BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAMIEN GUEDES, et al.,

Plaintiffs,

vs.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, et al.,

Defendants.

Case Number 18-CV-2988

Washington, D.C.
February 6, 2019
2:03 p.m.

FIREARMS POLICY COALITION, INC.,

Plaintiff,

vs.

MATTHEW WHITAKER, et al.,

Defendants.

Case Number 18-CV-3083

TRANSCRIPT OF PRELIMINARY INJUNCTION MOTION HEARING
BEFORE THE HONORABLE DABNEY L. FRIEDRICH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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-- continued --

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P R O C E E D I N G S

(Call to order of the court.)

THE COURTROOM DEPUTY: Civil Action 18-2988, Damien Guedes, et al., versus Bureau of Alcohol, Tobacco, Firearms & Explosives, et al.

Counsel, please come forward and identify yourselves for the Court.

MR. KRAUT: Good afternoon, your Honor. My name is Adam Kraut, and I represent the plaintiffs in the Guedes matter.

THE COURT: Good afternoon, Mr. Kraut.

MR. PRINCE: Good afternoon, your Honor. I am attorney Joshua Prince, and I also represent the plaintiffs in the Guedes matter.

THE COURT: Good afternoon, Mr. Prince.

MR. GOLDSTEIN: Good afternoon, Judge. My name is Tom Goldstein. I represent the plaintiff in the FPC matter that has been consolidated. I am joined by Daniel Woofter.

THE COURT: Thank you, Mr. Goldstein.

MR. SOSKIN: Good afternoon, your Honor. Eric Soskin with the Department of Justice. I represent the defendants in both matters. With me at counsel table is John Tyler, Caesar Lopez-Morales, and Mr. Hashim Mooppan, who will be addressing the matters in the Firearms Policy Coalition case. I will be addressing matters in the Guedes case.

THE COURT: Thank you very much.

We are here for argument on the plaintiffs' motions for preliminary injunction to enjoin the final rule on bump-stock devices that the Department of Justice published on December 26 of 2018.

I previously consolidated these cases involving the Guedes and Firearms Policy Coalition plaintiffs. As the parties know, the Condrea case, Case Number 18-3086, was recently transferred to me from Judge Contreras. It includes related claims and a motion for preliminary injunction. Briefing on the preliminary injunction motion is not yet complete, and I have not yet determined whether or when I will hear argument in that case.

But I would like to discuss, after I've heard argument on the motions, whether it makes sense to consolidate all of these cases. Although I know the Condrea plaintiffs are different than those here, many of the issues raised in the cases are the same or similar to those raised here. So at the conclusion of today's hearing, I will hear from counsel on both sides on that issue.

And as for today's argument, I understand that attorneys for the plaintiffs would like to divide the issues, and it sounds like the defense as well. I am fine with that. We have a lot of issues to cover here today. I am not going to set firm time limits, but do understand that court staff does have obligations. So we can't be here all night, unfortunately.

But here's how I would like to structure the order of

arguments. First, I would like to focus on the alleged APA violations, and I will start with the argument that ATF exceeded its statutory authority by promulgating the new bump-stock rule. After that, I would like to hear argument on the plaintiffs' arbitrary and capricious challenge. I understand that attorneys may be arguing separately the same issues, and I will just -- I hope you've divided it so you are not covering the same ground, but I will give you the chance, to the extent two attorneys are arguing the same issue, to do so.

All right. After we've done that, I will hear argument on the Whitaker appointment. And I will also give the parties a few minutes at the end to address any other issues that you would like to raise before me. There will be a lot to cover. I'm happy to take a break at some point if the parties like.

So with that, who will be arguing first for the plaintiffs on the APA challenge to ATF's interpretation of the statutory definition of "machine guns" and Section 5845 of the National Firearms Act?

MR. KRAUT: That would be myself, your Honor.

THE COURT: And you are Mr. Kraut?

MR. KRAUT: Yes, your Honor.

THE COURT: Mr. Kraut, let me just ask you at the outset, do you agree with me that in determining what the meaning of the statutory terms such as "automatically" and "single function" is, that I should look at the ordinary

meaning at the time the National Firearms Act was enacted, which is 1934, I believe?

MR. KRAUT: Yes, your Honor, and that was one of the points I was planning on making.

THE COURT: All right.

MR. KRAUT: So as we are aware, we are looking at ATF's interpretation of a statutory term that was adopted by Congress in 1934. There's a lot of case law that would suggest that ATF is barred from making that kind of interpretation, which they wish to do so. The Supreme Court said that it's a core administrative law principle that an agency cannot rewrite a clear, statutorily defined term. So when we have the term "machine gun" the way Congress enacted it and defined it, they said "the term machine gun means." And the Supreme Court has also said that as a rule, when a definition includes the term "means," it excludes any meaning that's not explicitly stated.

So when we are looking at this and we are looking at it under the National Firearms Act, the Gun Control Act that was later passed points back to that same definition found in the NFA. So we will just talk about the NFA, if that's okay with your Honor.

THE COURT: Sure. But you are not arguing that ATF doesn't have the authority to define terms within that definition that are not defined by Congress?

MR. KRAUT: I would submit to the Court that they don't have the authority to define clearly -- terms that have clear meaning, such as the term "automatically," such as the term "single function of the trigger." And we can look at things such as the legislative debate for the National Firearms Act to get an idea as to what Congress was intending, as well as definitions, as you had brought up earlier, in the dictionary at the time in which it was adopted.

THE COURT: But certainly, bump-stock devices did not exist back then; right?

MR. KRAUT: You are correct, your Honor. No, they did not.

THE COURT: So Congress had no idea when it was using the terms "automatically" and "single function" that it would be applied some day to bump-stock devices of the specific nature at issue here.

MR. KRAUT: I would agree that Congress did not have the foresight to think about what happened in the future as far as new inventions. Having said that, though, there's a number of instances where that holds true. And there is actually a quote I have here from a Supreme Court case that was decided last year which says that "Congress alone has the institutional competence, democratic legitimacy, and, most importantly, the constitutional authority to revise statutes in light of new social problems and preferences, and until it exercises that

power, the people may rely on the original meaning of the written law."

THE COURT: So was the Eleventh Circuit incorrect in *Akins* when it deferred to ATF's interpretation in that case?

MR. KRAUT: We would argue that we're not happy with that decision. However, the Eleventh Circuit ruled the way it did, and I would think if we're going to go down that rabbit hole as to the Akins Accelerator versus a bump stock, if we're going to compare the two and accept that for purposes of this discussion the Eleventh Circuit argument -- or decision, rather, is correct, then there is a very clearly delineated difference between the two devices.

THE COURT: I know. But for the larger point on whether Congress -- whether ATF can define terms in the Act that Congress hasn't specifically, it seems like the Eleventh Circuit deferred to ATF's interpretation. It seems like other courts have done so in different contexts involving business premises and other terms that are in the Act.

So I am just pushing back a little bit on your argument that ATF doesn't have the authority to shed further light on these terms that do have obvious meanings based on dictionary definitions, but yet, the way they're applied in certain contexts like here, there's some ambiguity. And does ATF not have the ability to further define the words in the definition that Congress enacted?

MR. KRAUT: Sure. And I would think to that point, there comes a limit. If we're going to agree that ATF does have the authority to define terms within the meaning of a defined term by Congress, so in the term "machine gun," if we're going to talk about "automatically" and "single function of the trigger," I would think that there comes a limit to the point of where we've gone so far past the intent of "automatically" or "single function of the trigger" that now we are outside the realm of ATF's authority to actually define those terms.

And I think that's what's happening in this instance. That's what I would submit to the Court anyway, that they've exceeded that authority that they may have.

THE COURT: All right. Do you disagree with ATF's definition of "single function" as single pull? Is that an argument you are making, or are you just disagreeing with whether there's more than a single pull in this case?

MR. KRAUT: Our argument to that point is that there is more than a single function of the trigger involved in the operation of a bump stock. So it puts it outside of that.

The easiest example that I could explain it with would be -- and I believe it's Exhibit 26. There's a video that was submitted that shows a M16, so an automatic machine -- a machine gun being utilized, and the individual shoots it with one hand. And in that video -- and I have the time stamp here. It's 19 seconds to about 42 seconds in that video. You will see that

the individual pulls the trigger to the rear, and the gun fires until it's exhausted all of its ammunition.

Alternatively, if you look at the video that we submitted, which was the video that shows the operation of a bump stock in slow motion from a couple different angles as well as just regular speed, the best I can compare it to in that video would be the second test, if you will, the one in the middle, and you can find that from 1:41 to 3:13 in there.

That one was fired with the stock unlocked so that it would slide freely on that buffer tube. And you will notice in the video, it's fired one-handed, and when the trigger is pulled to the rear once, it fires one round, and that's it.

So if we are going to go down that rabbit hole as to "automatically," it doesn't function in the same manner as a machine gun.

THE COURT: Okay. Let me back up. On ATF's definition of "single function of the trigger," ATF has defined it to mean a single pull of the trigger.

MR. KRAUT: Correct.

THE COURT: And I think other courts have done so similarly. Do you disagree with that definition?

MR. KRAUT: No, I would agree with that. A single function equates to a single pull.

Likewise, in their final rule, for that matter, they delineated the use of other devices out there known as binary

triggers, that a single function pulling it to the rear fires a round, releasing it fires a separate round, and they have said very clearly in the final rule that each of those is a separate function of the trigger. So you have two single functions occurring in that instance.

THE COURT: And back just to pure definitions, not the way in which they're applied here --

MR. KRAUT: Yes.

THE COURT: -- but do you disagree with ATF's definition of "automatically," which it defines to mean the result of self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger?

MR. KRAUT: If we are talking about it, just to make sure I understand, not as applied to this?

THE COURT: Not as applied, no.

MR. KRAUT: Then yes, I would give you that.

THE COURT: All right. Well, in defining "function," do you think it's reasonable for ATF to look at the actions of the shooter as opposed to the mechanical function of the gun?

MR. KRAUT: I don't. Again, if we go back to the definition of "machine gun" as adopted by Congress, it's strictly in relation to the firearm or its components.

THE COURT: But once you defined a single function as a single pull, aren't we looking at it from the perspective of a

shooter as opposed to the mechanical functioning of the gun?

MR. KRAUT: I suppose you could argue that, your Honor, but at the same token, if we are looking at a single function when we're looking at the mechanics of the operation of how the actual device works, if you remove the shooter from the equation and you just say that when the trigger is, you know, pulled and it starts the initiation of the firing sequence, what happens after that.

So I don't know if I would agree with you on that particular point. I think there is a delineated difference.

THE COURT: Okay. Go ahead.

MR. KRAUT: Okay. In that same vein, since we've kind of talked about the definition of a "machine gun" here, there's a couple other points that I would like to make. I think it makes sense for us to talk about the definition of a "semiautomatic rifle," which is also found in the Gun Control Act. The way Congress defined that was any repeating rifle which utilizes a portion of the energy of firing a cartridge to extract the fired cartridge case, chamber the next round, and which requires a separate pull of the trigger to fire each cartridge.

And again, going back to the operation of a bump stock, the video we did very clearly shows that you pull the trigger, it fires one round. It ejects the case, chambers another round, and until that trigger is pulled again, nothing happens.

So if we accept the ATF's definition as they're proposing it, now we run into the issue, well, are they eviscerating what a semiautomatic firearm is under the Gun Control Act. And I think that is something that the Court should consider when it looks at this.

THE COURT: All right. But is the trigger pulled in the sense that the shooter consciously pulls it, or is it simply bumping off the back of the finger that's setting on the ledge of the bump stock?

MR. KRAUT: That's a fair question. I would think -- I guess it would -- if you really had to get into the details, it would define what you mean by "pull" as to how the individual shooter is interacting with the firearm itself. I'm not sure I have a good answer for you there, your Honor.

THE COURT: Okay.

MR. KRAUT: The other point, then, or a couple other points would be simply that the government, the way they've now rewritten the definition, they've -- obviously, they've talked about "automatically," "single function of the trigger," but they also explicitly put in there that now bump-stock-type devices are covered under this definition of "machine gun." And I think what that indicates is that the definition of "machine gun" didn't previously encompass bump stocks, because now you have to explicitly say that.

Meanwhile, you have other decisions such as the Akins

Accelerator, for instance, out there, where the courts and even the agency was able to just take the definition as it existed and say that it applied.

So I think by delineating that it wasn't there or by adding it, they're kind of in some way admitting that it wasn't covered under that prior definition.

THE COURT: But do you -- are you arguing that it's inappropriate for ATF to go back to the actual language of the statute and the words in the definition of "machine gun" and actually try to determine what those terms mean as opposed to as they did historically? They had determinations such as what the Akins Accelerator -- initially, they determined there was a distinction because it had a spring or a mechanism inside.

MR. KRAUT: Yes, your Honor.

THE COURT: So one could argue that the approach that they used this round and actually looking at the words Congress enacted would be the more appropriate role, could you not, for ATF to look at the actual words and try to define those words and then apply it to the mechanism rather than creating --

MR. KRAUT: I would agree with you to a certain extent. Again, I think it goes back to what we discussed earlier as to where that line gets blurred and it's gone too far. If we are going back to self-regulating or self-acting mechanism, I think the very clear difference between a bump stock and an Akins Accelerator, for instance, is that the Akins

had a spring, and it didn't -- you would pull it to the rear, the trigger to the rear, and it would do its own thing. Where you could point to, okay, the spring is acting as a self-regulating mechanism or self-acting mechanism, rather, you do the same type of thing with a bump stock, and you get a single round fired.

So again, I think you get to a threshold as to it's a step too far.

THE COURT: Okay. So you would agree that some degree of manual input does not negate the automatic nature of an item like a firearm; right? Obviously, you have to pull the trigger; right? There's always some degree of manual input, and it doesn't happen by itself. And the question is, how much manual input is too much manual input?

Here, you have to pull the trigger. You have the trigger finger sitting on a ledge on the bump stock. That, to me, seems akin to what happened with the Akins Accelerator. You've got that manual input that seems pretty close.

The real distinction here, of course, is that the non-trigger arm is putting outward pressure on the barrel, and that's the real distinction here; correct?

MR. KRAUT: I would submit to you that if we are talking about a person's input, it's pulling the trigger one time, and that's the extent of it, especially when we are looking at machine guns as they were -- especially in 1934 as

they were commonly understood to operate. Machine guns, you would pull the trigger to the rear. Ammunition would be exhausted in the magazine, belt, whatever it was, and that would be the end of it.

I think when you start getting into distinguishing it as to, okay, well, now there's additional input from the individual utilizing it, we're kind of getting away from what, by definition, was a machine gun.

THE COURT: Let's focus on the trigger finger.

MR. KRAUT: Sure.

THE COURT: The difference here is it sits on a ledge; right? But there's no conscious effort on the shooter's part to pull it multiple times. It's sitting on a ledge, and it's -- correct me if I'm wrong. I'm trying to understand.

MR. KRAUT: I'm trying to follow along with you, your Honor.

THE COURT: But there's no conscious additional pull of the trigger. It's a single motion by the shooter, constant pressure on the trigger that then produces the repeated resets; correct?

MR. KRAUT: There is the issue with constant pressure on the trigger, because unlike a machine gun -- again, it's depicted on the video as to the operation of a bump stock. Every time that that was fired in the capacity where it operated is what's really at issue here. Trigger finger was removed from

the trigger by up to, I would say, a half inch. I don't want to give you an exact measurement, but every time that that happened, the trigger finger left contact with the trigger itself.

THE COURT: And again, that's not because of the shooter's conscious effort to do that; it's because of the what? Answer it for me. I'm looking for guidance here.

MR. KRAUT: Sure. I would say that because the buffer tube slides freely within the stock itself. Now, that same exact effect can be done without the use of a bump stock. We've submitted many videos as well as to individuals being able to do it not only through the use of belt loops or what have you, but also just with their own two hands.

So I don't think in that regard that's anything unique to the device at issue itself. It just might happen to make it a little easier, if you will.

THE COURT: Okay. So you have a problem with both the pull of the trigger and the outward pressure; correct?

MR. KRAUT: Yes, your Honor, yeah.

THE COURT: What about, as just one analogy -- I know the government has thrown out the car, which I will talk to them about, but let's say like a sewing machine, operates in an automatic way, but the sewer has to put the foot on the pedal and then also has to manipulate the fabric to use it a certain way.

You would not say that's an automatic --

MR. KRAUT: I would -- I didn't mean to cut you off, your Honor. I would think that if we are talking about the sewing machine as far as the operation of the machine itself without utilizing the motion as to direct the fabric through it, putting your foot on the pedal, pressing down, and the machine doing its own thing, I would agree with you that that's automatic.

I think --

THE COURT: So how is this different?

MR. KRAUT: I think that you're kind of comparing apples and oranges with that, because if we're talking about, again, the machine's operation, I would point to it being like the machine gun in Exhibit 26, where foot is on the pedal, machine goes. Finger's on the trigger, pulled to the rear; machine gun goes until it's out of ammunition. The sewing machine, I guess the comparable analogy would be until you're out of thread, until you're running out of the direction it's going in automatically.

If you're getting into returning the fabric on the machine, again, I think that it's -- I'm not sure that they're directly comparable in that vein.

THE COURT: Okay.

MR. KRAUT: The other point that I would bring up here, the other one anyway, and then I will let Mr. Prince

address the other issues in front of you, the Supreme Court in *Staples v. United States* said that the terms "automatic" and "fully automatic" refer to a weapon that fires repeatedly with a single pull of the trigger. That is, once the trigger is depressed, the weapon automatically continues to fire until the trigger is released or the ammunition is exhausted. They're saying that such of those are machine guns under the Act.

And then we had also in our brief submitted *Olofson*, *U.S. v. Olofson*, where they're talking about -- again, going to your point as to the definitions that were in existence at the time.

With that, unless you have any other questions, your Honor, I will defer my time to Mr. Prince.

THE COURT: Nothing more. Thank you.

MR. KRAUT: Thank you, your Honor.

MR. PRINCE: Good afternoon again, your Honor.

THE COURT: Good afternoon.

MR. PRINCE: May it please the Court. I am going to real briefly discuss several of the procedural issues, because I believe they quasi relate to the arbitrary and capricious aspect of some of the final rule.

THE COURT: Can we get into that after I have heard from the government on the definitions? I want to hear all that, but I think it would be helpful, while my mind is fresh, to hear the government's response on the definitions.

MR. PRINCE: That's perfectly fine, your Honor, because we believe our briefs have really already addressed those issues. I don't want to take up more of the Court's time than is necessary, because we do believe that, especially in the reply brief in relation to the arbitrary and capricious nature of the final rule, the analytical video is the key evidence that demonstrates that it is not what the government contends, that a bump stock does not all of a sudden cause a semiautomatic rifle to become a machine gun. Because if we do allow that premise to stand, we have now not only eviscerated the definition of "machine gun" that the Congress enacted, but now we're going to eviscerate the definition of "semiautomatic rifle" that the Congress enacted.

So in looking at the analytical video, we actually put the second markers for the Court in reference to that video so that the Court can see how the trigger is depressed, the action cycles. You see the ejection of the empty casing eject out. You see then in the one picture the bolt moving forward. We did it from both sides so the Court could see what's happening on both sides of the firearm. And you see the finger lose contact, as the Court's already aware, with the trigger, move about a half inch in front of it, and then come back in contact.

Also, as Attorney Kraut had mentioned, we have shown prior to that that shooting it one-handed in the identical fashion with the stock unlocked does not cause it to fire more than one

round.

So even if the Court were to say that it's in some sense user input, that isn't true either, because when we look at the mechanics of it, the user input, pulling the trigger in that scenario shows that only one round does fire and that the mechanism does not self-actuate or in any way, shape, or form automatically operate.

And so I truly believe that that Exhibit 28 to the complaint, which is actually within Exhibit A to the complaint because Exhibit A was the entire comment that was submitted during the rulemaking process, really depicts that.

It also depicts the fact that there is no self-acting or self-regulating mechanism. In fact, there's no mechanism whatsoever, and the government admits that in their brief. There is no mechanism in the stock. Now what they want the Court to believe is nothingness, absolutely nothing, the air space is a mechanism, and that is a step way too far.

THE COURT: But isn't it more than space? Doesn't the bump stock help channel the recoil energy along a straight line and a certain distance, and isn't that important in assessing whether it's automatic or not?

MR. PRINCE: But that's not what the government's argued. They've argued specifically that in relation to the self-acting and self-regulating mechanism, that it's now the space that is, in essence, the mechanism. And we had cited to

that in our reply brief. So we don't believe that now the government can try and contend something else.

THE COURT: But implicit in that -- I mean, it's not just space. It's space that's defined by this apparatus that keeps it moving through the space in a certain way.

MR. PRINCE: Once again, when we look at the video doing it one-handed, it doesn't operate that way.

THE COURT: Clearly, you need the other arm doing --

MR. PRINCE: Well, then --

THE COURT: Which makes it, I agree, much, you know, more manual input. And my question is, at what point is too much manual input too much to be automatic? And that's the real crux of this case.

MR. PRINCE: I think then it becomes the question of whether the person is actually the machine gun, and how are we going to contend with that. Because now if we're saying for it to operate automatically it has to be the person who actuates it, we're talking about every single person in the United States and throughout the -- through the world as being a machine gun, if that's the rabbit hole we're going to go down. And that's why this is so arbitrary and capricious.

This needs Congress to act. As Attorney Kraut had previously relayed to the Court, in a case that was not in our initial briefs, the U.S. Supreme Court has already acknowledged that and acknowledged, as he correctly stated, that when these

issues arise, it is for the Congress -- and that case was *Wisconsin Central Limited v. United States*, 138 Supreme Court 2067, and it comes at page 2074.

And I will just real quickly recite what the Court said. "Congress alone has the institutional competence, democratic legitimacy, and, most importantly, constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law."

In our brief, we've documented the government in this case concedes that when the Congress enacted the National Firearms Act, it was intended to be a narrow area of law and of firearms that were covered by it. They admit that absent the expansion that they are proposing in the final rule, they cannot regulate bump stock in any regard. They admit in their brief that they lack the authority to expand the definition. Yet, in that same brief, they admit they're expanding the definition.

THE COURT: To be fair, they say they're clarifying.

MR. PRINCE: We cite where they say they're expanding it. It's an expansion.

THE COURT: It's an expansion from where they were in their earlier interpretation; right? They narrowly interpreted it to only apply to Akins Accelerator, and now they've expanded their interpretation more broadly.

MR. PRINCE: But if we allow administrative agencies

in general now to redefine every term within a definition that Congress enacts, there is no meaning to anything Congress enacts, because an administrative agency can come in and say, well, "the" doesn't really mean "the" anymore, "shall" doesn't mean "shall."

And we see that with the procedural issue. They're contending "shall" now means "may." And I know we will touch on those later.

But I think it's important, when we look at the totality of the circumstances before the Court, that this is an administrative agency that found through multiple letters, of which they won't even produce to us -- we submitted an expedited FOIA March 30th, 2018, for all of the information. Under FOIA, within 10 days they had to respond. Today, we are 313 days since the submission of that, and guess what? Government hasn't responded at all.

We believe the Court should take an adverse inference to that, because it seems clear that they're trying to hide something, not only from us but from the public. What are these other determinations that exist out there, and do they conflict with what the government's contending here? We believe so, because why else is there this secrecy surrounding it? What's the big issue?

They admit in the final rule that they rely on these rulings. Yet they won't publish them, they won't make them

available. What else do those rulings say? What about the rulings that they don't rely on in the final rule but which have an interplay or relationship to the issues that now this Court has to address.

THE COURT: Did they concede that any of those earlier rulings actually defined "single function" and "automatically"?

MR. PRINCE: They have not conceded that, your Honor. However, we do not know what all determinations exist. That's why we filed the Freedom of Information Act during the pendency of the rulemaking. Two days into the rulemaking, we filed the Freedom of Information Act saying, look, government, you failed in producing these in the docket like you have to; we're trying to mitigate that harm, fix that harm for you; we're submitting a FOIA; we want this information.

And how does the government respond? They ignore us. 313 days, 31 times the amount that Congress dictated that the agency has. They haven't even assigned a control number to it that they've relayed to us.

What is in those documents?

Your Honor, I believe the only other aspects that have already really been touched on by my counsel, co-counsel, are the issues of "automatically," and we've already touched on them. We've already touched on the fact that there is no real mechanism here. The government concedes that.

We have also pointed out in our reply brief that the

government states that it requires additional manipulation of the trigger. They admit that our bump stock video shows that. But in the final rule, it's premised on the fact that there is no additional physical manipulation of the trigger. Manipulation of the trigger is a very broad explanation for what's occurring there. And they say that that is required for a bump stock to meet this new definition. Yet it doesn't. We can see that all very clearly in the video.

The other aspect that the Court already addressed with co-counsel Kraut was that there isn't -- in the government's argument, there has to be constant rearward pressure on the trigger. And again, the analytical video shows that that is not the case, that there is a loss of contact with the trigger, and therefore, it is not like the machine gun in Exhibit 26 where you pull the trigger, it's pulled to the rear, and it continues to operate until either the user releases the trigger or all the ammunition is depleted.

So with that, I believe those are really the issues regarding arbitrary and capriciousness, other than the procedural issues that we will address when the Court is ready.

Thank you, your Honor.

THE COURT: All right. Thank you, Mr. Prince.

Mr. Soskin, are you arguing initially?

MR. SOSKIN: Yes, your Honor. As long as we're hearing from the Guedes plaintiffs and their counsel, I will be

representing the United States.

THE COURT: All right.

MR. SOSKIN: Having heard the exchange between the Court and plaintiffs' counsel, I think it would behoove us to just take a step back here and think about the operation of a bump stock in the big picture.

What does a bump-stock-type device do? It permits -- as you saw in plaintiffs' videos, it permits a shooter of ordinary skill to operate a -- to operate a firearm in a race with the self-proclaimed world's fastest shooter and accomplish the same results. How does it do that? By supplying the mechanism that lets that shooter operate what was previously a semiautomatic rifle automatically, by taking manual components of that process out, by taking the individual initiative and thought going into a single pull of the trigger out, and it thus allows the ordinary -- of the ordinary skill, the ordinary shooter to shoot must faster.

That's the type of "automatically" that Congress relied on in the text at the time and in its purpose in adopting the definition it did in 1934. And that's why the government has operated within its statutory authority in promulgating the rule.

THE COURT: All right. Let me stop you there. You talk about the manual inputs that the bump stock takes out. One is the multiple conscious pulls of the trigger by the shooter.

What else?

MR. SOSKIN: When an individual attempts to bump fire on his or her own, he or she faces the challenge of ensuring that the recoil doesn't take the shooter's finger or the firearm so far away or in such a direction as to make it more difficult or difficult to engage in a subsequent pull of the trigger.

And what the bump-stock device allows is by limiting the space that the firearm can move, that it can reciprocate on, in some models, the tube that plaintiffs' counsel was describing and other models what I understand to be essentially a constrained space, as your Honor and Mr. Kraut discussed, it allows the shooter not to have to determine, delineate that space of recoil, to find the appropriate amounts of pressure, or it simplifies the process of applying the appropriate amounts of pressure to attain that reciprocating fire that you see illustrated in the video, that fast rate of automatic fire.

THE COURT: And the fact that the shooter has to keep this outward pressure on the barrel, is that not a manual input that just takes it a step too far from being automatic?

MR. SOSKIN: It does not, your Honor. The statutory text talks about a single function of the trigger. The interpretation that ATF has put on it for the last more than 10 years now, the interpretation that was affirmed by the Court in the *Akins* case of single pull of the trigger, likewise is focused on the shooter's trigger hand, not on what's going on

with other parts of the firearm.

THE COURT: Let's talk about Mr. Prince's point on the trigger finger, that it actually doesn't keep continuous contact, that there's actually space between the trigger and the finger and, thus, there are multiple pulls.

MR. SOSKIN: That's right, your Honor. Obviously, we cannot dispute what you see in the videos of its operation. And in fact, my understanding is that for it to mechanically function, the trigger finger is going to have to cycle a little further than the trigger would -- the trigger has to move beyond the reset point in order for it to reset and initiate the next fire.

But their view is an objection that's based on their interpretation of function of the trigger, a very trigger-focused, function-focused interpretation. If the focus is, as we have for more than 10 years held and as Courts have affirmed, on the pull of the trigger, then the fact that that pull continues both on and off of the trigger, that that single volitional act doesn't end when the separation occurs between the finger and the trigger is of no relevance.

Turning back to the question of the other hand, however, plaintiffs make much out of this -- the portion of the video that shows an attempt to fire a bump-stock-equipped machine gun with one hand. And they say, look, it doesn't fire with one hand; therefore, it's not a machine gun.

But nowhere in the statutory definition of "machine gun" is there a requirement that a machine gun be fired only with one hand. And in fact, many machine guns cannot even realistically be fired with two hands. One needs some kind of a fixed mount in order to keep it steady.

If Congress wanted to limit the definition of "machine gun" to a weapon that could only be fired with one hand, it could have said so, but it did not. And that doesn't interact with our interpretation here.

As Mr. Kraut noted, they don't actually disagree with the agency's definition of "single function of the trigger." They don't actually disagree with the agency's definition of "automatically." So the question here only becomes whether, in applying "single function" and "single pull of the trigger" and "automatically" here as the final rule defines them, a bump stock falls within that definition or not.

THE COURT: Okay. What about the second hand, not just the fact that it requires two arms, two hands, but also requires the added pressure?

MR. SOSKIN: The added pressure likewise is not directed to the trigger. It's added pressure that is directed to the firearm as a whole.

THE COURT: But without it, it won't work automatically.

MR. SOSKIN: That is true. It is an element of manual

input. But "automatically" and the definition of "automatic" does not require that the machine gun become a Roomba and operate by itself.

In fact, no machine gun operates that way. Every machine gun requires some amount of manual input. The shooter has to pull and keep pulling on the trigger. The shooter has to direct where the weapon is going. These are highly manual firearms, your Honor. And the presence of the second arm, and even the application of pressure by the second arm, whether you're using that to engage in bump firing or whether you're -- with a bump stock, or whether you're using that to direct and aim the firearm or to make sure that, as a lot of people discover their first time with an automatic weapon, the muzzle doesn't just rise and start dinging rounds into the ceiling, that doesn't make it -- that doesn't defeat the automatic nature of the weapon.

THE COURT: So why doesn't the rubber band example, why isn't that equally automatic?

MR. SOSKIN: Your Honor, we addressed the rubber band and belt loop examples in our brief. The difference is simple. Those are not items that are designed to turn a semiautomatic rifle into a machine gun.

THE COURT: But the statute doesn't have any sort of everyday exception in it for machine gun.

MR. SOSKIN: The statute includes in its definition

the combination of parts to make a machine gun. So it's possible that if you were to permanently attach a rubber band to a machine gun in some sort of way, you might actually be making a machine gun out of the combination of the semiautomatic rifle and the rubber band. But simply rubber bands that are designed for some other purpose independent of a machine gun, you know, certainly do not make one.

THE COURT: So I misunderstood ATF's position on this. ATF's position would be that if there's a rubber band attached to the semiautomatic weapon, that it is automatic? I thought ATF was drawing a distinction between the automaticity of the rubber band and the bump stock here.

MR. SOSKIN: Our position, I believe, is that the rubber band on its own is not a machine gun.

THE COURT: Well, clearly.

MR. SOSKIN: The fact that you are selling rubber bands. If you were to go out and sell a semiautomatic -- what was a semiautomatic rifle with a rubber band affixed to it in a way that turned it into a mechanism that qualified it under this final rule, the semiautomatic plus rubber band might well be.

THE COURT: Might? What is ATF's position on this? What if you have a closet full of semiautomatic rifles and your box of rubber bands there that can be assembled to create this automatic -- would ATF agree that would be an automatic machine gun?

It's unclear from your position here. I thought ATF's position was no, that's different because there are more manual inputs that are required with respect to a rubber band than there is with respect to the bump stock here.

Have I misunderstood your position?

MR. SOSKIN: Our position, your Honor -- and we, obviously, don't have this exact situation confronting us and haven't made a classification determination on it under the new rule, but I don't think a box of rubber bands and a closet full of semiautomatic rifles would get you there.

If you had, though, some arrangement by which, you know, there may be a snap piece or a set of buttons and a clip that permitted you to directly mount your rubber band in a manner akin to how a bump stock, you know, can be directly mounted as a replacement stock or a supplemental stock, that might require a different outcome.

I don't think we can prejudge how those classification decisions would be reached until we see --

THE COURT: Okay. But just to be clear, in terms of function of the two, putting aside whether there's enough evidence that that's what the purpose of the rubber band is being used for, putting that aside, the way in which the rubber band operates and the way in which the bump stock operates, if it's all attached to the machine gun in the proper way, is it equally automatic? Is that what you're saying?

MR. SOSKIN: Your Honor, I'm not familiar enough with how the rubber band is used to facilitate bump firing and how it gets, you know, attached in that circumstance. I've seen the belt loop model, and that, I think, doesn't get you there.

THE COURT: No, I agree with you, but the rubber band is harder.

MR. SOSKIN: You know, I think until we -- I don't think we are in a position to come out and give an advisory opinion on what the agency might decide to do with a particular rubber band.

One of the problems --

THE COURT: Wait. Just to be clear, I'm not asking for that. I just understood -- and I need to review the record, but I just understood that ATF's position with regard to rubber bands was not simply that they're used in these other ways, but rather that there's a distinction to draw and that that's in the record. But if you're telling me that it's not, it's not. Maybe I'm incorrect.

Can you check on that when you sit back down?

MR. SOSKIN: Sure. I think I understand your question a little bit better. Our understanding is, we were responding to an argument by plaintiffs that the final rule would require us to classify rubber bands in general as machine guns and that if we failed to say the rubber bands being sold at your local CVS are -- if we failed to say that those are machine guns, that

would be arbitrary and capricious because we're drawing a distinction between a rubber band in isolation and a bump stock in isolation.

And to the extent that our brief wasn't clear that we were arguing only about the question of whether we could distinguish rubber bands in isolation, I think that's as far as our argument was intended to go.

THE COURT: All right. Do you have any additional arguments on the definitions?

MR. SOSKIN: Yes, your Honor. I would also like to address the question regarding the movement of the shooter's finger, because I think this came up in your dialogue with Mr. Kraut, that when the -- you know, when the trigger is being bumped into the shooter's finger, there may be some amount of motion in that finger, not just a separation, and whether that comprises a separate pull.

And, you know, in preparing for this argument, you know, I do have an analogy for this one that doesn't quite make its way into our brief.

THE COURT: Did you go fire a bump stock?

MR. SOSKIN: I have in the past, your Honor, but not since these cases were filed.

THE COURT: I'm ready for a field trip, by the way.

MR. SOSKIN: That's interesting, your Honor. In one of the other cases, there has been a motion for a field trip.

THE COURT: Oh, okay. I'm kind of joking.

MR. SOSKIN: I think when you review in slow motion the operation of the movement of the finger that you're looking at, it's much more akin to a reflexive movement like shivering as opposed to a conscious voluntary act.

And that's really why those minuscule movements of the finger that result -- that come about as a result of the trigger being bumped into the shooter's finger do not comprise separate pulls and are not evidence of separate pulls. The shooter is still not thinking, okay, we're going to initiate another firing cycle with a separate pull.

THE COURT: So again, you're looking at this solely from the shooter's perspective? There's no conscious effort on the shooter's part? This is just happening as the trigger bumps against the finger; it's pushing it away?

MR. SOSKIN: Right. If we look at the 1934, you know, meaning of "pull" and "function" and "automatically," as we describe in our brief, it's fully consistent with those meanings, as well as, you know, the apparent and quite obvious automatic functioning of this device when installed as a part of a semiautomatic firearm.

So I believe I've addressed all of the issues that plaintiffs discussed here regarding why the department would not have authority to engage in -- to engage in the rulemaking. There are some other issues that they raised in their brief,

but, you know, our briefs, you know, address those directly as well.

I did want to highlight Mr. Kraut's answer with regard to the Akins device and the *Akins* cases, because I think he was asked directly whether the *Akins* decision was wrongly decided.

Of course, the Akins Accelerator involved a spring that really is indistinguishable in terms of its mechanical operation. It's a different kind of device. But in terms of the way that it channels energy, it's really indistinguishable from an ordinary machine gun that we all agree is encompassed within the definition.

Mr. Kraut said that he's not really happy with that decision, but stood short of saying that we should walk that back. Well, if he is committed to the positions that plaintiffs have taken here, that the agency doesn't have authority to interpret the undefined terms in the statute, then there would be a different outcome in the *Akins* case, and the agency would not have the authority even to take plainly energy-storing devices like the Akins Accelerator and say you can't use that storage of energy to operate the trigger of a firearm, and so we have no choice but to permit even these much more obviously machine guns out in unlimited numbers. That's the meaning of what would be required before Congress acts.

Turning finally to the *Wisconsin Central* case that plaintiffs have cited -- have cited twice here, I think there

are two key words in that quotation that they keep reading, and that explain why it is that the exercise of authority by the department here is proper.

What *Wisconsin Central* is talking about is the agency's ability to, quote, revise statutes. Here, the Department of Justice has not revised the statute. It has provided interpretations of two terms Congress left undefined. That's a noncontroversial administrative law position, that the agency has the authority to define those undefined terms.

And then it has added only to its regulatory definition, not to the statutory definition, a sentence that clarifies how the statutory language, as interpreted by the definition of those two undefined terms, applies to some very common, very widely or widely purchased devices, the bump stocks that people naturally in the wake of the final rule will be asking questions about how it applies to.

And that's why the clarification in the ATF's regulation, the regulatory definition is also appropriate and within the agency's authority.

THE COURT: Okay. Thank you. Is Mr. Mooppan also arguing this point? No? All right. Thank you, Mr. Soskin.

Mr. Kraut or Mr. Prince, do one of you want to respond and then also address any other arguments you want to make with respect to whether ATF's actions were arbitrary and capricious?

MR. KRAUT: If I may have just a moment of the Court's

time, I will be brief, and then if Mr. Prince has anything, but I will try to keep it short for your Honor, because I know there's other arguments to get to.

One of the things that Mr. Soskin had talked about here was the finger coming off the trigger in order to get it to function -- when we are talking about the operation of a bump stock and that it was his understanding that the finger has to come further off.

Just for the Court's clarity real quick, the way a trigger works, particularly in an AR-15, there's three components to the trigger, not including the pins or the springs. You have the trigger itself, which is the part that you pull on. You have the hammer, which is inside, which is what goes forward and hits the firing pin in order to shoot the gun, and then you have what's called a disconnector.

So the way these all work together is when the trigger is pulled, hammer strikes the firing pin, comes back. Disconnector grabs onto the hammer. As long as that trigger is pulled to the rear, disconnector keeps the hammer in place so that it doesn't go forward and start another round going down the barrel. When the trigger is released, the hammer then is cocked in the locked position and is actually at the bottom of the front of the trigger on the inside of the firearm, caught there until it's pulled and released again.

So I am just trying to paint a mental picture here as to

the operation inside the firearm as to how all that works.

So if we are going to go down that road, I would submit that, again, a single function of the trigger, well, it releases the hammer and then it gets caught again, and that's where that kind of goes there.

The government brought up the firing of the bump stock one-handed in the video that we had submitted as Exhibit, I believe, 28. And the purpose of that was to show that single function of the trigger equates to one round there. That goes back to just how I explained the operation of the trigger, to show that single pull equals single round there.

The last point I'd bring up real quick for you, your Honor, is that the Akins Accelerator, as far as it being indistinguishable from the operation of the machine gun, what ATF did in relation to that specific device was they said as long as you remove the spring, you can keep the stock that it's in.

So it would seem that the stored energy of the spring really gets to that automatic nature of what they're describing. That's kind of what I had tried to allude to earlier, if I didn't outright say it.

With that, I will -- I believe I will allot any extra time to Mr. Prince here.

THE COURT: All right. Thank you.

MR. PRINCE: Your Honor, just a point of

clarification. I'm not sure if the Court wants to yet go into the procedural issues at this point.

THE COURT: Yes, I am ready.

MR. PRINCE: You are? Very well, your Honor.

Again, I will be brief, as we've detailed these especially in our reply brief based on admissions even that the government has made.

The first one is the failure to provide the underlying documents. I've already touched on that. So I'm not going to waste the Court's time. I will just quickly cite to the D.C. Circuit's decision in *American Medical Association vs. Reno* where it says the APA, quote, requires the agency to make available to the public in a form that allows for meaningful comment the data the agency used to develop the proposed rule.

Here again, we even went so far as to ask ATF -- we put them on notice, you didn't put any of the underlying documents in the docket during the rulemaking --

THE COURT: But by "underlying documents," are you talking about more than just their prior rulings?

MR. PRINCE: We're talking about whatever prior rulings they issued regarding even single function of the trigger, anything that relates to what the agency was seeking to do and define had to be placed in the docket so that the public could see everything and actually have a meaningful opportunity to comment.

Again, I go back to, what's the secrecy here? Why are we, you know, not disclosing these things? And we even gave ATF a heads-up about their failure to do it, and they still didn't want to mitigate the harm.

THE COURT: It sounds like previously the government really didn't do any legal analysis, and the legal analysis is what's driving this do-over.

But are you arguing in addition to wanting that, those prior -- I don't know what you would call them -- opinions, but there's actual data that you think informs this decision that they did not provide as a part of their record here? Specifically, what is that?

MR. PRINCE: In the final rule -- and we do cite to this in our reply brief -- they specify a whole host of decisions where allegedly they talked about single pull of the trigger that were again never put forth, and we don't know to the extent that decisions by the agency exist contrary.

Also, I would argue to the Court that realistically, this was not an unbiased review of what the Congress initially enacted in the National Firearms Act. In the government's brief, they admit they were directed by President Trump to ban bump stocks. We have the evidence showing that President Trump stated he would ban bump stocks. And in their brief, they admit they carried out the directive.

That is not the informed, reasoned decision of an

administrative agency that looks at all the evidence impartially and makes a determination. They did that before. There's over 10 determinations where apparently the agency is incompetent to properly make determinations. That's what they want us to believe. And now all of a sudden, they had an epiphany. All of a sudden now, oh, wow, there's all these other terms there that we haven't yet had opportunity to define, and now based on a presidential directive, well, we're going to take those terms and define them as whatever we want to carry that out.

THE COURT: Didn't they start looking at this well before the presidential directive?

MR. PRINCE: No. In fact, we have that in our brief. President Trump directed before the directive was issued that he would ban bump stocks. It was thereafter -- on Twitter. And we have the links in our reply brief and were submitted during the comment period. That was before the comment period even started.

So we know that this was a directive from the president, not the unbiased decisionmaking that an administrative agency is supposed to perform. And if we are going to give ATF some form of deference based on their prior determinations or this determination, we know of at least 10 or 11 prior determinations that are opposite to it.

We also know and discuss in our reply brief that agency leadership -- the government admits agency leadership within ATF

found the opposite. Agency leadership hasn't changed. The only thing that's changed is a directive from the president.

THE COURT: I think what they've argued is that they started looking at the undefined terms in the definition, and that's why the result is different.

MR. PRINCE: But that's where we go down the rabbit hole. If now an administrative agency can redefine every single term that the Congress defines --

THE COURT: Congress did not define the term "automatically" and did not define the term "single function."

MR. PRINCE: Because it was understood. In fact, in the Congressional debates that we do cite to again in our brief and our exhibits to the comment, we do know what the Congress believed, and the Congress said it's where you pull the trigger all the way to the rear and it depletes the ammunition. Any time the trigger is released, reset, and repulled, that is a semiautomatic firearm. That is not intended to be included. And that's from 1934.

So we know that -- ATF has even admitted that it's intended to be a narrow area of law affecting certain firearms, and yet, they're broadening it.

The same is true with "single function of the trigger," and again, we cite to this in our reply brief. They say, yeah, we could have "single function of the trigger" that is a narrow

definition, but instead, we're deciding to interpret it broadly as single pull so that it encompasses a whole bunch of other ways in which one could operate a firearm.

Again, it runs directly contrary to what they've admitted was the intent of the Congress. This rests solely with the Congress to change if the Congress sees fit. Again, in our brief, we document even Senator Feinstein said ATF does not have this power; this rests solely with the Congress; we need to take action if there's going to be any action. And yet, that's not what occurred.

Now, moving on to the failure to provide a 90-day comment period. Once again, we have an admission from the government that yeah, there were technical difficulties; it was 85 days long that people could electronically submit comments. 85 isn't 90. They had an opportunity to mitigate this harm immediately. They could have immediately filed a notice in the Federal Register extending it for the time that there were technical difficulties, and this issue wouldn't even be before the Court. They could have notified the individuals who were precluded from being able to file comments during that period. They didn't.

THE COURT: Can you explain how that failure prejudices you, the five missing days?

MR. PRINCE: Because the Congress enacted a statute that says in 926(b) that the comment period shall be 90 days.

THE COURT: I know. But are you conceding there was

no prejudice to you?

MR. PRINCE: No, we do believe --

THE COURT: I think Courts do look at that in determining --

MR. PRINCE: Again, and we did document this in our brief, we believe there were individuals who were precluded from being able to submit comments and were led to believe that the comment period was closed, because that is the statement that was on the government website.

THE COURT: And they otherwise would have submitted something that never was a part of the record that's different than what's already in the record?

MR. PRINCE: Correct. And none of us have --

THE COURT: Specifically, what? Can you give me an example of what's --

MR. PRINCE: I don't know what another person would have submitted, your Honor.

THE COURT: Well, then how can you say it would not be harmless, given that there were tens of thousands of comments that were received here? Is there something unique that didn't get into this record as a result of that five-day lapse?

MR. PRINCE: That, I don't know, your Honor. Off the top of my head, I don't know of a specific issue, but that doesn't mean that there weren't individuals that did have issues that I haven't thought of that were important to them. And even

if it was a duplicative argument, they still had a right to be heard. That's why we have a requirement to have a 90-day comment period.

And this could have easily been addressed by ATF mitigating the harm by simply extending it by five days back then. They knew it happened. It's their own fault. And it's no different for any other administrative agency that they could have corrected it. But they chose not to, and instead, now it becomes an issue for the Court.

The other issue that ties hand in hand with this and is found in the same section, 926(b), is the failure to provide a hearing.

THE COURT: Hasn't the Fourth Circuit addressed this issue? I know it's not binding on me, but hasn't the Fourth Circuit looked at 926 and said it does not require an oral hearing?

MR. PRINCE: That is what the Fourth Circuit said. We don't believe that's a correct interpretation, because now it eviscerates what the Congress's intent was in saying that there shall afford interested parties opportunity for hearing before prescribing such rules and regulations. So basically, we're going to wipe that whole Congressional statement out. We're just going to put blinders on and not care.

The government concedes that not only did our clients request a hearing, but there were others as well. And we have a

plethora of issues that the agency never addressed in the final rule. They admit that. They acknowledge in relation to the statement on the Federal Register that the comment period was closed, but yeah, the final rule doesn't address that. They put that in their brief.

We also have the fact that they never once in the final rule address our analytical video, nor any of the other videos. We were prepared to have our expert, Richard Vasquez, down there for the hearing so that we could go over all of this. We could address issues like single function of the trigger, automatic, how, if there is, any differences between rubber bands, belt loops, and people's fingers and bump stocks.

You also heard, as Attorney Kraut raised, the fact that ATF has allowed all users of Akins Accelerators to continue to possess the stock, which is now functionally no different than a bump stock. All they required was for the individual to either turn in the spring to an ATF field office or to cut it in half. What about all those Akins Accelerators now?

This is the rabbit hole that we find ourselves going down because the agency is trying to carry out a directive from the president that does not belong with the agency. This is solely within the purview of the Congress. And if the Congress wants to act, it is within the Congress's authority to act.

Yet, what have we seen? We've seen Congress not take action, after we've even had the current acting -- Thomas

Brandon for ATF, the acting director, state to Congress, yeah, look, my agency does not have the power to regulate bump stocks. It was only after that directive that all of a sudden an epiphany occurred, whereby they now all of a sudden had authority to regulate bump stocks.

THE COURT: So back to the Akins Accelerator, you said that ATF requires the springs to be destroyed or removed. What remains? The stock?

MR. PRINCE: The entire stock.

THE COURT: Which -- does it function like the bump stock here?

MR. PRINCE: That is my understanding, your Honor.

THE COURT: It creates a space just like this?

MR. PRINCE: The spring sat in the space. But those are okay. Even when -- before this occurred, ATF reviewed the situation, and there are the letter determinations stating -- not determinations, but actually statements by ATF telling Akins Accelerator owners you just have to destroy the spring or turn it in to the local field office.

THE COURT: So is it essentially like a semiautomatic --

MR. PRINCE: So are bump stocks, your Honor. No different.

THE COURT: If you do the two things that you have to do here, can you do that with the remaining Akins Accelerator

and create the same effect?

MR. PRINCE: That is my understanding, that you can.

With that, those are really the procedural issues that I wanted to address. Again, I don't want to take up a plethora of the Court's time. We've already addressed these ad nauseam in all of the briefs. So I thank the Court.

THE COURT: Okay. Thank you.

Mr. Soskin? Before I get distracted, is he correct about the Akins Accelerator? Does it function identically to these bump stocks without the spring?

MR. SOSKIN: Your Honor, the letters that Akins Accelerator owners received were not sent with the benefit of the agency's definition of "automatically" made under the current examination. So to the extent that an Akins Accelerator functions in the same way as the bump stocks like a Slide Fire that were subsequently sold, the Akins Accelerator would be covered under the final rule and would be subject to the statute in the same manner as any other bump stock.

I believe one of the plaintiffs in the Condrea case is actually -- alleges he is an owner of an Akins Accelerator that has been deactivated, and they may have more insight into that issue.

Your Honor appears very familiar with the procedural arguments that the parties have made. Are there particular areas on those issues you would like to direct my attention to?

THE COURT: If you can just respond to his argument that ATF did not provide not just opinions but, it sounds like, some other data, some other information on which it relied. Is that true?

MR. SOSKIN: Your Honor, the final rule addressed these questions itself and explained that the agency is relying on legal analysis that has determined what the best interpretation of the statutory definition is. That legal analysis is not affected by underlying data like the notes of examinations of the devices that were submitted in the past.

And the agency -- I think the legal standard here is for the agency to set forth the basis on which it's making the decision in a way that all of those who would be expected to comment can understand what the basis for that decision is.

The basis for the agency's decision is not its past classification decisions. The basis for the department's rulemaking here is its legal analysis of what the terms -- what the undefined terms in the statute are and how that applies to a bump-stock device that operates in the manner described in the final rule.

So the documents that were requested in plaintiffs' FOIA request are not relevant to that determination. They did not prevent commenters from having the information they needed to comment.

THE COURT: So there's no underlying data that

reflects or could affect in any way ATF's determination that the way in which, for example, the single pull operates, would shed any kind of light on that?

Is it simply because -- is ATF's position simply that because you're now looking at the intent of the shooter, that any data ATF has about how far away from the trigger the finger goes or anything like that is just irrelevant here because you are shifting the way in which you're looking at this? Is that essentially your position?

MR. SOSKIN: Yes, your Honor. The application of the now-defined term "automatically" and the now, you know, published definition of "single function of the trigger" or "single pull of the trigger" are what do the work here in achieving the element of the final rule, the clarification that bump stocks are machine guns.

THE COURT: But there's a real debate between you and the plaintiffs over whether there's a single pull. And as I understand it, it all boils down to whether you look at this from the perspective of the shooter who is, in ATF's view, doing a single pull, a single movement and keeping that pressure and that direction, and the plaintiffs', which is the ricocheting or shivering or whatever you want to say, is not relevant here because it's not the shooter's conscious effort. Is that --

MR. SOSKIN: That seems to -- and our position is that that's a question of legal interpretation of the interpretation

of language and text, and it's not something on which light is going to be shed by, you know, anything that's not in the record.

THE COURT: Although has ATF's position on "single pull of the trigger" been the same for the last 10 years, in that it's always looked at the intent of the shooter? Has that always been ATF's interpretation of single function of the trigger? You've suggested that's not new.

MR. SOSKIN: It's correct that it's not new, your Honor. The single function/single pull interpretation --

THE COURT: Has been around by ATF, and yet historically, did ATF not issue determinations in which it said there's not a single pull in the past? And if so, why would that not be relevant here if ATF's always looked at it from the perspective of the shooter?

MR. SOSKIN: If a particular classification decision was made in 2009 or 2010, some particular year -- and I don't know if there was one, your Honor. I have not reviewed all those classification decisions. I understand that ATF is working on a response to plaintiffs' FOIA request, but those decisions were not and those materials were not relied on in the final rule. The history certainly reflects -- it reflects the publication of Ruling 2006-2 in 2006. It reflects the judicial affirmances of that interpretation.

And so even if the agency had made some error in one of

those classification decisions and failed to apply the definition that it had made publicly available, that would not change that the best interpretation of the statute is the definition and the clarification being promulgated here.

THE COURT: But when an agency reverses its position, it can do that, but doesn't it have to explain, you know, why the position was reversed? And you've done that in the sense that you've talked about now. We're looking at legal definitions. You've done that to some degree.

But my point is, if ATF's interpretation of "single function of the trigger" has always been "single pull of the trigger" and always been from the perspective of the shooter and if there are, in fact, earlier determinations that reach the opposite conclusion -- I don't know that there are, but let's assume for a moment that there are -- why does ATF not have to provide that and explain away how they now think this is not a single pull of the trigger from the shooter's perspective? Why is that not something you have to do here, you have to explain your reasoning and why it shifted?

Because we're not just now saying you've got a definition that was never there before that you're applying. You're saying, this was the definition we always had internally; even though we hadn't stated it explicitly, this is what we were doing. And if you were reaching different results with that same definition, why is that not something, if it does, in fact,

exist, that you should turn over and explain away?

MR. SOSKIN: I think there are a couple of answers to that, your Honor. First, if what we are looking at is the interpretation of "single function of the trigger" as "single pull of the trigger," that was a change in course that the agency acknowledged it was making in 2006. And at that time it did provide the reasoned basis required by the law and the recognition that it was changing course and the explanation of why it was doing so. It did that at the time of the Akins Accelerator. The Eleventh Circuit confirmed that in the *Akins* case. So that change in course is by the wayside.

As to the interpretation of "automatically" --

THE COURT: No, that's new. That's new. I'm hung up on the "single pull of the trigger" and whether you look at it from the shooter's perspective or from the mechanical function of the trigger. And I understood you to say, we've always -- that from at least 2006, we've always said single function means single pull; we explained that then.

Am I also correct that way back then you also looked at it from the perspective of the shooter?

MR. SOSKIN: Yes. The *Akins* ruling in 2006-2 are the embrace of that looking at it from the perspective of the shooter that is embodied in the single-pull approach.

THE COURT: Okay. So to the extent that you historically took a different position with respect to the bump

stocks at issue here, did it ever rely on ATF's determination that the shooter's single pull of the trigger, the shooter's intent was more than one pull?

Do you understand what I'm saying? Did you historically say, we're looking at this from the shooter's perspective, and there are multiple pulls here?

MR. SOSKIN: I understand the question. It might be -- suppose there were 10 determinations made. What if eight of them used one definition, used the Ruling 2006-2 definition of single pull and two of them did not, and even if that were the case -- and I don't believe it is, your Honor, but even if that were the case, the agency would have the authority here to promulgate this final rule based on the best interpretation of the statute, both to formalize its previous determination so that people inside the agency and submitters of devices for classification decisions don't make mistakes or don't misunderstand what that --

THE COURT: No, I understand, but I'm hung up on the fact that -- let's assume your hypothetical is correct and that there were eight prior determinations where you were applying the same definition and looking at it in the same way here. And in all eight of those, you applied that, and yet you came out differently, not because of the automatic nature, but you came out differently on the issue of a single pull from the shooter's perspective.

That, to me, seems like something you should have to share and explain. Do you disagree with me under the law?

I'm not asking you to tell me right now whether that's, in fact, the case, but if it is, is that not something that the agency should have to explain away now in a rational way?

MR. SOSKIN: I do not believe that the law governing changes in an agency's views would require that or would make that relevant where the agency is not relying on its -- you know, for its change in position on the analysis that's contained in those previous decisions.

But I would say, your Honor, that this is a factual matter that I believe ATF could answer. And so just because I haven't read all of those decisions, you know, doesn't mean we can't do that in short order and, you know, submit something to that effect if that's necessary.

But because the final rule is not built on these are what the -- these are what the classification decisions were before, in fact, it's built on the premise that these classification decisions were wrong. And so now, as we -- as we promulgate the new interpretation of "automatically" and as we put into this more formal form the definition of "single function of the trigger" and we apply those to bump stocks, we're reversing all of those previous classification decisions. We are explicitly not relying on those previous classification decisions. And I don't think that the particular analysis in those decisions goes

to the question of whether the final rule is arbitrary or capricious.

THE COURT: All right. Anything else?

MR. SOSKIN: If your Honor has no other questions on the procedure, that's all I have. Thank you.

THE COURT: I don't have any more. Mr. Kraut, Mr. Prince, anything you want to briefly respond on?

MR. PRINCE: No, your Honor.

MR. KRAUT: No, your Honor.

THE COURT: So that leaves the challenges to the Whitaker appointment. If it's all right, I would like to take just a five-, 10-minute break, and we will come back for that. Thank you.

(Recess taken from 3:26 p.m. to 3:41 p.m.)

THE COURT: All right. Are we ready for argument on the Whitaker appointment? Mr. Goldstein?

MR. GOLDSTEIN: Yes, your Honor.

THE COURT: Mr. Goldstein, I would like to start with the constitutional questions. And you've raised a number of compelling and novel arguments in your briefs. Yet, my first question for you is, given that I'm just a lowly district court judge here, why doesn't *Eaton* and subsequent cases, which seem to suggest that an individual can perform the duties of a principal office at least for a limited period of time without being confirmed by the Senate, why are those not controlling

here?

MR. GOLDSTEIN: Okay. So two things. The first is, of course, we have two lines of constitutional argument. One is about an employee serving as an officer. And that doesn't arise in *Eaton* because *Eaton* is unquestionably an officer. So that entire line of argument is separate.

So the question is whether Mr. Whitaker is equivalent to what the Supreme Court approved in *Eaton*. I think *Eaton* is the right focus. The post-*Eaton* cases just say that *Eaton* held that a vice consul could perform the functions of a consul and remain an officer, not a principal officer.

So I think the question is, what were the features of a vice consul in *Eaton* that are or are not analogous to Mr. Whitaker. And the defining feature of *Eaton*, I think, is the fact that that is a person who was the second in charge and also the person who automatically stepped in for the consul.

THE COURT: Right. Those are the facts. But the Supreme Court didn't seem to limit its opinion on that basis. And it refers to a subordinate officer, as do other cases, a subordinate officer generally rather than the first assistant.

So why do I read *Eaton* that narrowly?

MR. GOLDSTEIN: Actually, I guess we would have to disagree. The government itself, in reading its brief, you will see that they say the critical feature of *Eaton* was the regulatory scheme. And the Supreme Court says that.

What gives -- you have to separate out, I think, two different issues. One is the Supreme Court, when it says "subordinate" there, which it says one time, is saying that this person is an inferior officer under the Constitution. That is, when the vice consul is originally -- there was a question in *Eaton*, hey, this person, the vice consul, what is their kind of original function? And they were an inferior officer approved by the Secretary of State.

Then the Supreme Court says it's the regulatory scheme that puts the limits and makes them stay a subordinate.

The difference here is that the government's position is that the president can take anyone and put them in and say that they will serve the functions of a principal officer. There's no limit whatsoever.

THE COURT: Though there's the limit set forth in the FVRA.

MR. GOLDSTEIN: Well, I guess we were -- I'm trying to talk about the Constitution --

THE COURT: I know. But it's just not under that. The government's position is not any person.

MR. GOLDSTEIN: Your Honor, it is any person under the Appointments Clause. Of course, when the Supreme Court decided *Eaton* in the late 1800s, it didn't have these limits of the FVRA. The only limit there, it did say that you could put in a Senate-confirmed officer.

But I suppose the other thing that you would look at along with *Eaton* is what was the practice at the time. It would give you a better sense of what it was that the Supreme Court was looking at.

And as the government explains, as OLC explained, the practice was chief clerks. And so I think it's the case that if you were to look from the beginning of the country all the way through the point Congress limited temporary appointments in 1863, if you looked at all of what are called the acting and ad interim service -- so acting is someone who steps in when a principal is sick or away; ad interim is the office is vacant -- there are only two instances in that entire period of 70 or 80 years that anybody has been able to identify that it was someone other than the second in charge.

That's a hugely important factor. And that is, it's what stops the president from evading the Appointments Clause. That person remains a subordinate, the second in charge, because it's a part of their job function.

Everybody understood that the chief clerk would step in. The chief clerk, except for those two instances, did step in. The vice consul's job was by statute defined to step in. And when that person steps in, they are subordinate because they're going to go back to that position. I think it's quite clear that Mr. Whitaker isn't even going to resume his position as the chief of staff.

And if the government is going to win on the employee argument, that's going to be because there's been an appointment of him from being an employee to an officer. And I think everybody has to agree, in the period of that appointment when he is an officer, the standard is *Edmond*. And that is, does he generally speaking have some superior below the president, and he absolutely does not.

Generally speaking, *Eaton* had a superior because in the job of vice consul the vice consul reported to the consul. But here, you have a situation in which this appointment, which is from employee to officer, he has no superior --

THE COURT: But here, the DAG himself would not have a superior.

MR. GOLDSTEIN: And that's the *Eaton* problem. The Supreme Court says we have to deal with this practically. That is, generally speaking, the DAG has a superior. That's the standard.

THE COURT: But not when the office is vacant; right?

MR. GOLDSTEIN: Exactly. But the Supreme Court says you look at the character of the office as a whole, and the character of that office, the DAG steps in.

So take when this kind of situation first arose, that is, when Attorney General Sessions stepped out and recused from the Russia investigation. It's true that the DAG had no superior with respect to the Russia investigation, but he generally had a

superior.

And what the Supreme Court says in *Eaton* is that when the principal is sick or away, the fact that that person generally has a superior and will revert to their secondary position means that they aren't -- they aren't transformed into a principal officer.

And I think that the most that the government could say is that *Eaton* doesn't resolve the question, because even the government agrees it was the framework of the regulatory scheme that was critical. But the most you would say is that *Eaton* doesn't resolve this question, and you have to ask yourself what are the implications of the government's position.

The implications of the government's position with respect to the Appointments Clause is that any person can be named. It doesn't even have to be someone from the government. And they've been quite explicit about that. And when *Edmond* is saying that, you know, the structure of the Appointments Clause is critical to the separation of powers and a principal officer is someone -- an inferior officer is someone who generally has a superior, that seems an enormous tension, that there would be no limitations whatsoever.

So I do think that *Eaton* fairly read is understood to be talking about the second in command.

And the only other thing I would say is, we could debate who has the better reading of it, but then think about, okay,

the period before *Eaton* and the period after *Eaton*. Are there instances that the government can point to in which it was understood that their interpretation was right. And I don't think that there are. As I mentioned, before *Eaton*, there were these two isolated examples. Every other time, it was the second in charge.

And subsequently, the Congress understood that to be the rule when it enacted the first assistant rule. And that is, it took the chief clerks who had been stepping in or had been assigned by the president when there was an actual vacancy and created this first assistant standard, which appeared starting in the 1863 statute.

So there's this uniform practice in the United States under the Appointments Clause of not allowing just anybody to be put in there and not allowing the president to evade the Appointments Clause in that way, which I think is the inevitable consequence of their position.

THE COURT: All right. Let's talk about the other constitutional argument.

MR. GOLDSTEIN: Sure, employee. So it's a little hard for me to understand and predict what my friends are going to say on this question. Previously, they have conceded that Mr. Whitaker was an employee. That seems absolutely right, because he had no authority to enforce or apply the laws of the United States. He was a chief of staff. He was an important

manager, but he was a manager. So I'm going to take as that premise.

There is a suggestion in the Whitaker OLC opinion that the fact that he was hired by the attorney general is enough to make him an officer. That seems plainly wrong. The fact that the attorney general, as we say, hires a secretary or personal assistant doesn't make them an officer. The standard for being an officer is quite clear.

In addition, you don't have -- so then the question is, all right, if he was an employee to begin with, what is it that made him an officer? Was there an appointment? So I've made the point that, well, if there was an appointment, then he was appointed a principal officer, because for the entire period of the appointment he wouldn't have a superior.

But we don't think there was an appointment to begin with. And that's the Supreme Court's decision in *Weiss*. The Supreme Court said we look at the statutory scheme, and when you have a statutory scheme that says "appoint" and distinguishes it from things like designations, the Supreme Court says Congress hasn't called for an appointment there.

THE COURT: But isn't the whole point of the FVRA to appoint individuals when there's a vacancy? Granted, it does use the word "designate," but --

MR. GOLDSTEIN: It does use the word "direct."

THE COURT: Or "direct."

MR. GOLDSTEIN: That's our point. Up until 1998, it was not necessary for the Vacancies Act to appoint anyone because it was either the first assistant, who was an officer to begin with, unlike Mr. Whitaker, or the president could substitute for the first assistant a PAS, Senate-confirmed person.

In 1998, this issue arose, and Congress just said -- just inserted the employees without considering the fact that the Vacancies Act never called for appointments.

So as we point out, all of the presidential designation letters, including the one for Mr. Whitaker, distinguished the fact that you are being directed to do something from the fact that there would be an appointment of somebody else later.

That's exactly parallel to *Weiss*. It also comes up in *Edmond*, applying the same rules. The Supreme Court has twice said this, that you look at the statutory scheme. The answer back is kind of the practical one. Well, wouldn't Congress want this thing to operate constitutionally? Shouldn't we just understand that if Congress wrote this, that it would understandably write a thing that would function constitutionally?

And the Supreme Court has said absolutely not. It is absolutely possible for Congress to violate the Appointments Clause, and when it provides for appointment versus designation -- and this is just one of those cases. You have a

situation in which Congress only provided for a temporary designation. That's a separate part of the rule, of course. The Supreme Court has said over and over that you can't temporarily appoint someone as an officer. That doesn't exist. That phenomenon doesn't.

This started with a case involving the medical examinations, and the Supreme Court reaffirmed it in *Lucia*. It has said that an officer is a permanent position.

So even if one were to say that the Supreme Court -- that the Congress intended, even though it didn't actually say so, for 3345(a) to produce an appointment, the fact that it's temporary means that it can't constitutionally provide for an appointment. And that's, of course, totally consistent with the constitutional history. It was only officers.

Again, if we look through the span of the nation's history from its founding until President Trump became president and you ask how many times is it that an employee stepped in for an officer, much less a principal officer, so far as we can tell, it's twice. It's the two isolated examples.

And the government itself is the one who is telling you that historical practice has enormous value in informing the meaning of the Appointments Clause. And if no other presidents except one in two very isolated instances thought this was how the Appointments Clause worked from the nation's founding, that's really strong evidence that it doesn't work this way.

You layer on top of it just the implications. Again, their position is the President, under the Constitution, can put in any of those people and make them the attorney general of the United States. And it seems extremely unlikely that the -- these are fine people, but they may not have been vetted in the sense that one ordinarily thinks. Even if they're qualified to be the attorney general, they could also be made the secretary of defense, then the secretary of war.

And it seems extremely unlikely that a provision of the Constitution that is intended to require that that person go through Senate confirmation, they were satisfied that the qualification be that the person be breathing. That seems quite a discordant set of standards.

We do layer on top of that, there is some intersection between the statutory and constitutional points. The government has set up a strawman and said that our constitutional argument is that the person has to have been Senate-confirmed. That is not our argument. We've said that over and over.

We do think as a statutory matter, when we turn to this in a minute, the fact that the Congress required that the DAG and the associate and the other people on 508 be Senate-confirmed is strong evidence that it didn't intend just to allow the president to put in any of the 7,000 GS-15s under the Vacancies Act. But that's to come in a second.

THE COURT: Okay. I would like you to address how

these two statutes can be read together.

MR. GOLDSTEIN: Terrific. And I think that is the right answer. We, of course, have a constitutional avoidance argument. And that is, there's the layer on top that at the very least the tie goes to the runner here. And that is that one would avoid the novelty at the very least of the government's interpretation. If one were to take -- I think you have all the authority and wisdom that's required under Article III to make the constitutional decision. But if you were to say these constitutional questions -- you describe them as novel. We think we have the better of the argument, that you would read the statutes in a way to avoid that problem.

But then the question is, all right, the job is to reconcile the statutes. What's the best way to make them work together? Now, we both think, we and the government, that the Office of the Attorney General is subject to both 508 and the Vacancies Act.

The question is, when? The government's position is that all the time. And that is, though 508 has the DAG and then the associate and the attorney general can name other people, that the president can nullify that at any time by putting in somebody else, an employee, at any time.

We think that instead it's the mandatory designations that come first, and then once those are exhausted, then the president can use the Vacancies Act. So the statute applies at

a different time.

The question is, which one of those two interpretations makes better sense of the statutory scheme? The answer is ours, I think, both as a textual matter and as a functional matter.

So to start with the text, we are talking about 3347(a)(1), and the structure of that statute, it says that the Vacancies Act is the exclusive, which is the government's big word, means to assign someone to a PAS position unless. So it's exclusive, assign, unless, and then it's a statute, designate.

Now, the government talks about the word "exclusive" a lot, but I've never seen them talk about the phrase. And we, of course, read statutes as a whole. And I can just give you several examples that I think make quite clear that when the statute has the structure, something is an exclusive way of picking something, unless something else designates that thing, doesn't give a choice to the president.

So here are three quick examples. They all involve civil litigation. One is -- we'll just take the course of a litigation. First is where you're going to file suit. If we had a statute that said that the general venue statute is the exclusive means of determining where a lawsuit may be filed unless the statute creating the cause of action designates a venue, you wouldn't say that the plaintiff could choose between the two. You would say that the designation in the specific statute is controlling.

Then when we got to this court -- remember, we have the Codrea case, of course. We would have the rule that says the wheel is the exclusive means of determining what judge will decide a case unless it is designated as a related case. You wouldn't say that once it's a related case, you could then -- the court would then either use the wheel or the related case designation.

And then with respect to how it is that we were to serve papers in the case, if we had a rule that said the Federal Rules of Civil Procedure is the exclusive means of determining the deadlines for serving papers unless the judge specifies a deadline, you wouldn't say that the plaintiff can then choose between those two things.

When you have the structure, it's exclusive unless something is designated, that structure recognizes that the designation controls.

And I can give you an example inside 3347 itself. 3347(a)(2), so if I were just to take you to it, the structure of this provision is, the Federal Vacancies Reform Act is exclusive unless the president has put somebody in in a recess appointment. Right? So it's the exact "exclusive unless" structure.

No one would possibly say that this was intended to mean that if the position is filled through a recess appointment, the president can also decide to put in somebody under the Federal

Vacancies Reform Act. There's actually an appointee under the Constitution there.

And it's quite clear that the "exclusive unless" structure there has our meaning, which is that if something is already determined in another provision of the statute, then that is controlling, whether it's a recess appointment or a designation.

So that's, I think, the textual point, and the second is the structural one. The government says, quite rightly, that it leads a technical role for these other office-specific designation statutes, the one for the attorney general, the secretary of defense, the chairman of the joint chiefs, all of those statutes, there are about three dozen of them, but its role for them is extremely minor. It's so minor so as to be bizarre.

So they say that what Congress did is it enacted this general statute and it turned the specific ones into a choice. That is, Congress said to the president, okay, you can choose to subject yourself to a limitation where the first assistant can serve for 210 days or not. I've never seen a statute that operates like that. Why would the Congress give that choice to the president?

And the second is, what is the consequence of the choice? So the choice -- if the president makes the choice to adhere to the 210-day deadline, then he can appoint an employee. But if he decides not to follow the 210-day deadline, he can't

appoint -- designate an employee. Why in the world would Congress make the president's power to designate an employee turn on whether the first person is subject to 210 days?

Our reading, on the other hand, makes perfect sense of the statutes, because we know why the statutes exist. What happened was, starting in 1868, Congress started passing a general vacancies statute. Starting in 1870, it started creating these office-specific statutes that were an exception to this. So 1868, the president can put in any PAS person. 1870, no, he cannot for the attorney general; it will be the solicitor general. The Vacancies Act is amended and changed, and over time, Congress adopts three dozen of these statutes. These are all exceptions to the statute. That's their entire reason to exist. It is to say that the president's general power to put in somebody when this very important office is vacant doesn't exist here. Congress wants a very specific person to be in that job, very frequently someone that they have confirmed.

And so what the government is saying is that while it does have a technical role for those statutes, it is a nonsensical technical role that guts the statutes.

THE COURT: But can't Congress state that much more clearly than it did so here? And do you think that the Court got it wrong here in *English* and also the *Hooks* Court? Are those decisions incorrect?

MR. GOLDSTEIN: So I'm going to answer that, but let

me just very quickly focus on the fact that Congress could have done this more clearly. Congress did do what they said quite clearly. There are multiple of these office designation statutes, for example the ones for the Army, the Air Force, and the Navy, that operate exactly as they say this scheme does, because the office-specific statutes say the deputy will serve unless the president designates someone under the Federal Vacancies Reform Act. The exact structure that they ascribe to the Federal Vacancies Reform Act Congress did in terms in the office-specific statutes but didn't do with respect to the attorney general.

So now let me address both of those decisions. I will do *English* and then --

THE COURT: But back to finish your point there, so why isn't that determinative here? Why --

MR. GOLDSTEIN: It would be our point, and that is, Congress knows how to do what they claim happened here. And that is, if Congress did want to make the choice to say the president can override an office-specific designation statute with the Federal Vacancies Reform Act, it has done that three different times. The Attorney General Succession Act stands in very stark contrast to that. It has never been the case that the president could override them.

And can I give you one other reason? And that is, when will you know the statute doesn't operate the way the government

suggests is that there is no default provision.

THE COURT: What do you mean?

MR. GOLDSTEIN: That is, what happens on day 1 when the attorney general resigned? Which statute controlled? Was it the Federal Vacancies Reform Act or Section 508?

There is nothing in the text --

THE COURT: Succession, isn't it?

MR. GOLDSTEIN: Pardon?

THE COURT: Isn't it the 50 --

MR. GOLDSTEIN: But why? I mean, I agree that that's what the government believes. It's been very coy about it, but I think that's their position.

But my point is, if you look at the text of the two statutes, the one that says "shall" is the Vacancies Reform Act; the one that says "may" is 508. But the government, for no apparent textual reason, says that 508 controls.

Even when Mr. Sessions recused in the Russia investigation, that gave rise to the exact same issue. And that is, it could have been -- according to the government, the president had a choice under the Vacancies Reform Act or 508. But there is nothing there that tells anyone what happens if the president does nothing. And he did do nothing. Remember, Mr. Rosenstein stepped in for the attorney general in the Russia investigation. There is today no textual -- according to the government, no textual way of knowing whether he can only serve for 210 days.

Because when Congress wants the statute to operate as the government suggests, it adopts a default rule -- take the Air Force, Army, and Navy statutes, a default rule. And that is, the deputy will serve. And then it says, or the president can displace that person under the Vacancies Reform Act.

It never has had a situation so far as we are aware in which it's just a jump ball. And the government's position that the president can choose would gut, as we explained in our brief, an array of statutory construction principles, which is just the more specific provision controls.

THE COURT: But Congress did consider excluding Department of Justice from the FVRA, and it didn't.

MR. GOLDSTEIN: And we completely agree. Remember, I started with the fact -- because this is again a strawman of the government. The government says it used to be that the attorney general was not subject to the Vacancies Reform Act ever, and it now is. That's right. The question is when. Is it when the designations are done, because 3743(a)(1) says while it's designated that statute controls, or is it from day 1?

And before one says that seems an odd structure, remember that the government adopted our reading of the statute initially. The White House counsel adopted our reading when the statute was enacted and said it was the Vacancies Act applies once the designated officials are exhausted. And then every president from that point on has issued an order of succession,

an executive order. Every one of them adopts our interpretation. The president has never issued an order of succession that deviates from 508 controls and then the Vacancies Act. Never has it happened. It is always in the structure of 508.

Not only that, every one of those designation orders, the executive orders, every one of those for every other agency does the same thing. So as I mentioned, there are some three dozen of these statutes. The president has issued executive orders with respect to probably half of them over time. Every single time the president does that, he has respected the office-specific statute and then applied the Vacancies Reform Act. We have not been able to and the government has not identified any time where this supposed power to displace the designations statute was ever asserted by the president.

I don't want to lose sight of *English*. I'm just trying to answer your question. *English* and *Hooks*.

What happened was, starting in 2003, the government with respect to the Office of Management and Budget -- this will inform the discussion of *Hooks*, with respect to the Office of Management and Budget all the way through 2017 dealt with statutes that aren't designated statutes. The designation statutes are in 3347(a)(1)(B). Those are statutes under 3347(a)(1)(A). They have a different structure. (a)(1)(A) refers to statutes where the president or the department head or

a court of law can pick the person. And there it's, I think, fair to say, those don't have the structure I gave you of the venue statute or the wheel or the deadlines, because they don't pick something. They provide another process. And there, the government has said, well, the processes are not exclusive. That is a different question from the statute that designates.

Even when -- the government relies, for example, on Peter Keisler being made the acting attorney general over Paul Clement when he was the SG. That's dealing with 508(b). That's a situation where the attorney general provided a succession list. The statute itself did not designate anyone in that situation, and the president chose his own designation list over the attorney general's one. It doesn't give rise to the designation issue.

So let me deal with *English* and *Hooks*, if I can. So *Hooks* has that structure. So I will just start with it. And that is, the NLRB statute in *Hooks* -- let me just be quite clear. Both *Hooks* and *English* do say in the context of those cases it's nonexclusive. So I don't want to run away from that. I do want to say that our result would be consistent with those decisions, but I'm not running away from the fact that in one paragraph each of those decisions, *Hooks* completely in dictum, says when one of the exceptions applies the statute is nonexclusive. I understand that.

The reason the cases are actually distinguishable is the

following: *Hooks* does not involve (a)(1)(B). It is not a designation statute. It is instead a statute where the president would have been able to pick the general counsel of the NLRB, but from a different list. It wasn't that the statute itself designated who would be the NLRB general counsel. And that case was a very strange situation. It was only a question of how long the person could serve, not who the person was. Both statutes authorized the same person.

English is a different matter. So here are really important distinctions in *English*. In addition to the fact that neither of those cases involved the constitutional issue, number 1, *English* itself in term says if Congress wanted to displace the FVRA, it would have done something like 508. I mean, it says those words. The Court quite clearly points to our statute as an example of something that Congress would write to displace the FVRA.

Second, it was very important in *English* that Dodd-Frank was adopted second after the FVRA and has a provision that says this statute shall be --

THE COURT: Shall.

MR. GOLDSTEIN: -- construed as consistent with prior law. And the court refers to that many times, and the government relied on it quite heavily. That is, Congress was understood to adopt Dodd-Frank on the basis of the provisions of Title 5 that included the Vacancies Reform Act. In fact, the

Court found that it was obliged to make the FVRA the controlling statute and not displace the FVRA in light of that special provision --

THE COURT: But in this case the statute comes after the succession statute; right?

MR. GOLDSTEIN: That's right, exactly, but there isn't the provision here that you have in *English*. And that is, there is nothing in the Attorney General Succession Act that says you shall conform it to the later-enacted Vacancies Act. There is a principal of law, however, and that is, of course, that Congress adopt statutes against the backdrop of the understanding of existing law.

So you ask yourself, in 1998 when Congress enacted the Vacancies Reform Act, how was 508 understood? What was the backdrop of it? The understanding was that 508 controlled over the Vacancies Act. Even before 1998, the position of the Executive Branch is that the Vacancies Act was not exclusive.

THE COURT: But that's the practice. Did they think that that was required?

MR. GOLDSTEIN: Oh, I think - well, everyone -- I think you do ask yourself, what was the practice? How was the statute being applied?

And so the relevant point, I think, is that presidents 100 percent of the time before the adoption of the Vacancies Reform Act in 1998 treated 508 as controlling over the Vacancies

Act. And it was very analogous.

Starting in 1973, the Department of Justice took the position that the pre-FVRA Vacancies Act was nonexclusive. The presidents could use other statutes, not just the Vacancies Act. This was described in *Southwest General* by the Supreme Court. It's what spurred the adoption of the FVRA in 1998.

So the Department of Justice said no, the president can pick from the Vacancies Act or other statutes. Under that interpretation of the Vacancies Act, presidents never did this, never went so far as to say that we see there's an office-specific designation statute, whether 508 or any of the three dozen others, and I'm going to use my Vacancies Act power to trump that. That was the backdrop under which Congress adopted the Vacancies Reform Act in 1998.

So you say, what tells me in 1998 that Congress wanted to take these three dozen statutes and have them work in a totally different way ever since they were adopted, since the Attorney General Succession Act was adopted in 1870? From 1870 to 1998, 128 years, it had been understood that you could not displace the DAG with the Vacancies Act. What is it that tells me that Congress decided to change its mind? And what would make sense for Congress to change its mind with respect to that and the other statutes in a way that operates as I described, which is, their only job is to circumvent the Vacancies Act, to avoid the date, and when the only consequence of avoiding the date is that

the president can't appoint an employee? There's just no rational reason why Congress would do that sort of thing.

And so if we just come back to kind of what the governing principle of statutory construction is, we have to put these two things together. You have two choices. Our reading is perfectly reasonable, and that is, they work together in the designation sense. And that is, the office-specific statute is controlling while there's a designation; then the Vacancies Act applies. So it does apply to the Office of the Attorney General in that way.

Or you can say that the Vacancies Act applies from day 1 and just blows up in every functional way the Attorney General Succession Act. To do that, to so radically undermine the purpose of a statute that existed for 128 years, that's whole purpose is to be an exception to the Vacancies Act, that is mirrored in three dozen other statutes, you would really think Congress would say it was going to do that, and it just did not.

The only thing the government points to is one half of one sentence in a Senate report on a bill that was not enacted that didn't even include the word "exclusive." When -- that report expressly says these office-specific statutes are an exception to the Vacancies Act.

It is implausible, we submit, that Congress would have made such a radical change on such a radically important question. Who is the attorney general is a big deal. Who is the secretary

of defense is a big deal. It matters who is the chairman of the Joint Chiefs of Staff. If the Congress were about to say that's a jump ball, I see you have 7,000 employees who are GS-15s, pick anyone you like, we can't be bothered, someone would make a point of it. We do not find elephants in mouse holes.

Anything else?

THE COURT: No. Thank you.

MR. GOLDSTEIN: Thank you.

THE COURT: All right. Mr. Mooppan?

MR. MOOPPAN: May it please the Court. I would be happy to start with constitutional questions.

THE COURT: Sure.

MR. MOOPPAN: So on the constitutional questions, the unbroken history of practice and precedent demonstrates that the president is entitled to select on a temporary basis a non-Senate-confirmed official to perform the functions of a principal office. Plaintiffs actually concede that, and they make a big deal of conceding it and saying that it's a strawman. And what they want to say is the fight here is over who can serve in that capacity. Their argument, as best I can understand it, is that the person who can do it is only the so-called first assistant.

As a threshold matter, they don't really explain where they get that from the text of the Appointments Clause. But I think what the basic argument they're making is that that is a part of

the first assistant's job responsibilities as an inferior officer. In other words, he's an inferior officer, and one of his jobs is to perform the functions of the principal officer when the principal officer is gone.

If that's their theory, it's flatly belied by the same history of both the Legislative Branch and the Executive Branch and the Judicial Branch. So let me just go through those in turn.

The first is the acts of Congress that were passed in 1792 and 1795. Those statutes quite clearly do not restrict the acting secretary of state and treasury and the war department to the first assistant. They say any person could serve as the acting secretary. They could have. It would not have been very hard to write a statute along the lines that plaintiffs suggest that says the acting secretary of state, treasury, or war shall be the chief clerk and, if the chief clerk's not available, any other Senate-confirmed person, and if all that's not available, then any person. They didn't write that. They just said "any person."

And this wasn't some accidental choice either, because there were two of these statutes. It started in 1792, and it said any person for those three departments. But it was only for a limited set of vacancies. It was either for a death or sickness or absence.

And then in 1795, Congress both simultaneously broadened

and narrowed the statute. It broadened it by making it for any vacancy; it narrowed it by limiting it to six months. That makes crystal clear that Congress, these early Congresses, which the Supreme Court has repeatedly emphasized are strong evidence of proper interpretation of the Constitution because they included many of the people who ratified the Constitution, it makes perfectly clear that those individuals thought that the critical function was not who the person is, not what their extant office was. It was instead that they were serving on a temporary basis.

And that legislative judgment, of course, carries through to this day because the FVRA, as plaintiffs also concede, clearly and unambiguously -- and I will get into this more when we get to the statutory side -- clearly and unambiguously allows non-Senate-confirmed officials who are not the first assistant to serve as acting principal officers, because for among other reasons there are cabinets and departments that don't have office-specific vacancy statutes, like the State Department.

So when he stands up and says you would have thought Congress would have said something, Congress made crystal clear that for the State Department, which is one of the very first cabinet departments in this country, it is permissible to appoint an acting secretary of state who is not Senate-confirmed and who is not the first assistant. So that's the Legislative Branch.

Now let's turn to the Executive Branch, which I think is probably the most showing of why he is incorrect. He is right. He points out that most of the early history involved so-called chief clerks. What he is wrong about is what those chief clerks' job responsibilities are. He asserts just boldly that their job was, among other things, to step into the shoes of their bosses when the principal officer was gone. He doesn't cite anything to support that.

If you look at the statutes that created the chief clerks, the statutes that created the Treasury Department, the State Department, and the War Department, what you will see is it says nothing of the sort. What it says is that the chief clerks are there to do whatever the principal officer says. And when the principal officer is vacant, what was their job responsibility? To hold onto the papers. That was their job responsibility. It doesn't say a word about their job being to take over the department and run it.

And you don't have to take my word for that, because it's what the Court of Claims held in *Boyle*. In *Boyle*, a chief clerk sued to recover compensation for when he served as acting secretary. And the Court of Claims said exactly what I just said, which is, he did not serve as acting secretary ex officio. It wasn't a part of his job responsibilities. The reason he served is because the president picked him, and because the president picked him to do something that was not a part of his

job responsibilities, that's why the Court of Claims held he would get extra compensation.

So I agree with plaintiffs, the fact that he got compensation or not is not a part of the constitutional rule. The reason why he got the compensation is quite relevant. The reason -- I urge the Court to read *Boyle*. We only quoted part of it, but it's a very short opinion. It makes very clear that it was not ex officio. It was not a part of their job responsibilities. If you look at the statutes that created the chief clerks, that's abundantly clear that it was not a part of their job responsibilities.

There too, that historical period -- sorry. One other thing I should say about the history. The other thing that he skipped over, because he kept saying there were only two, that's not true, because there is a clear history of picking other Senate-confirmed officials, including in other departments. For example, when the secretary of treasury was absent or vacant, they would let the secretary of war, for example, be the ad interim service.

And why that's important, it's true they are Senate-confirmed, but they sure weren't Senate-confirmed for the other department. No one, when they confirmed, for example, a general to be the secretary of war, necessarily made the determination that you know what, he can also be the secretary of state and go negotiate peace agreements or he could be the

attorney general and take care of legal matters. No one confirmed them to that job. And unlike today, where the FVRA makes totally clear that when you are Senate-confirmed, under 3345(a)(2), that means that the president can also designate you to serve as another acting principal, so that you could say that the confirmation for one job is essentially confirmation for all the other jobs.

That was not true at the founding. The statutes did not say that when you're confirmed for one job, because of the fact of confirmation you can be confirmed for any other job. As we talked about earlier, what the statute said was any person could be picked for those other jobs when there was a vacancy.

So he doesn't have any explanation for why those are permissible either, and he also doesn't have any explanation for why, when there was no first assistant, they were allowed to pick someone who was not either the first assistant or Senate-confirmed. He seems to suggest there's just some floating emergency exception to the Constitution, but there's, obviously, no such exception in the text of the Constitution, and I don't know where the basis for creating an emergency exception would be.

The way it does reconcile this is in *Eaton*. The point is that, when you are serving temporarily, you are not actually the principal officer. You are at most an inferior officer. And once you think about it that way, it makes perfect sense that

you could pick either the first assistant or a Senate-confirmed person or someone else. The fact of the matter is, they are not the principal officer. They are only acting as the principal officer and at most are an inferior officer.

THE COURT: Do you think *Eaton* alone controls here, or do I have to rely on the historical practice of the political branches?

MR. MOOPPAN: I think *Eaton*'s reasoning does control here. But I agree with him that factually *Eaton* is not the same as this case, because the statute in *Eaton* did contemplate expressly that the vice consul would serve as acting.

I would point out one thing about that, though, which is, he says that the vice consul in *Eaton* was sort of the functional equivalent of the DAG; he was the first assistant. That's not right either. If you look at the statutes that are cited in *Eaton*, you will see that the vice consul -- the vice consul had one and only one job. It was to step into the shoes of the principal when the principal was gone. There was such a thing as a deputy consul. If you look at the statute that's cited in *Eaton* and you pull up the original -- it's a revised statute, I believe 1674. You will see that there's a consul, a deputy consul, and then there's a vice consul. The only thing a vice consul did was step into the shoes of the principal officer, the consul there, when the consul was gone.

I think what that shows is that his position is largely one

of labels. If it's permissible, as *Eaton* squarely holds it is, to have sitting on the books an office where the only job of the office is you will serve as the acting principal when the principal is gone, and that choice can be made by the president without Senate confirmation, and you could pick literally any person off the street, as happened in *Eaton* where they picked a missionary who had no prior government role, the secretary of state appointed him to be the vice consul solely for the purpose of serving as the consul because the consul was sick, going home to die, which is what he did, there is no difference between that and under the FVRA the president designating someone to be exactly the same thing, someone who serves as the acting principal for a temporary period when the Senate-confirmed principal is not present.

And I think that largely answers his point about the employees as well. He could be making one of two different arguments. If he's arguing that you can't pick someone who was an employee before, I think all of the sort of legislative, executive, and judicial practice that I just talked about shows that that is wrong.

He is, I think, making a second argument, which we should have addressed a little bit more squarely in the brief, which is this. I think what he's saying is that you have to become an officer before you could serve as an acting principal. And I will say two things about that. One is, it's not entirely clear

that it's right, because as he pointed out the Supreme Court has repeatedly held that for there to be an office one of the requirements of an office is it has to be continuing and permanent. And if you're only serving temporarily, arguably, you don't need to have an office.

But let's grant him the premise that -- and this is what OLC said and this is what is in our brief -- that you do need to have a, quote unquote, appointment as an inferior officer, why would the FVRA not satisfy it? The FVRA is the president designating a certain person to serve exactly in the role that the vice consul in *Eaton* served. His only point is that it uses the D word rather than the A word. It says "designate" rather than "appoint." There is no reason that should be given constitutional significance, especially given the canon of constitutional avoidance.

The only argument to the contrary is he relies on *Weiss*. *Weiss* is a very different case because it's basically the converse. In *Weiss*, it was undoubted that it wasn't an appointment. We know this because the person who was making the choice was not the president or secretary of war or defense at the time, who are the only people who can actually make an appointment.

It was, I believe, the JAG who was the person who designated someone to be a military judge. So there was no question that that statute did not purport to be authorizing an

appointment. The only question is whether the statute required an appointment. And in the context of saying it didn't require an appointment, the Court made the point that it doesn't use the word "appoint," it uses the word "designate."

Fair enough, but that's not enough to say you should strike down the FVRA as unconstitutional as applied, even though it's unquestionable that Congress could have written it to make even clearer that it is an appointment if that were necessary.

So with that, unless you have any other questions on constitutional, let me turn to the statutory.

THE COURT: Go ahead.

MR. MOOPPAN: On the statutory, again, there are a lot of points that we both agree on, though he tries to make it like we are suggesting that it's all a red herring. It is undisputed that the plain text of 3345 allows the president to designate a chief of staff to serve as the acting principal. It's clearly covered by the text of 3345. There is no question that agency heads are covered by the FVRA. And there's no question that that's true equally for the attorney general, because the Congress and the FVRA expressly removed an exclusion that would have meant that the FVRA didn't apply to the Office of Attorney General. So there's really no doubt that the statute applies to the Office of Attorney General, and he agrees.

What the fight is about at this point is, does Section 508 displace the FVRA? And on that, we know what the answer is,

because Congress has already told us how the FVRA interacts with office-specific statutes. And what Congress said in 3347 is that the FVRA is generally exclusive unless there is an office-specific statute.

THE COURT: Which there is here.

MR. MOOPPAN: Which there is here. But what that means is, it is not exclusive, but that does not mean it is not applicable. There's a difference between the statute being not exclusive and the statute being not applicable.

THE COURT: Why doesn't the plain language of that provision suggest that you go to a specific statute and stay there?

MR. MOOPPAN: I would say two things. One is, if the point was to say it has rendered the FVRA inapplicable because you go to the other statute and stay there, you wouldn't have phrased it as an exception to exclusivity. You would have phrased it as an exception to applicability. And the FVRA has a whole separate section about when the FVRA is not applicable. It's 3349(c). It lists a whole bunch of offices where the FVRA is not applicable. It would have been perfectly sensible and more sensible to put in that section of the code office-specific statutes. So you would have said the FVRA does not apply to all those things and also when there's an office-specific statute.

He's got a response to that, too, which is, he recognizes that he can't say the entire FVRA is inapplicable just because

there's an office-specific statute. So what he tries to do is he tries to generate a rigid order of operations. You first have to do the office-specific statute, and if and only if that's exhausted, then the FVRA kicks back in. And on that, the text of the statute just doesn't say that.

As your Honor pointed out, if they wanted to say that, they could have said it. They could have said it in many different ways. That would have been much clearer. They could have said, for example, that the FVRA does not apply unless an office-specific statute has been exhausted. They could have said that the office-specific statute is exclusive unless it's been exhausted. What you would not say is that the FVRA is not exclusive unless.

He tries to say otherwise because he emphasizes the fact that it uses the word "designates," as if "designates" somehow by its plain text requires you to go in the one bucket and take the other bucket off. And I think there's a couple reasons why that's wrong.

First, he used a lot of hypotheticals, but what he did in every one of those hypotheticals is the first part, the part that was exclusive, he had it be something that it was automatic, like venue shall be under such statute or the wheel shall work. The reason this is different is because this statute, the thing that's exclusive, is something that says the president may do something. So if you had a statute that said,

for example, venue may lie in districts A, B, and C, and that shall be exclusive unless another statute designates D and E, there, I think it quite plausibly could be read and properly would be read to say that those coexist, that it's not that A, B, and C get displaced if D and E exist. At that point it's plaintiffs' option where to go with A, B, and C or invoke the automatic rules of D and E.

The other problem with his impasse on the word "designates," if that were true, then it shouldn't matter whether there was someone in the office. So let's say there was no deputy attorney general, say there was no associate attorney general, and let's say the whole 508 all the way down was not filled. It still designates someone. The person is just not there.

So there's no textual basis to say that because it says "designates," you have to go to that statute, but only if there's someone there, and if someone's not there, you can kick back into the FVRA.

And that's particularly true, because as he pointed out when he was trying to distinguish *Hooks*, if you look at 3347, it deals with two types of designation statutes: Statutes that authorize the president to designate and statutes that directly designate. He recognizes that for the first of those two prongs, there, his designate argument doesn't work, that because it says the president "may" and then because it says the

president "may" the president has a choice.

The problem for him is, he's having 3347(a)(1)(A) function fundamentally differently than 3347(a)(1)(B). (a)(1)(B) somehow displaces the FVRA; (a)(1)(A) does not. That's an odd way to write the statute, especially given the legislative history where the legislative history listed all 41 of the statutes that fall within either (a)(1)(A) or (a)(1)(B) and then said of all of them in a clear sentence -- and I would urge the Court to read the sentence because he suggests we've clipped it, but we haven't. It says that "if those statutes were to remain in force, the FVRA would nevertheless provide an alternative procedure." It didn't say an alternative procedure if those people were exhausted. It just said an alternative procedure.

The last thing I would say on this is, he's tried to suggest this is an unprecedented application of the statute, and it's not, because of the -- primarily because of the example where George W. Bush designated Peter Keisler to serve as the acting attorney general, even though Solicitor General Clement was available.

He is right that the solicitor general under 508, it's now one of the two people automatically designated. But the way 508 is written, it says if those two people aren't there, if the DAG and the associate are not present, then the attorney general may specify other officers, solicitor general and other assistant attorney generals in order.

And the critical point is, the attorney general had done that. At the time there was an AG order in place, and Solicitor General Clement was the next person in line. And nevertheless, President Bush invoked the FVRA and leapfrogged and picked Assistant Attorney General Keisler.

They have no textual basis for how that could have been lawful under their argument, because there is no question that that was a -- 508 was there. The 508 person was available and could have served. They had been designated. They'd been designated pursuant to the attorney general's existing order that was in place and couldn't be revoked because, of course, the attorney general wasn't there to revoke it.

I don't think there's any possible way to say that they are right without saying that that designation was unlawful, that Acting Attorney General Keisler illegally served and, therefore, that every action he took while acting attorney general would all be ultra vires and not subject to ratification.

Unless your Honor has further questions.

THE COURT: No, thank you.

Mr. Goldstein?

MR. GOLDSTEIN: Thank you, your Honor. I will take it in the same order, if that's okay.

So, the government's position is that the Appointments Clause says "any person." So let's just be on the record that the government's position is that the president under the

Appointments Clause, which has no time limit for temporary appointments, says pick any human being that's breathing and put them in until you decide to send someone to the Senate.

That is not a plausible reading of the provision of the Constitution that is intended as fundamental to the separation of powers. There has to be some limiting principle. The government has none, because they have to fall back on the fact that the 1792 and 1795 statutes didn't say it has to be the second in charge. And that's because those statutes at the beginning of the nation didn't set boundaries. You didn't know who was going to be available at any particular time.

I have one really good piece of evidence that says that it was not understood, as Mr. Mooppan says, that it wasn't intended to authorize the President to put in any person. That is, for 70 years, until Congress wrote a statute, the president didn't do it. It did not happen. Only one of two people was put in.

If the person, if the secretary was out of town or sick, with the exception of those two very limited examples -- in fact, 100 percent of the time, because the two examples are where the office is vacant, 100 percent of the time, according to the Office of Legal Counsel, the chief clerk, who is the second in command in the department, stepped in. The chief clerk stepped in without an order from the president. It is true that if the office was vacant, then the president would write an order.

But if you look at the trial, the impeachment trial record, if you look at the OLC opinion, you will see well over, I think, a hundred instances where the secretary is sick or away and then the chief clerk takes responsibility and takes charge of the office. That is the best evidence of how those statutes were understood to operate.

If it were like Mr. Mooppan says, that the president could pick anyone he wanted in those circumstances, he would have done that. But he never did. It was either a Senate-confirmed person, almost always a department head, except for the military. They might put in a general. Or it was the chief clerk. That is how it actually operated.

And that's quite, quite important in understanding historical practice. It is quite, quite important in understanding the context of *Eaton*. And it is quite, quite important, because it is a really important limiting principle. If that person is in place ahead of time, is the second in command ahead of time, if it is understood that they will fill in in times of sickness or vacancy, that really limits the president manipulating the appointment power to fire the principal officer and put in somebody who is convenient and avoid Senate confirmation. The idea is because the person preexists -- it is subject to manipulation conceivably, but it is harder to manipulate. That person exists. And because they do have that predefined job, the chief clerk in particular, then

they do ordinarily have someone who is in charge of them.

And I'd just invite the Court to ask, in writing an opinion, does there have to be some limiting principle here, or is the government right that the president was empowered to fire every single member of the cabinet, put in any breathing human being of any age or nationality for any period of time until the president decided to nominate someone, or was there some constraint?

And on the view that there is no constraint, it is not fundamental to the separation of powers. It is a typo in the Constitution.

On the textual arguments, first of all, if we are right that there is at least a constitutional question, one could look at this as saying, look, what the government is saying the rule is was never actually operationalized as the rule. They have no doubt that it happened only twice in history that you had an employee do this or you had someone other than the first assistant who wasn't Senate-confirmed going for a principal officer. So the country has been around for a long time. What they were saying before this president happened twice. That is, I think, fairly described as a significant constitutional question, at the very least.

Then you ask, hey, how could this statute be interpreted? And I will concede, my friend says -- he used the verbiage it's plausible in his venue example that you would get to choose the

two. "Plausible" is not a very high standard. But take his example. If the venue statute said venue will exist in the District of Maryland or the District of Columbia or the Eastern District of Virginia, unless the statute specifies the Eastern District of Pennsylvania, is it conceivable that that's a choice? It's conceivable, but it is not likely.

The government never, in all of its briefing in the OLC opinion never takes the clause as a whole. Mr. Mooppan didn't say a single word about the purpose of the statutes that he's negating here. He didn't say a single word about how it is that Congress could have intended to adopt this crazy framework, where the only purpose of these statutes is to negate the amount of time and then the effect is that you can appoint an employee.

If one were to say I'm trying to put these statutes together, I'm trying to make the text work together, I'm trying to make Congress's intent work, then you would say that at the very least ours is the more sensible one of those.

He has a couple of technical arguments I should mention. Number 1, he says it doesn't make sense that the Congress did what we ascribe to it in 3347 because it wouldn't exclude an office in 3347. We know that's not true, because 3347 excludes an office. If you were to look at it, it says it is exclusive with respect to every executive office except the General Accounting Office, or now the Government Accountability Office, whatever. Its name changed. But that office has to be -- using

our interpretation, that office is excluded in terms under 3347. And it has to be understood that it doesn't become optional for the GAO. You can't use the Vacancies Act or some other provision.

And the reason the Congress didn't refer to the Attorney General Act any more is because it wasn't excluding it altogether. And the reason why it wasn't referring to the attorney general is that there are three dozen statutes that are office-specific statutes. So it dealt with them en masse. It wasn't necessary or even sensible to have a provision specific to the Office of the Attorney General. But we know it's not the case that Congress only dealt with, you know, excluding offices in 3349(c), because 3347 has an office-based exclusion.

Remember as well that he didn't discuss at all the recess appointment provision, which is 3347(a)(2) and under the same structure. It cannot be the case that it is exclusive unless the president makes a recess appointment, and that means that the president can make a -- can make a temporary designation while the office is full. It has to be in that instance that the "exclusive unless" clause means that the Vacancies Act doesn't apply at all, which is our position.

And that is, when the statute designates -- so there is a person who is designated. It is the DAG. Rod Rosenstein is in the building probably right now. He is available. While he is designated, then that controls.

It is important, we think, that this is not some fly-by-night drive-by interpretation of the statute. It is the interpretation of the Executive Branch during the statute's enactment and until 2017. Remember, the White House Counsel issued a regulation adopting our interpretation, rejecting theirs. And then all of the executive orders under the Attorney General Succession Act and all the designation statutes use our formulation. Again, it we're trying to make them work together, not negate them both, make sense of them both and avoid the constitutional question, then you would adopt our interpretation.

As to the Paul Clement example, he misunderstands the difference between 3437(a) and (b). So, Paul Clement and Rod Rosenstein become the acting attorney general under two different provisions. Rod Rosenstein is under -- it would be a statute that is governed by 3347(a)(1)(B), because there the statute designates the DAG.

When Paul Clement was designated, he was designated by the attorney general, not by the statute. 508(b) says look, once you get past the associate, the attorney general gets to pick. And so that's another set of options. That's much more like a venue statute that says venues A, B, and C are exclusive unless Congress provides for venues D, E, and F. In those situations where you have two different lists, it is much more plausible to believe that both choices are available.

But when you have quite clearly -- when the Congress designates the Eastern District of Pennsylvania, when Congress designates the DAG or the deputy secretary of defense, it wants that person or that place. It is making a very concrete choice. You would need a good reason to believe that Congress negated that choice.

And with all respect, half of a sentence in a Senate report on a version of the statute that was not -- a statute that wasn't adopted that doesn't even include the word "exclusive" when the report says in terms that those statutes operate as an exception to the Vacancies Act, is not anywhere within the field of reason of the reaction you would expect in Congress on a question like this. To say any of 7,000 people, any of these five lawyers can be the attorney general because they're all GS-15, I hope -- they deserve it. But anybody who is senior in the Department of Defense can now be the secretary of defense. Anybody can be the joint chief of staff who is senior there. Any of these offices. Is it conceivable that Congress would make that choice? Okay. That would be an interesting choice. It would surprise me.

I feel comfortable saying that somebody would mention it. Heads-up, everyone, this statute has been around for 128 years, it exists for a very good reason. The attorney general can investigate the president, we prefer that the president not be able to put in somebody that will have control over the

investigation without that person being Senate-confirmed, something like that. Somebody would make a point of it.

And when nobody says anything and it's possible to reconcile the statutes as we do in a very sensible way, as the government did originally, that's the better interpretation.

THE COURT: All right. Thank you.

MR. GOLDSTEIN: Did you want us to talk about consolidation, your Honor?

THE COURT: I do. Before we do that, I want to ask the other attorneys if there are any other issues that I have not asked you specifically about that you would like to raise, if there are any other points that we haven't covered here today.

MR. PRINCE: I don't believe so, your Honor. We would just rely on our briefs. Thank you.

THE COURT: All right.

MR. MOOPPAN: There is one thing I do want to raise, which is a scope of relief issue, which I probably should have mentioned at the tail end. This is limited to the Whitaker piece.

I just wanted to emphasize two things about the scope of relief. If you look at their complaint and their motion, they actually ask for an injunction that says that -- to enjoin Acting Attorney General Whitaker from performing the functions of the office.

Two things about that. One, even if they're right on the merits, the most that they could get is an injunction enjoining the enforcement of the bump-stock rule, because they don't have standing to complain about Acting Attorney General Whitaker's actions beyond the bump-stock rule. So that's the first thing.

And the second thing about the scope of relief I want to mention is, the most they would be able to get is an injunction against the bump-stock rule. But of course, depending on what this Court rules on the non-Appointments Clause challenges to the bump-stock rule, it's possible, depending on how broad the relief this Court grants, that there would be no reason to reach the Appointments Clause issue.

Now, that will turn on whether this Court grants relief limited to the plaintiffs, as we think would be proper, or whether it granted broader relief, which I think is an issue that really, frankly, hasn't been briefed about scope of relief.

THE COURT: All right. Thank you.

This reminds me, Firearms Policy Coalition does have a motion to file an amended complaint.

MR. GOLDSTEIN: The question of whether we can do this as a matter of right is perhaps a little complicated. It's our first amended complaint, although we were a part of an earlier complaint. I don't know exactly what the rules do in that kind of odd situation. There's been no answer filed. So we could debate that question, but it may be objectionable.

THE COURT: Does the government object to this motion?

MR. MOOPPAN: No, your Honor.

THE COURT: Okay. The motion is granted.

MR. GOLDSTEIN: That, I think, speaks to the scope of relief question, because we do have declaratory judgment claims and we do have standing to get those, unquestionably. So putting aside the question -- we're not trying to unduly interfere with operations. We're not asking for an order that he get out of the office. We are very conscious of the sensitivities there.

But we do have the declaratory judgment claims. We represented to the Court when we filed that that after the Court's ruling we would promptly confer with the government. We don't want to defer appellate review. We're not trying to play games.

We were a little concerned about what Mr. Mooppan is suggesting is going to happen, and that is, that they might try and moot out our Whitaker arguments so that the Court of Appeals couldn't get to them just by having the rule reissued. That's a possibility. So that makes our declaratory judgment claims potentially significant. We will talk to them after whatever the Court does.

THE COURT: And what's your position on consolidation?

MR. GOLDSTEIN: Your Honor, we oppose consolidation. Of course, it doesn't require our consent. I can speak for all

of the plaintiffs in this case. I will tell you the reasons.

And that is, it is my honest assessment that the different sets of plaintiffs challenging bump stocks don't necessarily coordinate that well. We think it would be a favor to the Court of Appeals when this case goes up to not have it go in a single matter.

We think the Court can accomplish everything it needs to without a formal consolidation order, and that is, the Court could dispose of both cases in a single opinion, in a single order. The Court can say that its opinion in this case is controlling in that one.

We want it to be smooth. We want it to be smooth for both you and the Court of Appeals. And if you consolidate them together, because of the D.C. Circuit's rules on, for example, one brief, it can take out of the Court of Appeals' hands the question of whether it wants them briefed together or separately. It would require everyone to be working together.

THE COURT: Don't we already have that issue to a degree, given that I've consolidated these two?

MR. GOLDSTEIN: Yes, but this consolidation --

THE COURT: You all work together well, but the others, you won't?

MR. GOLDSTEIN: I'm not blaming them. If anyone doesn't get along, I'm sure it's my fault.

It's just a genuine point. And that is, we are totally

sympathetic to the Court's presumed desire and the rules' desire for things to be disposed of efficiently.

I will say that there is a slight difference between the cases. That is, the substantive claims are the same, but they, in passing, have an injunctive claim for takings. I'm not sure how serious they are about it, but it's there. So I don't mean to prejudge it.

THE COURT: Mr. Goldstein, look at this handy-dandy chart that my law clerks made for me. You can see, these are your two cases, and this is this one. And with the exception of two areas, they overlap.

MR. GOLDSTEIN: Bingo.

THE COURT: Yes. So I am trying to be efficient here and conserve judicial resources. I am sensitive to the issues you raised about briefing. I will consider it and hear from the government, if the government has any position on this.

MR. SOSKIN: We don't see any need for consolidation, your Honor, and we echo Mr. Goldstein's views.

THE COURT: Okay. So both sides would prefer that I issue the same opinion, perhaps, or refer to the other case but not consolidate the matters?

MR. GOLDSTEIN: Yes, your Honor.

THE COURT: I will be checking with the plaintiffs in the other case as well.

Are there any other issues we need to address here?

As I said, I haven't decided whether I will hear additional argument in that case, given that the claims overlap so much that are raised in their motion for preliminary injunction.

In terms of when I hope to issue a ruling, it will, I hope, be some time the week of February 18th, but may be late in that week. That would be a goal. I'm not -- don't hold me to it. But I am sympathetic to the notion that whoever does not prevail here may want to seek emergency relief in the Court of Appeals, and I would like to give you adequate time to do that.

With that, any other matters? No? All right. Thank you.

(Proceedings adjourned at 4:51 p.m.)

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Sara A. Wick, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Sara A. Wick — February 18, 2019

SIGNATURE OF COURT REPORTER — DATE