



B-335587

January 25, 2024

The President
The White House

Subject: *Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998: Legal Adviser, U.S. Department of State*

Dear Mr. President:

Pursuant to section 3349(b) of title 5 of the United States Code, we are reporting a violation of the Federal Vacancies Reform Act of 1998 (Vacancies Act)¹ at the U.S. Department of State (State) with respect to the position of Legal Adviser. Specifically, we are reporting that the service of Richard Visek as Acting Legal Adviser from August 2, 2023, through the present day is in violation of the Act.²

While the inauguration of a new President resets and extends the 210-day acting service period for existing vacant positions, the Vacancies Act does not authorize additional acting service for the pendency of a third or successive nomination for a vacant position, or after the nomination's rejection, withdrawal, or return, even if the nomination represents the first or second nomination made by a newly inaugurated President. See B-333853, June 28, 2022; B-334690, Feb. 8, 2023.

Requirements of the Vacancies Act

The Vacancies Act establishes requirements for temporarily authorizing an acting official to perform the functions and duties of certain vacant positions that require presidential appointment and Senate confirmation (PAS positions). The Act

¹ 5 U.S.C. §§ 3345–3349d.

² We contacted State to seek factual information and its legal views on the matter. Letter from Assistant General Counsel for Appropriations Law, GAO, to Acting Legal Adviser, State (Sept. 25, 2023); Email from Senior Attorney, GAO, to Assistant Legal Adviser, Employment Law, State (Dec. 5, 2023). State responded with its explanation of pertinent facts, legal analysis, and supporting documents. Email from Assistant Legal Adviser, Employment Law, State, to Assistant General Counsel for Appropriations Law, GAO (Oct. 24, 2023) (State Response) (with attachments); Email from Assistant Legal Adviser, Employment Law, State, to Senior Attorney, GAO (Dec. 5, 2023) (State Supplemental Response).

identifies three categories of persons who may temporarily perform the functions and duties of a vacant PAS position. 5 U.S.C. § 3345. The first assistant to the vacant position automatically serves as acting officer unless the President designates an individual in one of the other categories. 5 U.S.C. § 3345(a)(1). The President may designate as acting officer either: (1) an individual serving in another PAS position; or (2) a senior agency officer or employee who has served for a minimum period of time prior to the vacancy. 5 U.S.C. §§ 3345(a)(2)–(3).

If no nomination has been submitted for the vacant position, the Vacancies Act generally limits the period of acting service to 210 days beginning on the date the vacancy occurs. 5 U.S.C. § 3346(a)(1). But when a vacancy exists during the 60-day period beginning on the date of a transitional presidential inauguration, the 210-day period is extended by 90 days, allowing for 300 days of acting service beginning on the transitional inauguration day or the date the vacancy occurs, whichever is later. 5 U.S.C. § 3349a(b). If a nomination has been submitted, acting service is also permitted during the pendency of a first or second nomination and, if the nominee is not confirmed, for up to 210 days after the date the first or second nomination is rejected, withdrawn, or returned. 5 U.S.C. §§ 3346(a)(2), (b).

After the expiration of the period of permissible acting service, the position must remain vacant and only the head of the agency may perform the functions or duties of the position. 5 U.S.C. § 3348(b). The Comptroller General is required, upon a determination that an acting official has served longer than the allowable period, to report such findings to Congress, the President, and the Office of Personnel Management. 5 U.S.C. § 3349(b).

BACKGROUND

State reported that the Legal Adviser position became vacant on April 30, 2019.³ President Trump nominated C.J. Mahoney for the position on January 6, 2020, and the nomination was returned on January 3, 2021.⁴ President Biden was inaugurated on January 20, 2021, and has submitted three nominations to date.⁵ Sarah Cleveland was nominated on August 10, 2021, and the nomination was returned on January 3, 2023.⁶ Margaret Taylor was nominated on April 25, 2023,⁷ and the

³ State Response; GAO's Executive Vacancy System.

⁴ State Response.

⁵ See *id.*

⁶ *Id.*

⁷ *Id.*

nomination was returned on January 3, 2024.⁸ Margaret Taylor was renominated on January 11, 2024, and the nomination is pending in the Senate.⁹

Richard Visek serves as the Principal Deputy Legal Adviser, which is the first assistant to the Legal Adviser position,¹⁰ and most recently began serving as Acting Legal Adviser under the Vacancies Act on January 20, 2021.¹¹ According to State, Mr. Visek has continued to serve as Acting Legal Adviser since then.¹²

DISCUSSION

Time Limitations on Mr. Visek's Acting Service

Because the Legal Adviser position was vacant on the most recent transitional inauguration day, January 20, 2021, the Vacancies Act authorized 300 days of acting service beginning on that day,¹³ regardless of the fact that previous periods of permissible acting service had begun to run or expired prior to the inauguration.¹⁴

⁸ Congress.gov, 118th Congress, PN549 — Margaret L. Taylor — Department of State, *available at* <https://www.congress.gov/nomination/118th-congress/549> (last visited Jan. 22, 2024).

⁹ Congress.gov, 118th Congress, PN1344 — Margaret L. Taylor — Department of State, *available at* <https://www.congress.gov/nomination/118th-congress/1344> (last visited Jan. 22, 2024).

¹⁰ State Response. Agency regulations or other documentation designating a first assistant position before a vacancy occurs are sufficient to establish that a position is the first assistant for purposes of the Vacancies Act. See B-334562, Feb. 8, 2023; B-332995, Aug. 2, 2021. State cites the Foreign Affairs Manual (FAM), which provides that, “[i]n accordance with the Federal Vacancies Reform Act of 1998, the Principal Deputy [Legal Adviser] serves as Acting Legal Adviser in the event that the position of Legal Adviser is vacant.” 1 FAM 242 (Feb. 10, 2009) (issued prior to the vacancy). We interpret this provision as designating the Principal Deputy Legal Adviser as first assistant to the Legal Adviser position under the Vacancies Act.

¹¹ State Response.

¹² *Id.*

¹³ Section 3349a resets the 210-day acting service period under section 3346 and extends it by 90 days, allowing for 300 days of acting service beginning on inauguration day for vacancies existing on that day. See 5 U.S.C. § 3349a(b)(1).

¹⁴ Prior to January 20, 2021, acting service was permitted during the following periods: for 210 days beginning on the date of the vacancy, April 30, 2019; during the pendency of C.J. Mahoney’s nomination, submitted on January 6, 2020; and during the period between the nomination’s return on January 3, 2021, and January 20, 2021. See 5 U.S.C. §§ 3346(a)–(b), 3349a(b)(1).

See B-333853, June 28, 2022. This acting service period ended on November 15, 2021. See *id.*; B-334562, Feb. 8, 2023.¹⁵

The Vacancies Act also permits acting service during the pendency of “a first or second nomination” and, if the nominee is not confirmed, for 210 days after those nominations are rejected, withdrawn, or returned. 5 U.S.C. §§ 3346(a)(2), (b). The phrase “a first or second nomination” refers to the first two nominations for the vacant position and does not include a third or successive nomination, even if those later nominations represent the first or second nomination submitted by a newly inaugurated President. See B-333853, June 28, 2022; B-334690, Feb. 8, 2023. In other words, while the inauguration of a new President authorizes an additional 300 days of acting service for existing vacant positions, it does not reset the nominations for purposes of the nomination-related acting service periods. See B-333853, June 28, 2022.

In this case, the first nomination for the Legal Adviser position for purposes of section 3346 was C.J. Mahoney’s January 6, 2020, nomination, which was returned on January 3, 2021. The second nomination was Sarah Cleveland’s August 10, 2021, nomination, which was returned on January 3, 2023.¹⁶ Acting service was therefore permitted during the pendency of Sarah Cleveland’s nomination and for 210 days after its return. Margaret Taylor’s April 25, 2023, and January 11, 2024, nominations, however, were the third and fourth nominations for the position, and their submission did not trigger an additional acting service period. See B-334690, Feb. 8, 2023.

A determination of when the acting service period for this position ended is made by reference to the specific facts and the interaction of several Vacancies Act provisions. As described above, the Vacancies Act permits acting service for 210 days after the return of a first or second nomination. 5 U.S.C. § 3346(b). Here, the 210th day after the return of the second nomination, Sarah Cleveland’s nomination, was August 1, 2023. However, the Vacancies Act also provides that “if the last day of any [acting service period] is a day on which the Senate is not in session, the second day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.” 5 U.S.C. § 3348(c). In other words, this provision extends the acting service period until after the Senate reconvenes.

¹⁵ The 210-day period was deemed to begin April 20, 2021, 90 days after inauguration day, and therefore concluded on November 15, 2021. See 5 U.S.C. § 3349a(b)(1).

¹⁶ This nomination was submitted prior to the expiration of the 300-day acting service period provided by section 3349a.

The Senate held a *pro forma* session “with no business . . . conducted” on August 1, 2023.¹⁷ Although we have previously applied section 3348(c) when there was no session of the Senate on the last day of the acting service period, see B-302743, Aug. 19, 2004, B-328888, Mar. 3, 2017, B-331536, Sept. 15, 2020, we have not previously examined how the provision applies when the Senate holds a *pro forma* session on that day. We must therefore determine whether the Senate was “in session” under section 3348(c) when it held a *pro forma* session on August 1, 2023.

In answering this question, we consider how *pro forma* sessions are treated in similar contexts. Of particular relevance is the Supreme Court’s conclusion that, for purposes of the Constitution’s Recess Appointments Clause, “*pro forma* sessions count as sessions.” *NLRB v. Noel Canning*, 573 U.S. 513, 550 (2014). Although the Appointments Clause generally requires that the President must obtain the advice and consent of the Senate before appointing an officer of the United States, the Recess Appointments Clause creates an exception to this requirement, allowing the President to fill vacancies that arise or exist during a recess of the Senate with appointees who may serve until the end of the next Senate session. See *id.* at 518–19 (citing U.S. Const. art. II, § 2, cl. 2 (Appointments Clause) and art. II, § 2, cl. 3 (Recess Appointments Clause)). The purpose of the Recess Appointments Clause is “to permit the President to obtain the assistance of subordinate officers when the Senate, due to its recess, cannot confirm them” and “to ensure the continued functioning of the Federal Government while the Senate is unavailable.” *Noel Canning*, 573 U.S. at 540, 552.

In determining whether the recess at issue in *Noel Canning* was sufficiently long enough to bring it within the Recess Appointments Clause, thereby authorizing the President to make recess appointments, the Court concluded that the Senate was in session when it held several *pro forma* sessions. *Noel Canning*, 573 U.S. at 550. The Court determined that “the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business.” *Id.* This interpretation was based on the Constitution’s broad delegation of authority to the Senate to determine how and when to conduct its business, tempered by the need for the Senate to have at least the capability to provide “advice and consent” as contemplated by the Appointments Clause. *Id.* at 550–52.

The Court went on to hold that the relevant *pro forma* sessions satisfied this standard because the Senate said that it was in session and “despite its resolution that it would conduct no business, the Senate retained the power to conduct business . . . simply by passing a unanimous consent agreement.” *Id.* at 552–53 (citing Floyd M. Riddick & Alan S. Frumin, *Riddick’s Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 1313 (1992) (Riddick’s)). In particular, the

¹⁷ 169 Cong. Rec. S3845 (daily ed. July 27, 2023) (reflecting the Senate’s agreement by unanimous consent to convene for a series of *pro forma* sessions between July 28, 2023, and September 1, 2023); 169 Cong. Rec. S3849 (daily ed. Aug. 1, 2023).

Court noted that the Senate could confirm nominees by unanimous consent. *Noel Canning*, 573 U.S. at 554.

Like the Recess Appointments Clause, the Vacancies Act authorizes certain officials to temporarily perform the functions and duties of a vacant PAS position. See 5 U.S.C. § 3345(a). And section 3348(c), like the Recess Appointments Clause, is triggered by the Senate's unavailability due to a recess. When the last day of the acting service period falls on a day the Senate is not in session, section 3348(c) extends the period until the Senate is back in session and receiving nominations, thereby allowing the President additional time to submit a nomination and further extend the acting service period. See 5 U.S.C. §§ 3346(a)(2); 3348(c); see also S. Rep. No. 105-250, at 32 (1998) (urging modification of an earlier version of the extension provision to guard against the President inadvertently missing the window for submitting a nomination after the Senate reconvenes).

Given the similarities between the Recess Appointments Clause and the Vacancies Act (and section 3348(c) in particular), we find the Supreme Court's reasoning in *Noel Canning* to be equally applicable here. In other words, we conclude that the Senate is "in session" for purposes of section 3348(c) when the Senate says it is in session, provided that it retains the capacity to conduct business.

The August 1, 2023, *pro forma* session was similar to the ones analyzed by the Court in *Noel Canning*. The respective orders to convene *pro forma* sessions and the procedures for the individual *pro forma* sessions are similar.¹⁸ The Senate referred to the August 1, 2023, *pro forma* session as a "session"¹⁹ and had the capability to conduct business by unanimous consent. See Riddick's at 1313. Therefore, we conclude that the Senate was "in session" on August 1, 2023, for purposes of section 3348(c). And because the Senate was "in session" on the last day of the acting service period, section 3348(c) did not extend the period.²⁰

¹⁸ See S. J., 112th Cong., 1st Sess., 923 (2011); 169 Cong. Rec. at S3845; 158 Cong. Rec. S1 (daily ed. Jan. 3, 2012); 169 Cong. Rec. at S3849.

¹⁹ 169 Cong. Rec. at S3845.

²⁰ In addition to having the capability to conduct business during the August 1, 2023, *pro forma* session, the Senate was in fact able to receive nominations that day before and after the *pro forma* session under a standing order that allows the Secretary of the Senate to receive messages from the President when the Senate is in recess or adjournment. See 169 Cong. Rec. S8 (daily ed. Jan. 3, 2023). Thus, even if section 3348(c) could be read to require that the Senate must not only be in session but also receiving nominations on the last day of the acting service period to avoid an extension—because the provision later states that the extension lasts until "the second day the Senate is next in session and receiving nominations"—that condition was met here. 5 U.S.C. § 3348(c).

Therefore, the period of permissible acting service ended on August 1, 2023, 210 days after the return of the second nomination, and Mr. Visek's service as Acting Legal Adviser after that date is in violation of the Act.

Validity of Actions Taken

The Vacancies Act includes an enforcement mechanism that restricts the performance of certain functions and duties of a vacant position when no "officer or employee is performing the functions and duties in accordance with" the Act. 5 U.S.C. § 3348(b). In that situation, "the office shall remain vacant" and only the head of the agency may perform the functions or duties of the position. *Id.* An action taken by any other person "in the performance of any function or duty . . . shall have no force or effect" and "may not be ratified." 5 U.S.C. § 3348(d). The Vacancies Act defines "function or duty" as any function or duty of the position that is established by statute or regulation (including any regulation in effect at any time during the 180-day period preceding the date of the vacancy) and required by statute or regulation to be performed by the applicable officer (and only that officer). 5 U.S.C. § 3348(a)(2). Agency officials who are not validly acting may, however, still be authorized to take certain actions in their official positions, so long as they are not performing a "function or duty" of the vacant position.

In response to our inquiry, State reports that there are no functions or duties meeting the Vacancies Act definition with respect to the Legal Adviser position.²¹ Based on State's response, we have no basis to conclude that any actions taken by Mr. Visek after August 1, 2023, must be nullified or viewed as having no force or effect.

State Response

State disagrees with our interpretation of the Vacancies Act's time limitations and contends that the submission of Margaret Taylor's April 25, 2023, nomination extended the period of permissible acting service.²² As support for its position, State cites a 2022 opinion issued by the Department of Justice's Office of Legal Counsel (OLC) asserting that upon the inauguration of a new President, section 3349a deems preexisting vacancies to have newly arisen after inauguration and resets the entire timing sequence for acting service for those positions, including the nominations that trigger certain acting service periods.²³ See *Federal Vacancies Reform Act's Application to a Vacancy for Which Prior Presidents Submitted Multiple Nominations*, 46 Op. Off. Legal Counsel __ (Oct. 21, 2022). Accordingly, State asserts that Mr. Visek could continue to serve as Acting Legal Adviser while

²¹ State Response.

²² See *id.*

²³ *Id.*; State Supplemental Response.

Margaret Taylor's April 25, 2023, nomination was pending.²⁴ And, under OLC's interpretation, acting service would also be permitted for 210 days after the return of the nomination on January 3, 2024. See OLC Opinion, slip op. at 13.²⁵

Our finding of a time violation in this instance is consistent with our previous interpretations. See, e.g., B-334562, Feb. 8, 2023. As we have previously explained, OLC's interpretation does not comport with the text of the Vacancies Act and is not supported by the Act's legislative history. Section 3349a only resets the initial 210-day period in section 3346(a)(1)²⁶ and does not address nominations in any way. *Id.* And, contrary to OLC's opinion, section 3349a does not modify the date of the vacancy; it merely "deem[s]" the initial 210-day period "to begin" on a different date. *Id.* (quoting 5 U.S.C. § 3349a(b)). In addition, the initial 210-day period is independent of the nomination-related periods, and, therefore, the exhaustion of the nomination-related periods would not, as OLC contends, prohibit additional acting service during the reset 210-day period. *Id.* Finally, the legislative history suggests that Congress included section 3349a due to concerns about the large number of vacancies that a new President would need to fill rather than concern over filling long-vacant positions. *Id.* (citing S. Rep. No. 105-250, at 21 (1998)).

CONCLUSION

While the inauguration of a new President resets and extends the 210-day acting service period under section 3346 for existing vacant positions, it does not reset the nominations for purposes of that section. In other words, the Vacancies Act does not authorize additional acting service for the pendency of a third or successive nomination for a vacant position, or after the nomination's rejection, withdrawal, or return, even if the nomination represents the first or second nomination made by a newly inaugurated President. Therefore, Margaret Taylor's nominations (the third and fourth nominations overall) did not extend the acting service period for the vacant Legal Adviser position, and Mr. Vissek's service as Acting Legal Adviser since August 2, 2023, is in violation of the Act.

²⁴ State Response. When State submitted its response, the nomination was pending in the Senate. The nomination was subsequently returned on January 3, 2024. Congress.gov, 118th Congress, PN549 — Margaret L. Taylor — Department of State.

²⁵ Margaret Taylor's January 11, 2024, nomination was President Biden's third nomination for the position and, even under OLC's interpretation, would not trigger an additional acting service period.

²⁶ We have previously noted the ambiguity in the statute as to which 210-day period section 3349a resets, but, like OLC, we have generally assumed that it refers to the initial 210-day period in section 3346(a)(1). See B-334562, Feb. 8, 2023.

In accordance with the requirements of the Vacancies Act, we are also sending letters reporting this violation to the chairs and ranking members of the Senate Committee on Homeland Security and Governmental Affairs, the House Committee on Oversight and Accountability, the Senate and House Committees on Appropriations, the Senate Committee on Foreign Relations, the House Committee on Foreign Affairs, and the Director of the Office of Personnel Management.

If you have any questions regarding this matter, please contact Shirley A. Jones, Managing Associate General Counsel, at (202) 512-8156, or Charlie McKiver, Assistant General Counsel, at (202) 512-5992.

Sincerely yours,

A handwritten signature in cursive script, reading "Edda Emmanuelli Perez".

Edda Emmanuelli Perez
General Counsel