



B-334564

February 8, 2023

The President
The White House

Subject: *Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998: Director, Office on Violence Against Women, Department of Justice*

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 Justice (DOJ) with respect to the position of Director of the Office on Violence Against Women (OVW). Specifically, we are reporting that the service of Allison Randall as Acting Director from May 26, 2022, 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 new President's first or second nomination for a vacant position where a former President has already made two or more unsuccessful nominations.³

¹ 5 U.S.C. §§ 3345–3349d.

² We contacted DOJ to seek factual information and its legal views on the matter. Letter from Assistant General Counsel for Appropriations Law, GAO, to Acting Assistant Attorney General for Administration, DOJ (Aug. 31, 2022); Email from Senior Attorney, GAO, to Deputy General Counsel, Justice Management Division, DOJ (Dec. 6, 2022). DOJ responded with its explanation of pertinent facts, legal analysis, and supporting documents. Letter from Acting Assistant Attorney General for Administration, DOJ, to Assistant General Counsel for Appropriations Law, GAO (Nov. 1, 2022) (DOJ Response) (with several attachments); Email from Deputy General Counsel, Justice Management Division, DOJ, to Senior Attorney, GAO (Dec. 8, 2022) (with attachment); Email from Deputy General Counsel, Justice Management Division, DOJ, to Senior Attorney, GAO (Dec. 15, 2022) (with attachment).

³ See B-333853, June 28, 2022.

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.⁴ 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 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.⁶

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.⁷ 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.⁸ 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.⁹

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.¹⁰ 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.¹¹

⁴ 5 U.S.C. § 3345.

⁵ 5 U.S.C. § 3345(a)(1).

⁶ 5 U.S.C. §§ 3345(a)(2)–(3).

⁷ 5 U.S.C. § 3346(a)(1).

⁸ 5 U.S.C. § 3349a(b).

⁹ 5 U.S.C. §§ 3346(a)(2), (b).

¹⁰ 5 U.S.C. § 3348(b).

¹¹ 5 U.S.C. § 3349(b).

BACKGROUND

DOJ reported that the Director position became vacant on April 21, 2012.¹² President Obama did not submit any nominations for the position.¹³ President Trump submitted two nominations, both of which were returned before the most recent transitional inauguration day, January 20, 2021.¹⁴ Shannon L. Goessling was nominated on June 18, 2018, and the nomination was returned on January 3, 2019.¹⁵ Ms. Goessling was nominated again on January 16, 2019, and the nomination was returned on January 3, 2020.¹⁶ President Biden was inaugurated on January 20, 2021, and has submitted two nominations to date.¹⁷ Rosemarie Hidalgo was nominated on May 26, 2022, and the nomination was returned on January 3, 2023.¹⁸ Ms. Hidalgo was nominated again on January 3, 2023, and the nomination is pending.¹⁹

President Biden designated Nadine Neufville, OVW's Deputy Director for Grant Development and Management, as Acting Director on January 20, 2021.²⁰ Ms.

¹² DOJ's response at various points identifies both April 21 and April 22, 2012, as the date of the vacancy. *Compare* DOJ Response, at 1, 4 (listing April 22), *with id.* at 3 (listing April 21). In previous vacancy reports submitted to GAO, DOJ identified April 21, 2012, as the date of the vacancy. See GAO's Executive Vacancy System.

¹³ See DOJ Response, at 3.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1, 3.

¹⁸ *Id.* Congress.gov, 117th Congress, PN2206 — Rosemarie Hidalgo — Department of Justice, available at <https://www.congress.gov/nomination/117th-congress/2206> (last visited Feb. 1, 2023).

¹⁹ Congress.gov, 118th Congress, PN70 — Rosemarie Hidalgo — Department of Justice, available at <https://www.congress.gov/nomination/118th-congress/70> (last visited Feb. 1, 2023).

²⁰ DOJ Response, at 3–4; Presidential Memorandum for Nadine Neufville, Associate Director (January 20, 2021) (Presidential Designation) (this memorandum appears to use Ms. Neufville's previous title, see DOJ Response, at 4). Ms. Neufville was designated as Acting Director under the Vacancies Act provision that permits the President to direct an officer or employee of the agency to act in a vacant position if such officer or employee served in a position at the agency for at least 90 days during the year preceding the vacancy and the rate of pay for the position exceeded a specified level. 5 U.S.C. § 3345(a)(3); see DOJ Response, at 1, 4; Presidential Designation. DOJ states that Ms. Neufville has served in positions meeting the pay requirement since 2008, including for the entire year preceding the vacancy, and

Neufville served as Acting Director until President Biden rescinded the designation on June 21, 2021.²¹ At that point, Allison Randall, who had been appointed as OVW's Principal Deputy Director on June 14, 2021, began serving as Acting Director by virtue of being the first assistant to the Director position.²²

Ms. Randall initially served as Acting Director through November 16, 2021.²³ When Ms. Hidalgo was first nominated for the position on May 26, 2022, Ms. Randall resumed her acting service and has served as Acting Director since then.²⁴

DISCUSSION

Time Limitations on Acting Service

Because the 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,²⁵ regardless of the fact that previous periods of

provided two Standard Form 50, Notification of Personnel Action forms, one from 2008 and one from 2012, in support. DOJ Response, at 4, Attachments.

²¹ DOJ Response, at 1, 3, 5. Presidential Memorandum for Nadine Neufville, Deputy Director for Grant Management and Development (June 21, 2021).

²² DOJ Response, at 1, 4–5; Attorney General Order No. 5073-2021, *Appointment of Allison L. Randall as Principal Deputy Director, Office on Violence Against Women* (June 16, 2021) (listing the effective date of the appointment as June 14, 2021). DOJ cites departmental regulations providing that “[e]very office within the Department” that is a PAS office “shall have a First Assistant within the meaning of the [Vacancies Act],” and “[w]here there is a position of Principal Deputy to the PAS office, the Principal Deputy shall be the First Assistant.” 28 C.F.R. § 0.137(b) (last amended prior to the vacancy); DOJ Response, at 4–5. 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. And an individual, like Ms. Randall, appointed to the first assistant position after the vacancy occurs is eligible to serve as acting official, so long as they are not nominated for the position. 5 U.S.C. §§ 3345(a)(1), (b); B-332995; GAO, *Changed Interpretation of Requirements Related to First Assistants Under the Federal Vacancies Reform Act of 1998*, GAO-02-272R (Washington, D.C.: Dec. 7, 2001).

²³ DOJ Response at 1, 3.

²⁴ *Id.*

²⁵ 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).

permissible acting service had expired prior to the inauguration.²⁶ This acting service period ended on November 15, 2021.²⁷

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.²⁸ We have concluded that 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.²⁹ 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.³⁰

In this case, the first nomination for the Director position for purposes of section 3346 was Ms. Goessling’s June 18, 2018, nomination, which was returned on January 3, 2019, and the second nomination was Ms. Goessling’s January 16, 2019, renomination, which was returned on January 3, 2020. Although Ms. Randall initially ceased acting in the Director position after November 16, 2021,³¹ she resumed

²⁶ See B-333853. Prior to January 20, 2021, acting service was permitted during the following periods: for 210 days beginning on the date of the vacancy, April 21, 2012, for 300 days beginning on January 20, 2017, which was a transitional inauguration day; during the pendency of the first nomination, submitted on June 18, 2018, and for 210 days after its return on January 3, 2019; and during the pendency of the second nomination, submitted on January 16, 2019, and for 210 days after its return on January 3, 2020. See 5 U.S.C. §§ 3346(a)–(b); 3349a(b)(1).

²⁷ See B-333853; B-333857, Apr. 18, 2022. The 210-day period was deemed to begin 90 days after inauguration day, April 20, 2021, and therefore concluded on November 15, 2021. 5 U.S.C. § 3349a(b)(1).

²⁸ 5 U.S.C. §§ 3346(a)(2), (b).

²⁹ See B-333853.

³⁰ *Id.*

³¹ The last day of the post-inauguration acting service period was November 15, 2021. See 5 U.S.C. § 3349a. We note that DOJ in its response and DOJ’s Office of Legal Counsel (OLC) assert that the period ended on November 16. DOJ Response, at 1; *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,

acting service when Ms. Hidalgo’s initial nomination was submitted on May 26, 2022. However, neither of Ms. Hidalgo’s nominations were the first or second nomination for purposes of section 3346, and their submission did not trigger an additional acting service period. Therefore, Ms. Randall’s service as Acting Director since May 26, 2022, is in violation of the Act.

Validity of Actions Taken on and after May 26, 2022

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.³² In that situation, “the office shall remain vacant” and only the head of the agency may perform the functions or duties of the position.³³ 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.”³⁴ 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).³⁵ Furthermore, officials may be authorized to take certain actions in their official, rather than acting, positions.

In response to our inquiry, DOJ reports that there are no functions or duties meeting the Vacancies Act definition with respect to the Director position.³⁶ Based on DOJ’s response, we have no basis upon which to conclude that any actions taken by Ms. Randall on or after May 26, 2022, must be nullified or viewed as having no force or effect.

DOJ Response and OLC Opinion on Nominations by a New President

DOJ 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

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.

³² 5 U.S.C. § 3348(b).

³³ *Id.*

³⁴ 5 U.S.C. § 3348(d).

³⁵ 5 U.S.C. § 3348(a)(2).

³⁶ DOJ Response, at 5.

nomination count in section 3346.³⁷ In support, DOJ cites a 2022 OLC opinion 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.³⁸ Accordingly, DOJ asserts that Ms. Hidalgo's May 26, 2022, nomination constitutes the first nomination for purposes of section 3346, and acting service was permitted while the nomination was pending.³⁹ Under this interpretation, Ms. Hidalgo's January 3, 2023, nomination would represent the second nomination for purposes of section 3346, allowing acting service to continue while that nomination is pending.

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

³⁷ DOJ Response, at 1–2.

³⁸ *Id.* at 1–2, Attachment; see OLC Opinion.

³⁹ DOJ Response, at 2, 8.

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.

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, 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

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

⁴⁴ *See id.*

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).

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.

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 raises 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

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, neither Ms. Hidalgo’s May 26, 2022, nomination nor her January 3, 2023, nomination (the third and fourth nominations overall) triggered additional acting service periods, and Ms. Randall’s service as Acting Director since May 26, 2022, is in violation of the 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, and the Director of the Office of Personnel Management.

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.

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 Emmanuelli Perez".

Edda Emmanuelli Perez
General Counsel