(Slip Opinion)

Whether the Departure of an Interim United States Attorney Restarts the Authorized Period of Acting Service Under the Federal Vacancies Reform Act of 1998

The departure of an interim U.S. Attorney appointed under 28 U.S.C. § 546 does not create a new vacancy under the Federal Vacancies Reform Act and therefore does not restart the period during which an Acting U.S. Attorney may serve under the Act.

September 4, 2026

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

When "an[y] officer . . . whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office," the Federal Vacancies Reform Act of 1998 ("FVRA") permits an acting officer to serve in place of the departed officer. 5 U.S.C. § 3345(a). Typically, the temporary officer may serve for at least 210 days, although that time limit may be extended for various reasons, such as if the President submits a nomination to the Senate for the office. *Id.* § 3346.

You have asked how those provisions interact with 28 U.S.C. § 546, which permits the Attorney General (or, in some circumstances, the relevant federal district court) to appoint a U.S. Attorney to serve on an interim basis when the office of U.S. Attorney is vacant. Specifically, you have asked whether, when an interim U.S. Attorney appointed under section 546 vacates the office, that person's departure restarts the time limits applicable to acting service under the FVRA, affording any acting official a new 210-day period of acting service—and potentially more.

Although we have, over the years, informally advised that the answer is "yes," we have never written a formal opinion on the question. Having now considered the question with the greater care and attention that accompanies a formal opinion of the Office, we believe the better answer is "no." That is, whether the FVRA remains available to temporarily fill a vacant U.S. Attorney position after the departure of a U.S. Attorney appointed under section 546 is calculated by applying the FVRA's timing provisions from the departure date of the last Senate-confirmed (or recess-appointed) occupant of the office. In other words, the departure of a U.S.

Attorney appointed on an interim basis under section 546 does not create a "new" vacancy for purposes of the FVRA's timing provisions.

I.

The FVRA is the default statutory scheme for allowing officials to temporarily act in many high-level Executive Branch offices during periods of vacancy, including the office of a U.S. Attorney. *See* 5 U.S.C. § 3345(a). But Congress also has enacted various office-specific vacancy statutes, which provide the Executive Branch with alternate options for addressing vacancies in covered offices. *See id.* § 3347(a)(1). As relevant here, Congress has provided that the Attorney General may appoint a U.S. Attorney to serve for a period when the office is vacant. *See* 28 U.S.C. § 546(a). In addition, the local district court is permitted to appoint an interim U.S. Attorney if an Attorney General appointment expires before the President appoints and the Senate confirms a U.S. Attorney to that office. *Id.* § 546(d). The following sections provide a brief overview of each statute and then explain our current understanding of the interaction between the two.

A.

The FVRA provides the general framework for designating an official to temporarily perform the functions and duties of vacant Senate-confirmed positions in the Executive Branch. *See* 5 U.S.C. § 3347.[1] Specifically, the statutory scheme authorizes a limited period of acting service in a covered office when "an officer of an Executive agency . . . whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office." *Id.* § 3345(a).

Under the FVRA, the default rule is that the "first assistant to the office"—which is a position often designated by statute or regulation—assumes the authority to "act[]" in that office. *Id.* §§ 3345(a)(1), 3346; *see*

[1] In Executive Branch practice, such individuals are informally called "PAS" ("requiring Presidential Appointment and Senate confirmation") officers. *Designating an Acting Attorney General*, 42 Op. O.L.C. 182, 192 (2018).

Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 63–65 (1999). The President may deviate from that default arrangement by designating another official who meets certain criteria to temporarily assume the duties of the vacant position. 5 U.S.C. § 3345(a)(2), (3). Individuals who "act" in a vacant position pursuant to the FVRA are referred to as the "Acting [vacant position title]." *See, e.g.*, *Temporary Filling of Vacancies in the Office of United States Attorney*, 27 Op. O.L.C. 149, 150 (2003) ("*Temporary Filling of Vacancies*").[2]

An individual designated as "acting" under the FVRA is generally limited to an initial period of 210 days following the date that the vacancy arose. 5 U.S.C. § 3346(a). Recognizing the large number of officials who must receive Senate confirmation in the early days of an administration, however, Congress has provided for a longer initial period of acting service (subject to the same extensions) if the vacancy occurs within a three-month period before or after the inauguration of a new President. *Id.* § 3349a. Moreover, wholly apart from the extension during presidential transitions, the initial period is extended if the President submits a nomination for the relevant office to the Senate. *Id.* § 3346.

The FVRA is "the exclusive means" for authorizing temporary acting service in a covered office, *id.* § 3347(a), unless another statute expressly designates or authorizes the designation of an acting official to serve in a specific office, *see id.* § 3347(a)(1); *see also Guedes v. ATF*, 356 F. Supp. 3d 109, 138–44 (D.D.C. 2019); *Designating an Acting Attorney General*, 42 Op. O.L.C. 182, 187 (2018). The FVRA also acknowledges that the President has Article II authority to make a recess appointment to a vacant office. 5 U.S.C. § 3347(a)(2); *see also* U.S. Const. art. II, § 2, cl. 3; *Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. 211, 214 (2002). In these ways, the FVRA provides a default mechanism for designating an official to perform the functions of vacant offices but permits the use of alternative mechanisms under certain circumstances.

[2] Individuals may also be empowered to use the "acting" title if they perform the duties of a vacant position pursuant to a more specific statute authorizing service in an acting capacity. *See, e.g.*, 28 U.S.C. § 508(b) (providing an order of succession and authorizing the Attorney General to establish a further order under which certain officials within the Department of Justice, in a designated order, may serve as the Acting Attorney General and "exercise the duties of the office of Attorney General").

B.

As our Office has long recognized, section 546 is one such alternative mechanism for dealing with a vacancy in the office of a U.S. Attorney. *See Temporary Filling of Vacancies*, 27 Op. O.L.C. at 149–50. Relevant officials in the Executive Branch may therefore choose between the FVRA and section 546 when deciding how to temporarily address a vacancy in the office of a particular U.S. Attorney. *Id.* at 149.

When "the office of [a] United States attorney is vacant," section 546 authorizes the Attorney General to temporarily "appoint" any person (including someone from outside the government) as "a United States attorney" for that district, so long as the Senate has not previously rejected that individual's nomination to the vacant position. 28 U.S.C. § 546(a)–(b). An individual appointed as interim U.S. Attorney may serve until the qualification of a Senate-confirmed U.S. Attorney for that district or the expiration of 120 days after the appointment, whichever date is earlier. *Id.* § 546(c); *see also Starting Date for Calculating the Term of an Interim United States Attorney*, 24 Op. O.L.C. 31, 31 (2000) ("*Starting Date for Calculating the Term*"). If the appointment expires before the qualification of a Senate-confirmed successor, the relevant district court may appoint an individual to serve in the vacant position "until the vacancy is filled." *Id.* § 546(d). Although their title is "U.S. Attorney," we have commonly referred to individuals appointed under section 546 as "interim U.S. Attorneys." *See, e.g.*, *Authority of the President to Name an Acting Attorney General*, 31 Op. O.L.C. 208, 210 n.2 (2007).

C.

An Acting U.S. Attorney (serving under the FVRA) is different in kind from an interim U.S. Attorney (appointed under section 546). Acting U.S. Attorneys do not "hold the office" of U.S. Attorney. *Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. at 214. Instead, they are authorized or "direct[ed]" to "perform the functions and duties of" the office of U.S. Attorney on a temporary basis, in addition to whatever permanent underlying office they hold. 5 U.S.C. § 3345(a)(1)–(3). Acting U.S. Attorneys continue to hold and be responsible for the duties of their permanent position of record (which is often First Assistant U.S. Attorney) and receive the pay of that permanent position, rather than the salary of a U.S.

Attorney, though they may delegate the exercise of some of their permanent position's duties to accommodate the time they must spend performing the duties of an Acting U.S. Attorney. *See Designating an Acting Director of National Intelligence*, 43 Op O.L.C. 291, 304–05 (2019).

By contrast, a section 546 interim appointment creates a "full fledged" U.S. Attorney with limited tenure, rather than an "Acting U.S. Attorney" who performs all of that office's duties. *Starting Date for Calculating the Term*, 24 Op. O.L.C. at 31–32; *Temporary Filling of Vacancies*, 27 Op. O.L.C. at 149. That is, our Office has understood interim U.S. Attorneys to be "appoint[ed]" to and hold the office of U.S. Attorney, albeit temporarily. 28 U.S.C. § 546(a), (d); *see also Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. at 214–15. This view is supported by case law. In particular, the Ninth Circuit explained shortly after the passage of the FVRA that section 546 appointments create "fully-empowered United States Attorneys, albeit with a specially limited term, not subordinates assuming the role of 'Acting' United States Attorney." *United States v. Gantt*, 194 F.3d 987, 999 n.5 (9th Cir. 1999) (section 546 appointment), *overruled on other grounds by United States v. W.R. Grace*, 526 F.3d 499, 506 (9th Cir. 2008). Consistent with that understanding, interim U.S. Attorneys use the title "United States Attorney," not "Acting U.S. Attorney."

II.

We conclude today that the departure of an interim U.S. Attorney serving under section 546 does not restart the time period permitted for acting service under the FVRA. An individual may therefore serve as Acting U.S. Attorney under the FVRA after the departure of an interim U.S. Attorney only if time remains under the FVRA's timing provisions, as calculated from the departure date of the last Senate-confirmed (or recess-appointed) occupant of the office. *See* 5 U.S.C. § 3346.

A.

We start, as we always do, with the statutory text. *Permitting Part-Time Employees to Work Regularly Scheduled Weeks of 33 to 39 Hours*, 39 Op. O.L.C. 99, 111 (2015) (citing *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013)).

The time limits of the FVRA are keyed to "the date the vacancy occurs." 5 U.S.C. § 3346(a)(1). The statute does not define with specificity what a "vacancy" is, but we think a key part of the "context" for understanding the meaning of that term, *Revocation of Prior Monument Designations*, 49 Op. O.L.C. __, at *35 (May 27, 2025), is section 3345, which defines the event that triggers the application of the FVRA, *see, e.g.*, *Dubin v. United States*, 599 U.S. 110, 120 (2023) ("Even in cases where 'the literal language of the statute is neutral' in isolation, reading 'the whole phrase' can point to a more targeted reading." (quoting *Marinello v. United States*, 584 U. S. 1, 7 (2018))). That triggering event, as noted above, is when "an officer of an Executive agency . . . whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a). That language is tied to the way the departing *officer* must be appointed, not to the method of appointment that attaches to the underlying *office* he holds. In the case of the office of U.S. Attorney, then, this language refers to a U.S. Attorney who had to be, and was in fact, appointed by the President with the advice and consent of the Senate but subsequently left office or became otherwise unavailable to serve. Section 3345, in other words, suggests that a vacancy occurs when the PAS officer leaves office.

An interim U.S. Attorney, however, does not fit that description. The appointment of an interim U.S. Attorney is *not* "required to be made" by the President after Senate advice and consent. *Id.* It is instead required to be made either by the Attorney General alone or by the district court alone. It is true, as we have long maintained, that an interim U.S. Attorney (temporarily) holds, in a sense, the same office as a U.S. Attorney who is Senate-confirmed. So even an interim U.S. Attorney holds an *office* for which "appointment to office is required to be made by the President, by and with the advice and consent of the Senate." *Id.* But the statutory language is, again, keyed to the departure of the *officer* "*whose* appointment to office" must be Senate-confirmed, not to the Senate-confirmed nature of the underlying *office* itself. *Id.* (emphasis added).

That distinction is further reinforced by the statute's repeated emphasis on the unavailability of the relevant PAS officer, rather than the event of a vacancy in the office to which a PAS official would be appointed. Section 3345(a)(1) provides that "the first assistant to the office of such officer"—

referring back to the PAS officer whose unavailability triggered the FVRA—automatically assumes the authority to perform the functions and duties of the absent officer. *Id.* § 3345(a)(1). Section 3345(a)(3) allows the designation of an employee from the relevant agency that meets certain criteria, but it similarly refers back to the "365-day period preceding the . . . beginning of inability to serve of the applicable *officer*"—not the fact of a vacancy in a particular office. *Id.* § 3345(a)(3) (emphasis added). And section 3345(b) refers both to "the office of such officer" and to the "office of an officer described under subsection (a)," further emphasizing that the subject of the FVRA's statutory scheme is the absent officer, not the vacant office. *Id.* § 3345(b)(1)(A), (2)(A).

Where Congress wished in the FVRA to make language office-specific rather than officer-specific, it did so with a specificity that is lacking in the triggering condition in section 3345. When defining an eligible first assistant who may serve by default as the acting officer, for example, Congress took care to specify that the first assistant "to the *office* of such officer" may serve, *id.* § 3345(a)(1) (emphasis added)—not the first assistant to any particular officer. As a result, the first assistant who acts by default under the FVRA is whoever currently occupies the office of first assistant, rather than needing to be first assistant at the time that the vacancy arose. *See Designation of Acting Associate Attorney General*, 25 Op. O.L.C. 177, 179–80 (2001). By contrast, the language defining the triggering condition in the chapeau to section 3345(a) is, as we have explained, tied to the particular departing PAS officer. That difference in language is presumptively intentional. *See, e.g.*, *Whether the Consumer Financial Protection Bureau May Continue to Draw Funds from the Federal Reserve System Under 12 U.S.C. § 5497 When the Federal Reserve System Is Operating at a Loss*, 49 Op. O.L.C. __, at *14–15 (Nov. 7, 2025); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62–63 (2006); *Russello v. United States*, 464 U.S. 16, 23 (1983).[3]

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[3] We are, of course, aware that the Second, Third, and Ninth Circuits disagree that a first assistant designated after a vacancy arises can serve as Acting U.S. Attorney. *See In re Grand Jury Subpoenas to Off. of N.Y. State Att'y Gen.*, No. 26-156, 2026 WL 2450485, __ F.4th __, at *5 (2d Cir. Aug. 21, 2026); *United States v. Jackson*, No. 25-6214, 2026 WL 2387099, __ F.4th __, at *6 (9th Cir. Aug. 17, 2026); *United States v. Giraud*, 160 F.4th 390, 400 (3d Cir. 2025). We respectfully disagree with those courts, as none engaged with, much less explained, the FVRA's varied treatment of officers and offices in

We recognize that the time limitations on acting service located in section 3346 are keyed to "the date the vacancy [in the office] occurs." 5 U.S.C. § 3346(a)(1). There is indeed a sense in which the departure of an interim U.S. Attorney—who, unlike an official acting in the position, actually encumbers the position of U.S. Attorney—creates a vacancy. But again, context is important, and we think that this reference to a "vacancy" in section 3346, at least absent any countervailing contextual features, is best understood also to relate back to the condition precedent outlined in section 3345(a)—the condition that triggers the FVRA in the first place, which is the inability of an individual PAS officer to serve. As noted previously, section 3345 outlines the precondition for the use of the FVRA to authorize acting service and specifies the individuals eligible to perform such service, in all cases "subject to the time limitations of section 3346." *Id.* § 3345(a)(1), (a)(2), (a)(3); *see also id.* § 3345(c). Section 3346, in referring to "the date the vacancy occurs" as the start of the permissible time period for acting service, *id.* § 3346(a)(1), refers back to the precondition in section 3345 that created the vacancy—that is, the death, resignation, or other inability to serve of a PAS officer, *id.* § 3345(a).

The text and structure of the FVRA therefore lead us to conclude that the departure of an interim U.S. Attorney does not unlock the FVRA's authority to temporarily fill a vacancy in a U.S. Attorney office or restart the time limits applicable to FVRA acting service.

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different contexts. The Second Circuit rightly observed that section 3345(a)(1) "focus[es] on the *office* rather than the individual *officeholder*" but assumed that the language was merely a "standardization" intended to "conform[] (a)(1) to the office-centric language running throughout the entirety of the section" rather than an intentional drafting choice with substantive consequences for interpreting the statute. 2026 WL 2450485, at *9; *contra, e.g.*, *Russello*, 464 U.S. at 23 ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (cleaned up)). Moreover, the courts' reasoning raises significant constitutional concerns because it would allow—indeed, require—an incoming administration to retain first assistants selected by its predecessor until the Senate can confirm successors. As that process can take months, if not years, it cannot be reconciled with the constitutional "hierarchy," deliberately created by the Framers, headed by "a 'Chief Magistrate' with whom the buck stops, and below him various 'assistants or deputies' who 'derive their offices from his appointment' and remain 'subject to his superintendence.'" *Trump v. Slaughter*, 146 S. Ct. 2283, 2293 (2026).

B.

In reaching this conclusion, we considered the argument that it is in tension with our longstanding advice that the FVRA's time limits restart following the departure of a recess appointee, even though a recess appointee, like an interim U.S. Attorney, is appointed by the President alone and not by and with the advice and consent of the Senate. *See Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. at 213–15. While we acknowledge that there is some tension, it does not change our view about how section 546 interacts with the timing provisions of the FVRA.

Article II of the Constitution gives the President an alternative means of filling a PAS office. He may "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. This clause "reflects the tension between, on the one hand, the President's continuous need for 'the assistance of subordinates' and, on the other, the Senate's practice . . . of meeting for a single brief session each year." *NLRB v. Noel Canning*, 573 U.S. 513, 523–24 (2014) (quoting *Myers v. United States*, 272 U.S. 52, 117 (1926)). The purpose of this power is to give the President, when the Senate is unavailable, constitutional authority to fill vacancies that would ordinarily require the Senate's consent—thereby relieving the "bur[d]en[] to the senate, and expens[e] to the public" that would be required if the Senate were "perpetually in session." 3 Joseph Story, *Commentaries on the Constitution of the United States* 410 (1833). Although considered a "subsidiary method for appointing [PAS] officials," *Noel Canning*, 573 U.S. at 556, "recess appointees may exercise all of the powers of regular appointees when they are in office," Memorandum for Cindy Daub, Chairman, Copyright Royalty Tribunal, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Tenure of Recess Appointees on the Copyright Royalty Tribunal* at 5 (Nov. 24, 1993) ("Dellinger Memorandum"); *see also, e.g.*, *Staebler v. Carter*, 464 F. Supp. 585, 597 (D.D.C. 1979) ("There is nothing to suggest that the Recess Appointments Clause was designed as some sort of extraordinary and lesser method of appointment.").[4]

[4] One distinction between the two involves positions with statutorily fixed service terms: For example, we have recognized that a PAS appointee may displace a recess appointee in a term-of-years position within the Executive Branch during the recess

In 2002, we recognized that the FVRA is triggered, and its time limits reset, when a recess appointee departs office. *See Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. at 215. Notwithstanding the officer-specific language of the triggering condition in section 3345, we noted that the FVRA elsewhere contains specific language presuming that the departure of a recess appointee creates a new vacancy. *See id.* at 214. In particular, section 3347(a)(2) recognizes that, through the recess-appointments power, "the President makes an appointment to *fill* a vacancy in [a specified] office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution." 5 U.S.C. § 3347(a)(2) (emphasis added). The reference in section 3347(a)(2) to a recess appointee "fill[ing]" the vacancy when appointed makes clear that if a recess appointee departs, that event newly un-fills the vacancy and hence creates a new one for purposes of section 3346. *Id.* That language stands in contrast to the office-specific vacancy statutes addressed in section 3347(a)(1), which describe the designated official as merely "perform[ing] the functions and duties of [the] specified office temporarily in an acting capacity," not as themselves filling the vacancy. *Id.* § 3347(a)(1). In this way, section 3347(a)(2) "simply make[s] clear that Congress did not intend, by the Vacancies Reform Act, to restrict the President's recess appointment power in any way." *Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. at 214.

In contrast to the treatment of recess appointees in section 3347(a)(2), the interim U.S. Attorney statute presumes that a vacancy continues to exist during an interim U.S. Attorney's tenure. There, in defining the district court's authority to appoint an interim U.S. attorney, Congress made clear that the U.S. Attorney vacancy "is filled" only upon confirmation and appointment of a PAS official, not by the judicial appointment itself. 28 U.S.C. § 546(d); *see also id.* § 546(c). That choice of language reinforces that the departure of an interim U.S. Attorney does not produce a new "vacancy" for FVRA purposes, even though the departure of a recess appointee does, as we concluded in our *Designation of Acting Solicitor of Labor* opinion. *See* 26 Op. O.L.C. at 213.

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appointee's term. *See, e.g.*, Memorandum for J. Paul Oetken, Associate Counsel to the President, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, *Re: Displacement of Recess Appointees in Tenure-Protected Positions* at 1 (Sept. 1, 2000) (describing this recognition as "long-standing").

Our conclusion today comports with the canon of constitutional avoidance. Under that canon, our Office will construe a statute, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (quoting *United States v. Jin Fuev Moy*, 241 U.S. 394, 401 (1916)); *see also, e.g.*, *Whether Eluding Inspection Under 8 U.S.C. § 1325(a)(2) Is a Continuing Offense*, 49 Op. O.L.C. __, at *10–11 (June 21, 2025). This "canon imposes a 'clarity tax' on Congress in order to advance values external to a statute." *Application of the Rehabilitation Act and Americans with Disabilities Act to State Institutionalization of Patients with Severe Mental Illness or Disabilities*, 50 Op. O.L.C. __, at *12–13 (June 18, 2026) (some quotation marks omitted) (quoting *Biden v. Nebraska*, 143 S. Ct. 2355, 2376–77 (2023) (Barrett, J., concurring)). Nevertheless, we impose that tax on Congress "out of respect for" that institution, which is presumed to "legislate[] in the light of [its] constitutional limitations." *Rust*, 500 U.S. at 191.

This canon was in play in our analysis of the FVRA's application to recess appointments for potentially two independent reasons. *First*, as this Office has also explained, while there are often holdover provisions that allow PAS officials to continue serving beyond the end of their term until a replacement is appointed, the Constitution does not permit such provisions to be applied to recess appointees, because the Recess Appointments Clause itself limits the duration of such appointees: "[T]he Constitution provides for the expiration of the recess appointee's duties, as well as his commission, at the end of the next session of Congress." Memorandum for the Files, from Attorney-Adviser, Office of Legal Counsel, *Re: Holdover of Recess Appointees* at 4 (Oct. 16, 1986); *see also* Dellinger Memorandum at 8. As a result, if the FVRA were also unavailable at the end of that period, it would create the possibility that *no one* would be able to fill the position of a PAS official pending Senate confirmation—a process that can take months—and produce an outcome that this Office has repeatedly explained is incompatible with the President's obligations under the Take Care Clause.[5] By interpreting the departure of a recess appointee to restart

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[5] *Temporary Presidential Designation of Acting Board Members of the Inter-American Foundation and the United States African Development Foundation*, 49 Op. O.L.C. __, at *4 (Mar. 14, 2025) (first citing *Power of the President to Designate Acting Member of the Federal Home Loan Bank Board*, 1 Op. O.L.C. 150, 151–53 (1977); then citing

the FVRA clock, our 2002 opinion avoided that outcome. That concern is not present for the departure of U.S. Attorneys appointed under section 546, given the absence of any time limit for service for those appointed under that section.

Second, the canon avoids tricky questions of congressional encroachment on the President's exercise of his constitutional powers, which both the Supreme Court and this Office have recognized violates the overall structure of the Constitution. *Cf., e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 726–27 (1986); *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 125–28 (1996). If the statute permitted the departure of a PAS appointee to restart the FVRA clock but not the departure of a recess appointee, that would undermine the President's use of the recess-appointment power and tend to aggrandize Congress's power over PAS appointees. Although Congress has over the years adopted a number of statutes to discourage the President's use of recess appointments, *see, e.g.*, 5 U.S.C. § 5503, the question of whether such statutes unconstitutionally "enhance" Congress's power at the expense of the President's has not, as far as we can tell, been considered by a court or resolved by this Office, *Slaughter*, 146 S. Ct. at 2303 (quoting Elena Kagan, *Presidential Administration*, 114 Harv. L Rev. 2245, 2271 n.93 (2001)); *compare, e.g.*, *Continuing Service of Deputy Director of OMB as Acting Director During Vacancy*, 1 Op. O.L.C. 287, 290 n.9 (1977) (applying section 5503 without suggesting it is unconstitutional), *with* Memorandum for Edwin Meese III, Attorney General, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Recess Appointments* at 7 n.7 (July 7, 1988) (noting that statutes which "place[] limitations on the President's exercise of his constitutional authority" present thorny issues that we have never resolved). By concluding that the departure of a recess appointee restarts the FVRA clock, our 2002 opinion avoided a similar question regarding 5 U.S.C. § 3347. Again, that concern is not present for those appointed not by constitutional prerogative but by statutory authority conferred by Congress in section 546.

Memorandum for Neil Eggleston, Associate Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of an Acting Staff Director of the United States Commission on Civil Rights* at 2 (Jan. 13, 1994); and then citing *Authority of the President to Remove the Staff Director of the Civil Rights Commission and Appoint an Acting Staff Director*, 25 Op. O.L.C. 103, 104 (2001)).

III.

The departure of an interim U.S. Attorney appointed under section 546 does not initiate a new full term of acting service under the FVRA. After the departure of such an interim appointee, service under the FVRA will remain available only if time remains from the Acting U.S. Attorney's tenure under section 3346, as calculated from the departure of the last Senate-confirmed (or recess-appointed) occupant of the office.

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