



# The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative

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## Summary

Since at least 1973, the Justice Department (DOJ) has taken the position that any executive department or agency whose authorizing legislation vests all powers and functions of the agency in its head and allows the head to delegate such powers and functions to subordinates in her discretion, does not have to comply with the Vacancies Act, which limits the time during which advice and consent positions may be filled by temporary designees before a nomination is forwarded to the Senate. All executive departments have such provisions. As a consequence, during 1998 some 20% of the 320 advice and consent positions in the departments were being filled by temporary designees, most of whom had served beyond the 120-day limitation period of the Act without presidential submissions of nominations. The designation by the Attorney General of an acting Assistant Attorney General for Civil Rights in December 1997 in apparent contravention of the Vacancies Act precipitated congressional hearings and the introduction of legislation in both Houses to remedy the perceived noncompliance. Also, a federal appeals court ruling in March 1998 narrowly construing the Vacancies Act further piqued congressional concerns. On July 15, 1998, the Senate Governmental Affairs Committee reported S. 2176, the Federal Vacancies Reform Act. Although the bill failed to survive a cloture vote on the floor, a compromise version was included in the FY 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act, which became law on October 21, 1998 (P.L. 105-277). The new Vacancies Act rejects the DOJ position and makes it the exclusive vehicle for temporarily filling vacant advice and consent positions and provides substantial incentives for the President to send forth timely nominations for Senate consideration.

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The designation of Mr. Bill Lann Lee by the Attorney General on December 15, 1997, as Acting Assistant Attorney General for Civil Rights in the Department of Justice (DOJ) revived a longstanding interbranch controversy over the legal propriety of the failure of executive branch departments and agencies to consistently comply with the provisions of the Vacancies Act. Since at least 1973, DOJ has taken the position that any executive department or agency whose authorizing legislation vests all powers and functions of the agency in its head and allows the head to delegate such powers and functions to subordinates in her discretion, does not have to comply with that Act, which limits the time during which advice and consent positions may be filled by temporary designees before a nomination is forwarded to the Senate.

All executive departments have such provisions. As a consequence, during 1998 some 20% of the 320 advice and consent positions in the departments were being filled by temporary designees, most of whom had served beyond the 120-day limitation period of the Act without presidential submissions of nominations. Several bills introduced in the 105<sup>th</sup> Congress sought to remedy what was seen by many to be noncompliance with the Vacancies Act that seriously undermined the Senate's confirmation prerogative. Following hearings on S. 2176, the Federal Vacancies Reform Act of 1998 was reported by the Senate Committee on Governmental Affairs on July 15, 1998. Although the bill failed to survive a cloture vote on the Senate floor on September 24, 1998, negotiations between the Senate sponsors and the Administration continued, and a compromise was reached on a revision and included in the FY 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act, which became law on October 21, 1998 (P.L. 105-277, Division C, title I, section 151).

The new Vacancies Act rejects the DOJ position on temporary appointments and makes it clear that the Act is the exclusive vehicle for temporarily filling vacant advice and consent positions unless Congress expressly provides otherwise. The legislation provides substantial incentives for prompt presidential submissions of nominations, including an increase in the time during which an acting officer may serve when timely nominations are submitted. But the President's choices of action are strictly confined and the failure to comply with the statute's requirements may lead to the vacation of the authorities and responsibilities of the office and to rendering the actions of acting officials void without the possibility of subsequent ratification. Special provision is made for vacancies that occur during a change of Administration after a presidential election. Finally, responsibility for monitoring compliance with the provisions of the law is placed with the Comptroller General.

This report will proceed as follows. First, the legislative history of the Vacancies Act is briefly described with particular attention to the early understanding of DOJ with respect to its intended purpose and coverage. That legislative history is also examined for clues as to the congressional intent with respect to the applicability of the Act to DOJ. Next, the development of the conflicting provisions of DOJ and the Comptroller General is reviewed and explained, followed by a recounting of Congress' 1988 attempt to resolve the uncertainty of DOJ's stance through amendatory legislation. The discussion continues with a review of the events that precipitated the most recent controversy and confrontation and the history of the legislative actions that culminated in the passage of the new legislation, and concludes with a detailed description and analysis of that legislation.

## Background

The Vacancies Act,<sup>1</sup> originally passed in 1868,<sup>2</sup> was intended to prevent the President from delaying sending forth nominations for advice and consent positions which could thereby evade the Senate's confirmation prerogative, and to provide the exclusive means for temporarily filling vacancies in covered positions unless Congress explicitly provided a superseding mechanism. Only two options were available under the statute: either a first assistant or a presidential designee who had previously received Senate confirmation could serve for a strictly defined and limited period. Prior to 1988, the limitation period was 10 days (until 1891) and then 30 days. In that year it was increased to 120 days. An unbroken line of Attorneys General and Office of Legal Counsel opinions from 1880 through 1977 reflected the understanding that there could be only one limited period of occupancy per vacancy (a first assistant's and a presidential designee's service could not be piggybacked) and that a pending nomination did not toll the limitation period.<sup>3</sup> These opinions held that once the time period was exhausted, the office had to remain vacant and the powers and duties of the office could not be lawfully exercised. The Act was understood by the Department of Justice (DOJ) to apply in this rigid manner whether bureau chiefs or the heads of cabinet departments were involved. The only recourse of a President to fill a position in the event the Vacancies Act was unavailable was the nomination process or a recess appointment.<sup>4</sup>

However, since 1973, DOJ has taken the position that the Vacancies Act only “provides one [possible] method for filling certain positions on an interim basis”, and that some departments and agencies, including DOJ, “have statutory authority to assign duties and powers of positions on a temporary basis outside the Vacancies Act”. DOJ asserts that it has such authority under Section 509 of title 28, which provides that “[a]ll functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General,” and under Section 510 which permits the Attorney General “from time to time to make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.” It also contends that these “vesting and delegation” provisions make the time limitations of the Vacancies Act on the filling of vacant positions inapplicable to the Department. This special authority is said to date from the establishment of the Department in 1870.<sup>5</sup>

In the past, DOJ has denied the applicability of the Vacancies Act, relying on Sections 509 and 510, with respect to vacancies in the offices of FBI Director and Assistant Attorney General for the Criminal Division, and the Departments of Health and Human Services (HHS), Education, and Labor, with the apparent support of DOJ, have adopted the same rationale with respect to administrative provisions in their own enabling legislation that similarly vests all powers and

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<sup>1</sup> 5 U.S.C. 3345-3349 (1994).

<sup>2</sup> Act of July 23, 1868, ch. 227, 15 Stat. 168.

<sup>3</sup> See, 16 Op. Atty. Gen. 596, 597 (1880); 18 Op. Atty. Gen. 530 (1883); 18 Op. Atty. Gen. 58 (1884); 20 Op. Atty. Gen. 8 (1891); 32 Op. Atty. Gen. 139, 141 (1920); 1 Op. OLC 150, 152 n.1 (1997).

<sup>4</sup> See generally, “Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights” (CRS General Distribution Memorandum, January 14, 1998) (Vacancies Act Memo), *reprinted in* Hearing, “Oversight of the Implementation of the Vacancies Act,” before the Senate Committee on Governmental Affairs, 105<sup>th</sup> Cong., 2d Sess. 62-115 (1998) (Vacancies Act Hearing).

<sup>5</sup> Vacancies Act Memo at 9, 17.

functions of the departments in their heads and allows discretionary delegations to subordinate officers and employees.

With equal consistency, the Comptroller General of the United States has disputed DOJ's position. The Comptroller argued that the language and history of the Vacancies Act establish that it is the exclusive authority for the temporary filling of vacant positions which require presidential appointment with the advice and consent of the Senate unless there is specific statutory language providing another means for filling the particular vacancies. Neither the DOJ provisions, nor similar provisions in other department enabling statutes, which have common origins, the Comptroller General argued, have either the requisite specificity or legislative purpose to effect a displacement of the scheme of the Vacancies Act.<sup>6</sup>

Following challenges in 1986 to rulings of non-compliance with the Act by the HHS, Labor and Education Departments, the Comptroller General requested that Congress address the growing compliance problem it was facing. Two significant amendments were made to the Act. First, the Act was amended to cover all executive departments and agencies, thereby overruling a 1973 court ruling limiting its coverage to executive and military departments. Second, Section 3348 was rewritten to allow 120 days, rather than 30 days, for a temporary designee to fill a vacancy. The new provision was designed to give the President more time to find a nominee and at the same time emphasize the centrality and importance of the Senate's confirmation prerogative. Thus, if a nomination was sent forward, the time limitation was abated during the period during which it was under consideration. Only if the nomination was rejected or withdrawn did the clock start ticking again on the temporary assignee. In its report, the Senate Committee expressed the belief that in this manner it was dealing with the interpretative controversy between DOJ and the Comptroller General. By giving more leeway to the President to find a nominee, and tying the time limitation on "actings" to the prompt forwarding of nominations, the Committee believed it made more effective and clear the Section 3349 declaration that the Act's provisions are the sole means for filling vacancies in covered agencies.<sup>7</sup>

A 1989 opinion by DOJ's Office of Legal Counsel acknowledged the Senate Committee's disagreement with its "longstanding view that the Vacancies Act does not extinguish other general authorities relating to the appointment of officers," but characterized the Committee report's explanation of the statutory changes as an improper and unsuccessful effort to "alter the proper construction of a statute through subsequent legislative history."<sup>8</sup> The opinion signaled that DOJ would continue to adhere to its position that certain provisions in agency enabling statutes may trump the Vacancies Act.

The effect of the application of DOJ's supersession policy throughout the executive branch, and consequently on the Senate's confirmation power, has been significant. At the Justice Department, 45 individuals since 1981 have been designated as "actings" in advice and consent positions for periods exceeding the permissible limitation of the Vacancies Act. The acting head of the Department's Criminal Division served in excess of 30 months until a nomination was submitted on March 13, 1998, and the acting Solicitor General served over 14 months until his resignation without any nomination being submitted. As late as September 1998 there were three other

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<sup>6</sup> *Id.*, at 17-19.

<sup>7</sup> *Id.* at 19-21.

<sup>8</sup> *Id.* at 21.

positions in the Department which were being filled by temporary designees for which nominations were submitted after the expiration of the 120-day limitation periods.

Similar situations presently exist in all the other executive departments. For instance, as of February 1998, 9 vacant advice and consent positions at the Commerce Department were being filled by actings. Of the 9, 7 had occupied the offices in excess of 120 days. One had served for three years. Nominations were pending for 5 of the 7 positions, but none were submitted prior to the expiration of the 120-day statutory limit. In all of the 14 executive departments there were, as of February 28, 1998, 64 acting officials in the 320 advice and consent positions, 43 of whom were serving beyond the 120-day limit of the Act.<sup>9</sup>

## Discussion

### The Substantiality of DOJ's Legal Position

The Department of Justice's contention that Section 14 of its 1870 enabling legislation, which vests all powers and functions of the Department in the Attorney General and allows her to delegate these powers and functions to such officers and employees as she deems necessary, supersedes the Vacancies Act and permits her to fill vacant advice and consent positions for an indeterminate period, does not appear supportable. A review of the legislative history of the provisions asserted to be the basis of the supersession does not provide the necessary explicitness and clarity to support the claim. In fact, the debates on the establishment of the Department in 1870 indicate that the provision said to be the original source of the authority had a wholly different purpose and did not in any way address the problem of vacant advice and consent positions. The singular purpose of the 1870 legislation was to bring order out of the chaos which fragmentation and dispersal of legal authority throughout the federal government over time had engendered. As succinctly put by Representative Jenckes, the principal sponsor of the bill, "It is for the purpose of having a unity of jurisprudence, if I may use that expression, in the executive law of the United States, that this bill proposes that all the law officers herein provided for shall be subordinate to one head".<sup>10</sup>

The debates concerning Section 14 make it evident that it was not a provision designed to override the recently enacted Vacancies Act. Its purpose was purely administrative, to establish a chain of command and to allow the Attorney General flexibility in organizing the new department which would have transferred to it a myriad of new substantive authorities and responsibilities and new legal personnel from other executive departments, a purpose consonant with the centralization of control of legal business in a law department.<sup>11</sup> It is not the type of explicit exemptive provision that would take it out from under general legislation like the Vacancies Act which was itself meant to be preemptive in nature. Further, the presence in Section 2 of the legislation of a provision making the new Solicitor General the Attorney General's chief (or first) assistant with the authority to act in his stead in the event of a vacancy in that office, is an indication of not only a congressional awareness of the Vacancies Act, but of an intent to utilize it

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<sup>9</sup> Roger Garcia, "Acting Officials in Positions Requiring Senate Confirmation in Executive Departments, as of February 1998" (CRS Report 98-252 GOV).

<sup>10</sup> Vacancies Act Memo at 9-17.

<sup>11</sup> See 42 Cong. Globe 3065, 3066 (Rep. Lawrence).

to further its purpose of unifying the governmental law functions in one agency, in this instance by protecting the Attorney General's office from potential presidential intrusions in case of a vacancy. By directing that the Solicitor General act as the temporary head of the department in case of a vacancy, it precluded presidential use of the alternative method of filling a vacancy, designation of another advice and consent official from another agency.<sup>12</sup> The subsequent legislative and administrative history of the Department's authorizing legislation also provides no support to the contention that the so-called "vesting and delegation" provision was meant to displace the Vacancies Act with respect to DOJ vacant positions. Similar provisions in the 13 other Executive departments also lack the necessary clear legislative intent to support a supersession theory.

The Constitution directs how officials who will exercise substantial authority under the laws are to be selected. Under the Appointments Clause, Art. II, sec. 2, cl. 2, the President is vested with the authority (and duty) to appoint all officers of the United States, subject to Senate confirmation, but Congress, by law, may vest the appointment of inferior officers elsewhere, *i.e.*, in the President alone, in the courts of law, or in the heads of departments. The President may also, under certain circumstances, fill vacancies in such offices through "recess appointments" which expire at the end of the next session of the Congress in which they were issued. Art. II, sec. 2, cl. 3.

Over the years, Congress has established a legislative scheme to protect the Senate's constitutional role in the confirmation process. The Vacancies Act traces its legislative origin to a 1795 enactment limiting the time a temporary assignee could hold office to six months.<sup>13</sup> All subsequent vacancies legislation contained some time limitation on temporary occupancy. Congress has also enacted provisions requiring that filling of vacancies by recess appointments be promptly followed by submissions of presidential nominations for such positions,<sup>14</sup> and prohibiting the payment of salary of recess appointees who had been rejected by a vote of the Senate.<sup>15</sup>

Congress' historic attention to the protection of the Senate's confirmation prerogative accords with the Supreme Court's view of the high importance the appointments process has in our constitutional scheme of balanced, separated powers. The Court has made it clear that "the principle of separation of powers is embedded in the Appointments Clause," *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 882 (1991), and most recently emphasized that the Clause "is more than a matter of `etiquette or protocol', it is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 117 S.Ct. 1573, 1579 (1997). See also, *Confederated Tribe of Siletz Indians of Oregon v. United States*, 110 F.3d 688, 696 (9<sup>th</sup> Cir. 1993) ("The Appointments Clause serves as a guard against one branch aggrandizing its power at the expense of another."). DOJ's position in the instant situation appears to misconceive the import of the constitutionally mandated appointment process and the carefully circumscribed roles that the President and the Senate play in that process.

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<sup>12</sup> Vacancies Act Memo at 12-15.

<sup>13</sup> Act of February 13, 1795, ch. 21, 1 Stat. 415.

<sup>14</sup> 5 U.S.C. 5503 (1994).

<sup>15</sup> The prohibition has been included in all Treasury and General Government Appropriations legislation for the past 60 years. See, *e.g.*, P.L. 105-61, sec. 610, 111 Stat. 1310.



## The Congressional Response

On March 18, 1998, the Senate Governmental Affairs Committee held an oversight hearing on the failure of executive agencies to adhere to the directives of the Vacancies Act.<sup>16</sup> Witnesses from both sides of the aisle (Senators Byrd and Thurmond), a representative of the Comptroller General, and academics, generally concurred that the non-compliance with the Act was unlawful but that the Act needed to be strengthened and clarified to make it effective. Senators Byrd and Thurmond announced that they were introducing legislation to address the problem. Department of Justice representatives declared the agency's continued adherence to its position.

Several remedial bills were subsequently introduced. S. 1761, introduced by Senator Byrd, provided that anyone performing the duties of a position that had been vacant in excess of the 120-day limitation of Section 3348 would not be paid for any day that such duties are performed, even if the person performing such duties occupied another position for which he was being paid. The bill provided that the Director of the Office of Management and Budget report monthly to the Comptroller General about vacancies in advice and consent positions and directed the Comptroller General to report when the 120-day period had been exceeded to the Congress, the President, the Treasury Secretary, and the Office of Personnel Management. The Vacancies Act was deemed to have superseded any other provision of law unless that law expressly provided that it supersedes the Act. The new provisions were to be prospective and to have no effect on pending nominations or occupiers of vacant positions.

S. 1764, introduced by Senators Thurmond and Lott, proposed more extensive revisions to the Vacancies Act. The bill made it clear that it is the exclusive vehicle for temporarily filling vacant advice and consent positions in executive agencies. For another statutory provision to supersede the Act it must expressly have provided that it was intended to do so. The President could fill vacancies only with the first assistant of the officer who was serving on the date the vacancy occurs or with an officer who had received Senate confirmation and was currently serving. If a vacant office was not temporarily filled in the manner provided within 120 days, the office was to remain vacant until a person was nominated by the President and confirmed by the Senate. A validly assigned acting official could serve for 120 days, but if that period was exhausted without the submission of a nomination the position must remain vacant until a nominee was confirmed. No one who performed the duties of the vacant office after the 120-day period had expired could be paid, either out of monies appropriated for the vacant position or for the position the assignee occupied while performing such duties. The heads of all executive departments and agencies were required to report vacancies in advice and consent positions upon their occurrence to the Comptroller General, and if the Comptroller General determined that the 120-day period had passed without submission of a nomination, he was required to report that determination to the Congress, the President, the Secretary of the Treasury, and the Office of Personnel Management. The bill was to apply prospectively to vacancies that occurred after enactment.

H.R. 3420, introduced by Representative Hyde and 12 others, would have amended Section 510 of title 28 to reject the applicability of Justice's "vesting and delegation" theory to itself, and specifically make the Vacancies Act applicable to the Department. It also provide that if the 120-day period of the Act lapse without the submission of a nominee for a Department vacancy, the United States Court of Appeals for the District of Columbia would appoint an acting official for the vacant position who would serve until the vacancy was filled, but the court could not appoint

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<sup>16</sup> See Vacancies Act Hearing, *supra*, footnote 4.

a current nominee or a person who had previously served as an acting official under the terms of the Vacancies Act.

Following the March hearing, Chairman Thompson introduced his own legislative proposal. S. 2176, the Federal Vacancies Reform Act of 1998, was introduced in the Senate on June 16, 1998 by Senators Thompson, Byrd, Thurmond, Lott and Roth. The bill, as amended, was reported by the Senate Committee on Governmental Affairs on July 15, 1998.<sup>17</sup> S. 2176 made clear that the Vacancies Act was to apply to all positions in executive agencies requiring Senate confirmation (except for positions in independent regulatory agencies and other boards and commissions, and for approximately 40 positions, including that of Attorney General, that may be temporarily filled under other specific statutes). The bill repudiated the contention of the Department of Justice that the head of a department may temporarily fill a position under a law authorizing that head to delegate or reassign duties among other officers in the department. A person would have been prohibited from serving as an acting officer if: (1) that person was serving as a first assistant when the incumbent of the position resigned or was unable to continue to serve; (2) during the 365-day period preceding the appointment, such person served as first assistant for less than 180 days; and (3) the President nominates that person for the position. The bill extended from 120 to 150 days the time period that an acting officer might serve, and would have extended that period for another 150 days if a nomination were submitted. If a nomination was not submitted within 150 days of the vacancy, however, then the office would remain vacant, and the duties of the office could be performed only by the head of the agency. Any action taken by an acting officer in violation of these provisions would be invalid, and no one would be permitted to ratify those actions. If the President submitted a nomination after the 150 days, an acting officer could be allowed to serve while the nomination was pending, or until 150 days after it was withdrawn or rejected. Each executive agency would be required to report to the Comptroller General an existing vacancy, the name of the person serving as acting officer and when such service began, the name of any nominee and when such nomination was submitted, and the final disposition of the nomination. The Comptroller General was to notify the Congress, the President, and the Office of Personnel Management when the 150-day limit was reached.

The Thompson bill and the Committee Report also addressed Vacancies Act issues raised in an appellate court ruling in *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F. 3d 203 (D.C. Cir. 1998), *motion for recall of mandate denied*, 1998 WL 549461 (D.C. Cir., Sept. 1, 1998). In that case, the incumbent Director of OTS, Timothy Ryan, on the day he resigned assigned all his duties to the then Deputy Director for Washington Operations, Jonathon Fiechter, who then served for almost four years. No nomination for the office was made during that period. Two days after Fiechter resigned, President Clinton invoked the Vacancies Act to designate Nicolas Retsinas, a HUD assistant Secretary, to be the acting Director. Within 120 days, the President submitted a nominee for Director, who was thereafter confirmed by the Senate. Doolin Bank challenged the legality of the initiation of an enforcement proceeding by Fiechter during his tenure. The court held that the Vacancies Act applied to the situation. It ruled, however, that the 120-day time limit of Section 3348 does not begin to run until the President acts to designate a current advice and consent official or a first assistant succeeds by operation of law. In the situation before it, neither occurred until Retsinas was designated four years after Ryan left. The court refused to consider Doolin's contention that Fiechter was actually Ryan's first assistant because the "argument comes too late," having not been raised in the administrative proceeding below or in its opening brief to the appeals court. But the court commented that since it held that

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<sup>17</sup> See S.Rept. 105-250 (1998).

Retsinas effectively ratified Fiechter's actions after he took office, "we do not decide whether Fiechter lawfully occupied the position of Director." Thus the Court did not address the effect of Section 3349, which makes the Act the exclusive vehicle for temporarily filling vacant positions, on Fiechter's assignment. Further, the Court's assumption that the lack of presidential action does not trigger the time limits of the Act, and the failure to definitively resolve the validity of the Fiechter designation, left open the possibility of revitalized use of the Justice Department's "vesting and delegation" theory, or the assignment of acting officials by outgoing officials coupled with presidential inaction without regard to the requirements of the Vacancies Act.<sup>18</sup>

The Senate Committee's concerns with the *Doolin* decision—that it recognized a right in the President to do nothing under the Vacancies Act and thereby allow an agency to designate an acting head for an indefinite period, and also the ability of a lawful successor of an unlawful acting official to retroactively ratify and make valid actions of the predecessor that might have otherwise been voidable—were strongly voiced in the Committee's Report,<sup>19</sup> in the floor debate,<sup>20</sup> and in the bill that reached the floor.<sup>21</sup>

A threat of filibuster in support of the Administration's opposition to the bill, and the failure to muster the 60 votes necessary to invoke cloture, prevented a Senate vote on S. 2176.<sup>22</sup> However, a period of intense negotiations between the Senate sponsors and Administration officials followed and an agreement on a compromise measure was reached and included in the FY 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act, which passed the House on October 20 and the Senate on October 21, and was signed into law on October 21 as P.L. 105-277, Division C, title I, section 151.

## **The New Vacancies Act**

The Federal Vacancies Reform Act of 1998 completely supplants current law. The new legislation appears to reflect a variety of decisional factors: the lessons of the 1988 experience when imprecise legislative drafting allowed the Executive to evade the Senate Committee's intended goals; the realization that piecemeal remediation of the 130-year-old statute would not address and resolve contemporary problems in policing, through the confirmation process, the effective and efficient staffing of a responsible political bureaucracy; and the understanding that the congressional goals of timely presidential submission of nominations and minimization of the period during which unconfirmed acting officials serve in key positions meant to be politically responsible and responsive, had to be balanced against executive concerns that the vetting process for potential officeholders has become more complex, difficult and protracted, and that the need

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<sup>18</sup> Three months after the appeals court's ruling, one of the parties discovered documents that indicated that Fiechter had in fact been designated by outgoing Director Ryan to be the first assistant for Vacancies Act purposes and moved the court to recall its mandate and reconsider its ruling. The appeals court denied the motion, adhering to its view that appellants' failure to raise that specific issue in either the administrative hearing or in its first brief to the court precluded the court from considering it. The appeals court also expressed doubt whether OTS could in fact have made Fiechter a first assistant entitled to succeed the outgoing director. 1998 WL 549461 at 2.

<sup>19</sup> See S.Rept. 105-250, *supra*, at 5-9.

<sup>20</sup> See, e.g., 144 Cong. Rec. S 11022 (daily ed. Sept. 28, 1998) (statement of Sen. Thompson).

<sup>21</sup> S. 2176 provided that the limitation period started the day the vacancy arose and if no nomination is submitted within that period the office had to remain vacant until a nominee was confirmed; and that actions taken by persons not complying with the Act are of no force and effect and cannot be ratified.

<sup>22</sup> Cloture failed by a vote of 53-38 after an extended debate. 144 Cong. Rec. 10866-69, 11021-39 (daily ed. Sept. 24, 1998).

for flexibility in maintaining the continuity and quality of administration during the period of interim service of an acting official was being unduly constrained by current law. The re-write appears animated by these considerations.

The President now has three options when an advice and consent position in any executive agency becomes vacant as a result of the death, resignation or other inability to perform the functions and duties of the office. Under new Section 3345 the President may allow the first assistant to such officer to assume the functions and duties of the office; or he may direct a current officer in any agency who has been subject to Senate confirmation to perform those tasks; or he may select any officer or employee of the subject agency who has been with that agency for at least 90 of the 365 days preceding the vacancy and is at least at the minimum GS-15 grade level. However, a person may not temporarily serve if that person did not, in the previous 365 days, served as a first assistant, or was first assistant for less than 90 days, and the President submits a nomination of that person to the Senate. Section 3345 (b) (1).

Section 3345 (a) is designed to provide optimal flexibility and administrative continuity in the case of a covered vacancy. A first assistant may now be either one who is designated such by law or by agency regulation. If there is no provision of law or agency regulation designating such a person, and the President deems it inappropriate to assign an advice and consent officer from another agency to occupy the office, he may select a person in the agency who has been there a sufficient amount of time and at a high enough grade level to perform the duties of the office. The limitation of Section 3345 (b) (1), noted above, is to prevent placing an employee in an agency simply for the purpose of having him in place while his nomination is pending.

The desirability of administrative continuity in office also explains the exception in Section 3345 (e). Where a person is serving in a position for a term of years and the term expires, he may continue to hold that office (subject to the time limitations of Section 3346) if the President nominates him for reappointment to that same office.

Under Section 3346, a person who is serving in an acting capacity pursuant to Section 3345 may temporarily hold that office for 210 days beginning on the date the vacancy occurs. The limitation period is suspended, however, if a first or second nomination is submitted to the Senate for as long as the nomination is pending in that body. If the first nomination is rejected by the Senate, or is withdrawn or is returned to the President, the acting officer may continue to serve for no more than 210 days after such action. But if a second nomination is submitted within that 210-day period, the acting officer may serve until the second nomination is confirmed, or for no longer than 210 days after the nomination is rejected, withdrawn, or returned. If a vacancy commences during a *sine die* congressional adjournment, the 210-day limitation period does not begin until the Senate reconvenes.

New Section 3347 declares that Sections 3345 and 3346 are the exclusive means for authorizing the temporary filling of advice and consent positions unless (1) Congress expressly provides by law that the President, a court, or the head of an executive department may designate an officer or employee to perform the function or duties of a specified office temporarily; or (2) Congress designates by law a particular officer or employee to temporarily serve; or (3) the President exercises his recess appointment power pursuant to Article II, sec. 2, cl. 3 of the Constitution. Section 3347(b) expressly negates the DOJ position that the statutory vesting of general agency authority in the head of any agency and allowing the agency head to delegate or reassign those vested duties and responsibilities to other agency officers or employees thereby provides an alternative to the Act's otherwise exclusive means of temporarily filling vacant positions.

Section 3348 provides that if an officer or employee is not temporarily serving in accordance with Sections 3345, 3346 and 3347, the office must remain vacant; but if it is an office other than the head of an agency, the head of the agency may perform the duties and functions of that office. Thus, if the President submits no nomination for an office during the 210-day period from the date of the commencement of a vacancy, the options available under the Act can no longer be utilized. Or, if the options provided under the Act are exhausted, only the nomination process or a recess appointment are available to the President. Further, if an action is taken by a person who is not qualified to act because he has not met the requirements of Sections 3345, 3346 or 3347, such actions are deemed by Section 3348(d)(1) as of no force or effect and may not be ratified in the future, except by an act of Congress. See Section 3348(d)(2). Section 3348 effectively overrules the contrary rulings and indications of the *Doolin* case.

Section 3349 directs the Comptroller General of the United States to monitor executive administration of the Act. The head of every executive agency must notify the Comptroller General of each covered vacancy as soon as it occurs, the name of the acting officer serving in the vacant position, the name of the presidential nominee for the vacant position, and the date of any rejection, withdrawal or return of a nomination. If the Comptroller General determines that a person is serving longer than the 210 day limitation and its applicable exceptions, he is to report his determination of that fact to the specified House and Senate Committees, the President, and the Office of Personnel Management.

Special provision is made for vacancies that occur during the transition to a new administration after a presidential election. Under Section 3349a, for any vacancy that exists in the 60-day period after inauguration day, the 210-day limitation period begins either 90 days after inauguration day or 90 days after the date which the vacancy occurs.

The new Act does not apply to statutory provisions that authorize an officeholder to continue to serve in office after the expiration of the term for which the person was appointed or until a successor is appointed or a specified period of time has expired, *i.e.*, so-called "holdover" provisions. Section 3349b. The Act also does not apply to advice and consent officers on boards, commissions or similar entities that are composed of multiple members and govern independent establishments or government corporations; the commissioners of the Federal Energy Regulatory Commission; members of the Surface Transportation Board; or Article I judges. Section 3349c.

Section 3349d provides that written notification by the President to the Senate that a nomination will be submitted to the Senate after a recess or an adjournment of more than 15 days is deemed to be a nomination for the purposes of Sections 3345 through 3349c of the Act if the notification contains the name of the nominee and the office to which he is to be nominated. But if the nomination is not actually submitted within two days after the end of such recess or adjournment, the nomination will be treated as withdrawn for the purposes of Sections 3345 through 3349c. This provision would appear to be an encouragement to the President not to utilize his recess appointment power.

The Act is effective on November 20, 1998, and will apply to any vacancy occurring after the effective date. But the time limitations of Section 3346 apply to any office that is vacant on the effective date as if the office became vacant on that date. Finally, a nomination for a vacant office submitted after the effective date will be considered the first nomination for that office even if that person had been previously nominated for that office.

## **Appendix. The Federal Vacancies Reform Act of 1998, P.L. 105-277**

**The Federal Vacancies Reform Act of 1998, Pub. L. 105-277, Division C,  
Title I, Section 151, to be codified at 5 U.S.C. 3345-3349d**

### **SEC. 151. FEDERAL VACANCIES AND APPOINTMENTS.**

*(a) SHORT TITLE.*-This section may be cited as the “Federal Vacancies Reform Act of 1998”.

*(b) IN GENERAL.*-Chapter 33 of title 5, United States Code, is amended by striking sections 3345 through 3349 and inserting the following:

#### **“§3345. Acting officer**

*“(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office-*

*“(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;*

*“(2) notwithstanding paragraph (1), the 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 subject to the time limitations of section 3346; or*

*“(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if-*

*“(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and*

*“(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.*

*“(b)(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if-*

*“(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person-*

*“(i) did not serve in the position of first assistant to the office of such officer; or*

*“(ii) served in the position of first assistant to the office of such officer for less than 90 days; and*

*“(B) the President submits a nomination of such person to the Senate for appointment to such office.*

*“(2) Paragraph (1) shall not apply to any person if*

*“(A) such person is serving as the first assistant to the office of an officer described under subsection (a);*

*“(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and*

*“(C) the Senate has approved the appointment of such person to such office.*

*“(c)(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President 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 subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.*

*“(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.*

**“§3346. Time limitation**

*“(a) Except in the case of a vacancy caused by sickness, the person serving as an acting officer as described under section 3345 may serve in the office-*

*“(1) for no longer than 210 days beginning on the date the vacancy occurs; or*

*“(2) subject to subsection (b), 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.*

*“(b) (1) If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 210 days after the date of such rejection, withdrawal, or return.*

*“(2) Notwithstanding paragraph (1), if a second nomination for the office is submitted to the Senate after the rejection, withdrawal, or return of the first nomination, the person serving as the acting officer may continue to serve-*

*“(A) until the second nomination is confirmed; or*

*“(B) for no more than 210 days after the second nomination is rejected, withdrawn, or returned.*

*“(c) If a vacancy occurs during an adjournment of the Congress sine die, the 210-day period under subsection (a) shall begin on the date that the Senate first reconvenes. “*

### **§3347 Exclusivity**

*“(a) Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office,) for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless-*

*“(1) a statutory provision 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; or “(2) 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.*

*“(b) Any statutory provision providing general authority to the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) to delegate duties statutorily vested in that agency head to, or to reassign duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(2) applies.*

### **“§3348. Vacant office**

*“(a) In this section-*

*“(1) the term ‘action’ includes any agency action as defined under section 551(13); and*

*“(2) the term ‘function or duty’ means any function or duty of the applicable office that-*

*“(A) (i) is established by statute; and*

*“(ii) is required by statute to be performed by the applicable officer (and only that officer); or*

*“(B)(i)(I) is established by regulation; and*

*“(II) is required by such regulation to be performed by the applicable officer (and only that officer); and*



*“(ii) includes a function or duty to which clause (i) (I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.*

*“(b) Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347, if an officer of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the Office-*

*“(1) the, office shall remain vacant; and*

*“(2) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office), only the head of such Executive agency may perform any function or duty of such office.*

*“(c) If 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.*

*“(d) (1) An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.*

*“(2) An action that has no force or effect under paragraph (1) may not be ratified.*

*“(e) This section shall not apply to-*

*“(1) the General Counsel of the National Labor Relations Board;*

*“(2) the General Counsel of the Federal Labor Relations Authority;*

*“(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate;*

*“(4) any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate; or*

*“(5) an office of an Executive agency (including the Executive Office of the President, and other than the General Accounting office) if a statutory provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office.*

**“§3349. Reporting of vacancies**

*“(a) The head of each Executive agency (including the Executive Office of the President, and other than the General Accounting office) shall submit to the Comptroller General of the United States and to each House of Congress-*

*“(1) notification of a vacancy in an office to which this section and sections 3345, 3346, 3347, 3348, 3349a, 3349b, 3349c, and 3349d apply and the date such vacancy occurred immediately upon the occurrence of the vacancy;*

*“(2) the name of any person serving in an acting capacity and the date such service began immediately upon the designation,*

*“(3) the name of any person nominated to the Senate to fill the vacancy and the date such nomination is submitted immediately upon the submission of the nomination; and*

*“(4)” the date of a rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return.*

*“(b) If the Comptroller General of the United States makes a determination that an officer is serving longer than the 210-day period including the applicable exceptions to such period under section 3346 or section 3349a, the Comptroller General shall report such determination immediately to—*

*“(1) the Committee on Governmental Affairs of the Senate;*

*“(2) the Committee on Government Reform and Oversight of the House of Representatives;*

*“(3) the Committees on Appropriations of the Senate and House of Representatives;*

*“(4) the appropriate committees of jurisdiction of the Senate and House of Representatives;*

*“(5) the President; and*

*“(6) the Office of Personnel Management.*

**“§3349a. Presidential inaugural transitions**

*“(a) In this section, the term ‘transitional inauguration day’ means 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.*

*“(b) With respect to any vacancy that exists during the 60-day period beginning on a transitional inauguration day, the 210-day period under section 3346 or 3348 shall be deemed to begin on the later of the date occurring—*

*“(1) 90 days after such transitional inauguration day; or*

*“(2) 90 days after the date on which the vacancy occurs.*

**“§3349b. Holdover provisions**

*“Sections 3345 through 3349a shall not be construed to affect any statute that authorizes a person to continue to serve in any office-*

*“(1) after the expiration of the term for which such person is appointed; and*

“(2) until a successor is appointed or a specified period of time has expired.

**“§3349c. Exclusion of certain officers**

“Sections 3345 through 3349b shall not apply to-

“(1) any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that-

“(A) is composed of multiple members; and

“(B) governs an independent establishment or Government corporation;

“(2) any commissioner of the Federal Energy Regulatory Commission;

“(3) any member of the Surface Transportation Board; or

“(4) any judge appointed by the President, by and with the advice and consent of the Senate, to a court constituted under article I of the United States Constitution.

**“§3349d. Notification of intent to nominate during certain recesses or adjournments**

“(a) The submission to the Senate, during a recess or adjournment of the Senate in excess of 15 days, of a written notification by the President of the President's intention to submit a nomination after the recess or adjournment shall be considered a nomination for purposes of sections 3345 through 3349c if such notification contains the name of the proposed nominee and the office for which the person is nominated.

“(b) If the President does not submit a nomination of the person named under subsection (a) within 2 days after the end of such recess or adjournment, effective after such second day the notification considered a nomination under subsection (a) shall be treated as a withdrawn nomination for purposes of sections 3345 through 3349c.

**(c) TECHNICAL AND CONFORMING AMENDMENT**

(1) **TABLE OF SECTIONS.**-The table of sections for chapter 33 of title 5, United States Code, is amended by striking the matter relating to subchapter III and inserting the following:

**“SUBCHAPTER III-DETAILS, VACANCIES, AND APPOINTMENTS**

“3341. Details; within Executive or military departments.

“[3342. Repealed.]

“3343. Details; to international organization.

“3344. Details; administrative law judges.

“3345. Acting officer.

“3346. Time limitation.

*“3347. Exclusivity.*

*“3348. Vacant office.*

*“3349. Reporting of vacancies.*

*“3349a. Presidential inaugural transitions.*

*“3349b. Holdover provisions relating to certain independent establishments.*

*“3349c. Exclusion of certain officers.*

*“3349d. Notification of intent to nominate during certain recesses or adjournments.*

*(2) SUBCHAPTER HEADING.-The subchapter heading for subchapter III of chapter 33 of title 5, United States Code, is amended to read as follows:*

*“SUBCHAPTER III-DETAILS, VACANCIES, AND APPOINTMENTS”.*

*(d) EFFECTIVE DATE AND APPLICATION -*

*(1) EFFECTIVE DATE.-Subject to paragraph (2), this section and the amendments made by this section shall take effect 30 days after the date of enactment of this section.*

*(2) APPLICATION.-*

*(A) IN GENERAL.-This section shall apply to any office that becomes vacant after the effective date of this section.*

*(B) IMMEDIATE APPLICATION OF TIME LIMITATION.-Notwithstanding subparagraph (A), for any office vacant on the effective date of this section, the time limitations under section 3346 of title 5, United States Code (as amended by this section) shall apply to such office. Such time limitations shall apply as though such office first became vacant on the effective date of this section.*

*(C) CERTAIN NOMINATIONS.-If the President submits to the Senate the nomination of any person after the effective date of this section for an office for which such person had been nominated before such date, the next nomination of such person after such date shall be considered a first nomination of such person to that office for purposes of sections 3345 through 3349 and section 3349d of title 5, United States Code (as amended by this section).*

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