

What's the Vacancy Act and Why It's Important

Overview

The Federal Vacancies Reform Act of 1998 ([The Vacancies Act](#)) is generally not in the headlines as it is a routine piece of legislation designed to provide guidance on how certain vacancies in the federal government are temporarily filled. It only covers Senate-confirmed positions.

While it is mostly used in the course of everyday employee turnover, it is also used during transition periods between administrations as new Senate-approved nominees are vetted and voted on or during an administration when a Senate confirmable appointee leaves their position. The person who takes on the duties of the vacant position are considered acting in nature and usually only serve a relatively short time.

The Basics

The Vacancy Act provides the exclusive means a government employee may temporarily perform the functions and duties of a vacant advice and consent position in an executive department or agency. If the acting official is not serving in compliance of the act, any actions they take regarding the functions and duties of the office will have no force or effect.

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The act places limits on a government employee's ability to serve as an acting officer in two ways:

- I. Only 3 classes of people can temporarily serve:
 1. The first assistant (most often the top deputy if they are in the position) automatically becomes the acting.
 2. Or the president may direct a senior official of an agency who is serving in a Senate-confirmed position.
 3. Or the president can select a senior official (not a Senate confirmed position) of the same executive agency if this person has served for at least 90 days during the year proceeding the vacancy and is at least a GS-15 level employee.
- II. The act limits the time a person may be an acting official to either 210 days (from the date of the vacancy) or during the pendency of a nomination with extensions if the nomination is rejected, withdrawn or returned. There are specific exceptions to this limit that would allow a person to hold the acting title longer than 210 days.

In addition, a person nominated to the position may not be named to the acting position.

What to Watch

While the confirmation process for President-elect Donald Trump's cabinet picks and senior staff is well underway, few, if any, will get Senate approval by January 20, which means the president-elect's team will have to rely on career federal employees or, in rare cases, a Biden holdover to run federal departments and agencies on a temporary basis.

Given what [Trump has said about career federal employees](#), he is not going to want them running things at the departments and agencies any longer than necessary. The Senate is attempting to act on Trump's appointees as fast as it can, but part of the problem was self-inflicted because Team Trump was slow in allowing the FBI to begin routine background checks on its nominees.

The reason it is worth knowing existence and details of the Vacancy Act is because in Trump I it was at the center of what became a [notorious case](#) involving [Chad Wolf](#), who was named and sworn in as the Acting Secretary of the Department of Homeland Security.

While Wolf was serving the Under Secretary of Homeland Security for Strategy, Policy and Planning from 2019-2021, a Senate confirmed position, he was appointed the Acting Secretary in November 2019. In November of 2020 because of a lawsuit, a court ruled his appointment was unlawful. The impact of this ruling was that all actions taken by Wolf were invalid.

Why It Matters

Trump may use the Vacancy Act to install temporary, long, or short term in nature, individuals to key positions. This issue has already come up when it became clear Trump's first pick to be AG—Matt Gaetz—couldn't be confirmed by the Senate, it was suggested by some that could be appointed to the position via the Vacancy Act.

But, as noted in the Wolf case, this may have consequences that could include invalidating actions taken.

President-elect Donald Trump may use Vacancy Act to place senior officials in acting roles for positions normally requiring Senate confirmation, even if they can only stay in office temporary. In the previous Trump administration, the Vacancy Act was at the center of what became a notorious case regarding Chad Wolf who was named and sworn in as the Acting Secretary of the Department of Homeland Security.

While Wolf was serving the Under Secretary of Homeland Security for Strategy, Policy and Planning from 2019-2021, a Senate confirmed position, he was appointed the Acting Secretary in November 2019. In November of 2020 because of a lawsuit, a court ruled his appointment was unlawful. The impact of this ruling was that all actions taken by Wolf were invalid. Despite this, such tactics could be used again.

However, in the new Trump administration this could change.

Trump was quick to announce the names of persons he intends to nominate for his cabinet and sub-cabinet positions, but his team was slow transition agreement — something that is usually done immediately after or even before the election by both parties that, among other provisions, includes FBI background checks for nominees. To get ready for a confirmation hearing the Senate staff and Senators review the nomination packages submitted to the committee in advance of any hearing. Compounding the normal bottleneck that occurs with each transition, many of Trumps nominees are controversial, which could cause the vetting and hearing process to go beyond January 20. Already two of his nominees have withdrawn their names from consideration. This all converges at a time when there is no Senate confirmed head all the Departments and agencies at a time when the president will want to quickly move his agenda.

While the confirmation process for Trump's cabinet picks and senior staff is well underway, few, if any, will get Senate approval by January 20, which means the president-elect's team will have to rely on career federal employees or, in rare cases, a Biden holdover to run federal departments and agencies on a temporary basis. The [Federal Vacancies Reform Act of 1998](#) provides guidance on how vacancies in Senate-confirmed positions are temporarily filled. However, each department and agency are unique in how it fills such vacancies. Only three categories of individuals can serve as acting officials: 1) The first assistant, usually the top deputy, previously designated, usually a career employee; 2) A senior official already in a Senate-confirmed position as directed by the president but since this is the beginning of the term this will not be a Trump person, it would have to be a Biden person who has agreed to stay for a short time; 3) A senior official in the same agency who has served for at least 90 days in the prior year and is at least a GS-15 federal employee. Given what [Trump has said about career federal employees](#), he is not going to want them running things at the departments and agencies any longer than necessary.

The Senate is attempting to act on Trump's appointees as fast as it can, but part of the problem was self-inflicted because Team Trump was slow in allowing the FBI to begin routine background checks on its nominees. The reason it is worth brushing up on the existence and details of the Vacancy Act is because in Trump I it was at the center of what became a [notorious case](#) involving [Chad Wolf](#), who was named and sworn in as the Acting Secretary of the

Department of Homeland Security. While Wolf was serving the Under Secretary of Homeland Security for Strategy, Policy and Planning from 2019-2021, a Senate confirmed position, he was appointed the Acting Secretary in November 2019. In November of 2020, because of a lawsuit, a court ruled his appointment was unlawful. The impact of this ruling was that all actions taken by Wolf were invalid. The Vacancy Act matters because the Trump team may try and use it to install temporary, long or short term in nature, individuals to key positions. This issue has already come up when it was suggested by some that Matt Gaetz, Trump's first pick to the AG, could be appointed to the position via the Vacancy Act, when it became clear he couldn't be confirmed by the Senate. But, as noted in the Wolf case, this may have consequences that could include invalidating actions taken.