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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 nondelegable 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 that 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. 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 governs 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 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, how it is enforced, 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. Finally, the report turns to issues of particular relevance to Congress, primarily highlighting the Vacancies Act's enforcement mechanisms.

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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] However, 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. 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.[2] The most recent transition of Administrations was no exception, and reports have noted that a number of offices across the executive branch currently remain vacant.[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]

Generally, to serve as an acting officer for an advice and consent position, a government officer or employee must be authorized to perform the duties of a vacant office by the Federal Vacancies Reform Act of 1998 (Vacancies Act).[5] The Vacancies Act allows only certain classes of employees to serve as an acting officer for an advice and consent position,[6] and specifies that they may serve for only a limited period.[7] If a covered acting officer's service is not authorized by the

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[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."). Thus, the Appointments Clause allows Congress to provide an alternative mechanism for the appointment of "inferior Officers," as distinguished from principal officers. *See* Buckley v. Valeo, 424 U.S. 1, 124-28 (1976) (per curiam) (defining requirements of the Appointments Clause); Edmond v. United States, 520 U.S. 651, 662-63 (1997) (discussing distinction between principal and inferior officers). *See generally* CRS Report R44083, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, by Henry B. Hogue and Maeve P. Carey.

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, e.g.*, CRS Report R40119, *Filling Advice and Consent Positions at the Outset of Recent Administrations, 1981-2009*, by Henry B. Hogue, Michael Greene, and Elizabeth Rybicki (available to congressional clients upon request).

[3] *See, e.g.*, Aaron Kessler, *Trump vacancies are here to stay*, CNN (Oct. 10, 2017, 3:12 PM), http://www.cnn.com/2017/10/10/politics/trump-vacancies-here-to-stay/index.html; Tom McCarthy, *Why are so many crucial U.S. government positions still unfilled?*, THE GUARDIAN (July 21, 2017, 7:00 AM), https://www.theguardian.com/us-news/2017/jul/21/donald-trump-administration-us-government-jobs-unfilled; Christopher Wallace, *Obama holdovers, vacancies remain at top levels of State Department*, FOX NEWS (Oct. 5, 2017), http://www.foxnews.com/politics/2017/10/05/obama-holdovers-vacancies-remain-at-top-levels-state-department.html.

[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).

It is an open question whether such temporary service might violate the Appointments Clause by allowing government employees to act as "Officers of the United States" absent appointment through the proper constitutional processes. *Compare* Designation of Acting Director of the Office of Management and Budget, 27 Op. O.L.C. 121, 123-25 (2003) (concluding acting officer was inferior officer, and that under the Vacancies Act, he was appointed consistently with the Appointments Clause), *with* 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.").

[5] 5 U.S.C. §§ 3345-3349c.

[6] *Id.* § 3345.

[7] *Id.* §§ 3346, 3349a.

Vacancies Act, any attempt by that officer to perform a "function or duty" of a vacant office has "no force or effect."[8]

This report first describes how the Vacancies Act operates and outlines its scope, identifying when the Vacancies Act applies to a given office, how it is enforced, 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. Finally, the report turns to issues of particular relevance to Congress, primarily highlighting the Vacancies Act's enforcement mechanisms.

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."[9] The Vacancies Act's requirements are triggered 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."[10]

Because the Vacancies Act is generally exclusive and subject to limited exceptions,[11] 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.[12] The Vacancies Act specifies that a "function or duty" is one that, by statute or regulation, must be performed by the officer in question.[13] Section 3348[14] provides that, "unless an officer or employee is performing the functions and duties [of an office] in accordance with" the Act,[15] "the office shall remain vacant."[16] 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.[17] As a result, Section 3348 usually allows three types of people to perform the functions

[8] *Id.* § 3348(d).

[9] 5 U.S.C. § 3347(a).

[10] *Id.* §§ 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).

[11] *See infra* "Which Offices?."

[12] *See* 5 U.S.C. §§ 3347-3348.

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

[14] 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).

[15] 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 requirements are explained in more detail *infra*, "Vacancies Act Limitations on Acting Service."

[16] 5 U.S.C. § 3348(b).

[17] *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

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.[18]

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."[19] The Supreme Court has suggested that the Vacancies Act renders any noncompliant actions "void *ab initio*,"[20] meaning that the action was "null from the beginning."[21] 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."[22] A "voidable" action is one that may be judged invalid because of some legal defect, but that "is not incurable."[23] For instance, before a court strikes down a voidable agency decision, it will often inquire into whether the legal defect created actual prejudice.[24] If an error is harmless, the court may uphold the agency action.[25] Critically, 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.[26] The Vacancies Act affirms this

remain vacant.").

[18] 5 U.S.C. § 3348(b).

[19] *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."

[20] *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 938 n.2 (2017). This case and the legal status of an agency action that has "no force or effect" are discussed in more detail *infra* notes 45-46 and accompanying text, and *infra* "Enforcement Mechanism."

[21] 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.").

[22] *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 General Counsel of NLRB were, at most, voidable rather than void).

[23] 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.").

[24] *See* SW Gen., Inc. v. NLRB, 796 F.3d 67, 79 (D.C. Cir. 2015), *aff'd* 137 S.Ct. 929, 944 (2017); FEC v. Legi-Tech, 75 F.3d 704, 708 n.4 (D.C. Cir. 1996); Prof'l Air Traffic Controllers Org. v. FLRA, 685 F.2d 547, 564 (D.C. Cir. 1982).

[25] *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.").

[26] *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 as incorporated in 1889, 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?"); Kinwood Capital Group, L.L.C. v. BankPlus (*In re*

consequence by explicitly specifying that an agency may not ratify any acts taken in violation of the statute.[27]

As is discussed in more detail later in this report,[28] the Vacancies Act has primarily been enforced through the courts, when a person with standing challenges an agency action on the basis that it was undertaken by an officer who was performing a function or duty of a vacant office in violation of the Vacancies Act.[29] If such a challenge is successful, a court would be likely to vacate the challenged agency action.[30]

Which Offices?

The Vacancies Act generally applies to advice and consent positions in executive agencies.[31] The term "Executive agency"[32] is defined broadly in Title 5 of the U.S. Code to mean "an Executive department, a Government corporation, [or] an independent establishment."[33] However, the Vacancies Act explicitly excludes certain offices altogether.[34] First, the Vacancies Act does not apply to officers of "the Government Accountability Office."[35] Second, a distinct provision states

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Northlake Dev. L.L.C.), 614 F.3d 140, 143 (5th Cir. 2010) ("For example, [under Mississippi law,] when a corporation takes an ultra vires action not authorized by its charter, the result can usually be ratified and thus cannot have been void *ab initio*."); 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*).

[27] 5 U.S.C. § 3348. *See also* S. REP. NO. 105-250, at 19 (1998) ("For example, the successor in the office by virtue of his appointment by the President by and with the advice and the consent of the Senate may not ratify the actions of a person who filled the office in violation of the legislation's provisions or who, not being the agency head, performed nondelegable duties of the office."). Legislative history suggests that Congress was specifically concerned with overruling the decision of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203, 214 (1998), in which the D.C. Circuit 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).

[28] *See infra* "Enforcement Mechanism."

[29] *E.g., SW Gen., Inc.*, 137 S. Ct. at 937. *See also* 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.").

[30] *See* SW Gen., Inc. v. NLRB, 796 F.3d 67, 78 (D.C. Cir. 2015) (noting rule that would apply in a "typical case," but concluding that the rule did not apply in the case before the court), *aff'd* 137 S.Ct. 929, 944 (2017). A number of cases suggest that an agency action is void when an agency exceeds its statutory authority, *e.g.*, Utah Power & Light Co. v. United States, 243 U.S. 389, 410 (1917), or if a rule or action is "arbitrary, capricious, or an abuse of discretion" under the Administrative Procedure Act, 5 U.S.C. § 706(2), *e.g.*, Mercy Hosp. of Laredo v. Heckler, 777 F.2d 1028, 1032 (5th Cir. 1985). As discussed in more detail *infra* notes 185 to 188 and accompanying text, these cases may provide guidance in evaluating the status of agency actions that have "no force or effect" under 5 U.S.C. § 3348(d).

[31] 5 U.S.C. § 3347.

[32] *Id.*

[33] *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).

[34] 5 U.S.C. §§ 3345, 3348.

[35] 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 Government Accountability Office (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

that the Vacancies Act does not apply to (1) a member of a multimember board 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."[36]

Additionally, while not excluded from the other requirements of the Vacancies Act,[37] 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.[38] 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.[39]

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.[40] The Senate report accompanying the Act suggests that 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."[41] Allowing the head of the agency—or the commissioners—to perform the nondelegable duties of these positions would undermine the independence of these positions.[42]

It is not entirely clear what the consequences are if an acting officer in one of these exempt positions violates the Vacancies Act. Because Section 3348 does not apply to those positions, it appears that any noncompliant actions should not be rendered void.[43] Instead, a court might conclude that any noncompliant acts are merely voidable—or could conclude that even if these

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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.

[36] 5 U.S.C. § 3349c.

[37] 5 U.S.C. § 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).

[38] 5 U.S.C. §§ 3348(b), (d), (e).

[39] *Id.* § 3348(e).

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

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

[42] *Id.*

[43] *See* 5 U.S.C. § 3348(d), (e).

officers violate the Vacancies Act, that law will not invalidate their actions.[44] In *NLRB v. SW General, Inc.*, 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*."[45] The Court affirmed the D.C. Circuit's ruling vacating the Acting General Counsel's noncompliant actions, but did not explicitly reconsider the issue of remedy.[46]

The D.C. Circuit in *S.W. 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."[47] Because the D.C. Circuit assumed that the contested actions were voidable rather than void, the court considered but ultimately rejected two legal doctrines—the harmless error and de facto officer doctrine—that could have allowed the court to uphold the NLRB's action.[48] 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 any other legal doctrines cured the initial legal error with the Acting General Counsel's actions.[49]

Finally, the Vacancies Act contemplates that other statutes may, under limited circumstances, either supplement or supersede its provisions.[50] 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."[51] 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.[52] For instance, 28 U.S.C. § 510, which states generally that the Attorney General may

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

[45] 137 S. Ct. 929, 938 n.2 (2017).

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

[47] *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).

[48] *SW Gen., Inc.*, 796 F.3d at 79; *id.* 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).

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

[50] *See* 5 U.S.C. §§ 3347; 3348(b). Nor does the Vacancies Act 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).

[51] *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).

[52] 5 U.S.C. § 3347(b). Legislative history suggests that Congress intended this provision to definitively counter the assertion of the Department of Justice 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

authorize any other employee to perform any function of the Attorney General, likely would not render the Vacancies Act nonexclusive.[53] To supplement or supersede the Vacancies Act, a statute must "expressly" authorize "acting" service.[54] Under certain circumstances, it might be the case that more than one statute governs acting service in a given office,[55] and that a person could lawfully serve as an acting officer under either statute.[56]

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.[57]

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.[58] For the purposes of the Vacancies Act, 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)."[59] If the function or duty is established by regulation, that regulation must have been in effect "at any time during the

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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.").

[53] *See* 5 U.S.C. § 3347(a)(1).

[54] *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). For further discussion of how other statutes may interact with the Vacancies Act, *see infra* "Exclusivity of the Vacancies Act."

[55] *See* Temporary Filling of Vacancies in the Office of U.S. Attorney, 27 Op. O.L.C. 149, 149 (2003) ("Both statutes [28 U.S.C. § 546 and the Vacancies Act] are available.").

[56] *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. *Cf.* Authority of the President to Name an Acting Attorney Gen., 31 Op. O.L.C. 208, 210 (2007) (arguing President's action to name Acting Attorney General under Vacancies Act would trump Attorney General's designation of Acting Attorney General under 28 U.S.C. § 508); John E. Bies, *If the Attorney General is Fired, Who Acts as Attorney General?*, LAWFARE (July 29, 2017, 5:06 PM), https://www.lawfareblog.com/if-attorney-general-fired-who-acts-attorney-general (outlining uncertainties in the interaction between the Vacancies Act and 28 U.S.C. § 508).

[57] 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 77. *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).

[58] 5 U.S.C. §§ 3345(a), 3345(b), (d).

[59] *Id.* § 3348(a)(2).

180-day period preceding the date on which the vacancy occurs."[60] Thus, the Vacancies Act appears to apply only to functions or duties that a statute or regulation has exclusively assigned to a specific officer, generally referred to as the *nondelegable* functions and duties of a vacant office.[61]

Conversely, the Vacancies Act likely does not prevent another person from performing any duties of an office that are *delegable*. So long as a statute or regulation does not require a specific officer to perform certain functions and duties, an agency could theoretically delegate all of the tasks that had previously been performed by an officer in a now-vacant advice and consent position to another officer or employee.[62] That other employee would likely be able to perform all of those delegable tasks without violating the Vacancies Act because the Act is seemingly only concerned with nondelegable functions and duties.[63]

There is, however, very little case law clarifying how to determine what "functions and duties" are within the scope of the Vacancies Act.[64] One federal district court noted that the Vacancies Act covered only "the 'functions and duties' . . . that are required by statute or regulation to be performed exclusively by the official occupying that position," and consequently held that a person lawfully serving in another role in an agency could perform certain job duties of a vacant office because those duties had been validly delegated to that person.[65] Courts might analyze this

[60] *Id.* § 3348(a)(2)(B)(ii).

[61] *See id. See also* Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 420 (D. Conn. 2008) ("The question before the Court is whether the authority to make tribal acknowledgment decisions is required by statute or regulation to be performed only or exclusively by the [absent officer]."), *aff'd*, 587 F.3d 132 (2d Cir. 2009); 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 . . . .").

[62] *E.g.*, Office of Thrift Supervision v. Paul, 985 F. Supp. 1465, 1474-75 (S.D. Fla. 1997) (holding that prior version of Vacancies Act was "not implicated" because officer formerly in vacant office had "validly delegated his responsibilities" to another officer via administrative orders, and that other officer's power to act was therefore "derived from the OTS Orders, not the statutory fall back provisions of the Vacancies Act"). Of course, 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 id.* In most cases, however, a head of an agency would likely have the ultimate authority to delegate responsibilities. *Cf. 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.").

[63] *See* 5 U.S.C. § 3348.

[64] *Cf.* 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) ("This [5 U.S.C. § 3348(a)(2)] 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.").

[65] *See Schaghticoke Tribal Nation*, 587 F. Supp. 2d at 421. In that 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 group as an Indian tribe, arguing in part that the officer was unlawfully exercising a function or duty of a vacant office. *Id.* at 419. In response, 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. *See also* Champaign Cty. v. U.S. Law Enforcement Assistance Admin., 611 F.2d 1200, 1207 (7th Cir. 1979) (holding assistant administrator's action did not violate prior version of Vacancies Act because he "was not acting in the capacity of Acting Administrator when he rejected the application, but as the Assistant Administrator with authority to deny applications delegated to him by the Administrator while the Administrator was still in office").

issue under the general legal principles that normally govern an inquiry into whether a particular duty is delegable.[66]

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.[67] Unless an acting officer is serving in compliance with the Vacancies Act, only the agency head can perform a nondelegable duty of a vacant advice and consent office.[68] 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,[69] and (2) the time period for which they may serve.[70]

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.[71] First, as a default and automatic rule, once an office becomes vacant, "the first assistant to the office" becomes the acting officer.[72] The term "first assistant" is a unique term of art under the Vacancies Act.[73] Nonetheless, the term is not defined by the Act and its meaning is not entirely clear.[74] For many offices, a statute or regulation explicitly designates an office to be the "first assistant" to

[66] *See, e.g.*, Stand Up for California! v. U.S. Dep't of Interior, No. 1:17-cv-00058, 2018 U.S. Dist. LEXIS 32701, at 34-35 (D.D.C. Feb. 28, 2018). For further discussion of the issue of determining whether duties are delegable, see *infra* "Delegability of Duties."

[67] 5 U.S.C. § 3348(b).

[68] *Id.* §§ 3345, 3346, 3348. Additionally, as discussed *supra* notes 50 to 56 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.

[69] *Id.* § 3345.

[70] *Id.* § 3346.

[71] 5 U.S.C. § 3345.

[72] *Id.* § 3345(a)(1).

[73] *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.'").

[74] *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* 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* 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.").

that position.[75] However, this is not true for all offices, and in those cases, who qualifies as the "first assistant" to that office may be open to debate.[76]

Alternatively, the President "may direct" two other classes of people to serve as an acting officer of an agency instead of the "first assistant."[77] First, the President may direct a person currently serving in a different advice and consent position to serve as acting officer.[78] 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.[79]

Ability to Serve If Nominated to Office

Section 3345 places an additional limitation on the ability of these three classes of people 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.[80] Thus, if the President submits for nomination a person who is currently the acting officer for that position, that person usually may not continue to serve as acting officer without violating the Vacancies Act.[81] The President can name another person to serve as an acting officer instead of the nominated person.[82]

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.[83] Francisco then began to serve as Acting Solicitor General.[84] In March, the President announced

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[75] *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) (2017) ("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."); Designation of Acting Associate Attorney Gen., 25 Op. O.L.C. 177, 177 (2001) (concluding that "unless the President designates another person as the Acting Associate Attorney General under the [Vacancies] Act, . . . the Principal Deputy[] is actually required" by a regulation that designates principal deputies as first assistants "to perform the functions and duties of the office of the Associate Attorney General in an acting capacity").

[76] *See supra* note 74.

[77] 5 U.S.C. § 3345. This directive may come *only* from the President. *Id.* There is one additional class who may serve as an acting officer: 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).

[78] *Id.* § 3345(a)(2).

[79] *Id.* § 3345(a)(3).

[80] *See* 5 U.S.C. § 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). *SW Gen*, 137 S. Ct. at 938. 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.

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

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

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

[84] *Id.* Francisco replaced Ian Gershengorn in this role, who had himself been a Principal Deputy Solicitor General

that he would be nominating Francisco to serve permanently as the Solicitor General.[85] 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.[86] This last shift may have been done to comply with the Vacancies Act.[87] Ultimately, the Senate confirmed Francisco to the position of Solicitor General on September 19, 2017.[88]

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[89] or (2) was appointed to that position through the advice and consent process.[90] 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.[91] Although Francisco may have been in a first assistant position, as the Principal Deputy Solicitor General,[92] he had not served in that position for 90 days, nor had he been appointed to that position through the advice and consent process.[93]

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.[94] 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."[95] These two periods run independently and concurrently.[96]

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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), *available at* https://www.justice.gov/opa/pr/attorney-general-loretta-e-lynch-statement-planned-departure-solicitor-general-donald-b.

[85] Coyle, *supra* note 83.

[86] *Id.*

[87] *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/.

[88] 163 Cong. Rec. S5835 (daily ed. Sept. 19, 2017) (recording Rollcall Vote No. 201 Ex.).

[89] *See* 5 U.S.C. § 3345(b)(1)(A).

[90] *See id.* § 3345(b)(2).

[91] *See id.* § 3345(b).

[92] *See* 28 C.F.R. § 0.137(b) (2017) ("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.").

[93] *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/.

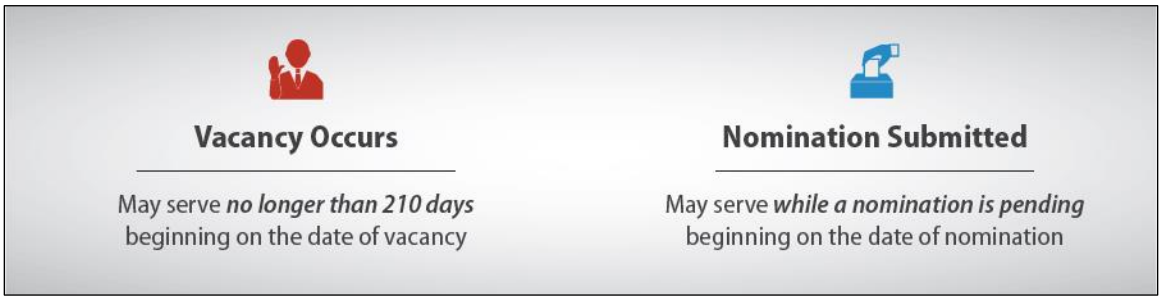
[94] These time limitations do not apply, however, to "a vacancy caused by sickness." 5 U.S.C. § 3346(a).

[95] *Id.* § 3346(a).

[96] *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. But even if a nomination is rejected, withdrawn, or returned before 210 days have passed, that return

Consequently, the submission and pendency of a nomination allows an acting officer to serve beyond the initial 210-day period.[97]

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.[98] 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.[99] The period is extended during a presidential transition period when a new President takes office.[100] If a vacancy exists on the new President's inauguration day or occurs within 60 days after the inauguration,[101] 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.[102] If 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.[103]

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.[104] 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

will trigger a new 210-day period, as discussed *infra* note 106 and accompanying text. *See* 5 U.S.C. § 3346(b).

[97] *See* 5 U.S.C. § 3346.

[98] *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).

[99] *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).

[100] *See id.* § 3349a.

[101] 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).

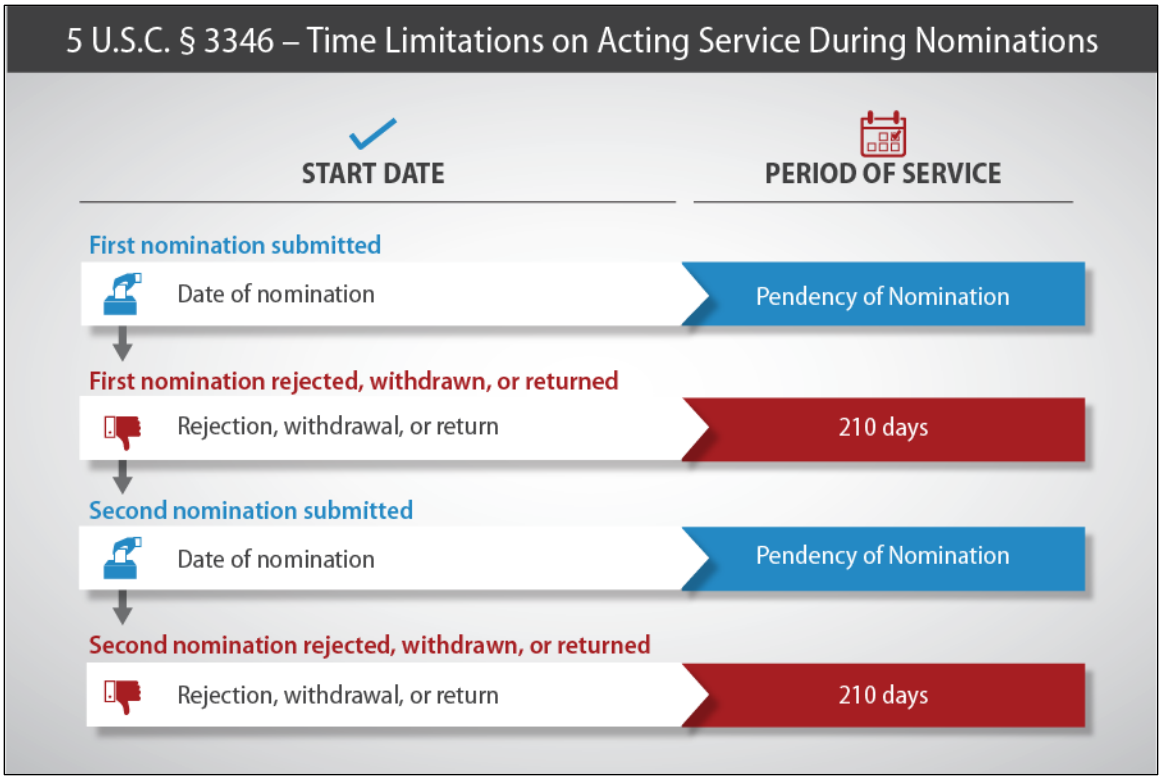
[102] *Id.* § 3349a(b). In effect, an acting official may serve for a 300-day period during a presidential transition. *Id.*

[103] *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).

[104] *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* "Ability to Serve If Nominated to Office."

start of the vacancy.[105] "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.[106] If the President submits a second nomination for the office, then an acting officer may continue to serve during the pendency of that nomination.[107] If the second nomination is also "rejected, withdrawn, or returned," then an acting officer may continue for one last 210-day period.[108] 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.[109] 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.[110]

Figure 2. Period of Service After Submission of Nomination



Source: 5 U.S.C. § 3346.

[105] 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").

[106] 5 U.S.C. § 3346(b)(1).

[107] *Id.* § 3346(b)(2)(A).

[108] *Id.* § 3346(b)(2)(B).

[109] *See id.* § 3346(a)(2).

[110] *See id.* § 3348.

Potential 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[.][111]

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.[112] In fact, the Senate report on the Vacancies Act expressly identified 40 agency-specific provisions that "would be retained by" the Act.[113] 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.[114] 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 . . . ."[115]

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.[116] But even if the Vacancies Act does not *exclusively* apply to a specific position, it will not necessarily be wholly inapplicable.[117] It is possible that both the agency-specific statute and the Vacancies Act may be available to temporarily fill a vacancy.[118] 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."[119]

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[111] *Id.* § 3347(a).

[112] *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.").

[113] S. REP. NO. 105-250, at 16-17 (1998).

[114] *Id.* at 16.

[115] 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).

[116] *See* 5 U.S.C. § 3347.

[117] Designating an Acting Dir. of the Bureau of Consumer Fin. Prot., 41 Op. O.L.C. ___, 2017 WL 6419154, slip op. at 5 (Nov. 25, 2017). *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. § 153(d)] is the *exclusive* means of appointing an Acting General Counsel of the [National Labor Relations Board].").

[118] 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).

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

However, if two statutes simultaneously apply to authorize acting service, this raises the question of 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.[120] The Vacancies Act sets out a detailed scheme delineating three classes of governmental officials that may serve as acting officers[121] and expressly limits the duration of an acting officer's service.[122] By contrast, agency-specific statutes tend to designate only one official to serve as acting officer[123] and often do not specify a time limit on that official's service.[124] 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.[125]

Where two statutes encompass the same conduct, courts will, if possible, "read the statutes to give effect to each."[126] 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."[127] With this principle in the background, judges have sometimes concluded that the Vacancies Act should operate concurrently with these agency-specific statutes, and that government officials should be able to temporarily serve under either statute.[128] Accordingly, courts have resolved any potential conflict by holding that whichever statute is invoked is the controlling one.[129] At times, however, this method of reconciling the relevant statutes could conflict with the general interpretive rule that more specific statutes should usually prevail over more general ones—even where the more general statutes were enacted after the more specific ones.[130]

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[120] *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).

[121] 5 U.S.C. § 3345.

[122] *Id.* § 3346.

[123] *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").

[124] *See* S. REP. NO. 105-250, at 17 (1998); *but see, e.g.*, 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.").

[125] *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).

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

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

[128] *See* English v. Trump, 279 F. Supp. 3d 307, 319 (2018); United States v. Lucido, 373 F. Supp. 1142, 1151 (E.D. Mich. 1974).

[129] *See, e.g.*, *Lucido*, 373 F. Supp. at 1151.

[130] *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."). *But see, e.g.*, English v. Trump, 279 F. Supp. 3d 307, 325 (D.D.C. 2018) (declining to apply this canon because it was "not clear" that the agency-specific statute was "more 'specific'"

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.[131] 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."[132] It also provided for a shorter term of acting service than the Vacancies Act.[133] The President, however, had invoked the Vacancies Act to designate an Acting General Counsel.[134] The court concluded that "the President is permitted to elect between these two statutory alternatives to designate" an acting officer.[135] 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."[136]

But 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.[137] A more difficult question may be raised when an agency-specific statute instead seems to expressly limit succession to a particular official.[138] The federal courts recently considered such a contention in a dispute over who was authorized to serve as the Acting Director 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.[139] The Deputy Director of the CFPB, Leandra English, filed suit,[140] 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."[141] 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.[142]

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.[143]

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than the Vacancies Act, "as applied to" the specific circumstances of the case).

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

[132] 29 U.S.C. § 153(d).

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

[134] *Id.* at 553.

[135] *Id.* at 556.

[136] *Id.*

[137] *See id.* at 555-56.

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

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

[140] 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.

[141] 12 U.S.C. § 5491(b)(5).

[142] *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).

[143] *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.

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."[144] 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.[145] 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.[146] English appealed this decision to the D.C. Circuit, but decided to discontinue her appeal before the appellate court issued its decision.[147]

In cases such as *Hooks* and *English*, courts are considering how to reconcile statutory provisions. Congressional silence on the relationship between agency-specific provisions and the Vacancies Act can raise difficult questions for courts trying to discern how to resolve any perceived inconsistencies between these statutes. 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 statute governing vacancies in the 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."[148] This statute expressly clarifies—in at least one respect—how the two statutes interact.[149]

Delegability of Duties

The Vacancies Act only bars acting officials from performing the *nondelegable* functions and duties of a vacant advice and consent position.[150] Unless a statute or regulation requires the holder of an office—and only that officer—to perform a function or duty, the Vacancies Act appears to permit an agency to delegate those duties to any other employee, who may then perform that duty without violating the Vacancies Act.[151] Therefore, in many circumstances, an agency officer or employee who has not been appointed to a particular advice and consent position could perform many, if not all, of the responsibilities of that position.

For example, the Government Accountability Office (GAO) considered in 2008 whether a senior official in the Department of Justice's Office of Legal Counsel (OLC), the Principal Deputy

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

[145] *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).

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

[147] Appellant's Motion for Voluntary Dismissal, English v. Trump, No. 18-5007 (D.C. Cir. July 9, 2018).

[148] 28 U.S.C. § 508.

[149] *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)).

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

[151] *See* 5 U.S.C. § 3348. Of course, *other* statutes or regulations might impact the analysis of whether a particular delegation of authority, or a particular exercise of delegated authority, is lawful. *E.g.* 5 U.S.C. § 302 (authorizing heads of agencies to delegate supervisory authority); NASA v. FLRA, 527 U.S. 229, 261 (1999) (Thomas, J., dissenting) (recognizing implicitly that 5 U.S.C. § 302 limits authority of agency officials to discipline agency employees, absent compliant delegation). *See also, e.g.*, 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).

Assistant Attorney General, had violated the Vacancies Act by performing the responsibilities of an absent officer, the Assistant Attorney General for the OLC.[152] 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.[153] 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.[154]

While there are few cases considering what types of duties may be nondelegable for purposes of the Vacancies Act, the courts that have considered the issue have upheld the ability of government officials to perform the delegated duties of a vacant office, so long as the delegation is otherwise lawful.[155] Outside the context of the Vacancies Act, courts often presume that delegation is permissible "absent affirmative evidence of a contrary congressional intent."[156] However, if a statute expressly prohibited delegation of a duty, that would likely render that duty nondelegable for the purposes of the Vacancies Act.[157] Courts have also 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.[158]

As discussed above,[159] the text[160] and the legislative history[161] of the Vacancies Act suggest that Congress intended the Act to bar the performance of only nondelegable functions or duties. This

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[152] 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.*

[153] *Id.* at *12-13.

[154] *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.

[155] Stand Up for California! v. U.S. Dep't of Interior, No. 1:17-cv-00058, 2018 U.S. Dist. LEXIS 32701, at 34-35 (D.D.C. Feb. 28, 2018); Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 421 (D. Conn. 2008).

[156] U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004). *See also* 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.

[157] *See* . 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 . . . .").

[158] *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").

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

[160] 5 U.S.C. § 3348(a)(2) (defining "function or duty" to include only those functions or duties "required by" statute or regulation "to be performed by the applicable officer (and only that officer)").

[161] S. REP. NO. 105-250, at 18 (1998) ("The functions or duties of the office that can be performed only by the head of

limitation on the scope of the Vacancies Act could potentially undermine one of the Act's primary purposes: to prevent the Executive from appointing "officers of the United States"[162] without Senate advice and consent.[163] Namely, 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.[164] At the same time, however, a general vesting and delegation statute could permit an agency head to delegate any delegable responsibilities of a vacant office to another officer or employee. 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—seemingly contrary to the goals of the Vacancies Act.

If Congress were concerned about the ability of an acting officer to perform certain functions or duties of an advice and consent position, it could pass a statute specifying that those functions and duties must be performed by the officer in that position. Then, the Vacancies Act would limit the ability of other officers to perform those duties when the position is vacant.[165] Congress could also enact other statutory limitations on the ability of certain officers to delegate their authority.[166] Any such statute could place substantive limitations on the *types* of duties that are delegable or could create procedural limitations on the *way* in which duties may be delegated.[167] Alternatively, if unsatisfied with the current language, Congress could amend the definition of "function or duty" in the Vacancies Act.[168]

Enforcement Mechanism

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

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the executive agency are therefore defined as the non-delegable functions or duties of the officer . . . .").

[162] U.S. CONST. art. II, § 2, cl. 2.

[163] *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.").

[164] 5 U.S.C. § 3347. As discussed *supra* note 52, 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.

[165] *See* 5 U.S.C. § 3348.

[166] *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.").

[167] *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."); 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"). *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"); United States v. Touby, 909 F.2d 759, 769 (3d Cir. 1990) ("The central inquiry with respect to a subdelegation challenge is whether Congress intended to limit the delegatee's power to subdelegate.").

[168] *See* 5 U.S.C. § 3348.

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.[169] 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.[170] However, this provision itself does not *require* the Comptroller General to make any such determination and contains no additional enforcement mechanism.[171] But 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.[172] 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.[173] The day before the hearing, the Comptroller General issued a letter reporting that the Acting Commissioner, Nancy Berryhill, was violating the Vacancies Act.[174] Shortly thereafter, Berryhill reportedly stepped down from the position of Acting Commissioner, serving instead in her position of record as Deputy Commissioner of Operations.[175]

Arguably, the most direct means to enforce the Vacancies Act is through private suits in which courts may nullify noncompliant agency actions.[176] The Vacancies Act appears to render noncompliant actions void.[177] As noted earlier,[178] a determination that an action is void means that legally, it is as if the action had never been taken in the first place.[179] But as a practical matter, not every act taken in violation of the Vacancy Act will necessarily be *formally* rendered void in a court of law. Although the Vacancies Act is, in a sense, self-executing,[180] violations of the

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[169] *Id.* § 3347.

[170] *Id.* § 3349(b).

[171] *See id.*

[172] *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).

[173] *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.

[174] 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).

[175] 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").

[176] *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.").

[177] *See* 5 U.S.C. § 3348(d).

[178] *Supra* notes 19 to 27 and accompanying text.

[179] *See, e.g.*, Interstate Commerce Comm'n v. Am. Trucking Ass'ns, 467 U.S. 354, 358 (1984).

[180] *See* 5 U.S.C. § 3348(d) ("An action taken by any person who is not acting [in accordance with the Vacancies Act] in the performance of any function or duty of a vacant office to which [the Vacancies Act applies] *shall have no* force or

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 as void in court.[181] The dearth of case law examining the Vacancies Act suggests that such cases are relatively rare.[182]

Even in the context of these lawsuits, it is not always entirely clear what relief a court may afford a regulated entity, if the court concludes that an acting officer has violated the Vacancies Act. There is little case law interpreting what it means for an agency action to have "no force or effect"[183] in the context of the Vacancies Act. The Supreme Court has suggested that any such actions would be "void *ab initio*."[184] To determine the consequences of such a determination, courts might turn to cases interpreting the judicial review provision of the Administrative Procedure Act (APA).[185] The APA directs courts to "hold unlawful and set aside" any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[186] This standard has clear parallels to the statement in the Vacancies Act that any action not "in accordance with"[187] the Vacancies Act has "no force or effect."[188] However, it does not appear that any court has yet officially recognized this similarity or compared the two standards.

As noted above, 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.[189] Certain offices

effect.") (emphasis added).

[181] 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).

[182] As of July 16, 2018, running a Shepard's Report on 5 U.S.C. § 3348 on Lexis Advance Research returns 29 federal court cases; narrowing the cases to those decided after October 21, 1998 (the date of passage of the Vacancies Act) drops the number of cases to 15.

[183] 5 U.S.C. § 3348(d).

[184] NLRB v. SW Gen., Inc., 137 S. Ct. 929, 938 n.2 (2017). This interpretation is consistent with the version of Black's Law Dictionary that was current at the time the Vacancies Act was enacted. *See* BLACK'S LAW DICTIONARY (6th ed. 1990) (defining "void" as "[a]n instrument or transaction which is wholly ineffective, inoperative, and incapable of ratification and which thus has *no force or effect* so that nothing can cure it") (emphasis added).

[185] 5 U.S.C. § 706. *Cf.* Utah Power & Light Co. v. United States, 243 U.S. 389, 410 (1917) ("If any of the regulations go beyond what Congress can authorize or beyond what it has authorized, those regulations are void and may be disregarded . . . ."); Catholic Social Serv. v. Shalala, 12 F.3d 1123, 1125 (D.C. Cir. 1994) ("Appellants claim that the rule in question . . . is, as a matter of administrative law, *ultra vires* and *void ab initio*. It is as if the Secretary wrote the rule on a scratch pad, left it in her home, and never published it in the Federal Register."); *id.* at 1128 (disagreeing with appellants that APA renders rule invalid in its entirety, "where only a part is invalid, and where the remaining portion may sensibly be given independent life"); United States v. Amdahl Corp., 786 F.2d 387, 392-93 (Fed. Circ. 1986) (stating that "[a]dministrative actions taken in violation of statutory authorization or requirement are of no effect" and considering consequences that flow from a court's determination that contract is void, rather than voidable).

[186] 5 U.S.C. § 706(2). *See also* Lion Health Servs. v. Sebelius, 635 F.3d 693, 704 (5th Cir. 2011) (holding rule invalid under APA "because it directly contradicts Congress's unambiguously expressed intent" and concluding lower court had jurisdiction "to declare the Regulation invalid, set it aside, and enjoin the Secretary from enforcing it"); NextWave Pers. Commc'ns, Inc. v. FCC, 254 F.3d 130, 149 (D.C. Cir. 2001) ("This provision [5 U.S.C. § 706(2)] requires us to invalidate agency action not only if it conflicts with an agency's own statute, but also if it conflicts with another federal law.").

[187] 5 U.S.C. § 3348(b).

[188] *Id.* § 3348(d). *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 172-73 (2012) (discussing when presumption of consistent usage should be applied to interpret similar words in distinct statutes similarly).

[189] *SW Gen., Inc.*, 137 S. Ct. at 938 n.2; 5 U.S.C. § 3348. *See supra* note 46 and accompanying text.

are exempt from the provision that nullifies the noncompliant actions of an acting officer,[190] 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.[191] The D.C. Circuit and the Supreme Court in *SW General* accepted the parties' apparent agreement that the actions of a noncompliant Acting General Counsel of the NLRB—one of the excepted offices—were voidable.[192] The determination that an agency action is voidable, rather than void, might have important consequences for the outcome of any court challenge because it could allow a court to consider mitigating arguments such as the harmless error doctrine or the ratification doctrine.[193]

However, notwithstanding its decision to accept the parties' litigating postures in that case, 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.[194] 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.[195] 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.[196]

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[190] 5 U.S.C. § 3348(e).

[191] *See id.* § 3348.

[192] *See SW Gen., Inc.*, 137 S. Ct. at 938 n.2; SW Gen., Inc. v. NLRB, 796 F.3d 67, 79 (D.C. Cir. 2015).

[193] *See SW Gen., Inc.*, 796 F.3d at 79.

[194] *See id.* 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.*

[195] *See* 5 U.S.C. § 3348.

[196] *See id.* §§ 3348, 3349.

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