

Who Can Serve as Acting Attorney General

November 15, 2018

A recent [shake-up in the leadership](#) at the Department of Justice (DOJ) has brought to the fore a number of unresolved legal questions surrounding the President's ability to name acting officers. The controversy began on November 7, 2018, when then-Attorney General (AG) Jeff Sessions [resigned](#) at the President's request. As a position subject to the advice and consent process contemplated in the [Appointments Clause](#) of the Constitution, the AG's office will remain vacant until a presidential nominee is confirmed by the Senate. But in the interim, the President [named](#) Matthew Whitaker, the former AG's chief of staff, to serve as Acting AG, performing the duties of that office while it remains vacant. To install Whitaker as Acting AG, the President [invoked](#) the [Federal Vacancies Reform Act of 1998](#) (Vacancies Act), a law that authorizes certain government officials to temporarily perform the duties of most executive offices that require Senate confirmation.

The selection of Whitaker to serve as Acting AG has generated significant legal debate. A [number of commentators](#) have argued that the President's selection of Whitaker to serve as Acting AG is unlawful. And on November 13, 2018, in [ongoing litigation](#) over the constitutionality of the Affordable Care Act, the State of Maryland filed a [preliminary injunction](#) formally challenging Whitaker's authority to serve as Acting AG. Maryland's [suit](#) had named Sessions as a defendant in his official capacity as the AG, raising the question of who may now be subbed into the litigation in his place. Adding to this legal debate, on November 14, 2018, the DOJ's Office of Legal Counsel (OLC) issued a [memorandum](#) defending the legality of Whitaker's service.

This Sidebar discusses the two primary arguments raised to challenge the President's decision to name Whitaker as Acting AG: first, that the Vacancies Act does not apply because another statute, 28 U.S.C. § 508, provides that the Deputy Attorney General (DAG) serves as Acting AG in the event of a vacancy; and second, that the Appointments Clause prohibits Whitaker, a non-Senate-confirmed official, from serving as the head of the DOJ.

Statutory Objections

There are two statutes that potentially govern Whitaker's ability to temporarily perform the duties of the AG in the event of a vacancy: (1) the Vacancies Act, and (2) a DOJ-specific statute, 28 U.S.C. § 508.

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Vacancies Act

The Vacancies Act generally authorizes acting officials to temporarily perform the [nondelegable](#) duties of vacant executive-branch offices. The [statute applies](#) to vacancies arising when an executive branch officer subject to Senate confirmation “dies, resigns, or is otherwise unable to perform the functions and duties of the office.” Specifically, the Vacancies Act allows [three classes](#) of government officials to temporarily perform the duties of a vacant advice-and-consent office for [limited periods of time](#). First, as a default rule, the [Vacancies Act provides](#) that “the first assistant” to the vacant office will perform the duties. Alternatively, the President may designate two other classes of government officials to serve instead of the first assistant: either (1) a government official serving in a Senate-confirmed position or (2) certain senior employees serving in the same agency as the vacant position. To qualify under this final provision, the employee must have served in a position where “the minimum rate of pay” is equivalent to “GS-15 of the General Schedule” for at least 90 days in the year preceding the occurrence of the vacancy. The [Vacancies Act allows](#) a qualified government official to serve as an acting officer for 210 days starting on the date of the vacancy—or longer, if the President submits a nomination for the office to the Senate.

Usually, the [Vacancies Act supplies](#) “the exclusive means for temporarily authorizing an acting official to perform the functions and duties” of a covered office—unless another statutory provision “designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity.” In the case of the AG’s office, [28 U.S.C. § 508](#) designates specific government officials to perform the AG’s duties if the office becomes vacant, meaning that the Vacancies Act is not the “[exclusive means](#)” to authorize acting service. But as discussed in more detail below, concluding that an agency-specific statute authorizes acting service does not necessarily mean that the Vacancies Act is wholly inapplicable.

28 U.S.C. § 508

[28 U.S.C. § 508](#) more specifically addresses vacancies in the AG’s office. Section 508(a) provides that the DAG “may exercise all the duties of” the AG in the case of a vacancy, expressly stating that the DAG is the “first assistant” to the AG for purposes of the Vacancies Act. However, if there is a vacancy and the DAG is unavailable to exercise the AG’s duties, Section 508(b) states that “the Associate Attorney General [(AAG)] shall act as [AG].” (The AAG position is [currently vacant](#).) This provision also authorizes the AG to create a “further order of succession.” (The most recent order of succession from the AG appears to be set forth in [AG Order No. 3777-2016. Executive Order 13775](#), issued by President Trump on February 9, 2017, provides a *further* order of succession if none of the officers designated in the AG’s order of succession is available.)

Applying these Two Statutes to the Current Vacancy

Under both the Vacancies Act and 28 U.S.C. § 508, when the AG’s office becomes vacant, the DAG automatically steps in as the Acting AG and is authorized to perform the duties of the AG. Thus, according to the default line of succession, [DAG Rod Rosenstein](#) would have become the Acting AG upon a vacancy in the AG’s office. The President, however, invoked the Vacancies Act when [he directed Whitaker](#) to serve as Acting AG. Whitaker, as a [senior agency employee](#) who has reportedly served as the chief of staff to the AG [since September 22, 2017](#), falls under the final class of permissible government officials who may serve under the Vacancies Act.

Some [legal scholars](#) have questioned whether the Vacancies Act does, in fact, authorize Whitaker to serve as Acting AG, arguing (among other things) that 28 U.S.C. § 508 may displace the Vacancies Act under these circumstances. As [one commentator](#) pointed out, more specific statutes usually control over more general ones, suggesting that in the event of a conflict between the two statutes, 28 U.S.C. § 508 should prevail. The provisions of the Vacancies Act that allow the President to supplant the line of succession

created by 28 U.S.C. § 508 might seem to create such a conflict. The State of Maryland raised this argument in [its recent brief](#), stating that “[t]he succession of the Attorney General *cannot* simultaneously be governed by both [28 U.S.C. § 508] and the Vacancies Reform Act.”

But as discussed in more detail in [this CRS report](#), the few courts that have considered the question have concluded that similar agency-specific statutes are not in conflict with the Vacancies Act. Instead, these [courts have held](#) that *both* the Vacancies Act and the agency-specific statute apply to authorize acting service, allowing the President to choose between the two statutes to temporarily fill the position. In their view, although the presence of an agency-specific statute renders the Vacancies Act nonexclusive, this does not make the Vacancies Act *inapplicable*. This is consistent with the general [rule](#) that if “possible, a court should construe statutes covering the same subject matter so as to give effect to both,” avoiding conflicts. Most recently, in a [dispute](#) over the leadership of the CFPB, a federal trial court [ruled](#) that the President could invoke the Vacancies Act even where the Dodd-Frank Act [provided](#), in seemingly mandatory language, that the Deputy Director of the CFPB “shall . . . serve as acting Director.” The judge concluded that under the circumstances, “shall” should not be read as mandatory. In the court’s view, it was “clear that Dodd-Frank’s ‘shall’ is implicitly qualified by the [Vacancies Act’s] ‘may.’”

Although the use of the word “shall” in the Dodd-Frank Act did not matter to that court, it is worth noting that 28 U.S.C. § 508 uses both permissive and mandatory language: while Section 508(a) provides that the DAG “may” step in as Acting AG, Section 508(b) states that the AAG “shall” act as AG if neither the AG nor DAG is available. The fact that at least part of Section 508 is permissive seems to support the argument that the President has discretion to choose between the two statutes. The fact that Section 508(a) expressly references the Vacancies Act, providing that the DAG is the “first assistant” under that statute, may further support the view that the two statutes are meant to apply concurrently, an argument DOJ noted in its [recent opinion](#). Maryland, however, seems to implicitly reject this position in its brief, [stating](#) that under 28 U.S.C. § 508, “there is no option or ambiguity.” Other commentators have [suggested](#) that “Congress’s use of the mandatory ‘shall’” in Section 508(b) “might fairly be understood to at least create a presumption of congressional intent that Section 508 supersedes the permissive provisions of the” Vacancies Act.

In a [2007 opinion](#), the DOJ’s OLC took the view that the President could name an Acting AG under the Vacancies Act “even if an officer of the [DOJ] otherwise could act under 28 U.S.C. § 508.” Presaging the judicial opinions mentioned above, the DOJ concluded that even if the Vacancies Act “is not exclusive,” that “does not mean that it is unavailable.” The DOJ’s more [recent opinion](#), issued on November 14, 2018, agreed with its 2007 opinion, concluding that the Vacancies Act “remains available, notwithstanding section 508.” The DOJ [believes](#) that the President permissibly invoked the Vacancies Act “to designate Mr. Whitaker as acting [AG] ahead of the alternative line of succession provided under section 508.”

Constitutional Objections

Putting to the side whether the Vacancies Act authorizes the President to appoint an Acting AG, [some](#) have [argued](#) that the President’s selection of Whitaker violates the Constitution’s Appointments Clause. The Appointments Clause [requires](#) Senate confirmation for the appointments of “officers of the United States,” although “Congress may by law vest the appointment of . . . inferior officers” in the President alone, department heads, or courts of law. Accordingly, the Senate must confirm “[principal](#)” officers, but Congress may authorize the President or a department head to unilaterally appoint “inferior” officers. These principles [ensure](#), among other things, that those entrusted with the power to appoint government officers are accountable to the people. Some have thus [argued](#) that Whitaker, as the Acting AG, is serving as a principal officer and because the President selected Whitaker absent Senate confirmation, that appointment violates the Constitution.

As an initial matter, no one disputes that the AG qualifies as a principal officer subject to Senate confirmation. After all, the position is not “[directed and supervised](#)” by a superior officer, and the AG answers directly to the President. Instead, the center of the constitutional debate over Whitaker’s appointment is whether an *Acting* AG also qualifies as a principal officer.

On the one hand, a formalist reading of the Clause’s requirements likely indicates that the Acting AG is a principal officer who must be confirmed by the Senate. For instance, in *NLRB v. SW General, Inc.*, Justice Clarence Thomas wrote a concurring opinion arguing that when the President temporarily fills an officer position pursuant to the Vacancies Act, he actually appoints the officer within the meaning of the Appointments Clause. Doing so for inferior officers is permissible according to Justice Thomas because the Appointments Clause permits Congress to vest the appointment of such officers with the President alone—and so the Vacancies Act permissibly vests the President with such authority. But the Vacancies Act cannot, in Justice Thomas’s view, allow the President to temporarily appoint *principal* officers without Senate confirmation without running afoul of the Appointments Clause. Closely related to this reading, [some have argued that](#) when a vacancy occurs for a Senate confirmable position, generally only another individual whom the Senate has already confirmed to a different position can temporarily fill the vacancy (assuming that the individual was confirmed to an office where it was [foreseeable to Congress](#) that that person would potentially fill this role, such as the DAG relative to the AG position). Under both these readings, the selection of Whitaker as Acting AG violates the Appointments Clause because he was not confirmed to his current position by the Senate.

On the other hand, taking a more functional approach to the Appointments Clause, precedent, historical practice, and certain pragmatic considerations suggest that the selection of an Acting AG whose nomination the Senate did not consider may comport with the Appointments Clause. For instance, in 1898, in the case of *United States v. Eaton*, the Supreme Court concluded that a vice consul that had not been confirmed by the Senate could temporarily exercise the powers of a Senate-confirmed consul. The Court reasoned that because the vice consul was selected for “a limited time, and under special and temporary conditions,” he was not a principal, but an inferior officer. Noting prudential concerns, a contrary holding, the Court observed, “would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered.” Justice Scalia, in a 1997 opinion for the Court, [cited Eaton favorably](#) for the proposition that a vice consul temporarily exercising the duties of a consul was an inferior officer. Under this view of acting appointments, because Whitaker was selected by the President to serve as Acting AG temporarily, pursuant to the Vacancies Act, he is currently serving as a properly appointed inferior officer.

Likewise, historical practice appears to support the view that the President may appoint individuals to temporarily serve in positions that are normally considered to constitute principal officers without Senate confirmation. In a 1792 statute, Congress [authorized](#) the President to appoint “any person” to exercise the duties of the Secretaries of War, State, and the Treasury when those offices were vacant due to “death, absence from the seat of government, or sickness.” And Congress arguably affirmed this interpretation of the Appointments Clause in a [statute](#) from 1863 and the [1868 Vacancies Act](#), when Congress authorized certain government officials to serve in an acting capacity without specifying that those officials required Senate confirmation. More recently, in a [2003 opinion](#), the OLC approved of President George W. Bush’s decision to designate a non-Senate-confirmed official to serve as head of the Office of Management and Budget. President Barack Obama also [filled](#) some agency head vacancies with individuals who had not been confirmed by the Senate; and President Donald Trump [has done](#) so in other circumstances than that of the Acting AG. There are fewer examples of a non-Senate-confirmed individual serving as Acting AG: it appears that this has occurred [once](#), when Assistant Attorney General J. Hubley Ashton served for about a week in 1866.

Were a court to address a constitutional challenge to the appointment of Acting AG Whitaker, a number of considerations may be relevant. One is the importance of historical practice to interpreting the Appointments Clause. In the context of [recess appointments](#), for example, the Court has sometimes looked to the past practice of the political branches to inform the Constitution’s meaning. Another consideration is the relevance of *Eaton* to the appointment of an Acting AG. A narrow reading of the decision might emphasize the exigency posed in replacing a consul located overseas; perhaps the replacement of the AG, responsible for overseeing the Justice Department, is distinguishable (Maryland makes a version of this argument in its [brief](#) challenging the appointment of Whitaker). But a broader view of the case could suggest that the Court believes the President may appoint individuals to temporarily exercise the duties of principal officers in cases of a vacancy. Finally, a court might consider the practical implications of a decision limiting a future President’s power to temporarily fill vacancies. One might argue that a ruling prohibiting acting service in principal offices could prevent the efficient functioning of government (e.g., some statutes [require](#) that only a department head approve of certain agency actions). In particular, such a rule could conceivably hamstring a new presidential administration’s ability to govern during a transition where the only Senate-confirmed officers available to fill vacancies would be from the last administration. As the Court [recognized](#) in a 2014 decision, impinging on the “President’s ability to staff the Executive Branch with people of his own choosing” may “limit the President’s control and political accountability.”

That said, as the Court has [observed](#), “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.” Permitting the President to unilaterally select officers to temporarily fill principal officer positions necessarily reduces the Senate’s relative power to oversee appointments to the executive branch. This concern could be exacerbated depending on the length of time that an individual is permitted to fill a position on a temporary basis. Courts—and [the DOJ](#)—[have recognized](#) that acting officers would likely violate the Appointments Clause if they serve for extended periods of time.

Conclusion

The appointment of acting officials to serve as principal officers poses an important constitutional question that concerns the proper division of authority between the political branches—and implicates a potentially difficult question regarding the interaction of two statutes. Whether these questions will be resolved in the courts, however, is unclear. As mentioned above, the State of Maryland has [challenged](#) the appointment of Whitaker as Acting AG in ongoing litigation. Suits by other parties are possible, so long as those parties [have standing](#) under Article III of the Constitution to challenge Whitaker’s appointment. Senate confirmation of a new AG could render any pending challenges to Whitaker’s appointment moot, leading to the [dismissal](#) of suits raising these questions. Ultimately, Congress enjoys considerable authority to enact legislation altering the method of appointment for acting officials, although any such bill must comport with the Appointments Clause.

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