



Out of Office: Vacancies, Acting Officers, and Day 301

November 1, 2017

Across the executive branch, [acting officers are currently serving](#) in vacant advice and consent positions, temporarily filling these offices until a permanent officer is nominated by the President and confirmed by the Senate. Some of these offices remain vacant because the Senate is still considering whether to confirm a nominated officer, but others are vacant because President Trump has not yet submitted a nomination to the Senate. According to [one tracker](#), there are currently 277 offices that have no formal nominee. Some of the acting officers filling these vacant advice and consent positions may soon face an important deadline—one that could limit their ability to continue performing the duties of the vacant office.

Under federal law, most acting officers may only serve for a limited amount of time. Specifically, the [Federal Vacancies Reform Act of 1998](#) (Vacancies Act), which generally governs the ability of government employees to temporarily perform the “functions and duties” of a vacant advice and consent position, [provides](#) that acting officers may serve for a period of 210 days after the vacancy occurs. However, after a new president enters office, to account for the [reality](#) that many high-level officials leave when the executive branch transitions to a new administration, the start of this 210-day period is delayed. These extended time periods for acting service may apply to many of the current vacancies in the executive branch, and are set to start expiring in November. So how do we figure out whether any given employee is still allowed to serve as an acting officer, and what the consequences are if an acting officer violates the Vacancies Act?

How Does the Vacancies Act Limit Acting Service?

The [Vacancies Act](#) limits the ability of a government officer or employee to temporarily perform the duties of a vacant office in an executive agency, if that position is one “for which appointment is required to be made by the President, by and with the advice and consent of the Senate.” (This language echoes the [Appointments Clause of the U.S. Constitution](#), which generally requires high-level “Officers of the United States” to be appointed by the President, “by and with the Advice and Consent of the Senate.”) The Vacancies Act governs acting service in most advice and consent positions, [with limited exceptions](#). However, the Vacancies Act applies only if an acting official attempts to perform a “[function or duty](#)” that is established by statute or regulation *and* is “required” by that statute or regulation “to be performed by the applicable officer (and only that officer).” Stated another way, the Vacancies Act applies only to the

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nondelegable duties of an office—those duties that are exclusively assigned to that particular office. Accordingly, the Vacancies Act likely would not prevent a government employee from performing any *delegable* responsibilities of the vacant office.

Under the Vacancies Act, only [certain classes of government employees](#) may perform these nondelegable duties, and they may only do so for a [limited period of time](#). There are two distinct periods during which an employee may serve as an acting officer: (1) for a 210-day period, beginning on the date that the vacancy occurred; or (2) if the President nominates someone to that office, for the period that the nomination is pending in the Senate. There is no limitation of days on this second period—so long as a nomination is pending, an acting officer may continue to serve. But if no nomination is submitted to the Senate, the 210-day period governs the acting officer’s service.

Although the 210-day period usually begins on the date of the vacancy, a [different set of rules](#) applies when a new president enters office. If a vacancy exists on the date of the new president’s inauguration, then the 210-day period will begin 90 days after inauguration. If a vacancy occurs within 60 days after the inauguration, the 210-day period begins 90 days after the date the vacancy occurred. Because a new president entered office this year, this alternate scheme applies to any offices that were vacant on January 20, 2017 or that became vacant within 60 days thereafter. Effectively, any acting officers filling any of these vacant offices may serve for a 300-day period. The beginning of that period, however, will depend on when the particular vacancy occurred.

The Vacancies Act also creates a [mechanism](#) to help track the existence of executive branch vacancies and the tenure of acting officers. Agency heads are [required](#) to notify the Comptroller General and “each House of Congress” of vacancies and of the officers temporarily filling those vacancies. Further, if the Comptroller General determines that an acting officer is serving beyond the statutory period of service, he [must report](#) that fact to certain congressional committees, as well as to the President and the Office of Personnel Management.

What Happens on Day 301?

A number of acting officers are currently filling vacancies that occurred during the presidential transition period. For those offices that were vacant on or shortly after Inauguration Day, the 210-day period, with the 90-day extension, will come to an end beginning [sometime in November](#). If an acting officer remains in office beyond this 300-day period, and if the President has not submitted any nomination to that office, then the acting officer runs the risk of violating the Vacancies Act.

On Day 301, whenever that day might occur for a particular office, the office would be designated vacant, for purposes of [the Vacancies Act](#), and only the head of the agency would be able to perform the functions and duties of that vacant office. (If an office designated vacant under this provision is that of the agency head, it appears that no one can temporarily perform the functions and duties of that office under the Vacancies Act.) If the acting officer remains in office and attempts to perform a *nondelegable* function or duty—one that a statute or regulation expressly assigns to that office—that action will “[have no force or effect](#).” In the words of the Supreme Court, it will be “[void ab initio](#)”: void [from the beginning](#), as if the act had never been done. (There are a few [specifically named offices](#) that are exempt from this provision, but it is [unclear what the consequences are](#) if one of those offices is staffed by an acting officer serving in violation of the Vacancies Act.) Critically, the [Vacancies Act](#) also prohibits an agency from subsequently ratifying any void actions. This [means](#) that the agency can’t cure any violations by reissuing its decision through the proper processes. Notably, if the President were to officially nominate [someone else](#) to the vacant office, the previous acting officer [might be able](#) to resume temporary service, but likely would not be able to ratify any legally defective actions taken in the interim between Day 301 and the date of nomination.

By rendering noncompliant actions [void](#), the Vacancies Act opens up the possibility of litigation: third parties injured by the decisions of an acting officer might challenge those agency actions in court. If a court agrees that the challenged action violated the Vacancies Act, then it would likely [vacate](#) that agency action. But the judicial process is slow and depends on a person with [standing](#) actually bringing a lawsuit. The limited amount of case law examining the Vacancies Act suggests that such cases are relatively rare. As discussed, the law also contains [reporting requirements](#), suggesting that the Comptroller General may be able to bring Congress's attention to any vacant positions that have reached the end of the applicable period of acting service.

For more information on how the Vacancies Act operates, see CRS Report R44997, *The Vacancies Act: A Legal Overview*, by Valerie C. Brannon.

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