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Temporarily Filling Presidentially Appointed, Senate-Confirmed Positions

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Summary

A vacant presidentially appointed, Senate-confirmed position (advice and consent position) can be filled temporarily under one of several authorities that do not require going through the Senate confirmation process. Under specific circumstances, many executive branch vacancies can be filled temporarily under the Federal Vacancies Reform Act of 1998 or by recess appointment. In some cases, the authority to fill a vacancy in a particular position on a temporary basis is specifically provided in statute. Generally, designation or appointment under one of these methods confers upon the official the legal authority to carry out the duties of the office. Alternatively, an individual may be hired by the agency as a consultant. A consultant does not carry the legal authority of the office, and may act only in an advisory capacity.

In many instances, the functions of a vacant advice and consent office have been carried out indefinitely by another official, usually the first assistant, under the terms of an administrative delegation order of the agency head. In such instances, the official has carried out these functions without formally assuming the vacant office on a temporary or permanent basis.

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According to the latest edition of the *Plum Book*,¹ more than 1,000 executive branch positions are filled through appointment by the President with the advice and consent of the Senate (advice and consent positions).² When an incumbent leaves an advice and consent position, the process of appointing a successor might last several weeks or months, as the President selects a nominee and the Senate considers the nomination.³ The need to provide for continuity in executing the functions of these positions during such periods has long been of concern to government leaders. The Constitution and federal statutes provide several authorities for temporarily filling vacancies in these positions:

- the Federal Vacancies Reform Act of 1998⁴ (Vacancies Act), which has antecedents dating to the 1800s;
- the President’s recess appointment power, which the framers included in the Constitution; and
- position-specific temporary appointment provisions, some of which also date to the 1800s.

Each of these authorities is discussed below.

Designations Under the Vacancies Act⁵

The Vacancies Act governs acting service in most executive branch advice and consent positions, outlining who can serve as an acting official and for how long. The statute specifies certain excepted positions, however. For example, the Vacancies Act does not apply to any advice and consent position on “any board, commission, or similar entity that ... (A) is composed of multiple members; and (B) governs an independent establishment or Government corporation.”⁶ This category includes, for example, independent regulatory boards and commissions. The Vacancies Act also likely does not apply to new advice and consent positions that have never been filled.

¹ U.S. Congress, House Committee on Oversight and Reform, *United States Government Policy and Supporting Positions*, 116th Cong., 2nd sess., committee print, December 2020 (Washington: GPO, 2020), pp. 209-212. The next edition of this quadrennial print, commonly known as the *Plum Book*, is expected in late 2024. The precise number of advice and consent positions is difficult to ascertain; other sources provide different estimates. CRS usually uses the *Plum Book* for such information, although some errors have been identified in its data. The *Plum Book*-based estimate includes full-time and part-time positions in the executive branch. It does not include positions that are typically filled through routine nomination and confirmation, including members of the officer corps in the military services and some positions in the Foreign Service. Advice and consent positions are also known as “PAS positions,” after the abbreviation used in the *Plum Book*.

² Prior to October 2012, approximately 1,200-1,400 executive branch positions were filled through the advice and consent process. The Presidential Appointment Efficiency and Streamlining Act (P.L. 112-166, 126 Stat. 1283) reduced this number by 163 positions. The act changed the appointment provisions for each of these positions such that, once vacant, they were no longer to be filled as advice and consent positions. See CRS Report R41872, *Presidential Appointments, the Senate’s Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey.

³ For example, one study found that the average duration of Senate consideration of President Joe Biden’s nominations during the first two years of his presidency was 144.6 days, or nearly five months. See Center for Presidential Transition, Partnership for Public Service, “The Pace of Appointments and Confirmations to Senate-Confirmed Positions during a President’s First Two Years,” <https://presidentialtransition.org/publications/the-pace-of-appointments-and-confirmations-to-senate-confirmed-positions-during-a-presidents-first-two-years/>.

⁴ 5 U.S.C. §§3345-3349e.

⁵ This section describes the provisions of the Vacancies Act in broad terms. For a more detailed discussion of the provisions of the act, see CRS Report R44997, *The Vacancies Act: A Legal Overview*, by Valerie C. Brannon.

⁶ 5 U.S.C. §3349c(1).

In some instances, a position that is covered by the Vacancies Act is also covered by a position-specific statute that provides for a particular official to step in on an acting basis or for a line of succession in the event of a vacancy. (See “Position-Specific Temporary Appointment Provisions,” below.) The Vacancies Act and position-specific statutes have sometimes been used in tandem to authorize the service of acting officials.⁷ (See “Combinations of Tools,” below.)

Who May Serve Under the Vacancies Act

When an executive branch advice and consent position covered by the Vacancies Act becomes vacant, it may be filled temporarily in one of three ways under the act: (1) the first assistant to such a position may automatically assume the functions and duties of the office in an acting capacity; (2) the President may direct an officer who is occupying a different advice and consent position to perform these tasks; or (3) the President may select an officer or employee who is occupying a different position, within the same agency, for which the rate of pay is equal to or greater than the minimum rate of pay at the GS-15 level. The selected official must have served in that agency for at least 90 days during the year preceding the vacancy.⁸

As a general rule, an individual may not simultaneously serve in an acting capacity under the Vacancies Act and as the nominee to that position. A Supreme Court interpretation of a provision of the act appears to allow an individual to continue once nominated only if the individual is serving as first assistant to the vacant position and either (1) has served as the first assistant for more than 90 days during the year preceding the vacancy or (2) was appointed to the first assistant position through the advice and consent process.⁹

Potential Duration of Service Under the Vacancies Act

In general, a temporary appointment under the Vacancies Act continues until no later than 210 days after the date the vacancy occurred or, if the vacancy occurred during a Senate recess, 210 days after the date the Senate reconvenes. The time restriction is lifted, and the acting officer can continue to serve, if a first or second nomination for the position has been submitted to the Senate for confirmation and is pending. The acting officer can continue to serve for an additional 210 days after the rejection, withdrawal, or return of a first or second nomination.¹⁰ Acting officials who serve under the Vacancies Act are authorized to “perform the functions and duties of the office temporarily in an acting capacity subject to [these] time limitations.”¹¹

Temporary appointments to vacancies that exist during the 60-day period following the inauguration of a new President are treated differently, which gives the new President additional flexibility during the transition. The ordinary 210-day restriction period does not commence until the later of the following two dates: 90 days after the incoming President assumes office or 90 days after the vacancy occurs.

In general, once the time limitations of the Vacancies Act have been exhausted, only the head of the agency may perform any function or duty of that office that is required to be performed by the

⁷ For a detailed discussion of the interaction of the Vacancies Act and position-specific statutes, see “Exclusivity of the Vacancies Act” in CRS Report R44997, *The Vacancies Act: A Legal Overview*, by Valerie C. Brannon.

⁸ 5 U.S.C. §3345(a).

⁹ Nat’l Labor Relations Bd. v. SW General, Inc., 137 S. Ct. 929 (2017). See CRS Legal Sidebar WSLG1840, *Help Wanted: Supreme Court Holds Vacancies Act Prohibits Nominees from Serving as Acting Officers*, by Valerie C. Brannon.

¹⁰ 5 U.S.C. §3346.

¹¹ 5 U.S.C. §3345(a)(1).

applicable officer.¹² Most duties carried out by advice and consent officials are delegable, however, and, during a prolonged vacancy, such duties have often been carried out by subordinate officials in accordance with an agency’s delegation orders. Although courts have sometimes disagreed on the precise definition of which functions and duties are covered by the Vacancies Act, such delegations have most often been upheld as consistent with the act.¹³ (See “Delegation of Duties to Another Official” below.)

Recess Appointments¹⁴

The President’s authority to make recess appointments is conferred by the Constitution, which states that the President “shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”¹⁵ In this context, the term *session* is understood to refer to an annual, rather than daily period. The term *recess* is understood to refer to a break in Senate proceedings between annual sessions or certain breaks within a session.¹⁶ Presidents have made such appointments during within-session recesses (*intrasession* recess appointments) and between sessions (*intersession* recess appointments). The Supreme Court has clarified that intrasession recesses will trigger the Recess Appointments Clause only if the recess is “of substantial length”—an issue discussed below.¹⁷ Recess appointments expire at the end of the next session of the Senate. As a result, a recess appointment may last for less than a year or nearly two years, depending on when the appointment is made.¹⁸

Limitations on Recess Appointment Authority

Presidents have occasionally used the recess appointment power in ways that have had the effect of circumventing the confirmation process.¹⁹ In response, Congress has placed restrictions on the

¹² 5 U.S.C. §3348.

¹³ This case law is discussed in more detail in CRS Report R44997, *The Vacancies Act: A Legal Overview*, by Valerie C. Brannon.

¹⁴ For a further discussion of recess appointments, see CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue; and CRS, *Constitution Annotated*, “Overview of Recess Appointments Clause,” https://constitution.congress.gov/browse/essay/artII-S2-C3-1/ALDE_00001144/. See also CRS Report RL33310, *Recess Appointments Made by President George W. Bush*, by Henry B. Hogue and Maureen O. Bearden; and CRS Report R42329, *Recess Appointments Made by President Barack Obama*, by Henry B. Hogue.

¹⁵ Article 2, §2, cl. 3 of the Constitution.

¹⁶ For more on congressional sessions and recesses, see CRS Report R42977, *Sessions, Adjournments, and Recesses of Congress*, by Valerie Heitshusen.

¹⁷ Nat’l Labor Relations Bd. v. Noel Canning, 573 U.S. 513, 527, 536-38 (2014).

¹⁸ A comparison of two recess appointments during the 108th Congress illustrates the difference in recess appointment duration that results from the timing of appointments. During the recess between the first and second sessions, President George W. Bush appointed Charles W. Pickering to a federal court of appeals judgeship. Several weeks later, during the first recess of the second session, President Bush appointed William H. Pryor to a judgeship on another federal court of appeals. Pickering’s appointment expired after less than 11 months at the end of the second session. In contrast, Pryor’s recess appointment would have expired after approximately 22 months at the end of the first session of the 109th Congress. Although the Pickering and Pryor recess appointments were only several weeks apart, Pryor could have served nearly twice as long because his appointment was made during an intrasession recess. (Pryor was subsequently confirmed by the Senate and appointed to the position permanently.)

¹⁹ For example, when President George W. Bush recess-appointed Pickering to a judgeship on the United States Court of Appeals for the Fifth Circuit, he noted that 2½ years had passed since Pickering’s nomination had been submitted to the Senate and stated that “a minority of Democratic Senators has been using unprecedented obstructionist tactics to (continued...)”

President's authority to make recess appointments. Under Title 5, Section 5503(a), of the *U.S. Code*, if the position to which the President makes a recess appointment falls vacant while the Senate is in session, the recess appointee may not be paid from the Treasury until he or she is confirmed by the Senate. The salary prohibition does not apply (1) if the vacancy arose within 30 days before the end of the session; (2) if a nomination for the office was pending when the Senate recessed, other than the nomination of the recess appointee; or (3) if a nomination was rejected within 30 days before the end of the session and another individual was given the recess appointment. A recess appointment falling under any one of these three exceptions must be followed by a nomination to the position not later than 40 days after the beginning of the next session of the Senate.²⁰ For this reason, when a recess appointment has been made, the President has generally submitted a new nomination to the position even where an old nomination is pending.

In some instances, a recess appointee whose nomination to the position is not successful might not be paid. These instances are discussed below. (See “Unsuccessful Nominations and Payment Limitations.”)

From the 110th Congress onward, it has become common for the Senate and House to use certain scheduling practices that preclude the President from making recess appointments.²¹ The practices do this by preventing the occurrence of a Senate recess of sufficient length for the President to be able to use his recess appointment authority.

These congressional scheduling practices might have prevented President George W. Bush from making recess appointments at the end of his presidency; he made no recess appointments during the times this approach was in use.²² It might have also limited use of the recess appointment power by President Obama²³ and President Donald Trump.

Presidential Challenge of Congressional Limitations

In January 2012, President Obama appeared to challenge the ability of this practice to prevent the exercise of his authority. He made four recess appointments during a three-day recess between pro forma sessions of the Senate on January 3 and January 6, 2012, a period that was generally considered too short to permit recess appointments. The recess during which the President made

prevent him and other qualified individuals from receiving up-or-down votes.” The President’s statement at the time of the recess appointment may be found at <http://georgewbush-whitehouse.archives.gov/news/releases/2004/01/20040116-19.html>.

²⁰ Courts have not adjudicated the constitutionality of this statute. Congress placed limits on payments to recess appointees as far back as 1863. (See Act of February 9, 1863, ch. 25, §2, 12 Stat. 646.) The statute was made part of the *Revised Statutes of the United States* (§1761) in 1875 and incorporated into the *United States Code* in 1925, as 5 U.S.C. §56. The current provisions date from 1940 (ch. 580, 54 Stat. 751). In 1966, Title 5 was revised and enacted into positive law by P.L. 89-554 (80 Stat. 475). The statute may now be found at Title 5, Section 5503.

Some observers have argued that this statute “suffers from serious constitutional infirmities” (Michael B. Rappaport, “The Original Meaning of the Recess Appointments Clause,” *UCLA Law Review*, vol. 52, no. 5 [June 2005], p. 1487, at 1544). As of the end of 2023, the courts have not addressed the constitutionality of Section 5503. The Department of Justice has sometimes opined on the application of the statute to specific circumstances but has not, per se, addressed its constitutionality. See, for example, 15 Op. O.L.C. 91 (1991) and 25 O.L.C. 182 (2001).

²¹ The evolution of this use of scheduling practices is discussed in greater detail in CRS Report R42329, *Recess Appointments Made by President Barack Obama*, by Henry B. Hogue.

²² See CRS Report RL33310, *Recess Appointments Made by President George W. Bush*, by Henry B. Hogue and Maureen O. Bearden.

²³ See CRS Report R42329, *Recess Appointments Made by President Barack Obama*, by Henry B. Hogue.

the appointments was part of a period of Senate absence that, but for the pro forma sessions, would have constituted an intrasession adjournment of 10 days or longer.

In an opinion regarding the lawfulness of these appointments, the Office of Legal Counsel in the Department of Justice argued that “the President may determine that pro forma sessions at which no business is to be conducted do not interrupt a Senate recess for the purposes of the Recess Appointments Clause.”²⁴ As mentioned above, the U.S. Supreme Court later concluded otherwise in a case regarding three of the four appointments. It held that, for purposes of the Clause, “the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business.”²⁵ The Court also held that the President may generally use the recess appointment power only during a Senate recess of 10 days or longer. A Senate recess of three days “is not long enough to trigger the President’s recess appointment power,” and a recess of more than three days but less than 10 is “presumptively too short to fall within the Clause” but “leaves open the possibility that a very unusual circumstance could demand the exercise of the recess-appointment power during a shorter break.”²⁶

Position-Specific Temporary Appointment Provisions

In some cases, Congress has expressly provided for an acting official to carry out the functions of a particular advice and consent position when an incumbent is absent or unable to serve or when the position is vacant. Generally, such provisions employ one or more of several methods: (1) a specified official is automatically designated as acting; (2) a specified official is automatically designated as acting, unless the President provides otherwise in the case of a vacancy; (3) the President designates an official to serve in an acting capacity in the case of a vacancy; or (4) the head of the agency designates an acting official. It is possible that both the agency-specific statute and the Vacancies Act may be available to temporarily fill a vacancy in such a position.²⁷

Method 1

Under the first method, the provision specifies another official who shall automatically serve as acting in the case of the incumbent’s absence or inability to serve or in the event that the position becomes permanently vacant. In contrast to provisions using the second method, below, provisions under the first method are silent on the President’s authority to designate an acting official under any circumstance. This does not mean that the President would not have any authority to do so, however.

²⁴ “Lawfulness of Recess Appointments during a Recess of the Senate notwithstanding Periodic Pro Forma Sessions,” Memorandum Opinion for the Counsel to the President, January 6, 2012, http://www.justice.gov/sites/default/files/olc/opinions/2012/01/31/pro-forma-sessions-opinion_0.pdf.

²⁵ Nat’l Labor Relations Bd. v. Noel Canning, 573 U.S. 513, 550 (2014). The three recess appointments at issue were found to be constitutionally invalid.

²⁶ Ibid. at 536-38. The opinion gave as an example of an unusual circumstance an instance such as “a national catastrophe ... that renders the Senate unavailable but calls for an urgent response.” The Court noted that “political opposition in the Senate would not qualify as an unusual circumstance.”

²⁷ The Vacancies Act might not be available in all such situations, however. For a detailed discussion of the interaction of the Vacancies Act and position-specific statutes, see “Exclusivity of the Vacancies Act” in CRS Report R44997, *The Vacancies Act: A Legal Overview*, by Valerie C. Brannon.

The top positions at some agencies are temporarily filled through the first method.²⁸ For example, the *U.S. Code* provides that the deputy director of the Office of Management and Budget “acts as the Director when the Director is absent or unable to serve or when the office of Director is vacant.”²⁹ The relevant statute states that, at the Federal Aviation Administration, the “Deputy Administrator acts for the Administrator when the Administrator is absent or unable to serve, or when the office of the Administrator is vacant.”³⁰ With regard to the Small Business Administration, federal law provides that the “Deputy Administrator shall be acting Administrator of the Administration during the absence or disability of the Administrator or in the event of a vacancy in the office of the Administrator.”³¹

Method 2

As with the first method, a provision under the second method specifies another official who shall automatically serve as acting in the case of the incumbent’s absence or inability to serve. In contrast to the provisions under the first method, however, it specifies that, in the event of a permanent vacancy, another official shall automatically serve as acting unless the President provides otherwise. It is possible that such a provision could be read to give the President the authority to designate an acting official during a vacancy without regard to the limitations of the Vacancies Act.³²

The top positions at two particular agencies are temporarily filled through the second method. With regard to the General Services Administration, the “Deputy Administrator is Acting Administrator ... during the absence or disability of the Administrator and, unless the President designates another officer of the Federal Government, when the office of Administrator is vacant.”³³ Similarly, the “Deputy Commissioner [of the Social Security Administration] shall be Acting Commissioner of the Administration during the absence or disability of the Commissioner and, unless the President designates another officer of the Government as Acting Commissioner, in the event of a vacancy in the office of the Commissioner.”³⁴

Method 3

Provisions employing the third method are silent with regard to any acting official in the event of an incumbent’s absence or inability to serve. They are also silent with regard to any automatic designation in the event of a permanent vacancy. Instead, such provisions explicitly authorize the President to designate an acting official when a position is vacant.

Positions that might be temporarily filled through the third method include the general counsel at the National Labor Relations Board and the special counsel for immigration-related unfair employment practices at the Department of Justice. In the case of the general counsel, the service of the President’s designee is limited to a period that would allow the Senate to act on a nomination:

²⁸ 31 U.S.C. §502(b), 49 U.S.C. §106(i), and 15 U.S.C. §633(b)(1).

²⁹ 31 U.S.C. §502(b). If both the director and deputy director are absent or unable to serve, or both positions are vacant, “the President may designate an officer of the Office to act as Director” (31 U.S.C. §502(f)).

³⁰ 49 U.S.C. §106(i).

³¹ 15 U.S.C. §633(b)(1).

³² For a detailed discussion of the interaction of the Vacancies Act and position-specific statutes, see “Exclusivity of the Vacancies Act” in CRS Report R44997, *The Vacancies Act: A Legal Overview*, by Valerie C. Brannon.

³³ 40 U.S.C. §302(b).

³⁴ 42 U.S.C. §902(b)(4).

In case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated 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.³⁵

The provision regarding the special counsel includes no such limitations: “In the case of a vacancy in the office of the Special Counsel the President may designate the officer or employee who shall act as Special Counsel during such vacancy.”³⁶

Method 4

In contrast to the methods discussed above, the fourth method provides for neither automatic acting service nor presidential designation.³⁷ Rather, it authorizes the agency head to make such a designation under specified circumstances.

In one manifestation of the fourth method, some agency heads are empowered to establish a line of temporary succession in the event of an absence, inability to serve, or vacancy in a particular position. For the Department of Education, for example, the Deputy Secretary automatically takes over in the event of the Secretary’s absence or disability or when the position is permanently vacant. In anticipation of potential vacancies in both positions, however, the Secretary is to establish a line of succession:

The Secretary shall designate the order in which other officials of the Department shall act for and perform the functions of the Secretary during the absence or disability of both the Secretary and Deputy Secretary or in the event of vacancies in both of those offices.³⁸

Other provisions allow agency heads to designate individuals to fill vacancies in lower-level positions temporarily. For example, to temporarily fill a vacant U.S. marshal position, the Attorney General “may designate a person to perform the functions of and act as marshal” so long as the Senate has not rejected that individual for appointment to the position.³⁹ An individual appointed in this manner

may serve until the earliest of the following events:

- (1) The entry into office of a United States marshal appointed [through the advice and consent process].
- (2) The expiration of the thirtieth day following the end of the next session of the Senate.
- (3) If such designee of the Attorney General is appointed by the President pursuant to [the advice and consent process] but the Senate refuses to give its advice and consent to the appointment, the expiration of the thirtieth day following such refusal.⁴⁰

³⁵ 29 U.S.C. §153(d).

³⁶ 8 U.S.C. §1324b(c)(1).

³⁷ Such alternatives might still be available under the Vacancies Act, however. See “Exclusivity of the Vacancies Act” in CRS Report R44997, *The Vacancies Act: A Legal Overview*, by Valerie C. Brannon.

³⁸ 20 U.S.C. §3412(a)(1).

³⁹ 28 U.S.C. §562.

⁴⁰ 28 U.S.C. §562.

This provision also illustrates the kinds of limitations that are sometimes included in temporary appointment provisions.

Combinations of Tools

For at least three positions—U.S. Attorney, solicitor of labor, and Assistant Secretary of Labor for Mine Safety and Health—combinations of the tools identified here have been used to fill vacancies temporarily. By using more than one authority, the Administration has been able to place unconfirmed individuals in these positions for longer periods of time than would have been possible if only one authority had been used.

With regard to U.S. Attorneys, the Office of Legal Counsel at the Department of Justice determined, in 2003, that U.S. Attorney vacancies could be filled temporarily under specific provisions that allow for appointment by the Attorney General,⁴¹ under the provisions of the Vacancies Act, or under a combination of these authorities in sequence.⁴²

President George W. Bush temporarily filled vacancies in the two Labor Department positions by using, in succession, recess appointment and Vacancies Act authorities. He recess appointed Eugene Scalia to be solicitor of labor on January 11, 2002.⁴³ Several days before the appointment would have expired, at the close of the 107th Congress, Scalia stepped down from the solicitor position and was appointed to a non-career Senior Executive Service position within the department. With the position of solicitor technically vacant, the President then designated Scalia as the acting solicitor, on November 22, 2002, under the Vacancies Act.⁴⁴ It appears that Scalia could have served at least 210 days in this capacity, but he resigned from the post on January 6, 2003.

A similar sequence of authorities was used to place Richard E. Stickler in the position of Assistant Secretary of Labor for Mine Safety and Health, first by recess appointment, on October 19, 2006, and later, under the Vacancies Act, on January 4, 2008.⁴⁵

⁴¹ 28 U.S.C. §546. This statute further provides for an unusual appointment role for U.S. district courts. Following the expiration of a 120-day appointment by the Attorney General, the district court for the district within which the vacancy exists “may appoint a United States attorney to serve until the vacancy is filled.”

⁴² A September 5, 2003, opinion by the Office of Legal Counsel at the Department of Justice stated that the Vacancies Act could be used singly or in combination with Title 28, Section 546, of the *U.S. Code* to temporarily fill U.S. Attorney positions. (This opinion may be found at http://www.justice.gov/sites/default/files/olc/opinions/2003/09/31/op-olc-v027-p0149_0.pdf.)

⁴³ The White House press release announcing Scalia’s recess appointment as solicitor for the Department of Labor may be found at <https://georgewbush-whitehouse.archives.gov/news/releases/2002/01/text/20020111-9.html>.

⁴⁴ See Dana Milbank, “Recess Appointees Relinquish Title Only; Reich, Scalia Put in Similar Jobs,” *Washington Post*, November 23, 2002, p. A10, final edition. A November 15, 2002, opinion by the Office of Legal Counsel at the Department of Justice supported this action. This opinion may be found at https://www.justice.gov/sites/default/files/olc/opinions/2002/11/31/op-olc-v026-p0211_0.pdf. The White House press release announcing Scalia’s designation as acting solicitor for the Department of Labor may be found at <https://georgewbush-whitehouse.archives.gov/news/releases/2002/11/20021122-4.html>.

⁴⁵ The White House press release announcing Stickler’s recess appointment may be found at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061019-8.html>, and the news release on his subsequent appointment may be found at <http://georgewbush-whitehouse.archives.gov/news/releases/2008/01/20080104-5.html>.

Unsuccessful Nominations and Payment Limitations

In some cases, individuals who are serving temporarily in advice and consent positions are also nominated to those positions.⁴⁶ In the event that such a nomination is not successful, two provisions of law might subsequently prevent the individual from being paid as an acting official. Unlike the provisions of Title 5, Section 5503, of the *U.S. Code*, which pertain to recess appointments alone and are discussed above, the following provisions appear to apply to any situation in which an individual is filling an advice and consent position on a temporary basis.

One provision from the FY2008 Financial Services and General Government Appropriations Act may prevent the official from being paid if the nomination is rejected:

Hereafter, no part of any appropriation contained in this or any other Act shall be paid to any person for the filling of any position for which he or she has been nominated after the Senate has voted not to approve the nomination of said person.⁴⁷

Similar provisions had been included in annual funding measures for most, if not all, of the prior 50 years. As a practical matter, nominations are rarely rejected by a vote of the full Senate.

A second provision, addressing a different set of circumstances, prevents individuals serving in acting or temporary capacity in advice and consent positions from being paid for their services if they have been nominated to the positions twice and the second nominations have been withdrawn or returned. This second provision, which was included in the FY2009 Financial Services and General Government Appropriations Act, states:

Effective January 20, 2009, and for each fiscal year thereafter, no part of any appropriation contained in this or any other Act may be used for 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 after the second submission of a nomination for that individual to that position has been withdrawn or returned to the President.⁴⁸

Consultants

At times, a nominee could be hired as a consultant while awaiting confirmation, but he or she may serve only in an advisory capacity and may not be installed in the office to which he or she has been nominated.⁴⁹ A nominee to a Senate-confirmed position has no legal authority to assume the responsibilities of that position based on his or her status as a nominee. The authority comes with one of the limited-term appointments discussed above, with Senate confirmation and

⁴⁶ As discussed above, a Supreme Court interpretation of a provision of the Vacancies Act appears to allow a nominee to serve under the Vacancies Act only if the individual is serving as first assistant to the vacant position and either (1) has served as the first assistant for more than 90 of the preceding 365 days or (2) was appointed to the first assistant position through the advice and consent process. *Nat'l Labor Relations Bd. v. SW General, Inc.*, 137 S. Ct. 929 (2017). See CRS Legal Sidebar WSLG1840, *Help Wanted: Supreme Court Holds Vacancies Act Prohibits Nominees from Serving as Acting Officers*, by Valerie C. Brannon.

⁴⁷ P.L. 110-161, Div. D, Title VII, §709; 121 Stat. 2021; 5 U.S.C. prec. §5501.

⁴⁸ P.L. 111-8, Div. D, Title VII, §749; 123 Stat. 693; 5 U.S.C. prec. §5501.

⁴⁹ The exclusivity provision of the Vacancies Act (5 U.S.C. §3347) is consistent with this interpretation. It establishes the act as the “exclusive means for temporarily authorizing an acting official to perform the functions and duties of” most advice and consent positions unless otherwise expressly provided in law or unless the President uses his recess appointment authority.

subsequent presidential appointment, or through occupying another position to which the authority of the vacant position has been delegated, as discussed below.⁵⁰

Delegation of Duties to Another Official

As discussed above, the temporary filling of an advice and consent position is governed by the Vacancies Act, the Recess Appointments Clause of the Constitution, and position-specific statutes. However, when the time limitations of the Vacancies Act have been exhausted, the functions of a vacant office have sometimes been carried out indefinitely by another individual, usually the first assistant, pursuant to a delegation of authority by the agency head.⁵¹ In such instances, the official has carried out these functions without assuming the vacant office.⁵² Generally, these functions have included any *except* those few that are statutorily vested specifically, and only, in the vacant office (“non-delegable duties”).

These delegation arrangements do not appear to be subject to limitations imposed by the Vacancies Act. The first assistant or other official carrying out the delegated functions during the vacancy has not necessarily served in the agency for a specified period prior to carrying out these duties or occupied another advice and consent position.

Federal court opinions have yielded competing interpretations of the Vacancies Act’s provisions and the permissibility of such delegation arrangements.⁵³ The apparent majority view has been that the Vacancies Act does not generally preclude such delegations, although specific delegations may still be evaluated and invalidated on a fact-specific basis. In general practice, executive branch leaders have continued to use the technique of authorizing another official to, in effect, carry out the role of a vacant position under a conditional delegation of duties.

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⁵⁰ In *Buckley v. Valeo*, the Supreme Court held that “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed” in Article II, Section 2, clause 2, of the Constitution (424 U.S. 1, 126 (1976)). This would appear to preclude consultants and nominees, who have not been so appointed, from exercising such authority.

⁵¹ In some circumstances, constitutional issues might arise under the Appointments Clause if the functions of an “Officer of the United States” are carried out by someone who was not appointed in accordance with that clause. For a discussion of these issues, see CRS, “Overview of Principal and Inferior Officers,” *Constitution Annotated*, https://constitution.congress.gov/browse/essay/artII-S2-C2-3-11-1/ALDE_00013101/; and “Constitutional Considerations” in CRS Report R44997, *The Vacancies Act: A Legal Overview*, by Valerie C. Brannon.

⁵² In such cases, the official has sometimes carried a title that includes a variation of “performing the duties of.” See, for example, Department of Homeland Security, “Senior Office Performing the Duties of the Commissioner, Office of the Commissioner [for U.S. Customs and Border Protection] Troy A. Miller,” <https://docs.house.gov/meetings/AP/AP15/20210519/112654/HHRG-117-AP15-Bio-MillerT-20210519.pdf>; and Department of Homeland Security, “Statement of Robert Fenton, Senior Official Performing the Duties of the Administrator, Federal Emergency Management Agency, U.S. Department of Homeland Security,” <https://docs.house.gov/meetings/AP/AP15/20210316/111322/HHRG-117-AP15-Wstate-FentonB-20210316.pdf>.

⁵³ See “Delegation of Duties” in CRS Report R44997, *The Vacancies Act: A Legal Overview*, by Valerie C. Brannon.

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