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# The Vacancies Act: A Legal Overview

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# Summary

The Federal Vacancies Reform Act of 1998 (Vacancies Act) generally provides the exclusive means by which a government employee may temporarily perform the functions and duties of a vacant advice-and-consent position in an executive agency. Unless an acting officer is serving in compliance with the Vacancies Act, any attempt to perform the functions and duties of that office will have no force or effect.

The Vacancies Act limits a government employee's ability to serve as an acting officer in two primary ways. First, the Vacancies Act provides that only three classes of people may serve temporarily in an advice-and-consent position. As a default rule, the first assistant to a position automatically becomes the acting officer. Alternatively, the President may direct either a senior official of the agency or a person serving in any other advice-and-consent position to serve as the acting officer. Second, the Vacancies Act limits the length of time a person may serve as acting officer: a person may serve either (1) for a limited time period running from the date that the vacancy occurred or (2) during the pendency of a nomination to that office, with some extensions if the nomination is rejected, withdrawn, or returned. The Vacancies Act is primarily enforced when a person who has been injured by an agency's action challenges the action based on the theory that it was taken in contravention of the Act.

There are, however, a few key limitations on the scope of the Vacancies Act. Notably, the Vacancies Act has largely been interpreted to govern the ability of a person to perform only those functions and duties of an office that are nondelegable. Unless a statute or regulation expressly specifies that a duty must be performed by the absent officer, that duty may likely be delegated to another government employee. In other words, delegable job responsibilities are outside the purview of the Vacancies Act. In addition, if another statute expressly authorizes acting service, that other statute may render the Vacancies Act nonexclusive, or possibly even inapplicable.

This report first describes how the Vacancies Act operates and outlines its scope, identifying when the Vacancies Act applies to a given office and which offices are exempt from its provisions. The report then explains who may serve as an acting officer and for how long, focusing on the limitations the Vacancies Act places on acting service. Next, the report discusses the Vacancies Act's enforcement mechanisms. Finally, the report turns to evolving legal issues regarding the application of the Vacancies Act, including a discussion of how other federal laws may limit the Act's reach. Specifically, the report concludes by examining the interaction of the Vacancies Act with agency-specific statutes, the ability to delegate the duties of a vacant office, and constitutional considerations.

# Contents

Background ..... 1
Scope and Operation of the Vacancies Act ..... 2
Which Offices? ..... 3
What Are the "Functions and Duties" of an Office? ..... 6
Vacancies Act Limitations on Acting Service ..... 10
Who Can Serve as an Acting Officer? ..... 10
For How Long? ..... 13
Consequences of Violating the Vacancies Act ..... 15
Evolving Legal Issues ..... 20
Exclusivity of the Vacancies Act ..... 20
Delegability of Duties ..... 25
Constitutional Considerations ..... 29

## Figures

Figure 1. Two Limited Periods of Service ..... 13
Figure 2. Period of Service After Submission of Nomination ..... 15

## Contacts

Author Information ..... 35

# Background

The Appointments Clause of the Constitution generally requires high-level "officers of the United States" to be appointed through nomination by the President, with the advice and consent of the Senate.[1] Appointment to these advice-and-consent positions can be a lengthy process, and officers sometimes unexpectedly vacate offices, whether by resignation, death, or other absence, leaving before a successor has been chosen.[2] In particular, there are often a large number of vacancies during a presidential transition, when a new President seeks to install new officers in important executive positions.[3] In the case of such a vacancy, Congress has long provided that individuals who were not appointed to that office may *temporarily* perform the functions of that office.[4] Usually, where a statute authorizes acting service, courts have said that "an acting officer is vested with the same authority that could be exercised by the officer for whom he acts."[5]

To serve as an acting officer for an advice-and-consent position, a government officer or employee generally must be authorized to perform the duties of a vacant office by the Federal Vacancies Reform Act of 1998 (Vacancies Act).[6] The Vacancies Act allows only certain classes of employees to serve as an acting officer for an advice-and-consent position,[7] and specifies that they may serve for only a limited period.[8] If a covered acting officer's service is not authorized by the Vacancies Act, any attempt by that officer to perform a "function or duty" of a vacant office has "no force or effect."[9]

This report first describes how the Vacancies Act operates and outlines its scope, identifying when the Vacancies Act applies to a given office and which offices are exempt from its provisions. The report then explains who may serve as an acting officer and for how long, focusing on the limitations the Vacancies Act places on acting service. Next, the report discusses how the Vacancies Act is enforced. Finally, the report turns to evolving legal issues regarding the application of the Vacancies Act, including a discussion of how other federal laws may limit the Act's reach. Specifically, the report concludes by examining the interaction of the Vacancies Act

[1] U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."). If the vacancy exists "during the Recess of the Senate," the Constitution also allows the President to appoint an officer to serve until "the End of [the Senate's] next Session." U.S. CONST. art. II, § 2. *See generally* CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue.

[2] *See generally* Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 638–48 (2020) (summarizing previous empirical research on executive branch vacancies and providing new data on Cabinet-level vacancies).

[3] *See, e.g.*, CRS Insight IN11541, *Presidential Transitions: Executive Branch Political Appointment Status*, by Henry B. Hogue.

[4] *See, e.g.*, Doolin Sec. Sav. Bank v. Office of Thrift Supervision, 139 F.3d 203, 209–10 (D.C. Cir. 1998) (describing vacancies legislation dating back to 1792).

[5] *In re* Grand Jury Investigation, 916 F.3d 1047, 1055 (D.C. Cir. 2019). *Cf.* Nw. Immigrant Rights Project v. U.S. Citizenship & Immigr. Servs., No. 19-3283, 2020 U.S. Dist. LEXIS 187410, at *60 (D.D.C. Oct. 9, 2020) (holding that a statute authorizing "the Secretary" of the Interior to designate an order of succession "to serve as Acting Secretary" did not authorize an acting Secretary to change the order of succession).

[6] 5 U.S.C. §§ 3345–3349c.

[7] *Id.* § 3345.

[8] *Id.* §§ 3346, 3349a.

[9] *Id.* § 3348(d).

with agency-specific statutes, the ability to delegate the duties of a vacant office, and constitutional considerations.

# Scope and Operation of the Vacancies Act

The Vacancies Act generally provides "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate."[10] As discussed in more detail below, the Vacancies Act may sometimes operate in tandem with agency-specific statutes that provide for a specific official to serve in the case of a vacancy.[11] The Vacancies Act applies if an officer serving in an advice-and-consent position in the executive branch "dies, resigns, or is otherwise unable to perform the functions and duties of the office."[12] Some have suggested that the Vacancies Act may not apply in the case of a presidential removal from office[13] or in the case of a *temporary* rather than permanent absence,[14] but the phrase "unable to perform the functions and duties of the office" appears relatively broad on its face, and the Vacancies Act does not expressly exclude firings or temporary absences.[15]

Although some positions are excluded from the Vacancies Act,[16] ordinarily a person may not temporarily perform "the functions and duties" of a vacant advice-and-consent position unless that service comports with the Vacancies Act.[17] The Vacancies Act specifies that a "function or duty" is one that, by statute or regulation, must be performed by the officer in question.[18] Section 3348[19] provides that, "unless an officer or employee is performing the functions and duties [of an

[10] *Id.* § 3347(a).

[11] *See infra* "Exclusivity of the Vacancies Act."

[12] 5 U.S.C. §§ 3345, 3348. The heads of executive agencies are required to report any vacancies, along with information about acting officers and nominations, "to the Comptroller General of the United States and to each House of Congress." *Id.* § 3349(a).

[13] *See, e.g.*, United States v. Valencia, No. 5:17-CR-882-DAE, 2018 U.S. Dist. LEXIS 200564, at *11–12 (W.D. Tex. Nov. 27, 2018); Ben Miller-Gootnick, *Boundaries of the Federal Vacancies Act*, 56 HARV. J. ON LEGIS. 459, 460 (2019). *But cf.* O'Connell, *supra* note 2, at 674 (noting textual, legislative history, and policy arguments "weigh[ing] in favor of the Vacancies Act applying to firings").

[14] *Cf., e.g.*, English v. Trump, 279 F. Supp. 3d 307, 322 (D.D.C. 2018) (noting party's argument that agency-specific statute referring to "absence or unavailability" includes only vacancies resulting from "temporary" conditions, opposing this language to that of the Vacancies Act); *In re* Grand Jury Investigation, 916 F.3d 1047, 1055–56 (D.C. Cir. 2019) (concluding that an agency-specific statute authorizing acting service in the event of the Attorney General's "absence or disability" could apply when the Attorney General recused himself from certain investigations, because the "single-issue recusal" qualified as "a 'disability' that created a vacancy").

[15] The Vacancies Act expressly refers to at least one form of temporary absence: sickness. *See* 5 U.S.C. § 3346 (providing that time limits on acting service do not apply to "a vacancy caused by sickness").

[16] *See infra* "Which Offices?"

[17] *See* 5 U.S.C. §§ 3347–3348.

[18] *Id.* § 3348(a)(2); *see infra* "What Are the "Functions and Duties" of an Office?"

[19] This report refers to specific sections of the Vacancies Act using their location in Title 5 of the U.S. Code, rather than referring to sections of Pub. L. No. 105-277, 112 Stat. 2681-611 (1998).

office] in accordance with" the Act,[20] "the office shall remain vacant."[21] If there is no acting officer serving in compliance with the Vacancies Act, then generally "only the head of [an agency] may perform" the functions and duties of that vacant office.[22] As a result, Section 3348 usually allows three types of people to perform the functions and duties of an advice-and-consent office when it is vacant: the agency head, a person complying with the Vacancies Act, or a person complying with another statute that allows acting service.[23] Section 3348 further provides that "an action taken by any person who" is not complying with the Vacancies Act "in the performance of any function or duty of a vacant office . . . shall have no force or effect."[24] The Vacancies Act also states that an agency may not ratify any acts taken in violation of the statute.[25] These enforcement mechanisms are discussed in more detail below.[26]

## Which Offices?

The Vacancies Act generally applies to advice-and-consent positions in executive agencies.[27] The term "Executive agency"[28] is defined broadly in Title 5 of the U.S. Code to mean "an Executive department, a Government corporation, [or] an independent establishment."[29] However, the Vacancies Act explicitly excludes certain offices altogether.[30] First, the Vacancies Act does not apply to officers of "the Government Accountability Office" (GAO).[31] Second, a distinct provision states that the Vacancies Act does not apply to (1) a member of a multimember board

[20] Specifically, the statute requires compliance with Sections 3345, 3346, and 3347. *See* 5 U.S.C. § 3348(b). Section 3345 sets out three classes of people who may serve as acting officers, *id.* § 3345; Section 3346 prescribes time limitations for acting service, *id.* § 3346; and Section 3347 provides that the Vacancies Act is exclusive unless another statutory provision expressly allows a person to "perform the functions and duties of a specified office temporarily in an acting capacity," *id.* § 3347(1). These provisions are explained in more detail *infra*, "Vacancies Act Limitations on Acting Service," and "Exclusivity of the Vacancies Act."

[21] 5 U.S.C. § 3348(b).

[22] *Id.* This provision allowing the head of the agency to perform functions and duties of the vacant office does not apply to an office that is "the office of the head of an Executive Agency." *Id.* § 3348(b)(2). Accordingly, if an office designated vacant under this provision is that of the agency head, it appears likely that no one can temporarily perform the functions and duties of that office under the Vacancies Act. *See* S. REP. NO. 105-250, at 19 (1998) ("If the head of the agency position is vacant for more than 150 days without a nomination being sent to the Senate, the office is to remain vacant.").

[23] 5 U.S.C. § 3348(b).

[24] *Id.* § 3348(d)(1). 5 U.S.C. § 3348(a)(1) defines "action" by reference to 5 U.S.C. § 551(13), which in turn defines "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

[25] *Id.* § 3348(d)(2).

[26] *See infra* "Consequences of Violating the Vacancies Act."

[27] 5 U.S.C. § 3347.

[28] *Id.*

[29] *See id.* § 105 (defining "executive agency" for purposes of Title 5 of the U.S. Code); Applicability of the Fed. Vacancies Reform Act to Vacancies at the Int'l Monetary Fund and the World Bank, 24 Op. O.L.C. 58, 61 (2000) (using 5 U.S.C. § 105 to define the term "executive agency," as used in the Vacancies Act).

[30] 5 U.S.C. §§ 3345, 3348.

[31] Specifically, the general provisions making the Vacancies Act applicable to officers of executive agencies specify that the relevant executive agencies "includ[e] the Executive Office of the President," but exclude the GAO. *Id.* §§ 3345(a), 3347(a), 3348(b), 3349(a). Although the GAO is generally considered to be a legislative agency rather than an executive branch agency, *see, e.g.*, Colonial Press Int'l, Inc. v. United States, 788 F.3d 1350, 1357 (Fed. Cir. 2015), it is expressly excluded from the Vacancies Act—likely because another statute, 5 U.S.C. § 104, expressly identifies the GAO as an "independent establishment" falling within the generally applicable definition of "executive agency" provided in 5 U.S.C. § 105.

that "governs an independent establishment or Government corporation"; (2) a "commissioner of the Federal Energy Regulatory Commission"; (3) a "member of the Surface Transportation Board"; or (4) a federal judge serving in "a court constituted under article I of the United States Constitution."[32]

Additionally, while not excluded from the other requirements of the Vacancies Act,[33] certain offices are exempt from the provision allowing only agency heads to perform the duties of a vacant office and the provision that renders noncompliant actions void.[34] Specifically, Section 3348(e) states that "this section"—Section 3348—"shall not apply to":

> (1) the General Counsel of the National Labor Relations Board;
>
> (2) the General Counsel of the Federal Labor Relations Authority;
>
> (3) any Inspector General appointed by the President, by and with the advice and consent of the Senate;
>
> (4) any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate; or
>
> (5) an office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) if a statutory provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office.[35]

The legislative history of the Vacancies Act sheds some light on the purpose of this exemption, suggesting that Congress sought to exclude these "unusual positions" from Section 3348 because these officials are meant to be "independent" of the commission or agency in which they serve.[36] The Senate report accompanying the Act suggests that for at least some of these positions, Congress intended "to separate the official who would investigate and charge potential violations of the underlying regulatory statute from the officials who would determine whether that statute had actually been violated."[37] Allowing the head of the agency to perform the nondelegable duties of these positions would undermine the independence of these positions.[38]

As discussed in more detail below, it is not entirely clear what the consequences are if an acting officer in one of these exempt positions violates the Vacancies Act.[39] Because Section 3348 does not apply to those positions, it appears that the law would not render noncompliant actions void.[40] Instead, a court might conclude that any noncompliant acts are merely voidable—a legal

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[32] 5 U.S.C. § 3349c. This first category would likely include, for example, members of the National Credit Union Administration Board, a multimember board that manages "an independent agency." 12 U.S.C. § 1752a.

[33] *Id.* § 3348(e); NLRB v. SW Gen., Inc., 137 S. Ct. 929, 944 (2017) (concluding 5 U.S.C. § 3345(b)(1) applied to Acting General Counsel of National Labor Relations Board and holding his service violated the Vacancies Act).

[34] 5 U.S.C. § 3348(b), (d), (e).

[35] *Id.* § 3348(e).

[36] S. REP. NO. 105-250, at 20 (1998). This portion of the report discusses the exemptions for General Counsels, but the report offers distinct, but substantively similar, explanations for exempting the "agency inspectors general." *See id.* The report does not specifically discuss sub-subsection (4), containing the exemption for Chief Financial Officers, *see id.*, because this provision was added after the committee's consideration of the bill, 144 CONG. REC. S12823 (daily ed. Oct. 21, 1998) (statement of Sen. Fred Thompson).

[37] S. REP. NO. 105-250, at 20 (1998).

[38] *Id.*

[39] *Infra* "Consequences of Violating the Vacancies Act."

[40] *See* 5 U.S.C. § 3348(d), (e).

distinction discussed below—or could conclude that even if these officers violate the Vacancies Act, that law will not invalidate their actions.[41]

Finally, the Vacancies Act contemplates that other statutes may, under limited circumstances, either supplement or supersede its provisions.[42] Section 3347 provides that the Vacancies Act is exclusive unless "a statutory provision expressly" authorizes "an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity."[43] However, Section 3347 states that a general statute authorizing the head of an executive agency "to delegate duties statutorily vested in that agency head to, or to reassign duties among, officers or employees of such Executive agency" will not supersede the limitations of the Vacancies Act on acting service.[44] For instance, 28 U.S.C. § 510, which states generally that the Attorney General may authorize any other employee to perform any function of the Attorney General, likely would not render the Vacancies Act nonexclusive.[45] To supplement or supersede the Vacancies Act, a statute must "expressly" authorize "acting" service.[46] Under certain circumstances, it might be the case that more than one statute governs acting service in a given office,[47] and that a person could lawfully serve as an acting officer under either statute.[48] This issue is discussed in more detail, below.[49]

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[41] *See* SW Gen., Inc. v. NLRB, 796 F.3d 67, 79 (D.C. Cir. 2015).

[42] *See* 5 U.S.C. §§ 3347, 3348(b). In addition, the Vacancies Act does not apply if "the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution." *Id.* § 3347(a)(2).

[43] *Id.* § 3347(a)(1). 5 U.S.C. § 3347(a)(1)(A) refers to statutes that authorize "the President, a court, or the head of an Executive department, to designate" acting officers, while 5 U.S.C. § 3347(a)(1)(B) refers to statutes that themselves designate acting officers. *See, e.g.*, 49 U.S.C. § 102(e) (creating assistant secretary and general counsel positions and authorizing those officials to serve as acting officials).

[44] 5 U.S.C. § 3347(b). Legislative history suggests that Congress intended this provision to definitively counter the Department of Justice's assertion that "its organic statute's 'vesting and delegation' provision" rendered the Vacancies Act's limitations inapplicable. 144 CONG. REC. S11021 (daily ed. Sept. 28, 1998) (statement of Sen. Fred Thompson). *See also id.* at S11025 (statement of Sen. Robert Byrd) ("Most importantly . . . it is a bill which will, once and for all, put an end to these ridiculous, specious, fallacious arguments that the Vacancies Act is nothing more than an annoyance to be brushed aside."); *id.* at S11026 (statement of Sen. Carl Levin) ("[The bill] would make clear that the act is the sole legal statutory authority for the temporary filling of positions pending confirmation. . . . I think in the opinion of probably most Senators that loophole does not exist. But, nonetheless, whether it is a real one or an imaginary one, it has been used by administrations in order to have people temporarily fill positions pending confirmation for just simply too long a period of time, which undermines the Senate's advice and consent authority."); *id.* at S11028 (statement of Sen. Strom Thurmond) ("[T]he Attorney General's misguided interpretation of the current Vacancies Act . . . . practically interprets the Act out of existence."); 144 CONG. REC. S12823 (daily ed. Oct. 21, 1998) (statement of Sen. Fred Thompson) ("[T]he organic statutes of the Cabinet departments do not qualify as a statutory exception to this legislation's exclusivity in governing the appointment of temporary officers.").

[45] *See* 5 U.S.C. § 3347(a)(1).

[46] *Id.* The committee report on the 1998 bill noted that the bill would "retain[] existing statutes" that contained such an express authorization. S. REP. NO. 105-250, at 15–16 (1998).

[47] *See, e.g.*, Hooks *ex rel.* NLRB v. Kitsap Tenant Support Servs., 816 F.3d 550, 556 (9th Cir. 2016).

[48] *See* United States v. Lucido, 373 F. Supp. 1142, 1150 (E.D. Mich. 1974) ("[U]nder both 28 U.S.C. § 508 and 5 U.S.C. § 3345, the Deputy Attorney General assumes the duties of the vacant position."). In *Lucido*, a district court upheld the actions of an acting officer who had exceeded the time limitations of an older version of the Vacancies Act, holding that a separate statute, 28 U.S.C. § 508(a), had authorized him to assume the duties of the Attorney General while acting in his position as Deputy Attorney General. *Id.* at 1151.

[49] *See infra* "Exclusivity of the Vacancies Act."

The Vacancies Act also makes certain exemptions for holdover provisions in other statutes: Section 3349b provides that the Vacancies Act "shall not be construed to affect any statute that authorizes a person to continue to serve in any office" after the expiration of that person's term.[50]

## What Are the "Functions and Duties" of an Office?

The Vacancies Act limits an officer or employee's ability to perform "the functions and duties" of a vacant advice-and-consent office.[51] Section 3348 contains a definition providing that a "function or duty" must be (1) established either by statute or regulation and (2) "required" by that statute or regulation "to be performed by the applicable officer (and only that officer)."[52] The interpretation of "function or duty" has significant implications for an agency's ability to delegate the duties of a vacant office and for determining the consequences of violating the Vacancies Act. For example, if an official performs a duty that is not within the scope of this definition, then even if that official's service did not comply with the Vacancies Act, Section 3348's enforcement provisions will not apply to invalidate the duty.[53] The issues of enforcement and delegation are discussed in more detail, below.[54]

Under the statutory definition, if the function or duty is established by regulation, that regulation must have been "in effect at any time during the 180-day period preceding the date on which the vacancy occurs."[55] This 180-day provision has been referred to as a "lookback" provision that requires the agency to assign or reassign any regulatory duties *prior* to the vacancy.[56] This provision suggests that a regulatory duty falls outside this definition if it is not assigned to an office in the lookback period, and the Vacancies Act may not apply if an agency attempts to assign a new duty to a vacant office after the vacancy occurs.[57] Relying on legislative history, the GAO has said this provision was also intended "to prevent agencies from re-issuing regulations

[50] 5 U.S.C. § 3349b. Additionally, Section 3345, which limits the types of people who can serve as an acting officer, includes a special provision allowing the President to direct certain officers who serve a fixed term in an executive department to continue to serve as an acting officer. *See infra* note 103; 5 U.S.C. § 3345(c)(1). *See also* Inapplicability of the Fed. Vacancies Reform Act's Reporting Requirements when PAS Officers Serve Under Statutory Holdover Provisions, 23 Op. O.L.C. 178, 179 (1999) (concluding "there is no vacancy to be reported under the Act when a PAS officer continues service under a holdover provision," but noting that this conclusion is not entirely clear).

[51] 5 U.S.C. §§ 3345(a), 3348(b), (d).

[52] *Id.* § 3348(a)(2). The definition of "function or duty" is found in 5 U.S.C. § 3348 and applies only to "this section" of the Vacancies Act. However, given that Section 3348 creates the Act's enforcement mechanisms, the definition is effectively controlling for the rest of the Act, as well. In other words, even if the language "functions and duties" as used in Sections 3345 and 3347 were interpreted to mean something different than the text used in Section 3348, a duty performed by a noncompliant official will have "no force or effect" only if it satisfies the definition in Section 3348. *But cf.* Nina Mendelson, L.M.-M. v. Cuccinelli *and the Illegality of Delegating Around Vacant Senate-Confirmed Offices,* YALE J. REG.: NOTICE & COMMENT (Mar. 5, 2020) (arguing that the Vacancies Act's "requirements for acting officers and time limitations on acting service could still be enforced under the Administrative Procedure Act" even if a challenged action does not fall under the definition of "function or duty" used in Section 3348).

[53] *See, e.g.*, Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam).

[54] *See infra* "Consequences of Violating the Vacancies Act" and "Delegability of Duties."

[55] 5 U.S.C. § 3348(a)(2)(B)(ii).

[56] *See* L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 33 (D.D.C. 2020) (discussing "lookback provision"); Guidance on Application of Fed. Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 71 (1999) (discussing "look-back provision"); O'Connell, *supra* note 2, at 634 (discussing "look-back period").

[57] *See* S. REP. NO. 105-250, at 18 (1998) ("The bill does not include as duties or functions of the office those duties that are limited or eliminated by statute after the date 180 days preceding the vacancy.")

providing that an office has no exclusive duties,"[58] possibly also preventing them from *limiting* the covered duties of the vacant office after the vacancy occurs.[59]

There is relatively little case law clarifying what "functions and duties" are within the scope of the Vacancies Act—and particularly, what it means for a statute or regulation to "require[]" a duty to be performed "only" by the applicable officer—but one trial court asserted that there are at least two ways to interpret this definition.[60] In the first interpretation, "functions and duties" could refer to a more limited category of duties that are not only assigned to one office, but also *may not* be delegated to any other official.[61] In the second interpretation, the "functions and duties" of a vacant office could include all the responsibilities that are expressly assigned by statute or regulation to one particular office and that were not delegated to another office during the lookback period (even if they could have been).[62]

Applying the first, narrower interpretation of "functions and duties," the Vacancies Act has been described as applying to only the *nondelegable* functions and duties of a vacant office because a *delegable* duty is not a duty that may be performed "only" by the officer in the vacant office.[63] One consequence of this interpretation is that temporary officials or subordinate officials may perform the duties of a vacant office without violating the Vacancies Act, as long as they do so subject to a lawful delegation.[64] Further, under this view, even if a duty has not been delegated, as long as it is delegable, it will fall outside the Section 3348 definition.[65] A number of courts,[66]

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[58] Fed. Vacancies Reform Act of 1998 - Assistant Attorney Gen. for the Office of Legal Counsel, U.S. Dep't of Justice, B-310780, 2008 U.S. Comp. Gen. LEXIS 101, at *10 n.11 (Comp. Gen. June 13, 2008).

[59] *See* S. REP. NO. 105-250, at 2 (1998) ("Such duties include duties established by regulation for the officer during any part of the 180 days before the vacancy occurred, notwithstanding subsequent regulations that purported to limit those duties.").

[60] L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 31 (D.D.C. 2020).

[61] *See id.* at 31–32.

[62] *See id.* at 31.

[63] *See, e.g.*, S. REP. NO. 105-250, at 18 (1998) ("The functions or duties of the office that can be performed only by the head of the executive agency are therefore defined as the non-delegable functions or duties of the officer . . . ."). *Cf., e.g.*, Crawford-Hall v. United States, 394 F. Supp. 3d 1122, 1133 (C.D. Cal. 2019) (referring to an office's "exclusive" duties).

[64] *See, e.g.*, ANNE JOSEPH O'CONNELL, ADMIN. CONFERENCE OF THE U.S., ACTING AGENCY OFFICIALS AND DELEGATIONS OF AUTHORITY 28 (2019) (discussing agency practice of using delegations as a substitute for acting service under the Vacancies Act). The legal principles that generally govern courts' analyses of whether a delegation is permissible are discussed below. *See infra* "Delegability of Duties." For example, such a delegation will be lawful only if the power was validly delegated by someone with the authority to do so—which might not be the case if the officer who formerly possessed those powers left without delegating any responsibilities. *See* Office of Thrift Supervision v. Paul, 985 F. Supp. 1465, 1474–75 (S.D. Fla. 1997); *see also id.* at 1475 n.9 ("The Court does not hold that such a designation could be indefinite, and the Court has no occasion to decide that issue at this time.").

[65] *See infra* "Consequences of Violating the Vacancies Act."

[66] *E.g.*, Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 420–21 (D. Conn. 2008), *aff'd*, 587 F.3d 132 (2d Cir. 2009). In this case, the Secretary of the Interior delegated all legally delegable duties of a vacant office to an inferior officer. *Id.* at 420. One of those duties was the ability to make "tribal acknowledgment decisions." *Id.* The Schaghticoke Tribal Nation challenged the inferior officer's decision not to acknowledge the tribe, arguing that the officer was unlawfully exercising a function or duty of a vacant office. *Id.* at 419. The court considered whether the authority to make acknowledgement decisions was a nondelegable function and concluded that it was not. *Id.* at 420–21. The court also held that it did not matter that the inferior officer had acted after the time period prescribed by the Vacancies Act because the Act "sets no time limits on redelegations of nonexclusive duties." *Id.* at 421.

along with the executive branch[67] and the Comptroller General,[68] have seemingly adopted this view, concluding that the Vacancies Act applies only to nondelegable duties.

For example, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) adopted this narrower interpretation of Section 3348 in *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*.[69] The Court there concluded that a challenged action taken by an acting official was not a function or duty encompassed by the Vacancies Act because the relevant action was delegable.[70] The fact that the duty was delegable was determinative, regardless of whether the duty had in fact *been* delegated to another official.[71]

Further supporting this interpretation, the GAO considered in 2008 whether a senior official in the Department of Justice's Office of Legal Counsel (OLC), the Principal Deputy Assistant Attorney General, had violated the Vacancies Act by performing the responsibilities of an absent officer, the Assistant Attorney General for the OLC.[72] The GAO concluded that the principal deputy had not violated the Vacancies Act because he had merely been performing the duties of his *own* position, which included the delegated duties of the vacant office.[73] The GAO approved of this delegation after reviewing the relevant statutes and regulations and concluding that "there [were] *no* duties" that could be performed only by the Assistant Attorney General.[74] The Department of Justice has likewise argued that Congress intended to allow the delegation of "non-exclusive responsibilities" because Congress "understood" that if only the head of an agency could perform all of a vacant office's duties, "the business of the government could be seriously impaired."[75]

By contrast, one trial court concluded in March 2020 that the second, broader interpretation of "function or duty" described above was more consistent with the operation and purpose of the Vacancies Act.[76] Specifically, the court said that the narrower reading of "function or duty" was "at odds" with Congress's intent to prohibit agency heads from invoking general vesting-and-

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[67] *E.g.*, Under Secretary of the Treasury for Enforcement, 26 Op. O.L.C. 230, 233–34 (2002).

[68] Fed. Vacancies Reform Act of 1998 - Assistant Attorney Gen. for the Office of Legal Counsel, U.S. Dep't of Justice, B-310780, 2008 U.S. Comp. Gen. LEXIS 101, at *12–13 (Comp. Gen. June 13, 2008).

[69] *See* Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam).

[70] *Id.*

[71] *See id.*

[72] Fed. Vacancies Reform Act of 1998 - Assistant Attorney Gen. for the Office of Legal Counsel, U.S. Dep't of Justice, B-310780, 2008 U.S. Comp. Gen. LEXIS 101, at *7 (Comp. Gen. June 13, 2008). The Principal Deputy Assistant Attorney General had performed these responsibilities after the time periods provided by the Vacancies Act had ended. *Id.*

[73] *Id.* at *12–13.

[74] *Id.* at *5 (emphasis added). The GAO noted first that there were "no statutory functions or duties for the position of Assistant Attorney General for the OLC, either non-delegable or delegable." *Id.* at *8. The GAO then concluded that although regulations assigned a number of duties to the Assistant Attorney General for the OLC, and specifically vested that officer with supervisory responsibility, the regulations were not "sufficiently prescriptive for [the OLC] to conclude that they assign non-delegable duties." *Id.* at *11.

[75] Guidance on Application of Fed. Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 72 (1999).

[76] L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 32 (D.D.C. 2020). The trial court dismissed the D.C. Circuit's decision in *Guedes* essentially by concluding that the statements in that opinion were dicta: "[T]he meaning of the vacant-office provision was neither disputed nor decided in *Guedes*. Indeed, neither below nor on appeal did the parties dispute whether the official's appointment satisfied the [Vacancies Act], . . . nor did the parties contest that, by the time the dispute reached the D.C. Circuit, the challenged rule had been validly ratified by a properly appointed official . . . ." *Id.* at 33 (citations omitted).

delegation statutes to evade the Vacancies Act.[77] One of the Act's primary purposes was to prevent the Executive from appointing "officers of the United States"[78] without Senate advice and consent.[79] Accordingly, Section 3347 provides that the Vacancies Act is "the exclusive means" to authorize a person to temporarily perform the duties of a vacant advice-and-consent office, and specifies that a statute that vests an agency head with the general authority to delegate duties will not suffice to override the Vacancies Act.[80] At the same time, however, a general vesting-and-delegation statute likely renders many duties of an office delegable,[81] and could permit an agency head to delegate any delegable responsibilities of a vacant office to another official.[82] As a result, if the responsibilities of a particular advice-and-consent position primarily consist of delegable duties, a general delegation statute could allow an agency employee to perform most of that position's responsibilities even though that employee was not appointed to that position through the advice-and-consent process.[83] The trial court said that by allowing "the mere existence of . . . vesting-and-delegation statutes" to "negate" the Vacancies Act's enforcement mechanisms, the second reading would be inconsistent with the law's purpose.[84]

The court also said that the first reading was supported by the Act's "lookback" provision defining "function or duty" to include regulatory duties only if the regulations were in effect during the 180-day period preceding the vacancy.[85] The court stated that this lookback provision was enacted to prevent agencies from using their general vesting-and-delegation authorities to circumvent the limits imposed by Vacancies Act.[86] In the court's view, agencies could only "use their organic authorities to issue rules reassigning duties" if they complied with the lookback period.[87] Thus, under the second view, the "functions and duties" subject to the Vacancies Act include any exclusive duties that *were not* delegated in the lookback period, regardless of whether those duties *could be* delegated.

Both views, therefore, allow agencies to delegate the duties of an office and thereby exclude those duties from the Vacancies Act's definition of function or duty: the first view broadly excludes any delegable duties, and the second view honors regulatory delegations in effect during the 180-day lookback period. As mentioned, the first reading interpreting the Vacancies Act to govern only a narrow set of nondelegable duties has seemed to be the prevailing view.

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[77] *Id.* at 33.

[78] U.S. CONST. art. II, § 2, cl. 2.

[79] *See, e.g.*, 144 CONG. REC. S11021 (daily ed. Sept. 28, 1998) (statement of Sen. Fred Thompson) ("As participants in the appointments process, we Senators have an obligation, I believe, to ensure that the appointments clause functions as it was designed, and that manipulation of executive appointments not be permitted.").

[80] 5 U.S.C. § 3347. As discussed *supra* note 44, the legislative history suggests that legislators were especially concerned with the fact that the Department of Justice was using general vesting-and-delegation statutes to evade the Vacancies Act's limitations on acting service.

[81] *See L.M.-M.*, 442 F. Supp. 3d at 34.

[82] *See, e.g.*, Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam).

[83] *L.M.-M.*, 442 F. Supp. 3d at 34.

[84] *Id.*

[85] *Id.* at 33.

[86] *Id.*

[87] *Id.*

# Vacancies Act Limitations on Acting Service

Section 3348 of the Vacancies Act allows only certain officers or employees to perform the "functions and duties" of a vacant advice-and-consent office.[88] Unless an acting officer is serving in compliance with the Vacancies Act, only the agency head can perform a covered duty of a vacant advice-and-consent office.[89] The Vacancies Act creates two primary types of limitations on acting service: it limits (1) the classes of people who may serve as an acting officer,[90] and (2) the time period for which they may serve.[91]

## Who Can Serve as an Acting Officer?

Section 3345 allows three classes of government officials or employees to temporarily perform the functions and duties of a vacant advice-and-consent office under the Vacancies Act.[92] First, as a default and automatic rule, once an office becomes vacant, "the first assistant to the office" becomes the acting officer.[93] The term "first assistant" is a term of art under the Vacancies Act.[94] Nonetheless, the term is not defined by the Act and its meaning is not entirely clear.[95] The Vacancies Act's legislative history suggests that the term refers to an office's "top deputy."[96] For some offices, a statute or regulation explicitly designates an office to be the "first assistant" to

[88] 5 U.S.C. § 3348(b).

[89] *Id.* §§ 3345, 3346, 3348. Additionally, as discussed *supra* notes 42 to 48 and accompanying text, the Vacancies Act allows a person to perform the duties of an office if *another* statute expressly authorizes "an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." *Id.* §§ 3347, 3348.

[90] *Id.* § 3345.

[91] *Id.* § 3346.

[92] *Id.* § 3345.

[93] *Id.* § 3345(a)(1).

[94] *See* 144 CONG. REC. S12822 (daily ed. Oct. 21, 1998) (statement of Sen. Fred Thompson) ("The term 'first assistant to the officer' has been part of the Vacancies Act since 1868 . . . and the change in wording [to 'first assistant to the *office*'] is not intended to alter case law on the meaning of the term 'first assistant.'"). *Cf., e.g.*, L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 25–26 (D.D.C. 2020) (looking to a dictionary to determine the ordinary meaning of the term "first assistant").

[95] *Compare* Doolin Sec. Sav. Bank v. Office of Thrift Supervision, 156 F.3d 190, 192 (D.C. Cir. 1998) ("[W]hether internal [agency] documents referring to Fiechter as a 'first assistant' rendered him such for the purposes of the Vacancies Act is a matter of considerable uncertainty. Our opinion in *Doolin [I]* recognized that, according to 'one line of authority,' the position of 'first assistant' must be created by statute before the automatic succession provision of the Vacancies Act applies.") (quoting Doolin Sec. Sav. Bank v. Office of Thrift Supervision (*Doolin I*), 139 F.3d 203, 209 n.3 (D.C. Cir. 1998)), *with* Guidance on Application of Fed. Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 63 (1999) ("At a minimum, a designation of a first assistant by statute, or by regulation where no statutory first assistant exists, should be adequate to establish a first assistant for purposes of the Vacancies Reform Act.").

[96] 144 CONG. REC. S11037 (daily ed. Sept. 28, 1998) (statement of Sen. Joseph Lieberman) (describing "first assistant" as "a term of art that generally refers to the top deputy"). *See also L.M.-M.*, 442 F. Supp. 3d at 24 (ruling that an official was not a "first assistant" because he occupied a temporary position that would never "serve in a subordinate role—that is, as an 'assistant'—to any other . . . official").

that position.[97] However, not all offices have such statutory or regulatory designations, and in those cases, who qualifies as the "first assistant" to that office may be open to debate.[98]

One additional question has been whether a first assistant must be serving at the time the vacancy occurs, or whether a person who later steps into the first assistant position can also serve as an acting officer under this provision of the Vacancies Act.[99] The most recent executive branch position on this question concludes that new first assistants can step in as acting officials.[100] In a 2001 opinion, the OLC noted that the text of the Vacancies Act refers to "the first assistant *to the office*," not the particular *officer*.[101] The OLC emphasized that prior versions of the Act had formerly used the phrase "first assistant to the officer," and argued that requiring a first assistant to be in place at the time of the vacancy would, in effect, improperly revive this old text by requiring that person to be the first assistant to the departing officer.[102]

Apart from the first assistant, the President "may direct" two other classes of officials to serve as acting officers instead.[103] First, the President may direct a person who has been confirmed to a different advice-and-consent position to serve as acting officer.[104] Second, the President can select a senior "officer or employee" of the same executive agency, if that employee served in that agency for at least 90 days during the year preceding the vacancy and is paid at a rate equivalent to at least a GS-15 on the federal pay scale.[105]

Section 3345 places an additional limitation on the ability of these three classes of officials to serve as acting officers for an advice-and-consent position. As a general rule, if the President nominates a person to the vacant position, that person "may not serve as an acting officer" for that position.[106] Thus, if the President nominates a person who is currently the acting officer for that

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[97] *E.g.*, 28 U.S.C. § 508 ("[F]or the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General."); 28 C.F.R. § 0.137(b) (2019) ("Every office within the Department to which appointment is required to be made by the President with the advice and consent of the Senate . . . shall have a First Assistant within the meaning of the Federal Vacancies Reform Act of 1998. Where there is a position of Principal Deputy to the . . . office, the Principal Deputy shall be the First Assistant. Where there is no position of Principal Deputy . . . , the First Assistant shall be the person whom the Attorney General designates in writing.").

[98] *See supra* note 95; *see also* Designating an Acting Director of the Federal Housing Finance Agency, slip op. at 8 (Op. O.L.C. Mar. 18, 2019), https://www.justice.gov/olc/file/1220591/download (stating that where an agency has multiple deputy directors, "none of them is obviously the . . . Director's 'first assistant'").

[99] *See, e.g.*, *L.M.-M.*, 442 F. Supp. 3d at 24 (noting that this "dispute poses a difficult question that the Office of Legal Counsel has answered differently at different times"). *Compare* Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 64 (1999) (concluding that an officer "must be the first assistant when the vacancy occurs in order to be the acting officer by virtue of being the first assistant"), *with* Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177, 180 (2001) (concluding that the prior OLC interpretation was erroneous and that the Vacancies Act, particularly as amended by Congress, "does not require that the first assistant be in place at the time the vacancy occurred to be the acting officer by virtue of being the first assistant").

[100] *E.g.*, Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177, 180 (2001).

[101] *Id.* at 179–80.

[102] *Id.*

[103] 5 U.S.C. § 3345. This directive may come *only* from the President. *Id.* There is one additional class of officials who may serve as acting officers: if an officer serves a fixed term rather than serving at the pleasure of the President, and the President has nominated that officer "for reappointment for an additional term to the same office in an Executive department without a break in service," then the President may direct that officer to serve, subject to the same time limitations imposed by the Vacancies Act on any other acting officer. *Id.* § 3345(c)(1).

[104] *Id.* § 3345(a)(2).

[105] *Id.* § 3345(a)(3).

[106] *See id.* § 3345(b); NLRB v. SW Gen., Inc., 137 S. Ct. 929, 935 (2017). In *NLRB v. SW General, Inc.*, the Supreme Court held that 5 U.S.C. § 3345(b)(1) applied to all three classes of persons who might serve as acting officers under the Vacancies Act, rather than only to first assistants serving under 5 U.S.C. § 3345(a)(1). *SWGen.*, 137 S. Ct. at 938.

position, that person usually may not continue to serve as acting officer without violating the Vacancies Act.[107] The President can name another qualified person to serve as an acting officer instead of the nominated person.[108]

The limitations of the Vacancies Act can create the need to shift government employees to different positions within the executive branch. For example, in January 2017, shortly after entering office, President Trump named Noel Francisco as Principal Deputy Solicitor General.[109] Francisco then began to serve as Acting Solicitor General.[110] In March of that year, the President announced that he would be nominating Francisco to serve permanently as the Solicitor General.[111] After this announcement, Francisco was moved to another role in the department and Jeffrey Wall, who was chosen by Francisco to be the new Principal Deputy Solicitor General, became the acting Solicitor General.[112] This last shift may have occurred to comply with the Vacancies Act.[113] Ultimately, the Senate confirmed Francisco to the position of Solicitor General on September 19, 2017.[114]

There is an exception to this limitation: a person who is nominated to an office may serve as acting officer for that office if that person is in a "first assistant" position to that office and either (1) has served in that position for at least 90 days during the year preceding the vacancy[115] or (2) was appointed to that position through the advice-and-consent process.[116] Returning to the example of the Solicitor General position, it appears that this exception would not have allowed Noel Francisco to continue to serve as the Acting Solicitor General, once nominated to that position.[117] Although Francisco may have been in a first assistant position, as the Principal Deputy Solicitor General,[118] he had not served in that position for 90 days prior to the vacancy; nor had he been appointed to that position through the advice-and-consent process.[119]

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For more on this decision, see CRS Legal Sidebar WSLG1840, *Help Wanted: Supreme Court Holds Vacancies Act Prohibits Nominees from Serving as Acting Officers*, by Valerie C. Brannon.

[107] *SW Gen.*, 137 S. Ct. at 944.

[108] *See* 5 U.S.C. § 3345(b); *SW Gen.*, 137 S. Ct. at 944.

[109] Marcia Coyle, *Noel Francisco, Trump's Solicitor General Pick, Is Sidelined for Now*, NAT'L LAW J. (Apr. 6, 2017), http://www.law.com/nationallawjournal/almID/1202783127057.

[110] *Id*. Francisco replaced Ian Gershengorn in this role, who had himself been a Principal Deputy Solicitor General serving as Acting Solicitor General. *See* Attorney General Loretta E. Lynch Statement on Planned Departure of Solicitor General Donald B. Verrilli Jr. (June 2, 2016), https://www.justice.gov/opa/pr/attorney-general-loretta-e-lynch-statement-planned-departure-solicitor-general-donald-b.

[111] Coyle, *supra* note 109.

[112] *Id*.

[113] *See id.*; *see also* Amy Howe, *Opinion analysis: Court limits "acting" appointments to fill vacancies*, SCOTUSBLOG (Mar. 22, 2017), http://www.scotusblog.com/2017/03/opinion-analysis-court-limits-acting-appointments-fill-vacancies.

[114] 163 CONG. REC. S5835 (daily ed. Sept. 19, 2017) (recording Rollcall Vote No. 201 Ex.).

[115] *See* 5 U.S.C. § 3345(b)(1)(A).

[116] *See id.* § 3345(b)(2).

[117] *See id.* § 3345(b).

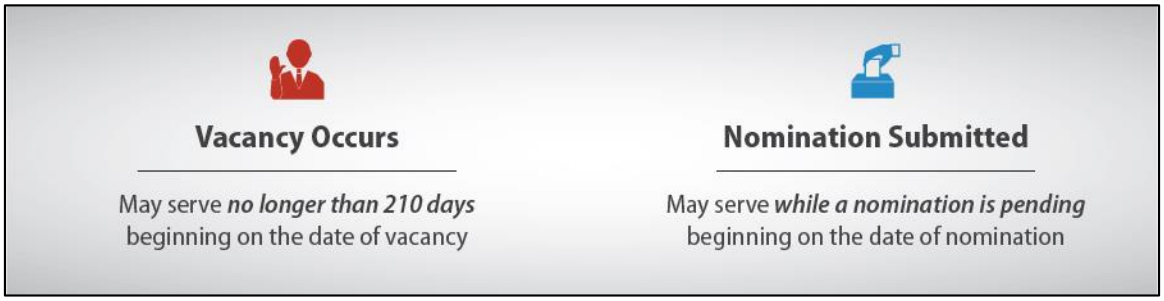
[118] *See* 28 C.F.R. § 0.137(b) (2019) ("Every office within the Department to which appointment is required to be made by the President with the advice and consent of the Senate . . . shall have a First Assistant within the meaning of the [Vacancies Act]. Where there is a position of Principal Deputy to [an advice-and-consent position], the Principal Deputy shall be the First Assistant.").

[119] *See* Jimmy Hoover, *Jones Day Attys Nab Key Legal Jobs in Trump Administration*, LAW 360 (Jan. 20, 2017), https://www.law360.com/articles/883009/jones-day-attys-nab-key-legal-jobs-in-trump-administration; Amy Howe, *Francisco confirmed as solicitor general*, SCOTUSBLOG (Sept. 19, 2017), http://www.scotusblog.com/2017/09/francisco-confirmed-solicitor-general.

## For How Long?

The Vacancies Act generally limits the amount of time that a vacant advice-and-consent position may be filled by an acting officer.[120] Section 3346 provides that a person may serve "for no longer than 210 days beginning on the date the vacancy occurs," or, "once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate."[121] These two periods run independently and concurrently.[122] Consequently, the submission and pendency of a nomination allow an acting officer to serve beyond the initial 210-day period.[123]

**Figure 1. Two Limited Periods of Service**




**Source:** 5 U.S.C. § 3346.

The 210-day time limitation is tied to the vacancy itself, rather than to any person serving in the office, and the period generally begins on the date that the vacancy occurs.[124] This period does not begin on the date an acting officer is named, and because it runs continuously from the occurrence of the vacancy, the time limitation is unaffected by any changes in who is serving as acting officer.[125] The period is extended during a presidential transition period when a new President takes office.[126] If a vacancy exists on the new President's inauguration day or occurs within 60 days after the inauguration,[127] then the 210-day period begins either 90 days after inauguration or 90 days after the date that the vacancy occurred, depending on which is later.[128] If

[120] These time limitations do not apply, however, to "a vacancy caused by sickness." 5 U.S.C. § 3346(a).

[121] *Id.*

[122] *See id.* Thus, as a technical matter, the submission of a nomination does not stop the clock on the 210-day period. That 210-day counter keeps running. Nevertheless, as a practical matter, the President's submission of a nomination to Congress renders the 210-day period irrelevant. Often, the submission and pendency of a nomination will take longer than 210 days. However, even if a nomination is rejected, withdrawn, or returned before 210 days have passed, that return will trigger a new 210-day period, as discussed *infra* note 132 and accompanying text. *See id.* § 3346(b).

[123] *See id.* § 3346.

[124] *See id.* § 3346(a)(1). However, "[i]f a vacancy occurs during an adjournment of the Congress sine die, the 210-day period . . . shall begin on the date that the Senate first reconvenes." *Id.* § 3346(c). Additionally, "[i]f the last day of any 210-day period under section 3346 is a day on which the Senate is not in session, the second day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period." *Id.* § 3348(c).

[125] *See id.* § 3346(a)(1) (stating that an acting officer may serve in the office "for no longer than 210 days beginning on the date *the vacancy occurs*") (emphasis added).

[126] *See id.* § 3349a.

[127] This provision refers to the "transitional inauguration day," defined as "the date on which any person swears or affirms the oath of office as President, if such person is not the President on the date preceding the date of swearing or affirming such oath of office." *Id.* § 3349a(a). The relevant period in which a vacancy must exist is "the 60-day period beginning on a transitional inauguration day." *Id.* § 3349a(b).

[128] *Id.* § 3349a(b). In effect, an acting official may serve for a 300-day period during a presidential transition. *Id.*

an acting officer attempts to perform a function or duty of an advice-and-consent office after the 210-day period has ended, and if the President has not nominated anyone to the office, that act will have no force or effect.[129]

Alternatively, Section 3346 allows an acting officer to serve while a nomination to that position "is pending in the Senate," regardless of how long that nomination is pending.[130] The legislative history of the Vacancies Act suggests that an acting officer may serve during the pendency of a nomination even if that nomination is submitted after the 210-day period has run following the start of the vacancy.[131] "If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate," then an acting officer may continue to serve for another 210-day period beginning on the date of that rejection, withdrawal, or return.[132] If the President submits a second nomination for the office, then an acting officer may continue to serve during the pendency of that nomination.[133] If the second nomination is also "rejected, withdrawn, or returned," then an acting officer may continue for one last 210-day period.[134] However, an acting officer may not serve beyond this final period—the Vacancies Act will not allow acting service during the pendency of a third nomination, or any subsequent nominations.[135] Again, if the acting officer serves beyond the pendency of the first or second nomination and the subsequent 210-day periods, any action performing a function or duty of the office will have no force or effect.[136]

[129] *See id.* § 3348. The Comptroller General is required to report any officer "serving longer than the 210-day period including the applicable exceptions to such period" to various congressional committees, the President, and the Office of Personnel Management. *Id.* § 3349(b).

[130] *Id.* § 3346(a)(2). However, 5 U.S.C. § 3345(b) generally limits the ability of a person to serve as acting officer if *that person* is the one nominated to the position, as discussed *supra* notes 106 to 119 and accompanying text.

[131] 144 CONG. REC. S11022 (daily ed. Sept. 28, 1998) (statement of Sen. Fred Thompson) ("The acting officer may continue to serve beyond [210] days if the President submits a nomination for the position even if that occurs after the [210th] day. So at the [210]-day expiration, the President still has it within his sole discretion to make the nomination; just simply send the nomination up and the acting officer can come back once again and assume his duties."). *See also* Guidance on Application of Fed. Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 68 (1999) (describing 5 U.S.C. § 3346 as containing a "spring-back provision, which permits an acting officer to begin performing the functions and duties of the vacant office again upon the submission of a nomination").

[132] 5 U.S.C. § 3346(b)(1).

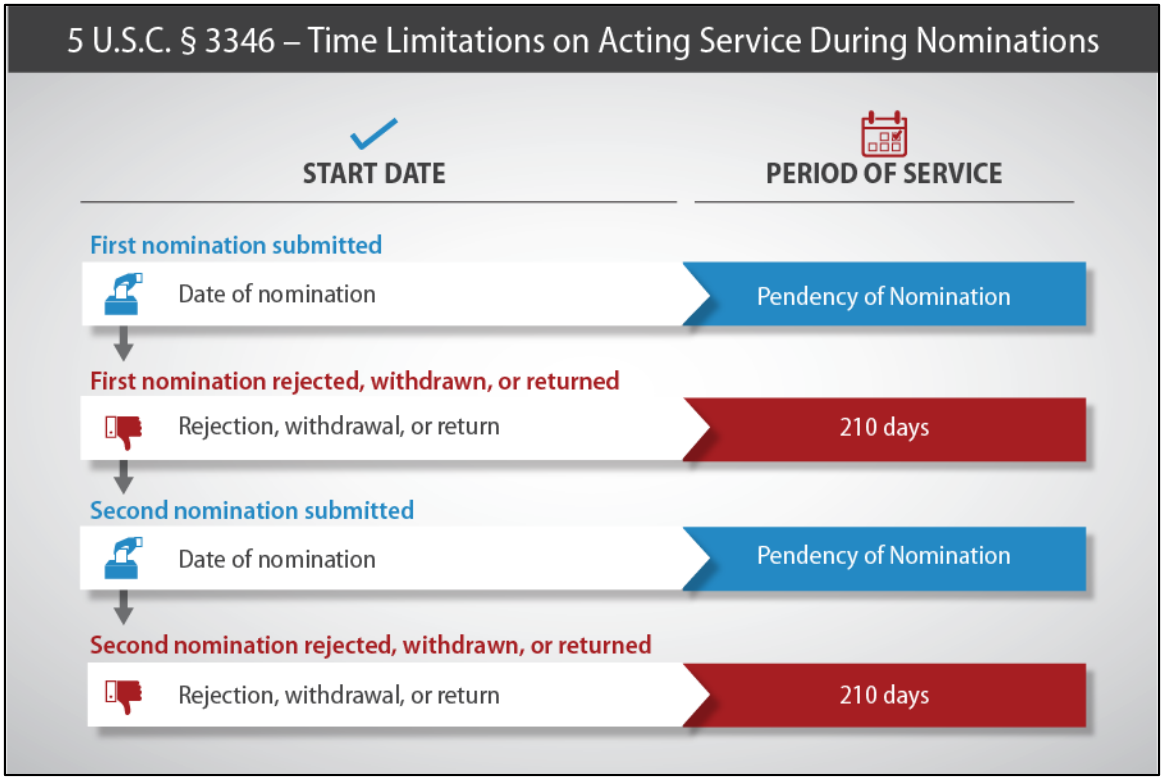
[133] *Id.* § 3346(b)(2)(A).

[134] *Id.* § 3346(b)(2)(B).

[135] *See id.* § 3346(a)(2).

[136] *See id.* § 3348.

**Figure 2. Period of Service After Submission of Nomination**




**Source:** 5 U.S.C. § 3346.

# Consequences of Violating the Vacancies Act

The Vacancies Act may be enforced through both the political process and through litigation. Several provisions of the Vacancies Act are centrally enforced through political measures rather than through the courts. For example, while the Act provides that an "office shall remain vacant" unless an acting officer is serving "in accordance with" the Vacancies Act, the statute does not create a clear mechanism to directly implement this provision.[137] Accordingly, the text of the Vacancies Act does not contemplate a means of removing any noncompliant acting officers from office.

Similarly, if the Comptroller General determines that an officer has served "longer than the 210-day period," the Comptroller General must report this to the appropriate congressional committees.[138] This provision does not *require* the Comptroller General to make any such determination, may depend in part on agency reporting of vacancies,[139] and contains no additional

[137] *Id*. § 3347.

[138] *Id*. § 3349(b). GAO's website has a searchable database containing the vacancies that agencies have reported to them. *Federal Vacancies Reform Act*, GAO, https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act (last visited May 27, 2021).

[139] A 2019 GAO opinion suggested that agencies are not fully compliant with their reporting obligations under the Vacancies Act. Agency Compliance with the Federal Vacancies Reform Act for Positions Subject to the Jurisdiction of Senate Finance Committee, B-329903 (Comp. Gen. Feb. 7, 2019).

enforcement mechanism.[140] If the Comptroller General does make such a report to Congress, this reporting mechanism may prompt congressional action pressuring the executive branch to comply with the Vacancies Act, exerted through normal channels of oversight.[141] For instance, in March 2018, the House Committee on Ways and Means Subcommittee on Social Security held a hearing on a vacancy in the office of the Commissioner of Social Security.[142] The day before the hearing, the Comptroller General issued a letter reporting that the Acting Commissioner, Nancy Berryhill, was violating the Vacancies Act.[143] Shortly thereafter, Berryhill reportedly stepped down from the position of Acting Commissioner, serving instead in her position of record as Deputy Commissioner of Operations.[144]

The most direct means to enforce the Vacancies Act is through private suits in which courts may nullify noncompliant agency actions.[145] Violations of the Vacancies Act are generally enforced only if a third party with standing (such as a regulated entity that has been injured by agency action) successfully challenges the action in court.[146] The Vacancies Act renders noncompliant actions "void *ab initio*,"[147] meaning that they were "null from the beginning,"[148] by providing that such actions have "no force or effect."[149]

The consequences that flow from a determination that an action is "void" are more severe than if a court were to announce that the action was merely "voidable."[150] A "voidable" action is one that

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[140] *See* 5 U.S.C. § 3349(b).

[141] *See generally, e.g.*, Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881 (2014). The reporting requirement may result in the GAO issuing a formal opinion about whether a particular acting officer is complying with the Vacancies Act. *See, e.g.*, Fed. Vacancies Reform Act of 1998 - Assistant Attorney Gen. for the Office of Legal Counsel, U.S. Dep't of Justice, B-310780, 2008 U.S. Comp. Gen. LEXIS 101 (Comp. Gen. June 13, 2008).

[142] *See Hearing on Lacking a Leader: Challenges Facing the SSA after over 5 Years of Acting Commissioners*, H. COMM. ON WAYS & MEANS (Mar. 7, 2018), https://waysandmeans.house.gov/event/hearing-lacking-leadership-challenges-facing-ssa-5-years-acting-commissioners.

[143] Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998—Commissioner, Social Security Administration, B-329853 (Comp. Gen. Mar. 6, 2018).

[144] Joe Davidson, *Social Security Is Now Headless because of Trump's Inaction. Will Other Agencies Be Decapitated?*, WASH. POST (Mar. 12, 2018), https://www.washingtonpost.com/news/powerpost/wp/2018/03/12/social-security-now-headless-because-of-trumps-inaction-will-others-agencies-be-decapitated. *See also, e.g.*, Extension of Expiration Dates for Two Body System Listings, 83 Fed. Reg. 13863 (Apr. 2, 2018) (signed by "Nancy Berryhill, Deputy Commissioner for Operations, performing the duties and functions not reserved to the Commissioner of Social Security").

[145] *See* S. REP. NO. 105-250, at 19–20 (1998) ("The Committee expects that litigants with standing to challenge purported agency actions taken in violation of these provisions will raise non-compliance with this legislation in a judicial proceeding challenging the lawfulness of the agency action.").

[146] Although the court ultimately upheld the agency's action, one example of such a challenge is found in *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 419–20 (D. Conn. 2008), *aff'd*, 587 F.3d 132 (2d Cir. 2009). *Cf.* Williams v. Phillips, 360 F. Supp. 1363, 1364, 1367 (D.D.C. 1973) (considering whether Vacancies Act authorized person's service as Acting Director of the Office of Economic Opportunity in the context of a suit brought by Senators to remove person from that position).

[147] *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 938 n.2 (2017).

[148] BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "void ab initio" as "[n]ull from the beginning, as from the first moment when a contract is entered into"). *E.g.*, Interstate Commerce Comm'n v. Am. Trucking Ass'ns, 467 U.S. 354, 358 (1984) (noting that if tariff is rendered void *ab initio*, "whatever tariff was in effect prior to the adoption of the rejected rate becomes the applicable tariff for the period.").

[149] *See* 5 U.S.C. § 3348(d).

[150] *See, e.g.*, Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co., 263 F.3d 26, 31 (2d Cir. 2001) (noting that a void contract "produces no legal obligation," but that a voidable contract does impose legal obligations unless rescinded). *See also* Quality Health Servs. of P.R., Inc. v. NLRB, 873 F.3d 375, 383 (1st Cir. 2017) (holding that the issue of validity of agency action had been waived under exhaustion statute, in part because complaints issued by Acting

may be judged invalid because of some legal defect, but that "is not incurable."[151] For instance, before a court strikes down a voidable agency decision, it will often inquire into whether the legal defect created actual prejudice.[152] If an error is harmless, the court may uphold the agency action.[153] In contrast, acts that are "void" may not be ratified or rendered harmless, meaning that another person who properly exercises legal authority on behalf of an agency may not subsequently approve or replicate the act, thereby rendering it valid.[154] The Vacancies Act affirms this consequence by explicitly specifying that an agency may not ratify any acts taken in violation of the statute.[155]

Federal district courts have, on occasion, vacated agency actions as void (as opposed to voidable) after determining the challenged actions were taken by officials improperly performing the duties of a vacant office.[156] In reviewing these agency actions, these courts have cited not only the "no force or effect" provision of the Vacancies Act, but also a provision of the Administrative Procedure Act (APA) that directs courts to "hold unlawful and set aside" any agency action that is "not in accordance with law."[157] For example, in *L.M.-M. v. Cuccinelli*, a federal district court expressly ruled that both the Vacancies Act and the APA authorized the court to vacate the

General Counsel of NLRB were, at most, voidable rather than void).

[151] Easley v. Pettibone Mich. Corp., 990 F.2d 905, 909 (6th Cir. 1993). The court in *Easley* considered both legal and ordinary definitions of the term "voidable," as distinct from the term "void," and decided that because it was considering the effect of an admitted legal error that could be cured, the most appropriate term to describe this particular type of defective action was "invalid." *Id.* at 909–10. *Accord* Chapman v. Bituminous Ins. Co. (*In re* Coho Res., Inc.), 345 F.3d 338, 344 (5th Cir. 2003) ("[V]iolations [of a certain provision of the bankruptcy code] are merely 'voidable' and are subject to discretionary 'cure.'"). *Cf.* BLACK'S LAW DICTIONARY (10th ed. 2014) (stating that the term "voidable" "describes a valid act that may be voided rather than an invalid act that may be ratified.").

[152] *See, e.g.*, SW Gen., Inc. v. NLRB, 796 F.3d 67, 79 (D.C. Cir. 2015), *aff'd* 137 S.Ct. 929, 944 (2017); Prof'l Air Traffic Controllers Org. v. FLRA, 685 F.2d 547, 564 (D.C. Cir. 1982); L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 35–36 (D.D.C. 2020).

[153] *See, e.g.*, Brock v. Pierce Cty., 476 U.S. 253, 260 (1986) ("We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action . . . . When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act.").

[154] *See, e.g.*, Shapleigh v. San Angelo, 167 U.S. 646, 652 (1897) ("Did the decree of the district court . . . abolishing the city of San Angelo . . . operate to render its incorporation void *ab initio*, and to nullify all its debts and obligations created while its validity was unchallenged? Or can it be held, consistently with legal principles, that the abolition of the city government, as at first organized, because of some disregard of law, and its reconstruction so as to include within its limits the public improvements for which bonds had been issued during the first organization, devolved upon the city so reorganized the obligations that would have attached to the original city if the State had continued to acquiesce in the validity of its incorporation?"); FEC v. Legi-Tech, 75 F.3d 704, 707 (D.C. Cir. 1996) (stating, in description of party arguments, that the Federal Election Commission's subsequent ratification of a defective civil enforcement proceeding could not cure error rendering that proceeding void *ab initio*).

[155] 5 U.S.C. § 3348. Legislative history suggests that Congress was specifically concerned with overruling the decision of the D.C. Circuit in *Doolin Security Savings Bank v. Office of Thrift Supervision*, 139 F.3d 203, 214 (D.C. Cir. 1998), in which that court had held that because a successor "effectively ratified" the action of an acting officer, the court did not need to decide whether that acting officer had "lawfully occupied the position." *See* S. REP. NO. 105-250, at 5 (1998) (noting *Doolin* "underscored" the "need for new legislation"). This Senate report expressed concern that "the ratification approach taken by the court in *Doolin* would render enforcement of the [Vacancies Act] a nullity in many instances." *Id.* at 20. *See also* 144 CONG. REC. S11022 (daily ed. Sept. 28, 1998) (statement of Sen. Fred Thompson) (referencing *Doolin* as reason to enact bill).

[156] L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 35–36 (D.D.C. 2020); Crawford-Hall v. United States, 394 F. Supp. 3d 1122, 1154 (C.D. Cal. 2019).

[157] 5 U.S.C. § 706(2); Bullock v. U.S. Bureau of Land Mgmt., 489 F. Supp. 3d 1112, 1130 (D. Mont. 2020); *L.M.-M.*, 442 F. Supp. 3d at 34; *Crawford-Hall*, 394 F. Supp. 3d at 1154.

agency's actions.[158] In applying the APA provision, the court considered the mitigating doctrine of harmless error, asking whether the plaintiffs were prejudiced by the error.[159] The court ultimately concluded that the error was not harmless because a different acting officer, serving properly, might have taken different actions.[160] The *L.M.-M.* court did not, however, consider any mitigating doctrines before concluding the actions had no force or effect under the Vacancies Act, holding that the Act barred the court from considering the ratification doctrine.[161]

The Vacancies Act's enforcement mechanisms—the no-force-or-effect provision and the no-ratification provision—apply if a person performs a "function or duty" of the vacant office.[162] Consequently, their application is subject to the interpretive dispute described above regarding the proper interpretation of "function or duty."[163] The breadth of this definition can have significant consequences for agency actions. For example, as noted above, the D.C. Circuit adopted a narrower definition of "function or duty" in *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, and therefore held that the Attorney General could ratify an action taken by an acting official who allegedly served in violation of the Vacancies Act.[164] The court said that the Vacancies Act only precludes the ratification of nondelegable duties and implicitly concluded that the relevant action was delegable.[165] Consequently, because Section 3348 did not apply, the court held that the action could be ratified by the Attorney General.[166] Thus, based on its narrower view of duties covered by the Vacancies Act, the court appeared to rule that the agency action could be ratified because the duty was *delegable,* even though the duty had not in fact *been* delegated to another official.[167]

As mentioned above, it is not entirely clear what the consequences are if a person performs a function or duty of a vacant office that falls within one of the exceptions from Section 3348.[168] Certain offices are exempt from the provision that nullifies the noncompliant actions of an acting officer,[169] and the statute does not otherwise specify what consequences follow, if any, if a person temporarily serving in one of those offices violates the Vacancies Act.[170] In *NLRB v. SW General, Inc.*, the Supreme Court explicitly left open the question of remedy with respect to those officials who are carved out of Section 3348.[171] In that case, the Supreme Court held that the service of the Acting General Counsel of the National Labor Relations Board (NLRB) violated the Vacancies Act, but noted that this position was exempt "from the general rule that actions taken in violation of the [Vacancies Act] are void *ab initio*."[172] The Court affirmed the D.C. Circuit ruling vacating

[158] *L.M.-M.*, 442 F. Supp. 3d at 35–36.

[159] *Id*. at 35. The court also considered and rejected application of the de facto officer doctrine. *Id*.

[160] *Id*.

[161] *Id*. at 30–36.

[162] 5 U.S.C. § 3348.

[163] *See supra* "What Are the "Functions and Duties" of an Office?"

[164] Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam).

[165] *See id*.

[166] *Id*.

[167] *See id*.

[168] *Supra* "Which Offices?"

[169] 5 U.S.C. § 3348(e).

[170] *See id*. § 3348.

[171] NLRB v. SW Gen., Inc., 137 S. Ct. 929, 938 n.2 (2017); 5 U.S.C. § 3348.

[172] *SW Gen., Inc.*, 137 S. Ct. at 938 n.2.

the Acting General Counsel's noncompliant actions, but did not explicitly reconsider the issue of remedy.[173]

The D.C. Circuit in *SW General, Inc.* had itself clarified that it was not fully exploring the question of the appropriate remedy and was merely *assuming*, on the basis of the parties' arguments, "that section 3348(e)(1) renders the actions of an improperly serving Acting General Counsel *voidable*, not void."[174] Accordingly, because the D.C. Circuit assumed that the contested actions were voidable, the court considered but ultimately rejected application of the harmless error and de facto officer doctrines.[175] If the Acting General Counsel were not exempt from Section 3348 and his noncompliance with the Vacancies Act had rendered his acts void *ab initio*, the court could not have considered whether these legal doctrines cured the initial legal error with the Acting General Counsel's actions.[176] The D.C. Circuit later held in another case that complaints initially filed by the improperly appointed General Counsel had been ratified by a properly appointed General Counsel, and therefore could not be challenged on the basis of the initial improper appointment.[177]

Notwithstanding its decision to accept the parties' litigating postures in *SW General*, the D.C. Circuit expressly left open the possibility that the Vacancies Act might "wholly insulate the Acting General Counsel's actions," so that the actions of an acting officer in one of these named offices are not even voidable.[178] It is possible that the Vacancies Act does not undermine the legality of the actions of these specified officers, even if they violate the Act, and that, under this interpretation, these positions could be indefinitely filled by acting officers without consequence under the Vacancies Act.

These questions may be clarified in future litigation, but Congress could, if it so chose, add statutory language more explicitly addressing or otherwise clarifying the consequences of violating the Vacancies Act, particularly with respect to those offices exempt from the enforcement mechanisms contained in Section 3348.[179] Congress could also amend the existing enforcement mechanisms, possibly by altering the reporting requirements or by adding additional consequences for violations of the Vacancies Act.[180]

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[173] *See id.* (noting that the NLRB had not sought certiorari on this issue).

[174] *SW Gen., Inc.*, 796 F.3d at 79. Similarly, in *Hooks* ex rel. *NLRB v. Kitsap Tenant Support Servs.*, 816 F.3d 550, 564 (9th Cir. 2016), the court dismissed a petition issued by the same Acting General Counsel, citing the D.C. Circuit's opinion to conclude that his actions were voidable. However, the court expressly noted that the NRLB had "waived any arguments based on the FVRA's exemption clause, 5 U.S.C. § 3348(e), and it [did] not otherwise contest the remedy sought by [the party challenging the petition]." *Id. See also* Creative Vision Res., L.L.C. v. NLRB, 882 F.3d 510, 528 n.6 (5th Cir. 2018); Quality Health Servs. of P.R., Inc. v. NLRB, 873 F.3d 375, 383 n.7 (1st Cir. 2017); Hooks v. Remington Lodging & Hospitality, L.L.C., 8 F. Supp. 3d 1178, 1189 (D. Alaska 2014).

[175] *SW Gen., Inc.*, 796 F.3d at 81 (holding error had not been rendered harmless by subsequent de novo review and ratification of the complaint by a properly appointed General Counsel); *id.* at 82 (holding NLRB had not shown that the de facto officer doctrine should apply in this case to bar plaintiff's attack on the complaint because the doctrine allows collateral attacks against actions taken by officers acting under the color of official title, so long as those challenges are properly preserved and the agency had reasonable notice of the defect in the officer's title to office).

[176] *See id.* at 81; 5 U.S.C. § 3348(d), (e).

[177] Midwest Terminals of Toledo Int'l, Inc v. NLRB, 783 Fed. Appx. 1, 7 (D.C. Cir. 2019).

[178] *See SW Gen., Inc.*, 796 F.3d at 79. Counsel for NLRB apparently had not raised this argument, and accordingly the D.C. Circuit "express[ed] no view" on whether it was correct. *Id.*

[179] *See* 5 U.S.C. § 3348.

[180] *See id.* §§ 3348, 3349. *See also, e.g.*, H.R. 1847, 116th Cong. § 3 (2019) (providing that "[i]f the President fails to make a formal nomination for a vacant Inspector General position" within 210 days of the vacancy occurring, the President must submit to Congress "(1) the reasons why the President has not yet made a formal nomination; and (2) a

# Evolving Legal Issues

Thus far, this report has discussed the Vacancies Act in isolation. The remainder of this report turns to selected, evolving legal issues that involve questions about how other federal laws, including both statutes and the Constitution, interact with the Vacancies Act. It also highlights special considerations for Congress.

## Exclusivity of the Vacancies Act

The Vacancies Act provides "the exclusive means" to authorize "an acting official to perform the functions and duties" of a vacant office—unless another statute "expressly":

> (A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or
>
> (B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity[.][181]

Across the executive branch, there are many statutes that expressly address who will temporarily act for specified officials in the case of a vacancy in the office.[182] The Senate report on the Vacancies Act identified 40 agency-specific provisions that "would be retained by" the Act.[183] To take one example, the Senate report anticipated that the Vacancies Act would not disturb the provision governing a vacancy in the office of the Attorney General.[184] That statute provides that "[i]n case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office."[185]

In the event that there is an agency-specific statute designating a specific government official to serve as acting officer, the Vacancies Act will no longer be exclusive.[186] Even if the Vacancies Act does not *exclusively* apply to a specific position, though, that does not mean that the other statute *does* exclusively apply.[187] It is possible that both the agency-specific statute and the Vacancies Act

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target date for making a formal nomination"); S. 1761, 105th Cong. § 2 (1998) (providing that "[a]n individual who performs the duties of an office in any Executive agency . . . temporarily in excess of" the Vacancies Act's time limits "may not receive pay for each day such duties are performed").

[181] 5 U.S.C. § 3347(a).

[182] *See, e.g.*, 49 U.S.C. § 102 ("The Department has a Deputy Secretary of Transportation . . . . The Deputy Secretary . . . acts for the Secretary when the Secretary is absent or unable to serve or when the office of Secretary is vacant.").

[183] S. REP. NO. 105-250, at 16–17 (1998). *See also* O'CONNELL, *supra* note 64, app. A at 74 (2019) (compiling agency-specific provisions).

[184] S. REP. NO. 105-250, at 16 (1998).

[185] 28 U.S.C. § 508(a). The statute further provides that "for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General." *Id.* This reference to the Vacancies Act has been in that statute at least since its codification in Pub. L. No. 89-554 § 4(c), 80 Stat. 612 (1966).

[186] *See* 5 U.S.C. § 3347.

[187] *See, e.g.*, Designating an Acting Director of National Intelligence, slip op. at 4 (Op. O.L.C. Nov. 15, 2019), https://www.justice.gov/olc/file/1220586/download ("In a series of opinions dating back to 2003, this Office has consistently explained that the Vacancies Reform Act remains available to the President as a means for designating an acting official even when an office-specific statute provides that someone else 'shall' serve in that role."). *See also* Hooks *ex rel.* NLRB v. Kitsap Tenant Support Servs., 816 F.3d 550, 556 (9th Cir. 2016) ("[The Vacancies Act] form[s] the exclusive means for filling a vacancy in an Executive agency office unless another statute expressly provides a means for filling such a vacancy. Because [29 U.S.C. § 153(d)] does so, neither the [Vacancies Act] nor [29 U.S.C.

may be available to temporarily fill a vacancy.[188] The Senate report can be read to support this view: it states that "even with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies Act would continue to provide an alternative procedure for temporarily occupying the office."[189] A number of courts have held that this principle applies to the statute governing Attorney General vacancies quoted above, ruling that the President may invoke the Vacancies Act to name an acting official and override the statutory line of succession provided in the agency-specific statute.[190]

When two statutes simultaneously apply to authorize acting service, it may be unclear which statute governs in the case of a conflict. If there are inconsistences between the two statutes and an official's service complies with only one of the two statutes, such a situation may prompt challenges to the authority of that acting official.[191] The Vacancies Act sets out a detailed scheme delineating three classes of governmental officials that may serve as acting officers[192] and expressly limits the duration of an acting officer's service.[193] By contrast, agency-specific statutes tend to designate only one official to serve as acting officer[194] and often do not specify a time limit on that official's service.[195] Accordingly, for example, if an acting officer is designated by the President to serve under the Vacancies Act but is not authorized to serve under the agency-specific statute, a potential conflict may exist between the two laws.[196]

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§ 153(d)] is the *exclusive* means of appointing an Acting General Counsel of the [National Labor Relations Board].").

[188] Temporary Filling of Vacancies in the Office of U.S. Attorney, 27 Op. O.L.C. 149, 149 (2003) (concluding that the Vacancies Act and a separate statute, 28 U.S.C. § 546(a), were both "available" to temporarily fill the position).

[189] S. REP. NO. 105-250, at 17 (1998).

[190] *See, e.g.*, Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 356 F. Supp. 3d 109, 139 (D.D.C. 2019), *aff'd on other grounds*, 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam); *see also* United States v. Castillo, 772 Fed. Appx. 11, 13 n.5 (3d Cir. 2019) (collecting cases).

[191] *See, e.g.*, Lower E. Side People's Fed. Credit Union v. Trump, 289 F. Supp. 3d 568, 571 (S.D.N.Y. 2018) (dismissing a suit that challenged the authority of an acting officer designated under the Vacancies Act by arguing that an agency-specific statute provided the sole authority for someone to serve as acting director of the agency).

[192] 5 U.S.C. § 3345.

[193] *Id.* § 3346.

[194] *See, e.g.*, 15 U.S.C. § 633(b)(1) (designating Deputy Administrator of the Small Business Administration to act for Administrator); 50 U.S.C. § 3037(b)(2) (designating Deputy Director of the Central Intelligence Agency to act for Director). *Cf.* 28 U.S.C. § 508 (designating Deputy Attorney General to act for Attorney General and providing that Attorney General may designate "further order of succession"); 42 U.S.C. § 902(b)(4) (designating Deputy Commissioner of Social Security to act for Commissioner "unless the President designates another officer of the Government").

[195] *See* S. REP. NO. 105-250, at 17 (1998); *see also, e.g.*, United States v. Guzek, 527 F.2d 552, 560 (8th Cir. 1975) (ruling that official serving under an agency-specific statute "succeeded to all the powers of the office . . . without circumscription by the 30-day limitation" created by a prior version of Vacancies Act). *But see, e.g.*, 12 U.S.C. § 4512(f) (authorizing the designation of an acting Federal Housing Finance Agency Director who will serve "until the return of the Director, or the appointment of a successor"); 29 U.S.C. § 153(d) ("[N]o person . . . designated [to act as General Counsel of the NLRB] shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.").

[196] *See* CRS Legal Sidebar LSB10036, *UPDATE: Who's the Boss at the CFPB?*, by Valerie C. Brannon and Jared P. Cole (describing conflict over vacancy in the position of the Director of the Consumer Financial Protection Bureau in which the Deputy Director claimed that an agency-specific statute authorizing the Deputy to serve as Acting Director was the sole legal authority governing the vacancy, while the President invoked the Vacancies Act to name a different person as Acting Director).

Where two statutes encompass the same conduct, courts will, if possible, "read the statutes to give effect to each."[197] Courts are generally reluctant to conclude that statutes conflict and will usually assume that two laws "are capable of co-existence . . . absent a clearly expressed congressional intention to the contrary."[198] At the same time, however, another general interpretive rule prescribes that more specific statutes should usually prevail over more general ones—even where the more general statutes were enacted after the more specific ones.[199] This canon of construction could suggest that agency-specific statutes should prevail in the case of a conflict with the Vacancies Act. Facing these two principles, courts have tended to conclude that the Vacancies Act should operate concurrently with agency-specific statutes, and that government officials should be able to temporarily serve under either statute.[200] Accordingly, courts have resolved any potential conflict by holding that whichever statute is invoked is the controlling one.[201]

For example, in *Hooks ex rel. NLRB v. Kitsap Tenant Support Services*, one federal court of appeals rejected a litigant's contention that an agency-specific statute displaced the Vacancies Act and provided "the exclusive means" to temporarily fill a vacant position.[202] The agency-specific statute at issue in that case provided that if the office of the NLRB's General Counsel is vacant, "the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy."[203] It also provided for a shorter term of acting service than the Vacancies Act.[204] The President, however, had invoked the Vacancies Act to designate an Acting General Counsel.[205] The court concluded that "the President is permitted to elect between these two statutory alternatives to designate" an acting officer.[206] Accordingly, the court rejected the argument that because the officer's designation did not comply with the agency-specific statute, "the appointment was necessarily invalid."[207]

The two statutes governing a vacant office might not always be so readily reconciled. In *Hooks*, both the Vacancies Act and the agency-specific statute expressly authorized the President to select an acting officer.[208] A more difficult question may be raised when an agency-specific statute instead seems to expressly limit succession to a particular official.[209] The federal courts considered such a contention in a dispute over who was authorized to serve as the Acting Director

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[197] Watt v. Alaska, 451 U.S. 259, 267 (1981).

[198] Morton v. Mancari, 417 U.S. 535, 551 (1974).

[199] *See, e.g.*, Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.").

[200] *See, e.g.*, Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 356 F. Supp. 3d 109, 139 (D.D.C. 2019), *aff'd on other grounds*, 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam); English v. Trump, 279 F. Supp. 3d 307, 319 (2018); United States v. Lucido, 373 F. Supp. 1142, 1151 (E.D. Mich. 1974).

[201] *See, e.g.*, *Lucido*, 373 F. Supp. at 1151. *See also, e.g.*, *English*, 279 F. Supp. 3d at 325 (declining to apply the canon that more specific statutes should prevail over more general ones because it was "not clear" that the agency-specific statute was "more 'specific'" than the Vacancies Act, "as applied to" the specific circumstances of the case).

[202] Hooks *ex rel.* NLRB v. Kitsap Tenant Support Servs., 816 F.3d 550, 555 (9th Cir. 2016).

[203] 29 U.S.C. § 153(d).

[204] *See Hooks*, 816 F.3d at 555.

[205] *Id.* at 553.

[206] *Id.* at 556.

[207] *Id.*

[208] *See id.* at 555–56.

[209] *See, e.g.*, Plaintiff-Appellant's Brief at 2-3, English v. Trump, No. 18-5007 (D.C. Cir. 2018), http://guptawessler.com/wp-content/uploads/2018/01/English-v-Trump-Brief-1.30.pdf.

of the Consumer Financial Protection Bureau (CFPB). The position of CFPB Director became vacant in late 2017, and the President invoked the Vacancies Act to designate Mick Mulvaney, the Director of the U.S. Office of Management and Budget, to serve as Acting Director of the CFPB.[210] The Deputy Director of the CFPB, Leandra English, filed suit,[211] arguing that she was the lawful Acting Director under an agency-specific statute that provided that the CFPB's Deputy Director "shall . . . serve as acting Director in the absence or unavailability of the Director."[212] English argued that the agency-specific statute displaced the Vacancies Act under normal principles of statutory interpretation, as a later-enacted and more specific statute.[213]

The U.S. District Court for the District of Columbia rejected these arguments and held that the President had permissibly invoked the Vacancies Act to designate Mulvaney as Acting Director.[214] In the trial court's view, both statutes were available: the agency-specific statute "requires that the Deputy Director 'shall' serve as acting Director, but . . . under the [Vacancies Act] the President 'may' override that default rule."[215] The court invoked two interpretive canons, the rule that statutes should be read in harmony and the rule against implied repeals, and concluded that under the circumstances, an "express statement" was required to displace the Vacancies Act entirely.[216] Accordingly, because the agency-specific statute was "silent regarding the President's ability to appoint an acting director," it did not render the Vacancies Act unavailable.[217]

When officials serve under an agency-specific statute, they must comply with any requirements or limitations set out in that separate statute—and may not have to comply with Vacancies Act limitations.[218] For example, between August 2020 and January 2021, six different judicial opinions concluded that the Department of Homeland Security (DHS) had failed to comply with the Homeland Security Act of 2002 (HSA) in designating an Acting DHS Secretary.[219] The HSA

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[210] English v. Trump, 279 F. Supp. 3d 307, 314 (D.D.C. 2018).

[211] For a more in-depth discussion of this lawsuit, see CRS Legal Sidebar LSB10036, *UPDATE: Who's the Boss at the CFPB?*, by Valerie C. Brannon and Jared P. Cole.

[212] 12 U.S.C. § 5491(b)(5).

[213] *English*, 279 F. Supp. 3d at 317. *See generally* United States v. Estate of Romani, 523 U.S. 517, 532–33 (1998) (noting that in the case of "plain inconsistency" between two statutes, later-enacted, more specific statutes generally trump prior, general statutes).

[214] *English*, 279 F. Supp. 3d at 319. The district court's ruling was on a motion for a preliminary injunction, so technically, the court held only that "English is not likely to succeed on the merits of her claim that Dodd-Frank's Deputy Director provision displaces the President's ability to name an acting Director of the CFPB pursuant to the FVRA." *Id.* at 331. However, much of the court's language was not so qualified.

[215] *English*, 279 F. Supp. 3d at 319.

[216] *Id.* at 320 (noting that the agency-specific statute provides that "[e]xcept as otherwise provided expressly by law, all Federal laws dealing with public or Federal . . . officers . . . shall apply to the exercise of the powers of the Bureau"). *See also id.* at 324–25 (invoking the presumption against implied repeals).

[217] *Id.* at 322 (emphasis omitted).

[218] *See, e.g.*, Casa de Md., Inc. v. Wolf, 486 F. Supp. 3d 928, 955 (D. Md. 2020) ("[T]he Court cannot generally extend the FVRA's timing provisions to a person serving temporarily and in an acting capacity pursuant to an agency-specific statute."); *id.* at 957 (concluding that the designation under the agency-specific statute was likely unauthorized). *Compare* Batalla Vidal v. Wolf, Nos. 16-CV-4756 & 17-CV-5228, 2020 U.S. Dist. LEXIS 213068, at *33 (E.D.N.Y. Nov. 14, 2020) ("Because Mr. Wolf did not assume the Acting Secretary role under Section 3345, Sections 3346 and 3348 do not apply to him."), *with* Nw. Immigrant Rights Project v. U.S. Citizenship & Immigration Servs., No. 19-3283, 2020 U.S. Dist. LEXIS 187410, at *58 (D.D.C. Oct. 9, 2020) (concluding 5 U.S.C. § 3348(d) might apply to an official serving under an agency-specific statute, so long as the vacant position is also covered by the Vacancies Act).

[219] Pangea Legal Servs. v. U.S. Dep't of Homeland Sec., Nos. 20-cv-09253-JD & 20-cv-09258-JD, 2021 U.S. Dist. LEXIS 5093, at *18 (N.D. Cal. Jan. 8, 2021); *Batalla Vidal*, 2020 U.S. Dist. LEXIS 213068, at *37–38; *Nw. Immigrant Rights Project*, 2020 U.S. Dist. LEXIS 187410, at *81; Immigrant Legal Res. Ctr. v. Wolf, 491 F. Supp. 3d 520, 535–36 (N.D. Cal. 2020); *Casa de Md., Inc.*, 486 F. Supp. 3d at 957; La Clinica de la Raza v. Trump, 477 F. Supp. 3d 951,

provides that the Deputy Secretary of Homeland Security is the Secretary's "first assistant for purposes of the Vacancies Act."[220] The HSA also states that, "notwithstanding" the Vacancies Act, the Secretary "may designate" a "further order of succession to serve as Acting Secretary."[221] DHS Secretaries had invoked this HSA provision to designate a further order of succession, and a number of courts held that DHS acted impermissibly when the agency attempted to install an Acting Secretary outside the relevant line of succession.[222] However, a few of these opinions rejected arguments alleging the Acting Secretary had additionally violated the time limits of the Vacancies Act, concluding that because the Acting Secretary was serving under the HSA, the Vacancies Act's time restrictions did not apply.[223] Further, some courts ruled that because the Acting Secretary was not serving under the Vacancies Act, the no-ratification provision in Section 3348 did not apply.[224] Accordingly, the courts considered a September 2020 DHS attempt to ratify the actions of the Acting Secretary—although most of the courts ultimately concluded that the ratification was likely ineffective on its merits.[225]

As *Hooks* and *English* illustrate, congressional silence on the relationship between agency-specific provisions and the Vacancies Act can raise difficult questions for courts. Congress can itself resolve tensions between the Vacancies Act and agency-specific statutes by clarifying the conditions under which these statutes apply. For example, the HSA states that the statutory provisions governing acting service in the office of the Secretary of Homeland Security apply "notwithstanding" the Vacancies Act,[226] indicating an intent to render the Vacancies Act inapplicable to this position.[227] To take another example, the statute governing vacancies in the

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972 (N.D. Cal. 2020). *See also* Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security, B- 331650 (Comp. Gen. Aug. 14, 2020) (concluding DHS's purported designations under the HSA were improper). Many of the judicial decisions involved requests for preliminary injunctions, and so the courts held that the plaintiffs were *likely* to succeed on the merits of their claims arguing the acting appointments were improper.

[220] 6 U.S.C. § 113(a)(1)(A). The HSA further specifies that, "notwithstanding" the Vacancies Act, "the Under Secretary for Management shall serve as the Acting Secretary if "neither the Secretary nor Deputy Secretary is available to exercise the duties of the Office of the Secretary." *Id.* § 113(g)(1).

[221] *Id.* § 113(g)(2).

[222] Specifically, after the Senate-confirmed Secretary resigned, an Acting Secretary claimed authority to act under a succession order that pertained to acting service in the event of a disaster or catastrophic emergency, but he was not authorized to serve under the succession order that applied in the event of the Secretary's death, resignation, or inability to perform the functions of the Office. *See Pangea Legal Servs.*, 2021 U.S. Dist. LEXIS 5093, at *20; *Batalla Vidal*, 2020 U.S. Dist. LEXIS 213068, at *37; *Immigrant Legal Res. Ctr.*, 491 F. Supp. 3d at 535; *Casa de Md., Inc.*, 486 F. Supp. 3d at 957; *La Clinica de la Raza*, 477 F. Supp. 3d at 972.

[223] *Batalla Vidal*, 2020 U.S. Dist. LEXIS 213068, at *30; *Immigrant Legal Res. Ctr.*, 491 F. Supp. 3d at 538; *Casa de Md., Inc.*, 486 F. Supp. 3d at 955.

[224] *Batalla Vidal*, 2020 U.S. Dist. LEXIS 213068, at *33 ("Because Mr. Wolf did not assume the Acting Secretary role under Section 3345, Sections 3346 and 3348 do not apply to him."); *cf. Nw. Immigrant Rights Project*, 2020 U.S. Dist. LEXIS 187410, at *52–53 (concluding that Section 3348 could apply to an Acting Secretary serving under the HSA, but holding that the no-ratification provision did not apply to a duty that had been delegated prior to the vacancy).

[225] *Pangea Legal Servs.*, 2021 U.S. Dist. LEXIS 5093, at *21; *Batalla Vidal*, 2020 U.S. Dist. LEXIS 213068, at *38; *Immigrant Legal Res. Ctr.*, 491 F. Supp. 3d at 535–36; *but cf. Nw. Immigrant Rights Project*, 2020 U.S. Dist. LEXIS 187410, at *57, 60 (concluding that the ratification likely did render the initial errors harmless, assuming that a new succession order was valid, but later concluding that the succession order was not valid because it was issued by an Acting Secretary without authority to designate an order of succession).

[226] 6 U.S.C. § 113(g)(1) ("Notwithstanding chapter 33 of title 5, the Under Secretary for Management shall serve as the Acting Secretary if . . . neither the Secretary nor Deputy Secretary is available to exercise the duties of the Office of the Secretary."); *id.* § 113(g)(2) ("Notwithstanding chapter 33 of title 5, the Secretary may designate such other officers of the Department in further order of succession to serve as Acting Secretary.").

[227] *See, e.g.*, *Immigrant Legal Res. Ctr.*, 491 F. Supp. 3d at 537; Designating an Acting Director of National

office of Attorney General provides that "for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General."[228] This statute expressly clarifies—in at least one respect—how the two statutes interact.[229] Congress could also amend the Vacancies Act itself—for example, to clarify that an agency-specific statute containing a mandatory provision for acting service not only renders the Vacancies Act nonexclusive, but also inapplicable.[230]

## Delegability of Duties

As discussed above, there is some dispute regarding how to interpret what "functions and duties" are covered by the Vacancies Act,[231] and some courts have interpreted the Vacancies Act to encompass only the *nondelegable* functions and duties of a vacant advice-and-consent position.[232] As explained earlier, this view permits an agency to delegate those duties to any other employee, who may then perform that duty without violating the Vacancies Act.[233] According to this interpretation of the Act, in many circumstances, an agency official who has not been appointed to a particular advice-and-consent position could perform the responsibilities of that position pursuant to a proper delegation. At least one trial court, however, has read the Vacancies Act to require any delegations to be in effect during the 180-day period preceding the vacancy.[234]

The prevailing view of the Vacancies Act as applying only to nondelegable duties requires courts to consider what duties are delegable, an inquiry that frequently involves the organic statutes that grant authority to federal officials. In the context of the Vacancies Act itself, there are few cases considering what types of duties may be nondelegable. Those courts that have considered the issue have generally upheld the ability of government officials to perform the delegated duties of

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Intelligence, slip op. at 6, https://www.justice.gov/olc/file/1220586/download (Op. O.L.C. Nov. 15, 2019). *See generally, e.g.*, Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 18 (1993) ("[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section.").

[228] 28 U.S.C. § 508.

[229] *Cf.* United States v. Lucido, 373 F. Supp. 1142, 1150–51 (E.D. Mich. 1974) (considering how to reconcile 28 U.S.C. § 508 with a prior version of the Vacancies Act); Authority of the President to Name an Acting Attorney Gen., 31 Op. O.L.C. 208, 209–10 (2007) (holding President's designation of an acting officer under the Vacancies Act would trump Attorney General's designation of a successor under 28 U.S.C. § 508(b)).

[230] *See, e.g.*, Accountability for Acting Officials Act, H.R. 6689, 116th Cong. § 2(g) (2020) ("[A]ny statutory provision . . . that contains a non-discretionary order or directive to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity shall be the exclusive means for temporarily authorizing an acting official to perform the functions and duties of such office.").

[231] *See* 5 U.S.C. § 3348; *supra* "What Are the "Functions and Duties" of an Office?"

[232] *See, e.g.*, Stand Up for California! v. U.S. Dep't of Interior, No. 19-5285, 2021 U.S. App. LEXIS 10929, at *10–11 (D.C. Cir. Apr. 16, 2021); United States v. Harris County, No. 4:16-CV-2331, 2017 U.S. Dist. LEXIS 229179, at *7 n.5 (S.D. Tex. Apr. 26, 2017).

[233] *See, e.g.*, Guidance on Application of Fed. Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 72 (1999). Of course, *other* statutes or regulations might affect the analysis of whether a particular delegation of authority, or a particular exercise of delegated authority, is lawful. *See, e.g.*, Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 1196 (D. Utah 2004) (considering the scope of an executive order delegating "authority otherwise vested" in the President to perform certain functions); Action for Boston Cmty. Dev. v. Shalala, 983 F. Supp. 222, 228–29 (D. Mass. 1997) (considering whether agency had offered sufficient evidence to demonstrate Secretary of Health and Human Services had properly delegated decisionmaking authority to regional administrator).

[234] L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 34 (D.D.C. 2020); *see also* Nw. Immigrant Rights Project v. U.S. Citizenship & Immigr. Servs., No. 19-3283, 2020 U.S. Dist. LEXIS 187410, at *53 (D.D.C. Oct. 9, 2020) (concluding a duty delegated in an order that was in effect "during the 180-day window proceeding the vacancy" was not a "function or duty" vested exclusively in the Secretary for purposes of enforcing the Vacancies Act).

a vacant office, so long as the delegation is otherwise lawful under the legal principles that ordinarily govern delegations.[235]

Outside the context of the Vacancies Act, courts often presume that delegation is permissible "absent affirmative evidence of a contrary congressional intent."[236] The Supreme Court has recognized that an agency head may have so many statutory responsibilities that it would be unreasonable to think that Congress intended the head to personally perform—or even oversee the performance of—every single assigned task.[237] In the words of the Court, internal agency delegation may be "necessary for prompt and expeditious action" in circumstances where delay could cause "injury beyond repair."[238]

The general presumption of delegability may be overcome in certain circumstances. A statute that expressly prohibited delegation of a duty—for example, stating that a duty "'may only be delegated to,' 'may not [be] delegate[d],' 'may not be reledegated,' 'shall not be redelegated,' or is 'not subject to delegation,'"—would likely render that duty nondelegable.[239] Some statutes may implicitly preclude delegation.[240] For example, courts have recognized that some statutes may limit the class of officers to whom a duty is delegable, meaning by implication that the duties are not delegable outside of that specified class.[241]

To take another example, one federal district court ruled in February 2019 that a statute implicitly precluded the delegation of a specific duty in the context of a Department of the Interior decision

[235] *See, e.g.*, *Stand Up for California!*, 2021 U.S. App. LEXIS 10929, at *19–20; Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 421 (D. Conn. 2008), *aff'd*, 587 F.3d 132 (2d Cir. 2009); Office of Thrift Supervision v. Paul, 985 F. Supp. 1465, 1474–75 (S.D. Fla. 1997).

[236] U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004). *See also, e.g.*, United States v. Mango, 199 F.3d 85, 91–92 (2d Cir. 1999) (concluding, in the face of statutory ambiguity, that subdelegation is permissible); Loma Linda Univ. v. Schweiker, 705 F.2d 1123, 1128 (9th Cir. 1983) ("Express statutory authority for delegation is not required . . . ."). *But see* Cudahy Packing Co. v. Holland, 315 U.S. 357, 361 (1942) (holding officer could not delegate subpoena power, where 29 U.S.C. § 209 and 15 U.S.C. § 49 provided that the officer "shall have power" of subpoena). In *Cudahy Packing Co.*, the Court considered whether the delegation of the subpoena power was authorized by a statute providing that "[t]he principal office of the [officer] shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place." *Id.* at 360 (quoting 29 U.S.C. § 204). The Court rejected this contention, stating that "[a] construction of the Act which would thus permit the Administrator to delegate all his duties, including those involving administrative judgment and discretion which the Act has in terms given only to him, can hardly be accepted unless plainly required by its words." *Id.* at 361.

[237] Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 122–23 (1947).

[238] *Id.*

[239] Stand Up for California! v. U.S. Dep't of Interior, 298 F. Supp. 3d 136, 143 (D.D.C. 2018), *aff'd*, 2021 U.S. App. LEXIS 10929. *See also, e.g.*, 12 U.S.C. § 1790d(i)(4)(A) ("Except as provided in subparagraph (B), the [National Credit Union Administration] Board *may not delegate* the authority of the Board under this subsection.") (emphasis added); 25 U.S.C. § 2706(a) ("The [National Indian Gaming] Commission shall have the power, *not subject to delegation* . . . .") (emphasis added).

[240] *Cf., e.g.*, Fed. Vacancies Reform Act of 1998 - Assistant Attorney Gen. for the Office of Legal Counsel, U.S. Dep't of Justice, B-310780, 2008 U.S. Comp. Gen. LEXIS 101, at *12 (Comp. Gen. June 13, 2008) (saying that finding nondelegability "requires language that clearly signals duties or functions that cannot be delegated, such as providing final approval or final decisionmaking authority in a particular position").

[241] *See, e.g.*, United States v. Giordano, 416 U.S. 505, 507–08 (1974) (holding "Congress did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or an Assistant Attorney General specially designated by him"); Halverson v. Slater, 129 F.3d 180, 185 (D.C. Cir. 1997) (concluding statute that authorized Transportation Secretary to "delegate the duties and powers conferred by this subtitle to any officer, employee, or member of the Coast Guard," 46 U.S.C. § 2104(a), prohibited the "delegation of . . . functions to a non-Coast Guard official").

to take property into trust at the request of the Santa Ynez Band of Chumash Mission Indians.[242] Federal law authorizes the Secretary of the Interior to acquire land in trust "for the purpose of providing land for Indians."[243] Pursuant to agency regulations delegating this authority and outlining procedures for its use, the Assistant Secretary-Indian Affairs (AS-IA) assumed jurisdiction over an administrative appeal reviewing the agency's decision to acquire the land for this tribe.[244] However, while the internal appeal was pending, the AS-IA resigned.[245] The Principal Deputy Assistant Secretary-Indian Affairs (PDAS) initially served as Acting AS-IA as the first assistant under the Vacancies Act, but "reverted" to his position as PDAS after 210 days.[246] After the expiration of the 210-day period, the PDAS issued a decision rendering the land acquisition final, citing "the authority delegated to [the PDAS] by 25 C.F.R. § 2.20(c)."[247] This regulation authorized the AS-IA to issue decisions in administrative appeals, but also allowed the AS-IA to assign decisionmaking authority to "a Deputy."[248] The regulation further said that if a decision "is signed by the [AS-IA], it shall be final . . . and effective immediately."[249] By contrast, if a Deputy signed the decision, the regulation provided that such a decision could be appealed to the Bureau of Indian Affairs.[250]

As framed by the trial court, the relevant question was therefore "whether 25 C.F.R. § 2.20(c) exclusively reserves with the [AS-IA] the authority to issue *final* decisions . . . , or whether the [AS-IA's] authority to issue final appeals decisions is delegable to a Deputy."[251] Although the regulation did not explicitly state that this authority was exclusive to the AS-IA or otherwise expressly preclude delegation,[252] the court nonetheless held that the duty to render final decisions was exclusive to the AS-IA and nondelegable for the purposes of the Vacancies Act.[253] The court observed that the regulation expressly stated that if a decision were "signed by a Deputy to the [AS-IA]," it would be subject to further appeal, meaning that "*only*" the AS-IA "may issue a final decision on the appeal."[254] The court further concluded that, in light of "the history and purpose behind the [AS-IA's] authority over appeals," the regulation was "intended to restrict the [AS-IA's] permissible delegation authority."[255] Finally, the court looked to the nature of the challenged function and inferred that the agency "contemplated that . . . [this] authority . . . would be used with restraint," suggesting that the duty should not "be freely delegable."[256]

A different federal district court decision from September 2020 held that an agency delegation violated the Vacancies Act based on the specific factual circumstances.[257] That case involved a

[242] Crawford-Hall v. United States, 394 F. Supp. 3d 1122, 1137 (C.D. Cal. 2019).

[243] 25 U.S.C. § 5108.

[244] *Crawford-Hall*, 394 F. Supp. 3d at 1129.

[245] *Id*.

[246] *Id*.

[247] *Id*.

[248] 25 C.F.R. § 2.20(c) (2018).

[249] *Id*.

[250] *Id*.

[251] *Crawford-Hall*, 394 F. Supp. 3d at 1136 (emphasis added).

[252] *See id*. at 1143.

[253] *Id*. at 1137.

[254] *Id*.

[255] *Id*. at 1139.

[256] *Id*. at 1147.

[257] *See* Bullock v. U.S. Bureau of Land Mgmt., 489 F. Supp. 3d 1112, 1126 (D. Mont. 2020).

series of orders delegating the duties of ten positions within the Department of the Interior, including the Director of the U.S. Bureau of Land Management (BLM).[258] The initial order issued by the outgoing Secretary of the Interior in January 2017 operated temporarily, with a fixed end date.[259] However, various Secretaries, both acting and Senate-confirmed, amended and extended the delegation order "thirty-two times over the next three years."[260] In May 2020, the official who was exercising the duties of the BLM Director pursuant to the amended order, William Perry Pendley, issued a new memo clarifying BLM's "order of succession" and designating himself as the first assistant to the BLM Director.[261] The memo also delegated to Pendley the authority to perform the Director's duties.[262] Once his authority to act under the Secretary's order expired, Pendley performed the delegated duties of the BLM Director pursuant to this memo.[263]

Montana officials sued BLM in July 2020, arguing that Pendley was unlawfully serving as Acting BLM Director in violation of the Vacancies Act.[264] The district court agreed with the challengers, saying that under the circumstances, the agency's attempt to designate Pendley as "an 'official performing the Director's duties under the Secretary's delegation'" rather than the "'Acting Director'" was merely "wordplay," representing "a distinction without a difference."[265] The court looked to two factors to conclude that Pendley did in fact "operate[] as the Acting BLM Director" in violation of the Vacancies Act.[266] The court noted that, first, "Pendley actually exercised powers reserved to the BLM Director," and second, "the Executive Branch repeatedly presented Pendley as Acting BLM Director."[267] The duration of the delegations also seemed to be a factor in the court's decision, with the court stating, "[t]he President cannot shelter unconstitutional 'temporary' appointments for the duration of his presidency through a matryoshka doll of delegated authorities."[268] This decision was fact-specific, and it remains to be seen whether any other courts will similarly look past agency designations to conclude that officials exercising delegated authority are in fact serving as acting officials who must comply with the Vacancies Act.

If Congress were concerned about agencies delegating duties of vacant offices, it could amend either the Vacancies Act or the organic acts creating those duties. For instance, Congress could amend the definition of "function or duty" in the Vacancies Act to more clearly prohibit delegation once an office becomes vacant.[269] Congress could also enact other statutory limitations on the ability of certain officers to delegate their authority.[270] There are already a number of

[258] *Id*. at 1118.

[259] *Id*.

[260] *Id*.

[261] *Id*. at 1126.

[262] *Id*.

[263] *Id*. at 1126–27.

[264] *Id*. at 1119.

[265] *Id*. at 1125, 1127.

[266] *Id*. at 1126–27.

[267] *Id*. at 1128.

[268] *Id*. at 1126. The court also noted that other courts had found "recent" violations of the Vacancies Act in other executive offices. *Id*.

[269] *See* 5 U.S.C. § 3348. As discussed, however, at least one district court held that the Vacancies Act already prohibits the performance of delegated duties unless the delegation complied with the 180-day lookback period. *L.M.-M.*, 442 F. Supp. 3d at 34.

[270] *See, e.g.*, 42 U.S.C. § 3535(q)(2) ("The Secretary may delegate authority to approve a waiver of a regulation only to an individual of Assistant Secretary rank or equivalent rank, who is authorized to issue the regulation to be waived.").

statutes that grant authority to executive branch officials but expressly provide that those authorities may not be delegated, or may only be delegated to specific officials.[271] Beyond placing additional substantive limitations on the *types* of duties that are delegable, Congress could also create procedural limitations on the *way* in which duties may be delegated.[272] For example, some statutes require delegations to be in writing,[273] while others provide that duties may only be delegated if certain conditions are met.[274]

## Constitutional Considerations

Some have questioned whether the Vacancies Act is consistent with the U.S. Constitution's Appointments Clause, at least with respect to particular types of acting service.[275] The Appointments Clause creates specific requirements for the appointment of "Officers of the United States": generally, officers must be appointed through presidential nomination and Senate confirmation.[276] However, while *principal* officers may only be appointed through Senate confirmation, Congress can vest the appointment of "*inferior* Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments."[277] Accordingly, to determine whether an official's appointment complied with the Appointments Clause, courts ask whether the official is a principal officer, inferior officer, or a "non-officer employee."[278] The Supreme Court has said that a federal official is a principal or inferior officer subject to the Appointments Clause if the official (1) performs duties that are "continuing and permanent, not occasional or temporary"[279]; and (2) exercises "significant authority pursuant to the laws of the United States."[280] To

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[271] *See, e.g.*, 21 U.S.C. § 360c(*i*)(1)(E)(iii) ("The responsibilities of the Director under this subparagraph may not be delegated."); *see also supra* note 239. *Cf., e.g.*, 26 U.S.C. § 7701(a)(11)(A) ("The term 'Secretary of the Treasury' means the Secretary of the Treasury, personally, and shall not include any delegate of his.").

[272] *See generally* Panama Refining Co. v. Ryan, 293 U.S. 388, 448 (1935) (noting that where Congress has delegated legislative power "subject to a condition, it is a requirement of constitutional government that the condition be fulfilled").

[273] *See, e.g.*, 3 U.S.C. § 301 (authorizing President to delegate functions but requiring delegation to "be in writing, [and] . . . be published in the Federal Register"); 10 U.S.C. § 138(c) ("[A]n Assistant Secretary may not issue an order to a military department unless . . . the Secretary of Defense has specifically delegated that authority to the Assistant Secretary in writing; and . . . the order is issued through the Secretary of the military department concerned.").

[274] *See, e.g.*, Pub. L. No. 104-53, § 211, 109 Stat. 468, 535 (1995) (transferring certain functions of Comptroller General to Director of Office of Management and Budget and providing that "[t]he Director may delegate any such function, in whole or in part, to any other agency or agencies if the Director determines that such delegation would be cost-effective or otherwise in the public interest").

[275] *See, e.g.*, NLRB v. SW Gen., Inc., 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring) ("The [Vacancies Act] authorizes the President to appoint both inferior and principal officers without first obtaining the advice and consent of the Senate. Appointing inferior officers in this manner raises no constitutional problems. . . . Appointing principal officers under the [Vacancies Act], however, raises grave constitutional concerns because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate.").

[276] U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."). *See generally* CRS Report R44083, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, by Henry B. Hogue and Maeve P. Carey.

[277] U.S. CONST. art. II, § 2, cl. 2 (emphasis added); *see also, e.g.*, Edmond v. United States, 520 U.S. 651, 662–63 (1997) (discussing distinction between principal and inferior officers).

[278] *See* Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018).

[279] United States v. Germaine, 99 U.S. 508, 511–12 (1878).

[280] Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam).

distinguish a principal officer from an inferior officer, the Supreme Court asks whether the officer's "work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate."[281] Stated another way, the relevant question is whether the officer has a "superior other than the President."[282]

Some have argued that temporary service under the Vacancies Act might violate the Appointments Clause by allowing government officials to act as "Officers of the United States" absent appointment through the proper constitutional processes.[283] Justice Thomas expressed this concern in a concurring opinion in *NLRB v. SW General, Inc.*, arguing that the President could not act alone to appoint someone to serve as the NLRB's general counsel.[284] A person performing the duties of an office that is generally subject to Senate confirmation will likely be performing—perhaps temporarily—continuing statutory duties that may qualify as "significant" for purposes of the Appointments Clause.[285] Thus, acting officials performing these continuing, significant duties could thereby qualify as officers subject to constitutional appointment procedures.[286] If their performance of those duties is not supervised by anyone other than the President, they might even be viewed as principal officers.[287] If acting officials could be considered principal officers when they perform a principal officer's duties, they would have to be appointed through Senate confirmation.[288] Under the Vacancies Act, however, acting officials are not appointed to serve through advice-and-consent procedures, but instead may serve pursuant to the operation of the statute or presidential designation alone.[289] Another possible concern not raised by Justice Thomas is that even if acting officials could be considered inferior officers rather than principal officers, the Vacancies Act may violate the Appointments Clause to the extent that it allows non-officer employees to automatically serve as acting officials by virtue of being first assistants.[290]

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[281] *Edmond*, 520 U.S. at 663.

[282] NLRB v. SW Gen., Inc., 137 S. Ct. 929, 947 (2017) (Thomas, J., concurring). *Cf.* Morrison v. Olson, 487 U.S. 654, 671–72 (1988) (relying on four factors to conclude that an official was an inferior officer: that the official (1) was "subject to removal by a higher Executive Branch official"; (2) "perform[ed] only certain, limited duties"; (3) held an office that was "limited in jurisdiction"; and (4) held an office that was "limited in tenure").

[283] *See, e.g.*, Patrick v. Whitaker, 426 F. Supp. 3d 182, 184–85 (E.D.N.C. 2019) (noting plaintiff's argument "that Mr. Whitaker's designation as Acting Attorney General violated the Appointments Clause"); Joshua L. Stayn, Note, *Vacant Reform: Why the Federal Vacancies Reform Act of 1998 Is Unconstitutional*, 50 DUKE L.J. 1511, 1513 (2001).

[284] *See SW Gen., Inc.*, 137 S. Ct. at 948.

[285] *Id.* at 946–47. *See also, e.g.*, Nw. Immigrant Rights Project v. U.S. Citizenship & Immigr. Servs., No. 19-3283, 2020 U.S. Dist. LEXIS 187410, at *68 (D.D.C. Oct. 9, 2020) ("[T]he Acting Secretary of the Department undoubtedly exercises significant governmental authority[.]").

[286] *See SW Gen., Inc.*, 137 S. Ct. at 947.

[287] *See id.* at 947–48; *see also* Freytag v. Comm'r, 501 U.S. 868, 882 (1991) ("Special trial judges are not inferior officers for purposes of some of their duties . . . , but mere employees with respect to other responsibilities. The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution.").

[288] *See SW Gen., Inc.*, 137 S. Ct. at 947–48.

[289] *See* 5 U.S.C. § 3345.

[290] *Cf.* E. Garrett West, Note, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 219 (2018) (discussing the "automatic-promotion mechanism" in the context of a first assistant who is an inferior officer performing the duties of a principal office).

A number of trial courts have concluded that officials temporarily acting under the Vacancies Act did not violate the Appointments Clause.[291] A few different theories have been offered to explain why acting service under the Vacancies Act does not violate the Appointments Clause—although some of these theories may justify only certain categories of service authorized by the Vacancies Act. First, for some officers who have already been appointed in accordance with the Appointments Clause, acting service could be seen as a conditional duty of the office to which they were originally appointed.[292] For example, a statute outlining the duties of the Senate-confirmed Deputy Secretary of Defense states that the Deputy will "act for, and exercise the powers of" the Secretary of Defense if the Secretary "dies, resigns, or is otherwise unable to perform the functions and duties of the office."[293] Under these circumstances, acting service can be seen as a contingent duty of the office—a duty that the President and Congress were aware of when appointing the Deputy Secretary.[294] In one opinion, the OLC argued that the Vacancies Act similarly makes acting service "part and parcel of the office" for *all* officers appointed after the enactment of the Vacancies Act, suggesting that the provisions authorizing acting service could be seen as creating a conditional duty for any covered offices.[295]

Another argument broadly justifying acting service is based on two Supreme Court cases that may suggest that when a government official temporarily performs duties, the temporary nature of the duties may prevent the official from being considered an officer, rather than an employee.[296] In *United States v. Germaine* and *Auffmordt v. Hedden*, the Supreme Court held that officials who were only occasionally asked to act on behalf of the government should not be considered constitutional officers.[297] The Court has since emphasized that to qualify as an officer, an official must "hold a continuing office established by law," and may not serve only "temporarily or episodically."[298] However, in both *Germaine* and *Auffmordt*, the officials were performing duties that, per statute, were themselves temporary.[299] It is not clear whether the same

[291] *See, e.g.*, Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 356 F. Supp. 3d 109, 153 (D.D.C. 2019) (holding that Acting Attorney General serving under the Vacancies Act did not violate the Appointments Clause), *aff'd on other grounds*, 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam); United States v. Santos-Caporal, No. 1:18 CR 171 AGF (ACL), 2019 U.S. Dist. LEXIS 19282, at *11–12, 17 (E.D. Mo. Jan. 9, 2019) (same). *But see* Patrick v. Whitaker, 426 F. Supp. 3d 182, 186 (E.D.N.C. 2019) ("The Court is inclined to agree with plaintiff that the President's designation of Mr. Whitaker as a principal officer pursuant to the [Vacancies Act] 'raises grave constitutional concerns . . . .' However, because the Court concludes that plaintiff lacks standing, it dismisses his claims." (quoting *SW Gen., Inc.*, 137 S. Ct. at 946)).

[292] *See, e.g.*, West, *supra* note 290, at 219.

[293] 10 U.S.C. § 132(b).

[294] *See, e.g.*, Ben Miller-Gootnick, Note, *Boundaries of the Federal Vacancies Reform Act*, 56 HARV. J. ON LEGIS. 459, 491 n.163 (2019).

[295] Designation of Acting Director of the Office of Management and Budget, 27 Op. O.L.C. 121, 122 n.3 (2003); *see also* 5 U.S.C. § 3345(a)(2) ("[T]he President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity . . . .").

[296] *See* Auffmordt v. Hedden, 137 U.S. 310, 327 (1890) (holding that a merchant appraiser who "acts only occasionally and temporarily" was not a constitutional officer); United States v. Germaine, 99 U.S. 508, 512 (1878) (holding that a surgeon who exercised "occasional and intermittent" duties, acting only "when called on . . . in some special case" was not a constitutional officer).

[297] *See Auffmordt*, 137 U.S. at 327; *Germaine*, 99 U.S. at 512.

[298] Lucia v. SEC, 138 S. Ct. 2044, 2053 (2018).

[299] *See Auffmordt*, 137 U.S. at 327; *Germaine*, 99 U.S. at 512.

principles would apply to an official temporarily performing continuing statutory duties—although some have suggested that they might.[300]

A different Supreme Court case seems more directly on point and has been cited for the proposition that officials *temporarily* serving in a continuing office should be considered, at most, inferior officers who may be appointed by the President or a department head acting alone.[301] In a case from the late 1800s, *United States v. Eaton*, the Supreme Court held that it did not violate the Appointments Clause for a vice-consul appointed by the Secretary of State to "temporarily perform[] the functions of the consular office" during the illness of the consul-general.[302] The Court said that where "the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official."[303] *Eaton* suggests that the Court views temporary acting service differently than the permanent performance of duties.[304]

On this basis, the OLC has argued that acting officials temporarily performing a principal officer's duties should be considered only inferior officers, and that when the President designates an official to serve under the Vacancies Act, he is appointing an inferior officer consistently with the Appointments Clause.[305] The Vacancies Act says that the President may "direct" Senate-confirmed officers and senior agency officials to serve as acting officials, rather than saying that the President may "appoint" these officials to serve.[306] Nonetheless, the OLC and at least one trial court have concluded that this provision should be interpreted as authorizing an appointment consistent with Appointments Clause procedures.[307]

The OLC's *Eaton*-based argument may have some limitations. For example, the argument does not, on its own, appear to account for first assistants who automatically serve pursuant to the

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[300] United States v. Peters, No. 6:17-CR-55-REW-HAI-2, 2018 U.S. Dist. LEXIS 204067, at *8 n.11 (E.D. Ky. Dec. 3, 2018) ("[A]s an academic observation, the Supreme Court's delineation of constitutional 'Officer' characteristics suggests that an 'Acting' official could be considered a 'lesser functionar[y]' employee for which 'the Appointments Clause cares not a whit about who named them.'" (quoting *Lucia*, 138 S. Ct. at 2051)).

[301] Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 356 F. Supp. 3d 109, 148 (D.D.C. 2019) ("[T]he Supreme Court has held . . . that an official designated to perform the duties of a principal office temporarily, on an acting basis, need not undergo Senate confirmation."), *aff'd on other grounds*, 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam).

[302] United States v. Eaton, 169 U.S. 331, 343 (1898).

[303] *Id*.

[304] *See also, e.g.*, Morrison v. Olson, 487 U.S. 654, 672 (1988) (holding that an independent counsel appointed under the Ethics in Government Act of 1978 was an inferior officer that could permissibly be appointed by a court, and noting, among other factors, that the office was "limited in tenure," citing *Eaton*). In *SW General, Inc.*, Justice Thomas distinguished *Eaton* by noting that the official serving as acting General Counsel had "served for more than three years in an office limited by statute to a 4-year term, and he exercised all of the statutory duties of that office," saying that there was "nothing 'special and temporary' about Solomon's appointment." NLRB v. SW Gen., Inc., 137 S. Ct. 929, 946 n.3 (2017) (Thomas, J., concurring). It is unclear whether the full Supreme Court or lower courts would take a similar view of acting service or, for Justice Thomas, what duration of service or amount of responsibility suffices to transform an acting official. *Cf., e.g.*, Bhatti v. Fed. Hous. Fin. Agency, 332 F. Supp. 3d 1206, 1218 (D. Minn. 2018) (ruling that "determining whether an otherwise validly appointed acting officer has served for 'too long' [in violation of the Appointments Clause] is a non-justiciable political question").

[305] Designating an Acting Attorney General, slip op. at 9 (Op. O.L.C. Nov. 14, 2018), https://www.justice.gov/olc/file/1112251/download; Designation of Acting Director of the Office of Management and Budget, 27 Op. O.L.C. 121, 123–24 (2003).

[306] *See* 5 U.S.C. § 3345(a)(2)–(3).

[307] Designation of Acting Director of the Office of Management and Budget, 27 Op. O.L.C. 121, 124–25 (2003); Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 356 F. Supp. 3d 109, 154–55 (D.D.C. 2019), *aff'd on other grounds*, 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam).

operation of the Vacancies Act, because these officials are not appointed to the acting position in accordance with the Appointments Clause.[308] At least one scholar has argued that for first assistants, automatic acting service should be viewed as "contingent powers appended to the original office."[309] However, this contingent-duties and *Eaton*-based argument may not extend to a first assistant who is a non-officer employee that was not appointed by the President or department head.[310] *Eaton* described the vice-consul temporarily filling the vacant office as an inferior officer.[311] Under the Appointments Clause, an inferior officer may be granted "significant authority," while a mere employee may not.[312] Accordingly, it is not clear whether *Eaton* supports the automatic designation of a non-officer employee to serve as an acting officer—even an inferior officer. Further, some have argued that because *Eaton* involved a temporary absence—an illness—it should not be interpreted to authorize an inferior officer to fill a permanent vacancy in a principal office.[313]

An alternative argument justifying acting service relies on the principle that Senate-confirmed officers can be given additional germane duties, even if those duties were not contemplated at the time the official was appointed.[314] In *Shoemaker v. United States*, the Supreme Court rejected a legal challenge arguing that Congress violated the Appointments Clause by naming federal officials to serve on a parks commission, unconstitutionally "appointing" the officers.[315] The Court, emphasizing that the Senate had already confirmed the officials to their existing positions, held that Congress could grant these officers "additional duties, germane to the offices already held by them" without providing for a new appointment.[316]

Similarly, in *Weiss v. United States*, the Supreme Court ruled that the Appointments Clause did not require a second appointment for military judges, upholding a statute that allowed military officials to assign commissioned officers to serve as judges.[317] Thus, unlike in *Shoemaker*, Congress had not granted new duties to specifically named officials, but authorized an executive branch official to designate "an indefinite number of military judges . . . from among hundreds or perhaps thousands of qualified commissioned officers."[318] Accordingly, the Court was not sure whether *Shoemaker* should control its analysis, saying that in *Weiss*, there was "no ground for suspicion . . . that Congress was trying to both create an office and also select a particular

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[308] *See* 5 U.S.C. § 3345(a)(1).

[309] West, *supra* note 290, at 219.

[310] *See id.* (arguing that first assistants can lawfully serve if "(1) the inferior officer's original appointment satisfies the Appointments Clause (i.e., she was lawfully appointed by the President, head of the department, or a court of law) and (2) the contingent duties are . . . 'special and temporary'" (quoting United States v. Eaton, 169 U.S. 331, 343 (1898))).

[311] *See* United States v. Eaton, 169 U.S. 331, 343 (1898); *see also, e.g.*, Bandimere v. SEC, 844 F.3d 1168, 1173–74 (10th Cir. 2016) (describing the vice consul as an example of an inferior officer). The vice-consul had been appointed by the Secretary of State, the department head. *Eaton*, 169 U.S. at 337.

[312] Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam).

[313] *E.g.*, Thomas Berry, *Is Matthew Whitaker's Appointment Constitutional? An Examination of the Early Vacancies Acts*, YALE J. ON REG.: NOTICE & COMMENT (Nov. 26, 2018), https://www.yalejreg.com/nc/is-matthew-whitakers-appointment-constitutional-an-examination-of-the-early-vacancies-acts-by-thomas-berry (noting that an official stepping in during a temporary absence is still subject to the supervision of the absent official and asserting that early executive branch practice treated short vacancies differently than more lengthy vacancies).

[314] *See, e.g.*, *id.*

[315] Shoemaker v. United States, 147 U.S. 282, 300–01 (1893).

[316] *Id.* at 301.

[317] Weiss v. United States, 510 U.S. 163, 176 (1994).

[318] *Id.* at 174.

individual to fill the office."[319] Even assuming that *Shoemaker*'s germaneness inquiry governed, though, the *Weiss* Court concluded that the test was satisfied.[320] Noting that "all military officers, consistent with a long tradition, play a role in the operation of the military justice system," the Court held that "the role of military judge is 'germane' to that of military officer."[321]

Some who do not believe that *Eaton* justifies acting service have argued that at least some applications of the Vacancies Act can be justified on these grounds.[322] If an official has been appointed through a constitutionally compliant procedure, under *Shoemaker* and *Weiss*, Congress may, through the Vacancies Act, authorize that official to take on additional duties, germane to their original appointment, without triggering the need for a second appointment.[323] However, *Shoemaker* and *Weiss* both approved of assigning new duties to Senate-confirmed officers.[324] It is not clear that these cases could authorize acting service by an inferior officer or a non-officer employee.[325] In addition, acting service may not satisfy the germaneness test if the acting official was confirmed to a position in another department and usually performs duties unrelated to those of the vacant office.[326] Further, the Court's decision in *Weiss* may suggest that if a statute allows an executive branch official to assign new duties to an official selected from a large pool of candidates—like the Vacancies Act—*Shoemaker*'s germaneness inquiry might not apply.[327] *Shoemaker* was concerned with *curbing* congressional encroachment on the executive branch's appointment authority.[328] Accordingly, one could argue that the germaneness test should not be invoked to *validate* a questionable appointment, particularly where the relevant statute looks like the one considered in *Weiss*.

A court might also consider the long history of the Vacancies Act as support for the constitutionality of acting service. In "separation-of-powers case[s]" interpreting the Appointments Clause, the Supreme Court has put "significant weight upon historical practice."[329] One district court upholding the constitutionality of an acting appointment under the Vacancies Act highlighted the "unbroken string of legislative enactments" authorizing acting service starting in 1792.[330] While there has been some "interbranch conflict" regarding various iterations of the Vacancies Act,[331] the executive branch has agreed that at least some temporary appointments are constitutional.[332] The executive branch has even, at times, argued that the President has the

[319] *Id*.

[320] *Id*.

[321] *Id*. at 175–76.

[322] *See, e.g.*, Thomas A. Berry, S.W. General*: The Court Reins in Unilateral Appointments*, 2017 CATO SUP. CT. REV. 151, 178–79 (2017); *see also* Designation of Acting Director of the Office of Management and Budget, 27 Op. O.L.C. 121, 122 n.3 (2003).

[323] *See, e.g.*, Berry, *supra* note 313.

[324] *Weiss*, 510 U.S. at 170; Shoemaker v. United States, 147 U.S. 282, 301 (1893).

[325] *See, e.g.*, Berry, *supra* note 313 ("Matthew Whitaker was not serving in a Senate-confirmed position at the time of his ascension, and so the *Shoemaker*/*Weiss* doctrine cannot apply to him.").

[326] *See Shoemaker*, 147 U.S. at 301.

[327] *Weiss*, 510 U.S. at 174.

[328] *See Shoemaker*, 147 U.S. at 301.

[329] NLRB v. Noel Canning, 573 U.S. 513, 514 (2014).

[330] Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 356 F. Supp. 3d 109, 148 (D.D.C. 2019), *aff'd on other grounds*, 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam). *Accord, e.g.*, Designating an Acting Attorney General, slip op. at 10–16 (Op. O.L.C. Nov. 14, 2018), https://www.justice.gov/olc/file/1112251/download.

[331] NLRB v. SW Gen., Inc., 137 S. Ct. 929, 935 (2017).

[332] *See, e.g.*, *id*. at 935–36; The Vacancies Act, 22 Op. O.L.C. 44 (1998).

inherent power "to make temporary . . . appointments in cases of need without conforming to the requirements of the Appointments . . . Clause."[333] Accordingly, historical practice suggests that Congress and the executive branch have considered at least some forms of acting service to be constitutional. And in particular, since 1868, prior versions of the Vacancies Act have provided for first assistants to automatically take on acting service.[334]

It is likely that litigants challenging the validity of acting officials' service will continue to raise constitutional arguments under the Appointments Clause. Further judicial consideration of the issue may shed light on what types of acting officials are constitutionally problematic and which of the theories described above may justify acting service.

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[333] The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 161–62 (1996). *Cf., e.g.*, Williams v. Phillips, 360 F. Supp. 1363, 1369 (D.C. Cir. 1973) (saying that if such a power existed, it would be only in "emergency situations," and pointing out "[s]everal constitutional problems . . . presented by a temporary appointive power").

[334] *See* Act of July 23, 1868, ch. 227, 15 Stat. 168.