, 299 F. Supp. 2d 1244, 1245-46 (M.D. Ala. 2004).

So, the Government's assertion that Mr. Whitaker is the Acting Attorney General doesn't have the force of law; it is just that: an assertion. The identity of the actual lawful officer is the kind of legal question a court classically resolves. The fact that Mr. Whitaker got there first on the docket is not an entitlement that eliminates the dispute and precludes other candidates. This is a court proceeding, not musical chairs.

The Government also says that it is the real party in interest, so that even if Mr. Whitaker was erroneously substituted, petitioner will still get all the relief to which he is entitled. Mem. 5-6. That's true. But it doesn't mean the Court has no power to grant the Motion. If that principle were controlling, the Rules wouldn't provide for substitution at all. But they do. They insist on either identifying the correct person holding the office or on designating only the office itself. Sup. Ct. R. 35.4.

There isn't a third option: naming whoever the Government designates, even if wrongly.

b. The Government next briefly argues that the Constitution forbids this Court from substituting Mr. Rosenstein unless petitioner has Article III standing to make the request. Mem. 9-10. That's also wrong. Standing goes to the Court's power to grant relief on a request that it change the status quo. *United States v. Windsor*, 570 U.S. 744, 757 (2013); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)). The Government does not doubt that petitioner has standing to bring his underlying lawsuit.

Although the federal courts must issue thousands of procedural orders a day, and millions a year, the Government couldn't find one case holding that a procedural request like this requires Article III standing. There is a reason. A litigant doesn't need to identify a concrete injury that will be redressed by the court taking an administrative action like granting its lawyer *pro hac vice* status, scheduling a hearing, expanding the ordinary page limits — or substituting an official. We know that: if the Court were required to find a justiciable controversy to exercise the power of substitution, it couldn't have substituted Mr. Whitaker in the first place. But it did, and it obviously has the power to substitute someone else now.[1]

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[1] To be clear, we believe that this Court's ruling on the substitution motion will also have real consequences in this case. As we said in the Motion (at 1), formally, the Acting Attorney General's supervision of this case is just like any other. But as a practical matter, there is a realistic chance that Mr. Whitaker has been or will become personally involved in determining the position of the United

II. This Court Should Decide The Motion To Substitute.

The real debate is not whether the Court *can* use the Motion to Substitute to decide who is the Acting Attorney General, but whether it *should*. Oddly, the Government spends only two pages on that issue. Mem. 10-12. As the Motion anticipated, the Government asserts that the Court's "general practice," *id.* 10, is to allow an issue to be addressed first in the lower courts and that it "typically," *id.* 11, would not do so in a context like this.[2]

Preliminarily, the Government fails to recognize that the ordinary rule does not apply to an Appointments Clause challenge. *Freytag* resolved a challenge to the assignment of cases by the Tax Court. The petitioners consented to the assignment. When they raised an Appointments Clause challenge on appeal, the court of appeals held that it was waived. So the merits were addressed in the first instance in this Court, over the Government's thorough objection. The Court reasoned that "the disruption to sound appellate process entailed by entertaining objections not raised below does not always overcome what Justice Harlan called 'the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers.'" 501 U.S. at 879 (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)).

States. We seriously doubt, for example, that he is agnostic on this Motion. He is not recused. The petition for a writ of certiorari itself raises a significant Second Amendment issue, on which the circuits are divided. It is realistic that the Acting Attorney General will play an active role on that issue, especially if certiorari is granted.

[2] We were struck but not surprised by the Administration's unblushing insistence that this Court follow normal order and refuse to decide this critical issue. The bright contrast between the Government's position here and the one it articulates in its own applications risks making the Court appear unbalanced, as if it departs from its usual practices only to help this Administration.

The Court would not be writing on a blank slate here. *See* Mem. 17 (arguing that the proper construction of the Vacancies Act was fully considered and resolved in its favor by a court of appeals and district court). But in any event, this Court's intervention is required because this isn't close to an ordinary question in an ordinary context. The importance of the issue is astonishing. A motion to substitute is likely to be the only context in which the Court can decide the question. The applicable principle of practice is therefore instead that the Court will take actions necessary to protect its own ability to resolve such a foundational dispute.

The Motion presents a legal question that requires a ruling by this Court. It is an epic inter-branch conflict over the powers of each one; checks and balances are everywhere. The President forced out a Senate-confirmed principal officer. He then issued an order personally selecting someone else who he refused to nominate. That order seeks to evade not only the Senate's right and obligation under Article II of the Constitution to decide whether to consent, but also an on-point statute enacted by Congress — the Attorney General Succession Act.

On these weighty issues relating to the validity of an appointment, the authority of an important government official to act, and the separation of powers between the branches, the buck stops here. *See, e.g.*, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (holding that Recess Appointments Clause only includes intra-session recesses of substantial length, extends to vacancies arising before recesses, and President's appointments made in three-day period between two pro forma sessions of the Senate were invalid); *Morrison v. Olson*, 487 U.S. 654 (1988) (holding that the Ethics and

Government Act did not violate the Appointments Clause, did not violate Article III, and did not violate separation of powers doctrine). The Court has resolved those questions, even when the question is not first decided in the lower courts, not only in *Freytag*, but in a ruling that almost all regard as not only historic but rightly decided. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (petition for a writ of mandamus to this Court).

Critically, the Government does not dispute that a prompt ruling on the appointments challenge would benefit the administration of justice nationally. It does not doubt that unwinding Mr. Whitaker's unlawful acts as Acting Attorney General would be enormously disruptive. Importantly, those acts are subject to later, collateral challenge because the de facto officer doctrine does not apply to challenges under the Appointments Clause. *See Nguyen v. United States*, 539 U.S. 69, 77 (2003); *Ryder v. United States*, 515 U.S. 177, 182 (1995). A thousand fires are beginning to bloom in the lower courts, right now. Conversely, if the Government is correct on the merits, the country would benefit too from a ruling upholding the appointment, ending all that unnecessary litigation, and removing the cloud that hangs over it.

Still, the Government suggests that the Court should only decide the question if it arrives here in the usual way: in a petition for a writ of certiorari, after consideration in the lower courts. The problem is that it won't — either because there isn't another context in which it can be raised, or because it will become moot before it arrives here. In fact, the Solicitor General makes that very point repeatedly. His statement that "[t]he question may never need to be addressed," Mem. 12, doesn't

actually describe whether the issue is important enough to require this Court's attention; it indisputably is. That statement is instead a backhanded acknowledgment that "the Court probably will never get another chance." And the Administration is taking full advantage of the assumption this Court cannot do anything about it.

Mr. Whitaker's role is vital in authority and sweeping in scope, but its nature is such that it will evade a judicial challenge to his appointment, or at the very least review in this Court. This Court has considered Appointments Clause challenges to adjudicators, because in those cases a party to the adjudication can challenge the decisionmaker. *E.g.*, *Nguyen*, 539 U.S. at 77; *Ryder*, 515 U.S. at 182. But the Attorney General is different.

The Government itself stresses that courts may ultimately never decide the lawfulness of the appointment because "the Department's litigation is conducted and supervised by officers whose litigation authority does not depend on the validity of Mr. Whitaker's designation as Acting Attorney General." Mem. 12. In fact, the Government has already made that exact argument in the lower courts opposing a challenge to Mr. Whitaker's appointment. *See* Gov't Resp. in Opp. to Mot. to Dismiss Indictment, *United States v. Valencia*, No. SA-17-CR-882-DAE (W.D. Tex. Nov. 19, 2018) (ECF No. 196).

Mr. Whitaker also sets the Department of Justice's enforcement priorities, but he does so at such a high level of abstraction that it's hard to see how someone would have standing to bring a challenge to the appointment. On the Government's view, the only way a litigant even "could seek to raise" an appointments challenge is if she

can show she was "adversely affected by an action personally taken by Mr. Whitaker while serving as Acting Attorney General." Mem. 12.

Mr. Whitaker has the final say on numerous other questions every day. But those decisions aren't public. Take the concrete responsibility of authorizing FISA warrants. Mr. Whitaker must do that, 50 U.S.C. § 1804, but they are secret. So the target does not know to challenge them.

Just as important, this question will probably evade this Court's review forever if it doesn't act very soon. Yes, other challenges to the appointment are now being briefed in the lower courts. But even assuming the parties can establish standing, the issue is going to be mooted. Again, it is striking that the Solicitor General notes the pendency of that litigation (citing just a few of the examples) but never even obliquely suggests to the Court that any of those cases will provide this Court with a vehicle to decide the issue. If he could have, he would have.

Sometime within a year, the President is surely going to nominate and the Senate is going to confirm a permanent Attorney General. He will then make all the motions to substitute in the lower courts moot, instantly; the new, undisputed Attorney General will be substituted automatically. Don't just believe us. The Solicitor General puts it in lights: "The question could also become moot if the Acting Attorney General is succeeded by another official before these cases are resolved." Mem. 12.

In fact, the Solicitor General does not identify any way for cases in the lower courts to reach this Court before the President moots the issue. A district court's rul-

ing on a motion to substitute is not a final, appealable judgment. Nor is there precedent deeming it a "controlling" question that a court of appeals could choose to hear in a discretionary, interlocutory appeal under 28 U.S.C. § 1292(b). According to the Government, the question has no practical consequence at all. Just as important, the Government doesn't even need to appeal if it loses in the district court or court of appeals. Mr. Whitaker can step aside in the individual case and decline to authorize an appeal (another example of his personal power) that puts his authority nationally at stake.

A lawsuit directly challenging the appointment has been filed by three isolated Democratic Senators. *Blumenthal v. Whitaker*, No. 1:18-cv-02664 (D.D.C. Nov. 19, 2018) (ECF No. 1). But they have not yet submitted briefing on how they can overcome the obvious argument that under *Raines v. Byrd*, 521 U.S. 811 (1997), they lack standing on the basis of being deprived of the right to vote on the nomination of the Attorney General. And of course, the district court hasn't even begun adjudicating their claim.

There is another very weighty example that truly places this Motion in historic context. *See supra* at 1. The Department of Justice is investigating whether the President of the United States and his campaign colluded with a foreign power and obstructed the investigation. Mr. Whitaker's appointment displaced Mr. Rosenstein, who previously oversaw the investigation. Mr. Whitaker's credentials for the position are unconventional. It is widely accepted that at least one reason the President chose him is that Mr. Whitaker thinks that this investigation should be ended altogether

or at least limited much more than Mr. Rosenstein has directed. The President has now empowered Mr. Whitaker to put those opinions into practice while the President himself bitterly attempts to undermine public confidence in the investigation almost daily.

Every day now, Mr. Whitaker is overseeing decisions about the scope of the investigation. Among other things, after appointing Mr. Whitaker, the President reversed himself and said he would not sit voluntarily for an interview with the Special Counsel; now the President will not provide testimony unless Mr. Whitaker allows the Department to subpoena him.

Obviously, it would be better if this dispute over the appointment were presented in the course of the investigation itself. We recognize that. But — and this is absolutely essential to understand — that won't happen. The Department of Justice's position that Mr. Whitaker was validly appointed binds the Special Counsel in charge of the investigation; by law, he cannot challenge it. *See* 28 C.F.R. pt. 600. Indeed, in response to a specific Order to address the appointment, the Special Counsel just filed a brief in the D.C. Circuit (also signed by a Deputy in the Office of the Solicitor General, which represents Mr. Whitaker here) taking "the government's view" and reiterating the Department's position (itself controlled by Mr. Whitaker). *See* U.S. Supp. Br. 1-2, *Miller v. United States*, No. 18-3052 (D.C. Cir. Nov. 8, 2018); *see also id.* 8 ("The Office of Legal Counsel has determined that the designation of the Acting Attorney General is valid as a statutory and constitutional matter.").

No one else implicated in the investigation would challenge Mr. Whitaker's replacement of Mr. Rosenstein either. All those people want the investigation narrowed, not expanded. For example, in that same brief, the Special Counsel explained that a witness challenging a grand jury subpoena wouldn't benefit from a hypothetical motion seeking to have Mr. Whitaker removed and replaced by Mr. Rosenstein, because Mr. Rosenstein oversaw the subpoena in the first place. *Id.*

The investigation will almost definitely close before this Court would decide this question in a different case next Term. There is no way to resurrect it if this Court later concludes in a separate case that Mr. Whitaker's appointment was illegal or unconstitutional. Again, who would make the argument? How would they do it?

Even assuming that some other vehicle outside the Russia investigation could present the issue later, what are the benefits of the Court declining to exercise its discretion to decide the question now? The Solicitor General has no serious argument on that point. As the Motion explains, and the Solicitor General does not doubt, the legal issues are well developed and fully presented. Often the Court will allow even a developed question to percolate in the lower courts, to see if a conflict meriting its review develops. But here, the issue is so weighty and goes to the fundamental separation of powers in our government. The Court's intervention seems inevitable, if it is possible. The Court would merely be waiting to count up lower court judges as they took sides.

We will close this discussion by putting the point starkly. If there is a realistic prospect of this question reaching the Court in a timely fashion in some other way,

deny the Motion. But if there is not, it must be decided on the merits. The question is too important. The circumstances are too grave. "[W]hen you have excluded the impossible, whatever remains, however improbable, must be the truth." Sherlock Holmes, in Sir Arthur Conan Doyle, *The Adventure of the Beryl Coronet*, *in The Adventures of Sherlock Holmes* 257, 270 (Wordsworth Classics 1996) (1892).

III. Rod Rosenstein Is The Acting Attorney General.

We assume that this Court's decision whether to exercise its discretion to resolve this dispute here and now will depend in part on its sense of the merits. The Court is more likely to intervene promptly if the President has acted in serious violation of Article II and 28 U.S.C. § 508. The Government treats those requirements like the law's vestigial nuisance, along the lines of an impacted wisdom tooth, inflamed appendix, or bruised coccyx: They may have served some purpose generations ago, but now we would just be better off without them. That is not how law works.

A. The appointment of Mr. Whitaker is unconstitutional under the Appointments Clause.

The Framers saw Donald Trump coming almost 250 years ago. They had King George to work from. Among the limits they imposed on the presidency was the Appointments Clause. Given that all now agree that "the Attorney General is surely a principal officer for purposes of the Appointments Clause," Mem. 21, there is no way to reconcile the designation of Mr. Whitaker with its text: The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States." U.S. Const. art. II, § 2, cl. 2.

The Appointments Clause is a command, not a notion. Even if soliciting the Senate's "advice" is precatory, securing its "consent" is mandatory. But not as a practical matter, according to the Government, which recognizes *no* constitutional limit on the President forcing out a Senate-confirmed principal officer to install a hand-picked successor with all the same powers as his predecessor. Rather, the Government merely intones the words "temporary" and "temporarily" — 29 times in total — as if that will convert Mr. Whitaker's open-ended, plenary control of the Nation's law enforcement apparatus into a short-term stay.

The Government specifically asserts that the appointment is valid under one precedent and in light of history. That is wrong. Sometimes principal officers are temporarily unable to perform their duties. Sometimes the office itself becomes vacant and there is a gap in time before the confirmation of a successor. The President still must "take care" to ensure that the Nation's laws are faithfully executed. U.S. Const. art. II, § 3. So this Court has recognized that in those special circumstances a non-confirmed official may temporarily perform the functions of the principal officer. *Cf. Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (The Constitution isn't a suicide pact.). But it has never suggested — and no President in history has ever taken the position — that the President may evade advice and consent by forcing out a principal officer and substituting a hand-picked, non-confirmed choice to serve while affirmatively disavowing any intention to nominate a permanent successor.

1. The Government relies on *United States v. Eaton*, 169 U.S. 331 (1898), which rejected an Appointments Clause challenge to the position of vice-consul. The consul-general was a representative of the United States in a foreign nation and thus a principal officer, confirmed by the Senate. Congress recognized, however, that the consul-general might become ill or otherwise unavailable to serve in a post far away from the United States, at a time that sending a replacement abroad was time consuming and perilous, seriously disrupting our foreign relations. So it provided for "the designation in advance" of a vice-consul, who would be a consular officer who could exercise the responsibilities of the consul-general in the case of exigency. *Id.* at 339.

The statute creating the position limited the service of the vice-consul to the period of the exigency: "Vice-consuls . . . shall be deemed to denote consular officers, who shall be substituted, temporarily, to fill the places of consuls-general . . . when they shall be temporarily absent or relieved from duty." 169 U.S. at 336 (quoting Rev. Stat. 1674). The vice-consul could only "be called upon to discharge the duties" when the consul-general *himself* "ceased temporarily to perform his duties." *Id.* at 340. Indeed, the designated vice-consul was not even paid for the role, except to the extent he performed the consul-general's responsibilities during that temporary exigency. *Id.* at 336-37 (citing Rev. Stat. 1703); *see also id.* at 338-39.

The strict statutory limits on the vice-consul's service tracked Congress's goal "to prevent the continued performance of consular duties from being interrupted by any temporary cause, such as absence, sickness or even during an interregnum caused by death and before an incumbent could be appointed." 169 U.S. at 339. The

point was to "secure an unbroken performance of consular duties by creating the necessary machinery to have within reach one qualified to perform them, free from any vicissitude which might befall" the consul-general. *Id.* Under this scheme, even when the vice-consul performed the consul-general's responsibilities, he remained the latter's "subordinate." *Id.* at 339.

The facts of *Eaton* demonstrate the system at work. The consul-general in what was then known as Siam (now Thailand) got very sick and left for the United States. Eaton served as vice-consul and performed the consul-general's responsibilities in his absence.

The Government later argued that Eaton shouldn't be paid. As is relevant here, the Attorney General argued that anyone exercising the responsibilities of a principal officer was himself a principal officer requiring Senate confirmation under the Appointments Clause, "whether temporarily acting or temporarily in office or permanently." U.S. Br. 14; *see also id.* 15 ("Within the meaning of the Constitution an ambassador, temporary or permanent, could not be an inferior officer any more than a judge of the Supreme Court could."); *id.* 19 ("No practice or act of Congress can make an officer so defined anything but a consular officer within the meaning of the Constitution. The President must appoint and the Senate confirm him.").

This Court rejected that argument. It held that the exercise of a principal officer's authorities was not *ipso facto* sufficient to require Senate confirmation, so long as the service was a temporary response to specific, short-term circumstances:

> 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. To so hold 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. The manifest purpose of Congress in classifying and defining the grades of consular offices . . . was to so limit the period of duty to be performed by the vice-consuls and thereby deprive them of the character of consuls in the broader and more permanent sense of the word.

169 U.S. at 343 (emphasis added).

The Court determined that vice-consuls were inferior officers. But its holding was not limited to those officials. 169 U.S. at 343-44. It cited approvingly the practice at the time of the founding of private individuals performing the functions of a consul temporarily, including a consul's son right after the consul died. For that period, they were regarded as lawful, de facto consuls and paid as such. *Id.* at 344.

Matthew Whitaker is no vice-consul to Siam. And Jeff Sessions did not depart for the other side of the planet by steamship, gravely ill, leaving no other Senate-confirmed official behind. He was at his post at the Department of Justice in Washington, D.C. His Senate-confirmed Deputy, Rod Rosenstein, was in the office directly below. If their windows opened, they could open them and talk to each other.

But put the particular facts of *Eaton* to the side. The Government admits that *Eaton* only approves a position that conforms to "the limits of the then-existent statutory and regulatory procedures" in that case. Mem. 24. But Mr. Whitaker's appointment looks nothing like those. The President himself created the vacancy in the principal office by forcing out the incumbent; the need for someone to perform the princi-

pal officer's responsibilities did not arise from external circumstances. That is a critical distinction, because it determines whether the President can remove a Senate-confirmed officeholder and avoid the Appointments Clause in selecting the replacement.

But there is more. The President is not trying to ensure the unbroken ordinary, pre-determined operations of the Department of Justice; he's trying to break them, by not allowing the Senate-confirmed Deputy to serve as Acting Attorney General. Mr. Whitaker's service is open ended, not in any respect defined by a limited exigency, such as absence, illness, or death. And Congress did not create his position (Chief of Staff) in anticipation that he would perform the responsibilities of the principal officer in any circumstances, much less these.

2. The Government next leans heavily on the Nation's early history. We pause on the fact that it claims in 2018 to have discovered the Constitution's original meaning, when there is a much more contemporaneous source: the Attorney General's just-quoted brief in *Eaton*. That brief's broad reading is irreconcilable with the Government's current characterization of the supposedly narrow limits of the Appointments Clause.

Nonetheless, the Government now says that there were 160 times between 1809 and 1860 when a non-Senate confirmed official performed the responsibilities of a cabinet secretary. Mem. 23. Based on the sources the Office of Legal Counsel cites, we think the correct number is actually 191. But that is only because it is counting totally irrelevant examples. (In Appendix A, *infra*, we detail all of them.) The history

is actually terrible for the Government, because there are zero times when the President forced out a Senate-confirmed official to install a non-confirmed successor, or even appointed a non-Senate confirmed official in the absence of some exigency requiring the appointment. For those and other reasons, there are zero cases that remotely resemble this one.[3]

A sure sign of the weakness of the Government's position is that it has to resort to inaugural-crowd-level math. Off the top, the great majority of the instances that it cites are irrelevant. To begin with, a dozen were appointments made during a congressional recess, expressly authorized by Article II. We don't understand how the Government could possibly have counted these.

In a massive proportion of the remaining instances — 153 of 179 — there wasn't an appointment *at all*. These were like the facts of *Eaton*. The incumbent was still in office. A chief clerk or assistant secretary served briefly, apparently when the incumbent was sick or away. (This was then-known as an "acting" appointment, whereas service during a vacancy when the office was actually open was known as "*ad interim*.") For most of this period of our history, the telegraph hadn't even been invented. So someone had to be present, conscious, and in charge at the relevant Department. The incumbent retained the power to reject or countermand any act of the person who briefly stood in for him. (Also, the great majority of these short periods of

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[3] So far as can be determined, the closest the Nation came was Andrew Johnson's failed attempt to remove Secretary of War Edwin Stanton and replace him with General Lorenzo Thomas. But Stanton refused to leave office. The entire episode was part of the basis for the Articles of Impeachment of Johnson. That is hardly a historical endorsement of the practice.

service — 117 — themselves began during a congressional recess, making it doubly wrong for the Government to include them because if the President actually did appoint someone, it would have been a recess appointment.)

That leaves only 26 *ad interim* appointments. All of them were for exigencies. Fifteen times, a Cabinet Secretary resigned in the transition between presidential administrations. It would have made no sense for the outgoing President to nominate a successor who wouldn't be confirmed because the incoming President would just nominate someone else. The acting appointment was almost always limited to the brief transition period — less than a week.[4]

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[4] The Office of Legal Counsel cherry-picks one example to create the false impression that there were regular lengthy appointments of non-confirmed officials. With two weeks left in the Jefferson Administration, Secretary of War Henry Dearborn stated his intention to resign and the President named the War Department's second-in-command (the Chief Clerk, John Smith) as Acting Secretary. The Government says that Smith served for 50 days. In fact, that is slippery math and the history is more complicated. *See* Appendix B, *infra* (collecting the relevant source material).

When Jefferson appointed Smith, he actually served in an acting capacity while Dearborn remained in office, so we list it in that category in the Appendix. The initial letters by Dearborn and Jefferson indicate that Dearborn intended to resign immediately. But that apparently didn't happen. Instead, Dearborn formally retained his position and left Washington to also serve as the Collector of the Port of Boston.

Dearborn's absence was an obvious exigency. Even if Dearborn had actually resigned his position, the end of Jefferson's term was an exigency too.

Madison then took office and immediately nominated William Eustis as the next Secretary of War. The Senate confirmed him the next day. According to the official records of both the Congress and the Army, that is when Dearborn actually resigned.

But Madison hadn't even told Eustis that he was being nominated. Eustis was away from his home in Massachusetts, didn't learn he had been confirmed for eight days, and didn't even bother to write Madison back for three more. He then delayed leaving for Washington and did not arrive for some time. Given the exigency that the confirmed Secretary wasn't in Washington, D.C., Madison understandably kept Smith as a holdover — still in an acting, not *ad interim* capacity — until Eustis arrived and took charge.

Four others were unexpected emergencies. Three times, the cabinet officer died in office.[5] In the fourth, the Senate rejected a cabinet nominee, for the first time ever.[6]

That leaves seven. They are the category most analogous to this one: *ad interim* appointments of non-Senate-confirmed officials when Cabinet officials resigned during the President's term. Tellingly, the Government (including the Office of Legal Counsel) does not discuss them. That is because they look nothing like the appointment of Mr. Whitaker. The President *never* in history forced out a Cabinet Secretary and replaced him with a hand-picked, non-confirmed appointee from outside the Department's chain of authority, much less one who is acting effectively indefinitely with no effort to confirm a successor.

- Twice, the Secretary of the Navy resigned *during* the War of 1812. The President appointed the second-in-command and submitted nominations 5 and 17 days later.
- Twice, a cabinet member resigned to protest the President's policies. Both times, the President appointed the second-in-command and nominated a successor two days later.

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[5] For example, the Secretary of the Navy was killed during an ill-fated demonstration of "The Peacemaker," which was then the world's largest naval weapon. The Senate-confirmed Secretary of State regrettably could not step in to take over the position, because he was killed too.

[6] It was Roger Taney, who had been serving a recess appointment as Treasury Secretary. Jackson appointed the Chief Clerk *ad interim* for two days, until Levi Woodbury was confirmed instead.

- Two involved the cabinet of President Tyler, which carried over from President Harrison, who had died of pneumonia after only a month in office. Every member of the cabinet but one resigned *en masse* in protest of Tyler's treatment of Whig initiatives, just a few months into his term. Tyler waited to make recess appointments for some, but needed Secretaries of War and the Navy immediately, so he appointed the seconds-in-command on an acting basis. Tyler then faced enormous resistance from the Senate, which was controlled by the Whigs, and which ultimately rejected 7 of 20 of his nominations. Finding candidates that the Senate would accept was difficult. Still, Tyler submitted successful nominations for permanent Secretaries only 2 and 30 days later.
- In the final instance, at the very beginning of the Administration, a Cabinet official immediately regretted accepting and resigned, citing his nervous disposition. The President appointed the Department's second-in-command and submitted a permanent nominee 16 days later.

The history is even worse for the Government with respect to the Attorney General specifically. From the Nation's founding until Congress created Senate-confirmed officials below the Attorney General in 1868, there were 18 gaps between Attorneys General in which a President could have named acting officials. The President did so only three times. Twice, the President named a Senate-confirmed Secretary from another Department (as there were no such officials who were subordinate to the Attorney General himself).

There is only one example of a non-confirmed person serving as *ad interim* Attorney General, ever. In 1866, Attorney General James Speed (a Lincoln holdover under President Johnson, and one of Lincoln's best friends) left office. He wasn't forced out. Instead, he resigned as a matter of conscience, to protest Johnson's veto of the first federal legislation to protect African Americans, the Civil Rights Act of 1866. Congress overrode the veto, passing the law. The country badly needed an Attorney General to enforce it. The President appointed the second-in-command — Assistant Attorney General J. Hubley Ashton — for a grand total of six days, probably while the new nominee, Henry Stanbery, traveled to Washington. Ashton was no slouch: he was the first person confirmed when Congress in 1868 created a Senate-confirmed subordinate to the Attorney General. Three members of this Court served as honorary pallbearers at his funeral.

None of the historical examples cited by the Government — with respect to Cabinet officials generally or the Attorney General specifically — remotely approach the circumstances of Mr. Whitaker's appointment. None of them involve the President creating the vacancy and thus the need for the appointment, much less creating it after months of advance planning. None involve an indeterminate and open-ended appointment to fill a vacancy. None involve the selection of a non-confirmed successor over a Senate-confirmed official within the agency, or even over the second-in-command who was knowledgeable and ready to serve. Put simply, none of them involve an attempt to evade the constitutional requirement that a principal officer be confirmed by the Senate.

In sum, there is no basis in precedent or history to depart from the text of Article II. The appointment of Mr. Whitaker violates the Appointments Clause.

B. The appointment of Mr. Whitaker is illegal under the Attorney General Succession Act.

This Court can avoid the constitutional question by recognizing that the President's appointment of Mr. Whitaker violated the Attorney General Succession Act. Worst case, the statute is ambiguous and should be construed to preclude the appointment. Before we turn to the arguments the Government does make, we start with the points that it does not contest. They are devastating.

The Solicitor General does not dispute the wild implausibility of the claim that Congress intended the Vacancies Act to be read as the Government now says. Supposedly, Congress acted to permit the President to install any Senate-confirmed official — say, the Librarian of Congress — for seven months as not just the Attorney General, but the Secretary of Defense, Chairman of the Joint Chiefs of Staff, or Director of the CIA — skipping over Senate-confirmed deputies in the process. Also, every GS-15 or above — more than 6,000 lawyers in the Department of Justice, for example — could be put in charge of the agency. That would risk havoc, gut the Senate's appointments power, and overturn succession rules that have been set forth in statutes specifically tailored to those offices for over a century. And Congress suppos-

edly made that extraordinary change without one whisper, by any member, anywhere, ever regarding legislation that went through multiple iterations, hearings, floor statements, and reports over a significant period of time.[7]

The Government also does not dispute either (1) that Congress enacted the "exclusivity" provision on which its argument depends to address a totally different problem, or (2) that the Vacancies Act itself (as well as other relevant statutes) shows that Congress wouldn't use such ham-fisted verbiage because it knows perfectly well how to write a clear provision that gives the President an optional appointment power. In fact, as explained by the excellent *amicus* brief of Morton Rosenberg (who wrote the Report on the statute that this Court has recognized as authoritative), the Government's reading inverts the purpose of the "exclusivity" provision. Congress specifically adopted it to *reject* the Office of Legal Counsel's position that the President could make appointments under either the Vacancies Act or the Department's organic statute. *See* Rosenberg *Amicus* Br. 5-12.

The Government's unstated but unavoidable position is thus that Congress dangerously upended existing law to give the President this extraordinary power, by

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[7] The Government quotes one sentence in one Senate Report regarding one Senate bill. Mem. 18. That bill was not adopted. But in any event, that sentence could not have meant that Congress intended that bill to make the Vacancies Act optional. The Report said the exact opposite, in terms: that the bill "retains" all the agency-specific appointment statutes, including specifically the Attorney General Succession Act. S. Rep. No. 105-250, at 17 (1998); *see also id.* at 2 ("The bill applies to all vacancies . . . with a few exceptions . . . [including] statutes that themselves stipulate who shall serve in a specific office in an acting capacity."). Most important, the Government omits that the Report says that, under that bill: "With respect to a vacancy in the office of Attorney General, 28 U.S.C. § 508 will remain applicable. That section ensures that Senate confirmed Justice Department officials will be the only persons eligible to serve as Acting Attorney General." *See generally* Rosenberg *Amicus* Br. 15-16.

mistake. Particularly given the principle of constitutional avoidance, it would take especially clear language for the Court to conclude it was required to reach that result. But even if the Government's reading is possible, it is not the better one; certainly, it is not clearly right.

The Attorney General Succession Act dictates that the Deputy Attorney General succeeds the Attorney General, and that other Senate-confirmed officials in the Department succeed the Deputy. 28 U.S.C. § 508(a), (b). The Government agrees: "Section 508(a) is a statute that 'designates'" the Acting Attorney General. Mem. 15.

But it then tries to sow some doubt by glancing in the direction of two provisions. Neither of those could make the Attorney General Succession Act optional. Both were already in the statute before the separate 1998 legislation, at a time that even the Government admits it was mandatory. Congress didn't somehow change the meaning of those provisions by failing to amend the Attorney General Succession Act to delete them.

One says that the Deputy "may" serve as Acting Attorney General, whereas the other officials "shall" if the Deputy does not. Mem. 15. That merely reflects the prospect that the Deputy may be unavailable. At most, it means the Deputy has a choice. The Government somehow reads the language as if it says that the *statute* itself "may apply." But it doesn't say anything like that. Among other things, the succession of other officials — who "shall" serve — is mandatory.

The Attorney General Succession Act also designates the Deputy as the "first assistant" under the Vacancies Act. Congress inserted that provision when both of

the statutes were recodified together and they both produced the same result. Congress simply failed to delete it. The critical point is that this clause *never* incorporated the Vacancies Act. The Government doesn't argue otherwise. If it did, then appointments under the Attorney General Succession Act would have always been subject to the Vacancies Act's restrictions, including its time limits. It has never been understood that way.

So the Attorney General Succession Act makes Mr. Rosenstein the Acting Attorney General unless a provision of the Vacancies Act changes that result. When Congress adopted the 1998 Vacancies Act, the White House Counsel issued a memorandum to the entire executive branch interpreting the statute, concluding that its provisions do not apply to the Attorney General. Memorandum for the Heads of Federal Executive Departments and Agencies and Units of the Executive Office of the President, from Alberto Gonzales, Counsel to the President, *Re: Agency Reporting Requirements Under the Vacancies Reform Act* 2 (Mar. 21, 2001). Times have obviously changed, even if the statute has not. The arguments the Government now makes are not persuasive.

First, the Vacancies Act provides that it is "exclusive . . . unless . . . a statutory provision expressly . . . designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." 5 U.S.C. § 3347. The better reading of that provision is that it gives way to the specific statute, which "*designates*" the official. Manifestly, it does not affirmatively say that in such a case "the Vacancies Act is non-exclusive."

At most, the word "unless" could be stretched so that, when there is a specific designation statute, the entire exclusivity clause does not apply. But the result is the same. Then the two statutes conflict because they produce two different appointees, and the more specific one controls. That is obviously the Attorney General Succession Act.

In any event, even if the two statutes are non-exclusive, you would not reconcile them as the Government supposes. The two would work together differently. The Attorney General Succession Act would designate specific, Senate-confirmed successors. But if those officers were not available, the President would have appointment authority under the Vacancies Act. That can happen during presidential transitions, for example. As the Motion explained, and the Government ignores, the President has issued an executive order that reconciles the statutes in exactly that way. Mot. 12-13 n.2.

Second, a provision states that the Vacancies Act "shall not apply" to a class of offices. 5 U.S.C. § 3349c; *see* Mem. 16. But nothing says that list is exclusive or is intended to override other statutes, impliedly repealing more than three dozen provisions of the U.S. Code. Nor does it suggest that reading, because all of the offices are of a very specific kind not addressed elsewhere — members of multimember bodies for which there are no succession rules. 5 U.S.C. § 3349c (excluding, *inter alia*, a body "composed of multiple members" and "any commissioner of the Federal Energy Regulatory Commission"). It is perfectly understandable that Congress adopted a provision to address them, because those bodies can continue to function without acting

appointments. And the Government does not even believe the negative inference its reading would create: that the Vacancies Act "shall" apply to every office not specified, including the Attorney General. That would make the Vacancies Act *non*-optional.

Third, the Government points to the Vacancies Act's drafting history. The Attorney General was expressly exempted from the prior version of the Act and a draft bill, but not the final 1998 statute. Mem. 19-20. The reason is obvious: Congress instead replaced it with a broader, general exception for *all* of the roughly 40 statutes that "designate[] an officer or employee to perform the functions and duties of a specified office." 5 U.S.C. § 3347(a)(1). The Attorney General-specific provision would have been meaningless and would only have generated confusion.[8]

For those reasons, the President's appointment of Mr. Whitaker violated the Attorney General Succession Act. At the very least, the statute is ambiguous and should be construed to bar the appointment in light of the grave doubts about the appointment's constitutionality under the Appointments Clause.

CONCLUSION

The Motion to Substitute should be granted.

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[8] The Rosenberg *amicus* brief (at 17-19) addresses the Government's misplaced reliance on *Hooks v. Kitsap Tenant Support Services, Inc.*, 816 F.3d 550 (9th Cir. 2016), and *English v. Trump*, 279 F. Supp. 3d 307 (D.D.C. 2018).

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