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Temporarily Filling Presidentially Appointed, Senate-Confirmed Positions

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Summary

A vacant presidentially appointed, Senate-confirmed position (PAS 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. These temporary appointment tools may be of interest to the 110th Congress as the Administration of President George W. Bush completes its last year. This report will be updated as events warrant.

According to the most recent edition of the *Plum Book*, in 2004 there were 1,101 executive branch positions to which appointments are made by the President with the advice and consent of the Senate (PAS positions).[1] The Constitution and federal statutes provide several authorities for temporarily filling vacancies in these positions: the Federal Vacancies Reform Act of 1998[2] (Vacancies Act); the President's constitutional recess appointment power; and position-specific temporary appointment provisions. Each of these authorities is discussed below.

[1] U.S. Congress, House Committee on Government Reform, *United States Government Policy and Supporting Positions*, 108th Cong., 2nd sess., committee print, November 22, 2004 (Washington: GPO, 2004), pp. 213-215. This document is commonly known as the *Plum Book*.

[2] P.L. 105-277, Div. C, Title I, § 151; 5 U.S.C. §§ 3345-3349d.

Designations Under the Vacancies Act

When an executive branch PAS position becomes vacant, it may be filled temporarily in one of three ways under the Vacancies 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 if a first or second nomination for the position has been submitted to the Senate for confirmation and is pending. The temporary appointment can continue for an additional 210 days after the rejection, withdrawal, or return of such a nomination.

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 begin to run until the later of the following two dates: 90 days after the incoming President assumes office, or 90 days after the vacancy occurs.

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."[3] The act does not apply to positions on multi-headed regulatory boards and commissions, or to new positions that have never been filled.[4]

Recess Appointments[5]

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."[6] Presidents have made such appointments during within-session recesses (*intrasession* recess appointments) and between sessions (*intersession* recess appointments). Intrasession recess appointments have sometimes

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[3] 5 U.S.C. § 3345(a)(1).

[4] 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.

[5] 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 T.J. Halstead. See also CRS Report RL33310, *Recess Appointments Made by President George W. Bush, January 20, 2001- January 31, 2008*, by Henry B. Hogue and Maureen Bearden.

[6] Article 2, § 2, cl. 3 of the Constitution.

provoked controversy in the Senate, and there is also an academic literature that has drawn their legitimacy into question.[7] 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.[8] 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 (other than the nomination of someone given a recess appointment during the preceding recess) was pending when the Senate recessed, 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.[9] 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 addition, although recess appointees whose nominations to a full term are subsequently rejected by the Senate may continue to serve until the end of their recess appointments, a recurring provision of the appropriations act funding the Department of the Treasury and specified other departments and agencies may prevent them from being paid after their rejection.[10]

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[7] Regarding Senate controversy, see Sen. George Mitchell, "The Senate's Constitutional Authority to Advise and Consent to the Appointment of Federal Officers," *Congressional Record*, vol. 139, July 1, 1993, p. 15266; and Senate Legal Counsel, "Memorandum of United States Senate as Amicus Curiae in Support of Plantiffs' Motion, and in Opposition to Defendants' Motions, for Summary Judgment on Count Two," U.S. District Court for the District of Columbia, *Mackie v. Clinton*, C.A. No. 93-0032-LFO, *Congressional Record*, vol. 139, July 1, 1993, pp. 15267-15274. For academic literature, see, for example, Michael A. Carrier, "When Is the Senate in Recess for Purposes of the Recess Appointments Clause?" *Michigan Law Review*, vol. 92, June 1994.

[8] 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://www.whitehouse.gov/news/releases/2004/01/20040116-19.html], accessed January 22, 2008.

[9] 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).

[10] P.L. 110-161, Div. D, § 709. 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." A similar provision has been part of this annual funding activity since at least 1950.

Position-Specific Temporary Appointment Provisions

In some cases, Congress has expressly provided for the temporary filling of vacancies in a particular PAS 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.

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. 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."[11] 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."[12] 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."[13]

The top positions at the General Services Administration (GSA) and Social Security Administration (SSA) are temporarily filled through the second method above. 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."[14] 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."[15]

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 the case of the General Counsel, the service of the President's designee is limited to a period of time 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

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[11] 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)).

[12] 49 U.S.C. § 106(i).

[13] 15 U.S.C. § 633(b)(1).

[14] 40 U.S.C. § 302(b).

[15] 42 U.S.C. § 902(b)(4).

> 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.[16]

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."[17]

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.[18]

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.[19] 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.[20] 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. Since 2003, U.S. Attorney vacancies have been filled temporarily through appointment

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[16] 29 U.S.C. § 153(d).

[17] 8 U.S.C. § 1324b(c)(1).

[18] 20 U.S.C. § 3412(a)(1).

[19] 28 U.S.C. § 562.

[20] Ibid.

by the Attorney General[21] and also under the provisions of the Vacancies Act.[22] As of July 23, 2007, the most recent date for which comprehensive data are available, at least 21 U.S. Attorney vacancies had been filled through sequential appointments under first one of these authorities and then the other.[23] 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.[24]

Consultants

At times, a nominee is hired as a consultant while awaiting confirmation, but he or she may serve only in an advisory capacity and may not take on the functions and duties of 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; the authority comes with one of the limited-term appointments discussed above, or with Senate confirmation and subsequent presidential appointment.[25]

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[21] 28 U.S.C. § 546.

[22] 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.usdoj.gov/olc/opinions/09052003_usaqanda.pdf], accessed January 22, 2008.)

[23] In addition, between January 1993 and March 9, 2006, at least eight U.S. Attorney vacancies — three under the Clinton Administration and five under the Bush Administration — were filled through successive 120-day appointments by the Attorney General under the provisions of 28 U.S.C. § 546.

[24] The White House press release announcing Stickler's recess appointment may be found at [http://www.whitehouse.gov/news/releases/2006/10/20061019-8.html], and the news release on his subsequent appointment may be found at [http://www.whitehouse.gov/news/releases/2008/01/20080104-5.html], both accessed January 23, 2008.

[25] 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.