

Do We Have a Quorum?: Anticipating Agency Vacancies and the Prospect for Judicial Remedy

RYAN J. LEVAN*

The nomination and confirmation process has crept to a halt in the contemporary hyper-partisan political atmosphere, where minority party blockage of presidential nominees has become a routine practice. Now more than ever, federal regulatory commissions are forced to operate with protracted vacancies, oftentimes without even a quorum of commissioners and the attendant ability to take discretionary action. Prior scholarship has identified the manifold difficulties created by vacancies, including loss of efficiency, disparate political representation within the commission, and, sometimes, complete inaction at the policymaking level. As the Supreme Court's 2013 decision in Arizona v. Inter Tribal Council of Arizona highlights, these symptoms are exacerbated when vacancies drop agency membership to less than a quorum of its board. Yet multi-member commissions are not powerless to prevent vacancy-induced standstills. This Note explores the various ways agencies anticipate losing quorum, ex ante, the judicial remedies available when those mechanisms fail, ex post, and examines both in a case study of the Election Assistance Committee in its ongoing litigation against the states of Arizona and Kansas in Kobach v. EAC. The Note concludes with a summary of potential solutions to agency inaction and prescribes best practices moving forward.

I. INTRODUCTION

In June 2013, the Supreme Court issued its controversial decision in *Shelby County v. Holder*,¹ striking down Section 4(b) of the

* Articles Editor, COLUM. J. L. & SOC. PROBS., 2014–15. J.D. Candidate 2015, Columbia Law School. The author would like to thank Professor Peter Strauss for his guidance and supervision of this project and the entire staff of the *Columbia Journal of Law and Social Problems*.

1. 133 S.Ct. 2612 (2013).

Voting Rights Act.² Amidst the excitement leading up to *Shelby County*, however, it went relatively unnoticed that the Court had handed down another important voting rights opinion just one week earlier in *Arizona v. Inter Tribal Council of Arizona*.³ In *Inter Tribal Council*, the Court invalidated Arizona's state law requiring concrete proof of citizenship to register by mail to vote in federal elections, such as a passport, driver's license, or birth certificate⁴ — a marked addition to the baseline Federal Mail Voter Registration Application Form (Federal Form) that requires a mere oath that the registrant meets the state voting requirements.⁵ In 2006, Arizona was denied clearance from the little-known independent agency in charge of authorizing Federal Form changes, the Election Assistance Commission (EAC), after the agency's board of commissioners deadlocked in a two-to-two vote on the request.⁶ Without at least three members voting in favor, the EAC could not approve Arizona's proposed state-specific change to the Federal Form.⁷ Undeterred, Arizona continued to enforce its proof-of-citizenship statute in direct defiance of the National Voter Registration Act (NVRA),⁸ even after the state's subsequent petitions were rejected by the EAC for want of a quorum.⁹ The EAC still has no quorum today.¹⁰

The threshold question before the Court in *Inter Tribal Council* was whether Congress could “make or alter” state voter-registration requirements under the Elections Clause.¹¹ But the Court's decision ultimately turned on the proper statutory con-

2. Voting Rights Act of 1965, 52 U.S.C. § 10301(b) (2006).

3. 133 S.Ct. 2247 (2013).

4. See ARIZ. REV. STAT. ANN. § 16-166(F) (2010) (“The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship. Satisfactory evidence of citizenship shall include . . . the applicant's driver license or . . . [a] legible photocopy of the applicant's birth certificate, . . . United States passport, . . . [or] naturalization documents.”).

5. See 52 U.S.C. § 20508(b)(2)(A)–(C).

6. See Complaint at 17, *Kobach v. U.S. Election Assistance Comm'n*, 6 F.Supp.3d 1252 (D.Kan. 2014).

7. See *Inter Tribal Council*, 133 S.Ct. at 2259–60.

8. 52 U.S.C. § 20507(a)(1) (2006).

9. See Complaint at 18, *Kobach*, 6 F.Supp.3d 1252.

10. *Commissioners*, U.S. ELECTION ASSISTANCE COMM'N, http://www.eac.gov/about_the_eac/commissioners.aspx (last visited Oct. 15, 2014) (“There are four vacancies on the commission.”).

11. U.S. CONST. art. I, § 4, cl. 1 (“The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.”).

struction of the NVRA's mandate that states "accept and use" the Federal Form.¹² Writing for a majority of seven justices, Justice Scalia declared that the text, history and structure of the Elections Clause compelled a reading of the NVRA that preempted encroaching state law, like Arizona's.¹³ Yet Justice Scalia, ever sympathetic to states' rights, left a clear trail of breadcrumbs for Arizona to find its way back to the Court. He encouraged Arizona to challenge the federal voting laws by submitting a new Federal Form alteration request to the EAC, followed by an Administrative Procedure Act (APA)¹⁴ challenge to the EAC's inevitable denial to hear the request without a quorum of commissioners.¹⁵ Justice Scalia added in a footnote:

If the EAC proves unable to act on a renewed request, Arizona would be free to seek a writ of mandamus to "compel agency action unlawfully withheld or unreasonably delayed." APA § 706(1). *It is a nice point, which we need not resolve here, whether a court can compel agency action that the agency itself, for lack of the statutorily required quorum, is incapable of taking.* If the answer to that is no, Arizona might then be in position to assert a constitutional right to demand concrete evidence of citizenship apart from the Federal Form.¹⁶

Sure enough, Arizona picked up on Justice Scalia's cue.¹⁷ Two months later, this time joined by Kansas,¹⁸ Arizona filed a complaint in federal court asserting that

12. *Inter Tribal Council*, 133 S.Ct. at 2247, 2253.

13. *Id.* at 2257.

14. 5 U.S.C. § 706(1)–(6) (2006).

15. *Inter Tribal Council*, 133 S.Ct. at 2259–60 ("In 2005, the EAC divided 2-to-2 on the request by Arizona to include the evidence-of-citizenship requirement among the state-specific instructions on the Federal Form, which meant that no action could be taken. Arizona did not challenge that agency action (or rather inaction) by seeking APA review in federal court, but we are aware of nothing that prevents Arizona from renewing its request.") (citations omitted).

16. *Id.* at 2260 n.10 (emphasis added).

17. In fact, Arizona Secretary of State Ken Bennett was clear that the state would follow Justice Scalia's advice to the letter. The day after the Court handed down *Inter Tribal Council*, Secretary Bennett publicly announced that "we plan to renew our request of the Election Assistance Commission to include information necessary to determine eligibility on the federal form as suggested by Justice Scalia. If the Commission once again refuses, we plan to pursue further litigation under the Administrative Procedure Act to include this information to determine eligibility." Press Release, Ariz. Sec'y of State

[t]o the extent the EAC's lack of quorum precludes the EAC from modifying the State-specific instructions of the Federal Form as requested by Plaintiffs [Kansas and Arizona], *the lack of quorum unconstitutionally prevents Plaintiffs, in violation of the Tenth Amendment, from exercising their constitutional right, power, and privilege of establishing and enforcing voting qualifications, including voter registration requirements.*¹⁹

Unlike in *Inter Tribal Council*, Arizona's new complaint targets the EAC's inability to respond to additional proof-of-citizenship requests.²⁰ In doing so, Arizona raises numerous complex constitutional questions about federalism and the separation of powers, including whether an independent regulatory commission's inability to take discretionary action due to lack of quorum can be the basis of a federal violation of the unenumerated powers reserved to the states by the Tenth Amendment. Also implicated in the litigation, as Justice Scalia noted, is whether a federal court can compel an agency to take discretionary action that the agency itself is unable to take for want of its statutorily required quorum. More fundamentally, Arizona's complaint asks what avenues of redress are available when agency performance is handcuffed by vacancies and quorum rules. This Note is devoted to answering that question.

Current scholarship in the area has properly identified the increasing empirical trends in protracted agency vacancies and the loss of institutional efficiency as a result of understaffed boards.²¹

Ken Bennett, Secretary of State Ken Bennett Statement on SCOTUS Ruling (June 17, 2013) *available at* <http://www.azsos.gov/releases/2013/pressrelease19.htm>.

18. The state of Georgia, although not a party to the litigation, also seeks confirmation of its request to add proof-of-citizenship requirements to its Federal Form. *See* Publication of EAC Decision regarding State Requests to Include Additional Proof-of-Citizenship, 79 Fed. Reg. 7439-01 (Feb. 7, 2014); *see also* U.S. ELECTION ASSISTANCE COMM'N, No. EAC-2013-0004, MEMORANDUM OF DECISION CONCERNING STATE REQUESTS TO INCLUDE ADDITIONAL PROOF-OF-CITIZENSHIP INSTRUCTIONS ON THE NATIONAL MAIL VOTER REGISTRATION FORM (2014) 3-5, *available at* <http://www.eac.gov/assets/1/ Documents/20140117%20EAC%20Final%20Decision%20on%20Proof%20of%20Citizenship%20Requests%20-%20FINAL.pdf>.

19. Complaint at 3, *Kobach v. U.S. Election Assistance Comm'n*, 6 F.Supp.3d 1252 (D.Kan. 2014) (emphasis added).

20. *Id.*

21. *See, e.g.*, Catherine L. Fisk, *Role of the Judiciary When the Agency Confirmation Process Stalls: Thoughts on the Two-Member NLRB and the Questions the Supreme Court Should Have, But Didn't, Address in New Process Steel, L.P. v. NLRB*, 5 FIU L. REV. 593, 595 (2010) (The role of courts "is a pressing issue across the administrative state, as the

The academy has also catalogued agency operation in the face of short-term sub-quorum scenarios, such as commissioner recusals, abstentions, and disqualifications.²² But the current literature has not sufficiently examined the success of the administrative mechanisms used to combat long-term, enduring vacancies in federal regulatory commissions. This inquiry is particularly timely in light of recent judicial decisions that have invalidated creative attempts to overcome the operational standstills imposed by vacancies, like the Supreme Court's rejection of indefinite delegation in *New Process Steel v. NLRB*²³ and the prohibition of intra-session recess appointments in *NLRB v. Noel Canning*.²⁴ Similarly, the literature has not demonstrated which judicial remedies remain open to litigants, like Arizona and Kansas, who seek relief from hamstrung agencies. Indeed, it remains unclear "what role courts should play when failures of the nomination and confirmation process threatens [*sic*] to prevent an agency from acting at all."²⁵

Part II of this Note explores the various ways agencies anticipate loss of quorum, *ex ante*, by surveying agency enabling statutes and institutional practices. There is no one-size-fits-all solution, and Part II identifies the inherent limitations of existing safeguards. Part III explores potential avenues of judicial relief, *ex post*, when anticipatory mechanisms fail and agency performance falls prey to vacancies. Like anticipatory measures, however, judicial remedies face their own shortcomings in solving vacancy problems. Part IV evaluates both components in an empirical study of the EAC and its ongoing litigation with Arizona and Kansas in *Kobach v. EAC*,²⁶ before concluding with an analy-

number of vacancies in federal agencies is very substantial."); Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913 (2009) (empirically demonstrating the increasing delays in nominations and appointments to executive agency leadership positions and highlighting the attendant costs, such as agency inaction, confusion, and lack of accountability).

22. See, e.g., Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1139, 1182 (2000) (generally discussing disqualification and abstention of commissioners across independent agencies); Kelly M. Falls, *Quorum of One: Redefining Recusal Standards in the Federal Trade Commission*, 19 GEO. J. LEGAL ETHICS 705 (2006) (detailing the effect of FTC commissioner recusals on sub-quorum decisions).

23. 560 U.S. 674 (2009).

24. 134 S.Ct. 2550 (2014).

25. Fisk, *supra* note 21, at 612.

26. 6 F.Supp.3d 1252 (D.Kan. 2014).

sis of best practices and potential solutions to agency inaction moving forward in Part V.

II. ANTICIPATING LOSS OF QUORUM

Quorum, the “minimum number of members . . . who must be present for a deliberative assembly to legally transact business,” is an integral rule of democratic decision-making used in all three branches of the federal government.²⁷ Despite its place as a widespread institutional practice, quorum can hamper effective agency performance when vacancies arise. Accordingly, Congress devised statutory safeguards such as extended-tenure, internal-promotion, delegation, and “vacancy” clauses to assist agencies in preventing loss of quorum as well as operating in the absence of quorum. The executive branch has its own methods of combatting vacancies, such as recess appointments. Even so, these methods are not foolproof; each one comes with its own advantages and limitations.

A. QUORUM RULES

Quorum rules are a fundamental part of regulating the collegial decision-making arrangement common to all multi-member federal agencies.²⁸ Congress recognized this and stipulated precise quorum rules in most agency enabling statutes.²⁹ Even agencies without specific congressional direction on quorum, like the Securities and Exchange Commission (SEC) and the Federal Trade Commission (FTC), have established their own quorum rules internally.³⁰ In such cases, agencies typically adopt the common law rules that a majority of the commission constitutes a

27. BLACK'S LAW DICTIONARY 1370 (9th ed. 2009).

28. See Breger & Edles, *supra* note 22, at 1181–82.

29. See, e.g., 47 U.S.C. § 154 (2006) (authorizing the Federal Communications Commission); 42 U.S.C. § 5841 (2006) (authorizing the Nuclear Regulatory Commission); 29 U.S.C. § 153 (2006) (authorizing the National Labor Relations Board); 15 U.S.C. § 2053 (2006) (authorizing the Consumer Product Safety Commission).

30. See *Falcon Trading Group v. S.E.C.*, 102 F.3d 579, 582 (D.C. Cir. 1996) (upholding SEC's internal quorum provision in 17 C.F.R. § 200.41 (2014)); *LaPeyre v. F.T.C.*, 366 F.2d 117, 122 (5th Cir. 1966) (FTC's internal quorum rule “is within the Commission's power to make and is wholly valid.”).

quorum³¹ and a vote by a majority of the quorum is sufficient to issue a decision.³²

The institutional necessity of quorum rules is evidenced by their permanence not only in the executive but in the legislative and judicial branches as well. The Constitution prescribes that in the Senate and House, “a Majority of each shall constitute a Quorum to do Business.”³³ For the judiciary, quorum rules control the composition of federal judicial panels. At the appellate level, federal legislation mandates that a “majority of the number of judges authorized to constitute a court or panel thereof . . . shall constitute a quorum.”³⁴ The Supreme Court has supported that principle in case law, reciting the rule that “two judges of a three-judge panel constitute a quorum legally able to transact business.”³⁵ Furthermore, even though Article III is silent on Supreme Court membership and quorum, Congress set both for the High Court by legislating that the “Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.”³⁶ This explicit quorum requirement demonstrates the legislative judgment that quorum rules are imperative to principled decision-making in multi-member bodies.

B. VACANCY-ANTICIPATION MECHANISMS

By their very nature, vacancies constrain the operation of agencies.³⁷ Accordingly, Congress equips enabling statutes with

31. See *F.T.C. v. Flotill Products, Inc.*, 389 U.S. 179, 183–84 (1967) (“The almost universally accepted common-law rule . . . is, in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body. Where the enabling statute is silent on the question, the body is justified in adhering to that common-law rule.”).

32. See *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967) (“Valid agency action depends on the effective concurrence of a majority of the designated quorum.”); see also Breger and Edles, *supra* note 22, at 1182.

33. U.S. CONST. art. I, § 5, cl. 1.

34. 28 U.S.C. § 46(d) (2006).

35. *Nguyen v. United States*, 539 U.S. 69, 82 (2003) (vacating the judgment of a three-member panel composed of two Article III judges and an Article IV judge).

36. 28 U.S.C. § 1 (2006).

37. See, e.g., FED. MINE SAFETY AND HEALTH REVIEW COMM’N, JUSTIFICATION OF APPROPRIATION ESTIMATES FOR COMMITTEE ON APPROPRIATIONS: FISCAL YEAR 2006 2 (2006) available at www.fmshrc.gov/plans/fy06budget.pdf (“The impact of not having a quorum of Commissioners for almost three[-]fourths of FY 2003 adversely affected the Commission’s performance goals.”); FED. ELECTION COMM’N, FISCAL YEAR 2010 CONGRESSIONAL JUSTIFICATION & PERFORMANCE BUDGET 4 (May 7, 2009), available at

various provisions designed to promote continued agency performance when vacancies threaten to impair agency operation. Although some provisions have been widely adopted — such as extended-tenure, internal-promotion, delegation, and “vacancy” clauses — there is no universal vacancy-prevention mechanism. Indeed, Congress often uses different language to spell out similar or identical anticipatory schemes. The absence of an across-the-board approach appears to be a product of the unique responsibilities and structural eccentricities of each commission, however, rather than a clear legislative judgment that protecting against vacancies is not important enough to warrant consistent statutory treatment.³⁸

1. *Extended-Tenure, Internal-Promotion, and Vacancy Clauses*

One of the most common of these preventative protocols is the extended-tenure provision, whereby a commission “member may serve after the expiration of that member’s term until a successor has taken office.”³⁹ The clause’s objective is to “ensure that the balanced structure of the Board [can] be maintained even if there [a]re delays in the President’s appointment and the Senate’s approval of a new Board member.”⁴⁰ This safeguard is not foolproof, however; it loses bite when an officer resigns instead of serving out the entirety of his or her term. Consequently, the provision has been less successful amid the recent trend of early resignations, since officers now often leave their posts for more lucrative opportunities in the private sector, other political appointments,

www.fec.gov/pages/budget/fy2010/FY_2010_CJ_Bud_05_07final.pdf (“Fiscal year 2008 presented the FEC with a unique challenge in conducting its day-to-day operations. Specifically, for the first six months of the calendar year the Commission only had two Commissioners and therefore lacked a quorum and was unable to take action on many core business matters. This situation impacted the agency’s ability to achieve several of its performance goals and other key activities.”).

38. *Cf. F.T.C. v. Flotill Products, Inc.*, 389 U.S. 179, 189 (1967) (“The inconsistency in congressional treatment of quorum voting — sometimes allowing agency action on the concurrence of a majority of the quorum, in other cases requiring unanimous concurrence, and in several statutes saying nothing at all — refutes any suggestion that Congress has regarded the problem to be such as to justify a single rule for federal regulatory agencies.”).

39. 42 U.S.C. § 2286(d)(3) (2006) (extended-tenure provision of the Defense Nuclear Facilities Safety Board).

40. *R.R. Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1345 (D.C. Cir. 1983) (Wald, J., dissenting) (“The section additionally provides that in the event a member’s term runs out before a successor is qualified, he or she shall continue in office until a successor takes over.”) (citation omitted).

or in anticipation of an administration change.⁴¹ Although a conceded difficult task, the benefit of extended-term provisions might be restored if the President planned for future appointees ahead of time.

Agencies also fill vacancies internally by promoting existing officers or appointing acting officials. Executive agencies accomplish this through the Federal Vacancies Reform Act (Vacancies Act).⁴² The Act paves the way for an internal successor “[i]f an officer of an Executive agency . . . dies, resigns, or is otherwise unable to perform the functions and duties of the office,” and enables the President to temporarily promote inferior officers.⁴³ Although the Vacancies Act does not apply to multi-member independent commissions, many have similar intra-board succession protocols and some have elevation procedures.⁴⁴ For instance, many commissions provide for the temporary replacement of an outgoing chairman. The Consumer Product Safety Commission (CPSC) “annually elect[s] a Vice Chairman to act . . . in case of a vacancy in the office of the Chairman.”⁴⁵ By contrast, when the chairman seat is open in the Federal Communications Commission (FCC), “the Commission may temporarily designate one of its members to act as chairman.”⁴⁶ Such provisions are valuable for maintaining daily agency function, because the chairman typically possesses responsibilities and powers unique from the other board members.⁴⁷

41. See generally B. Dan Wood & Miner P. Marchbanks, *What Determines How Long Political Appointees Serve?* 18 J. PUB. ADMIN. RESEARCH AND THEORY 375, 375 (2008) (explaining factors affecting political appointee tenure).

42. 5 U.S.C. §§ 3345–3349d (2006).

43. 5 U.S.C. § 3345(a)(3) (“[T]he President . . . may direct an officer or employee of [an] Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity.”).

44. See O’Connell, *supra* note 21, at 933 n.100 (“[The Vacancies Act] has several large exceptions. It does not cover ‘any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that . . . is composed of multiple members; and . . . governs an independent establishment or Government corporation.’”) (quoting 5 U.S.C. § 3349c).

45. 15 U.S.C. § 2053(d) (2006).

46. 47 U.S.C. § 155(a) (2006).

47. See, e.g., 42 U.S.C. § 5841(a)(2) (2006) (Nuclear Regulatory Commission Chairman charged with exercising “all of the executive and administrative functions of the Commission, including functions of the Commission with respect to (a) the appointment and supervision of personnel employed under the Commission . . . (b) the distribution of business among such personnel and among administrative units of the Commission, and (c) the use and expenditure of funds.”); 42 U.S.C. § 2286(c)(2)(A)–(C) (2006) (same for Chairman of Defense Nuclear Facilities Safety Board); 42 U.S.C. § 2000e-4(a) (2006) (Chairman of the Equal Employment Opportunity Commission charged with appointment

But even facile replacement of a board's chair cannot bypass the interruptions impressed by sub-quorum vacancies. While most agencies permit elevation *within* their board, few statutes allow the elevation of inferior officers *onto* it. This makes sense because the commissioners of most agencies are presidentially appointed "by and with the Advice and Consent of the Senate."⁴⁸ Allowing temporary elevation would run afoul of the constitutional appointment and confirmation requirements. For this very reason, chairman replacement is constrained to elevation within the board. One exception is the Federal Deposit Insurance Corporation (FDIC), which elevates acting officials in certain circumstances to round out its board.⁴⁹ On the whole, however, independent agencies lack the elevation tools employed by executive agencies to temporarily fill vacancies.

Congress' most robust attempt to preserve agency performance in the face of vacancies appears in statutes that contain a "vacancy" clause. For example, the Federal Trade Commission Act (FTCA) states that a "vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission."⁵⁰ The clause's meaning is clear in the context of the FTCA because the Act contains no quorum provision — the FTC can act even with vacancies.⁵¹ However, a conflict arises when vacancy and quorum provisions are included simultaneously, because it is unclear whether the vacancy clause modifies the quorum rule or simply supplements it. Either inter-

power of all non-board "officers, agents, attorneys, administrative law judges, and employees" of the Commission).

48. U.S. CONST. art. II, § 2, cl. 2; *see also* 15 U.S.C. § 78d(a) (2006) (presidential appointment for commissioners of the SEC); 47 U.S.C. § 154(a) (2006) (same for FCC); 15 U.S.C. § 41 (2006) (same for FTC).

49. 12 U.S.C. § 1812(d)(2) ("In the event of a vacancy in the office of the Comptroller of the Currency or the office of Director of the Consumer Financial Protection Bureau . . . the acting Comptroller of the Currency or the acting Director of the Consumer Financial Protection Bureau, as the case may be, shall be a member of the Board of Directors in the place of the Comptroller or Director."). This elevation provision is constitutionally permissible because § 1812(a)(1)(C) of the Banking Act only requires that three of the FDIC's five board members be appointed by the President and confirmed by the Senate. Accordingly, an acting official may be immediately elevated onto the Board any time a vacancy arises in either of the two non-appointed seats.

50. 15 U.S.C. § 41 (2006); *see also* 47 U.S.C. § 154(c) (2006) ("No vacancy in the [FCC] shall impair the right of the remaining commissioners to exercise all the powers of the Commission.").

51. *See* FTC v. Flotill Products, Inc., 389 U.S. 179, 181 (1967) ("The Federal Trade Commission Act does not specify the number of Commissioners who may constitute a quorum.").

pretation is problematic. On one hand, reading the vacancy clause to adjust the quorum requirement would eviscerate the quorum clause. Business *could* be transacted with less than a quorum, vacancies notwithstanding. On the other hand, interpreting the vacancy clause to mean that vacancies *in excess* of the quorum number do not alter agency performance yields surplus language; a quorum of three implicitly means that the absence of members four and five is irrelevant. The conflict highlights the inherent tension between the dual objectives of efficient agency operation and complete representation of the board's members.

This problem is illustrated by many authorizing statutes that ironically juxtapose the vacancy and quorum clauses. For example, in the same breath, the National Labor Relations Act (NLRA) states that a “vacancy in the [National Labor Relations] Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board.”⁵² The now-defunct Federal Power Commission was established with the provisions positioned in adjacent sentences: “No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission. Three members of the commission shall constitute a quorum for the transaction of business.”⁵³ Many other statutes are configured similarly.⁵⁴

The Supreme Court reconciled the conflicting clauses only recently. Although the interplay of the two provisions was not the direct subject of the litigation in *FTC v. Flotill Products, Inc.*, the Court remarked in dicta that it did “not regard the provision in [the FTCA] for the exercise of powers by the remaining commissioners in the case of a vacancy as regulating the matter of a quorum.”⁵⁵ The Supreme Court adopted the same position in 2010 when it addressed another pair of conflicting clauses head-on in *New Process Steel v. NLRB*.⁵⁶ In evaluating the NLRB's quorum-vacancy tandem, the Court announced, “[w]e thus understand the quorum provisions merely to define the number of

52. 29 U.S.C. § 153(b) (2006).

53. 16 U.S.C. § 792 (2006).

54. See, e.g., 45 U.S.C. § 154 (2006) (vacancy and quorum clauses in consecutive sentences for National Mediation Board); 42 U.S.C. § 2000e-4(c) (2006) (one sentence for Equal Employment Opportunity Commission); 19 U.S.C. § 1330(c)(6) (2006) (same for International Trade Commission).

55. 389 U.S. at 181 n.3 (internal quotations omitted).

56. 560 U.S. 674 (2009).

members who must participate in a decision, and look to the vacancy clause to determine whether vacancies in excess of that number have any effect on an entity's authority to act."⁵⁷ The Court's reading, though permissible, reduces the vacancy clause to surplusage. The purpose of quorum is to ensure that a commission can exercise its authority even with absences, so long as the minimum attendance number is met. Therefore, it is superfluous to use the vacancy clause to determine whether a board's powers are affected by vacancies that occur in excess of the quorum number — for example, vacancies in the fourth and fifth seats of a five-member board with a three-member quorum requirement — because the quorum provision already provides the answer to that question. More importantly, the Court's interpretation foreclosed the use of the vacancy clause as a basis for sub-quorum agency operation.

Yet all is not lost for the vacancy clause. There are certain circumstances under which it can function successfully. The Consumer Product Safety Act (CPSA) employs the provision in a unique, detailed way that adjusts the Consumer Product Safety Commission's (CPSC) quorum requirement in proportion to its vacancies.⁵⁸ Congress amended the CPSC's quorum requirement to authorize temporary sub-quorum operation after an episode in 2007 that handicapped the Commission for seven months. The CPSA now reads:

No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission, but three members of the Commission shall constitute a quorum for the transaction of business, except that if there are only three members serving on the Commission because of vacancies in the Commission, two members of the Commission shall constitute a quorum for the transaction of business, and if there are only two members serving on the Commission because of vacancies in the Commission, two members shall constitute a quorum for the six[-]month period beginning on the date of the vacancy

57. *Id.* at 685.

58. *See* 15 U.S.C. § 2053(d) (2006).

which caused the number of Commission members to decline to two.⁵⁹

This comprehensive treatment of the quorum and vacancy provisions is perhaps the most effective vacancy-anticipation scheme to date, and similar language has survived challenge in court. In *Falcon Trading Group Ltd. v. SEC*,⁶⁰ the D.C. Circuit upheld the SEC's regulation that a "quorum of the Commission shall consist of three members; provided, however, that if the number of Commissioners in office is less than three, a quorum shall consist of the number of members in office."⁶¹ Together, the comprehensive quorum schemes that regulate the CPSC and SEC demonstrate that if Congress wants to preserve an agency's operation with a vacancy clause, it must do so with language that specifically adjusts the quorum clause. Admittedly, Congress faces an uphill battle in amending the vacancy clause in every enabling statute. But the fact that it has not done so even once in the wake of *New Process Steel* may also reflect the legislative judgment that the quorum clause should supersede the vacancy clause.

2. Board Delegation

Delegation is another effective method of counteracting vacancies and comes in two principal forms: delegation to a subgroup of board members and delegation to non-board members. Rather than codify every facet of an agency's internal operations in its organic statute, Congress often leaves room for agency boards to determine the subdivision of power within a commission through delegation.⁶² As with quorum, agencies adopt their own internal delegation procedures when the organic statute is silent. Most models assign delegation authority to the chairman or a majority of the full board. For example, a three-member majority of the NLRB can delegate power to its General Counsel in excess of that officer's statutorily prescribed power to prosecute complaints of

59. 15 U.S.C. § 2053(d).

60. 102 F.3d 579, 582 (D.C. Cir. 1996).

61. 17 C.F.R. § 200.41 (2014).

62. *But see* 25 U.S.C. § 2706(a) (2006) (powers of National Indian Gaming Commission "not subject to delegation").

unfair labor practices.⁶³ The Federal Labor Relations Authority enjoys the same ability to delegate to its General Counsel.⁶⁴ NLRB delegations pursuant to that provision have withstood challenge in nearly half of the circuit courts.⁶⁵ By contrast, the Chairman of the Farm Credit Administration Board is vested with the authority to delegate to any employee any power “necessary for day to day management . . . except that the Chairman may not delegate powers specifically reserved to the Chairman . . . without Board approval.”⁶⁶

Delegation to inferior officials can be frustrated or neutralized when an agency lacks a quorum. First, delegation usually requires the consent of a majority of the board.⁶⁷ When sub-quorum vacancies occur, inferior officers can only wield power delegated prior to the loss of quorum.⁶⁸ A second impediment is that commissions are rarely able to delegate full authority to non-board members — particularly when doing so would implicate the board’s most important functions.⁶⁹

Consequently, an alternative delegation technique involves the assignment of power to a board subcommittee. The Nuclear Regulatory Commission (NRC) and the Federal Maritime Commission (FMC) each have emergency provisions in their internal regulations to allow for complete delegation of their boards’ pow-

63. See 29 U.S.C.A. § 153(d) (West 2014) (“He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.”).

64. See 5 U.S.C.A. § 7104(f)(2)(C) (West 2014) (“The General Counsel may . . . exercise such other powers of the Authority as the Authority may prescribe.”).

65. See *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011) (“[T]he delegation [to the General Counsel] survived the loss of a Board quorum”); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 852 (5th Cir. 2010) (“A general limitation on the ability of the Board to delegate duties to the General Counsel lies in the distinction between prosecutorial duties and adjudicatory functions”). See also *Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 140 (2d Cir. 2013) (delegation of authority by National Labor Relations Board to its general counsel remains valid after Board lost quorum); *Frankl v. HTH Corp.*, 650 F.3d 1334 (9th Cir. 2011); *Muffley v. Spartan Mining Co.*, 570 F.3d 534 (4th Cir. 2009).

66. 12 U.S.C.A. § 2245(c)(3) (West 2014).

67. See, e.g., 29 U.S.C.A. § 153(b) (West 2014) (majority of NLRB required for delegation); 47 U.S.C.A. § 155(c)(1) (West 2014) (same for FCC).

68. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 685 n.4 (2010) (“[T]he delegee group ceases to exist once there are no longer three Board members to constitute the group.”).

69. See, e.g., 52 U.S.C. § 30106(c) (“A member of the [FEC] may not delegate to any person his or her vote or any decision-making authority or duty vested in the Commission by the provisions of this Act.”).

ers. Under the Reorganization Plan of 1980, the NRC can delegate “any portion of [its] functions” to a single commissioner.⁷⁰ The Board exercised that power in 1995 when, in anticipation of losing quorum, it issued a notice granting “all Commission functions” to the Chairman until a quorum could be restored.⁷¹ The FMC has adopted a similar, albeit broader delegation policy that “authorizes the Commission to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board.”⁷² Similarly, the Federal Energy Regulatory Commission delegated authority to its Secretary, General Counsel, and two other directors in 1993.⁷³ All three of these delegations were made by internal agency regulations and none were challenged.

However, courts differed for years over whether to allow agency delegation to a board subcommittee when the delegation occurs pursuant to its organic statute rather than an internal regulation.⁷⁴ In those cases, the inquiry has been framed as whether the “delegation power overrides the quorum provision.”⁷⁵ Historically, courts supported board delegation in extenuating circumstances. In *Railroad Yardmasters of America v. Harris*,⁷⁶ the D.C. Circuit upheld the National Mediation Board’s delegation of all its power to a single commissioner despite the Railway Labor Act’s quorum requirement of two members.⁷⁷ The court reasoned

70. Reorganization Plan of 1980, 45 Fed. Reg. 40,561 (1980).

71. Notice of Delegation of Authority to the Chairman of the Nuclear Regulatory Commission, 60 Fed. Reg. 34561 (1995).

72. Delegation of Authorities, 46 C.F.R. § 501.21(a).

73. Order Delegating Authority to Secretary and Certain Office Directors, 63 FERC 61073 (1993).

74. For example, the Communications Act stipulates that for the FCC, when “necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions . . . to a panel of commissioners, an individual commissioner, an employee board, or an individual employee. . . .” 47 U.S.C.A. § 155(c)(1) (West 2014); *see also* 30 U.S.C.A. § 823(c) (West 2014) (Federal Mine Safety and Health Review Commission is “authorized to delegate to any group of three or more members any or all of the powers of the Commission. . .”).

75. *R.R. Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1346 (D.C. Cir. 1983) (Wald, J., dissenting).

76. *Id.* (majority opinion).

77. *See* 45 U.S.C.A. § 154 (West 2014) (“Two of the members in office shall constitute a quorum for the transaction of the business of the Board. . . . The Mediation Board is authorized by its order to assign, or refer, any portion of its work, business, or functions arising under this chapter or any other Act of Congress, or referred to it by Congress or either branch thereof, to an individual member of the Board . . .”).

that the delegation was valid because it “prevent[ed] temporary vacancies from disabling the Board” and “effectuate[d] Congress’ overriding purpose of maintaining labor peace in the critical railroad and airline industries.”⁷⁸ At the same time, the court made sure to “emphasize the narrowness of [the] holding in this case” and limited the ruling to the instant facts.⁷⁹ In the 1970 case *Earnest v. Moseley*, the Tenth Circuit ruled that the eight-member Federal Parole Board had authority to delegate board revocation decisions to a two-member panel on the basis that to “too narrowly circumscribe the authority of the Board to establish its own internal procedures and effectively distribute its work load would impose an undue burden on the Board.”⁸⁰ The court was persuaded, moreover, that the “creation of the Board and Congress’ vesting in it a very broad discretion carries with it an inherent authority to establish such procedures as will best effectuate Congress’ purpose in establishing the Board and the parole system.”⁸¹

In 2009, six federal courts of appeals considered the validity of the National Labor Relations Board’s indefinite delegation of the full power of the Board to less than a quorum of its board members.⁸² The five-member Board operates with a delegation clause that allows it to adjudicate more labor disputes by sitting in three-member panels.⁸³ The clause states that the “Board is authorized to delegate to any group of three or more members *any or all of the powers which it may itself exercise*,” so long as the delegation is made by a three-member majority of the original five-member board.⁸⁴ In turn, each three-member panel requires

78. *Harris*, 721 F.2d at 1344–45.

79. *Id.*

80. 426 F.2d 466, 469 (10th Cir. 1970).

81. *Id.* at 469.

82. See *Fisk*, *supra* note 21, at 593; see also *Ne. Land Servs., Ltd. v. NLRB*, 560 F.3d 36, 41 (1st Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410, 424 (2d Cir. 2009); *Narricot Indus., L.P. v. NLRB*, 587 F.3d 654, 660 (4th Cir. 2009); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 845–46 (7th Cir. 2009); *Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849, 852 (10th Cir. 2009); *Laurel Baye Healthcare by Lanier v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009).

83. See S. Rep. No. 105, 80th Cong., 1st Sess., 8 (1947) (“The expansion of the Board . . . would permit it to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously”); see also *New Process Steel v. NLRB*, 560 U.S. 674, 699 (2010) (Kennedy, J., dissenting) (“The purpose of the Taft–Hartley amendment was to increase the Board’s efficiency by permitting multiple three-member groups to exercise the full powers of the Board.”).

84. 29 U.S.C.A. § 153(b) (West 2014) (emphasis added).

a quorum of two to transact business.⁸⁵ In late 2007, the four-member NLRB exercised its delegation power in anticipation of its membership dropping to two.⁸⁶ The four sitting commissioners assigned all of the Board's power to a three-member panel of Commissioners Liebman, Schaumber and Kirsanow. Just days later, the recess appointments of Commissioners Kirsanow and Walsh expired. Remaining Commissioners Liebman and Schaumber exercised the full powers of the Board for over two years under the rationale that they were a two-member quorum of the three-member board that had previously included Commissioner Kirsanow.⁸⁷

Of the six circuit courts that heard challenges to the delegation, only the D.C. Circuit invalidated it.⁸⁸ The First, Second, Fourth, Seventh, and Tenth Circuits all upheld the delegation by reading the NLRB's quorum clause as subordinate to its delegation clause.⁸⁹ The White House Office of Legal Counsel sided with those five circuits.⁹⁰ Meanwhile, the D.C. Circuit took the opposing view that the quorum clause trumped the delegation clause, thereby undermining the legitimacy of the Board's delegation.⁹¹

In 2010, the Supreme Court granted certiorari in *New Process Steel v. NLRB* to resolve the discrepancy.⁹² The Court invalidated the delegation with a bare majority, albeit on slightly different grounds than the D.C. Circuit.⁹³ Justice Stevens's rare textual opinion ignored the Board's own interpretation of the statute en route to ruling that "the delegation clause requires that a delegee group *maintain* a membership of three in order to exercise the delegated authority of the Board."⁹⁴ The opinion went on to sanctify the quorum clause, explaining that "the Board quorum requirement and the three-member delegation clause should not be read as easily surmounted technical obstacles of little to no im-

85. *Id.*

86. See *Two-Member Board*, NAT'L LABOR RELATIONS BD, <https://www.nlr.gov/75th/twomemberboard.html> (last visited Nov. 10, 2014).

87. *Id.*

88. See Fisk, *supra* note 21, at 593.

89. *Id.* at 600.

90. *Id.*

91. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 472–73 (D.C. Cir. 2009).

92. 560 U.S. 674 (2010).

93. *Id.* at 684 n.4.

94. *Id.* at 688 (emphasis added).

port,” and that “Congress’ decision to require that the Board’s full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect rather than swept aside in the face of admittedly difficult circumstances.”⁹⁵ By contrast, Justice Kennedy’s dissent focused on “the objectives of the [NLRA], which must be to ensure orderly operations when the Board is not at full strength as well as efficient operations when it is.”⁹⁶ To Justice Kennedy, that end would have been “better respected by a statutory interpretation that dictates a result opposite to the one reached by the Court.”⁹⁷ Under that functional analysis, Justice Kennedy argued for upholding the delegation and faulted the majority’s interpretation for its willingness to “leave the Board defunct for extended periods of time, a result that Congress surely did not intend.”⁹⁸

To be sure, the statutory question presented in *New Process Steel* was a close call, and the Court’s interpretation was a reasonable one. Even so, it is troubling that the Court so easily dismissed considerations of operational efficiency, announcing that it was “not persuaded by the Government’s argument that [the Court] should read the statute to authorize the Board to act with only two members in order to advance the congressional objective of Board efficiency.”⁹⁹ Instead, the Court kicked the issue back to Congress, suggesting that “[i]f Congress wishes to allow the Board to decide cases with only two members, it can easily do so.”¹⁰⁰ That this was an overstatement was surely not lost on the Court; “anyone even remotely familiar with labor law knows that amending the NLRA is not easy. Every single change to the statute has been filibustered since 1974.”¹⁰¹

95. *Id.* at 687–88. The Court did not disturb the Board’s ability to delegate certain functions to non-board members, however, like the General Counsel. *Id.* at 684 n.4 (“Our conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel. The latter implicates a separate question that our decision does not address.”). Indeed, it remains unclear “which of the NLRB’s functions became invalid during the period in which it had only two members.” Fisk, *supra* note 21, at 615.

96. *Id.* at 689 (Kennedy, J., dissenting).

97. *Id.* (Kennedy, J., dissenting).

98. *Id.* at 701 (Kennedy, J., dissenting).

99. *Id.* at 686.

100. *Id.* at 688.

101. Fisk, *supra* note 21, at 609.

3. *Recess Appointments*

The Obama administration responded to *New Process Steel* by using the Recess Appointments Clause to hurdle the NLRB's quorum obstacle.¹⁰² During a Senate recess in early January 2014,¹⁰³ President Obama appointed three candidates to the remaining three commissioner vacancies on the NLRB.¹⁰⁴ At the time, the Senate had been periodically convening in *pro forma* sessions, where every three days "a single senator arrive[d] to gavel the body into session for a moment before adjourning for another three days."¹⁰⁵ No congressional business was transacted during these 30-second sessions.¹⁰⁶ Indeed, this now-familiar tool of obstructionism served the sole purpose of blocking the President from making recess appointments by preventing the Senate from adjourning to an inter-session recess.¹⁰⁷ President Obama made the appointments anyway and a soda distributor challenged them in the D.C. Circuit in *Noel Canning v. NLRB*.¹⁰⁸ In another textual opinion that dissected the Revolutionary Era meaning of the words "happen" and "the Recess," the circuit court invalidated the appointments under the rationale that they were not properly made during the inter-session recess of the Senate.¹⁰⁹ The court went on to rule that because the appointments

102. See U.S. CONST. art. II, § 2, cl. 3 ("The President shall have Power to 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.").

103. "[T]he 2-year life of each elected Congress typically consists of two formal 1-year sessions, each separated from the next by an 'inter-session recess.' The Senate or the House of Representatives announces an inter-session recess by approving a resolution stating that it will 'adjourn *sine die*,' *i.e.*, without specifying a date to return (in which case Congress will reconvene when the next formal session is scheduled to begin)." *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560–61 (2014) (citation omitted). The inter-session recess typically begins in late December and ends in early January, whereupon Congress starts its next session. See *id.* at 2578, app. A. By contrast, "[t]he Senate and the House also take breaks in the midst of a session." *Id.* at 2561. These are called "intra-session recesses." "The Senate or the House announces any such 'intra-session recess' by adopting a resolution stating that it will 'adjourn' to a fixed date, a few days or weeks or even months later." *Id.*

104. Mark Walsh, *SCOTUS Ponders Whether the President Can Make Appointments While Congress Is Out*, ABA JOURNAL (Jan. 1, 2014 9:50 AM), http://www.abajournal.com/magazine/article/scotus_ponders_whether_the_president_can_make_appointments_while_congress/.

105. *Id.*

106. *Id.*

107. *Id.*

108. 705 F.3d 490 (D.C. Cir. 2013).

109. *Id.* at 507.

were unconstitutional, the NLRB lacked a quorum for the first half of 2012 and, therefore, the Board's decisions made during that time were invalid.¹¹⁰

The government appealed and the Supreme Court heard the case in 2014. The Court unanimously affirmed, but its rationale differed from the D.C. Circuit's.¹¹¹ All nine justices agreed that President Obama's appointments were unconstitutional, but they divided into two camps as to why. Complete with appendices cataloguing every recess appointment ever made, Justice Breyer's functionalist opinion for five justices relied heavily on historical practice in finding that "the Constitution empowers the President to fill any existing vacancy during any recess — intra-session or inter-session — of sufficient length."¹¹² Justice Breyer clarified, however, that the three-day gap between *pro forma* sessions was too brief to constitute an intra-session recess.¹¹³ Therefore, President Obama's 2012 staffing of the NLRB was impermissible. In Justice Scalia's fiery concurrence that reads more like a dissent, he and the three remaining justices agreed that the appointments were invalid but would have gone further and held that intra-session recess appointments are *never* constitutional.¹¹⁴ Justice Scalia insisted that a plain-meaning reading of the Recess Appointments Clause was enough to arrive at this conclusion, but met Justice Breyer's historical practice argument with a contrary history lesson of his own.¹¹⁵

Despite the two starkly antagonistic positions that span a combined seventy pages, both the majority and concurrence agreed that the Presidential intra-session appointment power should be carefully circumscribed. Justice Breyer's proclamation that "a recess lasting less than 10 days is presumptively too short" effectively ratifies the practice of *pro forma* sessions and

110. *Id.*

111. *See* NLRB v. Noel Canning, 134 S.Ct. 2550 (2014).

112. *Id.* at 2577.

113. *Id.* at 2567.

114. *Id.* at 2595 (Scalia, J., concurring).

115. *Id.* at 2600 (Scalia, J., concurring). Justice Scalia's historical argument outlines the use of recess appointments in four epochs of congressional history, summarizing in conclusion that:

Intra-session recess appointments were virtually unheard of for the first 130 years of the Republic, were deemed unconstitutional by the first Attorney General to address them, were not openly defended by the Executive until 1921, were not made in significant numbers until after World War II, and have been repeatedly criticized as unconstitutional by Senators of both parties.

Id. at 2605 (Scalia, J., concurring).

keeps intact Congress' blueprint for blocking intra-session appointments.¹¹⁶ In short, the Court's decision in *Noel Canning* once again demonstrates its commitment to quorum rules at the expense of efficient agency operation.

III. JUDICIAL REMEDIES

Despite the aforementioned array of anticipatory mechanisms, agency inaction due to vacancies remains an obstacle in today's administrative state. Fortunately, some judicial remedies exist for parties affected by agency inaction. In the past, courts have employed the mandamus, stayed judicial orders, and the de facto officer doctrine in various contexts. Solutions like these could be applied to vacancy problems. Those solutions notwithstanding, litigation provides only limited prospects for redress.¹¹⁷

A. MANDAMUS AND COURT COMPULSION

One potential judicial antidote to agency standstills is a court-ordered mandamus.¹¹⁸ When independent commissions are unable to act due to lags in the nomination process, courts have held that litigants can sue to compel the President to make a nomination.¹¹⁹ In *Minnesota Chippewa Tribe v. Carlucci*, the Minnesota Chippewa sought to force President Nixon to make appointments to the understaffed National Advisory Council on Indian Education.¹²⁰ Although the case was ultimately dismissed on procedural grounds, the D.C. Federal District Court acknowledged that the federal judiciary has the power to compel the President to perform a nondiscretionary act, like nominating an officer.¹²¹ The Seventh Circuit later cited *Minnesota Chippewa* approvingly in *Assure Competitive Transport v. United States*, where it announced that "the President is not completely immune from judicial process for the sole reason that he is President" and suggest-

116. *Id.* at 2567.

117. *See* O'Connell, *supra* note 21, at 986.

118. *See* 28 U.S.C.A. § 1361 (West 2014) ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.").

119. *See* O'Connell, *supra* note 21, at 984; *see also* Harold J. Krent, PRESIDENTIAL POWERS 34 (2005) (noting that delay in appointing "at some point becomes tantamount to a failure to nominate").

120. 358 F. Supp. 973 (D.D.C. 1973).

121. *Id.* at 975–76.

ed that a remedy existed for those seeking agency appointments in the form of “a mandamus action where the President has been made a party defendant.”¹²² In the infamous “Tapes Case,” *United States v. Nixon*, the Supreme Court agreed that the President is subject to judicial process and ordered President Nixon to turn over incriminating videotapes related to the Watergate scandal.¹²³

Despite these examples, a mandamus to the chief executive remains an improbable vehicle for change. Aside from the “complex issues” implicated by suing the President of the United States, even a mandamus that successfully compelled appointment would have limited impact because “the President ha[s] discretion to choose *whom* to appoint, but not discretion to decide that the [Commission] should not be constituted.”¹²⁴ Moreover, mandamus actions are generally inapposite because contemporary vacancies have been the product of filibusters and the Senate’s unwillingness to confirm candidates rather than the President’s refusal to nominate them.¹²⁵

Unlike the President, agencies can be readily compelled by courts. The APA, though inapplicable to suing the President,¹²⁶ enables a court to “compel agency action unlawfully withheld or unreasonably delayed.”¹²⁷ This language empowers courts to force action when an agency drags its feet. Yet it is hard to see a reviewing court adopting the interpretation that agency inaction stemming from a lack of statutorily required quorum is action “unlawfully withheld” or “unreasonably delayed.” Indeed, Justice Scalia’s footnote in *Inter Tribal Council* indicated that the Su-

122. 629 F.2d 467, 475 (1980).

123. 418 U.S. 683, 706 (1974) (“[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”).

124. *Assure Competitive Transp.*, 629 F.2d at 475 (emphasis added). Agencies retain the same discretion in appointing internal officers. See *Aharonian v. Gutierrez*, 524 F. Supp. 2d 54, 55 (D.D.C. 2007) (“[T]he decision whom to appoint Deputy Director [of the U.S. Patent and Trademark Office] must be considered ‘committed to agency discretion by law.’”).

125. See Daniel Altman, *So Few Agencies, So Many Official Seats Unfilled*, N.Y. TIMES (July 27, 2002), <http://www.nytimes.com/2002/07/27/business/so-few-agencies-so-many-official-seats-unfilled.html?src=pm&pagewanted=2>.

126. See *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992).

127. 5 U.S.C.A. § 706(1) (West 2014).

preme Court would not entertain such an interpretation.¹²⁸ That fact, combined with courts' general unwillingness to substitute generalist judicial judgment for that of agency specialists, suggests that there are only limited prospects for judicial resolution under the APA when sub-quorum vacancies hinder agency performance.¹²⁹

Standing doctrine poses another barrier to litigation. Parties seeking appointments fight an uphill battle in demonstrating the constitutional elements of standing:¹³⁰ an injury to the plaintiff that is (1) "concrete, particularized, and actual or imminent; [(2)] fairly traceable to the challenged action; and [(3)] redressable by a favorable ruling."¹³¹ As one commentator has suggested, "[e]ach of these prongs seems quite difficult to show" in the vacancy context.¹³² For example, plaintiffs trying to satisfy the second and third prongs of the standing test face the procedural complications of naming a defendant when an agency has no commissioners and suing a party who can provide relief. Suing the wrong party or naming a party incapable of providing the relief sought would be fatal to a litigant's claim.¹³³

128. See *Ariz. v. Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. 2247, 2260 n.10 (2013) ("It is a nice point, which we need not resolve here, whether a court can compel agency action that the agency itself, for lack of the statutorily required quorum, is incapable of taking. *If the answer to that is no*, Arizona might then be in position to assert a constitutional right to demand concrete evidence of citizenship apart from the Federal Form.") (emphasis added).

129. See, e.g., *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66-67 (2004) ("The principal purpose of the APA limitations we have discussed — and of the traditional limitations upon mandamus from which they were derived — is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved — which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.")

130. See O'Connell, *supra* note 21, at 985.

131. *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1147 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)).

132. See O'Connell, *supra* note 21, at 985.

133. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568-71 (1992) (denying standing to plaintiff environmental group because any potential relief provided by Secretary of the Interior Lujan "would not remedy respondents' alleged injury.").

B. STAYED JUDICIAL ORDERS

Despite these procedural hurdles, courts do have power in fashioning a remedy once a litigant can show it is properly before the court. When courts have been able to rule on the merits, some have delivered judgments circumscribing a period within which an agency must comply.¹³⁴ This is a beneficial outcome for an agency fighting vacancies because it provides the regulatory commission a chance to devise its own solution to the quorum problem before any external intervention takes place. In that case, an agency could adopt one or more of the existing remedies for lack of quorum — delegation or elevation, for instance — or would be free to invent a new one. Of course, courts step in when an agency is unable to meet its court-imposed deadline.

For example, Rule 41 of the Federal Rules of Appellate Procedure permits appellate courts to stay judicial orders.¹³⁵ Judge Robert Bork of the D.C. Circuit exercised the stay power in *Independent United States Tanker Owners Committee v. Dole*, where the court invalidated a rule pertaining to the merchant marines made by the Secretary of Transportation.¹³⁶ The court gave the Department of Transportation six months to prepare itself before the judgment took effect, however, stating that “we exercise our power to withhold issuance of our mandate . . . to allow the Secretary to undertake further proceedings to address the problems of the merchant marine trade.”¹³⁷

The Supreme Court has made similar allowances to Congress in the context of improperly delegated power. In *Northern Pipeline Construction Company v. Marathon Pipe Line Company*, the Court ruled that Congress’ authorization of the bankruptcy courts violated Article III.¹³⁸ Rather than immediately dissolve all bankruptcy courts, however, the Court stayed its order nearly

134. See, e.g., Order Remanding to EAC at 1–2, *Kobach v. U.S. Election Assistance Comm’n*, 6 F. Supp.3d 1252 (D.Kan. 2014), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/KobachOrderRemanding2EAC.pdf> (giving the EAC a one-month window within which to act).

135. FED. R. APP. P. 41(a). Additionally, since “[n]o court can make time stand still,” judicial stays are particularly welcome when a case awaits appeal. *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 9–10 (1942) (“[A]s part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal.”) (internal footnote omitted).

136. 809 F.2d 847, 855 (D.C. Cir. 1987).

137. *Id.*

138. 458 U.S. 50, 87 (1982).

100 days to “afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws.”¹³⁹ Likewise, in *Buckley v. Valeo*, the Court found the Federal Election Commission’s legal foundation constitutionally deficient but stayed its decision for 30 days to allow Congress to reconstitute the Commission.¹⁴⁰ Finally, in *Bowsher v. Synar*, the Court withheld its judgment for up to 60 days to allow Congress to institute statutory safeguards to rectify the separation of powers problem posed by the Comptroller General, an executive branch officer the Court found was ultimately controlled by Congress.¹⁴¹

C. DE FACTO OFFICER DOCTRINE

The Court has adopted other measures to promote efficient agency operation. For example, the de facto officer doctrine “confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person’s appointment or election to office is deficient.”¹⁴² The doctrine “seeks to protect the public by insuring the orderly functioning of the government despite technical defects in title to office” and recognizes “the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question.”¹⁴³

Accordingly, one potential strategy for hamstrung agencies could be to internally select an officer to whom power is delegated, and then defend that officer’s actions under the de facto officer doctrine even if the court later rules that the officer was improperly assigned power. At minimum, this would allow the agency to continue to operate until the conclusion of any litigation challenging the delegation. Such a strategy could be particularly effective in cases like the NLRB’s. Justice Scalia even suggested at oral argument in *Noel Canning* that the government could comfortably rely on the de facto officer doctrine to sustain

139. *Id.* at 88.

140. 424 U.S. 1, 143 (1976); see also Fisk, *supra* note 21, at 614.

141. 478 U.S. 714, 736 (1986).

142. *Ryder v. United States*, 515 U.S. 177, 180 (1995) (internal quotation and citations omitted).

143. *Id.* (quoting 63A AM.JUR.2D *Public Officers and Employees* § 578 (1984)).

the validity of the decisions made by the NLRB recess appointees even if the Court ruled the appointments were invalid.¹⁴⁴

These judicial correctives highlight the latitude courts enjoy in trying to strike a balance between promoting operational efficiency and following the letter of the law. With a little creativity, courts can provide solutions to agency vacancies.

IV. *KOBACH v. EAC*

Arizona's defeat in *Inter Tribal Council* was only the first stage of what promises to be a lengthy legal battle over the next frontier of voting rights: proof-of-citizenship requirements. With a little urging from Justice Scalia, Arizona and Kansas have re-joined the fight in *Kobach v. EAC*, the sequel to *Inter Tribal Council*. On the merits, the dispute is complex, implicating dual sovereignty and fundamental individual rights. That complexity is compounded by the unique institutional structure and history of the EAC. Moreover, the case's procedural posture highlights the constraints of vacancy-prevention mechanisms and demonstrates the value of creative judicial remedies. A close look at *Kobach v. EAC* provides an apt opportunity to evaluate future steps that may be taken to prevent agency vacancies as well as potential judicial solutions.

A. THE ELECTION ASSISTANCE COMMISSION

The EAC has been an unusual agency throughout its twelve-year existence. The unique circumstances of the Commission's creation foreshadowed the problems it now faces. In fact, many of the agency's woes derive from its charge of administering the voting laws.

1. *Institutional Origins*

The Election Assistance Commission was created in 2002 as part of the Help America Vote Act (HAVA), a bipartisan response

144. See Transcript of Oral Argument at 5, *NLRB v. Noel Canning*, 132 S.Ct. 2550 (2014) (No. 12-1281), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1281_d1o2.pdf (“[S]urely, [the Government] would argue the de facto officer doctrine . . . we’ve applied that in innumerable cases. You don’t really think we’re going to go back and rip out every decision made [by the NLRB].”).

to the presidential election debacle of 2000.¹⁴⁵ After trouble with Florida's butterfly ballots prompted a recount and judicial intervention in *Bush v. Gore*,¹⁴⁶ Congress sought uniformity among the state voting mechanisms used in federal elections.¹⁴⁷ Accordingly, HAVA established the EAC as a federal voting clearinghouse and amended the NVRA to transfer to the newfound agency many of the oversight duties formerly tended to by the Federal Election Commission (FEC).¹⁴⁸ Chief among the EAC's new responsibilities was the very exercise of power challenged in *Inter Tribal Council*, the authority to "develop a mail voter registration application form for elections for Federal office."¹⁴⁹

However, the EAC was saddled with inherent institutional inefficiencies, in some part due to the "complex superstructure of federal regulation atop state voter-registration systems."¹⁵⁰ Whether a testament to the true bipartisan interest in fixing the voting laws or a sign of the mutual distrust between Democrats and Republicans in the voting arena (or both), HAVA passed with overwhelming support, 92–2 in the Senate and 357–48 in the House.¹⁵¹ Either way, the bipartisan quest for equity may have proved too much. Congress authorized the EAC with four commissioners, no more than two of whom may belong to the same political party.¹⁵² This unusual, even-membered board structure was undoubtedly designed to replicate the FEC's six-member board and ensure bipartisan cooperation between the commis-

145. 52 U.S.C. § 20921. As Senator Kit Bond of Missouri stated during the floor debate on HAVA's conference report:

The 2000 election opened the eyes of many Americans to the flaws and failures of our election machinery, our voting systems, and even how we determine what a vote is. We learned of hanging chads and inactive lists. We discovered our military's votes were mishandled and lost. We learned of legal voters turned away, while dead voters cast ballots. We discovered that many people voted twice, while too many weren't even counted once.

148 CONG. REC. S10488-02 (2002).

146. 531 U.S. 98 (2000).

147. See 148 CONG. REC. D1091-02 (2002) (HAVA's goal was to "require States and localities to meet uniform and nondiscriminatory election technology and administration requirements applicable to Federal elections, to establish grant programs to provide assistance to States and localities to meet those requirements and to improve election technology and the administration of Federal elections.").

148. 52 U.S.C. § 20508.

149. *Id.* § 20508(a)(2).

150. *Ariz. v. Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. 2247, 2251 (2013).

151. Congressional Record of Action for the 107th Congress, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03295:@@R> (last visited Mar. 9, 2014).

152. See 52 U.S.C. §§ 20923(a)–(b).

sioners.¹⁵³ Since HAVA requires that “[a]ny action which the Commission is authorized to carry out under this chapter may be carried out only with the approval of at least three of its members,” any EAC decision requires at least one member of the Commission to work across the aisle.¹⁵⁴ In practice, the arrangement was intended to elicit either a unanimous decision or none at all. Indeed, this is how the EAC operated in the first few years of its existence.¹⁵⁵ But the consensus-or-bust model also carried the prospect for deadlock, which was precisely the case in the EAC’s 2006 vote that knotted two-to-two on Arizona’s Federal Form alteration request.¹⁵⁶

Furthermore, HAVA does not provide the EAC with a full complement of mechanisms to combat vacancies. Instead of comprehensive vacancy provisions like those of the CPSC or SEC, HAVA has only two clauses that address vacancies. The first preserves the two-to-two party allegiance split: “A vacancy on the Commission shall be filled in the manner in which the original appointment was made and shall be subject to any conditions which applied with respect to the original appointment.”¹⁵⁷ This provision maintains the partisan balance, since the original appointment clause stipulates that “not more than two of [the appointees] may be affiliated with the same political party.”¹⁵⁸ Regardless, the balanced political representation of commissioners does not assist the agency in operating with vacancies or without quorum.

153. See 52 U.S.C. § 30106; FED. ELECTION COMM’N, FEC FISCAL YEAR 2010 CONGRESSIONAL JUSTIFICATION & PERFORMANCE BUDGET 4 (2009), available at www.fec.gov/pages/budget/fy2010/FY_2010_CJ_Bud_05_07final.pdf (“The FEC is structured to foster bipartisan decision-making. To accomplish its legislative mandate, the FEC is directed by six Commissioners, who are appointed by the President with the advice and consent of the Senate. By law, no more than three Commissioners can be members of the same political party.”).

154. 52 U.S.C. § 20928. Strangely, there is no mention of quorum for the EAC, but the common law rule makes the three-member majority a quorum by default.

155. Prior to the split vote of 2006, “the EAC ha[d] previously navigated difficult, politically-tinged issues while still maintaining unanimity on such matters” by reaching consensus or, if unable to do so, punting the issue without a vote altogether. *Position Statement of Commissioner Ray Martinez III, July 10, 2006*, ELECTION ASSISTANCE COMM’N, at 5–6, available at <http://www.eac.gov/assets/1/News/Vice%20Chairman%20Ray%20Martinez%20III%20Position%20Statement%20Regarding%20Arizona's%20Request%20for%20Accommodation.pdf> (“At least one hundred Tally Votes have been recorded by the EAC, with all Commissioners voting in the affirmative for each of the prior Tally Votes.”).

156. See Complaint at 17, *Kobach v. U.S. Election Assistance Comm’n*, 6 F.Supp.3d 1252 (D.Kan. 2014).

157. 52 U.S.C. § 20923(b)(3).

158. *Id.* § 20923(b)(2)(A)–(B).

The second vacancy provision in HAVA is the familiar extended-tenure clause, which states that a “member of the Commission shall serve on the Commission after the expiration of the member’s term until the successor of such member has taken office as a member of the Commission.”¹⁵⁹ This provision contemplates vacancies and seeks to maintain fluid operation by ensuring that the commissioner seats are filled at all times. It safeguards against a vacant period during the time it takes to replace an outgoing commissioner. But provisions like this one are undermined when agency heads voluntarily step down from their posts.¹⁶⁰ Notably, HAVA does not equip the EAC with a “vacancy clause” or board delegation power, thereby limiting the agency’s ability to combat vacancies.

2. Contemporary Problems

At present, the EAC has four vacant commissioner seats and no permanent Executive Director or General Counsel.¹⁶¹ All four of the EAC’s most recent commissioners resigned, beginning in 2009 with Commissioner Rosemary E. Rodriguez.¹⁶² Following her departure, the Commission operated with three commissioners for over a year and a half, until Commissioner Gracia M. Hillman resigned at the end of 2010. Commissioner Hillman’s resignation came after serving two full terms plus an additional year under the extended-tenure clause as she awaited the appointment and confirmation of a replacement.¹⁶³ When it became clear that no successor was imminent, she stepped down.¹⁶⁴ The final two commissioners, Gineen Bresso and Donetta Davidson, served without a quorum for a year more. In December 2011, they resigned within days of one another.¹⁶⁵ Only a month earli-

159. *Id.* § 20923(b)(3)(B).

160. See generally Wood & Marchbanks, *supra* note 41.

161. *Commissioners*, ELECTION ASSISTANCE COMM’N, http://www.eac.gov/about_the_eac/commissioners.aspx (last visited Mar. 9, 2014); *Employee Directory*, ELECTION ASSISTANCE COMM’N, http://www.eac.gov/about_the_eac/staff.aspx (last visited Feb. 5, 2014).

162. *Commissioner Rodriguez Resigns*, ELECTION ASSISTANCE COMM’N, http://www.eac.gov/commissioner_rodriguez_resigns/ (last visited Mar. 9, 2014).

163. Statement of Gracia M. Hillman, Comm’r, U.S. Election Assistance Comm’n, Statement of Gracia M. Hillman On the Occasion of Her Resignation as Commissioner, available at http://www.eac.gov/assets/1/Documents/GH%20Statement_12_06_10.pdf.

164. *Id.*

165. *Gineen Bresso*, ELECTION ASSISTANCE COMM’N, http://www.eac.gov/about_the_eac/gineen_bresso.aspx (last visited Mar. 9, 2014); *Donetta Davidson*, ELECTION ASSISTANCE

er, Executive Director Thomas Wilkey submitted his resignation.¹⁶⁶

President Obama attempted to fill the two vacancies left by Commissioners Rodriguez and Hillman by nominating Myrna Pérez and Thomas Hicks in early 2010 and 2011.¹⁶⁷ Though both are qualified, they continue to wait in limbo; after nearly three years, neither candidate has received a confirmation vote in the Senate.¹⁶⁸ In July 2014, President Obama announced the nominations of Matthew V. Masterson and Christy McCormick in addition to Pérez and Hicks.¹⁶⁹ The prospect of confirmation for all four candidates remains dubious, however, as Congress battles over whether to keep or kill the EAC altogether. In May 2013, House Republicans introduced the Election Assistance Commission Termination Act to eliminate the agency. The bill currently awaits a vote.¹⁷⁰

Worse still, House Republicans are not the only ones who lack faith in the EAC. In March 2013, President Obama appointed a commission to “identify best practices and otherwise make recommendations to promote the efficient administration of elections.”¹⁷¹ Rather than hand the task to the EAC, President Obama created an entirely new commission, the Presidential Commission on Election Administration.¹⁷²

By all measures, the meager statutory safeguards designed to maintain EAC operation in the face of vacancies have failed. One reason is that three of the EAC’s previous commissioners resigned before their terms expired. The resignations disabled the EAC’s only real quorum-maintenance clause, the term-extension

COMM’N, http://www.eac.gov/about_the_eac/donetta_davidson.aspx (last visited Mar. 9, 2014).

166. *Thomas R. Wilkey*, ELECTION ASSISTANCE COMM’N, http://www.eac.gov/about_the_eac/thomas_r_wilkey.aspx (last visited Mar. 9, 2014).

167. Dave Leventhal, *Kill the Election Assistance Commission?* THE CTR. FOR PUB. INTEGRITY (Dec. 12, 2013, 5:26 PM), <http://www.publicintegrity.org/2013/12/12/13993/kill-election-assistance-commission>.

168. *Id.*

169. Press Release, Office of the Press Sec’y, The White House, President Obama Announces More Key Administration Posts (July 17, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/07/17/president-obama-announces-more-key-administration-posts-0>.

170. Election Assistance Commission Termination Act, H.R. 1994, 113th Cong., 1st Sess. (2013).

171. Exec. Order No. 13639, 78 Fed. Reg. 19979 (March 28, 2013) *amended by* Exec. Order No. 1364478, 78 Fed. Reg. 31813 (May 21, 2013).

172. *About the Commission*, THE PRESIDENTIAL COMM’N ON ELECTION ADMIN., *available at* <http://www.supportthevoter.gov/the-commission/> (last visited Mar. 9, 2014).

provision. Even when invoked, however, the extended-term clause is limited. As the circumstances of Commissioner Hillman's resignation demonstrate, the safeguard can fail when there is no realistic prospect for timely appointment of successors. As a result of these resignations and the Senate's refusal to vote on new commissioners, the EAC has been left without a single board member.

3. *Kobach v. EAC*

On December 13, 2013, Judge Eric Melgren of the District Court of Kansas issued an order in response to Arizona and Kansas's complaint against the EAC.¹⁷³ In it, the court found that "there ha[d] been no final agency action by the Election Assistance Commission" but that "even in the absence of any commissioners, the EAC can consider and act upon the States' requests."¹⁷⁴ The court then gave the EAC roughly a month to issue a final agency action, adding that "[if] the EAC has not acted by January 17, 2014, the States' requests [for additional proof-of-citizenship requirements] will be deemed denied."¹⁷⁵ Six days after the order, the EAC issued a "Notice and Request for Public Comment" on the proof-of-citizenship dispute.¹⁷⁶ The Commission was flooded with 425 comments before the close of the 15-day comment period.¹⁷⁷

On January 16th, the night before the trial court's deadline, the EAC surprised many by issuing a 45-page "Memorandum of Decision Concerning State Requests to Include Additional Proof-of-Citizenship Instructions on the National Mail Voter Registration Form" ("Memorandum of Decision").¹⁷⁸ It was the agency's first discretionary act since 2010.¹⁷⁹ The Memorandum of Decision had three major effects. First, Acting Executive Director Alice Miller claimed discretionary authority, citing a 2008 delega-

173. Memorandum and Order, *Kobach v. U.S. Election Assistance Comm'n*, 6 F.Supp.3d 1252 (D.Kan. 2014) (No. 13-cv-4095-EFM-TJJ).

174. *Id.* at 1.

175. *Id.* at 2.

176. U.S. ELECTION ASSISTANCE COMM'N, NO. EAC-2013-0004, MEMORANDUM OF DECISION 5, *supra* note 18.

177. *Id.*

178. *Id.* at 1.

179. See Request for Substantive Comments: Procedural Manual for the Election Assistance Commission's Pilot Voting System Testing and Certification Program Manual, 75 Fed. Reg. 18, 189 (2010).

tion policy that was adopted unanimously by the three then-sitting commissioners.¹⁸⁰ The policy, called “The Roles and Responsibilities of the Commissioners and Executive Director of the United States Election Assistance Commission” (“R&R Policy”), delegated to the Executive Director the responsibility to “[i]mplement and interpret policy directives, regulations, guidance, guidelines, manuals and other policies of general applicability issued by the commissioners” and to “[m]aintain the Federal Voter Registration Form consistent with the NVRA and EAC Regulations and policies.”¹⁸¹ Second, the EAC formally denied Arizona and Kansas’ request on the merits for the addition of proof-of-citizenship requirements on the Federal Form.¹⁸² Lastly, the EAC declared that the “Memorandum of Decision shall constitute a final agency action within the meaning of [APA] § 704.”¹⁸³

On March 19, 2014, Judge Melgren issued a ruling in the case that proved to be a resounding win for Arizona and Kansas.¹⁸⁴ The court’s Memorandum and Order declared that the EAC lacked the statutory power under the NVRA to deny states’ requests because Congress had not preempted the States in the realm of proof-of-citizenship requirements.¹⁸⁵ Though that ruling was seemingly incompatible with the Supreme Court’s holding in *Inter Tribal Council*, Judge Melgren determined that “the EAC’s refusal to perform its nondiscretionary duty to change the instructions as required constitutes agency action unlawfully withheld,” and, therefore, ordered the EAC to make the requested changes to Arizona and Kansas’s state-specific Federal Forms.¹⁸⁶ Notably, the court’s opinion left two major questions unanswered: (1) “whether Congress may constitutionally preempt state laws regarding proof of eligibility to vote in elections”;¹⁸⁷ and (2)

180. Memorandum of Decision, *supra* note 18, at 15.

181. *Id.* at 16.

182. *Id.* at 20–45.

183. *Id.* at 46.

184. See Memorandum and Order, *supra* note 173, at 1–2.

185. *Id.* at 12.

186. *Id.* at 27–28 (“The Court orders the EAC to add the language requested by Arizona and Kansas to the state-specific instructions of the federal mail voter registration form immediately.”).

187. *Id.* at 12.

whether the EAC had the authority to act under Acting Executive Director Miller.¹⁸⁸

The ruling opened the door for any state to impose proof-of-citizenship barriers to registering by mail to vote. In response, the EAC and its intervenors — largely the same coalition from *Inter Tribal Council*, including the Inter Tribal Council of Arizona itself — appealed the decision to the Tenth Circuit¹⁸⁹ and filed for a stay of the district court decision in the interim.¹⁹⁰ On November 7, 2014, the Tenth Circuit unanimously reversed the district court, ruling for the EAC on both the procedural issues and the merits.¹⁹¹

B. ANALYSIS OF *KOBACH* v. *EAC*

The EAC's rejection of the states' requests on the merits was unsurprising. The Department of Justice argued as an amicus against Arizona in *Inter Tribal Council* and returned to support the EAC in *Kobach*.¹⁹² Moreover, the Obama administration disapproves of new voter identification laws and has fought additional barriers to voting.¹⁹³ The EAC's prolonged refusal to respond to Arizona and Kansas based on lack of quorum seems in some part related to the Commission's disapproval of the request on the merits. Accordingly, the Commission postponed deciding

188. *Id.* at 7 (“[T]he Court is skeptical that Miller ha[d] authority to make this decision for the EAC. However, the Court finds it unnecessary to address Miller’s authority to act as acting executive director . . . For the purposes of the following analysis, the Court assumes — without deciding — that Miller is authorized to make the decision on behalf of the EAC.”).

189. Joint Notice of Appeal of All Defendant-Intervenors, *Kobach* v. U.S. Election Assistance Comm’n, 6 F.Supp.3d 1252 (D.Kan. 2014) (No. 13-cv-4095-EFM-TJJ).

190. Motion to Stay, *Kobach*, 6 F.Supp.3d 1252.

191. See *Kobach* v. EAC, Nos. 14-3062 and 14-3072, 2014 WL 6612031 (10th Cir. Nov. 7, 2014).

192. See *Ariz. v. Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. 2247, 2250 (2013).

193. For example, Attorney General Eric Holder stated in a recent speech that “it is the duty of today’s Justice Department to continue monitoring jurisdictions around the country for changes that may hamper these voting rights. To keep taking appropriately aggressive action against any jurisdiction that attempts to hinder free and fair access to the franchise. And to keep refining and re-focusing current enforcement efforts — while we work with Congress to craft stronger tools for protecting voting rights.” Attorney Gen. Eric Holder, Remarks at the National Urban League Annual Conference (Thursday, July 25, 2013), available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130725.html>; see also President Barack Obama, Inaugural Address (Jan. 21, 2013) available at <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama> (“Our journey is not complete until no citizen is forced to wait for hours to exercise the right to vote.”).

on the merits for as long as possible. The trial court forced the agency's hand, however, and the EAC's new reliance on the R&R Policy as a legitimate source of delegation to the Executive Director created new avenues of litigation for both parties.

From an administrative law standpoint, the Tenth Circuit's ruling treats three main issues: (1) the EAC's proclamation that its Memorandum of Decision constitutes final agency action, (2) the validity of the EAC's delegation to its Executive Director, and (3) the level of deference owed to the EAC's interpretation of its own enabling statute.

1. *Final Agency Action*

A threshold question addressed by the Tenth Circuit was the finality of the EAC's action. The Memorandum of Decision stated that the document "shall constitute a final agency action within the meaning of [APA] § 704."¹⁹⁴ APA § 704 stipulates, in pertinent part, "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review."¹⁹⁵ By releasing a final action, the EAC made its decision binding and intentionally submitted it for review by a court. Despite Judge Melgren's refusal to consider the procedural legitimacy of the EAC's action, the Tenth Circuit deemed it necessary to examine the act's finality as a matter of jurisdiction.¹⁹⁶ The court acknowledged that an "agency cannot render its action final merely by styling it as such" and that "the decision of a subordinate [like Executive Director Miller] is not final action," but went on to "conclude that under the unique circumstances of this case, the Executive Director's decision — which was issued pursuant to a subdelegation of authority in a 2008 policy — was final."¹⁹⁷ The court ruled that the EAC's lack of quorum did not disturb the finality of the Memorandum and Decision.¹⁹⁸

194. Memorandum of Decision, *supra* note 18, at 46.

195. 5 U.S.C. § 704.

196. Kobach v. EAC, Nos. 14-3062 and 14-3072, 2014 WL 6612031 at *2 (10th Cir. Nov. 7, 2014).

197. *Id.* at *3.

198. *Id.* at *5.

2. *Validity of the EAC's Delegation under New Process Steel*

The second question the Tenth Circuit addressed that the district court failed to consider was whether Acting Executive Director Miller's assumption of authority under the R&R Policy was adequate grounds for the EAC's treatment of Kansas and Arizona's requests on the merits. The Memorandum of Decision asserted that "the existence of a quorum provision in Section 208 of HAVA does not prohibit the Commission from delegating administrative and implementing authority to its subordinate staff, so long as such delegation of authority is carried out . . . with the approval of at least three of its members."¹⁹⁹ The Tenth Circuit found that interpretation consistent with the Supreme Court's decision in *New Process Steel*, which held that the NLRB's indefinite delegation to a subcommittee could not survive the loss of quorum.²⁰⁰ The circuit distinguished *New Process Steel*, explaining that unlike the NLRB delegation in that case, the EAC's R&R Policy delegates *circumscribed* power to *lesser* officials rather than *plenary* power to a sub-quorum group of *board members*.²⁰¹ The court went on to highlight that, during the same period the NLRB delegated power to its three-member subcommittee, the Board also delegated indefinite litigation authority to its General Counsel.²⁰² The Supreme Court expressly declined to consider the validity of that delegation in *New Process Steel* and later rejected petitions for certiorari on the matter.²⁰³ However, the five

199. Memorandum of Decision, *supra* note 18, at 19 (internal quotations omitted).

200. See *New Process Steel L.P. v. NLRB*, 560 U.S. 674 (2010).

201. *Kobach v. EAC*, Nos. 14-3062 and 14-3072, 2014 WL 6612031 at *6 ("[B]ecause the 2008 delegation only passes limited authority to a subordinate outside the delegating group, it grants the Executive Director powers that survive the later loss of a quorum of commissioners."). In so ruling, the court implicitly accepted the EAC's contention that the "R&R policy does not cede policymaking authority to EAC staff; rather, it directs the staff to 'implement and interpret' the agency's policies consistent with federal law and EAC regulations." Memorandum of Decision, *supra* note 18, at 19.

202. See *Frankl v. HTH Corp.*, 650 F.3d 1334 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1821 (2012).

203. See *New Process Steel L.P. v. NLRB*, 560 U.S. at 685 n.4 (2010) ("Our conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel. The latter implicates a separate question that our decision does not address."); *HTH Corp. v. Frankl ex rel. NLRB*, 132 S. Ct. 1821 (2012) *denying cert.*

circuit courts that considered the issue upheld the delegation, and the Tenth Circuit declared it would follow suit.²⁰⁴

Moreover, the Tenth Circuit refuted the notion that proved fatal to the NLRB in *New Process Steel*, that the EAC's 2008 delegation was an instance of a "tail that would not only wag the dog, but would continue to wag after the dog died," stating instead that a "more apposite analogy for this case would be the faithful servant who continues to follow his master's orders even while his master is absent."²⁰⁵ Most forcefully, the Tenth Circuit went where the Supreme Court would not go in *New Process Steel*, declaring that "it would be impractical to simply shutter the EAC while it lacks a quorum."²⁰⁶

3. Deference to the EAC's Interpretation

The court's final important procedural determination addressed the level of deference owed to the EAC's interpretation of its ability to act on the states' request.²⁰⁷ The district court's ruling refused to give deference to the EAC's interpretation of the scope of its authority under the NVRA but did not consider whether to defer to the agency's interpretation of its own rules.²⁰⁸ Notably, the *New Process Steel* Court neglected to give weight to the NLRB's own interpretation of its delegation power under § 153(b), omitting to evaluate the agency's past practices under *Chevron*²⁰⁹ or any of its progeny.²¹⁰ The Tenth Circuit, however, relied on the presumption that "[a]bsent some indication in an agency's enabling statute that subdelegation is forbidden, subdelegation to subordinate personnel within the agency is generally permitted."²¹¹ The court found that HAVA "neither explicitly

204. See *Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 140 (2d Cir. 2013); *Osthus v. Whitesell Corp.*, 639 F.3d 841 (8th Cir. 2011); *Frankl v. HTH Corp.*, 650 F.3d 1334 (9th Cir. 2011); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844 (5th Cir. 2010); *Muffley ex rel. NLRB v. Spartan Mining Co.*, 570 F.3d 534 (4th Cir. 2009).

205. *Kobach v. EAC*, Nos. 14-3062 and 14-3072, 2014 WL 6612031 at *6 (internal quotations and citation omitted).

206. *Id.* at *7.

207. *Id.* at *3.

208. See Memorandum and Order, *supra* note 173, at 1264 ("[T]he Court finds that the EAC decision is not entitled to *Chevron* deference in this case.").

209. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

210. See *Fisk*, *supra* note 21, at 605.

211. *Kobach v. EAC*, Nos. 14-3062 and 14-3072, 2014 WL 6612031 at *4.

permits or forbids subdelegation”²¹² and ruled that the EAC operates within its *Chevron* space²¹³ when interpreting its ability to delegate.²¹⁴

One irregularity in the Tenth Circuit’s *Chevron* analysis, however, is that it did not consider that the EAC’s interpretation was made by an Acting Executive Director rather than by the Board, an individual commissioner, the General Counsel, or even a properly appointed Executive Director. The court never explained why the informality of Miller’s position did not undermine a claim to deference. Nor did the court mention that the EAC’s recent delegation flies in the face of years of contrary agency interpretations. The EAC’s sudden decision to rule on Arizona and Kansas’s requests — even as a response to Judge Melgren’s order — was a stark change of direction in what had been years of agency disavowal of the ability to take action without a quorum of commissioners. In 2011, for example, three years after the 2008 R&R Policy was adopted, Executive Director Thomas Wilkey circulated an internal memorandum stating that the EAC could not process Federal Form alteration requests like Kansas’ or Arizona’s without a quorum of commissioners.²¹⁵ On August

212. *Id.* (“Because the text of HAVA, the EAC’s enabling statute, neither explicitly permits nor forbids subdelegation, subdelegation is presumed permissible.”); Memorandum of Decision, *supra* note 18, at 18 (“HAVA contains no provisions which speak directly to the issue of delegation.”).

213. See Peter L. Strauss, “Deference” is too Confusing — Let’s Call Them “*Chevron* Space” and “*Skidmore* Weight,” 112 COLUM. L. REV. 1143, 1145 (2012). As Professor Strauss writes:

“*Chevron* space” denotes the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints, its *allocated* authority. The whole idea of “agency” is that the agent has a certain authority, a zone of responsibility legislatively conferred upon it. What that zone is requires defining . . . but within that zone, within what we shall call its *Chevron* space, the whole point of the empowering legislation is to allocate authority to the agency. Faced with the exercise of such authority, the natural role of courts, like that of referees in a sports match, is to see that the ball stays within the bounds of the playing field, and that the game is played according to its rules; it is not for them themselves to play the game. If they find a constitutionally valid allocation of authority to another body, it simply follows that that other body has the authority to decide the issues allocated to it, subject to such supervision as oversight entails. Courts are, of course, ultimately responsible for deciding questions of law; but one such question is how much authority has validly been allocated elsewhere, and the answer to that question is an element of the law the court is ultimately responsible to find and obey.

Id.

214. *Kobach v. EAC*, Nos. 14-3062 and 14-3072, 2014 WL 6612031 at *4.

215. Complaint at 8–9, *Kobach v. U.S. Election Assistance Comm’n*, 6 F.Supp.3d 1252 (D.Kan. 2014). The EAC’s Memorandum of Decision attempted to downplay that corre-

13, 2013, current Acting Executive Director Miller wrote to Arizona Secretary of State Ken Bennett, explaining that the EAC “staff cannot process your request due to a lack of a quorum on the Commission.”²¹⁶ The Tenth Circuit’s analysis simply ignores the fact that the Memorandum of Decision signals an abrupt shift away from that position. Even so, the decision is encouraging in its willingness to defer to agency interpretation.²¹⁷

V. MOVING FORWARD AND FUTURE BEST PRACTICES

Congress must be specific when it wants to statutorily grant agencies the ability to circumvent their quorum rules in emergency scenarios. The explicit, quorum-altering language in the CPSA serves as a workable example. That being said, it may reflect a legislative judgment that Congress has not amended the “vacancy clause” of the NLRB — or any other agency, for that matter — in the four years since *New Process Steel*.²¹⁸ Courts have more readily accepted sub-quorum agency operation when it comes from internal agency regulations, like those of the SEC and FTC. Agencies without express delegation clauses should seize upon Congress’ silence, as did the NRC and FMC, to set up their own delegation regulations for times of emergency. If the Tenth Circuit’s decision in *Kobach v. EAC* is any sign of things to come, courts may be more willing to accept agencies’ interpreta-

spondence, the “Wilkey Memo,” calling it “merely an internal operating procedure that described how the then-executive director sought to exercise and delegate (or temporarily refrain from acting upon) the responsibilities that the Commission had delegated to him.” Memorandum of Decision, *supra* note 18, at 17 n.7.

216. Letter from Exec. Dir. Alice Miller to Sec’y of State Ken Bennett (Aug. 13, 2013), available at <http://www.eac.gov/assets/1/Documents/EAC%20to%20AZ%20Secretary%20Bennett%208132013-OCR.pdf> (last visited Dec. 20, 2014).

217. As Professor Jennifer Nou urges, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), could be an alternative framework under which to evaluate agency deference in dead-locked scenarios. See Jennifer Nou, *Sub-regulating Elections*, 2013 S. Ct. Rev. 135, 138 (2014). In *Skidmore*, the Court ruled that the amount of weight owed to an agency’s interpretation depends on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” 323 U.S. 134, 140. Unfortunately for the EAC in this case, an evaluation of the Memorandum of Decision under *Skidmore* probably entitles it to little weight since it was issued by an official with dubious authority and is not “consisten[t] with earlier . . . pronouncements.”

218. *But see* *New Process Steel L.P. v. NLRB*, 560 US. 674, 696-97 (2010) (Kennedy, J., dissenting) (“Quorum provisions do not express the legislature’s judgment about the optimal number of members that should be present to transact business; they set a floor that, while less than ideal, provides a minimum number of participants necessary to protect against totally unrepresentative action.”) (internal quotations and page number omitted).

tions of their own rules under *Chevron*. If so, multi-member commissions would have greater latitude to solve the problems vacancies pose.

However, the fact that Congress expressly declined to extend the Vacancies Act to multi-member commissions suggests a floor for problem solving that agencies should be aware of when determining the precise dimensions of their sub-quorum performance methods. For example, the fact that “the President (and only the President) may direct an officer or employee of [an] Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity” probably forecloses internal member elevation in multi-member commissions.²¹⁹ Even so, agencies should be courageous in their attempts to combat vacancies; the de facto officer doctrine provides a valuable safe harbor even when courts invalidate specific operation schemes.

When preventive measures fail and courts are asked to intervene, finding a suitable remedy requires judicial creativity. Specific court orders, like a mandamus, may be ineffective given the nuances of an agency’s structural organization or factual circumstances. Still, others may succeed. For example, Judge Melgren’s order in *Kobach* was an imaginative iteration of the stayed judicial order that ultimately spurred the EAC to action.²²⁰ The Tenth Circuit’s ruling on appeal put practicality over formalism in allowing the EAC’s delegation to stand. New remedies may emerge as courts gain more experience with agency vacancies. As *Kobach v. EAC* plays out over the next few years — no doubt on its way to the Supreme Court — more answers may come.

VI. CONCLUSION

Agency mechanisms for anticipating and preventing vacancies come in all shapes and sizes. Some modify existing power structures, like extended-tenure provisions and “vacancy” clauses; some shift power within the agency, like board delegation and chairman-elevation provisions; and some, like recess appointments, rely on external officers to enter and accept power. While each of these mechanisms excels in different contexts, all are

219. 5 U.S.C. § 3345(a)(3).

220. It is even more remarkable, then, that Judge Melgren declined in his ruling to consider whether the EAC had power to act at all. See Memorandum and Order, *supra* note 173, at 7.

flawed. For that reason, though anticipatory provisions are widely adopted, there are no universal vacancy-prevention mechanisms.

Fifty years ago, the Supreme Court identified an integral aspect of agency quorum rules that remains relevant today:

The inconsistency in congressional treatment of quorum voting — sometimes allowing agency action on the concurrence of a majority of the quorum, in other cases requiring unanimous concurrence, and in several statutes saying nothing at all — refutes any suggestion that Congress has regarded the problem to be such as to justify a single rule for federal regulatory agencies.²²¹

Although that analysis referred only to quorum numbers, the observation is equally true of the statutory protocols that interact with the quorum rule. Indeed, Congress often phrases similar or identical anticipatory protocols in different ways. The absence of an across-the-board approach may represent a legislative judgment that preventing vacancies is not important enough to warrant consistent statutory treatment, or at the very least, not feasible. But with hyper-partisan politics and protracted vacancies here to stay, perhaps it is finally time for Congress to “regard[] the problem to be such as to justify a single rule.”²²² Going forward, Congress would do well to revisit quorum rules. Although agencies face certain constraints in the types of solutions they can devise, Congress is freer to supply workable answers.

Even so, uniform congressional amendments to authorizing statutes remain an unlikely outcome. If that is the case, Justice Jackson’s ominous warning in *Youngstown Sheet & Tube Co. v. Sawyer* that “[t]he tools belong to the man who can use them” will ring ever more true.²²³ If Congress cannot “prevent power from slipping through its fingers” in staving off agency vacancies, we may be forced to rely increasingly on courts to solve the problems vacancies pose.²²⁴ One commentator has opined that “litigation under current doctrine is a difficult and clunky mechanism for

221. *FTC v. Flotill Products, Inc.*, 389 U.S. 179, 189 (1967).

222. *Id.*

223. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) (“I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems.”).

224. *Id.*

trying to reduce agency vacancies. Even if legal doctrines shift to reflect empirical realities of agency vacancies, court challenges seem an unlikely mechanism for curtailing these vacancies.”²²⁵ That may well be true. But with the current level of sustained partisan blockage and the reluctance to compromise in Congress, courts should be prepared to be thrust into the position of helping fill the cracks in the administrative state. As *Kobach v. EAC* shows, they may be better suited to wield the “tools” than we — or they — think.

225. O’Connell, *supra* note 21, at 986.