1 concerned with at least some acting service by nominees.

2 And the reason that it created an exception for first

3 assistants, even as nominees, is that they are the least

4 likely to represent change in the agency. It's just the

5 deputy being pushed up one spot, and that's continuity

6 and regularity.

7   On the other hand, particularly when

8 Congress added for the first time in the FVRA this

9 category of GS-15s, potentially thousands of employees

10 within an agency, there's no accountability there to

11 Congress and there are potentially much greater concerns

12 about those individuals serving as acting officials

13 while the nominee. The facts of this case illustrate

14 that concern.

15   The President designated Mr. Solomon to

16 serve as the acting general counsel. Some months later

17 he nominated Mr. Solomon. Perhaps emboldened by the

18 nomination, Mr. Solomon then took some very

19 controversial actions that led the Senate promptly to

20 make clear to the President that this individual was not

21 going to be confirmed.

22   Rather than at that point finding a new

23 nominee, the President allowed Mr. Solomon to continue

24 serving even -- even after the nomination had been

25 returned by the Senate, waited four months before

1   renominating the same individual, and then only a few

2   months later after that, finally came up with a nominee

3   that the Senate approved.

4   In the meantime, Mr. Solomon served, even

5   though the Senate quite clearly did not consent to him,

6   served in the job for -- for over three years.

7   And so it is that kind of concern about

8   GS-15s that's fundamentally different from a first

9   assistant who represents continuity and regularity in

10 the office.

11   JUSTICE GINSBURG: If -- if Mr. Solomon had

12 been confirmed, you -- you say that that would be all

13 right, even -- even with the erroneous nomination of him

14 while he was acting.

15   But -- so he's confirmed for the permanent

16 office. Yet, under your reading, everything that he did

17 while he was acting is invalidated; is that right?

18   MR. DVORETZKY: Well, it's not necessarily

19 invalidated. It's subject to the defenses that the D.C.

20 Circuit identified at the end of its opinion, but under

21 our reading of the statute, when he was nominated, he

22 needed to step aside and he couldn't serve as the

23 permanent official until the Senate confirmed him.

24   JUSTICE GINSBURG: So his confirmation would

25 be irrelevant to what happens to what was done prior to

1   the confirmation?

2   MR. DVORETZKY: That's right. His

3   confirmation does not in effect ratify the actions that

4   he took when, in our view, he was improperly serving as

5   an acting official.

6   JUSTICE GINSBURG: If -- there's one other

7   peculiarity of this. This is why I mentioned the

8   90 days, but a first assistant who is also what they

9   call a PAS, presidentially-appointed,

10   Senatorial-confirmed, such a first assistant without any

11   90 days can simultaneously be acting; and a nominee.

12   But why couldn't the people in category two, that is

13   people who are presidentially-appointed,

14   Senatorially-confirmed in other agencies, why wouldn't

15   the same -- why wouldn't they be treated the same way if

16   the stress is on having someone that the Senate wants

17   approved?

18   MR. DVORETZKY: Because Senate confirmation

19   for one position is not fungible with Senate

20   confirmation for another. When you're talking about a

21   Senate-confirmed first assistant, that again is a

22   combination of Senate confirmation and somebody who's in

23   a first assistant position representing continuity and

24   regularity in the position.

25   Somebody who is confirmed for a completely

1   unrelated Senate position is much more of an end-run

2   around the Senate's advice-and-consent role for the

3   vacant office, and the legislative history includes

4   examples -- includes discussion of Congress' concern

5   about PAS officials who are being moved around from one

6   position to the other.

7   CHIEF JUSTICE ROBERTS: You -- you want to

8   respond to Justice Breyer's point about Mr. Lee?

9   MR. DVORETZKY: I do want to get back to the

10   point about Mr. Lee.

11   The concern about Mr. Lee was not just that

12   he was brought in from the outside at the last minute,

13   which is what the government emphasizes. If that were

14   the concern, Congress could have imposed a restriction

15   on short-serving first assistants as acting officials.

16   Instead, what Congress imposed was a

17   restriction on acting officials -- acting officials who

18   are also the nominee, and there's no reason to think

19   that Congress' concern about nominees serving as acting

20   officials was limited just to first assistants. The

21   text doesn't support that concern, and as the example of

22   Mr. Solomon's own service illustrates, in practice,

23   Congress can have very serious concerns about people

24   outside of the -- the first assistant category serving

25   as the acting official while also the nominees.

1   And -- and that's a vivid illustration of

2   the example in our brief of somebody who can serve

3   almost an entire presidential -- presidential term as

4   the permanent -- as the acting official, even though

5   Congress has made clear that the individual is not

6   somebody that -- that the Senate will consent to as the

7   permanent nominee.

8   JUSTICE KAGAN: Can I ask Mr. Dvoretzky

9   about the post-enactment history? Because, you know,

10   we're generally reluctant to demand that Congress

11   objects to things.

12   But on the other hand, the -- the history

13   here is so strong. All of these appointments, 100-plus

14   of them, in a time when Congress and the President -- I

15   mean, this is -- this has been a time where there's been

16   a lot of partisan bickering over appointments, and you

17   would think that in that context, if anybody had thought

18   that this statute could be read differently, we would

19   have heard about it, and yet we hear absolutely nothing.

20   So how do you explain that?

21   MR. DVORETZKY: Several points in response

22   to that.

23   First, just identifying these FVRA

24   violations is not an easy thing to do. It took the

25   government months of study to do it, and it's an arcane

1   technical issue.

2   Second of all, even if Congress had

3   identified the violations, what was it supposed to do

4   about them? If the nominee is somebody that the Senate

5   wants to approve, there's no point in rejecting them

6   based on their past improper service. That's not what

7   the FVRA requires. And doing so would only prolong the

8   vacancy with another acting official that Congress

9   hadn't approved.

10   If Congress doesn't approve of the nominee,

11   odds are it has a reason for doing so that is much more

12   of a headline issue than the FVRA. The FVRA does not

13   make the front page of the Washington Post. It's other

14   objections.

15   JUSTICE KAGAN: I don't know. Wouldn't you

16   say something like I don't like this nominee, and

17   anyway, it's illegal for the President to make this

18   nomination?

19   MR. DVORETZKY: You might add that, but it

20   would be a gratuitous addition to what is really the

21   fundamental concern with the nominee.

22   JUSTICE KAGAN: Seems like it gives it some

23   real extra oomph, right?

24   (Laughter.)

25   JUSTICE KAGAN: It's not just -- it's not

1   just a matter of my preferences versus the government's

2   preferences. Now the President's preference is illegal.

3   It's off the board. Congress has said he can't do it.

4   Who wouldn't say that in that circumstance?

5   MR. DVORETZKY: Somebody who then was going

6   to be pressed and had to explain the technicalities of

7   why the appointment was illegal.

8   (Laughter.)

9   JUSTICE BREYER: You -- you have been -- and

10   I understand -- you've been concerned about instances in

11   which there is controversy over appointment. But there

12   are thousands of jobs in the government where they have

13   to run departments where there's no controversy, you

14   know.

15   And people leave, or they die, or something

16   happens; there's a vacancy. And the main institutional

17   imperative is keep the job being done. Keep the office

18   working. So an obvious person is to say Mr. First

19   Assistant, you carry on. Okay? And maybe you bring in

20   somebody from next door. And maybe you look for a GS-18

21   in the department. You know, the guy next door has a

22   presidential appointment. So you put him in the job.

23   That's all. No problem.

24   And why all of a sudden Congress would, in

25   these thousands of instances where there's no problem,

1   or hundreds anyway, Congress would say, if you decide to

2   appoint him permanently, you have to take him

3   immediately out of the acting position, and there's more

4   disruption in the department. Why would anyone want to

5   do that?

6   Now, I could see they might want to do it

7   with the first assistant where it's a runaround, and

8   they have an idea that it's a runaround when he hasn't

9   served as first assistant for more than 90 days. Then

10   you might say, well, why him? Maybe they were just

11   trying to get this controversial guy in.

12   In other words, as -- as an administrator in

13   noncontroversial matters, I can understand their

14   interpretation more easily. But you will tell me that

15   I'm wrong because?

16   MR. DVORETZKY: The -- the first assistant

17   restriction in (b)(1) reflects that Congress clearly was

18   concerned about some acting officials who are also the

19   permanent nominee. Congress saw that as a particular

20   affront to its advice and consent role, and that

21   exemplifies a lot of the problems that led to the

22   enactment of the FVRA in which the Presidents --

23   Presidents of both parties were putting in their

24   ultimate choice for a position long term without Senate

25   confirmation.

1   There's no reason to think that that concern

2   is limited only to first assistants coming in from the

3   outside. Those concerns are equally applicable to any

4   of the thousands of GS-15 employee within an agency.

5   And it's not surprising that, in the same set of

6   revisions when Congress added (a)(3), it made -- made

7   those GS-15s eligible to serve, that it also thought,

8   well, perhaps this has the potential for mischief.

9   Perhaps this has the potential to allow just as much of

10   an end -- of a runaround of our advice-and-consent role

11   as the first assistants.

12   Likewise, with respect to the PAS officials,

13   it's true that PAS officials had previously been able to

14   serve as both permanent nominees and acting officials,

15   but the FVRA rethought this entire area of vacancies.

16   And it's not surprising that, while -- while Congress

17   was also prohibiting GS-15s, this new category from

18   serving as acting officials while nominees, that it also

19   swept in the (a)(2)s as well.

20   There's also a practical point about how

21   this actually operates. Much of the time, over

22   30 percent of the time, the President nominates and

23   designates, either at the same time, or -- or the

24   President nominates first and designates second after

25   apparently becoming impatient with the confirmation

1 process.

2   And so, Justice Breyer, your hypothetical --

3 your hypothetical was asking why does it make sense to

4 take the official out of the job once they are

5 nominated? Often that doesn't even happen. Often the

6 President is nominating the person and then making them

7 the acting official later. So you're not taking the

8 person out of the job.

9   Moreover, our interpretation of the statute

10 removes one person from the pool of acting officials.

11 There -- there is not -- this is not a situation where

12 we are taking out the thousands of GS-15s or PAS

13 officials. There are lots of people available to serve.

14 We're taking out the one person that reflects the

15 biggest affront to Congress' advice-and-consent role if

16 allowed to serve while also nominating.

17   JUSTICE SOTOMAYOR: And defeating the

18 efficient running of the department at the same time,

19 because if the person has been running the department,

20 now you're going to put it through a second dislocation

21 of having that person removed and somebody else step in.

22   MR. DVORETZKY: Again, in practice, over a

23 third of the time, that doesn't happen. It's also

24 something that the --

25   JUSTICE SOTOMAYOR: It hasn't happened

1   because no one's read it the way you have and

2   invalidated that person's actions so far.

3   MR. DVORETZKY: Well, no. What I mean is if

4   you look at the government's chart, a third of the time,

5   even if you applied our interpretation, it would not

6   result in the nominee being taken out of acting service

7   because the nominee isn't even put into acting service

8   until later or at the same time as the nomination.

9   Moreover, the President --

10   JUSTICE SOTOMAYOR: The Senate is taking a

11   long time to confirm, even when they're not objecting.

12   MR. DVORETZKY: So in -- in this particular

13   case, after Mr. Solomon had served for some

14   two-and-a-half years, when the President put up a

15   permanent nominee, the Senate confirmed him in a matter

16   of months. And so the Senate doesn't always take a long

17   time.

18   Moreover, the Senate has confirmed

19   approximately 85 percent of PAS officials during the

20   current President's administration. And so the Senate

21   is confirming these officials. What the FVRA requires

22   is that the official not do the job without Senate

23   confirmation because that would recreate the very

24   problems that the FVRA was intended to combat in the

25   first place.

1   There's a limited exception for long-serving

2   or Senate-confirmed first assistants, but that makes

3   policy sense because of the continuity and the

4   regularity that they bring to the job.

5   I'd like to address the -- the question that

6   was raised earlier about the consequences of ruling in

7   our favor retroactively in terms of past decisions.

8   No court has considered the "no force and

9   effect" language. But what I can tell you is that the

10   government has been shoring up a defense that would be

11   tied to the language in 3348 about the functions and

12   duties of a particular office. The only actions that

13   have no force and effect are those that are taken in the

14   performance of a function and duty of a vacant office.

15   In response to a Senate inquiry about a

16   deputy EPA administrator who had been serving for two

17   years, the EPA took the position that that individual

18   had not taken any actions whatsoever that were actually

19   tied to the functions or duties of the vacant office.

20   On the GAO website, there are approximately

21   two dozen reports of time violations over the years of

22   the FVRA. And the GAO reports that agencies had

23   reported to it that none of those two dozen individuals

24   who served in violation of the FVRA took any actions

25   that were tied to the functions and duties of the

1   office. And so the government is already shoring up

2   arguments for why the "no force and effect" language

3   would not undo actions taken by these improperly pointed

4   officials.

5   With respect to the GAO, the -- the Acting

6   Solicitor General referred to the GAO as a watchdog --

7   JUSTICE KAGAN: The way you described that,

8   you sound a bit skeptical of those defenses.

9   (Laughter.)

10   MR. DVORETZKY: Well, skeptical only in the

11   sense that they're not at issue in this case, and they

12   haven't been litigated. But if it were, if ruling in

13   our favor were going to lead the sky to fall, you would

14   expect the government to -- to tell you that. And not

15   only has the government not told you that, but the --

16   the surrounding context shows that the government thinks

17   it has pretty good arguments for why.

18   JUSTICE SOTOMAYOR: So you say that you can

19   bring those cases, too?

20   MR. DVORETZKY: I'm sorry?

21   JUSTICE SOTOMAYOR: Telling us -- so that --

22   you can bring those cases, too, or for other people to

23   bring them? They're in a real catch-22 situation.

24   MR. DVORETZKY: The fact is, though, it's

25   their burden to show the consequences of their actions.

1   And the government's track record on this shows just the

2   opposite; shows that these officials supposedly are not

3   doing anything that would actually be invalidated.

4   JUSTICE GINSBURG: So is Mr. Solomon's case

5   atypical, the general counsel to the NLRB?

6   MR. DVORETZKY: Well, it's atypical in the

7   sense that it is, under 3348(e), the "no force and

8   effect" language doesn't apply to the general counsel of

9   the NLRB. It's -- the -- his actions are only voidable

10   rather than void, and that's why the D.C. Circuit looked

11   to the harmless error doctrine and the de facto officer

12   doctrine as additional defenses.

13   But even in a case where the "no force and

14   effect" language did apply, again on the government's

15   theory, challengers would have to show that the actions

16   were -- that the actions that were taken were ones that

17   could only have been taken by an individual in the

18   vacant office. And the government doesn't believe that

19   that happens very much.

20   With respect to the cases that the

21   government cites for the first time in its reply brief,

22   none of those are on point. The Preseault case, the --

23   the operative language there was "under this act."

24   That's what made clear that the particular provision

25   there applied only to the statute at issue and not

1   separately to the Tucker Act.

2   The Mount Vernon case out of the Ninth

3   Circuit, interpreting the "notwithstanding" clause --

4   the -- the language in the "notwithstanding" clause

5   there to apply to all of (a) would have created

6   superfluity which is not the case here. To the

7   contrary, here the government's interpretation makes

8   (b)(2) superfluous.

9   Congress specifically added (b)(2) when it

10   expanded (b)(1) to apply to more than just first

11   assistants, and if (b) -- if (b)(1) did not apply to all

12   of (a) in the first place, there would be no need under

13   (b)(2) to create an exception for Senate-confirmed first

14   assistants. Those Senate-confirmed individuals could

15   serve under (a)(2), anyway. So the only reason that

16   Congress would have had to add that (b)(2) was because

17   (b)(1), pursuant to these -- the changes to the

18   statutory language otherwise applied to all of (a).

19   The government argues in its reply brief

20   that (b)(2) serves the -- serves a purpose because it

21   saves the President from having to designate someone

22   under (b)(2). That's not a plausible account that

23   Congress would have gone to all the trouble of adding

24   (b)(2) solely to achieve that goal.

25   And -- and, again, I would return to the

1   core language here, which is "person" and "section."

2   Those are broad inclusive terms. If Congress had meant

3   to accomplish what the government argues that this

4   statute is accomplishing --

5   JUSTICE GINSBURG: Wasn't that the argument,

6   is that language, "person" and "this section," were in

7   the prior bill, where it -- it applied only to first --

8   What do you call it?

9   MR. DVORETZKY: Only to first assistants.

10   JUSTICE GINSBURG: -- first assistants?

11   MR. DVORETZKY: Because -- because the --

12   that's true, but the language in the prior bill had an

13   old version of (b)(1) -- this is, again, at 19A of the

14   cert petition -- that made clear that the only persons

15   we were talking about were persons who are serving as

16   first assistants. There was immediate qualifying

17   language that made clear and narrowed what "person"

18   meant.

19   Congress specifically deleted that language

20   and it added a new (b)(2) that would be unnecessary if

21   (b)(1) applied only -- if (a)(1) applied -- I'm sorry --

22   if (b)(1) applied only to (a)(1).

23   If Congress had simply meant to achieve in

24   the draft what the government ascribes to it, the edits

25   could have been much simpler. It could have simply

1   changed 180 days to 90 days in order to shorten the --

2   the required period of acting service, and it could have

3   edited the existing (b)(1) to say, such person serves in

4   the position of first assistant to the office of such

5   officer. It made much broader changes.

6   CHIEF JUSTICE ROBERTS: Thank you, counsel.

7   Four minutes, Mr. Gershengorn.

8   REBUTTAL ARGUMENT OF IAN H. GERSHENGORN

9   ON BEHALF OF THE PETITIONER

10   GENERAL GERSHENGORN: Thank you, Mr. Chief

11   Justice. I'd like to make a number of points.

12   First, Justice Kagan, your account of what

13   would have happened in Congress had there been any

14   reason to believe there was a problem with the Executive

15   was doing is exactly right, and we know that because

16   after the D.C. Circuit ruled, in fact, what you said

17   would happen is what happened.

18   Senators started raising objections to the

19   President's nominees, arguing that they were serving

20   illegally. That's what happened in the years prior to

21   the Act, and that's what happened as soon as the D.C.

22   Circuit ruled. That in-between period, I submit, is

23   very significant.

24   Justice Sotomayor, you raised Section

25   (c)(1). I think you're exactly right. What their

1   reading of the statute does is read the notwithstanding

2   (a)(1) to mean notwithstanding (a)(1) -- to mean that it

3   applies to (a)(1), (a)(2), and (a)(3), but not (c)(1).

4   I think that's a very odd thing to express with the term

5   "notwithstanding (a)(1)."

6   Justice Breyer, you were asking about why it

7   would make sense to treat the (a)(2) and (a)(3)

8   differently, and I think you're exactly right. It does

9   not.

10   What Respondent said was there needs to be

11   accountability to Congress. Congress put in that

12   accountability. It said that these individuals under

13   (a)(2) and (a)(3) need to be personally designated by

14   the President. It cannot be delegated. That is the

15   kind of responsibility that when Congress puts that in

16   the President, this -- it's not surprising then that

17   those folks should be able to serve while they are

18   nominated because they have gotten not only a Senate

19   confirmation or long-standing agency service, but the

20   personal approval of the President.

21   Counsel tried to distinguish the cases that

22   we raised. I think they are worth raising because it

23   does change, I think, the way this -- this Court has

24   read the "notwithstanding" clause the way we say it.

25   Preseault is a perfect example. It said,

1   notwithstanding this Act, but Congress then didn't read

2   the remainder of clause to provide -- to apply to the

3   whole code. It limited to the Act, which was what was

4   specified in the "notwithstanding" clause. We think

5   that that's what this Court should do here.

6   And then finally I'd like to address this,

7   the treatment of PAS officers, which I think is really

8   important. What Respondent said was, oh, Congress swept

9   in (a)(2) as well. With that blithe assertion, he

10   attributes to Congress the intent to overturn 130 years

11   of practice that had raised no complaint. There is no

12   evidence anywhere in the congressional record that

13   Congress was concerned about Senate-confirmed officials

14   also -- who were also nominated, and it was not

15   reflected in the initial draft. The idea that Congress

16   blithely did that and swept in (a)(2), I think is just

17   not supported by the record.

18   And I'm sorry. One more point. One final

19   point. Justice Ginsburg, I think you're exactly right

20   on the person/section point, which Justice Kennedy also

21   had raised. That language was in the prior bill. There

22   is no doubt that the provision it was in applied --

23   applied in addition to only -- applied only to first

24   assistants. And our point is that "person" and

25   "section," of course it's broad. But all that does is

1   set up the conflict. Congress understood that.

2   So how did it resolve the conflict? Not in

3   the most natural way under -- that Respondent would have

4   this Court understand, by saying, notwithstanding

5   Subsection (a), which would have taken out all of the

6   problem. Instead it said, notwithstanding

7   Subsection (a)(1). And the idea that Congress did that

8   because there was no conflict between (a)(2) and (a)(3)

9   and -- and (b)(1) just doesn't hold water.

10   Finally, on that point -- I know that's my

11   third finally, and I apologize, Your Honor. But the --

12   it does seem that the notwithstanding (a)(1) doesn't do

13   any work in their reading. If Congress had just said

14   (a)(1), and then had had (b)(1) without the

15   "notwithstanding" clause, this Court would have

16   understood (b)(1) to be a limitation on (a)(1)'s

17   authority without a doubt. And so what "notwithstanding

18   (a)(1)" does is specify the order of operations, to

19   specify the provision that is overridden. And this

20   Court should give that -- that congressional decision

21   respect.

22   Thank you.

23   CHIEF JUSTICE ROBERTS: Thank you, counsel.

24   The case is submitted.

25   (Whereupon, at 11:05 a.m., the case in the

 1   above-entitled matter was submitted.)

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