

ORAL ARGUMENT SCHEDULED FOR MARCH 22, 2019

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 19-5043 (consolidated with Nos. 19-5042 & 19-5044)

FIREARMS POLICY COALITION, INC., CA 18-3083,
Plaintiff-Appellant,

DAMIEN GUEDES; FIREARMS POLICY FOUNDATION; MADISON SOCIETY
FOUNDATION, INC.; SHANE RODEN; FLORIDA CARRY, INC.,
Plaintiffs-Appellees,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES;
WILLIAM P. BARR, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF
THE UNITED STATES; THOMAS E. BRANDON, IN HIS OFFICIAL CAPACITY AS
ACTING DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND
EXPLOSIVES; UNITED STATES OF AMERICA,
Defendants-Appellees,

On Appeal from the United States District Court for the District of
Columbia (Nos. 1:18-cv-02988-DLF, 1:18-cv-03086-DLF)

ADDENDUM FOR FIREARMS POLICY COALITION, INC.

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28 U.S.C. § 508

(The Attorney General Succession Act;
the “AG Act” in the brief)

28 U.S.C. § 508.
Vacancies

(a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.

(b) When by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Associate Attorney General shall act as Attorney General. The Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.

(Added Pub. L. 89-554, §4(c), Sept. 6, 1966, 80 Stat. 612 ; amended Pub. L. 95-139, §2, Oct. 19, 1977, 91 Stat. 1171.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
	[Uncodified].	R.S. §347 (last sentence). 1953 Reorg. Plan No. 4, §1, eff. June 20, 1953, 67 Stat. 636.

The last sentence of R.S. §347 is cited as authority inasmuch as the function contained therein was the function transferred to the Deputy Attorney General by 1953 Reorg. Plan No. 4. The word "may" is substituted for "have the power". The words "During any period of time" are omitted as unnecessary.

PRIOR PROVISIONS

A prior section 508, acts June 25, 1948, ch. 646, 62 Stat. 910 ; Mar. 2, 1955, ch. 9, §2(a), 69 Stat. 10 ; Oct. 11, 1962, Pub. L. 87-793, §1003(a), 76 Stat. 865 ; Aug. 14, 1964, Pub. L. 88-426, title III,

§306(a)(1), 78 Stat. 428 ; Oct. 6, 1964, Pub. L. 88–631, §3(b), 78 Stat. 1008 , related to salaries of United States attorneys, assistant United States attorneys, and special attorneys, prior to repeal by Pub. L. 89-554, §8(a), and reenactment in section 548 of this title by section 4(c) of Pub. L. 89–554.

AMENDMENTS

1977-Subsec. (b). Pub. L. 95–139 substituted "the Associate Attorney General shall act as Attorney General. The Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General" for "the Assistant Attorneys General and the Solicitor General, in such order of succession as the Attorney General may from time to time prescribe, shall act as Attorney General".

DOJ's Organic Act

(The Original Attorney General Succession Statute,
in effect from 1870 to 1953)

Act of July 20, 1870, ch. 150, §§ 1–2, 16 Stat. 162
(“DOJ’s Organic Act”)

CHAP. CL— *An Act to establish the Department of Justice.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be, and is hereby, established an executive department of the government of the United States, to be called the Department of Justice, of which the Attorney-General shall be the head. His duties, salary, and tenure of office shall remain as now fixed by law, except so far as they may be modified by this act.

Sec. 2. *And be it further enacted,* That there shall be in said Department an officer learned in the law, to assist the Attorney-General in the performance of his duties, to be called the solicitor-general, and who, in case of a vacancy in the office of Attorney-General, or in his absence or disability, shall have power to exercise all the duties of that office. . . .

. . . .

APPROVED, June 22, 1870.

Reorganization Plan No. 4 of 1953
(Amending the Attorney General Succession Statute)

Reorganization Plan No. 4 of 1953, 18 Fed. Reg. 3577 (June 23, 1953), reprinted in 67 Stat. 636.

REORGANIZATION PLAN NO. 4 OF 1953

*Prepared by the President and Transmitted to the Senate and the House of Representatives in Congress Assembled, April 20, 1953, Pursuant to the Provisions of the Reorganization Act of 1949, Approved June 20, 1949, as Amended.*¹

DEPARTMENT OF JUSTICE

SECTION 1. *Acting Attorney General.*

(a) The function with respect to exercising the duties of the office of Attorney General vested in the Solicitor General by Section 347, Revised Statutes, as amended (5 U.S. C. 293), is hereby transferred to the Deputy Attorney General, and for the purposes of Section 177, Revised Statutes (5 U. S. C. 4) the Deputy Attorney General shall be deemed to be the first assistant of the Department of Justice.

(b) During any period of time when, by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Assistant Attorneys General and the Solicitor General, in such order of succession as the Attorney General may from time to time prescribe, shall act as Attorney General.

....

[F. R. Doc. 53-5578; Filed, June 22, 1953; 9:01 a.m.]

¹ Effective June 20, 1953, under the provisions of section 6 of the act; published pursuant to section 1 of the act (63 Stat. 203; 5 U. S. C. Sup. 133z). [Footnote in original.]

The 1966 Codified Version of the AG Act:
28 U.S.C. § 508

(The result of codifiers combining Reorganization
Plan No. 4 of 1953 with the 1870 Attorney General
Succession Statute)

28 U.S.C. § 508 (1966)²
Vacancies

(a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.

(b) When, by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Assistant Attorneys General and the Solicitor General, in such order of succession as the Attorney General may from time to time prescribe, shall act as Attorney General.

² [All (1966) references herein are to the 2d Supplement of the 1964 U.S. Code. The same may be found in the law that enacted this section: Pub. L. No. 89-554, § 4a, 80 Stat. 378, 611, 612 (1966).]

5 U.S.C. §§ 3345–3349d

(The Federal Vacancies Reform Act;
The FVRA (current & relevant version))

5 U.S.C. § 3345. Acting officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

(b)(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if—

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if—

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

(Added Pub. L. 105–277, div. C, title I, §151(b), Oct. 21, 1998, 112 Stat. 2681–611; amended Pub. L. 108–271, §8(b), July 7, 2004, 118 Stat. 814.)

REFERENCES IN TEXT

The General Schedule, referred to in subsec. (a)(3)(B), is set out under section 5332 of this title.

PRIOR PROVISIONS

A prior section 3345, Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 425; Pub. L. 100–398, §7(a)(1), (2), Aug. 17, 1988, 102 Stat. 988, provided for details to office of head of Executive agency or military department, prior to repeal by Pub. L. 105–277, div. C, title I, §151(b), (d)(1), Oct. 21, 1998, 112 Stat. 2681–611, 2681-616, effective 30 days after Oct. 21, 1998.

AMENDMENTS

2004—Subsec. (a). Pub. L. 108–271 substituted "Government Accountability Office" for "General Accounting Office" in introductory provisions.

5 U.S.C. § 3346. Time limitation

(a) Except in the case of a vacancy caused by sickness, the person serving as an acting officer as described under section 3345 may serve in the office—

(1) for no longer than 210 days beginning on the date the vacancy occurs; or

(2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate.

(b)(1) If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 210 days after the date of such rejection, withdrawal, or return.

(2) Notwithstanding paragraph (1), if a second nomination for the office is submitted to the Senate after the rejection, withdrawal, or return of the first nomination, the person serving as the acting officer may continue to serve—

(A) until the second nomination is confirmed; or

(B) for no more than 210 days after the second nomination is rejected, withdrawn, or returned.

(c) If a vacancy occurs during an adjournment of the Congress sine die, the 210-day period under subsection (a) shall begin on the date that the Senate first reconvenes.

(Added Pub. L. 105–277, div. C, title I, §151(b), Oct. 21, 1998, 112 Stat. 2681–612.)

PRIOR PROVISIONS

A prior section 3346, Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 426, provided for details to subordinate offices, prior to repeal by Pub. L.

105–277, div. C, title I, §151(b), (d)(1), Oct. 21, 1998, 112 Stat. 2681–611, 2681-616, effective 30 days after Oct. 21, 1998. See section 3345 of this title.

5 U.S.C. § 3347. Exclusivity

(a) Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless—

(1) a statutory provision expressly—

(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(2) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

(b) Any statutory provision providing general authority to the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) to delegate duties statutorily vested in that agency head to, or to reassign duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(1) applies.

(Added Pub. L. 105–277, div. C, title I, §151(b), Oct. 21, 1998, 112 Stat. 2681–613; amended Pub. L. 106–31, title V, §5011, May 21, 1999, 113 Stat. 112; Pub. L. 108–271, §8(b), July 7, 2004, 118 Stat. 814.)

PRIOR PROVISIONS

A prior section 3347, Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 426, provided for Presidential authority relating to details, prior to repeal by Pub. L. 105–277, div. C, title I, §151(b), (d)(1), Oct. 21, 1998, 112

Stat. 2681–611, 2681-616, effective 30 days after Oct. 21, 1998.
See section 3345 of this title.

AMENDMENTS

2004—Pub. L. 108–271 substituted "Government Accountability Office" for "General Accounting Office" in introductory provisions of subsec. (a) and in subsec. (b).

1999—Subsec. (b). Pub. L. 106–31 substituted "subsection (a)(1)" for "subsection (a)(2)".

5 U.S.C. § 3348. Vacant office

(a) In this section—

(1) the term "action" includes any agency action as defined under section 551(13); and

(2) the term "function or duty" means any function or duty of the applicable office that—

(A)(i) is established by statute; and

(ii) is required by statute to be performed by the applicable officer (and only that officer); or

(B)(i)(I) is established by regulation; and

(II) is required by such regulation to be performed by the applicable officer (and only that officer); and

(ii) includes a function or duty to which clause (i)(I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.

(b) Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347, if an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the office shall remain vacant; and

(2) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office), only the head

of such Executive agency may perform any function or duty of such office.

(c) If the last day of any 210-day period under section 3346 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.

(d)(1) An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.

(2) An action that has no force or effect under paragraph (1) may not be ratified.

(e) This section shall not apply to—

(1) the General Counsel of the National Labor Relations Board;

(2) the General Counsel of the Federal Labor Relations Authority;

(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate;

(4) any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate; or

(5) an office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) if a statutory provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office.

(Added Pub. L. 105–277, div. C, title I, §151(b), Oct. 21, 1998, 112 Stat. 2681–613; amended Pub. L. 108–271, §8(b), July 7, 2004, 118 Stat. 814.)

PRIOR PROVISIONS

A prior section 3348, Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 426; Pub. L. 100–398, §7(b), Aug. 17, 1988, 102 Stat. 988, provided for time limitations relating to details, prior to repeal by Pub. L. 105–277, div. C, title I, §151(b), (d)(1), Oct. 21, 1998, 112 Stat. 2681–611, 2681-616, effective 30 days after Oct. 21, 1998. See section 3346 of this title.

AMENDMENTS

2004—Subsec. (b). Pub. L. 108–271 substituted "Government Accountability Office" for "General Accounting Office" in two places.

Subsec. (e)(5). Pub. L. 108–271 substituted "Government Accountability Office" for "General Accounting Office".

5 U.S.C. § 3349. Reporting of vacancies

(a) The head of each Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) shall submit to the Comptroller General of the United States and to each House of Congress—

(1) notification of a vacancy in an office to which this section and sections 3345, 3346, 3347, 3348, 3349a, 3349b, 3349c, and 3349d apply and the date such vacancy occurred immediately upon the occurrence of the vacancy;

(2) the name of any person serving in an acting capacity and the date such service began immediately upon the designation;

(3) the name of any person nominated to the Senate to fill the vacancy and the date such nomination is submitted immediately upon the submission of the nomination; and

(4) the date of a rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return.

(b) If the Comptroller General of the United States makes a determination that an officer is serving longer than the 210-day period including the applicable exceptions to such period under section 3346 or section 3349a, the Comptroller General shall report such determination immediately to—

(1) the Committee on Governmental Affairs of the Senate;

(2) the Committee on Government Reform and Oversight of the House of Representatives;

(3) the Committees on Appropriations of the Senate and House of Representatives;

(4) the appropriate committees of jurisdiction of the Senate and House of Representatives;

(5) the President; and

(6) the Office of Personnel Management.

(Added Pub. L. 105–277, div. C, title I, §151(b), Oct. 21, 1998, 112 Stat. 2681–614; amended Pub. L. 108–271, §8(b), July 7, 2004, 118 Stat. 814.)

PRIOR PROVISIONS

A prior section 3349, Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 426, provided for restrictions relating to details to fill vacancies, prior to repeal by Pub. L. 105–277, div. C, title I, §151(b), (d)(1), Oct. 21, 1998, 112 Stat. 2681–611, 2681–616, effective 30 days after Oct. 21, 1998. See section 3347 of this title.

AMENDMENTS

2004—Subsec. (a). Pub. L. 108–271 substituted "Government Accountability Office" for "General Accounting Office" in introductory provisions.

CHANGE OF NAME

Committee on Governmental Affairs of Senate changed to Committee on Homeland Security and Governmental Affairs of Senate, effective Jan. 4, 2005, by Senate Resolution No. 445, One Hundred Eighth Congress, Oct. 9, 2004.

Committee on Government Reform and Oversight of House of Representatives changed to Committee on Government Reform of House of Representatives by House Resolution No. 5, One Hundred Sixth Congress, Jan. 6, 1999. Committee on Government Reform of House of Representatives changed to Committee on Oversight and Government Reform of House of Representatives by House Resolution No. 6, One Hundred Tenth Congress, Jan. 5, 2007.

5 U.S.C. § 3349a. Presidential inaugural transitions

(a) In this section, the term "transitional inauguration day" means 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.

(b) With respect to any vacancy that exists during the 60-day period beginning on a transitional inauguration day, the 210-day period under section 3346 or 3348 shall be deemed to begin on the later of the date occurring—

(1) 90 days after such transitional inauguration day; or

(2) 90 days after the date on which the vacancy occurs.

(Added Pub. L. 105–277, div. C, title I, §151(b), Oct. 21, 1998, 112 Stat. 2681–615.)

5 U.S.C. § 3349b. Holdover provisions

Sections 3345 through 3349a shall not be construed to affect any statute that authorizes a person to continue to serve in any office—

(1) after the expiration of the term for which such person is appointed; and

(2) until a successor is appointed or a specified period of time has expired.

(Added Pub. L. 105–277, div. C, title I, §151(b), Oct. 21, 1998, 112 Stat. 2681–615.)

5 U.S.C. § 3349c. Exclusion of certain officers

Sections 3345 through 3349b shall not apply to—

(1) any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that—

(A) is composed of multiple members; and

(B) governs an independent establishment or Government corporation;

(2) any commissioner of the Federal Energy Regulatory Commission;

(3) any member of the Surface Transportation Board; or

(4) any judge appointed by the President, by and with the advice and consent of the Senate, to a court constituted under article I of the United States Constitution.

(Added Pub. L. 105–277, div. C, title I, §151(b), Oct. 21, 1998, 112 Stat. 2681–615.)

5 U.S.C. § 3349d. Notification of intent to nominate during certain recesses or adjournments

(a) The submission to the Senate, during a recess or adjournment of the Senate in excess of 15 days, of a written notification by the President of the President's intention to submit a nomination after the recess or adjournment shall be considered a nomination for purposes of sections 3345 through 3349c if such notification contains the name of the proposed nominee and the office for which the person is nominated.

(b) If the President does not submit a nomination of the person named under subsection (a) within 2 days after the end of such recess or adjournment, effective after such second day the notification considered a nomination under subsection (a) shall be treated as a withdrawn nomination for purposes of sections 3345 through 3349c.

(Added Pub. L. 105–277, div. C, title I, §151(b), Oct. 21, 1998, 112 Stat. 2681–615.)

5 U.S.C. §§ 3345–3349 (1988)

(The Vacancies Act, as amended; the version of the act as it appeared until amended by the FVRA in 1998)

5 U.S.C. § 3345 (1988)**Details; to office of head of Executive agency or military department**

When the head of an Executive agency (other than the General Accounting Office) or military department dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 425; Pub. L. 100–398, §7(a)(1), (2), Aug. 17, 1988, 102 Stat. 988.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
	5 U.S.C. 4.	R.S. §177.

The words "Executive department" are substituted for "department" as the definition of "department" applicable to this section is coextensive with the definition of "Executive department" in section 101.

The words "or military department" are inserted to preserve the application of the source law. Before enactment of the National Security Act Amendments of 1949 (63 Stat. 578), the Department of the Army, the Department of the Navy, and the Department of the Air Force were Executive departments. The National Security Act Amendments of 1949 established the Department of Defense as an Executive Department including the Department of the Army, the Department of the Navy, and the Department of the Air Force as military departments, not as Executive departments. However, the source law for this section, which was in effect in 1949, remained applicable to the Secretaries of the military departments by virtue of section 12(g) of the National Security Act Amendments of 1949 (63 Stat. 591), which is set out in the reviser's note for section 301.

This section was part of title IV of the Revised Statutes. The Act of July 26, 1947, ch. 343, §201(d), as added Aug. 10, 1949, ch. 412, §4, 63 Stat. 579 (former 5 U.S.C. 171–1), which provides "Except to the extent inconsistent with the provisions of this Act [National Security Act of 1947], the provisions of title IV of the Revised Statutes as now or hereafter amended shall be applicable to the Department of Defense" is omitted from this title but is not repealed.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1988—Pub. L. 100–398 inserted "agency" after "Executive" in section catchline and substituted "Executive agency (other than the General Accounting Office)" for "Executive department" in text.

5 U.S.C. § 3346 (1988)**Details; to subordinate offices**

When an officer of a bureau of an Executive department or military department, whose appointment is not vested in the head of the department, dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 426.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
	5 U.S.C. 5.	R.S. §178.

The words "his first assistant" are substituted for "the assistant or deputy of such chief or of such officer, or if there be none, then the chief clerk of such bureau". A chief of a bureau is an officer within the meaning of this section. The words "Executive department" are substituted for "department" as the definition of "department" applicable to this section is coextensive with the definition of "Executive department" in section 101.

The words "or military department" are inserted to preserve the application of the source law. Before enactment of the National Security Act Amendments of 1949 (63 Stat. 578), the Department of the Army, the Department of the Navy, and the Department of the Air Force were Executive departments. The National Security Act Amendments of 1949 established the Department of Defense as an Executive Department including the Department of the Army, the Department of the Navy, and the Department of the Air Force as military departments, not as Executive departments. However, the source law for this section, which was in effect in 1949, remained applicable to the Secretaries of the military departments by virtue of section 12(g) of the National Security

Act Amendments of 1949 (63 Stat. 591), which is set out in the reviser's note for section 301.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

5 U.S.C. § 3347 (1988)**Details; Presidential authority**

Instead of a detail under section 3345 or 3346 of this title, the President may direct the head of another Executive department or military department or another officer of an Executive department or military department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the office until a successor is appointed or the absence or sickness stops. This section does not apply to a vacancy in the office of Attorney General.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 426.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
	5 U.S.C. 6.	R.S. §179.

The words "in his discretion", "vacant", and "incumbent" are omitted as surplusage. The words "Executive department" are substituted for "department" as the definition of "department" applicable to this section is coextensive with the definition of "Executive department" in section 101. As used, the word "an" is coextensive with and substituted for "either".

The words "or military department" are inserted to preserve the application of the source law. Before enactment of the National Security Act Amendments of 1949 (63 Stat. 578), the Department of the Army, the Department of the Navy, and the Department of the Air Force were Executive departments. The National Security Act Amendments of 1949 established the Department of Defense as an Executive Department including the Department of the Army, the Department of the Navy, and the Department of the Air Force as military departments, not as Executive departments. However, the source law for this section, which was in effect in 1949, remained applicable to the secretaries of the military departments by virtue of section 12(g) of the National Security

Act Amendments of 1949 (63 Stat. 591), which is set out in the reviser's note for section 301.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

5 U.S.C. § 3348 (1988)**Details; limited in time**

(a) A vacancy caused by death or resignation may be filled temporarily under section 3345, 3346, or 3347 of this title for not more than 120 days, except that—

(1) if a first or second nomination to fill such vacancy has been submitted to the Senate, the position may be filled temporarily under section 3345, 3346, or 3347 of this title—

(A) until the Senate confirms the nomination; or

(B) until 120 days after the date on which either the Senate rejects the nomination or the nomination is withdrawn; or

(2) if the vacancy occurs during an adjournment of the Congress sine die, the position may be filled temporarily until 120 days after the Congress next convenes, subject thereafter to the provisions of paragraph (1) of this subsection.

(b) Any person filling a vacancy temporarily under section 3345, 3346, or 3347 of this title whose nomination to fill such vacancy has been submitted to the Senate may not serve after the end of the 120-day period referred to in paragraph (1)(B) or (2) of subsection (a) of this section, if the nomination of such person is rejected by the Senate or is withdrawn.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 426; Pub. L. 100–398, §7(b), Aug. 17, 1988, 102 Stat. 988.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
	5 U.S.C. 7.	R.S. §180. Feb. 6, 1891, ch. 113, 26 Stat. 733.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1988—Pub. L. 100–398 amended section generally. Prior to amendment, section read as follows: "A vacancy caused by death or resignation may be filled temporarily under section 3345, 3346, or 3347 of this title for not more than 30 days."

5 U.S.C. § 3349 (1988)**Details; to fill vacancies; restrictions**

A temporary appointment, designation, or assignment of one officer to perform the duties of another under section 3345 or 3346 of this title may not be made otherwise than as provided by those sections, except to fill a vacancy occurring during a recess of the Senate.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 426.)

HISTORICAL AND REVISION NOTES		
<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
	5 U.S.C. 8.	R.S. §181.

The prohibition is restated in positive form.

This section was part of title IV of the Revised Statutes. The Act of July 26, 1947, ch. 343, §201(d), as added Aug. 10, 1949, ch. 412, §4, 63 Stat. 579 (former 5 U.S.C. 171–1), which provides "Except to the extent inconsistent with the provisions of this Act [National Security Act of 1947], the provisions of title IV of the Revised Statutes as now or hereafter amended shall be applicable to the Department of Defense" is omitted from this title but is not repealed.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

5 U.S.C. §§ 4–9 (1952)

(The Vacancies Act, as it read in June 1953,
when Reorganization Plan No. 4 made its cross
reference)

5 U.S.C. § 4 (1952)**Vacancies in office of department heads; temporarily filling.**

In case of the death, resignation, absence, or sickness of the head of any department, the first or sole assistant thereof shall, unless otherwise directed by the President, as provided by section 6 of this title, perform the duties of such, head until a successor is appointed, or such absence or sickness shall cease. (R. S. § 177.)

DERIVATION

Act July 23, 1868, ch. 227, § 1, 15 Stat. 168.

5 U.S.C. § 5 (1952)**Vacancies in subordinate offices.**

In case of the death, resignation, absence, or sickness of the chief of any bureau, or of any officer thereof, whose appointment is not vested in the head of the department, the assistant or deputy of such chief or of such officer, or if there be none, then the chief clerk of such bureau, shall, unless otherwise directed by the President, as provided by section 6 of this title, perform the duties of such chief or of such officer until a successor is appointed or such absence or sickness shall cease. (R. S. § 178.)

DERIVATION

Act July 23. 1868, ch. 227, § 2, 15 Stat. 168.

5 U.S.C. § 6 (1952)**Discretionary authority of President as to vacancies.**

In any of the cases mentioned in sections 4 and 5 of this title except the death, resignation, absence, or sickness of the Attorney General, the President may, in his discretion, authorize and direct the head of any other department or any other officer in either department, whose appointment is vested in the President, by and with the advice

and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease. (R. S. § 179.)

DERIVATION

Act July 23, 1868, ch. 227, § 3, 15 Stat. 168;
act June 22, 1870, ch. 150, § 2, 16 Stat. 162.

5 U.S.C. § 7 (1952)

Temporary appointments to vacancies limited.

A vacancy occasioned by death or resignation must not be temporarily filled under the provisions of sections 4-6 of this title for a longer period than thirty days. (R. S. § 180; Feb. 6, 1891, ch. 113, 26 Stat. 733.)

DERIVATION

Act July 23, 1868, ch. 227, § 3, 15 Stat. 168.

5 U.S.C. § 8 (1952)

Restriction on manner of temporary appointments to fill vacancies.

No temporary appointment, designation, or assignment of one officer to perform the duties of another, in the cases covered by sections 4 and 5 of this title, shall be made otherwise than as provided by those sections, except to fill a vacancy happening during a recess of the Senate. (R. S. § 181.)

DERIVATION

Act July 23, 1868, ch. 227, § 2, 15 Stat. 168.

5 U.S.C. § 9 (1952)**Extra compensation for duties performed while filling vacancies.**

An officer performing the duties of another office, during a vacancy, as authorized by sections 4-6 of this title, is not by reason thereof entitled to any other compensation than that attached to his proper office. (R. S. § 182.)

DERIVATION

Act July 23, 1868, ch. 227, § 3, 15 Stat. 168.

The Vacancies Act of 1868

(The origins of the modern
Federal Vacancies Reform Act)

Act of July 23, 1868, ch. 227, 15 Stat. 168
("The Vacancies Act of 1868")

CHAP. CCXXVII — *An Act to authorize the temporary Supplying of Vacancies in the Executive Departments.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in case of the death, resignation, absence, or sickness of the head of any executive department of the government, the first or sole assistant thereof shall, unless otherwise directed by the President of the United States, as is hereinafter provided, perform the duties of such head until a successor be appointed, or such absence or sickness shall cease.

SEC. 2. *And be it further enacted,* That in case of the death, resignation, absence, or sickness of the chief of any bureau, or of any officer thereof, except commissioner of patents, whose appointment is not in the head of any executive department, the deputy of such chief or of such officer, or if there be no deputy, then the chief clerk of such bureau, shall, unless otherwise directed by the President of the United States, as is hereinafter provided, perform the duties of such chief or of such officer until a successor be appointed or such absence or sickness shall cease. And no appointment, designation, or assignment otherwise than as is herein provided, in the cases mentioned in the first, second, and third sections of this act, shall be made except to fill a vacancy happening during the recess of the Senate.

SEC. 3. *And be it further enacted,* That in any of the cases hereinbefore mentioned it shall be lawful for the President of the United States, in his discretion, to authorize and direct the head of any other executive department or other officer in either of those departments whose appointment is, by and with the advice and consent of the Senate, vested in the President, to perform the duties of the office vacant as aforesaid until a successor be appointed, or the sickness or absence of the incumbent shall cease : *Provided,* That nothing in this act shall authorize the supplying as more than ten aforesaid a vacancy for a longer period than ten days when such vacancy shall be occasioned by death or resignation, and the officer so performing the duties of the

office temporarily vacant shall not be entitled to extra compensation therefor : *And provided also*, That in case of the death, resignation, absence, or sickness of the commissioner of patents, the duties of said commissioner, until a successor be appointed or such absence or sickness shall cease, shall devolve upon the examiner-in-chief in said office oldest in length of commission.

SEC. 4. *And be it further enacted*, That all acts heretofore passed on the subject of temporarily supplying vacancies in the executive departments, or which empower the President to authorize any person or persons to perform the duties of the head of any executive department, or of any officer in either of the departments, in case of a vacancy therein or inability of such head of a department or officer to discharge the duties of his office, and all laws inconsistent with the provisions of this act, be, and the same are hereby, repealed.

APPROVED, July 23, 1868.

The Vacancies Act of 1795

Act of Feb. 13, 1795, ch. 21, 1 Stat. 415
(“The Vacancies Act of 1795”)

CHAP. XXI — *An Act to amend the act intituled “An act making alterations in the Treasury and War departments.”*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in case of vacancy in the office of Secretary of State, Secretary of the Treasury, or of the Secretary of the department of War, or of any officer of either of the said departments, whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices; it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices, until a successor be appointed, or such vacancy be filled : *Provided*, That no one vacancy shall be supplied, in manner aforesaid, for a longer term than six months.

APPROVED, February 13, 1795.

The Vacancies Act of 1792

Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281
(“The Vacancies Act of 1792”)

CHAP. XXXVII — *An Act making alterations in the Treasury and War
Departments*

....

SEC. 8. *And be it further enacted*, That in case of the death, absence from the seat of government, or sickness of the Secretary of State, Secretary of the Treasury, or of the Secretary of the War department, or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons at his discretion to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease.

....

APPROVED, May 8, 1792

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on March 4, 2019. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Thomas C. Goldstein

Thomas C. Goldstein