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Temporarily Filling Presidentially Appointed, Senate-Confirmed Positions

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Summary

A vacant presidentially appointed, Senate-confirmed position (herein, “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, temporary filling of vacancies in a particular position is specifically provided for 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 may be 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 carries out these functions without assuming the vacant office.

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According to the 2012 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 (herein, advice and consent positions).² The Constitution and federal statutes provide several authorities for temporarily filling vacancies in these positions: the Federal Vacancies Reform Act of 1998³ (Vacancies Act); the President's constitutional recess appointment power; and position-specific temporary appointment provisions. Each of these authorities is discussed below.

Designations 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; (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 position, in 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, and who has been with the agency for at least 90 of the preceding 365 days.

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 suspended, 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 such a nomination.

Notably, the Supreme Court of the United States has held that a provision of the Vacancies Act limits the conditions under which an individual may serve in both an acting capacity and as the nominee to the same position. The court's opinion appears to allow an individual to serve on this basis only if the individual has served as the first assistant to the vacant position for more than 90 of the preceding 365 days or if the individual is serving as first assistant, and that position itself requires the advice and consent of the Senate.⁴

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

¹ U.S. Congress, House Committee on Oversight and Government Reform, *United States Government Policy and Supporting Positions*, 112th Cong., 2nd sess., committee print, December 1, 2012 (Washington: GPO, 2012), pp. 197-200. The next edition of this quadrennial print, commonly known as the *Plum Book*, is expected in late 2016. 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 considered to be routine nominations, 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 are 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 P.L. 105-277, Div. C, Title I, §151; 5 U.S.C. §§3345-3349d.

⁴ *NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017).

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 non-delegable function or duty of that office.⁵

Appointees 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.”⁶ The act does not apply to positions on multi-headed regulatory boards and commissions, or to new positions that have never been filled.⁷

Recess Appointments⁸

The President’s authority to make recess appointments is conferred by the Constitution, which states that “[t]he 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.”⁹ Presidents have made such appointments during within-session recesses (*intrasession* recess appointments) and between sessions (*intersession* recess appointments). 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.

Presidents have occasionally used the recess appointment power in ways that have had the effect of circumventing the confirmation process.¹⁰ In response, Congress has placed restrictions on the President’s authority to make recess appointments. Under 5 U.S.C. §5503(a), 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, provided that the nominee was not previously recess appointed to the position; 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

⁵ 5 U.S.C. §3348.

⁶ 5 U.S.C. §3345(a)(1). However, when the time limitations of the Vacancies Act have been exhausted, it may still be possible for the functions of a vacant office, except those that are non-delegable, to be carried out indefinitely by another individual pursuant to a delegation of authority. See “Delegation of Duties to another Official,” below.

⁷ This law superseded previous, similar statutory provisions. For more on the Vacancies Act, see CRS Report 98-892, *The New Vacancies Act: Congress Acts to Protect the Senate’s Confirmation Prerogative*, by Morton Rosenberg.

⁸ For a further discussion of recess appointments, see CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue; and CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu. 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.

⁹ Article 2, §2, cl. 3 of the Constitution.

¹⁰ For example, when President George W. Bush recess appointed Charles W. 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 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>.

session of the Senate.¹¹ For this reason, when a recess appointment is made, the President generally submits a new nomination for the nominee even when 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 as a means of precluding the President from making recess appointments.¹² 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.¹³ It also might have limited use of the recess appointment power by President Obama.¹⁴

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 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.”¹⁵ 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.”¹⁶ The Court also held that the President may use the recess appointment power essentially only during a Senate recess of 10 days or longer. A Senate recess of 3 days “is not long enough to trigger the President’s recess appointment power,” and a recess of more than 3 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.”¹⁷

¹¹ Congress placed limits on payments to recess appointees as far back as 1863. The current provisions date from 1940 (ch. 580, 54 Stat. 751; 5 U.S.C. §56, revised, and recodified at 5 U.S.C. §5503, by P.L. 89-554, 80 Stat. 475).

¹² 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.

¹³ See CRS Report RL33310, *Recess Appointments Made by President George W. Bush*, by Henry B. Hogue and Maureen O. Bearden.

¹⁴ See CRS Report R42329, *Recess Appointments Made by President Barack Obama*, by Henry B. Hogue.

¹⁵ “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, available at http://www.justice.gov/sites/default/files/olc/opinions/2012/01/31/pro-forma-sessions-opinion_0.pdf.

¹⁶ *Nat’l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2574 (2014). The three recess appointments at issue were found to be constitutionally invalid.

¹⁷ *Noel Canning*, 134 S. Ct. 2550, 2566-2567 (2014). 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.”

Position-Specific Temporary Appointment Provisions

In some cases, Congress has expressly provided for the temporary filling of vacancies in a particular advice and consent position. 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; (3) the President designates an official to serve in an acting capacity; or (4) the head of the agency in which the vacancy exists designates an acting official.

Method 1

The top positions at the Office of Management and Budget (OMB), the Federal Aviation Administration (FAA), and the Small Business Administration (SBA), among others, are temporarily filled through the first method.¹⁸ For example, the *U.S. Code* provides that “[t]he Deputy Director [of OMB] acts as the Director when the Director is absent or unable to serve or when the office of Director is vacant.”¹⁹ The relevant statute states that, at the FAA, 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.”²⁰ With regard to the SBA, 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.”²¹

Method 2

The top positions at the General Services Administration (GSA) and Social Security Administration (SSA) are temporarily filled through the second method above, in which a specified official is automatically designated as acting, unless the President provides otherwise. With regard to GSA, 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.”²² Similarly, the “Deputy Commissioner [of SSA] 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.”²³

Method 3

Positions for which the President is authorized to designate an acting official—the third method above—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

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

¹⁹ 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)).

²⁰ 49 U.S.C. §106(i).

²¹ 15 U.S.C. §633(b)(1).

²² 40 U.S.C. §302(b).

²³ 42 U.S.C. §902(b)(4).

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:

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.²⁴

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.”²⁵

Method 4

In one manifestation of the fourth method, designation by agency head, in some departments and agencies, the agency head is empowered to establish a line of temporary succession in the event of a 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 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.²⁶

Other provisions allow agency heads to designate individuals to fill vacancies in lower level positions temporarily. For example, the Attorney General “may designate a person to perform the functions of and act as marshal,” as long as that individual has not been rejected by the Senate for appointment to the position.²⁷ An individual appointed in this manner “may serve until the earliest of the following events: (1) [t]he entry into office of a United States marshal appointed [through the advice and consent process;] (2) [t]he expiration of the thirtieth day following the end of the next session of the Senate[;]” or (3) if the designee is nominated by the President and rejected by the Senate, “the expiration of the thirtieth day following such” rejection.²⁸ 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

²⁴ 29 U.S.C. §153(d).

²⁵ 8 U.S.C. §1324b(c)(1).

²⁶ 20 U.S.C. §3412(a)(1).

²⁷ 28 U.S.C. §562.

²⁸ *Ibid.*

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,²⁹ under the provisions of the Vacancies Act, or under a combination of these authorities in sequence.³⁰ The President temporarily filled vacancies in the two Labor Department positions by using, in succession, his recess appointment and Vacancies Act authorities. He recess appointed Eugene Scalia to be Solicitor of Labor on January 11, 2001. 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. With the position of Solicitor technically vacant, the President then gave Scalia a temporary appointment to the position, on November 22, 2002, under the Vacancies Act. 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, 2008.³¹

Unsuccessful Nominations and Payment Limitations

In some cases, individuals who are serving temporarily in advice and consent positions are also nominated to those positions. 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 5 U.S.C. §5503, 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. The provision reads, “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.”³² Similar provisions had been included in annual funding measures for most of, 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 an individual serving in an acting or temporary capacity in an advice and consent position from being paid for his or her services if he or she has been nominated to the position twice and the second nomination has 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

²⁹ 28 U.S.C. §546.

³⁰ 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 28 U.S.C. §546 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.)

³¹ 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>.

³² P.L. 110-161, Div. D, Title VII, §709; 121 Stat. 2021; 5 U.S.C. prec. §5501.

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.³³

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. 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 subsequent presidential appointment, or through occupying another position to which the authority of the vacant position has been delegated, as discussed below.³⁴

Delegation of Duties to Another Official

As discussed in this report, the temporary filling of an advice and consent position is governed by the Vacancies Reform Act of 1998, the Recess Appointments Clause of the Constitution, and position-specific statutes. However, when the time limitations of the Vacancies Act have been exhausted, it may be possible for the functions of a vacant office to be carried out indefinitely by another individual, usually the first assistant, pursuant to a delegation of authority by the agency head.³⁵ In such instances, the official carries out these functions without assuming the vacant office. Generally, these functions may include any *except* those few that are statutorily vested specifically, and only, in the vacant office (“non-delegable duties”).

In one such instance, described in a 2008 Government Accountability Office (GAO) opinion, the Office of Legal Counsel (OLC) at the Department of Justice was led by the Principal Deputy Assistant Attorney General for that office, Steven G. Bradbury, during a prolonged vacancy in the usual lead position, the Assistant Attorney General for OLC, after the time limitations of the Vacancies Act had been exhausted. The opinion states

The issue remaining is whether Mr. Bradbury, as Principal Deputy Assistant Attorney General during the timeframe in which the office [of Assistant Attorney General for OLC] has been vacant, performed any functions or duties which under the Vacancies Act may be performed only by the Attorney General as head of the Department. According to the Department, Mr. Bradbury’s service during the relevant time period has been in

³³ P.L. 111-8, Div. D, Title VII, §749; 123 Stat. 693; 5 U.S.C. prec. §5501.

³⁴ 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. The exclusivity provision of the Vacancies Reform 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.

³⁵ Arguably, constitutional issues might arise if the functions of a *principal officer* of the United States, such as a Secretary, were carried out indefinitely by an official who had not been appointed to the position. Most advice and consent positions, however, are *inferior officers*. For a discussion of the distinction, see “Appointments Clause and Presidential Advisors” in CRS Report R40856, *The Debate Over Selected Presidential Assistants and Advisors: Appointment, Accountability, and Congressional Oversight*, by Barbara L. Schwemle et al.

accordance with the Vacancies Act, since the position of Assistant Attorney General for OLC does not have any duties or functions which are exclusive to the position.³⁶

In contrast to limitations imposed by the Vacancies Act, the first assistant or other official carrying out these delegated functions during the vacancy need not have served in the agency for a specified period prior to carrying out these duties. He or she might or might not occupy another advice and consent position. He or she may be a career or non-career appointee.

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³⁶ U.S. Government Accountability Office, *Federal Vacancies Reform Act of 1998 - Assistant Attorney General for the Office of Legal Counsel, U.S. Department of Justice*, B-310780, June 13, 2008, pp. 3-4, available at <http://www.gao.gov/products/A82394>.