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Bullock v. United States Bureau of Land Mgmt.

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Bullock v. United States Bureau of Land Mgmt.,
No. 4:20-cv-00062-BMM, 2020 U.S. Dist. LEXIS 177029
(D. Mont. Sept. 25, 2020).

Henry O'Brien

I. INTRODUCTION

During the four years of the Trump administration, five people exercised the powers of the Director of the Bureau of Land Management; none were appointed by the President and confirmed by the Senate nor formally appointed as acting officials under the Federal Vacancies Reform Act of 1998 (“FVRA”).¹ Montana Governor Steve Bullock and the Montana Department of Natural Resources and Conservation (collectively, “Plaintiffs”) sued BLM and Secretary of the Interior David Bernhardt (collectively, “BLM”) in the United States District Court for the District of Montana, alleging the current head of BLM, William Perry Pendley, had no authority to lead BLM and his actions as Director of BLM (“Director”) were therefore invalid.² *Bullock v. BLM* highlights longstanding and continuing conflict between the executive branch’s appointments power and the Senate’s duty to advise and consent.

II. FACTS AND BACKGROUND

A. Factual Background

Under the Trump administration, BLM operated for four years without a Senate-confirmed Director.³ Like other Principal Officers of the United States, the Director must be appointed by the President, with the advice and consent of the Senate.⁴ Such positions are often referred to as Presidential appointment and Senate confirmation offices (“PAS offices”).⁵

On the last day of the Obama administration, the outgoing Secretary of the Interior issued Order 3345 to temporarily delegate the “functions, duties, and responsibilities” of various Interior PAS offices, including the Director, to career employees.⁶ The order limited the

1. *Bullock v. United States Bureau of Land Mgmt.*, No. 4:20-cv-00062-BMM, 2020 U.S. Dist. LEXIS 177029, *4 (D. Mont. Sept. 25, 2020) [hereinafter *Bullock I*].

2. *Id.* at *1–3.

3. *Bullock I*, at *3.

4. U.S. CONST. Art II, § 2, cl. 2 (requiring senatorial advice and consent for all non-inferior officers).

5. *Nat’l Labor Relations Bd. v. SW Gen., Inc.*, ___ U.S. ___, 137 S. Ct. 931, 934 (2017).

6. Secretary Sally Jewell, Temporary Redefinition of Authority for Certain Vacant Non-Career Senate-confirmed Positions, Order No. 3345, 2017 DEP SE LEXIS 3 (Jan. 20, 2017) [hereinafter Order 3345].

delegation to duties not required by law to be performed exclusively by PAS officials.⁷

Over the next three years, the Department of the Interior (“Interior”) amended Order 3345 to re-delegate the duties of Director of BLM to five different people.⁸ The fifth was Deputy Director of Policy and Programs William Perry Pendley, who assumed the duties on July 29, 2019.⁹ In total, Interior amended the order 32 times, including four times to extend Pendley’s tenure.¹⁰ In May, 2020, Pendley authored a memo (“Pendley Memo”) declaring the Deputy Director of Policy and Programs to be the first assistant to the Director for FVRA purposes, and delegating to *himself* the “functions, duties, and responsibilities” of the Director.¹¹

Order 3345, as originally written, was intended to allow continuous agency leadership during the transition between the Obama and Trump administrations in January 2017.¹² The order cites Reorganization Plan No. 3 of 1950 for authority—a directive which vests all authority of Interior in the Secretary and allows the Secretary to, “from time to time,” delegate “any function of the Secretary” to any employee of Interior.¹³

On July 30, 2020, ten days after Plaintiffs filed this suit, President Trump formally nominated Pendley to the office of Director of BLM.¹⁴ President Trump withdrew Pendley’s nomination on September 8, 2020, but Pendley continued to lead BLM.¹⁵

B. BLM

BLM manages 245 million acres¹⁶ of public land, almost exclusively in the West and Alaska.¹⁷ Most of this land is arid or semi-arid and represents America’s unwanted, left-over lands—those unclaimed when the era of public land disposal ended.¹⁸ BLM also manages all 700 million acres of federally-owned mineral rights.¹⁹ The agency is led by a Director, who is a PAS officer.²⁰

7. *Id.* § 4.

8. *Bullock I*, at *5.

9. *Id.*; Defs.’ Opp’n to Pls.’ Expedited Mot. for Summ. J. 5, Sept. 9, 2020, No. 4:20-CV-00062-BMM.

10. *Bullock I*, at *5.

11. Memo from William Perry Pendley to Casey Hammond, Designation of Successors for Presidentially-Appointed, Senate-Confirmed Positions, United States Department of the Interior, 1 (May 22, 2020).

12. Order 3345, *supra* note 34, § 1.

13. Reorganization Plan No. 3 of 1950, 64 Stat. 1262, §§ 1, 3, 15 Fed. Reg. 3174, (May 24, 1950).

14. *Bullock I*, at *7.

15. *Id.*

16. *Bullock I*, at *3.

17. GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW, 26 (7th ed. 2014).

18. *Id.*

19. *Id.*

20. *Bullock I*, at *3.

Under the Federal Land Policy and Management Act²¹ (“FLPMA”), BLM must develop, maintain, and revise Resource Management Plans (“RMPs”), which dictate how particular lands will be used.²² FLPMA also requires BLM to “provide for meaningful public involvement of State and local government officials” when preparing RMPs.²³ Anyone with an interest in a RMP and who participates in the planning process, may file a protest with Director.²⁴ Regulations require the Director to respond to and resolve properly filed protests.²⁵

C. Appointments

The Senate’s confirmation authority acts as an important check on the power wielded by the executive branch through the modern administrative agencies. The confirmation process, though, can be cumbersome.²⁶ Congress has long allowed the President to appoint interim officers, understanding that these offices may sometimes need to be filled quickly.²⁷

The earliest statutes allowing temporary officers to serve before being confirmed by the Senate were passed in the 1790s.²⁸ Those early statutes limited acting officers to several critical cabinet positions but did not limit who could be appointed.²⁹ Reforms in the 1860s aimed at preventing executive evasion of senatorial advice and consent powers culminated in the Vacancies Act of 1868 (“Vacancies Act”).³⁰ The Vacancies Act repealed all existing, conflicting statutes and allowed interim officers to serve in PAS positions for a maximum of ten days at any executive department.³¹ In 1891, the duration increased to thirty days,³² and in 1988, Congress extended it to 120 days.³³

Despite Congress’s attempts to assert the Senate’s confirmation power, the late twentieth century saw the Vacancies Act increasingly

21. 43 U.S.C. §§ 1701–1784.

22. 43 U.S.C. § 1712; 43 C.F.R. § 1601.0–5(n); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 69 (2004).

23. 43 U.S.C. § 1712(c)(9); 43 C.F.R. § 1610.3–2.

24. 43 C.F.R. § 1610.5–2.

25. *Id.* § 1610.5–2(a)(3), (b).

26. *Id.* at 929, 934–35.

27. *SW Gen.*, 137 S. Ct. at 935.

28. *Id.* at 935 (citing Act of July 23, 1868, ch. 227, 15 Stat. 168; Act of Feb. 20, 1863, ch. 45, 12 Stat. 656).

29. *Id.* (citing Act of May 8, 1792, ch. 37, § 8, 1 Stat. 2, which included only the Secretaries of State, Treasury, and War).

30. MORTON ROSENBERG, *THE NEW VACANCIES ACT: CONGRESS ACTS TO PROTECT THE SENATE’S CONFIRMATION PREROGATIVE*, Congressional Research Service Report No. 98-892, 6 (Nov. 2, 1998); *SW Gen.*, 137 S. Ct. at 935.

31. Act of July 23, 1868, ch. 227, 15 Stat. 168.

32. *SW Gen.*, 137 S. Ct. at 935.

33. Presidential Transitions Effectiveness Act, 102 Stat. 985, § 7(a)(1)(B).

circumvented by the executive branch.³⁴ Beginning in 1973, the Department of Justice (“DOJ”) argued the Vacancies Act was not the exclusive method for designating interim officials.³⁵ DOJ argued that any executive agency with an organic act vesting all powers of the agency in a single person and providing for that person to delegate their power could designate an interim official without complying with the Vacancies Act.³⁶ This approach spread to other agencies, and in 1998 nearly twenty percent of PAS offices were held by unconfirmed, interim appointees in excess of the 120-day limit.³⁷

President Clinton’s 1997 appointment of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights likely spurred an additional Vacancies Act revision.³⁸ Clinton originally nominated Mr. Lee through an ordinary Appointments Clause procedure. However, when Republicans controlling the Senate Judiciary Committee vowed to vote down the nomination, President Clinton threatened a recess appointment, reconsidered, and made the “Acting” appointment.³⁹ The only basis for Mr. Lee’s interim appointment was the DOJ opinion, as he did not qualify for an interim appointment under the Vacancies Act.⁴⁰ The acting appointment frustrated many, as Mr. Lee had been functionally rejected for a PAS office by the Senate.⁴¹ In response, Congress passed FVRA in 1998.⁴²

D. FVRA

Unlike the Vacancies Act, FVRA states expressly that it represents the exclusive means of making acting appointments, unless another

34. *SW Gen.*, 137 S. Ct. at 935–36; MORTON ROSENBERG, THE NEW VACANCIES ACT: CONGRESS ACTS TO PROTECT THE SENATE’S CONFIRMATION PREROGATIVE, Congressional Research Service Report No. 98-892, 6 (Nov. 2, 1998).

35. MORTON ROSENBERG, THE NEW VACANCIES ACT: CONGRESS ACTS TO PROTECT THE SENATE’S CONFIRMATION PREROGATIVE, Congressional Research Service Report No. 98-892, 1 (Nov. 2, 1998); THE VACANCIES ACT, 22 Op. O.L.C. 44, 45 (March, 18, 1998) (“ For decades, the Department of Justice has taken the position that statutes vesting an agency’s powers in the agency head and allowing delegation to subordinate officials may be used to assign, on an interim basis, the powers of certain vacant Senate-confirmed offices”).

36. *Id.*

37. *SW Gen.*, 137 S. Ct. at 936.

38. *See* MORTON ROSENBERG, THE NEW VACANCIES ACT: CONGRESS ACTS TO PROTECT THE SENATE’S CONFIRMATION PREROGATIVE, Congressional Research Service Report No. 98-892, 1 (Nov. 2, 1998).

39. David L. Jordan, *Separation of Powers: The Appointment of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights*, 26 HASTINGS CONST. L.Q. 935, 935–36 (Summer 1999).

40. *Id.* at 938.

41. MORTON ROSENBERG, THE NEW VACANCIES ACT: CONGRESS ACTS TO PROTECT THE SENATE’S CONFIRMATION PREROGATIVE, Congressional Research Service Report No. 98-892, 1, 6–8 (Nov. 2, 1998).

42. 5 U.S.C. §§ 3345–3349(d) (2020).

statute specifically provides otherwise.⁴³ Additionally, FVRA invalidates the Department of Justice opinion used to make non-FVRA conforming appointments, such as that for Bill Lann Lee.⁴⁴

FVRA allows vacant PAS offices to be filled in three ways. The default is for the “first assistant to the office” to become the acting officer.⁴⁵ Alternatively, the President can appoint another PAS officer to the office.⁴⁶ Finally, the President can appoint a high-level employee of the agency if that person worked at the agency for more than ninety days in the year before the vacancy.⁴⁷ FVRA does not allow, in most cases, a person to serve in an acting capacity if they have been formally nominated to fill the office.⁴⁸

Acting officers under FVRA may not serve longer than 210 days from the beginning of the vacancy.⁴⁹ This time limit is extended in some circumstances, such as when Congress rejects a formal nominee or adjourns.⁵⁰

FVRA has teeth. It states that any action taken by an unlawfully serving officer, while performing a function or duty of the vacant office, “shall have no force or effect” and “may not be ratified.”⁵¹ The functions or duties referred to in the statute apply only to mandatory functions or duties that must be performed by the PAS officer.⁵²

III. SUMMARY JUDGEMENT ORDER

Plaintiffs moved for expedited summary judgment before BLM responded to the Complaint.⁵³ BLM argued Plaintiffs did not have standing in this matter because they had not been injured.⁵⁴ Furthermore, BLM maintained that Pendley was lawfully exercising the authority of Director.⁵⁵

43. 5 U.S.C. § 3347(a).

44. *Id.* § 3347(b).

45. *Id.* § 3345(a)(1).

46. *Id.* § 3345(a)(2).

47. *Id.* § 3345(a)(3) (here, “high-level” means an employee compensated at or above the GS-15 level).

48. *Id.* § 3345(b).

49. *Id.* § 3346.

50. *Id.* § 3346(b)–(c).

51. *Id.* § 3348(d).

52. *Id.* § 3348(a)(2).

53. Defs.’ Opp’n to Pls.’ Expedited Mot. for Summ. J. 1–2, Sept. 9, 2020, No. 4:20-CV-00062-BMM.

54. *Bullock v. United States Bureau of Land Mgmt.*, No. 4:20-cv-00062-BMM, 2020 U.S. Dist. LEXIS 177029, *2 (D. Mont. Sept. 25, 2020).

55. *Id.* at *8, 22–23.

A. Standing

Any plaintiff invoking federal jurisdiction must establish standing by proving they suffered an injury caused by the defendant that is redressable by the court.⁵⁶

Plaintiffs advanced three injuries to establish standing,⁵⁷ alleging that under Pendley’s direction, BLM (1) failed to uphold its commitment to prevent degradation to sage-grouse habitat by renegeing on conservation policies;⁵⁸ (2) revised two RMPs for BLM lands in Montana;⁵⁹ (3) injured the state of Montana in its sovereign capacity.⁶⁰ The court did not reach the merits of the first, and most speculative, argument because it determined standing was established by both of the Plaintiffs’ other arguments.⁶¹

1. Procedural Injury from RMP Revision

Generally, an injury must be an “actual or imminent invasion of a legally protected right that is concrete and particularized,” not merely speculative.⁶² However, a plaintiff claiming injury from a violated procedural right “can assert that right without meeting all the normal standards for redressability and immediacy.”⁶³ Instead, the plaintiff must show the procedures allegedly violated were “designed to protect some threatened concrete interest”⁶⁴ Importantly, plaintiffs asserting procedural rights do not need to prove the outcome would have been different had the right not been violated.⁶⁵

The court characterized Plaintiffs’ second standing argument—injury from Pendley’s oversight of the revision and coordination process for RMPs covering the Missoula and Lewiston areas—as a procedural

56. *Id.* at *8 (citing *Lujan v. Def. of Wildlife*, 504 U.S. 555, 559–60 (1992)).

57. *Id.* at *8.

58. *Id.* at *9 (referencing *Mont. Wildlife Fed’n v. Bernhardt*, No. CV-18-69-GF-BMM, 2020 U.S. Dist. LEXIS 90571 (D. Mont. May 22) appeal docketed, No. 20-35658 (9th Cir. July 22, 2020), which set aside those policy changes).

59. *Id.* at *10.

60. *Id.* at *11–12.

61. *Id.* at *9–12 (questioning the first theory as lacking specificity, but noting Plaintiffs likely had standing under this theory “in the same way that a bank had standing to challenge the recess appointment of the Director of the Consumer Financial Protection Bureau” in *State Nat’l Bank of Big Spring v. Lew*, 795 F.3d 48, 53 (D.C. Cir. 2015)).

62. *Id.* at *16 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560) (internal quotation marks omitted)).

63. *Id.* at *10–11 (quoting *Lujan v. Def. of Wildlife*, 504 U.S. 555, 572 n.7 (1992) (internal quotation marks omitted)).

64. *Id.* at *12 (quoting *WildEarth Guardians v. U.S. Dep’t of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015) (internal quotation marks omitted)).

65. *Id.* at *17.

injury.⁶⁶ The court found Plaintiffs had a concrete interest in their right to comment on the RMP revision process and protest to the Director, and they exercised that right by commenting on the draft RMPs that the proposed revisions would lead to injuries to wildlife, cultural, and recreational resources in the state.⁶⁷

The court dismissed BLM’s argument that Plaintiffs needed to show more specifically how the RMP revisions injured their agenda⁶⁸ and found injury in Plaintiffs’ allegation that Pendley engaged in the state consultation process while unlawfully acting as the Director.⁶⁹ The court reasoned that if Pendley served unlawfully, Plaintiffs’ protest and comments were not heard by an official with the power to address their concerns.⁷⁰ Therefore, a procedural injury was suffered during the RMP revision process and occurred regardless of the RMPs’ impact on the state’s resources.⁷¹

2. Injury to Sovereign Interests

States are not treated as ordinary litigants in standing analyses, due to their “special position and interest” as sovereigns.⁷² Instead, states are entitled to “special solicitude”⁷³ and can establish standing based on injuries to the resources in their domain.⁷⁴

The court found injury to Plaintiff’s interests because any unlawful actions by Pendley as Director would improperly infringe on Plaintiffs’ sovereignty over the “land, water, air, and wildlife” in the state.⁷⁵ BLM manages almost a third of Montana’s lands and Plaintiffs have standing to protect their interests in that territory.⁷⁶

Having found Plaintiff’s properly established standing under two theories, the court turned to the merits of the case.

B. FVRA and Appointments Clause

BLM argued Pendley was not the Acting Director of BLM, but rather remained Deputy Director for Policy and Programs and was merely

66. *Id.* at *10–11. Pls.’ Br. in Supp. of Expedited Mot. for Summ. J. 9–11, July 7, 2020, No. 4:20-CV-00062-BMM.

67. *Id.* at *15; Pls.’ Compl. ¶¶ 65–76, July 7, 2020, No. 4:20-CV-00062-BMM.

68. Defs.’ Opp’n to Pls.’ Expedited Mot. for Summ. J. 14–15, Sept. 9, 2020, No. 4:20-CV-00062-BMM.

69. *Id.* at *14.

70. *Id.* at *15–16.

71. *See id.* at *14–16.

72. *Id.* at *18 (quoting *Massachusetts v. Env’tl. Prot. Agency*, 549 U.S. 497, 518 (2007)) (internal quotation marks omitted).

73. *Id.* at *19 (quoting *Massachusetts*, 549 U.S. at 518) (internal quotation marks omitted).

74. *Id.* at *18.

75. *Id.* at *19.

76. *Id.* at *18–19.

exercising the delegated authority of the Director.⁷⁷ Therefore, Pendley's authority came not from FVRA, but from Order 3345 and thereafter the Pendley Memo.⁷⁸

The court determined neither of those sources provided alternative, valid authorization for Pendley to serve as Acting Director or exercise the duties and function of the Director.⁷⁹ The court then found Pendley had acted as Director without authorization under FVRA and in violation of the Appointments Clause.⁸⁰

1. Order 3345 and the Pendley Memo Were Invalid

The court found Order 3345 had no legal authority and rejected BLM's distinction between an acting director and an employee exercising the duties and functions of the Director.⁸¹ BLM argued the duties of a PAS office can be delegated to an agency employee for at least as long as Pendley had been serving without offending the Appointments Clause.⁸² The court found this argument flawed because the authority cited by BLM held only that Congress is empowered to allow the President temporary appointees, as it had in FVRA.⁸³ The court underscored that FVRA is the exclusive method for designating acting PAS officers.⁸⁴

The court similarly dismissed the Pendley Memo as an alternative to proper FVRA procedure because the memo did not cite to any authority for its declarations and BLM did not provide any.⁸⁵

2. Pendley Operated as Acting Director

Despite BLM's claim that Pendley was only exercising the duties of the Director, the court found two factors indicated Pendley "operated as the Acting BLM Director."⁸⁶ First, and most significantly, Pendley "exercised powers reserved to the BLM Director."⁸⁷ For instance, the administrative record established that Pendley had reviewed and denied protests

77. Defs.' Opp'n to Pls.' Expedited Mot. for Summ. J. 16, Sept. 9, 2020, No. 4:20-CV-00062-BMM.

78. *Id.* at *22–23.

79. *Id.* at *24–26.

80. *Id.* at *26–34.

81. *Id.* at *26–27 ("the Executive Branch cannot use wordplay to avoid constitutional and statutory requirements").

82. Defs.' Opp'n to Pls.' Expedited Mot. for Summ. J. 16–19, Sept. 9, 2020, No. 4:20-CV-00062-BMM (citing *United States v. Eaton*, 169 U.S. 331, 333, 343 (1898)).

83. *Bullock I*, at *27–28.

84. *Id.* at *28.

85. *Id.* at *28–29. At oral argument, BLM, for the first time, offered Reorganization Plan No. 3 of 1950 as authorization for the Pendley Memo. The court rejected this authority as facially invalid. *Id.*

86. *Id.* at *30.

87. *Id.* at *29.

to RMPs, which is a function the BLM Director must perform.⁸⁸ Second, the court noted that Pendley presented himself and was referred to in official documents as Acting BLM Director.⁸⁹ BLM insisted these references were inadvertent. The court conceded the references were not dispositive, but still found they reinforced “what was already established through delegation and practice”⁹⁰

3. BLM Violated FVRA and the Appointments Clause

The court found Order 3345 and the Pendley Memo invalid, and therefore Pendley’s tenure could only be justified under FVRA.⁹¹ BLM did not argue Pendley was properly serving under FVRA and the court therefore held, in only a few sentences, that FVRA was violated.⁹²

The Pendley Memo attempted to designate Pendley’s office as the first assistant to the Director, but the court determined the memo was invalid.⁹³ Therefore, Pendley could not become Acting Director under FVRA’s default succession provision.⁹⁴

Pendley did not qualify for acting service under any other provision of FVRA for several reasons.⁹⁵ Most importantly, the President had not selected Pendley to serve as Acting Director. Furthermore, BLM’s Deputy Director for Policy and Programs is not a PAS office, and Pendley had only been at BLM for two weeks when he was delegated directorial duties.⁹⁶ Each of these facts alone made Pendley an invalid Acting Director.⁹⁷ Finally, the court noted Pendley had continued to serve as Acting Director while his formal nomination to the position was pending in the Senate—a clear FVRA violation.⁹⁸ Because Pendley served as Acting Director with no legal basis, his term also violated the Appointments Clause.⁹⁹

As Pendley was never a valid Acting Director, his entire 424 days of service were held unlawful.¹⁰⁰

88. *Id.* (citing 43 C.F.R. §§ 1610.3-2(e), 1610.5-2(a)(3)).

89. *Id.* at *30.

90. *Id.*

91. *Id.*

92. *Id.* at *32.

93. *Id.*

94. *Id.* at *26, *31; 5 U.S.C. § 3345(a)(1).

95. *Id.* at *31.

96. *See Bullock I*, at *31–32; Defs.’ Opp’n to Pls.’ Expedited Mot. for Summ. J. 5, Sept. 9, 2020, No. 4:20-CV-00062-BMM.

97. *See Bullock I*, at *31–32.

98. *Id.* at *32.

99. *Id.* at *32.

100. *Id.* at *36.

C. Relief

The court fully granted Plaintiffs' motion for summary judgment and enjoined Pendley from operating as Director. The order also directed the parties to submit briefs on which of Pendley's acts the court should set aside under FVRA's enforcement clause.¹⁰¹ In a later order,¹⁰² the court set aside only three Montana RMPs; the only relief Plaintiffs requested.¹⁰³

The Center for Biological Diversity and other conservation groups ("Conservation Groups") moved to file an amicus brief before the Relief Order.¹⁰⁴ The Conservation Groups signaled their brief would have detailed other invalid Pendley actions that could be set aside.¹⁰⁵ The court rejected the Conservation Groups' motion because "amicus typically may not introduce an issue into a case or seek relief that is not raised or requested by the parties."¹⁰⁶

IV. CASE ANALYSIS

The court in *Bullock v. BLM* struck down BLM's attempts to rationalize Pendley's role in a fairly cursory and facial manner. For example, the court did not investigate whether Order 3345 was effective under the Reorganization Plan No. 3 of 1950 or probe the limits of when an inferior officer *may* exercise the delegated functions or duties of a PAS office. Granted, the parties did not extensively brief these issues, but the court appeared to view Pendley's service as BLM Director as an affront to the Appointments Clause and FVRA and swiftly found violations.¹⁰⁷ This approach is especially clear when compared with the invalidation of two other acting, Trump administration PAS officers: Kenneth Cuccinelli II as Acting Director of the United States Citizenship and Immigration Services ("USCIS"),¹⁰⁸ and Chad Wolf as Acting Secretary of the Department of Homeland Security ("DHS").¹⁰⁹

Cases such as these suggest that even post-FVRA, there is significant room and motivation for the executive branch to push the legal limits of temporary appointments.

101. *Id.* at *36–37.

102. *Bullock v. United States Bureau of Land Mgmt.*, 4:20-cv-00062-BMM, 2020 U.S. Dist. LEXIS 200801, (October 16, 2020) [hereinafter *Bullock II*].

103. *Id.* at *3, *12.

104. Mot. for Leave to File Br. as Amici Curiae, No. 4:20-cv-00062-BMM (Oct. 5, 2020).

105. *See id.*

106. *Bullock II*, at *10.

107. *Bullock v. United States Bureau of Land Mgmt.*, No. 4:20-cv-00062-BMM, 2020 U.S. Dist. LEXIS 177029, *30–31 (D. Mont. Sept. 25, 2020).

108. *See L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1 (D.D.C. March 1, 2020).

109. *See Casa de Maryland, Inc. v. Wolf*, No. 8:20-cv-02118-PX, 2020 U.S. Dist. LEXIS 166613 (D. Md. Sept. 11, 2020); *Vidal v. Wolf*, No. 16-CV-4756, No. 17-CV-5228, 2020 U.S. Dist. LEXIS 213068 (E.D. N.Y. Nov. 14, 2020).

A. Other Trump-Era Vacancies Cases

Many administrations have pushed the legal limits of temporary appointments,¹¹⁰ but this and two other cases mentioned above suggest a pattern of deliberate FVRA evasion under the Trump administration. *Cuccinelli* considered whether Mr. Cuccinelli properly assumed the role of Acting Director of USCIS.¹¹¹ When the Senate-confirmed Director of the USCIS resigned in June 2019, Deputy Director Mark Koumans initially assumed the Acting Director title, in conformance with FVRA.¹¹² However, nine days later, the Secretary of DHS created a new position in USCIS—Principal Deputy Director—and appointed Cuccinelli to that post. On the same day, the Secretary updated USCIS’s order of succession to make the newly-created Principal Deputy Director the first assistant to the Director.¹¹³ Under this reorganization, Cuccinelli was elevated above the former first assistant and assumed the Acting Director title.¹¹⁴

Unlike in *Bullock*, the parties agreed Cuccinelli’s role could only be justified under FVRA.¹¹⁵ The court held Cuccinelli’s role violated FVRA for a “fundamental and clear-cut reason” that was apparently not directly briefed by either party: Cuccinelli could not be an “assistant” if he had never served below any other official in the department.¹¹⁶

In another example of Trump-era vacancies violations, *Casa de Maryland* and *Vidal* each found error in both Chad Wolf’s and his predecessor, Kevin McAleenan’s, tenures as Acting Secretary of the DHS.¹¹⁷ Courts have interpreted a 2016 amendment to the Homeland Security Act (“HSA”) to provide DHS a significant exception to FVRA.¹¹⁸ The exception allows Secretary of DHS to designate the DHS order of succession beyond the first two assistants notwithstanding FVRA, meaning those officials can serve in an acting capacity indefinitely.¹¹⁹ Accordingly, various DHS Secretaries made a practice of editing the order of succession for the agency to allow selected personnel occupying inferior positions to assume

110. See MORTON ROSENBERG, THE NEW VACANCIES ACT: CONGRESS ACTS TO PROTECT THE SENATE’S CONFIRMATION PREROGATIVE, Congressional Research Service Report No. 98-892, 1–3 (Nov. 2, 1998).

111. 442 F. Supp. 3d at 7.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 25.

116. *Id.* at 24–25 (declining to directly resolve the question of whether only the person who is first assistant at the time of a vacancy may ascend under 5 U.S.C. 3345(a)(1) and citing opposing Office of Legal Counsel opinions).

117. *Casa de Md., Inc., v. Wolf*, No. 8:20-cv-02118-PX, 2020 U.S. Dist. LEXIS 166613, *66 (D. Md. September 11, 2020); *Vidal v. Wolf*, No. 16-CV-4756, No. 17-CV-5228, 2020 U.S. Dist. LEXIS 213068, *37 (E.D. N.Y. Nov. 14, 2020).

118. *Vidal*, 2020 U.S. Dist. LEXIS 213068, at *29–30 (interpreting 6 U.S.C. 113(g), and noting *Casa de Md.*, 2020 U.S. Dist. LEXIS 166613 and *Immigrant Legal Res. Ctr. v. Wolf*, No. 20-cv-05883-JSW, 2020 U.S. Dist. LEXIS 179599 (N.D. Cal. Sept. 29, 2020) reached the same conclusion).

119. *Id.*

acting PAS roles upon resignations.¹²⁰ Mr. Wolf's and Mr. McAleenan's appointments were made under the HSA exception, not FVRA, but were nonetheless invalid because of what amounted to a paperwork error.¹²¹

Although the DHS order of succession manipulation scheme was authorized outside of FVRA, it is still perhaps the perfection of the process attempted in *Cuccinelli* and *Bullock*. Secretaries of Departments without FVRA exceptions can appoint the administration's desired candidate to an inferior, non-PAS position and update the order of succession memo. The outgoing PAS officer then can resign or be terminated, causing the desired candidate to lawfully assume the office for at least 210 days under FVRA.¹²² This process was not itself invalidated in *Casa de Maryland* or *Vidal*; the acting tenures were only found likely invalid because Mr. McAleenan ascended in direct contradiction to the order of succession memo.¹²³

Like in the case of *Pendley*, the facts of *Cuccinelli*'s appointment alone raise immediate specters of impropriety. The *Cuccinelli* decision differs, though, in its approach. The court, over several pages, engages in a textual analysis of the word "assistant" and incorporates the structure of FVRA.¹²⁴ The *Bullock* ruling, though certainly not arbitrary or legally baseless, takes a blunter approach.¹²⁵

Bullock, in its bluntness, may stand for more than the other two cases. Unlike *Casa de Maryland* and *Vidal*, the *Bullock* decision was broad enough to invalidate the legal theory justifying invalid tenure.¹²⁶ This conclusion is important because any agency could still use the order of succession scheme to populate PAS offices.

There is also significance in the *Bullock* court's swift dismissal of BLM's attempts to retroactively justify *Pendley*'s role.¹²⁷ All three cases

120. *Casa de Md.*, 2020 U.S. Dist. LEXIS 166613 at *60.

121. *Vidal*, 2020 U.S. Dist. LEXIS 213068, *15–20, 35–37 (the "paperwork error" was the result of there being two memos detailing the order of succession: one in case of resignation or death and another in the case of a catastrophic emergency; Mr. McAleenan was next-in-line under the catastrophic emergency memo, but not the resignation memo); *Casa de Md.*, 2020 U.S. Dist. LEXIS 166613 at *60 (adding that because Mr. McAleenan was not a valid acting Director, his modification to the order of succession that elevated Wolf was ineffectual).

122. The appointment in *Casa de Maryland* was authorized by an exception to FVRA added to the agency's organic act in 2016. The court interpreted that provision to allow for indefinite acting officials, but still found Mr. Wolf's and Mr. McAleenan's tenures likely invalid, due to what amounted to a paperwork error. *Casa de Md., Inc.*, 2020 U.S. Dist. LEXIS 166613 at *48–53, 64–65. However, the order of succession manipulation structure is still applicable to other agencies, albeit with the 210 day limit.

123. *Id.* at *60–62.

124. *Id.* at *25–29.

125. *Bullock v. United States Bureau of Land Mgmt.*, No. 4:20-cv-00062-BMM, 2020 U.S. Dist. LEXIS 177029, *31–32 (D. Mont. Sept. 25, 2020).

126. *Id.*, at *26–30.

127. *Id.* at *27–29; *Bullock v. United States Bureau of Land Mgmt.*, 4:20-cv-00062-BMM, 2020 U.S. Dist. LEXIS 200801, *7–10 (October 16, 2020).

note the critical importance of Senate confirmation to the separation of powers and the clear intent of FVRA to preserve that function. However, only in *Bullock* does a court take a strong stand against allowing run-arounds of FVRA.

*B. Courts Should Scrutinize Acting
Appointments for FVRA Violations*

Scrutiny of potentially extra-FVRA temporary appointments is required in order to maintain a balance between the Appointments Clause and the executive's need to appoint bona fide acting officials. The importance of both is recognized in the legislative history of the various Vacancies Acts.¹²⁸

As noted, one of the primary motivations for passing FVRA was to cure a Department of Justice opinion that allowed for perpetual temporary officials under the color of delegation if the agency vested all power in an office and allowed that officer to delegate some or all of that power. In rationalizing Pendley's tenure, BLM advanced a nearly identical argument.¹²⁹ Even after *Bullock*, BLM officials cited to the "important historical context" of the delegation of acting duties as an alternative to FVRA.¹³⁰

As *Bullock* does, courts should look to the history of the Vacancies Act and the clear intent of FVRA to resolve efforts by the executive branch to evade FVRA. If courts do not reject these attempts on a more than case-by-case basis, Congress may have to act again to protect the advice and consent duty.

V. CONCLUSION

Due to the upcoming change in executive administration and the limited remedies requested by Plaintiffs, the direct effects of *Bullock v. BLM* may be limited and short-lived. The court did not appear to struggle to reach its determination, nor did the opinion introduce any consequential new rules. However, the directness of the ruling in the face of a clear attempt to circumvent a legislative mandate is a refreshing and needed approach. Without more rulings of this nature at higher levels of the court system or legislative action, agencies will remain tempted to avoid the advice and consent burden through administrative maneuvering. And with long delays in appointing and confirming nominees, this conflict will not evaporate.

128. See *infra* Part II.A.

129. Defs.' Opp'n to Pls.' Expedited Mot. for Summ. J. 16–17, Sept. 9, 2020, No. 4:20-CV-00062-BMM.

130. Daniel Jorjani, *Statement from the Solicitor of the Department of the Interior, Dan Jorjani, regarding the Bullock v. Bureau of Land Management Ruling*, Twitter, Sept. 29, 2020, <https://twitter.com/DOIJorjani/status/1311107316251602944>.