

# The Vacancies Act: A Legal Overview

Updated January 27, 2025

Congressional Research Service

<https://crsreports.congress.gov>

R44997



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January 27, 2025

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## The Vacancies Act: A Legal Overview

The Federal Vacancies Reform Act of 1998 (Vacancies Act, or Act) generally provides the exclusive means for a government employee to perform temporarily the functions and duties of a vacant presidentially appointed, Senate-confirmed position in an executive agency (advice-and-consent position), with certain exceptions.

The Vacancies Act both authorizes and limits acting service in two primary ways. First, the Vacancies Act provides that 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 certain senior officials of the agency or any Senate-confirmed official to serve as the acting officer. Second, the Vacancies Act governs the length of time a person may serve as acting officer: a person may serve (1) for a limited time period running from the date that the vacancy occurred; and (2) during the pendency of a first or second nomination to that office, with extensions if the nomination is rejected, withdrawn, or returned.

The Vacancies Act stipulates that unless a covered acting officer is serving in compliance with the law, any attempt to perform the functions and duties of that office will have no force or effect. Noncompliant actions are void and may not be ratified. The Vacancies Act is primarily enforced when a person injured by an agency action brings a lawsuit arguing that an acting official violated the Act and therefore that the action is void.

While the Vacancies Act states that it is generally the exclusive means to authorize acting service, courts have interpreted the law to allow at least two other means of temporary service. First, on its face, the Vacancies Act is exclusive *unless* another statute expressly authorizes acting service. An agency-specific statute governing acting service may render the Vacancies Act nonexclusive, or possibly even inapplicable. Second, some courts have interpreted the Vacancies Act only to govern the performance of the functions and duties of an office that are nondelegable. Unless a statute or regulation expressly specifies that a duty must be performed by the absent officer, that duty may likely be delegated to another government employee. Under this interpretation, an agency may delegate many, if not all, of the duties of a vacant office to another official without violating the Vacancies Act.

The Appointments Clause of the U.S. Constitution may also limit acting service in some circumstances. The Appointments Clause requires “Officers of the United States” to be appointed through specific processes. In particular, so-called “principal officers” such as the heads of departments may be appointed only through Senate confirmation, and inferior officers must be appointed by Senate confirmation, the President, a department head, or a court. Acting service may raise constitutional concerns if it allows an official to perform the duties of an “Officer of the United States” absent a proper appointment. While the Supreme Court approved of certain acting service “under special and temporary conditions” in *United States v. Eaton*, 169 U.S. 331, 343 (1898), open questions remain about the constitutionality of service under the modern Vacancies Act.

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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.<sup>1</sup> 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.<sup>2</sup> In particular, there are often many vacancies during a presidential transition, when a new President seeks to install new officers in important executive positions.<sup>3</sup> In these instances, the executive branch may seek to fill these vacancies temporarily with individuals who were not appointed to the vacant office.

There are several sources of authority that might permit an official to perform the functions of a vacant office.<sup>4</sup> Authority might come from a statute clarifying who steps in during a vacancy or from an agency delegation of authority. Usually, where a statute authorizes acting service, courts have said that “an acting officer is vested with the same authority that could be exercised by the officer for whom he acts.”<sup>5</sup> Apart from position-specific statutes authorizing acting service, Congress has also enacted broader statutes generally authorizing individuals to temporarily perform the functions of a vacant office.<sup>6</sup>

The most recent iteration of a statute generally authorizing government officers or employees to serve as acting officers for vacant advice-and-consent positions is the Federal Vacancies Reform Act of 1998 (Vacancies Act).<sup>7</sup> The Vacancies Act allows certain classes of employees to serve as acting officers for advice-and-consent positions<sup>8</sup> and specifies that they may serve for a limited period.<sup>9</sup> If a covered acting officer’s service is in accordance with the Vacancies Act, any attempt by that officer to perform a “function or duty” of a vacant office has “no force or effect.”<sup>10</sup>

<sup>1</sup> U.S. CONST. art. II, § 2, cl. 2. 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 (2015); Cong. Rsch. Serv., *Overview of Recess Appointments Clause*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artII-S2-C3-1/ALDE\\_00001144/](https://constitution.congress.gov/browse/essay/artII-S2-C3-1/ALDE_00001144/) (last visited Jan. 27, 2025).

<sup>2</sup> *See generally* Anne Joseph O’Connell, *Actings*, 120 COLUM. L. REV. 613, 638–48 (2020) (summarizing previous empirical research on executive branch vacancies and providing new data on Cabinet-level vacancies); CRS Report R44083, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, by Henry B. Hogue and Maeve P. Carey (2021).

<sup>3</sup> *See, e.g.*, CRS In Focus IF12721, *Presidential Transitions: Executive Branch Political Appointment Status*, by Henry B. Hogue (2024).

<sup>4</sup> *See generally* CRS Report RS21412, *Temporarily Filling Presidentially Appointed, Senate-Confirmed Positions*, by Henry B. Hogue (2024).

<sup>5</sup> *In re Grand Jury Investigation*, 916 F.3d 1047, 1055 (D.C. Cir. 2019); *see also* *Fortin v. Comm’r of Soc. Sec.*, 112 F.4th 411, 427 (6th Cir. 2024) (holding that an inferior officer acting as an agency head “temporarily had all the power of the vacant . . . position”); *United States v. Pellicci*, 504 F.2d 1106, 1107 (1st Cir. 1974) (“There is no basis for concluding that one ‘acting’ as Attorney General has fewer than all the powers of that office.”). *Cf. Nw. Immigrant Rights Project v. U.S. Citizenship & Immigr. Servs.*, 496 F. Supp. 3d 31, 69 (D.D.C. 2020) (holding that a statute authorizing “the Secretary” of Homeland Security to designate an order of succession “to serve as Acting Secretary” did not authorize an acting Secretary to change the order of succession).

<sup>6</sup> *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).

<sup>7</sup> 5 U.S.C. §§ 3345–3349c.

<sup>8</sup> *Id.* § 3345.

<sup>9</sup> *Id.* §§ 3346, 3349a.

<sup>10</sup> *Id.* § 3348(d).

This report first describes the Vacancies Act’s scope and operation, identifying when the Vacancies Act applies to a given office and which duties are covered by the Act. The report then explains who may serve as an acting officer and for how long. Next, the report discusses how the Vacancies Act is enforced. Finally, the report turns to evolving legal issues regarding the application of the Vacancies Act, including a discussion of how other federal laws may limit the Act’s reach. Specifically, the report concludes by examining the interaction of the Vacancies Act with agency-specific statutes, the ability to delegate the duties of a vacant office, and constitutional Appointments Clause considerations.

## Scope and Operation of the Vacancies Act

The Vacancies Act generally provides “the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate.”<sup>11</sup> The Vacancies Act applies if an officer serving in an advice-and-consent position in the executive branch “dies, resigns, or is otherwise unable to perform the functions and duties of the office.”<sup>12</sup> Some have suggested that the Vacancies Act may not apply in the case of a presidential removal from office<sup>13</sup> or a *temporary* rather than permanent absence,<sup>14</sup> but the phrase “unable to perform the functions and duties of the office” appears relatively broad on its face, and the Vacancies Act does not expressly exclude firings or temporary absences.<sup>15</sup>

As a general rule, a person may not temporarily perform the covered “functions and duties” of a vacant advice-and-consent position unless that service comports with the Vacancies Act.<sup>16</sup> The Vacancies Act specifies that a “function or duty” is one that, by statute or regulation, must be performed by the officer in question.<sup>17</sup> Section 3348<sup>18</sup> provides that, “unless an officer or employee is performing the functions and duties [of an office] in accordance with” the Act,<sup>19</sup> “the

<sup>11</sup> *Id.* § 3347(a).

<sup>12</sup> *Id.* §§ 3345, 3348.

<sup>13</sup> *See, e.g.,* United States v. Valencia, No. 5:17-CR-882-DAE, 2018 U.S. Dist. LEXIS 200564, at \*11–12 (W.D. Tex. Nov. 27, 2018); Ben Miller-Gootnick, *Boundaries of the Federal Vacancies Act*, 56 HARV. J. ON LEGIS. 459, 460 (2019). *Cf. Rop v. Fed. Hous. Fin. Agency*, 50 F.4th 562, 571 (6th Cir. 2022) (“not[ing]” that agency-specific statute authorizes President to designate acting director in the event of “death, resignation, illness, and absence—but not, explicitly, removal”); O’Connell, *supra* note 2, at 674 (noting textual, legislative history, and policy arguments “weigh[ing] in favor of the Vacancies Act applying to firings”).

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

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

<sup>16</sup> *See* 5 U.S.C. §§ 3347–3348.

<sup>17</sup> *Id.* § 3348(a)(2); *see infra* “What Are the ‘Functions and Duties’ of an Office?”

<sup>18</sup> 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 P.L. 105-277, 112 Stat. 2681-611 (1998).

<sup>19</sup> Specifically, the statute requires compliance with Sections 3345, 3346, and 3347. *See* 5 U.S.C. § 3348(b). Section 3345 sets out three classes of people who may serve as acting officers, *id.* § 3345; Section 3346 prescribes time limitations for acting service, *id.* § 3346; and Section 3347 provides that the Vacancies Act is exclusive unless another statutory provision expressly allows a person to “perform the functions and duties of a specified office temporarily in an acting capacity,” *id.* § 3347(1). These provisions are explained in more detail *infra*, “Vacancies Act Limitations on Acting Service,” and “Exclusivity of the Vacancies Act.”

office shall remain vacant.”<sup>20</sup> 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, so long as the office is not that of the agency head.<sup>21</sup> Section 3348 further provides that if a person performs “any function or duty of a vacant office,” that action “shall have no force or effect” unless the person is complying with the Vacancies Act.<sup>22</sup> The Vacancies Act also states that an agency may not ratify any acts taken in violation of the statute.<sup>23</sup> Enforcement is discussed in more detail below.<sup>24</sup>

At the same time, as discussed elsewhere, the Vacancies Act contemplates that other statutes may, under limited circumstances, either supplement or supersede its provisions.<sup>25</sup> Section 3347(a) 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.”<sup>26</sup> However, Section 3347(b) 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.<sup>27</sup> For instance, 28 U.S.C. § 510, which states generally that the Attorney General may authorize any other employee to perform any function of the Attorney General, likely falls under Section 3347(b), rather than Section 3347(a).<sup>28</sup> To supplement or supersede the Vacancies Act, a statute must “expressly” authorize “acting”

<sup>20</sup> 5 U.S.C. § 3348(b).

<sup>21</sup> *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 head of an Executive Agency.” *Id.* § 3348(b)(2). Accordingly, if an office designated vacant under Section 3348(b)(1) 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 . . . the office is to remain vacant.”).

<sup>22</sup> 5 U.S.C. § 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.”

<sup>23</sup> *Id.* § 3348(d)(2).

<sup>24</sup> *See infra* “Consequences of Violating the Vacancies Act.”

<sup>25</sup> *See infra* “Exclusivity of the Vacancies Act.” In addition, the Vacancies Act does not apply if “the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.” 5 U.S.C. § 3347(a)(2).

<sup>26</sup> 5 U.S.C. § 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.

<sup>27</sup> *Id.* § 3347(b). Legislative history suggests that Congress intended this provision to counter definitively the Department of Justice’s assertion that “its organic statute’s ‘vesting and delegation’ provision” rendered the Vacancies Act’s limitations inapplicable. 144 CONG. REC. S11021 (daily ed. Sept. 28, 1998) (statement of Sen. Fred Thompson). *See also id.* at S11025 (statement of Sen. Robert Byrd) (“Most importantly . . . it is a bill which will, once and for all, put an end to these ridiculous, specious, fallacious arguments that the Vacancies Act is nothing more than an annoyance to be brushed aside.”); *id.* at S11026 (statement of Sen. Carl Levin) (“[The bill] would make clear that the act is the sole legal statutory authority for the temporary filling of positions pending confirmation. . . . I think in the opinion of probably most Senators that loophole does not exist. But, nonetheless, whether it is a real one or an imaginary one, it has been used by administrations in order to have people temporarily fill positions pending confirmation for just simply too long a period of time, which undermines the Senate’s advice and consent authority.”); *id.* at S11028 (statement of Sen. Strom Thurmond) (“[T]he Attorney General’s misguided interpretation of the current Vacancies Act . . . practically interprets the Act out of existence.”); 144 CONG. REC. S12823 (daily ed. Oct. 21, 1998) (statement of Sen. Fred Thompson) (“[T]he organic statutes of the Cabinet departments do not qualify as a statutory exception to this legislation’s exclusivity in governing the appointment of temporary officers.”).

<sup>28</sup> *See* 5 U.S.C. § 3347(a)(1).

service.<sup>29</sup> Under certain circumstances, it might be the case that more than one statute governs acting service in a given office,<sup>30</sup> and that a person could lawfully serve as an acting officer under either statute.<sup>31</sup> As a result, Section 3348 generally contemplates that three classes of people may perform the functions and duties of an advice-and-consent office when it is vacant: the agency head (if the vacancy is not the agency head), a person complying with the Vacancies Act, or a person complying with another statute that allows acting service.<sup>32</sup>

## Which Offices?

The Vacancies Act generally applies to advice-and-consent positions in executive agencies.<sup>33</sup> The term “Executive agency”<sup>34</sup> is defined in Title 5 of the *U.S. Code* as “an Executive department, a Government corporation, [or] an independent establishment.”<sup>35</sup> However, the Vacancies Act explicitly excludes certain offices altogether.<sup>36</sup> The Vacancies Act does not apply to

- an officer of the Government Accountability Office (GAO);<sup>37</sup>
- a member of a multimember board that “governs an independent establishment or Government corporation”;
- a “commissioner of the Federal Energy Regulatory Commission”;
- a “member of the Surface Transportation Board”; or
- a federal judge serving in “a court constituted under article I of the United States Constitution.”<sup>38</sup>

<sup>29</sup> *Id.* The committee report on an earlier version of 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).

<sup>30</sup> *See, e.g.,* *Hooks ex rel. NLRB v. Kitsap Tenant Support Servs.*, 816 F.3d 550, 556 (9th Cir. 2016).

<sup>31</sup> *See, e.g.,* *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.

<sup>32</sup> 5 U.S.C. § 3348(b).

<sup>33</sup> *Id.* § 3347.

<sup>34</sup> *Id.*

<sup>35</sup> *See id.* § 105; 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).

<sup>36</sup> 5 U.S.C. §§ 3345, 3348.

<sup>37</sup> *Id.* §§ 3345(a), 3347(a), 3348(b), 3349(a). Although GAO is generally considered to be a legislative agency rather than an executive branch agency, *see, e.g.,* *Colonial Press Int’l, Inc. v. United States*, 788 F.3d 1350, 1357 (Fed. Cir. 2015), it is expressly excluded from the Vacancies Act—likely because 5 U.S.C. § 104 identifies GAO as an “independent establishment” falling within the generally applicable definition of “executive agency” provided in 5 U.S.C. § 105.

<sup>38</sup> 5 U.S.C. § 3349c. The multimember board category would likely include, for example, members of the National Credit Union Administration Board, a board that manages “an independent agency.” 12 U.S.C. § 1752a. This exclusion from the Act might not apply to members who are appointed to a distinct position and serve on a board *ex officio*. *Cf., e.g.,* *Ctr. for Biological Diversity v. United States Int’l Dev. Fin. Corp.*, 77 F.4th 679, 687–88 (D.C. Cir. 2023) (interpreting similar language in the Sunshine Act to exclude *ex officio* members). One example of an “Article I court” is the U.S. Court of Appeals for Veterans Claims. *See, e.g.,* CRS In Focus IF11365, *U.S. Court of Appeals for Veterans Claims: A Brief Introduction*, by Jonathan M. Gaffney (2021).



The Vacancies Act does not address its application to military officers,<sup>39</sup> but another Title 5 provision defines “officer,” in part, as an individual “appointed in the civil service.”<sup>40</sup> This language suggests the Act might not include uniformed officers.

Additionally, while not excluded from the other requirements of the Vacancies Act,<sup>41</sup> certain offices are exempt from the provision that allows agency heads to perform the duties of a vacant office and renders noncompliant actions void.<sup>42</sup> The statute states that Section 3348 does 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.<sup>43</sup>

The legislative history of the Vacancies Act suggests 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.<sup>44</sup> The Senate report accompanying an earlier version of the Act suggests that for at least some of these positions, Congress intended “to separate the official who would investigate and charge potential violations of the underlying regulatory statute from the officials who would determine whether that statute had actually been violated.”<sup>45</sup> Allowing the head of the agency to perform the nondelegable duties of these positions would undermine the independence of these positions.<sup>46</sup> As mentioned, though, these positions are not only exempt from the Vacancies Act’s agency-head provision, but from the enforcement provision as a whole.<sup>47</sup> Thus, if a person violates the Vacancies Act to perform the duties of one of these

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<sup>39</sup> The Senate Report on an earlier version of the bill suggested that the military departments are generally covered by the Vacancies Act. S. REP. NO. 105-250, at 12 (1998). Title 5 separately defines “military departments,” 5 U.S.C. § 102, and does not expressly include this term in the definition of “Executive agency,” 5 U.S.C. § 105, or in the Vacancies Act. Nonetheless, the Senate Report pointed out that the military departments are within the Department of Defense, which is expressly included within the definition of “Executive agency.” 5 U.S.C. §§ 101, 105.

<sup>40</sup> 5 U.S.C. § 2104. The Vacancies Act refers to both vacant “offices” and departing “officers.” *Id.* §§ 3345, 3347.

<sup>41</sup> *Id.* § 3348(e); *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 309 (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).

<sup>42</sup> 5 U.S.C. § 3348(b), (d), (e).

<sup>43</sup> *Id.* § 3348(e). There are also agency-specific provisions governing acting service in some of these offices. *See, e.g.*, 5 U.S.C. § 403 note (Inspectors General); 29 U.S.C. § 153(d) (General Counsel of the National Labor Relations Board). For more information on how these agency-specific provisions might interact with the Vacancies Act, *see infra* “Exclusivity of the Vacancies Act.”

<sup>44</sup> S. REP. NO. 105-250, at 20 (1998). This portion of the report discusses the exemptions for General Counsels, but the report offers distinct, but substantively similar, explanations for exempting the “agency inspectors general.” *See id.* The report does not specifically discuss sub-subsection (4), containing the exemption for Chief Financial Officers, *see id.*, because this provision was added after the committee’s consideration of the bill, 144 CONG. REC. S12823 (daily ed. Oct. 21, 1998) (statement of Sen. Fred Thompson).

<sup>45</sup> S. REP. NO. 105-250, at 20 (1998).

<sup>46</sup> *Id.*

<sup>47</sup> 5 U.S.C. § 3348.



exempt positions, the law apparently would not void the noncompliant actions.<sup>48</sup> The potential consequences of violating the Vacancies Act are discussed in more detail below.<sup>49</sup>

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.<sup>50</sup>

## 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.<sup>51</sup> The interpretation of “function or duty” is critical to determining whether a person has violated the Vacancies Act. If an official performs a duty that is not within the scope of this definition, then Section 3348’s enforcement provisions will not invalidate the action.<sup>52</sup> The related issues of enforcement and delegation are discussed in more detail in later sections of this report.<sup>53</sup>

Section 3348 contains a definition providing that a “function or duty” must be (1) established either by statute or regulation and (2) “required” by that statute or regulation “to be performed by the applicable officer (and only that officer).”<sup>54</sup> A function or duty established by regulation falls under Section 3348 if the regulation was “in effect at any time during the 180-day period preceding the date on which the vacancy occurs.”<sup>55</sup> This 180-day provision has been referred to as a “lookback” provision that requires the agency to assign or reassign any regulatory duties *prior* to the vacancy.<sup>56</sup> Thus, even if an agency reassigns a covered regulatory duty after the vacancy occurs, it will remain a “function or duty” of the office.<sup>57</sup> Relying on legislative history, the GAO has said this provision was intended “to prevent agencies from re-issuing regulations providing

<sup>48</sup> See, e.g., *NLRB v. Newark Elec. Corp.*, 14 F.4th 152, 161 (2d Cir. 2021) (“[A]ctions taken by an Acting General Counsel of the Board are *not* automatically void and *may* be ratified by a lawfully appointed acting official . . .”); *SW General, Inc. v. NLRB*, 796 F.3d 67, 79, 81 (D.C. Cir. 2015) (assuming without deciding that actions of an improperly serving Acting General Counsel are voidable rather than void), *aff’d* 580 U.S. 288, 309 (2017).

<sup>49</sup> *Infra* “Consequences of Violating the Vacancies Act.”

<sup>50</sup> 5 U.S.C. § 3349b. 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 [Presidential Appointment with Senate Confirmation] officer continues service under a holdover provision,” but noting that this conclusion is not entirely clear). 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. 5 U.S.C. § 3345(c)(1); *infra* note 109.

<sup>51</sup> 5 U.S.C. §§ 3345(a), 3348(b).

<sup>52</sup> See, e.g., *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam).

<sup>53</sup> See *infra* “Consequences of Violating the Vacancies Act” and “Delegation of Duties.”

<sup>54</sup> 5 U.S.C. § 3348(a)(2). The definition applies only to Section 3348 of the Vacancies Act. However, given that Section 3348 creates the Act’s enforcement mechanisms, the definition is effectively controlling for the rest of the Act as well. *But cf.* *Nina Mendelson, L.M.-M. v. Cuccinelli and the Illegality of Delegating Around Vacant Senate-Confirmed Offices*, YALE J. REG.: NOTICE & COMMENT (Mar. 5, 2020) (arguing that the Vacancies Act’s “requirements for acting officers and time limitations on acting service could still be enforced under the Administrative Procedure Act” even if a challenged action does not fall under the definition of “function or duty” used in Section 3348).

<sup>55</sup> 5 U.S.C. § 3348(a)(2)(B)(ii).

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

<sup>57</sup> See 5 U.S.C. § 3348(a)(2)(B)(ii).

that an office has no exclusive duties,”<sup>58</sup> preventing them from limiting the covered duties of the vacant office after the vacancy occurs.<sup>59</sup>

The definition of “function or duty” is also limited by the second element of the statutory definition. A duty is included if it must be performed “only” by the applicable officer.<sup>60</sup> As one trial court described, there are at least two ways courts may interpret whether a statute or regulation “require[s]” a duty to be performed “only” by the applicable officer.<sup>61</sup> In the first interpretation, “functions and duties” could refer to a more limited category of duties that are not only assigned to one office by statute or regulation, but also *may not* be delegated to any other official.<sup>62</sup> On this reading, a statute does not “require[]” a duty to be performed “only” by one officer if the duty may be delegated to another official.<sup>63</sup> In the second interpretation, the “functions and duties” of a vacant office include the responsibilities that are assigned by statute or regulation to only one particular office.<sup>64</sup> Under either interpretation, a duty will not meet this definition if a statute or covered regulation expressly assigns the duty to more than one office.<sup>65</sup>

Applying the first, narrower interpretation of “functions and duties,” the Vacancies Act has been described as applying to only the *nondelegable* functions and duties of a vacant office because a *delegable* duty is not a duty that may be performed “only” by the officer in the vacant office.<sup>66</sup> One consequence of this interpretation is that temporary officials or subordinate officials may perform the delegable duties of a vacant office without violating the Vacancies Act.<sup>67</sup> Under this first view, even if a duty has not been delegated, as long as it is delegable, it will fall outside the Section 3348 definition.<sup>68</sup> A number of courts<sup>69</sup> and the executive branch<sup>70</sup> have seemingly adopted this view, concluding that the Vacancies Act applies only to nondelegable duties. One

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

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

<sup>60</sup> 5 U.S.C. § 3348(a)(2).

<sup>61</sup> *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 31 (D.D.C. 2020).

<sup>62</sup> See *id.* at 31–32.

<sup>63</sup> Cf., e.g., *Kajmowicz v. Whitaker*, 42 F.4th 138, 148 (3d Cir. 2022) (Fisher, J., concurring) (arguing that to “conclude something is not a ‘function or duty,’” under the Vacancies Act, “the authority in question, in addition to being delegable, must actually have been delegated”).

<sup>64</sup> See *L.M.-M.*, 442 F. Supp. 3d at 31.

<sup>65</sup> *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132, 135 (2d Cir. 2009) (holding that a duty fell outside the definition because, per regulation, it could be done by either the relevant officer or an authorized representative).

<sup>66</sup> See, e.g., *Kajmowicz*, 42 F.4th at 148 (majority opinion); S. REP. NO. 105-250, at 18 (1998).

<sup>67</sup> See, e.g., ANNE JOSEPH O’CONNELL, ADMIN. CONFERENCE OF THE U.S., ACTING AGENCY OFFICIALS AND DELEGATIONS OF AUTHORITY 28 (2019) (discussing agency practice of using delegations as a substitute for acting service under the Vacancies Act). Even if the Vacancies Act is not understood to bar delegation, however, the delegation may be challenged on its own terms. The legal principles that generally govern courts’ analyses of whether a delegation is permissible are discussed *infra* “Delegation of Duties.” For example, such a delegation will be lawful only if the power was validly delegated by someone with the authority to do so—which might not be the case if the officer who formerly possessed those powers left without delegating any responsibilities. See *Office of Thrift Supervision v. Paul*, 985 F. Supp. 1465, 1474–75 (S.D. Fla. 1997).

<sup>68</sup> *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam); see also *infra* “Consequences of Violating the Vacancies Act.”

<sup>69</sup> E.g., *Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. U.S. Dep’t of Homeland Sec.*, 107 F.4th 1064, 1076 (9th Cir. 2024); *Kajmowicz v. Whitaker*, 42 F.4th 13, 148–49 (3d Cir. 2022); *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1336 (Fed. Cir. 2022); *Stand Up for Cal. v. U.S. Dep’t of Interior*, 994 F.3d 616, 622 (D.C. Cir. 2021).

<sup>70</sup> E.g., Under Secretary of the Treasury for Enforcement, 26 Op. O.L.C. 230, 233–34 (2002).

federal court of appeals acknowledged that this approach renders the Vacancies Act's scope "vanishingly small," as usually only a small subset of an official's duties will be nondelegable, but the court nonetheless concluded that this was the best reading of Section 3348.<sup>71</sup>

GAO seems to have adopted a position consistent with this view when, in 2008, it considered whether the Principal Deputy Assistant Attorney General in the Department of Justice's Office of Legal Counsel (OLC) violated the Vacancies Act.<sup>72</sup> GAO concluded that the principal deputy had not violated the Vacancies Act because he had merely been performing the duties of his *own* position.<sup>73</sup> These duties apparently included supervisory responsibilities that had been vested in the Assistant Attorney General's office, which was vacant.<sup>74</sup> GAO approved of this arrangement after reviewing the relevant statutes and regulations and concluding that "there [were] *no* duties" that could be performed only by the Assistant Attorney General: all of the regulatory duties were delegable.<sup>75</sup>

By contrast, some trial courts have concluded that the second, broader interpretation of "function or duty" described above is more consistent with the text, operation, and purpose of the Vacancies Act.<sup>76</sup> For example, one court said that the narrower reading of "function or duty" was "at odds" with Congress's intent to prohibit agency heads from invoking general vesting-and-delegation statutes to evade the Vacancies Act.<sup>77</sup> One of the Act's primary purposes was to prevent the Executive from appointing "Officers of the United States"<sup>78</sup> without Senate advice and consent.<sup>79</sup> Accordingly, Section 3347 specifies that a statute granting an agency head general authority to delegate duties will not override the Vacancies Act.<sup>80</sup> At the same time, a general vesting-and-

<sup>71</sup> *Arthrex*, 35 F.4th at 1337.

<sup>72</sup> 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.*

<sup>73</sup> *Id.* at \*6.

<sup>74</sup> *Id.* at \*12–13.

<sup>75</sup> *Id.* at \*5 (emphasis added). 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. GAO then concluded that although regulations assigned a number of duties to the Assistant Attorney General for OLC, and specifically vested that officer with supervisory responsibility, the regulations were not "sufficiently prescriptive for [OLC] to conclude that they assign non-delegable duties." *Id.* at \*11.

<sup>76</sup> *Pub. Emps. for Env't Resp. v. Nat'l Park Serv.*, 605 F. Supp. 3d 28, 45 (D.D.C. 2022); *Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11, 22–23 (D.D.C. 2022); *Behring Reg'l Ctr. LLC v. Wolf*, 544 F. Supp. 3d 937, 946–47 (N.D. Cal. 2021); *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 32 (D.D.C. 2020). As these citations suggest, three judges from the U.S. District Court for the District of Columbia have reached this conclusion even though the D.C. Circuit's decision in *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam), seemed to imply that Section 3348 encompasses only nondelegable duties. Those trial courts have declined to apply *Guedes* on the grounds that the relevant statements in that opinion were dicta. *E.g.*, *L.M.-M.*, 442 F. Supp. 3d at 33.

<sup>77</sup> *L.M.-M.*, 442 F. Supp. 3d at 34.

<sup>78</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>79</sup> *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.").

<sup>80</sup> 5 U.S.C. § 3347. As discussed *supra* note 27, 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. *See also, e.g.*, *Pub. Emps. for Env't Resp.*, 605 F. Supp. 3d 28 at 46 (taking a broader approach to Section 3348 and concluding that a provision allowing the Secretary of the Interior to delegate any of the office's functions was "not the kind of 'agency-specific statute' that is 'intended to apply alongside'" the Vacancies Act but was instead "a general authority that must be interpreted in light of the more specific and limited authority in the" Vacancies Act (quoting *English v. Trump*, 279 F. Supp. 3d 307, 319 (D.D.C. 2018))).

delegation statute likely renders many duties of an office delegable.<sup>81</sup> 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 head to delegate most of that position's responsibilities to another official.<sup>82</sup> The trial court said that by allowing "the mere existence of . . . vesting-and-delegation statutes" to "negate" the Vacancies Act's enforcement mechanisms, the narrower reading would be inconsistent with the law's purpose, as expressed in Section 3347.<sup>83</sup>

Another trial court taking a broader view of the definition of "function or duty" agreed with these arguments based on the statute's purpose and also believed the broader approach was consistent with the plain language of Section 3348.<sup>84</sup> That court held that a federal regulation created a function or duty "squarely within" the definition's text because the regulation designated one specific "officer and only that officer to perform the duty or function."<sup>85</sup> The regulation did not "identify any other official" who could perform the function.<sup>86</sup> In the court's view, looking to the agency's vesting-and-delegation statute to conclude that the function was delegable would bring in "a second, additional statute"—an "interpretive exercise" unsupported by the Vacancies Act's "unambiguous language."<sup>87</sup>

Both approaches to interpreting "function or duty," therefore, sometimes allow agencies to delegate the duties of an office and thereby exclude those duties from the Vacancies Act's definition of function or duty, an issue discussed in more detail below.<sup>88</sup> The first view broadly excludes any delegable duties. Under the first view, the enforcement mechanisms of the Vacancies Act (also discussed below)<sup>89</sup> will not apply to a noncompliant official so long as the relevant duty was delegable, even if the duty was not in fact properly delegated to that official. Under this second view, in contrast, if a duty is assigned only to one office—that is, it has not been delegated—the Vacancies Act's enforcement mechanisms could apply even if the duty is theoretically delegable. The second view honors regulatory delegations in effect during the 180-day lookback period and would further allow the delegation of any duties that are statutorily assigned to more than one office.<sup>90</sup>

<sup>81</sup> See *L.M.-M.*, 442 F. Supp. 3d at 34. See also, e.g., 28 C.F.R. § 0.15 (authorizing the Deputy Attorney General to exercise the authorities of the Attorney General and to redelegate certain authorities).

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

<sup>83</sup> *L.M.-M.*, 442 F. Supp. 3d at 32, 34.

<sup>84</sup> *Behring Reg'l Ctr. LLC v. Wolf*, 544 F. Supp. 3d 937, 946 (N.D. Cal. 2021).

<sup>85</sup> *Id.* at 946.

<sup>86</sup> *Id.* at 945–46.

<sup>87</sup> *Id.* at 946.

<sup>88</sup> *Infra* "Delegation of Duties." The Department of Justice has argued that Congress intended to allow the delegation of "non-exclusive responsibilities" because Congress "understood" that if only the head of an agency could perform all of a vacant office's duties, "the business of the government could be seriously impaired." Guidance on Application of Fed. Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 72 (1999).

<sup>89</sup> *Infra* "Consequences of Violating the Vacancies Act."

<sup>90</sup> *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 34 (D.D.C. 2020); but cf. *Behring Reg'l Ctr. LLC*, 544 F. Supp. 3d at 947 (holding that a preexisting delegation of the Secretary's functions to the Deputy Secretary did "not apply" when there was no Deputy Secretary to exercise the purportedly delegated statutory function).

## Vacancies Act Limitations on Acting Service

Section 3348 of the Vacancies Act authorizes only certain officers or employees to perform the “functions and duties” of a vacant advice-and-consent office.<sup>91</sup> Unless an acting officer is serving in compliance with the Vacancies Act, “the office shall remain vacant” and in the case of a subordinate office, only the agency head can perform a covered duty of a vacant advice-and-consent office.<sup>92</sup> The Vacancies Act limits acting service in two main ways: it limits (1) the categories of people who may serve as an acting officer,<sup>93</sup> and (2) the time period for which they may serve.<sup>94</sup>

### Who Can Serve as an Acting Officer?

Section 3345 allows three categories of government officials or employees to perform temporarily the functions and duties of a vacant advice-and-consent office under the Vacancies Act.<sup>95</sup> First, as a default rule, once an office becomes vacant, “the first assistant to the office” becomes the acting officer.<sup>96</sup> “First assistant” is a term of art under the Vacancies Act.<sup>97</sup> Nonetheless, the term is not defined by the Act and its meaning can be ambiguous.<sup>98</sup> The Vacancies Act’s legislative history suggests that the term refers to an office’s “top deputy.”<sup>99</sup> For some offices, a statute or regulation explicitly designates an office to be the “first assistant” to

<sup>91</sup> 5 U.S.C. § 3348(b).

<sup>92</sup> *Id.* §§ 3345, 3346, 3348. Additionally, as discussed *infra* “Exclusivity of the Vacancies Act,” 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.

<sup>93</sup> *Id.* § 3345.

<sup>94</sup> *Id.* § 3346.

<sup>95</sup> *Id.* § 3345.

<sup>96</sup> *Id.* § 3345(a)(1).

<sup>97</sup> 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.’”); *CASA de Md., Inc. v. Wolf*, 486 F. Supp. 3d 928, 954 (D. Md. 2020) (“Historically, each Vacancies Act since 1868 identified the ‘first assistant’ as the most senior and capable official to serve in an acting capacity . . .”). *Cf., e.g., L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 25–26 (D.D.C. 2020) (looking to a dictionary to determine the ordinary meaning of the term “first assistant”).

<sup>98</sup> Compare *Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 156 F.3d 190, 192 (D.C. Cir. 1998) (“[W]hether internal [agency] documents referring to Fiechter as a ‘first assistant’ rendered him such for the purposes of the Vacancies Act is a matter of considerable uncertainty. Our opinion in *Doolin I* recognized that, according to ‘one line of authority,’ the position of ‘first assistant’ must be created by statute before the automatic succession provision of the Vacancies Act applies.”) (quoting *Doolin Sec. Sav. Bank v. Office of Thrift Supervision (Doolin I)*, 139 F.3d 203, 209 n.3 (D.C. Cir. 1998)), with Guidance on Application of Fed. Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 63 (1999) (“At a minimum, a designation of a first assistant by statute, or by regulation where no statutory first assistant exists, should be adequate to establish a first assistant for purposes of the Vacancies Reform Act.”).

<sup>99</sup> 144 CONG. REC. S11037 (daily ed. Sept. 28, 1998) (statement of Sen. Joseph Lieberman).



that position.<sup>100</sup> However, not all offices have such statutory or regulatory designations, and in those cases, who qualifies as the “first assistant” to that office may be open to debate.<sup>101</sup>

One additional question has been whether a first assistant must be serving at the time the vacancy occurs, or whether a person who later steps into the first assistant position can also serve as an acting officer under this provision of the Vacancies Act.<sup>102</sup> The most recent executive branch position is that new first assistants can step in as acting officials.<sup>103</sup> In a 2001 opinion, OLC noted that the text of the Vacancies Act refers to “the first assistant *to the office*,” not the particular *officer*.<sup>104</sup> OLC emphasized that prior versions of the Act had formerly used the phrase “first assistant to the officer,” and argued that requiring a first assistant to be in place at the time of the vacancy would, in effect, improperly revive this old text by requiring that person to be the first assistant to the departing officer.<sup>105</sup> GAO has agreed with this conclusion.<sup>106</sup> At the same time, one trial court concluded that an official named to a newly created *position* could not qualify as a first assistant under the Vacancies Act because the position was created after the vacancy occurred and would end once the superior was confirmed.<sup>107</sup> The purported first assistant occupied a temporary position that would never “serve in a subordinate role—that is, as an ‘assistant’—to any other . . . official.”<sup>108</sup>

Apart from the first assistant, the President “may direct” two other classes of officials to serve as acting officers instead.<sup>109</sup> First, the President may direct a person who has been confirmed to a different advice-and-consent position to serve as acting officer.<sup>110</sup> 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

<sup>100</sup> *E.g.*, 28 U.S.C. § 508 (“[F]or the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.”); 28 C.F.R. § 0.137(b) (2019) (“Every office within the Department to which appointment is required to be made by the President with the advice and consent of the Senate . . . shall have a First Assistant within the meaning of the Federal Vacancies Reform Act of 1998. Where there is a position of Principal Deputy to the . . . office, the Principal Deputy shall be the First Assistant. Where there is no position of Principal Deputy . . . , the First Assistant shall be the person whom the Attorney General designates in writing.”).

<sup>101</sup> *See, e.g.*, *Pub. Emps. for Env’t Resp. v. Nat’l Park Serv.*, 605 F. Supp. 3d 28, 44 (D.D.C. 2022) (“Because NPS has multiple Deputy Directors, none of the Deputy Directors is a ‘first assistant’ who automatically assumes those duties . . . .”); *Designating an Acting Director of the Federal Housing Finance Agency*, 2019 OLC LEXIS 16, at \*11–12 (Op. O.L.C. Mar. 18, 2019) (stating that where an agency has multiple deputy directors, “none of them is obviously the . . . Director’s ‘first assistant’”).

<sup>102</sup> *See, e.g.*, *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 24 (D.D.C. 2020) (noting that this “dispute poses a difficult question that the Office of Legal Counsel has answered differently at different times”). *Compare* *Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 64 (1999) (concluding that an officer “must be the first assistant when the vacancy occurs in order to be the acting officer by virtue of being the first assistant”), *with* *Designation of Acting Associate Attorney General*, 25 Op. O.L.C. 177, 180 (2001) (concluding that the prior OLC interpretation was erroneous).

<sup>103</sup> *Designation of Acting Associate Attorney General*, 25 Op. O.L.C. 177, 180 (2001).

<sup>104</sup> *Id.* at 179–80 (quoting 5 U.S.C. § 3345(a)(1)) (emphasis added in original).

<sup>105</sup> *Id.*

<sup>106</sup> *Environmental Protection Agency—Legality of First Assistant Named After Vacancy Serving as Acting General Counsel*, B-332995, 2021 WL 3406262, at \*3 (Comp. Gen. Aug. 2, 2021).

<sup>107</sup> *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 24 (D.D.C. 2020).

<sup>108</sup> *Id.*

<sup>109</sup> 5 U.S.C. § 3345. This directive may come *only* from the President. *Id.* There is one additional class of officials who may serve as acting officers: if an officer serves a fixed term, 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. 5 U.S.C. § 3345(c)(1).

<sup>110</sup> 5 U.S.C. § 3345(a)(2).

to at least a GS-15 on the federal pay scale.<sup>111</sup> Some courts have held that a standing order of succession created by a President qualifies as a directive to serve under the Vacancies Act.<sup>112</sup>

Section 3345 places an additional limitation on the ability to serve as an acting officer. As a general rule (with an exception discussed below), if the President nominates a person to the vacant office, that nominee “may not serve as an acting officer” for that position.<sup>113</sup> Thus, if the President nominates 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.<sup>114</sup> The President may name another qualified person to serve as an acting officer instead of the nominated person.<sup>115</sup> One question is whether this general rule continues to prohibit a person from serving if the nomination is withdrawn or returned, or whether a person could resume service after a withdrawal or return.<sup>116</sup>

These limitations 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.<sup>117</sup> Francisco then began to serve as Acting Solicitor General.<sup>118</sup> In March of that year, the President announced that he would be nominating Francisco to serve permanently as the Solicitor General.<sup>119</sup> 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.<sup>120</sup> This last shift may have occurred to comply with the Vacancies Act.<sup>121</sup>

There is an exception to this limitation: a person who is nominated to an office may serve as the acting officer if that person is the first assistant to that office and either (1) has served in that

<sup>111</sup> *Id.* § 3345(a)(3).

<sup>112</sup> *E.g.*, *Fortin v. Comm’r of Soc. Sec.*, 112 F.4th 411, 419 (6th Cir. 2024); *Dahle v. Kijakazi*, 62 F.4th 424, 429 (8th Cir. 2023).

<sup>113</sup> 5 U.S.C. § 3345(b); *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 293 (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). 580 U.S. at 299. 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 (2017).

<sup>114</sup> *SW Gen.*, 580 U.S. at 293.

<sup>115</sup> *See* 5 U.S.C. § 3345(b).

<sup>116</sup> *See, e.g.*, Letter from Members of the U.S. Senate Comm. on Com., Sci., & Transp. to President Joseph Biden (Sept. 20, 2023), <https://www.commerce.senate.gov/services/files/796C3233-2110-4A65-ADA3-4CFA39FDE167>. If a nomination is rejected—that is, the Senate has voted not to approve the nomination—a separate provision of law will prevent paying that person to fill the position. Pub. L. No. 110-161, div. D, title VII, § 709, 121 Stat. 2021 (codified at 5 U.S.C. prec. § 5501). Another provision prohibits “the payment of services to any individual carrying out the responsibilities of any position requiring Senate advice and consent in an acting or temporary capacity” if the person’s second nomination to the position is withdrawn or returned. Pub. L. No. 111-8, div. D, title VII, § 749; 123 Stat. 693 (codified at 5 U.S.C. prec. § 5501).

<sup>117</sup> Marcia Coyle, *Noel Francisco, Trump’s Solicitor General Pick, Is Sidelined for Now*, NAT’L LAW J. (Apr. 6, 2017), <http://www.law.com/nationallawjournal/almID/1202783127057>.

<sup>118</sup> *Id.* Francisco replaced Ian Gershengorn in this role, who had himself been a Principal Deputy Solicitor General serving as Acting Solicitor General. *See* Attorney General Loretta E. Lynch Statement on Planned Departure of Solicitor General Donald B. Verrilli Jr. (June 2, 2016), <https://www.justice.gov/opa/pr/attorney-general-loretta-e-lynch-statement-planned-departure-solicitor-general-donald-b>.

<sup>119</sup> Coyle, *supra* note 117.

<sup>120</sup> *Id.*

<sup>121</sup> *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>.



position for at least 90 days during the year preceding the vacancy<sup>122</sup> or (2) was appointed to that position through the advice-and-consent process.<sup>123</sup> Returning to the example of the Solicitor General position, it appears that Noel Francisco did not qualify for this exception and could not continue to serve as the Acting Solicitor General, once nominated to that position.<sup>124</sup> Although Francisco may have been in a first assistant position, as the Principal Deputy Solicitor General,<sup>125</sup> he had not served in that position for 90 days prior to the vacancy; nor had he been appointed to that position through the advice-and-consent process.<sup>126</sup>

## For How Long?

The Vacancies Act generally limits how long a vacant advice-and-consent position may be filled by an official serving under the Act.<sup>127</sup> 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.”<sup>128</sup> The Act also allows a qualified person to serve for 210 days after the first or second nomination is rejected, withdrawn, or returned.<sup>129</sup> These periods—the initial period of 210 days and the periods following a first or second nomination—are generally understood to run independently.<sup>130</sup> Consequently, the submission and pendency of a nomination allow an acting officer to serve beyond the initial 210-day period.<sup>131</sup>

<sup>122</sup> See 5 U.S.C. § 3345(b)(1)(A).

<sup>123</sup> See *id.* § 3345(b)(2). In addition, 5 U.S.C. § 3345(c) authorizes the President to direct “an officer who is nominated . . . for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office.”

<sup>124</sup> See *id.* § 3345(b).

<sup>125</sup> See 28 C.F.R. § 0.137(b) (2019) (“Every office within the Department to which appointment is required to be made by the President with the advice and consent of the Senate . . . shall have a First Assistant within the meaning of the [Vacancies Act]. Where there is a position of Principal Deputy to [an advice-and-consent position], the Principal Deputy shall be the First Assistant.”).

<sup>126</sup> 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>.

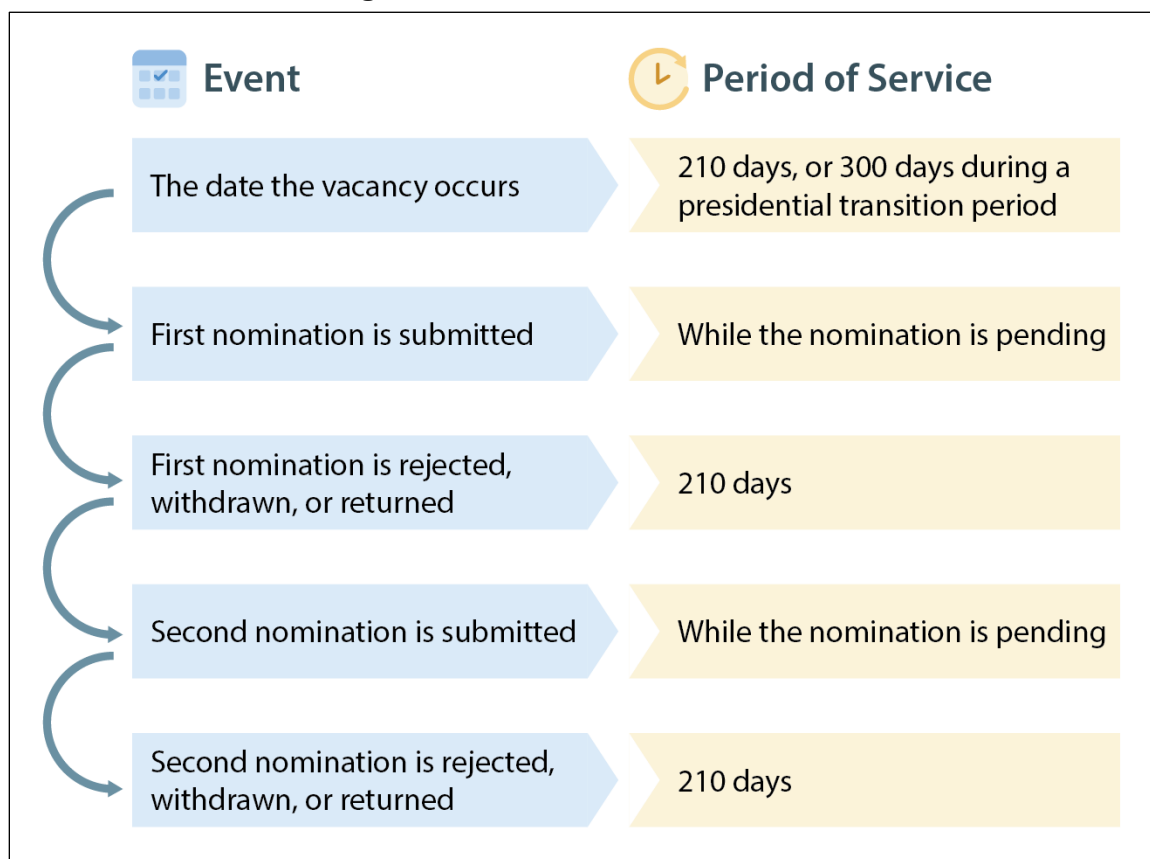
<sup>127</sup> These time limitations do not apply, however, to “a vacancy caused by sickness.” 5 U.S.C. § 3346(a). As discussed *infra*, “Exclusivity of the Vacancies Act” and “Delegation of Duties,” officials may be able to perform the duties for longer periods under some agency-specific statutes or delegations.

<sup>128</sup> 5 U.S.C. § 3346(a).

<sup>129</sup> *Id.* § 3346(b).

<sup>130</sup> *E.g.*, *Rush v. Kijakazi*, 65 F.4th 114, 119 (4th Cir. 2023); see *infra* note 140. The second time period has sometimes been described as a tolling provision, but as a technical matter, under the view that these time periods are independent, 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. Even if a nomination is rejected, withdrawn, or returned before 210 days have passed, that return will trigger a new 210-day period. See 5 U.S.C. § 3346(b).

<sup>131</sup> See 5 U.S.C. § 3346.

**Figure 1. Vacancies Act Time Periods**

Source: 5 U.S.C. § 3346

The 210-day limit 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.<sup>132</sup> Accordingly, this period does not begin on the date an acting officer is named and does not reset if the President names a new acting officer.<sup>133</sup> The period is extended during a presidential transition period when a new President takes office.<sup>134</sup> Specifically, if a vacancy exists on the new President's inauguration day or occurs within 60 days after the inauguration,<sup>135</sup> 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.<sup>136</sup> These requirements effectively create a 300-day period beginning either on January 20 or the date the vacancy occurred. If an acting officer attempts to perform a function or duty of an

<sup>132</sup> See *id.* § 3346(a)(1). "If 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).

<sup>133</sup> See *id.* § 3346(a)(1).

<sup>134</sup> See *id.* § 3349a.

<sup>135</sup> This provision refers to a vacancy that exists during "the 60-day period beginning on a 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.*

<sup>136</sup> *Id.* § 3349a(b).

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.<sup>137</sup>

Alternatively, Section 3346 allows an acting officer to serve while “a first or second nomination for the office . . . is pending in the Senate,” regardless of how long that nomination is pending.<sup>138</sup> Some have suggested that this provision only authorizes “the person serving” during the first 210-day period to continue to serve, operating solely as a tolling provision during that period of days.<sup>139</sup> The federal appeals courts that have considered the issue have rejected this view, instead holding that an acting officer may serve during the pendency of a nomination even if that nomination is submitted after the 210-day period has ended.<sup>140</sup> Thus, GAO and the executive branch have described Section 3346 as containing a “spring-back” provision.<sup>141</sup>

Nominations to the vacant office can extend the periods for acting service for years. “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.<sup>142</sup> If the President submits a second nomination for the office, then an acting officer may continue to serve during the pendency of that nomination.<sup>143</sup> If the second nomination is also “rejected, withdrawn, or returned,” then an acting officer may continue for one last 210-day period.<sup>144</sup>

An acting officer may not serve beyond this final period—the Vacancies Act will not allow acting service during the pendency of a third or any subsequent nominations.<sup>145</sup> GAO has said that where a vacancy spans presidential administrations, if a former President already submitted two nominations for the vacant position, these nomination-based time periods do not reset for a new President.<sup>146</sup> Under this reading, if, for example, a former President submitted one nomination but withdrew it without confirmation, a new President’s first nomination to the position would be the second nomination for purposes of the time limitations in Section 3346. OLC has disagreed with this view, asserting that a new administration “restarts the entire time sequence in section 3346.”<sup>147</sup> Regardless, if the acting officer serves beyond the pendency of the allowed nominations and the subsequent 210-day periods, any action performing a function or duty of the office will have no force or effect.<sup>148</sup>

<sup>137</sup> See *id.* § 3348. For more on violating the Vacancies Act, see *infra* “Consequences of Violating the Vacancies Act.”

<sup>138</sup> 5 U.S.C. § 3346(a)(2). However, 5 U.S.C. § 3345(b) generally limits the ability of a person to serve as acting officer if *that person* is the one nominated to the position, as discussed *supra* notes 113 to 126 and accompanying text.

<sup>139</sup> 5 U.S.C. § 3346(a); *e.g.*, *Rush v. Kijakazi*, 65 F.4th 114, 121 (4th Cir. 2023).

<sup>140</sup> *Gaiambrone v. Comm’r Soc. Sec.*, No. 23-2988, 2024 U.S. App. LEXIS 18167, at \*8 (3d Cir. July 24, 2024); *Rush v. Kijakazi*, 65 F.4th 114, 119 (4th Cir. 2023); *Seago v. O’Malley*, 91 F.4th 386, 390 (5th Cir. 2024); *Fortin v. Comm’r of Soc. Sec.*, 112 F.4th 411, 420 (6th Cir. 2024); *Dahle v. Kijakazi*, 62 F.4th 424, 427 (8th Cir. 2023).

<sup>141</sup> Violation of the 210-Day Limit Imposed by the Federal Vacancies Reform Act of 1998—Department of Energy, Director of Office of Science, B-328888, slip op. at 2 (Comp. Gen. Mar. 3, 2017); Guidance on Application of Fed. Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 68 (1999).

<sup>142</sup> 5 U.S.C. § 3346(b)(1).

<sup>143</sup> *Id.* § 3346(b)(2)(A).

<sup>144</sup> *Id.* § 3346(b)(2)(B).

<sup>145</sup> See *id.* § 3346(a)(2).

<sup>146</sup> Department of Defense, Office of Inspector General—Legality of Service of Acting Inspector General, B-333853, 2022 WL 2341425, at \*4 (Comp. Gen. June 26, 2022).

<sup>147</sup> Federal Vacancies Reform Act’s Application to a Vacancy for Which Prior Presidents Submitted Multiple Nominations, 46 Op. O.L.C. 1, 2022 OLC LEXIS 10, at \*3 (Oct. 21, 2022).

<sup>148</sup> See 5 U.S.C. § 3348.

## Consequences of Violating the Vacancies Act

The Vacancies Act may be enforced through both the political process and through litigation. Sections 3348 and 3349 spell out the law’s enforcement mechanisms.

Section 3349 requires the heads of executive agencies to report covered vacancies, along with information about acting officers and nominations, “to the Comptroller General of the United States and to each House of Congress.”<sup>149</sup> If the Comptroller General determines that an officer has served “longer than the 210-day period,” the Comptroller General must report this service to the appropriate congressional committees.<sup>150</sup> This provision does not *require* the Comptroller General to make any such determination and may depend in part on agency reporting of vacancies.<sup>151</sup> 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.<sup>152</sup> 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.<sup>153</sup> The day before the hearing, the Comptroller General issued a letter reporting that the Acting Commissioner, Nancy Berryhill, was violating the Vacancies Act.<sup>154</sup> Shortly thereafter, Berryhill reportedly stepped down from the position of Acting Commissioner, serving instead in her position of record as Deputy Commissioner of Operations.<sup>155</sup>

Section 3348 provides that unless an acting officer is serving “in accordance with” the Vacancies Act, the “office shall remain vacant” and “only the head of such Executive agency may perform any function or duty of such office” (unless the office is that of the agency head).<sup>156</sup> The Act further provides that if a person performs “any function or duty of a vacant office” but is “not acting under” the Act, that action “shall have no force or effect” and “may not be ratified.”<sup>157</sup> The text of the Vacancies Act does not expressly contemplate a means of removing any noncompliant

<sup>149</sup> *Id.* § 3349(a). The reporting requirement applies to a vacancy “in an office to which this section and sections 3345, 3346, 3347, 3348, 3349a, 3349b, 3349c, and 3349d apply.” *Id.* GAO’s website has a searchable database containing reported vacancy information. *Federal Vacancies Reform Act*, GAO, <https://www.gao.gov/legal/federal-vacancies-reform-act/federal-vacancies-current-administration> (last visited Jan. 27, 2025).

<sup>150</sup> 5 U.S.C. § 3349(b). The reporting requirement may result in 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).

<sup>151</sup> A 2019 GAO opinion suggested that agencies are not fully compliant with their reporting obligations under the Vacancies Act. Agency Compliance with the Federal Vacancies Reform Act for Positions Subject to the Jurisdiction of Senate Finance Committee, B-329903, 2019 U.S. Comp. Gen. LEXIS 36 (Comp. Gen. Feb. 7, 2019).

<sup>152</sup> *See generally, e.g.*, Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881 (2014).

<sup>153</sup> *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>.

<sup>154</sup> 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).

<sup>155</sup> 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”).

<sup>156</sup> 5 U.S.C. § 3348(b).

<sup>157</sup> *Id.* § 3348(d).

acting officers from office. The most direct means to enforce the Vacancies Act is through private suits in which courts may nullify noncompliant agency actions.<sup>158</sup> Such a suit may be brought by a third party with standing, such as a regulated entity that has been injured by agency action.<sup>159</sup> Accordingly, for example, several lawsuits challenged actions of the Social Security Administration that depended on Berryhill’s authority as Acting Commissioner.<sup>160</sup>

The Vacancies Act renders noncompliant actions “void *ab initio*,”<sup>161</sup> meaning that they were “null from the beginning.”<sup>162</sup> As Section 3348 expressly spells out,<sup>163</sup> acts that are “void” may not be ratified, meaning that another person who properly exercises legal authority on behalf of an agency may not render the act valid by approving or replicating it.<sup>164</sup> Accordingly, one court stated that the Vacancies Act “clearly” prohibits “a statement or directive that merely adopts an earlier action in identical form with no additional reasoning.”<sup>165</sup> At the same time, the court clarified that agencies can sometimes reconsider a prior action and reach a similar outcome in a separate action that is not a mere ratification.<sup>166</sup>

The Vacancies Act’s enforcement mechanisms—the no-force-or-effect provision and the no-ratification provision—apply if a person performs a “function or duty” of the vacant office.<sup>167</sup> Consequently, their application is subject to the interpretive dispute described above regarding the proper interpretation of a “function or duty” that may “only” be performed by the relevant officer.<sup>168</sup> The breadth of this definition can have significant consequences for agency actions.<sup>169</sup> If a court interprets the Vacancies Act not to apply to delegable duties, then even if a person violates the Act in performing a duty of the vacant office, the Act will not invalidate any duty that

<sup>158</sup> 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.”).

<sup>159</sup> E.g., *Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11, 22 (D.D.C. 2022). 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); but see CRS Report R45636, *Congressional Participation in Litigation: Article III and Legislative Standing*, by Kevin M. Lewis (2019).

<sup>160</sup> See, e.g., *Rush v. Kijakazi*, 65 F.4th 114, 118 (4th Cir. 2023).

<sup>161</sup> See *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 298 n.2 (2017); *Asylumworks*, 590 F. Supp. 3d at 19.

<sup>162</sup> 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”).

<sup>163</sup> 5 U.S.C. § 3348(d)(2).

<sup>164</sup> See, e.g., *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*). Legislative history suggests that Congress was specifically concerned with overruling the decision of the D.C. Circuit in *Doolin Security Savings Bank v. Office of Thrift Supervision*, 139 F.3d 203, 214 (D.C. Cir. 1998), in which that court had held that because a successor “effectively ratified” the action of an acting officer, the court did not need to decide whether that acting officer had “lawfully occupied the position.” See S. REP. NO. 105-250, at 5 (1998) (noting *Doolin* “underscored” the “need for new legislation”). This Senate report expressed concern that “the ratification approach taken by the court in *Doolin* would render enforcement of the [Vacancies Act] a nullity in many instances.” *Id.* at 20. See also 144 CONG. REC. S11022 (daily ed. Sept. 28, 1998) (statement of Sen. Fred Thompson) (referencing *Doolin* as reason to enact bill).

<sup>165</sup> *Pub. Emps. for Env’t Resp. v. Nat’l Park Serv.*, 605 F. Supp. 3d 28, 47 (D.D.C. 2022).

<sup>166</sup> *Id.* at 48. The court concluded that the Vacancies Act did not invalidate an agency rule that qualified as “a new deliberative action” even though the rule “reached a similar conclusion” as a prior action taken by an improperly acting official. *Id.* at 49. *Accord* *Fortin v. Comm’r of Soc. Sec.*, 112 F.4th 411, 428 (6th Cir. 2024).

<sup>167</sup> 5 U.S.C. § 3348.

<sup>168</sup> *Supra* “What Are the ‘Functions and Duties’ of an Office?”

<sup>169</sup> See, e.g., *Kajmowicz v. Whitaker*, 42 F.4th 138, 149 (3d Cir. 2022).

is delegable.<sup>170</sup> Courts adopting this narrower definition of “function or duty” have also allowed delegable functions to be ratified.<sup>171</sup> In contrast, the trial courts taking a broader approach to the definition have concluded that Section 3348 prevented the ratification of functions statutorily assigned to a vacant office.<sup>172</sup> Under either approach, the Vacancies Act’s prohibitions will not apply if a statute expressly assigns the duty to more than one office.<sup>173</sup>

Accordingly, if a duty is delegable or has been delegated, Section 3348 might not apply. In addition, the Vacancies Act’s enforcement mechanisms might not apply if a person is acting under an agency-specific statute, as discussed below,<sup>174</sup> or if a person performs a function or duty of a vacant office that falls within one of the exceptions from Section 3348.<sup>175</sup> As previously mentioned, certain offices are exempt from the provision that nullifies the noncompliant actions of an acting officer,<sup>176</sup> and the statute does not otherwise specify what consequences follow if a person temporarily serving in one of those offices violates the Vacancies Act.<sup>177</sup> 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.<sup>178</sup>

Outside the context of the Vacancies Act, courts evaluating allegedly unlawful agency actions might conclude those acts are *voidable*, rather than *void*.<sup>179</sup> The consequences that flow from a determination that an action is “void” are more severe than if it is merely “voidable.”<sup>180</sup> A “voidable” action is one that may be judged invalid because of some legal defect, but that “is not incurable.”<sup>181</sup> For instance, before a court strikes down a voidable agency action, it might inquire into whether the legal defect created actual prejudice.<sup>182</sup> If an error is harmless, the court may uphold the agency action.<sup>183</sup> Courts may also assume that a voidable action can be ratified by an official with the proper authority.<sup>184</sup> In contrast, as under the Vacancies Act, a void act may not be

<sup>170</sup> *E.g.*, *United States v. Tinley Park*, No. 1:16-cv-10848, 2017 U.S. Dist. LEXIS 234517, at \*10–11 (N.D. Ill. July 17, 2017).

<sup>171</sup> *E.g.*, *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam).

<sup>172</sup> *E.g.*, *Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11, 25 (D.D.C. 2022); *Behring Reg'l Ctr. LLC v. Wolf*, 544 F. Supp. 3d 937, 948 (N.D. Cal. 2021).

<sup>173</sup> *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132, 135 (2d Cir. 2009).

<sup>174</sup> *Infra* “Exclusivity of the Vacancies Act.”

<sup>175</sup> *Supra* “Which Offices?”

<sup>176</sup> 5 U.S.C. § 3348(e).

<sup>177</sup> *See id.* § 3348.

<sup>178</sup> *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 298 n.2 (2017); 5 U.S.C. § 3348.

<sup>179</sup> *See, e.g.*, *NLRB v. Newark Elec. Corp.*, 14 F.4th 152, 162–63 (2d Cir. 2021). *Cf., e.g.*, *United States v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380, 384 (8th Cir. 1992) (“A regulation not promulgated pursuant to the proper notice and comment procedures has no ‘force or effect of law’ and therefore is void ab initio.”).

<sup>180</sup> *Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. U.S. Dep’t of Homeland Sec.*, 107 F.4th 1064, 1077 (9th Cir. 2024) (stating that a voidable action may be challenged, but the agency may raise defenses such as harmless error, de facto officer doctrine, or ratification); *cf. 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).

<sup>181</sup> *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 909 (6th Cir. 1993).

<sup>182</sup> *See, e.g.*, *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 79 (D.C. Cir. 2015), *aff’d*, 580 U.S. 288, 309 (2017); *Prof’l Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 564 (D.C. Cir. 1982).

<sup>183</sup> *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.”).

<sup>184</sup> *See, e.g.*, *Fed. Election Comm’n v. NRA Pol. Victory Fund*, 513 U.S. 88, 98 (1994).



ratified.<sup>185</sup> Thus, some courts have held that agencies may ratify potentially invalid actions if an action does not meet the Vacancies Act’s definition of function or duty,<sup>186</sup> the official was serving under an agency-specific statute,<sup>187</sup> or the official falls within one of the statutory exceptions.<sup>188</sup> Nonetheless, there is not consensus on these points,<sup>189</sup> and there are open questions regarding when an agency action should be considered void or voidable.

These open questions may be clarified in future litigation. Congress could, if it so chose, add statutory language clarifying the consequences of violating the Vacancies Act. For example, Congress could amend the definition of “functions or duties” or clarify the consequences for those offices exempt from Section 3348’s enforcement mechanisms.<sup>190</sup> Congress could also amend the existing enforcement mechanisms, possibly by altering the reporting requirements or adding consequences for violations of the Vacancies Act.<sup>191</sup>

## Evolving Legal Issues

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

### Exclusivity of the Vacancies Act

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

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

(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity[.]<sup>192</sup>

<sup>185</sup> *FEC v. Legi-Tech*, 75 F.3d 704, 707 (D.C. Cir. 1996).

<sup>186</sup> *E.g.*, *Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. U.S. Dep’t of Homeland Sec.*, 107 F.4th 1064, 1076 (9th Cir. 2024); *Kajmowicz v. Whitaker*, 42 F.4th 13, 152 (3d Cir. 2022).

<sup>187</sup> *E.g.*, *Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 130 (E.D.N.Y. 2020). For discussion of the interaction between the Vacancies Act and agency-specific statutes governing acting service, see *infra* “Exclusivity of the Vacancies Act.” As that section discusses, a number of courts considered this issue in 2020 and 2021 in the context of acting service at the Department of Homeland Security.

<sup>188</sup> *E.g.*, *NLRB v. Newark Elec. Corp.*, 14 F.4th 152, 161 (2d Cir. 2021); *Midwest Terminals of Toledo Int’l, Inc. v. NLRB*, 783 Fed. Appx. 1, 7 (D.C. Cir. 2019). In contrast, the appeals court in *SW General, Inc. v. NLRB*, 796 F.3d 67, 79, 81 (D.C. Cir. 2015), *aff’d* 580 U.S. 288, 309 (2017), assumed that the disputed actions were voidable rather than void and considered but ultimately rejected application of the harmless error and de facto officer doctrines.

<sup>189</sup> See discussions *supra* “What Are the ‘Functions and Duties’ of an Office?” and *infra* “Exclusivity of the Vacancies Act.”

<sup>190</sup> See 5 U.S.C. § 3348.

<sup>191</sup> See, e.g., Securing Chain of Command Continuity Act, H.R. 6972, 118th Cong. § 2 (2024) (providing additional reporting requirements if an agency head who is a member of the National Security Council becomes medically incapacitated); S. 1761, 105th Cong. § 2 (1998) (providing that “[a]n individual who performs the duties of an office in any Executive agency . . . temporarily in excess of” the Vacancies Act’s time limits “may not receive pay for each day such duties are performed”).

<sup>192</sup> 5 U.S.C. § 3347(a).



Across the executive branch, there are many statutes that expressly address who will temporarily act for specified officials in the case of a vacancy.<sup>193</sup> The Senate report on an earlier version of the Vacancies Act identified about 40 agency-specific provisions that “would be retained by” the Act.<sup>194</sup> 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.<sup>195</sup> 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.”<sup>196</sup>

If there is an agency-specific statute designating a specific government official to serve as acting officer, the Vacancies Act will no longer be exclusive.<sup>197</sup> Even if the Vacancies Act does not *exclusively* apply to a specific position, though, that does not mean that the other statute *does* exclusively apply.<sup>198</sup> It is possible that both the agency-specific statute and the Vacancies Act may be available to temporarily fill a vacancy.<sup>199</sup> 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.”<sup>200</sup> A number of courts have held that this principle applies to the statute governing Attorney General vacancies quoted above, ruling that the President may invoke the Vacancies Act to name an acting official and override the statutory line of succession provided in the agency-specific statute.<sup>201</sup>

When two statutes simultaneously apply to authorize acting service, it may be unclear which statute governs in the case of a conflict. The Vacancies Act sets out a detailed scheme delineating three classes of governmental officials that may serve as acting officers<sup>202</sup> and limiting the duration of an acting officer’s service.<sup>203</sup> By contrast, agency-specific statutes tend to designate only one official to serve as acting officer<sup>204</sup> and often do not specify a time limit on that official’s service.<sup>205</sup> Accordingly, for example, if an acting officer is designated by the President to serve

<sup>193</sup> See, e.g., O’CONNELL, *supra* note 67, app. A at 74 (2019) (compiling agency-specific provisions).

<sup>194</sup> S. REP. NO. 105-250, at 16–17 (1998). The list is numbered 1–40, but is missing numbers 26 and 27.

<sup>195</sup> *Id.* at 16.

<sup>196</sup> 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).

<sup>197</sup> See 5 U.S.C. § 3347.

<sup>198</sup> See, e.g., *Hooks ex rel. NLRB v. Kitsap Tenant Support Servs.*, 816 F.3d 550, 556 (9th Cir. 2016); Designating an Acting Director of National Intelligence, 2019 OLC LEXIS 17, at \*6 (Op. O.L.C. Nov. 15, 2019).

<sup>199</sup> Temporary Filling of Vacancies in the Office of U.S. Attorney, 27 Op. O.L.C. 149, 149 (2003).

<sup>200</sup> S. REP. NO. 105-250, at 17 (1998).

<sup>201</sup> See, e.g., *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 356 F. Supp. 3d 109, 139 (D.D.C. 2019), *aff’d on other grounds*, 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam); see also *United States v. Castillo*, 772 Fed. Appx. 11, 13 n.5 (3d Cir. 2019) (collecting cases).

<sup>202</sup> 5 U.S.C. § 3345.

<sup>203</sup> *Id.* § 3346.

<sup>204</sup> 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., e.g., 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”).

<sup>205</sup> See S. REP. NO. 105-250, at 17 (1998); see also, e.g., *United States v. Guzek*, 527 F.2d 552, 560 (8th Cir. 1975) (ruling that official serving under an agency-specific statute “succeeded to all the powers of the office . . . without circumscription by the 30-day limitation” created by a prior version of Vacancies Act); *Su v. Coway USA, Inc.*, No. (continued...)

under the Vacancies Act but is not authorized to serve under the agency-specific statute, a potential conflict may exist between the two laws.<sup>206</sup> Similarly, a conflict may exist if an acting officer cites an agency-specific statute to serve beyond the time limits of the Vacancies Act.<sup>207</sup> If an official's service complies with only one of the two statutes that potentially authorize service, such a situation may prompt challenges to the authority of that acting official.<sup>208</sup>

At the same time, 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.”<sup>209</sup> So far, courts have tended to conclude that the Vacancies Act should operate concurrently with agency-specific statutes, and that government officials should be able to temporarily serve under either statute.<sup>210</sup> Where the two statutes coexist, the effect is that whichever statute the executive branch invokes is the controlling one.<sup>211</sup>

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.<sup>212</sup> 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.”<sup>213</sup> It also provided for a shorter term of acting service than the Vacancies Act.<sup>214</sup> The President, however, had invoked the Vacancies Act to designate an Acting General Counsel.<sup>215</sup> The court concluded that “the President is permitted to elect between these two statutory alternatives to designate” an acting officer.<sup>216</sup> Accordingly, the court rejected the

2:24-cv-08156-JLS-AJR, 2024 U.S. Dist. LEXIS 219798, at \*12 (C.D. Cal. Dec. 4, 2024) (similar). *But cf.*, e.g., 12 U.S.C. § 4512(f) (authorizing the designation of an acting Federal Housing Finance Agency Director who will serve “until the return of the Director, or the appointment of a successor”); 29 U.S.C. § 153(d) (“[N]o person . . . designated [to act as General Counsel of the NLRB] shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.”).

<sup>206</sup> See CRS Legal Sidebar LSB10036, *UPDATE: Who's the Boss at the CFPB?*, by Valerie C. Brannon and Jared P. Cole (2018) (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).

<sup>207</sup> See, e.g., *Matter of: U.S. Department of Labor—Legality of Service of Acting Secretary of Labor*, B-335451, 2023 U.S. Comp. Gen. LEXIS 260, at \*7–8 (Comp. Gen. Sept. 21, 2023) (concluding that Deputy Secretary of Labor could serve as Acting Secretary under 29 U.S.C. § 552 until successor is appointed).

<sup>208</sup> See, e.g., *Lower E. Side People's Fed. Credit Union v. Trump*, 289 F. Supp. 3d 568, 571 (S.D.N.Y. 2018) (citing procedural grounds to dismiss a suit that challenged 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).

<sup>209</sup> *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

<sup>210</sup> See, e.g., *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 356 F. Supp. 3d 109, 139 (D.D.C. 2019), *aff'd on other grounds*, 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam); *English v. Trump*, 279 F. Supp. 3d 307, 319 (2018); *United States v. Lucido*, 373 F. Supp. 1142, 1151 (E.D. Mich. 1974).

<sup>211</sup> See, e.g., *Lucido*, 373 F. Supp. at 1151; *English*, 279 F. Supp. 3d at 324.

<sup>212</sup> *Hooks ex rel. NLRB v. Kitsap Tenant Support Servs.*, 816 F.3d 550, 555 (9th Cir. 2016).

<sup>213</sup> 29 U.S.C. § 153(d).

<sup>214</sup> See *Hooks*, 816 F.3d at 555.

<sup>215</sup> *Id.* at 553.

<sup>216</sup> *Id.* at 556.

argument that because the officer’s designation did not comply with the agency-specific statute, “the appointment was necessarily invalid.”<sup>217</sup>

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.<sup>218</sup> A closer question may be raised when an agency-specific statute instead seems to expressly limit succession to a particular official.<sup>219</sup> The federal courts 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 CFPB Director.<sup>220</sup> The CFPB’s Deputy Director, Leandra English, filed suit,<sup>221</sup> arguing that she was the lawful Acting Director under an agency-specific statute providing that the CFPB’s Deputy Director “shall . . . serve as acting Director in the absence or unavailability of the Director.”<sup>222</sup> English argued that the mandatory, later-enacted agency-specific statute displaced the Vacancies Act.<sup>223</sup> 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.<sup>224</sup> 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.”<sup>225</sup>

In contrast, other statutes expressly displace the Vacancies Act. When there is a vacancy in many Inspector General offices, a statute provides that Section 3345(a) of the Vacancies Act “shall not apply.”<sup>226</sup> Instead, the statute outlines slightly different conditions for who may serve as Acting Inspector General, still “subject to the time limitations” of Section 3346.<sup>227</sup>

When officials serve under an agency-specific statute, they must comply with any requirements or limitations set out in that separate statute—and may not have to comply with Vacancies Act limitations.<sup>228</sup> For example, between August 2020 and January 2021, six different judicial

<sup>217</sup> *Id.*

<sup>218</sup> *See id.* at 555–56.

<sup>219</sup> *See, e.g.*, Plaintiff-Appellant’s Brief at 2–3, *English v. Trump*, No. 18-5007 (D.C. Cir. 2018), <http://guptawessler.com/wp-content/uploads/2018/01/English-v-Trump-Brief-1.30.pdf>.

<sup>220</sup> *English v. Trump*, 279 F. Supp. 3d 307, 314 (D.D.C. 2018).

<sup>221</sup> 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 (2018).

<sup>222</sup> 12 U.S.C. § 5491(b)(5).

<sup>223</sup> *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).

<sup>224</sup> *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.

<sup>225</sup> *Id.* at 319.

<sup>226</sup> 5 U.S.C. § 403 note. This provision governs “the Inspector General of an establishment [defined in 5 U.S.C. § 401(1)], the Special Inspector General for the Troubled Asset Relief Program, and the Special Inspector General for Pandemic Recovery.” *Id.* At least two other Inspectors General have similar provisions. *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 5203, 136 Stat. 3229–33 (2022).

<sup>227</sup> 5 U.S.C. § 403 note.

<sup>228</sup> *See, e.g.*, *Rop v. Fed. Hous. Fin. Agency*, 50 F.4th 562, 572 (6th Cir. 2022) (holding that an official serving under an (continued...))

opinions concluded that the Department of Homeland Security (DHS) violated the Homeland Security Act of 2002 (HSA) in designating an Acting DHS Secretary.<sup>229</sup> The HSA provides that the Deputy Secretary of Homeland Security is the Secretary’s “first assistant for purposes of the Vacancies Act.”<sup>230</sup> The HSA also states that, “notwithstanding” the Vacancies Act, the Secretary “may designate” a “further order of succession to serve as Acting Secretary.”<sup>231</sup> DHS Secretaries had invoked this HSA provision to designate a further order of succession, and several courts held that DHS acted impermissibly when the agency attempted to install an Acting Secretary outside the relevant line of succession.<sup>232</sup> At the same time, a few of these opinions rejected arguments alleging the Acting Secretary had also violated the time limits of the Vacancies Act, concluding that because the Acting Secretary was serving under the HSA, the Vacancies Act’s time restrictions did not apply.<sup>233</sup> Some have argued that lengthy service under agency-specific statutes violates the Appointments Clause of the U.S. Constitution—an issue discussed below.<sup>234</sup> Thus far, however, some courts have rejected those claims and allowed officials to serve indefinitely under agency-specific statutes that do not contain express time limits.<sup>235</sup>

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agency specific statute was not subject to any time limits); Social Security Administration—Legality of Service of Acting Commissioner, B-333543, slip op. at 1–2 (Comp. Gen. Feb. 1, 2022) (concluding the Vacancies Act’s time limitations and enforcement provisions did not apply to an Acting Commissioner of Social Security serving under the Social Security Act rather than the Vacancies Act). *But see, e.g.,* Nw. Immigrant Rights Project v. U.S. Citizenship & Immigration Servs., 496 F. Supp. 3d 31, 58–59 (D.D.C. 2020) (concluding 5 U.S.C. § 3348(d) might apply to an official serving under an agency-specific statute, so long as the vacant position is also covered by the Vacancies Act); *In re Acting Fed. Ins. Administrator’s Status & Auth.*, B-183012, 56 Comp. Gen. 761, 765 (Comp. Gen. 1977) (concluding that a Deputy Administrator could no longer act for the Administrator even though that was part of his duties because “the time has long since expired when anyone—whatever his title—may serve as Acting Administrator”).

<sup>229</sup> *Pangea Legal Servs. v. U.S. Dep’t of Homeland Sec.*, 512 F. Supp. 3d 966, 974 (N.D. Cal. 2021); *Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 131 (E.D.N.Y. 2020); *Nw. Immigrant Rights Project*, 496 F. Supp. 3d at 70; *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 535–36 (N.D. Cal. 2020); *CASA de Md., Inc. v. Wolf*, 486 F. Supp. 3d 928, 957 (D. Md. 2020); *La Clinica de la Raza v. Trump*, 477 F. Supp. 3d 951, 972 (N.D. Cal. 2020). *Accord* Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security, B-331650 (Comp. Gen. Aug. 14, 2020). Many of these judicial decisions involved requests for preliminary injunctions, and so the courts held only that the plaintiffs were *likely* to succeed on the merits of their claims arguing the acting appointments were improper.

<sup>230</sup> 6 U.S.C. § 113(a)(1)(A). The HSA further specifies that, “notwithstanding” the Vacancies Act, “the Under Secretary for Management shall serve as the Acting Secretary if “neither the Secretary nor Deputy Secretary is available to exercise the duties of the Office of the Secretary.” *Id.* § 113(g)(1).

<sup>231</sup> *Id.* § 113(g)(2).

<sup>232</sup> Specifically, after the Senate-confirmed Secretary resigned, an Acting Secretary claimed authority to act under a succession order that pertained to acting service in the event of a disaster or catastrophic emergency, but he was not authorized to serve under the succession order that applied in the event of the Secretary’s death, resignation, or inability to perform the functions of the Office. *See, e.g., Immigrant Legal Res. Ctr.*, 491 F. Supp. 3d at 535; *CASA de Md., Inc.*, 486 F. Supp. 3d at 957; *La Clinica de la Raza*, 477 F. Supp. 3d at 972.

<sup>233</sup> *Batalla Vidal*, 501 F. Supp. 3d at 130; *Immigrant Legal Res. Ctr.*, 491 F. Supp. 3d at 538; *CASA de Md., Inc.*, 486 F. Supp. 3d at 955.

<sup>234</sup> *Infra* “Constitutional Considerations.”

<sup>235</sup> *E.g., Rop v. Fed. Hous. Fin. Agency*, 50 F.4th 562, 571 (6th Cir. 2022) (rejecting the constitutional claim on its merits); *Bhatti v. Fed. Hous. Fin. Agency*, 15 F.4th 848, 853–54 (8th Cir. 2021) (concluding any constitutional error was cured by ratification); *cf. Gaiambrone v. Comm’r Soc. Sec.*, No. 23-2988, 2024 U.S. App. LEXIS 18167, at \*4–5 (3d Cir. July 24, 2024) (declining to hold service under Vacancies Act violates Constitution but observing that scenario where acting official serves under a statute without time limitations might be “distinguishable”). In one opinion, OLC stated that although an acting official was serving under an agency-specific statute with no express time limit, his service “may not continue indefinitely,” and the President must submit a nomination “within a reasonable time.” Status of the Acting Director, Office of Management and Budget, 1 Op. O.L.C. 287, 287 (1977); *see also* Designating an Acting Attorney General, 2018 OLC LEXIS 9, at \*47 (Op. O.L.C. Nov. 14, 2018) (reaffirming the conclusion that acting officers should not serve beyond a reasonable time).

Further, courts disagreed in the DHS cases about whether the Vacancies Act prevented the ratification of noncompliant actions. One trial court ruled that because the Acting Secretary was not serving under the Vacancies Act, the Act's no-ratification provision did not apply: that is, a properly serving official could ratify his actions.<sup>236</sup> However, two later trial court decisions concluded that Section 3348 did bar the ratification of actions taken by the improperly acting official, because the Vacancies Act still applied to the vacant *office*, even if the specific acting official was purportedly designated under the HSA.<sup>237</sup>

As the foregoing cases illustrate, congressional silence on the relationship between agency-specific provisions and the Vacancies Act can leave courts with difficult questions for resolution. Congress can itself resolve tensions between the Vacancies Act and agency-specific statutes by clarifying when these statutes apply. For example, the HSA states that certain of the statutory provisions governing acting service in the office of the Secretary of Homeland Security apply “notwithstanding” the Vacancies Act,<sup>238</sup> indicating an intent to render the Vacancies Act inapplicable under the relevant circumstances.<sup>239</sup> To take another example, the statute governing vacancies in the office of the 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.”<sup>240</sup> This statute expressly clarifies—in at least one respect—how the two statutes interact.<sup>241</sup> Congress could also amend the Vacancies Act itself—for example, to clarify that an agency-specific statute containing a mandatory provision for acting service not only renders the Vacancies Act nonexclusive, but also inapplicable.<sup>242</sup>

<sup>236</sup> *Batalla Vidal*, 501 F. Supp. 3d at 130 (“Because Mr. Wolf did not assume the Acting Secretary role under Section 3345, Sections 3346 and 3348 do not apply to him.”). That court ultimately concluded, however, that the ratification was likely ineffective on its merits. *Id.* at 133. *Cf. Nw. Immigrant Rights Project v. U.S. Citizenship & Immigration Servs.*, 496 F. Supp. 3d 31, 69–70 (D.D.C. 2020) (concluding that the ratification likely did render the initial errors harmless, assuming that a new succession order was valid, but later concluding that the succession order was not valid because it was issued by an Acting Secretary without authority to designate an order of succession).

<sup>237</sup> *Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11, 22 n.8 (D.D.C. 2022); *Behring Reg'l Ctr. LLC v. Wolf*, 544 F. Supp. 3d 937, 946 (N.D. Cal. 2021). *Cf. Nw. Immigrant Rights Project*, 496 F. Supp. 3d at 59 (concluding that Section 3348 could apply to an Acting Secretary serving under the HSA, but holding that the no-ratification provision did not apply to a duty that had been delegated prior to the vacancy).

<sup>238</sup> 6 U.S.C. § 113(g)(1) (“Notwithstanding chapter 33 of title 5, the Under Secretary for Management shall serve as the Acting Secretary if . . . neither the Secretary nor Deputy Secretary is available to exercise the duties of the Office of the Secretary.”); *id.* § 113(g)(2) (“Notwithstanding chapter 33 of title 5, the Secretary may designate such other officers of the Department in further order of succession to serve as Acting Secretary.”).

<sup>239</sup> *See, e.g., Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 537 (N.D. Cal. 2020); Designating an Acting Director of National Intelligence, 2019 OLC LEXIS 17, at \*8 (Op. O.L.C. Nov. 15, 2019). *See generally, e.g., Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) (saying a “notwithstanding” clause “clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other section”).

<sup>240</sup> 28 U.S.C. § 508.

<sup>241</sup> *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) (stating 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)).

<sup>242</sup> *See, e.g., Accountability for Acting Officials Act*, H.R. 6689, 116th Cong. § 2(g) (2020) (“[A]ny statutory provision . . . that contains a non-discretionary order or directive to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity shall be the exclusive means for temporarily authorizing an acting official to perform the functions and duties of such office.”); Appointments Clause Enforcement Act of 2020, H.R. 8481, 116th Cong. § 2(e) (2020) (similar).



## Delegation of Duties

Ambiguity in the definition of “function or duty” has created competing interpretations of what functions are covered by the Vacancies Act, as explained above.<sup>243</sup> The Act defines a covered “function or duty” to include only statutory or regulatory duties that are “required . . . to be performed by the applicable officer (and only that officer).”<sup>244</sup> Some courts have interpreted the Vacancies Act to encompass only the *nondelegable* functions and duties of a vacant advice-and-consent position.<sup>245</sup> Others have interpreted the Act to exclude functions and duties that have actually been delegated to another official within the lookback period.<sup>246</sup>

Under either view, a number of courts, GAO, and OLC have concluded that this definition allows agency officials to perform some lawfully delegated duties of a vacant office without violating the Vacancies Act.<sup>247</sup> The law therefore may allow other officials to perform certain duties even if the Vacancies Act’s time limits have run out, or even if the agency official is not qualified to serve under the Vacancies Act.<sup>248</sup> Agencies might designate officials as “performing the duties of” a vacant position when the official is performing those duties pursuant to an agency delegation rather than a statute authorizing acting service.<sup>249</sup> Delegations can take various forms. For instance, some agencies have standing delegations of specific duties, and agencies may sometimes make delegations of all of an office’s duties in the event of a vacancy.<sup>250</sup>

Although the Vacancies Act might not foreclose delegation, other statutes or regulations might affect the analysis of whether a particular delegation or a particular exercise of delegated authority is lawful.<sup>251</sup> As a basic principle, a person making a delegation must possess the authority to perform the act.<sup>252</sup> Courts might also need to consider whether a given duty is delegable, an inquiry that frequently involves the organic statutes that grant authority to federal officials. Courts usually presume that statutes allow agency officials to further subdelegate authority to subordinates “absent affirmative evidence of a contrary congressional intent.”<sup>253</sup> The

<sup>243</sup> See 5 U.S.C. § 3348; *supra* “What Are the ‘Functions and Duties’ of an Office?”

<sup>244</sup> 5 U.S.C. § 3348(a)(2).

<sup>245</sup> See, e.g., *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 32 (D.D.C. 2020).

<sup>246</sup> See, e.g., *Nw. Immigrant Rights Project v. U.S. Citizenship & Immigr. Servs.*, 496 F. Supp. 3d 31, 59 (D.D.C. 2020); *supra* notes 55 to 57 and accompanying text.

<sup>247</sup> E.g., *Kajmowicz v. Whitaker*, 42 F.4th 138, 148 (3d Cir. 2022); *Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. U.S. Dep’t of Homeland Sec.*, 107 F.4th 1064, 1076 (9th Cir. 2024); *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1336 (Fed. Cir. 2022); Fed. Vacancies Reform Act of 1998 – Assistant Attorney Gen. for the Office of Legal Counsel, U.S. Dep’t of Justice, B-310780, 2008 U.S. Comp. Gen. LEXIS 101, at \*12–13 (Comp. Gen. June 13, 2008); Under Secretary of the Treasury for Enforcement, 26 Op. O.L.C. 230, 233–34 (2002).

<sup>248</sup> See, e.g., Guidance on Application of Fed. Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 72 (1999).

<sup>249</sup> See, e.g., Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998: Assistant Secretary for Economic Policy, U.S. Department of the Treasury, B-335739, 2024 U.S. Comp. Gen. LEXIS 37, at \*6 & n.10 (Comp. Gen. Feb. 8, 2024). See also, e.g., Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533, 558–63 (2020) (discussing agency delegations).

<sup>250</sup> See, e.g., O’CONNELL, *supra* note 67, at 28–37 (giving examples of agency delegations).

<sup>251</sup> See, e.g., *Utah Ass’n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1196 (D. Utah 2004) (considering the scope of an executive order delegating “authority otherwise vested” in the President to perform certain functions); Action for Boston Cmty. Dev. v. Shalala, 983 F. Supp. 222, 228–29 (D. Mass. 1997) (considering whether agency had offered sufficient evidence to demonstrate Secretary of Health and Human Services properly delegated decisionmaking authority to regional administrator).

<sup>252</sup> See RESTATEMENT (THIRD) OF AGENCY § 3.04(1) (AM. L. INST. 2006) (“An individual has capacity to act as principal . . . if, at the time the agent takes action, the individual would have capacity if acting in person.”).

<sup>253</sup> *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004). See also, e.g., *United States v. Mango*, 199 F.3d (continued...)

Supreme Court has recognized that an agency head may have so many statutory responsibilities that it would be unreasonable to think that Congress intended the head to personally perform—or even oversee the performance of—every single assigned task.<sup>254</sup> In the words of the Court, internal agency delegation may be “necessary for prompt and expeditious action” when delay could cause “injury beyond repair.”<sup>255</sup> Thus, one federal appeals court observed that most duties will be delegable, which can render the Vacancies Act’s scope “vanishingly small.”<sup>256</sup>

At the same time, any delegation must be lawful on its own merits, and the official must act within the scope of the delegation.<sup>257</sup> As discussed above,<sup>258</sup> a number of trial courts held that officials purportedly acting as DHS Secretary were not authorized to serve under an agency delegation order.<sup>259</sup> In addition, the general presumption of delegability may be overcome in certain circumstances. A statute may foreclose “redelegation when its text, ‘fairly read’ in light of the statutory purpose, evinces a congressional desire to render a function or duty exclusive and non-redelegable.”<sup>260</sup> A statute that expressly prohibited delegation of a duty—for example, stating that a duty “‘may only be delegated to,’ ‘may not [be] delegate[d],’ ‘may not be redelegated,’ ‘shall not be redelegated,’ or is ‘not subject to delegation,’”—would likely render that duty nondelegable.<sup>261</sup> Some statutes may implicitly preclude delegation.<sup>262</sup> For example, courts have recognized that some statutes may limit the class of officers to whom a duty is delegable, meaning by implication that the duties are not delegable outside of that specified class.<sup>263</sup>

85, 91–92 (2d Cir. 1999) (concluding, in the face of statutory ambiguity, that subdelegation is permissible); *Loma Linda Univ. v. Schweiker*, 705 F.2d 1123, 1128 (9th Cir. 1983) (“Express statutory authority for delegation is not required . . .”). *But see* *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 361 (1942) (holding officer could not delegate subpoena power where 29 U.S.C. § 209 and 15 U.S.C. § 49 provided that the officer “shall have power” of subpoena); Stephen Migala, *Delegation Inside the Executive Branch*, 24 NEV. L.J. 147, 149 (2023) (describing this redelegation presumption as “mistaken” and “somewhat recent”). In *Cudahy Packing Co.*, the Supreme 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.” 315 U.S. 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.

<sup>254</sup> *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 122–23 (1947).

<sup>255</sup> *Id.*

<sup>256</sup> *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1337 (Fed. Cir. 2022).

<sup>257</sup> *See, e.g., United States v. Libby*, 429 F. Supp. 2d 27, 33–34 (D.D.C. 2006) (discussing limitations on a delegation); *cf. Stand Up for Cal! v. U.S. Dep’t of Interior*, 994 F.3d 616, 625 (D.C. Cir. 2021) (rejecting arguments that delegation was invalid after reviewing delegation procedures).

<sup>258</sup> *Supra* note 229 and accompanying text.

<sup>259</sup> *See, e.g., CASA de Md., Inc. v. Wolf*, 486 F. Supp. 3d 928, 959 (D. Md. 2020); *Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 132 (E.D.N.Y. 2020); *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 535–36 (N.D. Cal. 2020). The plaintiffs in these cases sought preliminary injunctions, and the courts found they were likely to succeed on the merits.

<sup>260</sup> *Stand Up for Cal! v. U.S. Dep’t of Interior*, 994 F.3d 616, 622 (D.C. Cir. 2021) (quoting *United States v. Giordano*, 416 U.S. 505, 514 (1974)).

<sup>261</sup> *Stand Up for Cal! v. U.S. Dep’t of Interior*, 298 F. Supp. 3d 136, 143 (D.D.C. 2018), *aff’d*, 994 F.3d 616. *See, e.g., 6 U.S.C. § 681d(c)(3)* (“The authority of the Director [of the Cybersecurity and Infrastructure Security Agency] to issue a subpoena under this subsection may not be delegated.” (emphasis added)); 25 U.S.C. § 2706(a) (“The [National Indian Gaming] Commission shall have the power, not subject to delegation . . .” (emphasis added)).

<sup>262</sup> *Cf., e.g., Fed. Vacancies Reform Act of 1998 - Assistant Attorney Gen. for the Office of Legal Counsel, U.S. Dep’t of Justice*, B-310780, 2008 U.S. Comp. Gen. LEXIS 101, at \*12 (Comp. Gen. June 13, 2008) (saying that finding nondelegability “requires language that clearly signals duties or functions that cannot be delegated, such as providing final approval or final decisionmaking authority in a particular position”).

<sup>263</sup> *See, e.g., United States v. Giordano*, 416 U.S. 505, 507–08 (1974) (holding “Congress did not intend the power to (continued...)”).



To take another example, one trial court ruled in February 2019 that a statute implicitly precluded the delegation of a specific duty in the context of a scheme governing an agency appeals process.<sup>264</sup> Federal law authorizes the Secretary of the Interior to acquire land in trust “for the purpose of providing land for Indians.”<sup>265</sup> Pursuant to agency regulations delegating this authority, the Assistant Secretary-Indian Affairs (AS-IA) assumed jurisdiction over an administrative appeal reviewing the agency’s decision to take property into trust at the request of the Santa Ynez Band of Chumash Mission Indians.<sup>266</sup> However, while the internal appeal was pending, the AS-IA resigned.<sup>267</sup> The Principal Deputy Assistant Secretary-Indian Affairs (PDAS) initially served as Acting AS-IA as the first assistant under the Vacancies Act, but “reverted” to his position as PDAS after 210 days.<sup>268</sup> After the expiration of the 210-day period, the PDAS issued a decision rendering the land acquisition final, citing “the authority delegated to [the PDAS] by 25 C.F.R. § 2.20(c).”<sup>269</sup> This regulation authorized the AS-IA to issue decisions in administrative appeals, but also allowed the AS-IA to assign decisionmaking authority to “a Deputy.”<sup>270</sup> The regulation further said that if a decision “is signed by the [AS-IA], it shall be final . . . and effective immediately.”<sup>271</sup> By contrast, if a Deputy signed the decision, the regulation provided that such a decision could be appealed to the Bureau of Indian Affairs.<sup>272</sup>

As framed by the trial court, the relevant question was therefore “whether 25 C.F.R. § 2.20(c) exclusively reserves with the [AS-IA] the authority to issue *final* decisions . . . , or whether the [AS-IA’s] authority to issue final appeals decisions is delegable to a Deputy.”<sup>273</sup> Although the regulation did not expressly preclude delegation of this authority,<sup>274</sup> the court nonetheless held that the duty to render final decisions was exclusive to the AS-IA and nondelegable for the purposes of the Vacancies Act.<sup>275</sup> The court observed that the regulation expressly stated that if a decision were “signed by a Deputy to the [AS-IA],” it would be subject to further appeal, meaning that “*only*” the AS-IA “may issue a final decision on the appeal.”<sup>276</sup> The court further concluded that, in light of “the history and purpose behind the [AS-IA’s] authority over appeals,” the regulation was “intended to restrict the [AS-IA’s] permissible delegation authority.”<sup>277</sup> Finally, the court looked to the nature of the challenged function and inferred that the agency

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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”).

<sup>264</sup> *Crawford-Hall v. United States*, 394 F. Supp. 3d 1122, 1137 (C.D. Cal. 2019).

<sup>265</sup> 25 U.S.C. § 5108.

<sup>266</sup> *Crawford-Hall*, 394 F. Supp. 3d at 1129.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> 25 C.F.R. § 2.20(c) (2018).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Crawford-Hall*, 394 F. Supp. 3d at 1136 (emphasis added).

<sup>274</sup> *See id.* at 1143.

<sup>275</sup> *Id.* at 1137.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 1139.

“contemplated that . . . [this] authority . . . would be used with restraint,” suggesting that the duty should not “be freely delegable.”<sup>278</sup>

A different federal district court decision from September 2020 held that a broader agency delegation violated the Vacancies Act based on the specific factual circumstances.<sup>279</sup> That case involved a series of time-limited orders delegating the duties of 10 positions within the Department of the Interior, including the Director of the U.S. Bureau of Land Management (BLM).<sup>280</sup> The initial order issued by the outgoing Secretary of the Interior in January 2017 operated temporarily, with a fixed end date.<sup>281</sup> Various Secretaries, both acting and Senate-confirmed, amended and extended the delegation order “thirty-two times over the next three years.”<sup>282</sup> In May 2020, the official who was exercising the duties of the BLM Director pursuant to the amended order, William Perry Pendley, issued a new memo delegating to himself indefinitely the authority to perform all of the Director’s duties.<sup>283</sup> Once his authority to act under the Secretary’s order expired, Pendley performed the delegated duties of the BLM Director pursuant to this memo.<sup>284</sup>

Montana officials sued BLM in July 2020, arguing that Pendley was unlawfully serving as Acting BLM Director.<sup>285</sup> The district court agreed with the challengers, saying that the agency’s attempt to designate Pendley as “an ‘official performing the Director’s duties under the Secretary’s delegation’” rather than the “‘Acting Director’” was merely “wordplay,” representing “a distinction without a difference.”<sup>286</sup> The court looked to two factors to conclude that Pendley violated the Vacancies Act.<sup>287</sup> The court noted that, first, “Pendley actually exercised powers reserved to the BLM Director,” and second, “the Executive Branch repeatedly presented Pendley as Acting BLM Director.”<sup>288</sup> The duration of the delegations also seemed to be a factor in the court’s decision, with the court stating, “[t]he President cannot shelter unconstitutional ‘temporary’ appointments for the duration of his presidency through a matryoshka doll of delegated authorities.”<sup>289</sup> This decision was fact-specific, and it remains to be seen whether any other courts will similarly look past agency designations to conclude that officials exercising delegated authority are in fact serving as acting officials who must comply with the Vacancies Act.<sup>290</sup>

<sup>278</sup> *Id.* at 1147.

<sup>279</sup> *See* *Bullock v. U.S. Bureau of Land Mgmt.*, 489 F. Supp. 3d 1112, 1126 (D. Mont. 2020).

<sup>280</sup> *Id.* at 1118.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 1126–27.

<sup>285</sup> *Id.* at 1119.

<sup>286</sup> *Id.* at 1125, 1127.

<sup>287</sup> *Id.* at 1126–27.

<sup>288</sup> *Id.* at 1128.

<sup>289</sup> *Id.* at 1126. The court also noted that other courts had found “recent” violations of the Vacancies Act in other executive offices. *Id.*

<sup>290</sup> *But see* *Pub. Emps. for Env’t Resp. v. Nat’l Park Serv.*, 605 F. Supp. 3d 28, 47 (D.D.C. 2022) (agreeing with *Bullock*’s interpretation of the Vacancies Act and ruling Reorganization Plan No. 3 of 1950 “does not allow the Secretary [of the Interior] to evade the FVRA by ‘delegating’ the entirety of the duties and functions for an appointment-and-confirmation office to an inferior official”); *In re Acting Fed. Ins. Administrator’s Status & Auth.*, B-183012, 56 Comp. Gen. 761, 764 (Comp. Gen. 1977) (“Once the period in which he may legally perform those duties has expired, any redelegation to another position—particularly if the other position is occupied by the same man who can no longer serve as Administrator—would seem a patent circumvention of the Vacancies Act.”).

Some have argued that orders delegating all of an office's functions indefinitely may be particularly problematic because Congress intended to stop the executive branch practice of using so-called vesting-and-delegation statutes to avoid earlier iterations of the Vacancies Act.<sup>291</sup> Section 3347 of the current Vacancies Act states that a statute "providing general authority to 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 displace the Vacancies Act as the exclusive authority for acting service.<sup>292</sup> Some have argued that reading the definition of "function or duty" to allow agencies to indefinitely delegate all the duties of a vacant office renders this provision effectively "meaningless."<sup>293</sup> Nonetheless, as discussed, a number of courts have concluded that delegable duties are not within the scope of the Vacancies Act.<sup>294</sup> Indefinite or lengthy service pursuant to a delegation can also raise constitutional issues, as discussed in the next section of this report.<sup>295</sup>

If Congress were concerned about agencies delegating duties of vacant offices, it could amend either the Vacancies Act or the organic acts creating those duties. For instance, Congress could amend the definition of "function or duty" in the Vacancies Act to prohibit delegation once an office becomes vacant.<sup>296</sup> Congress could also enact other statutory limitations on the ability of certain officers to delegate their authority.<sup>297</sup> There are already a number of statutes that grant authority to executive branch officials but expressly provide that those authorities may not be delegated, or may only be delegated to specific officials.<sup>298</sup> Beyond placing additional substantive limitations on the *types* of duties that are delegable, Congress could also create procedural limitations on the *way* in which duties may be delegated.<sup>299</sup> For example, some statutes require delegations to be in writing,<sup>300</sup> while others provide that duties may only be delegated if certain conditions are met.<sup>301</sup>

<sup>291</sup> See Mendelson, *supra* note 249, at 560. Some of the relevant legislative history is discussed *supra* note 27.

<sup>292</sup> 5 U.S.C. § 3347(b).

<sup>293</sup> Lauren Shapiro, Note, *Legal Constraints on Executive Power to Manage Agency Vacancies*, 2021 H. J. ON LEGIS. ONLINE 1, 4 (2021).

<sup>294</sup> *E.g.*, *Kajmowicz v. Whitaker*, 42 F.4th 138, 148–49 (3d Cir. 2022); *Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. U.S. Dep't of Homeland Sec.*, 107 F.4th 1064, 1076 (9th Cir. 2024); *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1336 (Fed. Cir. 2022). For example, one court maintained that "competing narratives in the legislative history cannot alter the plain language of the statute." *Arthrex, Inc.*, 35 F.4th at 1337.

<sup>295</sup> *But see, e.g., Arthrex, Inc.*, 35 F.4th at 1335 (rejecting argument that service under a delegation violated the Appointments Clause because it was unlimited, stating that service was "limited to the period" of the vacancy).

<sup>296</sup> See 5 U.S.C. § 3348. As discussed, however, at least one district court held that the Vacancies Act already prohibits the performance of delegated duties unless the delegation complied with the 180-day lookback period. *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 34 (D.D.C. 2020).

<sup>297</sup> 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.").

<sup>298</sup> See, *e.g.*, 21 U.S.C. § 360c(i)(1)(E)(iii) ("The responsibilities of the Director under this subparagraph may not be delegated."); 26 U.S.C. § 7701(a)(11)(A) ("The term 'Secretary of the Treasury' means the Secretary of the Treasury, personally, and shall not include any delegate of his."); see also *supra* note 261.

<sup>299</sup> 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").

<sup>300</sup> 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.").

<sup>301</sup> See, *e.g.*, P.L. 104-53, § 211, 109 Stat. 468, 535 (1995) (transferring certain functions of Comptroller General to (continued...))

## Constitutional Considerations

Some have questioned whether the Vacancies Act is consistent with the U.S. Constitution's Appointments Clause, at least with respect to particular types of acting service.<sup>302</sup> As explained below, however, courts have so far rejected such constitutional challenges. The Appointments Clause requires "Officers of the United States" to be appointed through specific procedures: as a general rule, presidential nomination and Senate confirmation.<sup>303</sup> However, while *principal* officers may only be appointed through Senate confirmation, Congress can vest the appointment of "*inferior* Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments."<sup>304</sup>

Accordingly, to determine whether an official's appointment complied with the Appointments Clause, courts ask whether the official is a principal officer, inferior officer, or a "non-officer employee."<sup>305</sup> The Supreme Court has said that a federal official is a principal or inferior officer subject to the Appointments Clause, rather than a mere employee, if the official (1) performs duties that are "continuing and permanent, not occasional or temporary"<sup>306</sup>; and (2) exercises "significant authority pursuant to the laws of the United States."<sup>307</sup> To distinguish a principal officer from an inferior officer, the Supreme Court asks whether the officer's "work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate."<sup>308</sup> Stated another way, the relevant question is whether the officer has a "superior other than the President."<sup>309</sup>

Some have argued that temporary service under the Vacancies Act might violate the Appointments Clause by allowing government officials to act as "Officers of the United States" absent appointment through the proper constitutional processes.<sup>310</sup> Justice Thomas, for example, has expressed this concern.<sup>311</sup> An office that is generally filled through Senate confirmation will likely have statutory duties that may qualify as "significant authority."<sup>312</sup> Acting officials performing these continuing, significant duties—such as issuing "a final decision binding the

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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").

<sup>302</sup> See, e.g., *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 311 (2017) (Thomas, J., concurring).

<sup>303</sup> U.S. CONST. art. II, § 2, cl. 2. See generally CRS Report R44083, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, by Henry B. Hogue and Maeve P. Carey (2021).

<sup>304</sup> U.S. CONST. art. II, § 2, cl. 2 (emphasis added); see also, e.g., *Edmond v. United States*, 520 U.S. 651, 662–63 (1997) (discussing distinction between principal and inferior officers).

<sup>305</sup> See *Lucia v. SEC*, 585 U.S. 237, 245 (2018).

<sup>306</sup> *United States v. Germaine*, 99 U.S. 508, 511–12 (1878).

<sup>307</sup> *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam).

<sup>308</sup> *Edmond*, 520 U.S. at 663. Cf. *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988) (relying on four factors to conclude that an official was an inferior officer: that the official (1) was "subject to removal by a higher Executive Branch official"; (2) "perform[ed] only certain, limited duties"; (3) held an office that was "limited in jurisdiction"; and (4) held an office that was "limited in tenure").

<sup>309</sup> *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 315 (2017) (Thomas, J., concurring).

<sup>310</sup> E.g., *Patrick v. Whitaker*, 426 F. Supp. 3d 182, 184–85 (E.D.N.C. 2019) (noting plaintiff's argument "that Mr. Whitaker's designation as Acting Attorney General violated the Appointments Clause"); Joshua L. Stayn, Note, *Vacant Reform: Why the Federal Vacancies Reform Act of 1998 Is Unconstitutional*, 50 DUKE L.J. 1511, 1513 (2001).

<sup>311</sup> *SW Gen., Inc.*, 580 U.S. at 316.

<sup>312</sup> *Id.* at 314. See also, e.g., *Nw. Immigrant Rights Project v. U.S. Citizenship & Immigr. Servs.*, 496 F. Supp. 3d 31, 64–65 (D.D.C. 2020) ("[T]he Acting Secretary of the Department undoubtedly exercises significant governmental authority[.]").

Executive Branch”<sup>313</sup>—might thereby qualify as officers subject to constitutional appointment procedures.<sup>314</sup> If their performance of those duties is not supervised by anyone other than the President, they might even be viewed as principal officers.<sup>315</sup> If acting officials could be considered principal officers when they perform a principal officer’s duties, they would have to be appointed through Senate confirmation.<sup>316</sup> Under the Vacancies Act, however, acting officials instead serve pursuant to the operation of the statute or presidential designation alone.<sup>317</sup> Thus, the Vacancies Act might allow inferior officers or even non-officer employees to perform the duties of principal or inferior officers.

A number of federal courts have concluded that officials temporarily acting under the Vacancies Act did not violate the Appointments Clause.<sup>318</sup> A few different theories have been offered to explain why acting service authorized under the Vacancies Act or an agency-specific statute does not violate the Appointments Clause, although some of these theories may justify only certain categories of service.

First, for some officers who have already been appointed in accordance with the Appointments Clause, acting service could be seen as a conditional duty of the office to which they were originally appointed.<sup>319</sup> For example, a statute outlining the duties of the Senate-confirmed Deputy Secretary of Defense states that the Deputy will “act for, and exercise the powers of” the Secretary of Defense if the Secretary “dies, resigns, or is otherwise unable to perform the functions and duties of the office.”<sup>320</sup> Under these circumstances, acting service can be seen as a contingent duty of the home office—a duty that the President and Congress were aware of when appointing the Deputy Secretary.<sup>321</sup> This argument would justify acting service from Senate-confirmed officers or, if acting officials are inferior officers, from officers who were appointed by the President or a department head, so long as acting service is an existing duty of the acting official’s home position.

This interpretation could thus raise the question of when acting service qualifies as a duty of the office. In one opinion, OLC argued that the Vacancies Act makes acting service “part and parcel of the office” for *all* officers appointed after the enactment of the Vacancies Act, suggesting that the provisions authorizing acting service could be seen as creating a conditional duty for any

<sup>313</sup> *United States v. Arthrex, Inc.*, 594 U.S. 1, 23 (2021).

<sup>314</sup> *See SW Gen., Inc.*, 580 U.S. at 313 n.3.

<sup>315</sup> *See id.* at 315; *see also* Freytag v. Comm’r, 501 U.S. 868, 882 (1991) (“Special trial judges are not inferior officers for purposes of some of their duties . . . , but mere employees with respect to other responsibilities. The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution.”).

<sup>316</sup> *See SW Gen., Inc.*, 580 U.S. at 316.

<sup>317</sup> *See* 5 U.S.C. § 3345. *See* E. Garrett West, Note, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 219 (2018) (discussing the “automatic-promotion mechanism” in the context of a first assistant who is an inferior officer performing the duties of a principal office).

<sup>318</sup> *See, e.g., United States v. Smith*, 962 F.3d 755, 763 (4th Cir. 2020) (holding that Acting Attorney General serving under the Vacancies Act did not violate the Appointments Clause); *United States v. Castillo*, 772 Fed. Appx. 11, 13 n.5 (3d Cir. 2019) (collecting cases reaching the same conclusion). *But see* Patrick v. Whitaker, 426 F. Supp. 3d 182, 186 (E.D.N.C. 2019) (“The Court is inclined to agree with plaintiff that the President’s designation of Mr. Whitaker as a principal officer pursuant to the [Vacancies Act] ‘raises grave constitutional concerns . . .’ However, because the Court concludes that plaintiff lacks standing, it dismisses his claims.” (quoting *SW Gen., Inc.*, 580 U.S. at 313)).

<sup>319</sup> *See, e.g., West, supra* note 317, at 219.

<sup>320</sup> 10 U.S.C. § 132(b).

<sup>321</sup> *See, e.g., Ben Miller-Gootnick*, Note, *Boundaries of the Federal Vacancies Reform Act*, 56 HARV. J. ON LEGIS. 459, 491 n.163 (2019).



covered offices.<sup>322</sup> One court suggested that the Appointments Clause was “not implicated” when the President designated a career appointee to serve as the Acting Commissioner of Social Security.<sup>323</sup> Citing Supreme Court cases that allowed Congress to assign new, “germane” duties to Senate-confirmed officers,<sup>324</sup> the court said that a presidential directive under the Vacancies Act permissibly “expanded” the official’s powers.<sup>325</sup>

Another argument potentially justifying acting service for a broad category of officials is based on Supreme Court cases suggesting that *temporary* performance of duties may be permissible.<sup>326</sup> Specifically, courts have cited a Supreme Court case from the late 1800s for the proposition that officials temporarily serving in a continuing office should be considered, at most, inferior officers who may be appointed by the President or a department head acting alone.<sup>327</sup> In *United States v. Eaton*, the Supreme Court held that it did not violate the Appointments Clause for a vice-consul appointed by the Secretary of State to “temporarily perform[] the functions of the consular office” during the illness of the consul-general.<sup>328</sup> The Court said that where “the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official.”<sup>329</sup> *Eaton* suggests that the Court views temporary acting service differently than the permanent performance of duties.<sup>330</sup>

Given that the Supreme Court has approved of acting service in only one case, questions have arisen as to how far *Eaton* extends, and when an acting official is performing duties “for a limited time and under special and temporary conditions.”<sup>331</sup> *Eaton* itself involved an inferior officer performing the duties of his superior under a statutory authorization while the superior was ill.<sup>332</sup>

<sup>322</sup> Designation of Acting Director of the Office of Management and Budget, 27 Op. O.L.C. 121, 122 n.3 (2003); *see also* 5 U.S.C. § 3345(a)(2) (“[T]he President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity . . .”).

<sup>323</sup> *Fortin v. Comm’r of Soc. Sec.*, 112 F.4th 411, 421 (6th Cir. 2024).

<sup>324</sup> *Id.* at 420; *Shoemaker v. United States*, 147 U.S. 282, 301 (1893) (holding that Congress could assign new duties to a previously confirmed officer so long as the new duties were germane to the office).

<sup>325</sup> *Fortin*, 112 F.4th at 421.

<sup>326</sup> *Cf. Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (holding that a merchant appraiser who “acts only occasionally and temporarily” was not a constitutional officer); *United States v. Germaine*, 99 U.S. 508, 512 (1878) (holding that a surgeon who exercised “occasional and intermittent” duties, acting only “when called on . . . in some special case” was not a constitutional officer). However, acting service involves the temporary performance of *permanent* duties established by law, in a way that is potentially distinguishable from the *temporary* duties at issue in those cases.

<sup>327</sup> *E.g.*, *Rop v. Fed. Hous. Fin. Agency*, 50 F.4th 562, 571 (6th Cir. 2022); *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1334 (Fed. Cir. 2022); *United States v. Smith*, 962 F.3d 755, 764 (4th Cir. 2020); *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 356 F. Supp. 3d 109, 148 (D.D.C. 2019), *aff’d on other grounds*, 920 F.3d 1, 12 (D.C. Cir. 2019) (*per curiam*).

<sup>328</sup> *United States v. Eaton*, 169 U.S. 331, 343 (1898). A statute provided that vice-consuls “shall be substituted, temporarily, to fill the places of consuls-general . . . when they shall be temporarily absent.” *Id.* at 336.

<sup>329</sup> *Id.* at 343.

<sup>330</sup> *See also, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 672 (1988) (holding that an independent counsel appointed under the Ethics in Government Act of 1978 was an inferior officer that could permissibly be appointed by a court, and noting, among other factors, that the office was “limited in tenure,” citing *Eaton*); *United States v. Arthrex, Inc.*, 594 U.S. 1, 22 (2021) (citing *Eaton* in discussing historical precedent for inferior officers exercising “limited power under ‘special and temporary conditions’”).

<sup>331</sup> *Eaton*, 169 U.S. at 343. In *SW General, Inc.*, Justice Thomas distinguished *Eaton* by noting that the official serving as acting General Counsel had “served for more than three years in an office limited by statute to a 4-year term, and he exercised all of the statutory duties of that office,” saying that there was “nothing ‘special and temporary’ about Solomon’s appointment.” *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 313 n.3 (2017) (Thomas, J., concurring).

<sup>332</sup> *Eaton*, 169 U.S. at 343.

As an initial point, although contrary to some court rulings, some scholars have argued that because *Eaton* involved a temporary absence—an illness—it should not be interpreted to authorize an inferior officer to fill a permanent vacancy in a principal office.<sup>333</sup>

Another question is which officials *Eaton* authorizes to serve: whether *Eaton* authorizes inferior officers to temporarily act as principal officers,<sup>334</sup> or whether *Eaton* means officials, including non-officer employees, who temporarily exercise the duties of a vacant office generally qualify as inferior officers.<sup>335</sup> Taking the latter stance, OLC has argued that when Presidents direct officials to serve under the Vacancies Act, they are appointing inferior officers consistently with the Appointments Clause.<sup>336</sup> One federal appeals court concluded that an agency-specific statute authorizing the President to designate an acting officer permissibly authorized the appointment of inferior officers.<sup>337</sup> It is unclear whether this argument could support first assistants who automatically serve pursuant to the operation of the Vacancies Act or an agency-specific statute rather than through presidential designation.<sup>338</sup> Such automatic service may be particularly problematic if the first assistant is a non-officer employee who was not appointed by the President or department head.<sup>339</sup>

An additional question raised by *Eaton* is how long an acting officer may serve before the service is no longer “for a limited time and under special and temporary conditions.”<sup>340</sup> Indefinite acting service runs the risk of effectively nullifying the Senate’s power of advice and consent, and the government has long recognized that there must be some limit on acting service.<sup>341</sup> One concern

<sup>333</sup> E.g., Thomas Berry, *Is Matthew Whitaker’s Appointment Constitutional? An Examination of the Early Vacancies Acts*, YALE J. ON REG.: NOTICE & COMMENT (Nov. 26, 2018), <https://www.yalejreg.com/nc/is-matthew-whitakers-appointment-constitutional-an-examination-of-the-early-vacancies-acts-by-thomas-berry> (noting that an official stepping in during a temporary absence is still subject to the supervision of the absent official and asserting that early executive branch practice treated short vacancies differently than more lengthy vacancies). Cf., e.g., *Arthrex*, 35 F.4th at 1335 (holding that an acting official was still serving “for a limited time” under *Eaton* although the service was for the duration of the vacancy).

<sup>334</sup> E.g., *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1334 (Fed. Cir. 2022).

<sup>335</sup> Cf. *Rop v. Fed. Hous. Fin. Agency*, 50 F.4th 562, 571 (6th Cir. 2022); *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 356 F. Supp. 3d 109, 147–48 (D.D.C. 2019), *aff’d on other grounds*, 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam).

<sup>336</sup> Designation of Acting Director of the Office of Management and Budget, 27 Op. O.L.C. 121, 123–24 (2003); *accord* *Gaiambrone v. Comm’r Soc. Sec.*, No. 23-2988, 2024 U.S. App. LEXIS 18167, at \*6 n.9 (3d Cir. July 24, 2024); *Guedes*, 356 F. Supp. 3d at 154–55. *But see* *Fortin v. Comm’r of Soc. Sec.*, 112 F.4th 411, 420 (6th Cir. 2024) (concluding the “linguistic distinction” between the use of “direct” in the Vacancies Act and a constitutional “appointment” is “deliberate,” and holding that acting service does not involve a constitutional appointment).

<sup>337</sup> *Rop*, 50 F.4th at 571.

<sup>338</sup> See 5 U.S.C. § 3345(a)(1). A similar argument could be raised to challenge acting officials serving under an agency order of succession or delegation order. One federal appeals court responded to such an argument by concluding that a general delegation provision authorized the President, acting through an agency official, to select a delegate to perform the challenged duties. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1334–35 (Fed. Cir. 2022). The implicit conclusion was that this delegation provision satisfied the requirement of presidential selection.

<sup>339</sup> See West, *supra* note 317, at 219 (arguing that first assistants can lawfully serve if “(1) the inferior officer’s original appointment satisfies the Appointments Clause (i.e., she was lawfully appointed by the President, head of the department, or a court of law) and (2) the contingent duties are . . . ‘special and temporary’” (quoting *United States v. Eaton*, 169 U.S. 331, 343 (1898))).

<sup>340</sup> *Eaton*, 169 U.S. at 343.

<sup>341</sup> E.g., *Williams v. Phillips*, 482 F.2d 669, 671 (D.C. Cir. 1973) (“The Government concedes that the President cannot designate an acting officer indefinitely without any presentation to the Senate for confirmation.”); Designating an Acting Attorney General, 2018 OLC LEXIS 9, at \*47 (Op. O.L.C. Nov. 14, 2018) (confirming OLC’s prior conclusion that acting officers should not serve beyond a reasonable time). Cf. *Dennis v. Luis*, 741 F.2d 628, 634 (3d Cir. 1984) (holding there must be some limit under the Virgin Islands constitution on the time period an acting officer may serve (continued...)).



of Congress in enacting the 1998 reforms to the Vacancies Act was limiting indefinite service.<sup>342</sup> At times, jurists have suggested that acting service might be limited to a “reasonable” time,<sup>343</sup> to the periods outlined in the Vacancies Act,<sup>344</sup> or other specific time periods.<sup>345</sup> A number of courts, however, have declined to impose time limits based on the Appointments Clause where the relevant statute does not expressly limit service.<sup>346</sup> One court said that an acting official was authorized under *Eaton* because his service was “limited to the period in which the . . . offices remained vacant.”<sup>347</sup>

One final argument justifying the constitutionality of acting service might come from the long history of the Vacancies Act.<sup>348</sup> In “separation-of-powers case[s]” interpreting the Appointments Clause, the Supreme Court has put “significant weight upon historical practice.”<sup>349</sup> One district court upholding the constitutionality of an acting appointment under the Vacancies Act highlighted the “unbroken string of legislative enactments” authorizing acting service starting in 1792.<sup>350</sup> In particular, since 1868, prior versions of the Vacancies Act have provided for first assistants to take on acting service automatically.<sup>351</sup> While there has been some “interbranch

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because otherwise “there could be a complete nullification of the legislature’s power of advice and consent,” which would “obliterate the concept of separation-of-powers”).

<sup>342</sup> See, e.g., S. REP. NO. 105-250, at 7 (1998) (“A limit must be placed on the President’s time to act to fill a position. If the purpose of the Vacancies Act is to limit the President’s power to designate temporary officers, a position requiring Senate confirmation may not be held by a temporary appointment for as long as the President unilaterally decides.”); 144 CONG. REC. S11022 (daily ed. Sept. 28, 1998) (statement of Sen. Thompson) (discussing indefinite length of acting service as significant problem contrary to legislative intent); 144 CONG. REC. S11024 (daily ed. Sept. 28, 1998) (statement of Sen. Byrd) (“It is precisely that time restriction on the filling of these vacant positions that is, I believe, the linchpin of this issue.”).

<sup>343</sup> Status of the Acting Director, Office of Management and Budget, 1 Op. O.L.C. 287, 290 (1977) (outlining considerations to determine what period is reasonable, including “the specific functions being performed by the Acting Director; the manner in which the vacancy was created (death, long-planned resignation, etc.); the time when the vacancy was created (e.g., whether near the beginning or the end of a session of the Senate); whether the President has sent a nomination to the Senate; and particular factors affecting the President’s choice (e.g., a desire to appraise the work of an Acting Director) or the President’s ability to devote attention to the matter”). Cf., e.g., *Bhatti v. Fed. Hous. Fin. Agency*, 332 F. Supp. 3d 1206, 1218 (D. Minn. 2018) (ruling that “determining whether an otherwise validly appointed acting officer has served for ‘too long’ [in violation of the Appointments Clause] is a non-justiciable political question”), *aff’d in part on other grounds*, 15 F.4th 848, 852–53 (8th Cir. 2021).

<sup>344</sup> *Williams*, 482 F.2d at 671.

<sup>345</sup> *Rop v. Fed. Hous. Fin. Agency*, 50 F.4th 562, 580–81 (6th Cir. 2022) (Thapar, J., concurring in part and dissenting in part) (claiming six months, based on historical practice). The plaintiffs in this case argued for a maximum of about two years, citing the Recess Appointments Clause. *Id.* at 573 (majority opinion).

<sup>346</sup> E.g., *Rop*, 50 F.4th at 572 (majority opinion); *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1334–35 (Fed. Cir. 2022). Cf. *Gaiambrone v. Comm’r Soc. Sec.*, No. 23-2988, 2024 U.S. App. LEXIS 18167, at \*4–5 (3d Cir. July 24, 2024) (concluding Vacancies Act time limitations are permissible and declining to impose allegedly constitutionally required time limit of 180 days).

<sup>347</sup> *Arthrex, Inc.*, 35 F.4th at 1335.

<sup>348</sup> E.g., *United States v. Smith*, 962 F.3d 755, 764, 765 (4th Cir. 2020) (noting that “*Eaton* is congruous with centuries of unbroken historical practice”); *CASA de Md., Inc. v. Wolf*, 486 F. Supp. 3d 928, 957 (D. Md. 2020) (stating indefinite service might not raise serious constitutional doubts, given history of statutes authorizing acting officials).

<sup>349</sup> *NLRB v. Noel Canning*, 573 U.S. 513, 514 (2014).

<sup>350</sup> *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 356 F. Supp. 3d 109, 148 (D.D.C. 2019), *aff’d on other grounds*, 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam).

<sup>351</sup> See Act of July 23, 1868, ch. 227, 15 Stat. 168.

conflict” regarding various iterations of the Vacancies Act,<sup>352</sup> Congress and the executive branch have seemingly agreed implicitly that at least some forms of acting service are constitutional.<sup>353</sup>

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

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<sup>352</sup> *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 294 (2017).

<sup>353</sup> *See, e.g., id.* at 294–95; The Vacancies Act, 22 Op. O.L.C. 44 (1998). The executive branch has even, at times, argued that the President has the inherent power “to make temporary . . . appointments in cases of need without conforming to the requirements of the Appointments . . . Clause.” The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 161–62 (1996). *Cf., e.g., Williams v. Phillips*, 360 F. Supp. 1363, 1369 (D.C. Cir. 1973) (saying that if such a power existed, it would be only in “emergency situations,” and pointing out “[s]everal constitutional problems . . . presented by a temporary appointive power”).