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IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL LABOR RELATIONS :
BOARD, :
Petitioner : No. 15-1251
v. :
SW GENERAL, INC., DBA :
SOUTHWEST AMBULANCE, :
Respondent. :

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Washington, D.C.
Monday, November 7, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

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Department of Justice, Washington, D.C.; on behalf of
the Petitioner.

SHAY DVORETZKY, ESQ., Washington, D.C.; on behalf of the
Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 15-1251, National Labor Relations Board v. Southwest General, Incorporated.

Mr. Acting Assistant Attorney General.

ORAL ARGUMENT OF IAN H. GERSHENGORN

ON BEHALF OF THE PETITIONER

GENERAL GERSHENGORN: Mr. Chief Justice, and may it please the Court:

The Vacancy Reform Act's limitation on an individual serving as both the nominee and as the acting official for a single office applies only to someone who is currently the first assistant in that office and is acting pursuant to the automatic service rule set forth in Subsection 3345(a)(1).

Both the GAO and OLC adopted that interpretation of the Act shortly after its passage. And in the nearly two decades from passage of the Act until the D.C. Circuit decision here, Presidents of both parties have made scores of nominations and designations based on that interpretation of the text without recorded objection from even a single Senator or staff member.

JUSTICE KAGAN: General Gershengorn, can I

1 ask: As you read this statute, suppose you just took
2 out these words "notwithstanding Section" -- "Subsection
3 (a) (1)." What would then the effect of the statute be?

4 GENERAL GERSHENGORN: So, Your Honor, I
5 think that our textual argument would be much more
6 difficult, and the effect of the statute would be
7 effectively to override (a) (1), (a) (2), and (a) (3).

8 The "notwithstanding" clause really is the
9 anchor of our textual interpretation. But its strength,
10 I think, comes not only from its text, but also how it
11 fits so well with both the history, structure,
12 contemporaneous interpretation, and practice.

13 JUSTICE KAGAN: But just focusing on text
14 for a minute.

15 GENERAL GERSHENGORN: Sure.

16 JUSTICE KAGAN: If that's true, if the
17 entire textual argument really does rest on the
18 "notwithstanding Subsection (a) (1)" -- I mean, typically
19 when you have a "notwithstanding" clause, it means, you
20 know, take away Subsection (a) (1), not, you know, close
21 your eyes to Subsection (a) (1). But it doesn't do
22 anything more than that.

23 So why do you think it should be taken to do
24 something more than that in this case?

25 GENERAL GERSHENGORN: Your Honor, we think

1 that because it's a routine application of the expressio
2 unius canon in the context of the "notwithstanding"
3 clause. And so we think it has power for at least three
4 reasons.

5 First -- and we're on pages 82A and 82 --
6 83A of the government's brief -- the -- the expressio
7 unius implication is very strong here, because if you
8 read the statute on page 82A, (a) (1) sets out the first
9 assistant rule, (a) (2) sets out the -- the PAS rule for
10 a Senate-confirmed official, and (a) (3) then sets out
11 the act -- the career official or the agency with --
12 agency official with substantial service.

13 The very next words in the statute are
14 "notwithstanding Subsection (a) (1)." So after (a) (1),
15 (a) (2), and (a) (3), Congress said, "Notwithstanding only
16 (a) (1)."

17 We think the expressio unius counter is
18 particularly powerfully, because Congress could have
19 said, if we're -- we wanted to do a respondens se,
20 notwithstanding subsection (a), but it did not do that.
21 And it's particularly powerful as well, because the
22 "notwithstanding" clause, as Your Honor suggests, is one
23 that Congress uses all the time. Congress will say,
24 notwithstanding any other provision in the code,
25 notwithstanding any other section of the --

1 JUSTICE KAGAN: But can I give you a hypo?

2 GENERAL GERSHENGORN: Sure.

3 JUSTICE KAGAN: So the hypo is, I'm at a
4 restaurant, and I -- I'm talking to my waiter, and I
5 place three orders. I say, number 1, I'll have the
6 house salad. Number two, I'll have the steak. Number
7 three, I'll have the fruit cup. And then I tell the
8 waiter, notwithstanding order number three, I can't eat
9 anything with strawberries.

10 So on your theory, the waiter could bring me
11 a house salad with strawberries in it, and that seems to
12 me a quite odd interpretation of what's a pretty clear
13 instruction: No strawberries.

14 GENERAL GERSHENGORN: So, Your Honor, I
15 think this really is fundamentally different for a
16 number of reasons.

17 First of all, we have before us, in contrast
18 to your -- your waiter hypothetical, we have before us
19 the very history of this clause which suggests an
20 interpretation very much in line with the government's
21 interpretation.

22 JUSTICE KAGAN: So I -- I take it, you know,
23 you have some arguments, some strong arguments on -- on
24 history and on practice, but, you know, again, I'm just
25 sort of -- isn't that just a peculiar way to understand

1 the, you know, notwithstanding order number three, no
2 strawberries?

3 GENERAL GERSHENGORN: So I don't think it
4 is, Your Honor, and I -- I -- in a footnote, the -- if,
5 for example, you had been a routine -- a regular member
6 of that restaurant -- regular diner at that restaurant
7 and had always understood that you couldn't have
8 strawberries with only one of those things, then the
9 waiter would be justified in interpreting it
10 differently, and we have that contemporaneous practice
11 here.

12 But given Your Honor's textural point only
13 for the moment, I do think that's exactly what this
14 Court held in Preseault, in -- in -- where there was a
15 "notwithstanding" clause, that said, notwithstanding the
16 provisions of the Act, funds -- that you have to rely on
17 advance appropriations, and this Court said, no, that
18 doesn't override the existence of the Tucker Act.

19 I point the Court as well to the case cited
20 in our brief, SEC v. Mount Vernon Memorial Park, which
21 is a situation extremely similar to this, if I could
22 just take a sec on that because I think it will help.
23 That was an interpretation of the Investment Company
24 Act, and it said, "An investment company is an issuer
25 who meets one of the following: (a)(1), (a)(2), and

1 (a) (3)."

2 And for (a) (3), there was something called a
3 (b) (1) limitation, and it said "Notwithstanding (a) (3),
4 an issuer is" -- "you're not an issuer unless you're in
5 the business of issuing securities." And what the Court
6 said was that the issuer who fell within that
7 limitation, the same (b) (1) limitation, nonetheless was
8 an investment company under (a) (2) precisely because the
9 introductory limitation was limited to notwithstanding
10 (a) (3), and that case is cited in our brief. I think
11 Shomberg is the same.

12 Our point, Your Honor, is not that it is
13 inevitably that way. The expressio unius canon is
14 never -- is -- is a canon. It's an aid to
15 interpretation, and it may be that, for example, in your
16 restaurant hypo, that would be a -- it would be clear
17 from context. But here we really do think that all of
18 the other aids to statutory --

19 JUSTICE ALITO: Isn't there another
20 explanation for why the "notwithstanding" clause of
21 (b) (1) refers only to (a) (1)? If it -- without that,
22 there would be a direct conflict between (b) (1) and
23 (a) (1) because (a) (1) says "shall," the first assistant
24 shall perform. Whereas (a) (2) and (a) (3) say that the
25 President may do certain things. So there isn't the

1 same kind of direct conflict between the remainder of
2 (b) (1) and (a) (2) and (a) (3) as there is with respect to
3 (a) (1).

4 GENERAL GERSHENGORN: So, Your Honor, that
5 is the argument that respondents make, and we simply
6 disagree with that. We think there is a direct conflict
7 between (a) (2), which says the President may appoint
8 this person as an acting, and (b) (1), which says the
9 President may not appoint -- appoint a person as an
10 acting when that person is also the nominee.

11 That (b) (2) is a very -- is a designation
12 and delegation of power to the President to make a
13 designation, and it is every bit as broad as the -- as
14 the (a) (1) example.

15 JUSTICE ALITO: But it's not quite the same
16 kind of conflict. To -- to pick up on Justice Kagan's
17 restaurant scenario and modifying it a bit, if she -- if
18 she were to say, or if I were to say to the waiter, "You
19 may bring me the soup of the day, but you may not bring
20 me soup that contains shellfish because I'm allergic to
21 it," there wouldn't be a conflict of the same sort,
22 would there, between those two statements?

23 GENERAL GERSHENGORN: So, Your Honor, I do
24 think that there -- I do think there would be, and I
25 think in particular, even apart from the restaurant hypo

1 itself, the whole purpose of (a) (2) is to give the
2 President the power to make a designation when he
3 believes there's a superior official serving elsewhere
4 in the government. That grant of power is every much
5 restricted by (b) (1) as (a) (1) absent the introductory
6 clause. The -- the (b) (1) says the President may do
7 this. (b) (2) says in some circumstances he may not do
8 this, and that is precisely the kind of conflict that
9 Congress was getting at.

10 But even if you thought the text had some
11 ambiguity here, I really do think that the other aids to
12 statutory construction which this Court's have looked
13 to -- this Court has looked to -- over and over, really
14 do work in our favor and really not at all in
15 Respondent's favor here.

16 The -- principally, if one looks at the
17 contemporaneous interpretation and consistent practice,
18 what one sees is the sponsor of the legislation
19 identified precisely the government's interpretation.
20 Both GAO and OLC adopted that interpretation.
21 President --

22 JUSTICE GINSBURG: You went into detail
23 without any elaboration. It's just a question, and
24 here's the answer, and there's no reason for the answer
25 from OLC. As far as GAO is concerned, they didn't say

1 precisely what happens with category two and three.

2 GENERAL GERSHENGORN: So, Your Honor, I
3 think -- so, two points -- a number of points, but two
4 responding directly to both of those.

5 With respect to OLC, our point is not that
6 this Court should defer to it or defer to the reasoning
7 in it. Our point -- our point is, from the very
8 beginning, from the moment the statute was passed,
9 Congress was aware of the interpretation the Executive
10 Branch was putting on it and raised no objection.

11 And with respect to GAO, the GAO letter I
12 think is quite significant because GAO recall under
13 Section 3349 is the Congressionally-designated watchdog
14 for the Vacancies Act, and when GAO issued its letter,
15 which I -- I respectfully disagree, Your Honor, I think
16 the GAO letter is quite clear.

17 If you look at it, what it says is there are
18 four ways to make an acting appointment, and for
19 number 1, (a) (1), it says "And you can't be the
20 nominee."

21 For the other three, it does not have that,
22 and the whole point of that letter was to give guidance
23 to Congress. So that letter was circulated not just to
24 the Senate majority and minority committees, but to the
25 Office of Presidential Personnel, to the White House

1 counsel's office, to OPM and OMB.

2 CHIEF JUSTICE ROBERTS: Well, I think you're
3 putting a significant burden on Congress to sort of
4 speak up. There's sort of an estoppel against Congress.
5 If they don't speak up in every instance where they
6 think some prerogative or interpretation is -- is being
7 misapplied or prerogative taken away from them, then
8 there can -- deemed to have acquiesced in it. And this
9 is a context in which that might be particularly
10 inappropriate, because maybe the particular appointment
11 contravenes your -- your theory.

12 But a significant number of people in
13 Congress want to see that vacancy filled, you know,
14 under -- even though it contravenes these more general
15 provisions, and that might not be a particular battle
16 they want to fight at that time. I -- I think it's a
17 very serious burden to impose on the Legislative Branch.

18 GENERAL GERSHENGORN: So, Your Honor, if --
19 we're not imposing a burden on the Branch, but we are
20 asking you not to turn a blind eye to what really
21 happened in this context.

22 What lead up to the Vacancy Reform Act
23 was -- was decades of Congress raising exactly the kind
24 of objections that one would expect. There were
25 oversight hearings. There were GAO letters. There were

1 congressional research reports. There were letters back
2 and forth to the Attorney General complaining about the
3 way the Justice Department and the Executive Branch was
4 handling the vacancies, and -- and ignoring the
5 Vacancies Act.

6 Then what we have is an interpretation --
7 then what we have is the Vacancies Reform Act and an
8 interpretation set out by the author of the very
9 provision we're talking about, Senator Thompson, and
10 opened discussion by GAO, the watchdog of the Vacancies
11 Act, designated by Congress and by OLC, and then
12 silence. So we're not putting a burden --

13 JUSTICE GINSBURG: But you have on the other
14 side -- was it Senator Thompson, you have Senator Byrd
15 who seemed to be putting on it the construction that
16 Respondents do.

17 GENERAL GERSHENGORN: So, Your Honor, I
18 think that actually Senator Byrd is quite -- is quite
19 vague about that and omits the "notwithstanding"
20 language.

21 But even if you thought that was sort of a
22 draw, I would note that Senator Byrd, who again was not
23 shy and had weighed in on these Vacancies Act issues,
24 never raised an objection when the -- when Presidents
25 across three administrations continued it into --

1 JUSTICE KENNEDY: I'm sorry. I think it
2 should be noted that, you know, it's one thing to
3 consult legislative history to understand the -- the
4 whole context in which the -- the Congress was acting,
5 but it's quite another thing to rely on an isolated
6 statement and later contradicted by -- by another
7 Senator, and even for those who at times find
8 legislative history helpful, I think this is where it's
9 at its weakest and most unpersuasive.

10 GENERAL GERSHENGORN: Your Honor, I
11 disagree -- I don't -- I don't disagree with Your Honor.
12 It is merely one, though, of a consistent stream given
13 the OLC and GAO opinion.

14 So I really would like to get back to the
15 Chief Justice's point, if I could. It is not at all an
16 estoppel by Congress. It is -- the reason why this
17 Court has put -- should put particular weight on this
18 silence here is because it reflects a contemporaneous
19 and uniform interpretation of Congress' understanding of
20 how its own powers are being -- are or are not being
21 infringed.

22 CHIEF JUSTICE ROBERTS: How is that -- I'm
23 sorry.

24 GENERAL GERSHENGORN: And given the past
25 history --

1 CHIEF JUSTICE ROBERTS: How is that not --
2 how is that not an estoppel?

3 GENERAL GERSHENGORN: It's not an estoppel,
4 Your Honor. What it is, is further evidence that the
5 interpretation of the plain language that we're putting
6 forward is correct. The language supports it. The --
7 everybody understood and has acted for 20 years on that
8 assumption.

9 CHIEF JUSTICE ROBERTS: Sounds like the
10 point I was trying to make, is: You are putting weight
11 on the fact that they didn't do anything. And you say
12 you've got other arguments, too, and I appreciate that,
13 but what did they do, then?

14 GENERAL GERSHENGORN: Absolutely, Your
15 Honor. No, I am putting weight on what they didn't do.
16 To me, it is very much the dog that didn't bark.
17 Congress had been barking quite loudly and vociferously
18 for decades on this very issue. And then it adopted a
19 statute that was interpreted by its own watchdog in a
20 certain way, and then the barking stopped. And it seems
21 to me this Court is really ignoring reality to not -- to
22 not see that that has important weight.

23 JUSTICE KENNEDY: What would be the
24 consequences if we affirm? Your brief didn't list a
25 great parade of horribles. It seems to me that our

1 system is quite capable of accommodating the
2 Respondent's argument. And on that point, eight judges
3 have looked at this, and every one of them has come to
4 the conclusion that the Respondent's reached.

5 GENERAL GERSHENGORN: So, Your Honor, I
6 believe there are important consequences.

7 So, first, Congress understood that there
8 are often important positions that don't have first
9 assistants to take over. To cite one at page 11A of the
10 chart, there's an appointment of Linton Brooks, who was
11 a -- who was named as the director in the National
12 Nuclear Security Administration. They're the folks that
13 oversee nuclear counterterrorism.

14 When the Senate-confirmed director of that
15 agency left, there was no first assistant, and the
16 President, President Bush, put in Linton Brooks both as
17 nominee and to act to take over.

18 So Congress was well aware that there often
19 weren't first assistants around.

20 JUSTICE KAGAN: Can I ask you about the
21 consequences going backward?

22 GENERAL GERSHENGORN: Yes.

23 JUSTICE KAGAN: Your brief did not talk
24 about this, but do you think that if we find against
25 you, that that subjects to some uncertainty actions that

1 these 100-plus officials took?

2 GENERAL GERSHENGORN: Yes, Your Honor.

3 JUSTICE KAGAN: If so, what actions?

4 GENERAL GERSHENGORN: So, Your Honor, it
5 does -- and that's the second point to Justice Kennedy's
6 question.

7 It does subject the past officials to
8 substantial uncertainty. In truth, we don't know
9 exactly the extent of it, because we don't know when
10 we'll have defenses of waiver. We don't know when we
11 might, for some things, be able to ratify. But there's
12 no doubt that there are significant reliance interests
13 that the Executive Branch --

14 JUSTICE GINSBURG: What did Judge Henderson
15 say about that? This is not going to be a floodgate
16 situation, because you would have to raise it. Here, it
17 was raised before the ALJ. And for these other cases
18 where the vacancy was long filled, there would be no
19 possibility of making, very late in the day, an argument
20 that you didn't make before.

21 GENERAL GERSHENGORN: So, Your Honor, I'm in
22 a tough position, because I don't want to argue too hard
23 against defenses that we're going to want to assert
24 later. But I do think what Judge Henderson was talking
25 about in particular was the NLRB situation, which is a

1 different situation, because there are particular
2 hearings and the NLRB has an ability to ratify that
3 other agencies don't.

4 JUSTICE KAGAN: Suppose you didn't have
5 those defenses, because, you know, I'm not sure why you
6 would necessarily, given that the statute says they're
7 void ab initio if people take it as against these
8 procedures. So if you didn't have those defenses, as
9 you look down the list of these officials, what kinds of
10 actions are you most worried about being unsettled?

11 GENERAL GERSHENGORN: So, Your Honor, we
12 have, for example, Adam Szubin, who was the
13 Undersecretary For Terrorism and Financial Crimes. He
14 does the terror-sponsored designations in the Treasury
15 Department. We have the deputy attorney general. We
16 have the head of OPM. These are people who issue -- may
17 issue regulations, who make designations, who make
18 important decisions in the Executive Branch.

19 It is, I think -- the reliance interests of
20 the Executive Branch are quite strong here. This is a
21 situation -- and we have put very senior officials in
22 place at the -- with the understanding that what they
23 were doing based on -- that what they were doing was
24 lawful at the time based on the -- based on the language
25 of the statute and the interpretation provided on it.

1 JUSTICE KAGAN: Can I just press you a
2 little bit?

3 GENERAL GERSHENGORN: Sure.

4 JUSTICE KAGAN: I mean, those are all very
5 important positions that you named, but it's not
6 absolutely clear to me that those -- that there are
7 categories of decisions that those people take that we
8 should be worried about. And if there are, I would like
9 to know about those categories of decisions.

10 GENERAL GERSHENGORN: So, Your Honor, I
11 can't list them chapter and verse. But I do think the
12 kinds of things we're worried about are rulemakings by
13 the heads of agencies, the -- particular designations
14 by -- by the senior officials, and decisions on
15 litigation and other things that may be subject to
16 challenge.

17 We have not gone back and catalogued all of
18 the potential ramifications, but we do think that with
19 over 100 officials over the course of 20 years, the
20 effects of this are really quite significant.

21 JUSTICE KENNEDY: Does that 100 include or
22 exclude military officers? Do you know?

23 GENERAL GERSHENGORN: It is not including
24 military officers, Your Honor. These are -- these are
25 the acting officials in the Executive Branch, but I

1 don't think they're military officials.

2 The interpretation that the -- that the
3 Court is putting forward -- if I could make a couple of
4 points on the structure and why we really don't think
5 that this is -- that this is the right way to reason and
6 why our way makes sense -- we think what's reflected in
7 the Vacancies Act is a judgment by Congress that before
8 an individual serves as both the acting and the nominee,
9 that there be one of two protections: that the
10 individual either have been Senate-confirmed before, or
11 that they meet a length-of-service requirement.

12 So in (a)(2), what one sees is that that's
13 in a prior Senate confirmation. In (a)(3), it's a
14 length of service. And if one looks at (c)(1), which
15 addresses Senate-confirmed officials whose terms have
16 expired, again, it's Senate confirmation.

17 The entire purpose of (b)(1) is to extend
18 those protections to first assistants. So what (b)(1)
19 does is, for first assistants, it puts on a
20 length-of-service requirement. And then in (b)(2), it
21 exempts from that length-of-service requirement what --
22 the very individuals who have received prior Senate
23 confirmation. The package works as a seamless whole.

24 Congress was not putting on a
25 first-assistant requirement on a PAS appointee from

1 elsewhere in the government, and it was not putting on a
2 first-assistant requirement on a career agency official
3 moved into an acting position. What it was doing was
4 making sure that first assistants who were both nominees
5 and the acting had -- had one of the two protections.

6 It's also consistent with the way the
7 legislative history is, and the drafting history, with
8 respect -- I think this is very important -- to the PAS
9 positions. It had been the President's prerogative
10 expressly under the Vacancies Act, back to 1968, to take
11 a PAS officer and put him into an acting position and
12 then still be able to nominate him. The first draft of
13 the bill preserved that.

14 So after all of the rancor, after all of the
15 unhappiness of the Vacancies Act, the first draft of the
16 bill allowed an acting officer to come in automatically
17 under (a) (1), whereas a PAS under (a) (2), and the (b) (1)
18 restriction, only applied to (a) (1). There's no
19 dispute.

20 And so then what happened? Then there was
21 an objection that the bill didn't give enough authority
22 to the President, and so changes were made to give the
23 President more authority. And what Respondents would
24 have you believe is that Congress overturned sub
25 silentio, without a single complaint, 130 years of

1 Executive Branch practice.

2 JUSTICE KAGAN: Well, why do you -- why and
3 how do you think that that change was made, then?

4 Because the change clearly was made. In the initial
5 draft, it obviously applied only to first assistants;
6 and then in the final draft, not so obvious at all.

7 And, you know, I agree with you there's no explanation,
8 but there is a change.

9 Are you suggesting it was, you know, just a
10 mistake that somehow happened?

11 GENERAL GERSHENGORN: Absolutely not, Your
12 Honor. And if you'll bear with me, I can explain that.

13 The initial draft of (a)(1) required a --
14 provided that the person be a first assistant to the
15 officer. And (b)(1) read as it does.

16 When Congress -- Congress changed that to
17 allow the appointment of officers who were not -- who
18 were -- after the officer dies, and so they changed it
19 to first assistant to the office. The significance of
20 that is that somebody could be appointed first assistant
21 even after the vacancy arose. That was a very big
22 change. If Your Honor looks at page 19A of the -- of
23 the Appendix to the petition where the bill is set out,
24 the original bill, the way the bill read, it -- it put
25 the restriction only on the person who was serving at

1 the time of the vacancy. So if the -- if Congress had
2 left (b) (1) the way it was, it would have created a very
3 odd situation where at the current serving first
4 assistant would be subject to (b) (1), and the after put
5 in, that someone put in later, was not subject to
6 (b) (1).

7 So what did Congress do? Congress changed
8 it so that the limitation applied to all first
9 assistants. But then it added "notwithstanding" (a) (1),
10 and that is the critical thing. So in other words,
11 Congress did it, made this change to (b) (1), precisely
12 to deal with the after-appointed first assistants, and
13 then it added the "notwithstanding" clause to say
14 notwithstanding only (a) (1). And so it does seem to me,
15 Your Honor, that it was a very important change.

16 And I think if Your Honor chases -- chases
17 through the legislative history and looks at 19A and way
18 the provision works, you will see that that was the
19 reason -- that that was the reason for the change.

20 JUSTICE GINSBURG: If you -- if your -- if
21 your interpretation is the correct one, what is your
22 answer to the horrible that appears in the -- in the
23 Respondent's brief at 33 to 34? They say if you read
24 the statute the way the government does, then you could
25 have somebody in there who has never been read --

1 approved by Congress, by the Senate. You could have
2 someone there upwards of, they calculate, 630 days.

3 GENERAL GERSHENGORN: So, Your Honor, the
4 response to that is there's no doubt that someone can
5 serve for that length of time, and that Congress
6 understood that. That's the consequence of the time
7 limits in the Vacancies Act.

8 What Respondents are arguing is that should
9 only be true for first assistants but should not be true
10 for -- for individuals that the President appoints
11 under -- designates under (a) (2) and (a) (3). And it's
12 that irrationality that we think the statute -- it's
13 that difference that we think the statute just doesn't
14 justify.

15 So just to be clear: It is -- it is crystal
16 clear under both Respondent's view and our view that an
17 individual can serve for a very long period of time.
18 That's the consequence of the -- of the 210-day --
19 210-day period and the various ways you can extend it.

20 The question before you, though, is whether
21 it makes sense that Congress decided only the first
22 assistants could do that. But there are real reasons to
23 doubt that. (A) (2) and (a) (3) were put in precisely to
24 give the President himself -- and it could only be the
25 President; it's not delegable -- the chance to choose a

1 superior -- a superior officer, a better -- a better
2 placed, the more talented officer than the first
3 assistant. It seems very odd in that situation to say
4 that the 1100-day scale, or however many days, could
5 only served by the first assistant but not by someone
6 chosen by the President for that very reason under
7 (a) (2) and (a) (3).

8 If I could reserve the balance of my time.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 Mr. Gershengorn.

11 Mr. Dvoretzky.

12 ORAL ARGUMENT OF SHAY DVORETZKY

13 ON BEHALF OF THE RESPONDENT

14 MR. DVORETZKY: Mr. Chief Justice, and may
15 it please the Court:

16 Four features of the FVRA's text and
17 drafting history compel our interpretation.

18 First, Congress used the broad terms "a
19 person" and "this section."

20 Second, "notwithstanding" is a term of
21 expansion. It does not contract the broad meaning of
22 "person" and "section."

23 Third, the government's interpretation makes
24 Subsection (b) (2) superfluous in multiple ways.

25 And fourth, at the time that Congress added

1 (b) (2), it deleted language from the initial draft of
2 (b) (1) that expressly limited the provision to first
3 assistants. The revised language encompasses all acting
4 officers.

5 JUSTICE KENNEDY: I -- I agree that "person"
6 and "section" are very strong arguments for you.
7 Suppose what the statute said is "notwithstanding (a) (1)
8 and (a) (2)"? And what -- what would then be your
9 argument with respect to whether or not it affected
10 (a) (3)?

11 MR. DVORETZKY: I still think in that
12 circumstance that "person" and "section" would apply to
13 (a) (3). But the reason that that would be a different
14 case is that there is no meaningful distinction between
15 (a) (2) and (a) (3) and the role that they play in the
16 statute.

17 There is a meaningful distinction between
18 (a) (1) on the one hand and (a) (2) and (a) (3) on the
19 other hand. And it makes sense because of that
20 distinction that Congress would single out just (a) (1).

21 JUSTICE KAGAN: I don't get that,
22 Mr. Dvoretzky. And maybe this follows the government's
23 line of thought, but, you know, I've been -- the (a) (1)
24 says, "The first assistant shall be the acting officer."
25 And then (b) (1) says, no, she may not be. Right? And

1 (a) (2) and (a) (3) doesn't use the words "shall," but it
2 says, the President may appoint any of these people.
3 And then (b) comes along and says, no, the President
4 can't appoint some subset of them.

5 So the basic conflict seems to me to be the
6 same in both cases, which is that the second clause says
7 not so fast, not with respect to those people.

8 MR. DVORETZKY: Justice Kagan, the
9 difference is that (a) (1) is a self-executing provision.
10 It automatically places the first assistant into the
11 vacant office, and (b) (1) then takes the person out.

12 (A) (2) and (a) (3) are grants of discretion that has to
13 be understood side by side with --

14 JUSTICE KAGAN: But those grants of
15 discretion are very broad, and then (b) (1) again takes
16 the person out, takes the person out of the grant of
17 discretion, just as it takes the person out of the
18 self-executing provision before them.

19 MR. DVORETZKY: They -- they are broad only
20 if read in isolation, but they can't be read in
21 isolation as a statutory matter. And oftentimes, the
22 President doesn't read them in isolation as a practical
23 matter.

24 In other words, there is no way to avoid the
25 conflict created between (a) (1) and (b) (1) because

1 (a) (1) puts the person in the job and (b) (1) takes them
2 out.

3 If the President, however, simply reads
4 (a) (2) and (a) (3) together with (b) (1), then he knows
5 what the limitations are on his discretion, and he can
6 avoid that ripping out. It's that ripping out of the
7 nominee from acting service that creates a particularly
8 stark conflict that Congress sought to address through
9 the "notwithstanding" (a) (1) clause.

10 JUSTICE KAGAN: I have to say, I find it a
11 little bit odd to think of this drafter thinking of the
12 kind of distinction you're making. Say, well, this is
13 self-executing and this is not self-executing. It's
14 only a broad grant of discretion. And then not
15 realizing that just by virtue of saying "notwithstanding
16 (a) (1)," the statute creates -- raises this question
17 about, well, you've said (a) (1) but not (a) (2) or
18 (a) (3). What does that mean?

19 I mean, that seems just like a very strange
20 drafter to me, somebody who is so in the weeds that they
21 can't figure out that pretty obvious objection to what
22 they're doing.

23 MR. DVORETZKY: Well, perhaps one way to
24 think of it, and this goes back to your first question
25 of the argument, what if you had a statute that didn't

1 have any "notwithstanding" clause at all at the
2 beginning of (b)(1)? In that situation it would be
3 clear that "person" and "section" would make (b)(1)
4 applicable to (a)(2) and (a)(3).

5 There would be a question in that situation,
6 though, whether (b)(1) also applied to (a)(1), first of
7 all, because of the starkness of the conflict between
8 (a)(1) and (b)(1), and second of all, the government
9 argues that the general versus specific canon would
10 apply there, but it wouldn't necessarily because the
11 general versus specific canon is typically invoked in
12 order to avoid superfluity where you have one general
13 provision and a specific provision that would be
14 meaningless if not read as an exception to the general.

15 Here, however, in -- in the hypothetical
16 statute without the "notwithstanding" clause, you
17 wouldn't have superfluity concern because (b)(1) would
18 apply to (a)(2) and (a)(3). And so you'd be left with a
19 particular question, not about (2) and (3), but just
20 about (1). And so it makes sense that Congress singled
21 out (1) because of the particular role that it's playing
22 in the statute.

23 JUSTICE SOTOMAYOR: So what about (c)(1)?
24 Isn't, under your reading, it -- it will never be in
25 effect?

1 MR. DVORETZKY: No. No, Your Honor. First
2 of all, the officials under (c)(1) are not acting
3 officials. They are receiving term extensions. The
4 language of (c)(1) talks about those individuals
5 continuing to serve in the office.

6 (a)(1) through (3) all talk about performing
7 the functions and duties of the office temporarily in an
8 acting capacity. The legislative history likewise talks
9 about three categories of acting officials, and it
10 consistently talks about (a)(1), (2), and (3). And so
11 (c)(1) is just functioning separately. That's just a
12 different thing.

13 JUSTICE SOTOMAYOR: So why aren't (a)(2) and
14 (a)(3) functioning separately from (a)(1)? If -- if
15 (c)(1) can function separately, and that was the thought
16 of the drafters, why don't we carry it to its logical
17 conclusion? (a)(1) is separate from -- they are written
18 almost identically. "The Presidents may direct," "may
19 appoint," may -- they are all sort of exceptions to the
20 rule.

21 MR. DVORETZKY: The reason that (c)(1)
22 functions separately is that it describes the work that
23 the official is doing in a different way. It describes
24 continuing to serve in the office. (a)(1) through
25 (a)(3) all describe the work that the official is doing

1 in the same parallel way, performing the functions and
2 duties of the office temporarily in an acting capacity.
3 That's why the three categories of acting officials are
4 (a) (1) to (a) (3), but (c), by its text, is just doing
5 something different.

6 JUSTICE BREYER: Why -- why -- the thing --
7 I'd like to go back to the Solicitor General's last
8 point, and that's where I'm having -- I have a puzzle.
9 I'd like to hear what you have to say.

10 I mean, for the purposes of this question,
11 I'm assuming all the text, which sounds to me, if a
12 person came from Mars, that's what he would expect a
13 legal argument to be like.

14 The -- the number's all over had the place,
15 and I will also assume that for every chef salad there
16 is a countervailing strawberry shortcake; all right?
17 So -- so everything balances out. Assume.

18 Now, it seems to me that this exception here
19 is saying this. We have the Secretary of the Treasury.
20 He has five assistants. Each is a presidential
21 appointee. One day, secretary -- Assistant Secretary of
22 the Treasury number two dies, and now the President can
23 fill that role with any one of three people on an acting
24 basis: His first assistant, some other assistant
25 secretary or deputy in the treasury department, or a

1 GS-18.

2 Have I got it right so far?

3 MR. DVORETZKY: Yes, Your Honor.

4 JUSTICE BREYER: I'm using examples. All
5 right.

6 Now, what this statute as you read it would
7 seem to say, if you appoint whichever one you choose,
8 put any one of those three people in, go ahead, do it.
9 Now, if you nominate those, one of those three to a
10 presidential position roughly, they are out. All of
11 them are out. Oh, wait. There's one exception. The
12 first assistant is not out if he served for 90 days as
13 first assistant.

14 Have I got the statute right?

15 MR. DVORETZKY: Yes, Your Honor.

16 JUSTICE BREYER: Okay. I would just wonder,
17 were I from Mars, what's the point of such a statute?

18 (Laughter.)

19 JUSTICE BREYER: Why is it you're perfectly
20 willing to have stay there and do the acting job the
21 first assistant, if he served 90 days before, but you're
22 not willing to have served the acting job this guy who
23 was a GS-18 in the same department, or the person who
24 was an assistant secretary of the Treasury, number two.
25 Why? I can't think of an answer given your

1 interpretation.

2 I can think of an answer given their
3 interpretation. I say what they were worried about on
4 their interpretation were our friends number two and
5 number three, the GS-18 and the Assistant Secretary
6 number two. They can continue to serve, on their
7 interpretation.

8 Hey, why did they do this? The name of that
9 explanation is called Bill Lann Lee. Because that was
10 the problem that gave rise to the statute, and on their
11 interpretation they passed some words that solved that
12 problem. So there we are.

13 I get an explanation for his, assuming that
14 you like purposes more than you like numbers. I get an
15 explanation on his, and I don't get an explanation on
16 yours. So that's what I would like you to respond to.

17 MR. DVORETZKY: So I'd like to respond,
18 first of all, to why it makes sense to treat first
19 assistants differently, and second of all, to Bill Lann
20 Lee and how that is relevant to the statute.

21 The legislative history explains in multiple
22 places that first assistants are particularly
23 well-suited to be the acting official because they
24 represent continuity and regularity in the office.

25 We know from (b) (1) that Congress was

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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