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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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