



Decision

Matter of: Department of Defense, Office of Inspector General—Legality of Service of Acting Inspector General

File: B-333853

Date: June 28, 2022

DIGEST

We consider whether an official is permitted to act in a presidentially appointed, Senate-confirmed (PAS) position during the pendency of third or successive nominations to the position where the first and second nominations were made by a former president. The Federal Vacancies Reform Act of 1998 (Vacancies Act) limits the service of an acting official to 210 days beginning on the date the vacancy occurs, during the pendency of first and second nominations, and for 210 days after the return, withdrawal or rejection of the first and second nominations. In presidential transition years, the Vacancies Act permits an additional 300 days of acting service for any vacancies that exist during the 60-day period beginning on inauguration day. We conclude that an official is eligible to act for a 300-day period from a transitional inauguration day, such as January 20, 2021; however, such official is ineligible to act during the pendency of the third or successive nominations to a position where the pendency of those nominations falls outside of the additional 300-day period of allowable acting service. Accordingly, Sean W. O'Donnell's service as the Acting Inspector General of the Office of Inspector General of the Department of Defense between April 6, 2020 and January 19, 2021, as well as from November 16, 2021 to the present day, was and continues to be in violation of the Vacancies Act.

DECISION

This responds to a referral sent by the Council of the Inspectors General on Integrity and Efficiency (CIGIE) regarding the legality of Sean W. O'Donnell's service as acting Inspector General of the Department of Defense, Office of Inspector General

(DOD OIG).¹ As explained below, we conclude that Mr. O’Donnell’s service as the acting Inspector General between April 6, 2020, and January 19, 2021, as well as from November 16, 2021, to the present day, was and continues to be in violation of the Vacancies Act.

In accordance with our regular practice, we contacted DOD OIG to seek factual information and its legal views on this matter.² DOD OIG responded with its explanation of the pertinent facts and legal analysis.³

BACKGROUND

The Vacancies Act establishes requirements for temporarily authorizing an acting official to perform the functions and duties of vacant positions that require presidential appointment and Senate confirmation (PAS positions). 5 U.S.C. §§ 3345–3349d. Section 3346 of the Vacancies Act outlines the permissible periods of acting service under the act. *Id.* § 3346. Unless an officer is serving in compliance with the time limitations of section 3346, as well as other conditions specified in sections 3345 and 3347, the office must remain vacant and only the agency head may perform the functions and duties of such office, so long as it is not the agency head’s office. *Id.* § 3348(b).

DOD OIG is an independent unit within DOD tasked with conducting and supervising audits, investigations, and evaluations relating to the operations of DOD.⁴ The Inspector General (IG) serves as the principal advisor to the Secretary of Defense on matters such as auditing, criminal investigations, and prevention and detection of

¹ Letter from Chairperson, Integrity Committee, CIGIE, to General Counsel, GAO (Dec. 1, 2021).

² GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* <https://www.gao.gov/products/GAO-06-1064SP>. Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, DOD OIG (Dec. 21, 2021); E-mail from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, DOD OIG (Apr. 12, 2022).

³ Letter from General Counsel, DOD OIG, to Assistant General Counsel for Appropriations Law, GAO (Jan. 20, 2022) (Response Letter); E-mail from General Counsel, DOD OIG, to Assistant General Counsel for Appropriations Law, GAO (Apr. 19, 2022).

⁴ See DOD Directive 5106.01, *Inspector General of the Department of Defense (IG DoD)* (Apr. 20, 2012) (incorporating Change 2, May 29, 2020), at 1. DOD-OIG was established in 1982 by the Inspector General Act of 1978, as amended (IGA). 5 U.S.C. app.

fraud, waste and abuse.⁵ The IG is a PAS position⁶ that is subject to the Vacancies Act.⁷

On January 8, 2016, Jon T. Rymer resigned as IG, creating a vacancy in the position.⁸ At that time, Glenn A. Fine served as Principal Deputy Inspector General.⁹ Consistent with DOD OIG's Order of Succession Memorandum, Mr. Fine served as acting IG from January 8, 2016,¹⁰ until August 5, 2016.¹¹ On September 28, 2016, Mr. Fine was nominated by President Obama to serve as IG.¹² Mr. Fine resumed service as acting IG on September 28, 2016, for the pendency of his nomination.¹³ The Senate returned Mr. Fine's nomination on January 3, 2017.¹⁴ Mr. Fine was nominated to serve as IG for a second time on January 4, 2017¹⁵, and continued to serve as acting IG during the pendency of his second nomination.¹⁶ President Trump was inaugurated on January 20, 2017, and withdrew Mr. Fine's second nomination on February 28, 2017.¹⁷ Mr. Fine continued to serve as acting IG under the Trump administration until November 16, 2017.¹⁸

⁵ DoD Directive 5106.01, at 2.

⁶ IGA, § 3.

⁷ *Id.* §§ 3345-3349d. While the nullification provisions of the Act do not apply to Inspectors General, *id.* § 3348(e)(3), the other provisions of the Act, including time limitations, are applicable. B-326480, Mar. 30, 2015.

⁸ Response Letter, Enclosure 1, at 1.

⁹ Mr. Fine began serving as the Principal Deputy Inspector General on June 1, 2015. Response Letter, DOD IG Email Announcement. The Principal Deputy Inspector General is the first assistant to the IG. *Id.* Enclosure 1, at 1; see DoD Directive 5106.01, at 2 and DoD OIG Order of Succession Memorandum.

¹⁰ Response Letter, Enclosure 1, at 1; Response Letter, DOD IG Order of Succession Memorandum. Additionally, under the Vacancies Act, the "first assistant" to the vacant PAS position automatically becomes the acting officer in case of a vacancy unless the President designates another individual who satisfies the Vacancies Act's eligibility requirements or a separate statute provides otherwise. 5 U.S.C. §§ 3345(a), 3347(a).

¹¹ Response Letter, Enclosure 1, at 1.

¹² *Id.*; Response Letter, Enclosure 2, at 3.

¹³ Response Letter, Enclosure 1, at 1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*; Response Letter, Enclosure 2, at 3.

¹⁸ Response Letter, Enclosure 1, at 1.

On April 6, 2020, President Trump nominated Jason Abend to serve as IG.¹⁹ On the same day, President Trump designated Sean W. O'Donnell to serve as acting IG.²⁰ The Senate returned Mr. Abend's nomination on January 3, 2021.²¹ On January 6, 2021, President Trump nominated Mr. Abend to serve as IG for a second time.²² President Biden was inaugurated on January 20, 2021, and withdrew Mr. Abend's nomination on February 4, 2021.²³ On November 15, 2021, President Biden nominated Robert P. Storch to serve as IG.²⁴ Mr. O'Donnell has served, and continues to serve, as acting IG since his April 6, 2020 designation.²⁵

DISCUSSION

At issue here is whether Mr. O'Donnell's service as acting IG of the Department of Defense complies with the time limitations prescribed by the Vacancies Act.

Application of 5 U.S.C. §§ 3346, 3348 and 3349a in Presidential Transition Years

The Vacancies Act establishes requirements for temporarily authorizing an acting official to perform the functions and duties of a PAS position. Generally, the Vacancies Act limits the service of an acting official to 210 days beginning on the date the vacancy occurs. 5 U.S.C. § 3346(a)(1). The Vacancies Act also permits acting service during the pendency of first and second nominations. 5 U.S.C. § 3346(a)(2). If a first nomination is rejected by the Senate, withdrawn, or returned to the President by the Senate, then the act permits an official to serve in the acting position for no more than 210 days after such rejection, withdrawal, or return. *Id.* § 3346(b). Likewise, if a second nomination is rejected or returned by the Senate, or withdrawn by the President, then the act permits the officer to continue to serve in

¹⁹ Response Letter, Enclosure 1, at 1; Response Letter, Enclosure 2, at 3.

²⁰ See Response Letter, Presidential Designation. Mr. O'Donnell was designated by the President to serve in accordance with 5 U.S.C. § 3345(a)(2). Response Letter, Enclosure 1, at 2. Mr. O'Donnell was confirmed by the Senate as IG of the Environmental Protection Agency on December 19, 2019. PN1158 – Sean O'Donnell – Environmental Protection Agency, 116th Congress (2019-2020), <https://www.congress.gov/nomination/116th-congress/1158>.

²¹ Response Letter, Enclosure 1, at 1.

²² *Id.*; Response Letter, Enclosure 2, at 3.

²³ Response Letter, Enclosure 1, at 1; Response Letter, Enclosure 2, at 3.

²⁴ Response Letter, Enclosure 1, at 1; Response Letter, Enclosure 2, at 3. This nomination is still pending. Response Letter, Enclosure 1, at 1; PN1368 – Robert Phillip Storch – Department of Defense, 117th Congress (2021-2022), <https://www.congress.gov/nomination/117th-congress/1368>.

²⁵ Response Letter, Enclosure 1, at 1; Response Letter, Presidential Designation.

the acting position for no more than 210 days after such rejection, withdrawal or return. *Id.*

In presidential transition years, section 3346 is supplemented by an additional timing rule. With respect to positions that are vacant at the start of a new administration, the 210-day period under section 3346 is deemed to begin 90 days after the transitional inauguration day.²⁶ 5 U.S.C. § 3349a(b)(1). In other words, for any vacancy that exists as of the presidential inauguration day, section 3349a resets the 210-day period contemplated by section 3346(a)(1), and allows for an additional 300 days of eligible acting service from the date of inauguration day notwithstanding prior periods of acting service. *See id.* For example, if a PAS officer resigned on President Biden's inauguration day, January 20, 2021, the 210-day period contemplated by section 3346(a)(1) would start 90 days after inauguration day, allowing the officer to act for a total of 300 days ending on November 15, 2021. *See id.* We have previously held that section 3349a applies to *any* vacancy, even those that predate the transitional inauguration day. *See, e.g.,* B-287720, May 18, 2001. For instance, we have held that where an acting official's service under a previous administration was in violation of section 3346, an acting official was again permitted to temporarily serve in the position for the time period allowed under section 3349a once a new President had taken office. *See id.* In short, section 3349a authorizes an additional 300 days of acting service beginning on inauguration day for vacancies that arose in an earlier presidential administration, even if one or more of the periods of permissible acting service specified in section 3346 began to run or expired prior to inauguration day.

A related question relevant to this case is whether the inauguration of a new president also "resets" the nomination count for a vacant position for purposes of the time periods under section 3346(a)(2) and (b), which apply when a "first or second nomination" is submitted. In other words, the question is whether an acting official may serve during the pendency of a third or subsequent nomination for the vacant position (and for 210 days after the nomination is returned, rejected, or withdrawn) provided that it is the first or second nomination by the newly inaugurated President. As explained below, we conclude that the act does not permit acting service in that situation.

In interpreting provisions of a statute, we follow the settled rule of statutory construction that the starting point is the language of the statute itself. B-311423 *et al.*, May 1, 2008. Where the language is clear on its face, its plain meaning will be given effect. B-271845, Aug. 23, 1996 (citing *Chevron, U.S.A., Inc. v. Natural Res.*

²⁶ "Transitional inauguration day" refers to "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." 5 U.S.C. § 3349a(a). For positions that are filled on a transitional inauguration day but become vacant during the first 60 days of a new administration, the 210-day period under section 3346 or 3348 is deemed to begin 90 days after the date on which the vacancy occurs. *Id.* § 3349a(b)(2).

Defense Council, Inc., 467 U.S. 837, 842 (1984)). Provisions with unambiguous language may not be construed as to alter or extend their plain meaning. B-287158, Oct. 10, 2002 (citing *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296 (1989); B-271845, Aug. 23, 1996)).

Neither section 3349a nor any other provision of the act authorize acting service during the pendency of a third or subsequent nomination to a position where the first and second nominations were made by a former president. Section 3349a merely prescribes a different start date for the 210-day period of permissible acting service for vacancies existing on a transitional inauguration day, thereby displacing the default 210-day period in section 3346(a)(1). The provision does not address nominations for purposes of the time periods in section 3346(a)(2) and (b); in other words, it does not specify different treatment for nominations pending on or submitted on or after inauguration day. Section 3349a only indirectly impacts these provisions by authorizing an additional 300-day period of acting service beginning on inauguration day, even if the periods of permissible acting service related to nominations began to run or expired prior to inauguration day.

Other than section 3349a, section 3346 is the primary provision of the Vacancies Act that addresses the permissible time periods for acting service.²⁷ See 5 U.S.C. § 3346. This section authorizes an acting officer to serve: for 210 days after a vacancy occurs²⁸, during the pendency of a first or second nomination for the office²⁹, and for additional 210-day periods after the rejection, return or withdrawal of the first or second nomination.³⁰ Section 3346 is silent regarding acting service for the pendency of a third or successive nomination,³¹ and we have previously concluded that such nominations do not extend the period of permissible acting service.³² We will not interpret congressional silence as a grant of authority, unless

²⁷ Section 3348(c) also briefly addresses the permissible period of acting service, extending it if the Senate is not in session on the last day of the period. 5 U.S.C. § 3348(c).

²⁸ 5 U.S.C. § 3346(a)(1).

²⁹ *Id.* § 3346(a)(2).

³⁰ *Id.* § 3346(b).

³¹ *Id.* § 3346.

³² See B-328888, Mar. 3, 2017 (addressing a situation in which the same President submitted three nominations for a vacant position). The Office of Legal Counsel has likewise opined that “[t]he submission of a third nomination will not suspend or otherwise affect the running of” the period of permissible acting service. 23 Op. Off. Legal Counsel 60, 69 (1999) (OLC Guidance).

context requires otherwise.³³ No provision of the Vacancies Act supports a reading of section 3346's silence to authorize acting service for the pendency of a third or successive nomination, either as a general matter or in certain, limited circumstances. Accordingly, we refrain from doing so here.

DOD OIG proposes that we read into section 3349a an additional timing rule, which would authorize acting service for the pendency of a third or successive nomination where the first and second nominations were made by a different president.³⁴ Specifically, DOD OIG argues that for vacancies existing prior to a transitional inauguration day, section 3349a is best read to deem the vacancy as having occurred 90 days after the start of the incoming president's term, meaning that only nominations pending on or submitted on or after that day are counted for purposes of determining the acting service period.³⁵ Under this interpretation, notwithstanding prior nominations made by outgoing presidents, an acting officer would be permitted to serve during the pendency of the new president's first and second nominations for the vacant position, and for 210 days following the rejection, withdrawal or return of those first and second nominations.³⁶ In effect, this theory contemplates resetting

³³ See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989) (“Ordinarily, ‘Congress’ silence is just that—silence.”) (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987)).

³⁴ Response Letter, Enclosure 2, at 1–3. Although DOD OIG acknowledges that section 3349a does not expressly address this question, DOD OIG asserts that its interpretation has long been accepted by the Executive Branch. *Id.* at 1. Specifically, DOD OIG suggests that the OLC Guidance supports the theory that in the circumstances noted above, the date of the vacancy is reset. *Id.*; OLC Guidance, at 70. However, this reliance is misplaced. The relevant portion of the Guidance notes that “for purposes of calculating the time limit”, the vacancy shall be deemed to have arisen at a later date, and the “time limit begins anew.” OLC Guidance at 70. We do not read this to suggest that the date of the vacancy itself should be reset. Rather, we interpret this guidance to mean that for any vacancies that exist within the first 60 days of a new administration, the 210-day period afforded under section 3346 is reset, and deemed to begin 90 days after the transitional inauguration day or the date that the vacancy occurs, whichever is later. See OLC Guidance at 70; 5 U.S.C. § 3349a. The OLC Guidance says nothing about section 3349a affecting how nominations are counted for purposes of section 3346(a)(2) and (b).

³⁵ Response Letter, Enclosure 2, at 1–2.

³⁶ *Id.* DOD OIG also asserts that an acting officer would be permitted to serve for 300 days from the beginning of a new administration regardless of any nominations made by a previous President. *Id.* at 1. As explained above, we agree with this aspect of DOD OIG's interpretation.

the date of the vacancy entirely, thereby affording a new administration the full possible cycle of acting service permitted by section 3346.³⁷

While section 3349a affords incoming presidents with one additional 300-day period of acting service, it does not afford them a clean slate, as suggested by DOD OIG. The text of section 3349a unambiguously states that in the context of inaugural transition years, the “210-day period under section 3346 or 3348” shall be deemed to begin at the later of two specified dates.³⁸ See 5 U.S.C. § 3349a. In contrast, section 3349a says nothing about nominations or prescribes different treatment for nominations that are pending on or submitted on or after inauguration day. Nor does section 3346 tie the time periods related to nominations to either the date of the vacancy or the running of the initial 210-day acting service period. Because the text of section 3349a is unambiguous, we will not construe section 3349a beyond its plain meaning.

We recognize the concerns raised by DOD OIG regarding this conclusion, specifically that it means that past nominations may disadvantage a newly inaugurated President by limiting the period acting officials may serve in the new administration. But these concerns cannot override the plain meaning of the Vacancies Act’s provisions. Reading the statute as a whole, if Congress intended a restart of the count for nominations in section 3349a it could have so provided as it did by expressly extending the timeframe for presidential transition periods. See 5 U.S.C. § 3349a.

Legality of Mr. O’Donnell’s Acting Service

We now analyze Mr. O’Donnell’s eligibility in light of the rules discussed above. The IG position became vacant as of January 8, 2016.³⁹ On this same date, the

³⁷ *Id.* at 3.

³⁸ In interpreting section 3349a(b), we note that “the 210-day period under section 3346 or 3348” could refer to multiple 210-day periods. See *id.* §§ 3346(a)(1), 3346(b)(1), 3346(b)(2)(B). Although section 3348 is also mentioned in section 3349a(b), this reference does not clarify the ambiguity, as section 3348(c) merely refers to “any 210-day period under section 3346”. *Id.* § 3348(c). As a practical matter, the ambiguity is irrelevant to the question at hand. We read section 3349a(b) to create an extended or new 300-day period of acting service, regardless of whether this period coincides with any particular circumstance. On the other hand, DOD OIG reads the reference to the 210-day period as clearly referring to the period in section 3346(a)(1) to support their position that section 3349a resets the date of the vacancy. Response Letter, Enclosure 1, at 2. While we agree the reference to the 210-day period could be to the period in section 3346(a)(1), that does not change the fact there is no language in section 3349a indicating that the provision resets the date of the vacancy.

³⁹ Response Letter, Enclosure 1, at 1.

Honorable Glenn A. Fine began serving as acting IG.⁴⁰ Under section 3346(a), Mr. Fine was permitted to serve as acting IG for 210 days. See 5 U.S.C. § 3346(a)(1). On September 28, 2016, Mr. Fine was nominated to fill the position permanently.⁴¹ This nomination allowed him to serve as acting IG during the pendency of his nomination.⁴² See 5 U.S.C. §§ 3345(b), 3346(a)(2). Mr. Fine's nomination was returned to the President by the Senate on January 3, 2017.⁴³ Pursuant to the Vacancies Act, this allowed Mr. Fine to serve as acting IG for 210 days after the first nomination was returned. See 5 U.S.C. § 3346(b)(1). When Mr. Fine was nominated for a second time on January 4, 2017, he was again permitted to serve during the pendency of his nomination.⁴⁴ This second nomination was withdrawn by President Trump on February 28, 2017.⁴⁵

Although Mr. Fine normally would have been permitted to continue acting for only 210 days after the withdrawal of his second nomination under section 3346(b)(2), because the vacancy in the IG position existed during a presidential transition year, Mr. Fine was permitted to serve as acting IG for 210 days starting 90 days after President Trump's inauguration. See 5 U.S.C. § 3349a(b)(1). However, after Mr. Fine completed this period of service, the position should have been vacant for the remainder of President Trump's time in office, unless another officer was appointed by the President and confirmed by the Senate to the position. See *id.* § 3348(b)(1). As such, Mr. O'Donnell's appointment to the position of acting IG from April 6, 2020, through January 19, 2021, violated the Vacancies Act.

However, this does not end our analysis. As mentioned above, for any vacancy that exists as of a presidential inauguration day, the 210-day period under section 3346(a)(1) is reset, which affords an additional 300 days of eligible acting service from the date of the transitional inauguration day. See 5 U.S.C. §§ 3346(a)(1), 3349a(b)(1). Accordingly, President Biden's inauguration on January 20, 2021, allowed an official to act as IG for 300 days. See *id.* § 3349a. Mr. O'Donnell's

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² A person nominated to fill a PAS position may not act in such position unless the person served as first assistant to the position for at least 90 of the last 365 days that preceded the vacancy. See 5 U.S.C. §§ 3345(b)(1). In Mr. Fine's case, the vacancy in the IG position occurred on January 8, 2016, and Mr. Fine had been serving as the first assistant to the IG since June 1, 2015. See Response Letter, Enclosure 1, at 1–2. As such, Mr. Fine was permitted to serve as acting IG during the pendency of his nomination.

⁴³ Response Letter, Enclosure 1, at 1.

⁴⁴ Response Letter, Enclosure 1, at 1; See 5 U.S.C. § 3346(a)(2).

⁴⁵ Response Letter, Enclosure 1, at 1; Response Letter, Enclosure 2, at 3.

service as acting IG from January 20, 2021 to November 15, 2021,⁴⁶ was therefore permissible.

No other provisions of the Vacancies Act allow for additional extensions of acting service after this 300-day period, so the office must remain vacant. See 5 U.S.C. §§ 3346, 3348⁴⁷, 3349a. According to DOD OIG, Mr. O'Donnell currently serves as acting IG.⁴⁸ Therefore, Mr. O'Donnell's service as acting IG from November 16, 2021, to the present day violates the time limitations of the Vacancies Act.

CONCLUSION

We conclude that an official is ineligible to act in a presidentially appointed, Senate-confirmed position during the pendency of the third or successive nominations to a position where the pendency of those nominations falls outside of another acting service period provided by the Vacancies Act, such as the additional 300-day period from a transitional inauguration day. Therefore, Mr. O'Donnell's service as acting Inspector General of the Department of Defense, Office of Inspector General, between April 6, 2020, and January 19, 2021, as well as from November 16, 2021, to the present day, was and continues to be in violation of the Vacancies Act.

In accordance with the requirements of the Vacancies Act, we are 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 Government Reform, the Senate and House Committees on Appropriations, the Senate Committee on Armed Services, the House Committee on Armed Services, the President, and the Director of the Office of Personnel Management. See 5 U.S.C. § 3349(b).



Edda Emmanuelli Perez
General Counsel

⁴⁶ Section 3349a directs that the 210-day period starts 90 days after the transitional inauguration day. Ninety days after the transitional inauguration day is April 20, 2021, and the 210-day period ended on November 15, 2021. See B-333857, Apr. 18, 2022.

⁴⁷ The Senate was in session on the last day of the period, November 15, 2021, and therefore section 3348(c) did not extend the acting service period. See 5 U.S.C. § 3348(c); 167 Cong. Rec. S8065–S8213 (daily ed. Nov. 15, 2021).

⁴⁸ Response Letter, Enclosure 1, at 1.