

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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