



Statement of

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Subcommittee on Social Security  
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Hearing on

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After Over 5 Years of Acting Commissioners”**

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### **Chairman Johnson, Ranking Member Larson, and Members of the Subcommittee:**

My name is Valerie Brannon. I am a legislative attorney in the American Law Division of the Congressional Research Service (CRS). Thank you for inviting me to testify on behalf of CRS regarding the vacancy in the office of the Commissioner of Social Security (Commissioner). My testimony will broadly address the statutory authority for other governmental officials to temporarily perform the duties of that office in an acting capacity.<sup>1</sup>

As discussed in more detail below, there are two statutes that could govern the ability of a government employee to serve as the Acting Commissioner. The first is the Federal Vacancies Reform Act of 1998 (Vacancies Act), the statute that generally governs the ability of government employees to perform the functions and duties of vacant advice and consent positions in the executive branch.<sup>2</sup> The second is Section 702 of the Social Security Act (Section 702), which creates the position of the Commissioner, along with a number of other high-level offices in the Social Security Administration (SSA).<sup>3</sup> Notably, Section 702 also contains a provision pertaining to a vacancy in the office of the Commissioner.<sup>4</sup>

## **Vacancies Act**

The Vacancies Act generally provides “the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate.”<sup>5</sup> The law is triggered if an officer serving in an advice and consent position in the executive branch “dies, resigns, or is otherwise unable to perform the functions and duties of the office.”<sup>6</sup> With very few exceptions, the statute applies to most vacant advice and consent positions in the executive branch.<sup>7</sup> Importantly, the Vacancies Act places two kinds of limitations on acting service. First, the statute allows only certain

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<sup>1</sup> This testimony is centrally concerned with the authority Congress has provided to allow an acting officer to temporarily exercise an office’s powers. There may be other legal issues raised by an acting officer serving as the Commissioner of Social Security, such as the ability of the Commissioner to delegate duties to other officials to perform in their own capacities. *See* 42 U.S.C. § 902(a)(7) (authorizing Commissioner to assign duties and delegate authority). There may also be constitutional limitations on the ability of other officials to perform the duties of the Commissioner. *See, e.g.,* Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam) (“[A]ny 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 by [the Appointments Clause of the U.S. Constitution].” (quoting U.S. CONST. art. II, § 2, cl. 2)). I am happy to explore any of these additional legal questions at the request of the Subcommittee.

<sup>2</sup> 5 U.S.C. §§ 3345-3349c. For a more thorough discussion of the Vacancies Act, see CRS Report R44997, *The Vacancies Act: A Legal Overview*, by Valerie C. Brannon.

<sup>3</sup> 42 U.S.C. § 902; Pub. L. No. 103-296, § 102, 108 Stat. 1467 (1994). Specifically, Section 702 also creates the offices of the Deputy Commissioner of Social Security, the Chief Actuary, the Chief Financial Officer, and the Inspector General. *Id.*

<sup>4</sup> 42 U.S.C. § 902(b)(4).

<sup>5</sup> 5 U.S.C. § 3347(a). The Vacancies Act only applies to functions or duties that are (1) established either by statute or regulation and (2) “required” by that statute or regulation “to be performed by the applicable officer (and only that officer).” *Id.* § 3348(a)(2). Accordingly, the Vacancies Act apparently restricts the exercise of nondelegable duties by other government officials. *See id.*; *see also* Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 420 (D. Conn. 2008).

<sup>6</sup> 5 U.S.C. §§ 3345, 3348.

<sup>7</sup> *See id.* §§ 3345(a), 3347(a), 3348(b), 3349(a) (excluding the Government Accountability Office); *id.* § 3349c (excluding members of certain boards and commissions, along with federal judges); *id.* § 3348(e) (excluding statutorily specified offices from the provision of the Vacancies Act that renders noncompliant actions void). *Cf. id.* § 3349b (providing that the Vacancies Act “shall not . . . affect” holdover statutes).

classes of employees to perform the duties of a vacant advice and consent position.<sup>8</sup> Second, the Vacancies Act specifies that such employees may perform these duties for only a limited period of time.<sup>9</sup>

### Who Can Serve as an Acting Officer Under the Vacancies Act?

There are only three classes of government officials or employees who may temporarily perform the functions and duties of a vacant advice and consent office under the Vacancies Act.<sup>10</sup> First, as a default and automatic rule, once an office becomes vacant, “the first assistant to the office” becomes the acting officer.<sup>11</sup> Alternatively, under the Vacancies Act, the President “may direct” two other classes of people to serve as an acting officer instead of the “first assistant.”<sup>12</sup> First, the President may direct a person currently serving in a different advice and consent position to serve as acting officer.<sup>13</sup> Second, the President can select a senior “officer or employee” of the same executive agency, if that employee served in that agency for at least 90 days during the year preceding the vacancy and if the rate of pay for that employee is at least GS-15 on the federal pay scale.<sup>14</sup>

### How Long Can an Acting Officer Serve Under the Vacancies Act?

The Vacancies Act also limits the amount of time that a vacant advice and consent position may be filled by an acting officer. An acting officer may serve either (1) during a fixed 210-day period beginning on the date that the vacancy occurred, or (2) during the period while a “first or second nomination for the office” is pending in the Senate.<sup>15</sup> These two time periods run independently and concurrently.<sup>16</sup> Consequently, the submission and pendency of a nomination allows an acting officer to serve beyond the initial 210-day period.<sup>17</sup> The legislative history of the Vacancies Act suggests that an acting officer may serve during the pendency of a nomination even if that nomination is submitted after the initial 210-day period has expired.<sup>18</sup>

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<sup>8</sup> *Id.* § 3345.

<sup>9</sup> *Id.* §§ 3346, 3349a.

<sup>10</sup> *Id.* § 3345. Further, even individuals otherwise falling within one of these three classes might be prohibited from serving as an acting officer if they are themselves nominated by the President to serve permanently in that position. *See id.* § 3345(b). *See also* SW Gen., Inc. v. NLRB, 137 S. Ct. 929, 938 (2017) (holding 5 U.S.C. § 3345(b)(1) applies to all three classes of persons who might serve as acting officers under the Vacancies Act, rather than only to first assistants serving under 5 U.S.C. § 3345(a)(1)).

Individuals in one additional class may serve as an acting officer. Specifically, the Vacancies Act provides that if an officer serves a fixed term rather than serving at the pleasure of the President, and the President has nominated that officer “for reappointment for an additional term to the same office in an Executive department without a break in service,” then the President may direct that officer to serve, subject to the same time limitations imposed by the Vacancies Act on any other acting officer. *Id.* § 3345(c)(1). Because the Commissioner serves a fixed six-year term, it is possible that this provision could allow a Commissioner who is re-nominated to the position to continue service. *See* 42 U.S.C. § 902(a)(3).

<sup>11</sup> 5 U.S.C. § 3345(a)(1).

<sup>12</sup> *Id.* § 3345(a). This directive *only* may come from the President. *Id.*

<sup>13</sup> *Id.* § 3345(a)(2).

<sup>14</sup> *Id.* § 3345(a)(3).

<sup>15</sup> *Id.* § 3346(a). If the first or second nomination to the office is “rejected by the Senate, withdrawn, or returned to the President by the Senate,” the acting officer may continue to serve for a 210-day period beginning on the date of that rejection, withdrawal, or return. *Id.* § 3346(a).

<sup>16</sup> *See id.* § 3346(b).

<sup>17</sup> *See id.* § 3346.

<sup>18</sup> 144 CONG. REC. S11022 (daily ed. Sept. 28, 1998) (statement of Sen. Thompson). *Accord* Guidance on Application of Fed’l Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 68 (1999).

However, if the vacancy exists during the 60-day period beginning on the day a new President takes office, then the 210-day period begins the later of either 90 days after inauguration or 90 days after the date that the vacancy occurred.<sup>19</sup> Therefore, with respect to vacancies that existed on January 20, 2017, the Vacancies Act appears to have authorized certain government officials to serve in an acting capacity for a 300-day period beginning on January 20, 2017, and likely authorizes certain qualified officials to continue to serve upon the submission of a nominee.<sup>20</sup>

### How is the Vacancies Act Enforced?

The heads of executive agencies are required to report any vacancies, along with information about acting officers and nominations, “to the Comptroller General of the United States and to each House of Congress.”<sup>21</sup> Furthermore, if an individual is not serving in compliance with the Vacancies Act and attempts to perform “any function or duty of a vacant office,” the Vacancies Act provides that such an action “shall have no force or effect.”<sup>22</sup> Therefore, if an acting officer is not one of the three classes of government officials authorized to serve under the Vacancies Act or if an acting officer is serving after the relevant time periods have run, any attempt by that officer to perform a function or duty of an advice and consent office will have “no force or effect.”<sup>23</sup> This provision might be enforced in courts if, for example, a private suit challenging the authority of a person to act seeks to nullify any noncompliant agency actions.<sup>24</sup> Additionally, if the Comptroller General determines that an officer has served “longer than the 210-day period,” the Comptroller General must report this finding to the appropriate congressional committees, the President, and the Office of Personnel Management.<sup>25</sup>

### Section 702 of the Social Security Act

Section 702 creates the positions of Commissioner and Deputy Commissioner of Social Security (Deputy Commissioner), along with a few other high-level positions, defining their duties and terms of service.<sup>26</sup> This provision was added to the Social Security Act as part of the 1994 reorganization that established the SSA as an independent agency.<sup>27</sup> Both the Commissioner and Deputy Commissioner positions require appointment through the advice and consent process.<sup>28</sup> Section 702 provides in relevant part that:

The Deputy Commissioner shall be Acting Commissioner of the Administration during the absence or disability of the Commissioner and, unless the President designates another officer of

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<sup>19</sup> 5 U.S.C. § 3349a(b). This provision refers to the “transitional inauguration day,” defined as “the date on which any person swears or affirms the oath of office as President, if such person is not the President on the date preceding the date of swearing or affirming such oath of office.” *Id.* § 3349a(a).

<sup>20</sup> *See id.* §§ 3346; 3349a.

<sup>21</sup> *Id.* § 3349(a).

<sup>22</sup> *Id.* § 3348(d)(1).

<sup>23</sup> *Id.*

<sup>24</sup> *See* S. REP. NO. 105-250, at 19-20 (1998) (“The Committee expects that litigants with standing to challenge purported agency actions taken in violation of these provisions will raise non-compliance with this legislation in a judicial proceeding challenging the lawfulness of the agency action.”). *See, e.g.,* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 944 (2017) (holding government official violated Vacancies Act and affirming decision below that found an act taken by the official was invalid).

<sup>25</sup> 5 U.S.C. § 3349(b).

<sup>26</sup> 42 U.S.C. § 902.

<sup>27</sup> Pub. L. No. 103-296, § 102, 108 Stat. 1467 (1994).

<sup>28</sup> 42 U.S.C. §§ 902(a)(1), (b)(1).

the Government as Acting Commissioner, in the event of a vacancy in the office of the Commissioner.<sup>29</sup>

Therefore, pursuant to Section 702, as a general matter, the Deputy Commissioner “shall be Acting Commissioner” in three situations: (1) the absence of the Commissioner; (2) the disability of the Commissioner; or (3) a vacancy in the office of the Commissioner.<sup>30</sup> In the case of a *vacancy* in the office, however, the Deputy Commissioner serves as Acting Commissioner “unless the President designates another officer of the Government as Acting Commissioner,”<sup>31</sup> Accordingly, in this third situation, if the President designates “another officer of the Government” as Acting Commissioner, the other “officer” will serve in that role instead of the Deputy Commissioner.<sup>32</sup>

Section 702 is silent on two critical issues. First, Section 702 does not define who is an “officer of the Government” that could be designated to serve as the Acting Commissioner in lieu of the Deputy Commissioner.<sup>33</sup> Second, Section 702 does not expressly limit the duration of an Acting Commissioner’s service.<sup>34</sup>

## Interaction between the Vacancies Act and Section 702

At first glance, both the Vacancies Act and Section 702 could potentially be viewed to govern a vacancy in the Commissioner’s office. Section 702 expressly provides that in the event of a vacancy, the Deputy Commissioner shall serve as Acting Commissioner.<sup>35</sup> In turn, the Vacancies Act generally governs acting service for most executive branch offices,<sup>36</sup> and none of its limited exceptions seem to exempt the position of the Commissioner.<sup>37</sup> Any inconsistencies between these two statutes may prompt challenges to the authority of an Acting Commissioner, if that official is not complying with one of the two statutes.<sup>38</sup>

Where two statutes encompass the same conduct, courts will, if possible, “read the statutes to give effect to each.”<sup>39</sup> Courts are generally reluctant to conclude that statutes conflict and will usually assume that two laws “are capable of co-existence, . . . absent a clearly expressed congressional intention to the

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<sup>29</sup> *Id.* § 902(b)(4).

<sup>30</sup> *Id.* The President and the SSA have provided a further order of succession in the event that the offices of both the Commissioner and the Deputy Commissioner are vacant. *See SSA Organizational Manual, Chapter S: Social Security Administration*, SOC. SEC. ADMIN., <https://www.ssa.gov/org/orgOC.htm> (last visited Mar. 2, 2018) (referencing Presidential Memorandum on Providing an Order of Succession Within the Social Security Administration, 79 Fed. Reg. 63805 (Oct. 24, 2014)). *See also* Presidential Memorandum on Providing an Order of Succession Within the Social Security Administration, 81 Fed. Reg. 96337 (Dec. 30, 2016).

<sup>31</sup> *See* 42 U.S.C. § 902(b)(4).

<sup>32</sup> *See id.*; *cf.* *United States v. Morrow*, 266 U.S. 531, 534 (1925) (“The general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation.”).

<sup>33</sup> *See* 42 U.S.C. § 902(b)(4).

<sup>34</sup> *See id.*

<sup>35</sup> *See id.*

<sup>36</sup> 5 U.S.C. § 3347.

<sup>37</sup> *See supra* note 7. However, the Vacancies Act does provide that it will *not* be *exclusive* if another “statutory provision expressly” authorizes “an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity.” 5 U.S.C. § 3347(a)(1). Whether 42 U.S.C. § 902 renders the Vacancies Act *nonexclusive* as applied to this position will be discussed in greater detail below.

<sup>38</sup> *See, e.g., Lower E. Side People’s Fed. Credit Union v. Trump*, No. 1:17-cv-9536, 2018 U.S. Dist. LEXIS 17587, at \*3-4 (S.D.N.Y. Feb. 1, 2018) (dismissing on standing grounds a suit challenging the authority of an acting officer designated under the Vacancies Act that argued that an agency-specific statute provided the sole authority for someone to serve as acting director of the agency).

<sup>39</sup> *Watt v. Alaska*, 451 U.S. 259, 267 (1981).

contrary.”<sup>40</sup> With respect to the two statutes at issue here, as is discussed in more detail below, Congress provided some clues about how the Vacancies Act should interact with agency-specific statutes through the statute’s exclusivity provision.<sup>41</sup>

### Exclusivity of the Vacancies Act

As noted above, the Vacancies Act generally provides “the exclusive means” for authorizing acting service.<sup>42</sup> However, the statute is only exclusive “unless” another statutory provision “expressly . . . authorizes an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or . . . designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity.”<sup>43</sup> Section 702 does authorize or designate another government official—the Deputy Commissioner—to temporarily perform the Commissioner’s duties as “Acting Commissioner.”<sup>44</sup> Accordingly, it is likely that on its own terms, the Vacancies Act is not the exclusive means to authorize an Acting Commissioner.<sup>45</sup> Put another way, the Vacancies Act allows for the operation of Section 702.

### Open Questions Raised by Section 702

If Section 702 governs a vacancy in the Commissioner’s office, there may be some open questions regarding the scope of the authority that the provision grants to acting officers. First, it is unclear *who* Section 702 authorizes to serve as the Acting Commissioner beyond the Deputy Commissioner. Section 702 appears to provide that the Deputy Commissioner will automatically succeed the Commissioner in an acting capacity in the case of a vacancy in the Commissioner’s office.<sup>46</sup> However, Section 702 places a condition on this automatic succession by providing that the Deputy Commissioner is Acting Commissioner “unless the President designates another officer of the Government as Acting Commissioner.”<sup>47</sup>

It is not entirely clear whether this language merely recognizes that other provisions of law might grant the President the authority to designate another acting officer or whether Section 702 itself grants the President that authority.<sup>48</sup> One plausible reading is that this clause refers to the designation of other

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<sup>40</sup> *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

<sup>41</sup> 5 U.S.C. § 3347.

<sup>42</sup> *Id.* § 3347(a).

<sup>43</sup> *Id.*

<sup>44</sup> *See* 42 U.S.C. § 902(b)(4).

<sup>45</sup> *See* 5 U.S.C. § 3347(a); 42 U.S.C. § 902(b)(4). This understanding of the statutory text finds support in the Vacancies Act’s legislative history. *See* S. REP. NO. 105-250, at 15-16 (1998) (describing 42 U.S.C. § 902(b)(4) as one of the “existing statutes” governing acting service that “would be retained by” the Vacancies Act); 144 CONG. REC. S6414 (daily ed. June 16, 1998) (statement of Sen. Thompson) (stating that the bill “preserves those specific statutes” that already “provide a process by which persons can serve as acting officers when particular offices are vacant”). The relevant text of the proposed bill at the time of these statements was substantially similar to the text Congress ultimately enacted. *Compare* S. REP. NO. 105-250, at 26 (1998), *and* 144 CONG. REC. S6415 (daily ed. June 16, 1998), *with* 5 U.S.C. § 3347.

<sup>46</sup> *See* 42 U.S.C. § 902(b)(4) (“The Deputy Commissioner *shall* be Acting Commissioner . . .”) (emphasis added); *see, e.g.*, *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 651 (2003) (noting “shall” is mandatory, not discretionary).

<sup>47</sup> *See* 42 U.S.C. § 902(b)(4).

<sup>48</sup> *Cf.* *Alaska Bulk Carriers, Inc. v. Kreps*, 595 F.2d 814, 835, 835 & n.108 (D.C. Cir. 1979), *rev’d*, *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980) (discussing “housekeeping statutes” that “detail[] the means and methods of implementation of specific powers which are granted elsewhere in the statute” but do not constitute “an independent grant of power”); *Colo. Gen. Assembly v. Lamm*, 700 P.2d 508, 518-19 (Colo. 1985) (holding state statute “referring to transfers authorized by law . . . refers only to transfers which are authorized by some other provision of law”).

officers *under the Vacancies Act*.<sup>49</sup> This reading may be persuasive because in 1994, at the time the current version of Section 702 was enacted,<sup>50</sup> the Vacancies Act's provisions allowing the President to direct someone other than a first assistant to serve as an acting officer also referred to "officers."<sup>51</sup> Specifically, the prior version of the Vacancies Act allowed the President to designate only heads of departments or Senate-confirmed officers to serve as an acting officer instead of a first assistant.<sup>52</sup> A 1979 Department of Justice opinion recognized "the close relationship" between the language of the Vacancies Act and a distinct statutory provision that, similar to Section 702, provided for a deputy to fill a vacancy in an acting capacity "unless the President shall designate 'another officer of the Government.'"<sup>53</sup> That opinion concluded that the agency-specific statute's proviso should be given the same meaning as the Vacancies Act.<sup>54</sup>

On the other hand, an argument can be made that the plain language of the proviso in Section 702 independently allows the President to designate another "officer of the Government" to serve as the Acting Commissioner "in the event of a vacancy in the office of the Commissioner."<sup>55</sup> Courts do sometimes interpret provisos to have independent effect.<sup>56</sup> For example, in one case, the U.S. Court of Appeals for the Ninth Circuit examined a bankruptcy statute concerning the legal effect that would result from dismissing a case, which provided in relevant part that the statutory outcome would occur "unless" a court "order[ed] otherwise."<sup>57</sup> The court concluded that this "unless" clause itself authorized a court to dismiss a case with prejudice, so as to avoid the legal consequences that would have otherwise resulted under the statute.<sup>58</sup>

If Section 702 is interpreted to affirmatively authorize the President to designate "another officer of the Government as Acting Commissioner," this interpretation raises another issue: the meaning of the phrase "officer of the Government."<sup>59</sup> In the context of executive branch employees, an "officer" often refers to a

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<sup>49</sup> See 42 U.S.C. § 902(b)(4); 5 U.S.C. §§ 3345(a)(2)-(3).

<sup>50</sup> Pub. L. No. 103-296, § 102, 108 Stat. 1467 (1994).

<sup>51</sup> See S. REP. NO. 105-250, at 26 (1998).

<sup>52</sup> See *id.*

<sup>53</sup> Memorandum for the General Counsel, General Services Administration, 3 Op. O.L.C. 148, 149 (1979) (quoting 40 U.S.C. § 751(c), a provision that is now codified at 40 U.S.C. § 302(b)).

<sup>54</sup> *Id.* at 150. Another argument in favor of reading Section 702's proviso more narrowly is that in the context of executive agencies, courts are generally reluctant to construe ambiguous provisions to create new authority. See *Gonzales v. Oregon*, 546 U.S. 243, 262-63 (2006). *Cf., e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 309-10 (1979) (reading "housekeeping statute" to grant heads of agencies authority only to regulate internal affairs, rather than creating substantive regulatory powers).

<sup>55</sup> See 42 U.S.C. § 902(b)(4). We could find no case law interpreting the express proviso in Section 702. Moreover, courts have not interpreted statutes with similar language. See 38 U.S.C. § 304 ("Unless the President designates another officer of the Government, the Deputy Secretary shall be Acting Secretary of Veterans Affairs during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary."); 40 U.S.C. § 302 ("The Deputy Administrator is Acting Administrator of General Services 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."); *cf.* 44 U.S.C. § 304 ("In case of the death, resignation, absence, or sickness of the Director of the Government Publishing Office, the Deputy Director of the Government Publishing Office shall perform the duties of the Director of the Government Publishing Office until a successor is appointed . . . ; but the President may direct any other officer of the Government, whose appointment is vested in the President by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed . . .").

<sup>56</sup> See *Republic of Iraq v. Beaty*, 556 U.S. 848, 858 (2009) ("The principal clause granted the President a power; the second proviso purported to grant him an *additional* power. It was not, on any fair reading, an exception to, qualification of, or restraint on the principal power.") (emphasis in original). The proviso at issue in that case read, "The President may suspend the application of any provision of [a certain law]: . . . *Provided further*, That the President may make inapplicable . . . any other provision of law . . ." *Id.* at 856 (quoting Pub. L. No. 108-11, § 1503, 117 Stat. 579 (2003)) (internal quotation marks omitted).

<sup>57</sup> *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1223 (9th Cir. 1999) (quoting 11 U.S.C. § 349).

<sup>58</sup> *Id.*

<sup>59</sup> 42 U.S.C. § 902(b)(4).

special class of high-level officials who qualify as “officers of the United States” pursuant to the Appointments Clause of the U.S. Constitution.<sup>60</sup> However, this interpretation is not the only possible reading. Congress and the courts sometimes refer to lower-level government employees as officers,<sup>61</sup> even if those employees are not “officers” for the purposes of the Appointments Clause. Accordingly, if the exception contained in the vacancies clause of Section 702 has independent effect, it is unclear whether this provision would allow the President to designate only constitutional “officers of the United States”<sup>62</sup> to serve as the Acting Commissioner or whether the statute would also allow the President to select other governmental employees.

Further, Section 702 does not provide any limitations on the duration of acting service.<sup>63</sup> This silence could be interpreted to allow the Acting Commissioner to serve indefinitely.<sup>64</sup> However, even prior to the 1998 enactment of stricter and more broadly applicable time limitations in the Vacancies Act,<sup>65</sup> it was not necessarily the case that an acting officer could serve indefinitely.<sup>66</sup> The Department of Justice stated in at least one opinion that if a statute did require a position to be filled by advice and consent, it was “implicit” in such a statute that another official “may not properly serve indefinitely as Acting Director.”<sup>67</sup> According to the Department of Justice, if there was no specific time limit provided in a statute allowing for acting service, the acting officer could serve for a “reasonable time.”<sup>68</sup>

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<sup>60</sup> U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”). See *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam) (“[A]ny 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 by [the Appointments Clause of the U.S. Constitution].” (quoting U.S. CONST. art. II, § 2, cl. 2)). Cf. Memorandum for the General Counsel, General Services Administration, 3 Op. O.L.C. 148, 149 (1979) (“We . . . conclude that a military officer who does not occupy a *statutory office* in a military department is not eligible for designation as Acting Administrator of General Services . . . .”) (emphasis added).

<sup>61</sup> See, e.g., *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 199 (1933) (stating law that waived patent fees for “any officer of the government, except officers and employees of the Patent Office” was “evidently intended to encourage government employees to obtain patents” (emphasis added) (quoting Act of March 3, 1883, ch. 143, 22 Stat. 625.)).

<sup>62</sup> U.S. CONST. art. II, § 2, cl. 2. The term “Officers of the United States” includes both principal and inferior officers. See *Edmond v. United States*, 520 U.S. 651, 662-63 (1997) (discussing the distinction between principal and inferior officers).

<sup>63</sup> See 42 U.S.C. § 902(b)(4).

<sup>64</sup> See, e.g., S. REP. NO. 105-250, at 3 (1998) (noting position of Department of Justice, prior to enactment of current version of Vacancies Act, that “where a department’s organic act vests the powers and functions of the department in its head and authorizes that officer to delegate such powers and functions to subordinate officials or employees as she sees fit, such authority supersedes the Vacancies Act’s restrictions on temporarily filling vacant advice and consent positions, allowing for designation of acting officials for an indefinite period”).

<sup>65</sup> See, e.g., S. REP. NO. 105-250, at 7 (1998) (“A limit must be placed on the President’s time to act to fill a position. If the purpose of the Vacancies Act is to limit the President’s power to designate temporary officers, a position requiring Senate confirmation may not be held by a temporary appointment for as long as the President unilaterally decides.”); 144 CONG. REC. S11022 (daily ed. Sept. 28, 1998) (statement of Sen. Thompson) (discussing indefinite length of acting service as significant problem contrary to legislative intent); 144 CONG. REC. S11024 (daily ed. Sept. 28, 1998) (statement of Sen. Byrd) (“It is precisely that time restriction on the filling of these vacant positions that is, I believe, the linchpin of this issue.”).

<sup>66</sup> See, e.g., *Dennis v. Luis*, 741 F.2d 628, 634 (3d Cir. 1984) (holding there must be some limit on the time period an acting officer may serve because otherwise “there could be a complete nullification of the legislature’s power of advice and consent,” which would “obliterate the concept of separation-of-powers”). Cf. *Williams v. Phillips*, 482 F.2d 669, 671 (D.C. Cir. 1973) (“The Government concedes that the President cannot designate an acting officer indefinitely without any presentation to the Senate for confirmation. An indication of the reasonable time required by the President to select persons for nomination appears in the 30-day period provided in the Vacancies Act for temporary appointments of Executive Department officers pending nomination to the Senate . . . .”).

<sup>67</sup> Status of the Acting Director, Office of Management and Budget, 1 Op. O.L.C. 287, 289 (1977).

<sup>68</sup> *Id.* at 289-90. Cf., e.g., Memorandum Opinion for the Deputy Counsel to the President, 6 Op. O.L.C. 119, 120 (1982) (noting disagreement with Comptroller General, who took “the position that the 30-day limitation of 5 U.S.C. § 3348 must be read into (continued...)”).

## Possibility of the Vacancies Act Applying

Even if the Vacancies Act does not *exclusively* apply to the position of the Commissioner, that does not necessarily mean that it does not apply *at all*.<sup>69</sup> Section 702 does not itself expressly state that it is the exclusive means to temporarily fill a vacancy or state that the Vacancies Act is inapplicable.<sup>70</sup> Indeed, as discussed above, the “unless” clause in Section 702 at the very least contemplates that the President can designate “officers of the Government” under the authority of another statute.<sup>71</sup> It is possible, therefore, that both statutes might be available to temporarily fill the vacancy.<sup>72</sup> If both statutes apply, any inconsistencies would continue to present the question of which statute governs in the case of an unavoidable conflict. If an Acting Commissioner is authorized to serve under one statute but not by the other, this raises the possibility that her actions were unauthorized and subject to legal challenge, if the more restrictive statute governed her service. While the two statutes are generally consistent with each other, there are two possible areas of conflict between the Vacancies Act and Section 702.

Turning first to the question of *who* may serve as Acting Commissioner, both statutes are consistent in the sense that they both appear to contemplate the Deputy Commissioner automatically becoming Acting Commissioner in the event of a vacancy. Section 702 expressly provides for this,<sup>73</sup> and it is likely that the Deputy Commissioner would be the “first assistant” who automatically steps into the role under the Vacancies Act.<sup>74</sup> Although the term “first assistant” is not expressly defined in the Vacancies Act, and there is no statute or regulation that expressly defines any given official as the Commissioner’s “first assistant,”<sup>75</sup> it seems likely that the Deputy Commissioner, as the second in command in the SSA,<sup>76</sup> should be considered the Commissioner’s first assistant.<sup>77</sup>

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(...continued)

all statutes authorizing the temporary filling of vacancies, because otherwise the President could circumvent the power of the Senate to advise and consent to appointments”).

<sup>69</sup> Designating an Acting Dir. of the Bureau of Consumer Fin. Prot., 41 Op. O.L.C. \_\_\_\_, slip op. at 5 (Nov. 25, 2017). *See also* *Hooks ex rel. NLRB v. Kitsap Tenant Support Servs.*, 816 F.3d 550, 556 (9th Cir. 2016) (“[The Vacancies Act] form[s] the exclusive means for filling a vacancy in an Executive agency office unless another statute expressly provides a means for filling such a vacancy. Because [29 U.S.C. § 153(d)] does so, neither the [Vacancies Act] nor [29 U.S.C. § 153(d)] is the *exclusive* means of appointing an Acting General Counsel of the [National Labor Relations Board].”) (emphasis in original).

<sup>70</sup> *See* 42 U.S.C. § 902(b)(4).

<sup>71</sup> *Id.*

<sup>72</sup> *See* *English v. Trump*, No. 17-cv-2534, 2018 U.S. Dist. LEXIS 4571, at \*24 (D.D.C. Jan. 10, 2018), *appeal filed*, No. 18-5007 (D.C. Cir. Jan. 12, 2018) (holding that statute providing that Deputy Director “shall . . . serve as acting Director” of the Consumer Financial Protection Bureau in case of the Director’s “absence or unavailability” did not displace the Vacancies Act (quoting 12 U.S.C. § 5491(b)(5)) (internal quotation mark omitted)); S. REP. NO. 105-250, at 17 (1998) (“[E]ven with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies Act would continue to provide an alternative procedure for temporarily occupying the office.”); Temporary Filling of Vacancies in the Office of U.S. Attorney, 27 Op. O.L.C. 149, 149 (2003) (concluding that the Vacancies Act and a separate statute, 28 U.S.C. § 546(a), were both “available” to temporarily fill the position).

<sup>73</sup> 42 U.S.C. § 902(b)(4) (“The Deputy Commissioner shall be Acting Commissioner . . . in the event of a vacancy in the office of the Commissioner.”).

<sup>74</sup> *See* 5 U.S.C. §§ 3345(a)(1) (“[T]he first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity . . .”).

<sup>75</sup> *See* 42 U.S.C. § 902; 28 C.F.R. § 422.1; *SSA Organizational Manual, Chapter S: Social Security Administration*, SOC. SEC. ADMIN., <https://www.ssa.gov/org/orgOC.htm> (last visited Mar. 2, 2018). *See generally* Guidance on Application of Fed’l Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 63 (1999) (“At a minimum, a designation of a first assistant by statute, or by regulation where no statutory first assistant exists, should be adequate to establish a first assistant for purposes of the Vacancies Reform Act.”). *Cf., e.g.*, 28 U.S.C. § 508 (“[F]or the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.”); 28 C.F.R. § 0.137(b) (2017) (“Every office within the Department [of Justice] to which appointment is required to be made by the President with the advice and consent of the Senate . . . shall have a First Assistant within the meaning of the Federal Vacancies Reform Act of 1998. Where there is a position of Principal Deputy to the . . . office, (continued...)”).

However, both statutes also provide for the possibility that the President might designate someone other than the Deputy Commissioner to serve as Acting Commissioner.<sup>78</sup> The Vacancies Act would allow the President to select either a person currently serving in any other advice and consent position or certain senior employees from the SSA.<sup>79</sup> As discussed, it is unclear whether Section 702 merely recognizes that other provisions of law—like the Vacancies Act—might allow the President to designate others as Acting Commissioner, or whether it instead independently grants the President the authority to select “another officer of the Government,” whatever that phrase might mean.<sup>80</sup> The statutes may conflict if Section 702 and the Vacancies Act are interpreted to allow the President to direct different classes of individuals to serve as Acting Commissioner.

The statutes might also conflict with respect to *how long* a person may serve as Acting Commissioner. The Vacancies Act would only allow an Acting Commissioner to serve for either a limited, precisely set period of time starting on the date of the vacancy or while a nomination to the position is pending in the Senate.<sup>81</sup> Section 702 does not provide any express limitations on the duration of acting service, and on its own terms, might allow an Acting Commissioner to serve for a “reasonable” period of time, which could conceivably last longer than the period outlined in the Vacancies Act.<sup>82</sup>

## Conclusion

The Vacancies Act sets out a detailed scheme delineating which governmental officials the President may direct to serve as acting officers<sup>83</sup> and expressly limits the duration of an acting officer’s service.<sup>84</sup> Section 702 is largely silent on these issues and could possibly be read as more permissive than the Vacancies Act.<sup>85</sup> Accordingly, if, for example, an Acting Commissioner is not one of the classes of people authorized to serve under the Vacancies Act or is serving beyond the time limitations outlined in that law, but may otherwise be complying with Section 702, a potential conflict may exist between the two laws.<sup>86</sup> In such a situation, if the actions of the Acting Commissioner were challenged in a court as violating the Vacancies Act, the court would likely interpret the two statutes so that they are in harmony with each other.<sup>87</sup> One way to do this would be to read Section 702 narrowly, so that the limitations in the Vacancies

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the Principal Deputy shall be the First Assistant.”).

<sup>76</sup> See *Organizational Chart*, SOC. SEC. ADMIN., <https://www.ssa.gov/org/ssachart.pdf> (last visited Mar. 2, 2018).

<sup>77</sup> See 144 CONG. REC. S11037 (daily ed. Sept. 28, 1998) (statement of Sen. Lieberman) (describing “first assistant” as “a term of art that generally refers to the top deputy”); 42 U.S.C. § 902(b) (creating position of Deputy Commissioner and providing that Deputy Commissioner will serve as Acting Commissioner during the Commissioner’s absence or disability or in the event of a vacancy in the office).

<sup>78</sup> See 42 U.S.C. § 902(b)(4); 5 U.S.C. §§ 3345(a)(2)-(3).

<sup>79</sup> See 5 U.S.C. §§ 3345(a)(2)-(3).

<sup>80</sup> See 42 U.S.C. § 902(b)(4).

<sup>81</sup> See 5 U.S.C. § 3346.

<sup>82</sup> See 42 U.S.C. § 902(b)(4); Status of the Acting Director, Office of Management and Budget, 1 Op. O.L.C. 287, 290 (1977) (outlining factors that determine what period is reasonable under the circumstances).

<sup>83</sup> See 5 U.S.C. § 3345.

<sup>84</sup> *Id.* § 3346.

<sup>85</sup> See 42 U.S.C. § 902(b)(4).

<sup>86</sup> Cf. CRS Legal Sidebar LSB10036, *UPDATE: Who’s the Boss at the CFPB?*, by Valerie C. Brannon and Jared P. Cole (describing conflict over vacancy in the position of the Director of the Consumer Financial Protection Bureau in which the outgoing Director invoked an agency-specific statute to name an Acting Director, and the President subsequently invoked the Vacancies Act to name a different person as Acting Director).

<sup>87</sup> See, e.g., *Watt v. Alaska*, 451 U.S. 259, 267 (1981).

Act govern. An alternative way to reconcile the two statutes would be to conclude because both statutes confer discretion on the President, whichever the President invokes should control.<sup>88</sup> If a court determined that the statutes instead irreconcilably conflict, it might turn to traditional principles of statutory interpretation, such as the rule of favoring the more specific statute over the more general law.<sup>89</sup> Ultimately, however, because of the dearth of case law interpreting either statute, it is difficult to draw any definite conclusions as to how a reviewing court might resolve a legal challenge over the actions of the Acting Commissioner.

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<sup>88</sup> See *Hooks ex rel. NLRB v. Kitsap Tenant Support Servs.*, 816 F.3d 550, 556 (9th Cir. 2016); *English v. Trump*, No. 17-cv-2534, 2018 U.S. Dist. LEXIS 4571, at \*24 (D.D.C. Jan. 10, 2018), *appeal filed*, No. 18-5007 (D.C. Cir. Jan. 12, 2018). It could be argued, however, that this reading of the statute renders the express limitations of the Vacancies Act superfluous, suggesting that such an interpretation might not properly give effect to both statutes. See *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (noting that courts should give effect to two statutes if that “would not render one or the other wholly superfluous”). See also *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (“The courts are not at liberty to pick and choose among congressional enactments.”); *but see Hooks*, 816 F.3d at 556 (concluding that Congress intended the Vacancies Act to provide an alternative process for temporarily occupying the office) (citing S. REP. No. 105-250, at 17 (1998)).

<sup>89</sup> See *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (noting “basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum”); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21 (2012) (noting that in “conflict[s] between laws of equivalent dignity,” “the specific governs the general”). In such a situation, a court might conclude that Section 702 should control because it is the more specific statute: Section 702 applies solely to the Commissioner, while the Vacancies Act generally applies to the entire executive branch. Compare 42 U.S.C. § 902(b)(4), with 5 U.S.C. § 3347.