



B-334562

February 8, 2023

The President
The White House

Subject: *Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998: Assistant Secretary/Director, U.S. Immigration and Customs Enforcement*

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 U.S. Immigration and Customs Enforcement (ICE), U.S. Department of Homeland Security (DHS), with respect to the Assistant Secretary/Director position (ICE Director).² Specifically, we are reporting that the service of Tae D. Johnson as Acting ICE Director from November 16, 2021, through the present day is in violation of the Act.³

¹ 5 U.S.C. §§ 3345–3349d.

² DHS titled the position “Assistant Secretary/Director” when reporting vacancy information to GAO. GAO’s Executive Vacancy System. Although the position is currently most commonly referred to as “Director”, see, e.g., U.S. Immigration and Customs Enforcement, *Ice Leadership*, available at <https://www.ice.gov/leadership> (last visited Feb. 1, 2023), “Assistant Secretary” is used in some contexts. See, e.g., Congress.gov, 117th Congress, PN1602 — Ed Gonzalez — Department of Homeland Security, available at <https://www.congress.gov/nomination/117th-congress/1602> (last visited Feb. 1, 2023).

³ We contacted DHS to seek factual information and its legal views on the matter. Letter from Assistant General Counsel for Appropriations Law, GAO, to Associate General Counsel for General Law, DHS (Aug. 31, 2022). DHS responded with its explanation of pertinent facts, legal analysis, and supporting documents. Letter from Associate General Counsel for General Law, DHS, to Assistant General Counsel for Appropriations Law, GAO (Oct. 28, 2022) (DHS Response) (including several attachments).

In doing so, we reaffirm our 2022 decision concluding that while the inauguration of a new President resets and extends the 210-day acting service period for existing vacant positions, it does not “reset” the nominations for the position for purposes of the nomination-related acting service periods.⁴

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 identifies three categories of persons who may temporarily perform the functions and duties of a vacant PAS position.⁵ The first assistant to the vacant position automatically serves as acting officer unless the President designates an individual in one of the other categories.⁶ 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.⁷

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.⁸ But when a vacancy exists during the 60-day period beginning on the date of a presidential transitional 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.⁹ 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.¹⁰

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.¹¹ The Comptroller General is required, upon a determination that an

⁴ See B-333853, June 28, 2022.

⁵ 5 U.S.C. § 3345.

⁶ 5 U.S.C. § 3345(a)(1).

⁷ 5 U.S.C. §§ 3345(a)(2)–(3).

⁸ 5 U.S.C. § 3346(a)(1).

⁹ 5 U.S.C. § 3349a(b).

¹⁰ 5 U.S.C. §§ 3346(a)(2), (b).

¹¹ 5 U.S.C. § 3348(b).

acting official has served longer than the allowable period, to report such findings to Congress, the President, and the Office of Personnel Management.¹²

BACKGROUND

DHS reported that the position of ICE Director became vacant on January 20, 2017.¹³ Three nominations were submitted by President Trump, all of which were either returned or withdrawn before the most recent transitional inauguration day, January 20, 2021.¹⁴ Thomas D. Homan was nominated on November 14, 2017, and the nomination was withdrawn on May 15, 2018.¹⁵ Ronald D. Vitiello was nominated on August 16, 2018, and the nomination was returned on January 3, 2019.¹⁶ Mr. Vitiello was nominated a second time on January 16, 2019, and the nomination was withdrawn on April 4, 2019.¹⁷

President Biden was inaugurated on January 20, 2021, and has submitted two nominations to date.¹⁸ Ed Gonzalez was nominated on April 28, 2021, and the nomination was returned on January 3, 2022.¹⁹ Mr. Gonzalez was nominated a second time on January 4, 2022, and the nomination was withdrawn on July 11, 2022.²⁰

Tae D. Johnson serves as the ICE Deputy Director, which is the first assistant to the ICE Director position,²¹ and began serving as Acting ICE Director under the

¹² 5 U.S.C. § 3349(b).

¹³ GAO's Executive Vacancy System; DHS Response, at 11.

¹⁴ See DHS Response, at 11.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ DHS Response, at 2, 11.

¹⁹ *Id.* at 11.

²⁰ *Id.*

²¹ DHS Response, at 12. GAO has previously determined that 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-332995, Aug. 2, 2021. DHS cites DHS Delegation No. 00106, *DHS Orders of Succession and Delegations of Authorities for Named Positions* (Rev. 8.17), which provides that the first assistant to a PAS position for purposes of the Vacancies Act is the position designated as the first to succeed that PAS position in the relevant Annex to the Delegation. DHS Response, at 12 (citing DHS Delegation No. 00106, paragraph II.E). DHS also attached Annex N to DHS

Vacancies Act on January 20, 2021.²² According to DHS, Mr. Johnson has continued to serve as Acting ICE Director since then.²³

DISCUSSION

Time Limitations on Mr. Johnson's Acting Service

Because the ICE Director 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,²⁴ regardless of the fact that previous periods of permissible acting service had expired prior to President Biden's inauguration.²⁵ This most recent acting service period ended on November 15, 2021.²⁶

Delegation No. 00106, issued on September 14, 2016 (prior to the vacancy), designating the ICE Deputy Director as the first position to succeed the ICE Director, and therefore the first assistant for purposes of the Vacancies Act. *Id.* at 12, Attachment 2.

²² See 5 U.S.C. § 3345(a)(1). DHS's response at various points identifies both January 20 and January 21, 2021, as the date Mr. Johnson began serving as Acting ICE Director. Compare DHS Response, at 1, 11 (listing January 21 as the start of his acting service), with *id.* at 2 (stating that President Biden was inaugurated on January 20 and that Mr. Johnson began his acting service the same day). In earlier reports to GAO, DHS identified January 20 as the beginning of Mr. Johnson's acting service, see GAO's Executive Vacancy System, and official DHS documents issued on January 20, 2021, refer to Mr. Johnson as Acting ICE Director. See Memorandum from Acting Secretary, DHS, to Acting ICE Director, et al., *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021), available at https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf (last visited Feb. 1, 2023).

²³ DHS Response, at 1.

²⁴ 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).

²⁵ See B-333853. Prior to January 20, 2021, acting service was permitted during the following periods: for 300 days beginning on the date of the vacancy, January 20, 2017, which was a transitional inauguration day; during the pendency of the first nomination, submitted on November 14, 2017, and for 210 days after its withdrawal on May 15, 2018; and during the pendency of the second nomination, submitted on August 16, 2018, and for 210 days after its return on January 3, 2019. See 5 U.S.C. §§ 3346(a)–(b), 3349a(b)(1).

²⁶ See B-333853; B-333857, Apr. 18, 2022. The 210-day period was “deemed to begin on . . . the date occurring . . . 90 days after such transitional inauguration day,”

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.²⁷ We have concluded that the phrase “a first or second nomination” refers to the first two nominations submitted to the Senate 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.²⁸ 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.²⁹

In this case, the first nomination for the ICE Director position for purposes of section 3346 was Mr. Homan’s November 14, 2017, nomination, which was withdrawn on May 15, 2018, and the second nomination was Mr. Vitiello’s August 16, 2018, nomination, which was returned on January 3, 2019. Because neither President Trump’s final nomination nor President Biden’s two subsequent nominations represented the first or second nomination for purposes of section 3346, their submission did not trigger additional acting service periods.³⁰ Therefore, Mr. Johnson’s service as Acting ICE Director after the 300-day acting service period expired on November 15, 2021, is in violation of the Act.

which was April 20, 2021, and therefore concluded on November 15, 2021. 5 U.S.C. § 3349a(b)(1). The Department of Justice’s Office of Legal Counsel (OLC), however, maintains that the last day of the period was November 16. *Federal Vacancies Reform Act’s Application to a Vacancy for Which Prior Presidents Submitted Multiple Nominations*, 46 Op. Off. Legal Counsel ___ (Oct. 21, 2022), slip op. at 6 & n.3, available at https://www.justice.gov/d9/2022-11/2022-10-21_-_vra_multiple_nominations.pdf (last visited Feb. 1, 2023) (OLC Opinion). Both GAO and OLC agree that the date occurring 90 days after inauguration day was April 20. See B-333853, at 10 n.46; OLC Opinion, at 6 n.3. Because the 210-day period “beg[a]n on” April 20, we count April 20 as the first day of the period, making November 15 the 210th, or last, day. See 5 U.S.C. § 3349a(b)(1); B-333853; see also *Slinger Drainage, Inc. v. Environmental Protection Agency*, 237 F.3d 681, 682–83 (D.C. Cir. 2001) (interpreting a statutory period “beginning” on a specified date and counting that date as the first day of the period). In contrast, OLC does not count April 20 in calculating the 210-day period. See OLC Opinion, at 6 n.3.

²⁷ 5 U.S.C. §§ 3346(a)(2), (b).

²⁸ See B-333853.

²⁹ *Id.*

³⁰ See 5 U.S.C. §§ 3346(a)(2), (b).

Validity of Actions Taken after November 15, 2021

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.³¹ In that situation, “the office shall remain vacant” and only the head of the agency may perform the functions or duties of the position.³² 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.”³³ 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).³⁴ Furthermore, officials may be authorized to take certain actions in their official, rather than acting, positions.

In response to our inquiry, DHS states that there are no functions or duties meeting the Vacancies Act definition with respect to the ICE Director position.³⁵ DHS maintains that the Secretary of Homeland Security has broad authority to delegate functions residing in subordinate offices, including the office of the ICE Director.³⁶ Based on DHS’s response and the cited sources, we have no basis upon which to conclude that any actions taken by Mr. Johnson on or after November 16, 2021, must be nullified or viewed as having no force or effect.

DHS Response and OLC Opinion on Nominations by a New President

DHS disagrees with our interpretation of the Vacancies Act’s time limitations and contends that section 3349a resets both the 210-day acting service period and the nomination count in section 3346.³⁷ Accordingly, DHS asserts that the two nominations of Mr. Gonzalez submitted by President Biden constitute first and second nominations for purposes of section 3346, meaning that the period of permissible acting service continues until February 6, 2023, 210 days after the withdrawal of Mr. Gonzalez’s second nomination.³⁸ In support, DHS cites a 2022 opinion issued by the Department of Justice’s Office of Legal Counsel (OLC)

³¹ 5 U.S.C. § 3348(b).

³² *Id.*

³³ 5 U.S.C. § 3348(d).

³⁴ 5 U.S.C. § 3348(a)(2).

³⁵ DHS Response, at 14.

³⁶ *Id.* (citing 6 U.S.C. §§ 112(a)(1)–(3), (b), 113(a)(1)(G), 455(c)).

³⁷ DHS Response, at 2–3.

³⁸ *Id.*

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.³⁹

In its opinion, OLC acknowledges that section 3349a does not expressly address the effect of the provision on prior nominations and therefore might be understood as not resetting any previously exhausted nomination-related periods, but contends that the structure and relationship of the various timing provisions in the Vacancies Act and the Act's legislative history support its conclusions.⁴⁰

First, OLC asserts that in section 3349a, "the 210-day period under section 3346 or 3348" refers to the initial 210-day acting service period following a vacancy in section 3346(a)(1) and not the 210-day periods following the rejection, withdrawal, or return of a first or second nomination in section 3346(b).⁴¹ OLC then contends that the provision must be read as resetting the nominations for purposes of the nomination-related periods because to read it otherwise would mean that not even the initial 210-day period would be reset, given that "section 3346's authorization of acting service ceases after the final 210-day period following a second nomination."⁴² Finally, OLC asserts that the purpose of section 3349a and its legislative history support OLC's interpretation.⁴³ Specifically, OLC maintains that section 3349a is intended to encourage a new President to submit nominations promptly and cites relevant legislative history stating this purpose, while acknowledging that the legislative history does not expressly address the effect of a prior President's unsuccessful nominations.⁴⁴

OLC's interpretation does not comport with the text of section 3349a or section 3346. In B-333853, we concluded that section 3349a only expressly resets the initial 210-day period in section 3346(a)(1) and does not address nominations in any way,

³⁹ *Id.* at 2, Attachment 3; see OLC Opinion. DHS included a separate discussion in its response that largely tracks the analysis and conclusions in the OLC Opinion. See DHS Response, at 2–9.

⁴⁰ OLC Opinion, at 7–13.

⁴¹ OLC Opinion, at 5–7; see 5 U.S.C. §§ 3346(b)(1), (2)(B). We discussed the ambiguity of this phrase in B-333853 and determined that, as a practical matter, the issue was not relevant for determining whether there was a time violation. B-333853, at 8 n.38. But we also acknowledged that section 3349a could refer to the initial 210-day period in section 3346(a)(1) and assumed as much in our analysis. *Id.* at 5, 6, 8 n.38, 9.

⁴² OLC Opinion, at 7–8.

⁴³ See *id.* at 9–13.

⁴⁴ See *id.*

much less prescribe different treatment for nominations submitted on or after inauguration day. We made this determination, in part, because section 3349a does not modify the date of the vacancy, and merely “deem[s]” the initial 210-day period “to begin” on one of two specified dates instead of “the date the vacancy occurs” as provided in section 3346.⁴⁵ We also noted that the initial 210-day period in section 3346 is independent of the nomination-related periods and calculated separately.⁴⁶ Therefore, the exhaustion of the nomination-related periods does not, as OLC contends, prohibit additional acting service during the 210-day period under section 3346(a)(1) when reset by section 3349a.⁴⁷

⁴⁵ See 5 U.S.C. §§ 3346(a)(1), 3349a(b); B-333853, at 7 n.34, 8 n.38; cf. 5 U.S.C. § 3349a(b)(2) (distinguishing between the date the 210-day period is deemed to begin and “the date on which the vacancy occurs” with respect to vacancies arising after the transitional inauguration day).

⁴⁶ B-333853, at 8; see 5 U.S.C. § 3346(a). DHS further contends that because sections 3346(a)(2) and (b) do not include an express point of reference for determining whether a nomination is the first or second nomination, the implied point of reference is the beginning of the initial 210-day period, supporting the interpretation that the periods operate in sequence. DHS Response, at 7. We disagree. These sections refer to a first or second nomination “for the office.” 5 U.S.C. §§ 3346(a)(2), (b). And the introductory text of section 3346 expressly refers to persons acting “in the office” under section 3345, which, in turn, applies when a PAS officer “dies, resigns, or is otherwise unable to perform the functions and duties of the office.” 5 U.S.C. §§ 3345(a); 3346(a). Accordingly, the more straightforward reading of sections 3346(a)(2) and (b) is that they simply refer to the first or second nomination for an office that is vacant as described in section 3345.

DHS also cites section 3349(b) in support of the interpretation that the time periods in section 3346 are sequential. DHS Response, at 7. Section 3349(b) describes the Act’s time limitations as “the 210-day period including the applicable exceptions to such period under section 3346 or section 3349a.” 5 U.S.C. § 3349(b). Putting aside that this is merely a summary of the time limits intended to inform when the Comptroller General must report a time violation, this provision undercuts OLC and DHS’s interpretation because it distinguishes between the nomination-related periods (“the applicable exceptions . . . under section 3346”) and the post-inauguration time periods (“the applicable exceptions . . . under . . . section 3349a”). See *id.*

⁴⁷ OLC’s interpretation would also call into question the treatment of nominations submitted by either the previous or new President that are pending on the date the 210-day period begins under section 3349a. Such nominations would have been submitted prior to the reset 210-day period and therefore out of sequence under OLC’s view of the structure of the various timing provisions. OLC implicitly acknowledges the issue but declines to address how such nominations would be treated. OLC Opinion, at 13 n.8.

Further, we do not view the statements cited by OLC regarding section 3349a's purpose, standing alone, as implicitly suggesting congressional intent to reset the nominations for long-vacant positions. Nothing in the legislative history suggests, as OLC asserts, that congressional concern about new Presidents filling long-vacant positions (including those for which prior unsuccessful nominations had been submitted) was an animating force behind the addition of section 3349a. Instead, Congress was concerned about the large number of vacancies that a new President would need to fill as a result of the transition ("essentially all [PAS] positions in the executive branch"), potentially requiring "additional time to nominate individuals to fill them."⁴⁸ The vast majority of such vacancies would be too recent for the previous President to have submitted a nomination.⁴⁹

In B-333853, we recognized the same concerns that OLC and DHS raise regarding our interpretation of section 3349a, namely that past nominations may disadvantage a newly inaugurated President by limiting the acting service period in the new administration.⁵⁰ However, these concerns cannot override the plain meaning of the Vacancies Act's provisions.

CONCLUSION

We reaffirm that 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, when the nomination-related periods have previously been exhausted because prior Presidents submitted two or more unsuccessful nominations for the office, the new President's submission of a nomination does not trigger a new or extended acting service period under the Vacancies Act. Therefore, Mr. Johnson's service as Acting ICE Director from November 16, 2021, to the present day is in violation of the Vacancies Act.

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 and House Committees on the Judiciary, the House

⁴⁸ S. Rep. No. 105-250, at 21 (1998).

⁴⁹ After receiving the referral that led to our decision in B-333853, we examined in May 2022 how many vacant PAS positions subject to the Vacancies Act had nominations submitted by a prior President. Of the hundreds of covered positions, we identified less than 40 vacant positions at the time for which at least one nomination had been submitted by a prior President; less than 25 of those were positions for which at least two nominations had been submitted by a prior President.

⁵⁰ B-333853, at 8.

Committee on Homeland Security, 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 that reads "Edda Emmanuelle Perez".

Edda Emmanuelli Perez
General Counsel