UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

In re Appointment of Thomas C. Goldstein
as *Amicus Curiae* Pursuant to
50 U.S.C. § 1803(i)(2)(B)

Docket No.: Misc. 18-04

MOTION OF THOMAS C. GOLDSTEIN FOR APPOINTMENT AS *AMICUS CURIAE* AND FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Thomas C. Goldstein
Goldstein & Russell, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636 (Telephone)
(800) 574-2033 (Fax)
tgoldstein@goldsteinrussell.com

December 7, 2018

Pursuant to 50 U.S.C. § 1803(i)(2)(B) and Foreign Intelligence Surveillance Court Rules of Procedure 6(d) and 7, Thomas C. Goldstein respectfully moves this Court to appoint him as *amicus curiae* to assist the Court in deciding whether the President's appointment of Matthew G. Whitaker as Acting Attorney General violates governing statutes and the U.S. Constitution. To ensure that the participation of *amicus curiae* would not delay any proceedings before the Court, attached to this motion is a proposed brief, together with a recent opinion of the Office of Legal Counsel and a brief filed by the Office of the Solicitor General expressing the contrary view. Also attached are certifications required by Rules 7 and 63 of the Court's Rules of Procedure.

The Court is most likely aware of both the controversy over the lawfulness of Mr. Whitaker's appointment and the statutory authority of the Attorney General to certify applications to this Court under the Foreign Intelligence Surveillance Act of 1978 (FISA), codified as amended at 50 U.S.C. §§ 1801-1885c. That authority has especially fraught implications if Mr. Whitaker's appointment is unlawful. *See* David Kris, *Whitaker's Appointment and Broader Risks at the Justice Department*, Lawfareblog, https://tinyurl.com/y9hjqagq (Nov. 17, 2018).

Amicus has not sought leave to participate with respect to a particular pending application, because the applications generally are secret. The Court may choose to address this question in the context of a FISA application already signed by Mr.

Whitaker and appoint *amicus* to participate at that stage. But even if Mr. Whitaker has not personally authorized a FISA application, the issue remains significant for this Court. The Attorney General retains ultimate authority regarding the submission of FISA applications. 50 U.S.C. § 1804. He not only may authorize an application, but also may refuse to authorize it. That is particularly relevant at a time when the Department of Justice is pursuing an investigation of whether the President or his campaign colluded with a foreign power. That investigation has involved the use of at least one FISA warrant.

This question deserves the Court's urgent attention. There are grave doubts about Mr. Whitaker's appointment that could have significant implications for the Court's work, including with respect to unwinding official actions if the appointment is later invalidated. In particular, actions taken by an appointee named in violation of the Appointments Clause are not protected from later challenge by the de facto officer doctrine. *See Nguyen v. United States*, 539 U.S. 69, 77 (2003); *Ryder v. United States*, 515 U.S. 177, 182 (1995).

As an Article III court, the Foreign Intelligence Surveillance Court (FISC) is imbued with the inherent authority "to protect the integrity of [its] proceedings." *Giles v. California*, 554 U.S. 353, 374 (2008); *Davis v. Washington*, 547 U.S. 813, 834 (2006); *see United States v. Cavanagh*, 807 F.2d 787, 791-92 (9th Cir. 1987). The Court's authorizing statute, the Foreign Intelligence Surveillance Act of 1978

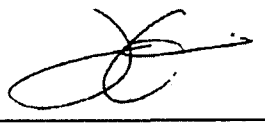
(FISA), codified as amended at 50 U.S.C. §§ 1801-1885c, also recognizes "the inherent authority of the court . . . to determine or enforce compliance with an order or a rule" of the Court. 50 U.S.C. § 1803(h). Under the Court's Rules, moreover, FISC judges "may exercise the authority vested by the Act and such other authority as is consistent with Article III of the Constitution and other statutes and laws of the United States, to the extent not inconsistent with the Act." FISA Ct. R. 5(a). And though the Court is one of specialized jurisdiction, "specialization says nothing about the inherent powers of lower federal courts qua Article III bodies." Brief of Amicus Curiae at 2, *In re Opinions & Orders of This Court Addressing Bulk Collection of Data Under the FISA*, FISC Docket No. Misc. 13-08 (June 13, 2018) (citing *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) ("Certain implied powers . . . necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others."). Thus, it is within this Court's authority to protect its proceedings by ensuring that the correct Acting Attorney General appear and authorize actions before it.

The relief urged by *amicus curiae* should not disrupt the work of this Court or strip it of its very important role in the administration of national security. Indeed, what *amicus curiae* is proposing does quite the opposite—it insulates from later collateral attack the important and sensitive work of the Executive and this Court. If

Mr. Whitaker's appointment is invalidated, Deputy Attorney General Rod J. Rosenstein remains an eligible official to approve FISA applications. *See* 50 U.S.C. §§ 1801(g), 1804. The Assistant Attorney General for the National Security Division, if appropriately designated, may also approve FISA applications. *See id.* And even if this Court determines that the President in fact validly appointed Mr. Whitaker as Acting Attorney General, that ruling would only benefit the administration of justice by seeking to remove the cloud of uncertainty over the appointment as soon as possible.

For the foregoing reasons, Thomas C. Goldstein respectfully requests that the Court appoint him as *amicus curiae* to assist the Court in deciding the legality of the President's appointment of Matthew G. Whitaker as Acting Attorney General, grant leave to file the attached brief, and order any other relief as appropriate.

Respectfully submitted,



Thomas C. Goldstein
Goldstein & Russell, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636 (Telephone)
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CERTIFICATION OF BAR MEMBERSHIP AND SECURITY CLEARANCE STATUS

Pursuant to Foreign Intelligence Surveillance Court Rules of Procedure 7(h)(l), 7(i), and 63, *Amicus Curiae* Thomas C. Goldstein respectfully submits the following information:

Thomas C. Goldstein is a member, in good standing, of the following federal courts: the Supreme Court of the United States; the United States Courts of Appeals for the First, Second, Third, Fourth, Sixth, Ninth, Eleventh, Federal, and District of Columbia Circuits; and the United States District Courts for the District of Columbia, and the District of Maryland. He is licensed to practice law by the bars of the District of Columbia and the State of Maryland.

Thomas C. Goldstein does not currently hold a security clearance. *Amicus* respectfully submits that he may participate in proceedings related to this matter without access to classified information or a security clearance. The motion and brief do not contain classified information, and as the enclosed brief makes clear, this is not a question where access to classified information is "necessary to participate." 50 U.S.C. § 1803(i)(3)(B); *see* Foreign Intelligence Surveillance Court Rule

of Procedure 63 (requiring counsel only to have "the appropriate security clearance").

Respectfully submitted,

Thomas C. Goldstein
Goldstein & Russell, P.C.
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Suite 850
Bethesda, MD 20814
(202) 362-0636 (Telephone)
(800) 574-2033 (Fax)
tgoldstein@goldsteinrussell.com

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CERTIFICATE OF FILING AND SERVICE

I certify that on December 7, 2018, the foregoing motion, including attached certification, proposed brief, and exhibits thereto, were submitted as described below. Pursuant to Foreign Intelligence Surveillance Court Rules of Procedure 7(a), 7(k), and 8(a), the undersigned received instructions from both the Clerk of the Foreign Intelligence Surveillance Court and the Security and Emergency Planning Staff, U.S. Department of Justice to effect filing in this manner.

Hand delivered by courier to:

Litigation Security Group
U.S. Department of Justice
145 N Street, N.E.
Suite 2W-115
Washington, DC 20002

Courtesy service by FedEx overnight delivery to:

Matthew G. Whitaker
Acting Attorney General
Office of the Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

John C. Demers
Assistant Attorney General
for National Security
U.S. Department of Justice
National Security Division
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Thomas C. Goldstein
Goldstein & Russell, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
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BRIEF OF *AMICUS CURIAE* THOMAS C. GOLDSTEIN

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Goldstein & Russell, P.C.
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Suite 850
Bethesda, MD 20814
(202) 362-0636 (Telephone)
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BRIEF OF *AMICUS CURIAE* THOMAS C. GOLDSTEIN

Thomas C. Goldstein respectfully submits this brief to urge the Court to hold that the President's appointment of Matthew G. Whitaker as Acting Attorney General violates the U.S. Constitution and governing statutes, and that only Deputy Attorney General Rod J. Rosenstein can participate in proceedings before this Court as the Acting Attorney General.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Thomas C. Goldstein is a founding partner of the law firm Goldstein & Russell, P.C. He has served as counsel to parties in well over 100 merits cases at the Supreme Court, personally arguing 42. In addition to practicing law, Goldstein teaches Supreme Court litigation at Harvard Law School and previously taught the same subject at Stanford Law School. Goldstein is also the co-founder and publisher of SCOTUSblog.

Proposed *amicus curiae* submits this brief in the public interest, as a friend of the Court and not on behalf of any party. He is not being compensated for this work and is not working in coordination with any other person or organization. He has no information indicating and no reason to believe that any of his firm's clients have an interest in any proceeding before this Court.

BACKGROUND

The Constitution's Appointments Clause provides that "Officers of the United States" may serve only "by and with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. This requirement applies to "principal officers." *Edmond v. United States*, 520 U.S. 651, 660-63 (1997). The Attorney General, who reports only to the President and is in charge of federal law enforcement, is a paradigmatic principal officer.

In 2017, the Senate confirmed Jeff Sessions as Attorney General. For months, the President criticized Mr. Sessions for recusing from the Department of Justice's investigation into whether the President and his campaign colluded with Russia and obstructed justice. *E.g.*, Devlin Barrett, John Wagner & Seung Min Kim, *Trump and Sessions Feud Over the Direction of the Justice Department*, Wash. Post (Aug. 23, 2018), https://wapo.st/2RHxLWC. It was widely reported that the President would force out Mr. Sessions promptly after the 2018 midterm elections. *E.g.* Alexandra Hutzler, *Donald Trump Will Fire Jeff Sessions After Midterms, Republicans Say*, Newsweek (Aug. 24, 2018), http://bit.ly/2rrHQLM. He did.

The Attorney General Succession Act provides that other Senate-confirmed officials in the Department will serve if the Attorney General is unavailable. 28 U.S.C. § 508. The Deputy Attorney General may serve; if the Deputy is unavailable, other officials shall do so. *Id.* If those officials are all unavailable, an Executive

Order issued under the Vacancies Reform Act specifies other Senate-confirmed officials who will serve as Acting Attorney General. Exec. Order No. 13787 (Mar. 31, 2017), *available at* http://bit.ly/2BVYNnw.

The Deputy Attorney General is Rod Rosenstein. Due to Mr. Sessions' recusal, Mr. Rosenstein had supervised the Russia investigation. The President has criticized Mr. Rosenstein for not limiting that inquiry. *See* Kevin Johnson & Maureen Groppe, *Sessions Ouster Fuels Fear Trump is Trying to Impede Robert Mueller's Probe*, USA Today (Nov. 7, 2018), http://bit.ly/2UpVw7a. When the President forced out Mr. Sessions, Mr. Rosenstein was available to serve as Acting Attorney General. But the President instead chose Matthew Whitaker. Mr. Whitaker was then serving as the Attorney General's Chief of Staff, a non-confirmed position. Previously, Mr. Whitaker was best known for publicly arguing that the Russia investigation should be narrowed or closed. *See, e.g.*, Matthew Whitaker, *Mueller's Investigation of Trump is Going Too Far*, CNN Opinion (Originally Published Aug. 6. 2017), https://cnn.it/2QEa9ol.

SUMMARY OF THE ARGUMENT

The President's appointment of Matthew Whitaker as Acting Attorney General violates the Appointments Clause. Mr. Whitaker is exercising all the powers of the Attorney General, but has not been confirmed. The Supreme Court has held that a non-confirmed official may exercise the authority of a principal officer only in

response to temporary and special circumstances. Both the first Vacancies Act and the early history of temporary appointments reflect those limitations. Without them, the Appointments Clause is essentially meaningless, because otherwise the President could remove any principal officer and appoint a non-confirmed successor.

That is what happened here. The President did not appoint Mr. Whitaker in response to any temporary and special circumstance. Instead, the President planned in advance to remove Mr. Sessions and then refused to allow the other Senate-confirmed officials designated by Congress to serve as Acting Attorney General. The appointment was accordingly unconstitutional.

The Court can avoid the constitutional question by holding that the President's appointment of Mr. Whitaker violated the Attorney General Succession Act. The Government concedes that, as enacted, that statute would make the Deputy Attorney General the Acting Attorney General. There is no merit to the Government's argument that Congress changed that result by enacting the Vacancies Reform Act.

ARGUMENT

I. MATTHEW WHITAKER'S APPOINTMENT VIOLATES THE APPOINTMENTS CLAUSE.

The Constitution requires that the Senate confirm a principal officer. The Supreme Court held in *United States v. Eaton*, 169 U.S. 331 (1898), that Congress could create an office that would exercise a principal officer's powers temporarily in response to special circumstances. The Court reasoned that such a position was

necessary to maintain the government's unbroken operations. *Id.* at 339, 343. Further, a stricter rule would make it unconstitutional for a principal officer to delegate responsibilities to a subordinate. *Id.* at 343-44.

In *Eaton*, the Court upheld the non-confirmed position of "vice-consul." The vice-consul exercised the powers of the consul general—a Senate-confirmed principal officer—only in the special circumstances that the consul general became sick, left the consulate, or died. *Id.* at 338-39. The vice-consul's powers were temporary because they ended when the consul recovered, returned, or was replaced. *Id.*

The facts of *Eaton* demonstrate the statute in action. The consul-general in Siam—now Thailand—got very sick and left for the United States. *Id.* at 331. The vice-consul stepped in and performed the consul-general's responsibilities. *Id.* at 331-33. Travel to and from the United States in the late-nineteenth century was arduous and lengthy. The vice-consul ultimately served roughly ten months before the consul-general's sick leave expired and he was replaced. *Id.*

Under *Eaton*, the President's appointment of Mr. Whitaker was unconstitutional. Mr. Whitaker exercises all of the Attorney General's powers. But there are no special circumstances here and the President was not ensuring the uninterrupted operations of the Department of Justice. The President both planned and created the vacancy in the Office of the Attorney General; and the President refused to permit succession by the Deputy Attorney General, who Congress placed in the direct line

of succession to fill that vacancy (just as a vice-consul would temporarily perform the functions of the consul general). Rod Rosenstein was not on the other side of the planet in Thailand; he was in the office directly below Mr. Sessions. If their windows opened, they could lean out and talk to each other.

Eaton's holding that service by a non-confirmed official must respond to special circumstances is essential. If the appointment of Mr. Whitaker is constitutional, a President can remove and replace any confirmed principal officer with a non-confirmed individual, at any time. The President's lawyers would only have to intone that the appointment is "temporary." And by that, they mean that the appointee will never be confirmed and the service is limited only by statute. If that is the law, then the Appointments Clause basically means nothing.

But the Supreme Court has made clear that the Appointments Clause is essential to the separation of powers. *Freytag v. Comm'r*, 501 U.S. 868, 882 (1991). In fact, it was tailor made for these circumstances: The President has given someone all the powers of a principal officer, for the President's own personal reasons, who the Senate almost certainly would not confirm. *Compare Edmond v. United States*, 520 U.S. 651, 659-60 (1997) ("The President's power to select principal officers of the United States was not left unguarded," and "Advice and Consent . . . . serves both to curb Executive abuses of the appointment power and 'to promote a judicious

choice of [persons] for filling the offices of the union.'") (quoting *The Federalist No. 76*, at 386-87, internal citations omitted).

According to the Government—which is to say, the Department of Justice under Mr. Whitaker's control—Mr. Whitaker's appointment is supported by history. *See generally* Memorandum for Emmet T. Flood, Counsel to the President, from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, *Re: Designating an Acting Attorney General* (Nov. 14, 2018) (OLC Memorandum), Exhibit D *infra*. It recognizes that Congress's adoption of the first Vacancies Act—enacted in 1792—best shows the founders' understanding of the Appointments Clause. *Id.* at 11. But that law permitted the President to name acting officials temporarily only when the officeholder died, or was sick or absent. Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281. It did not allow the President to make an appointment if he removed a department head.

The Government also points to the early practices of the Executive Branch. OLC Memorandum at 8-9. But in the most-relevant period, between 1789 and the War of 1812, non-confirmed officials served as principal officers only in temporary and special circumstances. Almost always, the department's second-in-command stepped in temporarily while the Secretary was briefly sick or away.

In that time, there were also 21 vacancies in the cabinet and the Office of Postmaster General. *See* Exhibit A, *infra* (citing Robert Brent Mosher, *Executive*

Register of the United States: 1789-1902 (1903)). At least two were created when the President forced out the officer. Overwhelmingly, the President either left the position vacant (12 times) or appointed another Senate-confirmed official (8 times).

The President temporarily filled the vacancy with a non-confirmed official only one time, at most. That was a special circumstance, too. With only two weeks left in the Jefferson Administration, the Secretary of War (Henry Dearborn) resigned. *See* Exhibit B at 1, *infra*. The President appointed the department's second-in-command (Chief Clerk John Smith). *Id.* at 2-3. It would have made no sense for Jefferson to nominate someone who could not be confirmed before Madison took office. It was also difficult for any other confirmed Secretary to step in while the cabinet turned over. And Smith's service was limited by the fact that Madison would pick a permanent nominee. (In fact, the official biographies of both Congress and the Army state that Dearborn actually continued to serve until the Senate confirmed his permanent successor. *Id.* at 4, 9-10.)

The Government therefore has to rely on later appointments. *See* OLC Memorandum at 9-10. Those would not be evidence of the Appointments Clause's original meaning. But they don't support the Government's position anyway. Even stretching all the way to 1860, outside of appointments authorized by the Recess Appointments Clause, the President temporarily appointed non-confirmed officials a total of 23 times. Exhibit C at 9-11. Each responded to special circumstances: the

President's term ended (14 times); the principal officer resigned or died in office (8 times); or the Senate rejected a permanent nominee (once). The President maintained the department's unbroken operations by appointing the second-in-command, except once for 2 days.

Also notably, the temporary appointment almost always lasted less than one week. Mr. Whitaker's service is already longer than every example but one. The sole exception arose from special circumstances as well. President Tyler's cabinet resigned to protest his policies. The Senate (controlled by Whigs) strongly resisted the President's nominees, rejecting 7 out of 20 during his presidency. In one instance, it took 43 days to find and confirm an acceptable permanent secretary.

The history of the vacancies specifically in the Office of Attorney General is even worse for the Government. Between 1789 and 1860, presidents repeatedly left the Office vacant—once for seven months—rather than attempting to install a non-confirmed official, just as presidents had in the founding quarter century. In American history, there was only one time that the President ever named a non-confirmed official as Acting Attorney General. That was in 1866. Again, there were special circumstances. Andrew Johnson's Attorney General (James Speed) had resigned in protest of the President's policies. But the country badly needed someone to serve during the ongoing fight over the first civil rights law protecting African Americans. Johnson appointed the second-in-command (Assistant Attorney General J. Hubley

Ashton) for six days, apparently while the permanent successor traveled to Washington, D.C.

But even those few, limited examples were too much for Congress. In 1868, it enacted a new Vacancies Act. Act of July 23, 1868, ch. 227, 15 Stat. 168. That statute only allowed the President to name Senate-confirmed officials as acting appointees. And it strictly limited their service to ten days. *Id.*

II. MATTHEW WHITAKER'S APPOINTMENT VIOLATED THE ATTORNEY GENERAL SUCCESSION ACT.

This Court can avoid the obvious constitutional doubt over the President's appointment of Mr. Whitaker by holding that it violated the Attorney General Succession Act. 5 U.S.C. 508(a). *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) ("it is a cardinal principle" of statutory interpretation that when an interpretation of a statute raises "a serious doubt" as to its constitutionality, "this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided," and adopt that interpretation instead) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). The Government believes that the President validly appointed Mr. Whitaker under the Vacancies Reform Act, which Congress enacted in 1998. OLC Memorandum at 3-6. When that statute applies, an officer's "first assistant" will serve in an acting capacity by default. 5 U.S.C. § 3345(a)(1). But the President may instead appoint a Senate-confirmed official or established senior employee. *Id.*

§ 3345(a)(2)-(3). The acting official's service is generally limited to 210 days. *Id.* § 3346.

The Vacancies Reform Act is "the *exclusive* means for temporarily authorizing an acting official to perform the functions and duties of [a Senate-confirmed office] . . . , *unless* . . . a statutory provision expressly . . . *designates* an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." 5 U.S.C. § 3347(a)(1)(B) (emphases added).

For essentially the reasons set out in Part I, *supra*, the Government's reading of the Vacancies Reform Act violates the Appointments Clause, or at the least creates grave constitutional doubt. It permits the President to remove a principal officer and appoint a hand-picked, non-confirmed official for a long period in the absence of any special circumstances. The Government argues that when an office is subject to a specific "designation" statute, the Vacancies Reform Act remains fully applicable, but is merely "non-exclusive." That means, it continues, that the President can choose the appointment authority of the Vacancies Reform Act whenever he wants. OLC Memorandum 4-6. On that view, the President may remove critical principal officers—such as the Attorney General, the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the Director of National Intelligence—whenever he or she likes and replace them with non-confirmed employees like Mr. Whitaker rather than the Senate-confirmed officials designated by Congress. Most important, on the

Government's reading, the President may do so in the absence of any special circumstances, as Mr. Whitaker's appointment illustrates. The Government's reading therefore renders the Vacancies Reform Act unconstitutional, because it cannot be reconciled with the Supreme Court's decision in *Eaton*.

There are two other readings of the statutory scheme that are more consistent with the text and also constitutional. Under either, Mr. Whitaker's appointment was illegal.

First, assume that the Government is right that the Vacancies Reform Act is "non-exclusive." It does not follow that the President can choose between that statute and the Attorney General Succession Act. Congress elsewhere authorized the President to choose between the general Vacancies Reform Act and a specific designation statute, but not for the Attorney General.[1] So, both statutes would apply. Under ordinary rules of statutory construction, to the extent the two conflict, the more-specific provision governing the particular office controls. *See, e.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645-46 (2012).

Here, there is a conflict because the two statutes provide irreconcilable rules. Under the Attorney General Succession Act, the Deputy Attorney General "may exercise all the duties of that office," subject to no time limits and automatically succeeded by another Senate-confirmed Department official, and with no authority for

[1] *See, e.g.*, 7 U.S.C. §§ 2210-11 (Deputy Secretary of Agriculture).

the President to choose someone else. 28 U.S.C. § 508(a), (b). That rule conflicts with the Vacancies Reform Act, under which the Deputy serves for a maximum of 210 days (with no automatic successor), unless the President selects someone else. 5 U.S.C. § 3345(a)(1)-(3). Given the conflict, the Attorney General Succession Act governs.

Notably, in other circumstances, there would be no conflict and the Vacancies Reform Act could in fact be "non-exclusive." The officers designated by the Attorney General Succession Act may not be available. That may happen, for example, during the transition between presidential administrations when political appointees resign or are removed. In that circumstance, the Attorney General Succession Act is silent on who will serve as Acting Attorney General. The President could then rely on the authority provided by the Vacancies Reform Act. Indeed, the Executive Order governing succession in the Office of the Attorney General reconciles the two statutes exactly that way. Exec. Order No. 13787 (Mar. 31, 2017), *available at* http://bit.ly/2BVYNnw.

Second, the constitutional violation can be avoided by holding that the Vacancies Reform Act does not apply at all. The statute's "exclusivity" clause is inapplicable whenever a statute "*designates* an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." 5 U.S.C.

§ 3347(a)(1)(B) (emphasis added). To "designate" is to "choose (someone or something) for a particular job or purpose." *Black's Law Dictionary* 541 (10th ed. 2014). Hence, the Vacancies Reform Act itself recognizes that the office-specific statute chooses the successor—in this case, the Deputy Attorney General. Indeed, soon after Congress passed the Vacancies Reform Act, the White House Counsel concluded that it did not apply to the Attorney General. *See* Memorandum for the Heads of Federal Executive Departments and Agencies and Units of the Executive Office of the President, from Alberto Gonzales, Counsel to the President, *Re: Agency Reporting Requirements Under the Vacancies Reform Act* 2 (Mar. 21, 2001).

That reading is much more consistent with the purpose of the "exclusivity" clause. Congress adopted it to reject the Office of Legal Counsel's position that the President could appoint an official in the Department of Justice under either the predecessor vacancies act or the Department's own organic statute. *See generally* Morton Rosenberg, Cong. Research Serv., *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* (Jan. 1998). When the bill was being debated, the Department of Justice insisted that Congress use the word "exclusive" in the statute itself, whereas before it had merely appeared in a congressional report. *Oversight of the Implementation of the Vacancies Act: Hearing on S. 1764 Before the S. Comm. on Governmental Affairs*, 105th Cong. 25, 122, 129 (1998) (*1998 Hearing*). Thus, the Government's reading of the Vacancies Reform

Act would do the opposite of what Congress intended, by allowing the President to use either statute to appoint an acting official.

By contrast, the Government's view requires reading the exclusivity clause in an unusual way to render ineffective dozens of statutes that Congress enacted over more than 100 years with the specific purpose to limit the President's unilateral appointment authority.[2] That would mean Congress adopted the Vacancies Reform Act to allow the President to terminate the heads of vital departments (the Attorney General, the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, the Administrator of the Environmental Protection Agency, and so on) and replace them with any of thousands of unqualified employees or other Senate-confirmed officials (such as the seven members of the Social Security Advisory Board, the two trustees of the Federal Old-Age and Survivors Trust Fund, the nine Directors of the Corporation for Public Broadcasting, and so on), with no present intent to even nominate a permanent replacement.

The Executive Branch did not even *request* that authority. *1998 Hearing* at 138. If Congress nonetheless intended to gift it, some legislator would have mentioned it. But none did. The courts will decline to read oblique language in statutes to change the law so dramatically. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457,

[2] *See, e.g.*, 10 U.S.C. § 132(b) (automatic succession by Deputy Secretary of Defense); 10 U.S.C. § 154(d) (Vice Chairman of Joint Chiefs of Staff); 50 U.S.C. § 3026(a) (Principal Deputy Director of National Intelligence).

468 (2001) (Congress does not fundamentally alter regulatory schemes "in vague terms or ancillary provisions"). Congress does not put "elephants in mouseholes." *Id.*; *see Branch v. Smith*, 538 U.S. 254, 273 (2003) (presumption that statutes are not repealed by implication).

Congress specifically knows how to use clear language to give the President the power to override the designation of a default successor, and courts do not stretch statutory language when it is obvious that Congress knew how to accomplish the same result much more directly. *See, e.g.*, *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014); *Whitfield v. United States*, 543 U.S. 209, 216 (2005). Elsewhere, Congress expressly allowed the President to use the authority provided by the Vacancies Reform Act instead. *Supra* n.1. Congress also allowed the President to override the designated successor for specific offices.[3] The Vacancies Reform Act itself provides that the President may override the default rule for those offices to which it applies. *See* 5 U.S.C. § 3345(a) (the "first assistant" will

[3] *See* 38 U.S.C. § 304 ("Unless the President designates another officer of the Government, the Deputy Secretary shall be Acting Secretary of Veterans Affairs during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary"); 40 U.S.C. § 302(b) ("The Deputy Administrator is Acting Administrator of General Services during the absence or disability of the Administrator and, unless the President designates another officer of the Federal Government, when the office of Administrator is vacant."); 42 U.S.C. § 902(b)(4) ("The Deputy Commissioner shall be Acting Commissioner of the Administration during the absence or disability of the Commissioner and, unless the President designates another officer of the Government as Acting Commissioner, in the event of a vacancy in the office of the Commissioner.").

serve by default under paragraph (1), but the President may select another official "notwithstanding paragraph (1)"). None of those provisions applies to the Attorney General.

The Government's contrary arguments are not persuasive. It notes that a provision of the Vacancies Reform Act excludes certain multi-member bodies. *Id.* § 3347c (excluding, for example, a body "composed of multiple members" and "any commissioner of the Federal Energy Regulatory Commission"). But that provision is not exclusive; it does not say that those are the "only" excluded offices. Instead, those bodies do not have their own office-specific succession statutes. Congress addressed multi-member bodies separately because they can continue to operate without an interim appointment of a single officer. *See* 144 Cong. Rec. S12823 (Oct. 21, 1998) (Sen. Thompson); *id.* at S12824 (Sen. Byrd).

The Government also would draw a negative inference from the fact that the predecessor vacancies act expressly excluded only the Office of the Attorney General. 5 U.S.C. § 3347 (1966). But that inference makes no sense, when Congress in the Vacancies Reform Act instead adopted a *broader* exclusion for all the statutes that "designate[]" a successor for a specific office. 5 U.S.C. § 3347(a)(1)(B).

The Government also notes that the Attorney General Succession Act has always provided that "for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General." 28 U.S.C. § 508(a). But that

provision never had any substantive effect. It was enacted together with the prior vacancies act, which expressly did not apply to the Attorney General. 5 U.S.C. § 3347 (1966). And the Government itself believes that clause has no effect today even on its reading, because automatic appointments under the Attorney General Succession Act are not subject to the Vacancies Reform Act, which restricts the appointee's length of service.

Finally, the Government relies on a few decisions of other courts. OLC Memorandum at 6 (citing *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 555-56 (9th Cir. 2016); *English v. Trump*, 279 F. Supp. 3d 307, 323-24 (D.D.C. 2018)). One district court did conclude in dictum that the appointment of Mr. Whitaker was lawful, albeit with very truncated briefing. *United States v. Valencia*, No. 5:17-CR-882, ECF No. 175 (W.D. Tex. Nov. 27, 2018). But the two other cases relied on by the Government are distinguishable or unpersuasive.

The Ninth Circuit has stated in brief dictum that the Vacancies Reform Act is "non-exclusive." *Hooks*, 816 F.3d at 555-56. But it was undisputed that the President could choose the official in that case (the Acting General Counsel of the National Labor Relations Board). *Id.* The Ninth Circuit also rested its decision on one sentence in one Report discussing the Senate version of the Vacancies Reform Act, without realizing that Congress did not adopt that bill. *Id.* Even as to that bill, the Report actually stated that "statutes that themselves stipulate who shall service in a

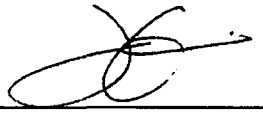
specific office" were "express exceptions." S. Rep. No. 105-250, at 2. The sentence quoted by the Ninth Circuit instead referred to what "would" occur if Congress were "to repeal those statutes in favor of the procedures contained in the Vacancies Act." *Id.* at 17.

A district court upheld the President's appointment of an Acting Director of the Consumer Financial Protection Board when the Director resigned. *English*, 279 F. Supp. 3d at 323-24. But that decision is easily distinguishable as well. The court itself distinguished the Attorney General Selection Act as a statute that would displace the Vacancies Reform Act. *Id.* The court also indicated that only the President had any statutory authority because the Deputy Director could serve in an acting capacity only in cases of the Director's "absence or unavailability," not a resignation. *Id.* The court finally reasoned that its holding result was more consistent with the President's own constitutional authority to participate in selecting principal officers, because the Deputy Director was chosen by the Director. *Id.* That reasoning does not apply to the Deputy Attorney General, who is selected by the President.

CONCLUSION

For the foregoing reasons, the Court should hold that Matthew Whitaker may not participate in matters before this Court as Acting Attorney General of the United States.

Respectfully submitted,



Thomas C. Goldstein
Goldstein & Russell, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636 (Telephone)
(800) 574-2033 (Fax)
tgoldstein@goldsteinrussell.com

December 7, 2018

INDEX OF EXHIBITS

EXHIBIT A

FOUNDING ERA APPOINTMENTS*

Gaps left vacant (12)

1. Secretary of the Treasury Alexander Hamilton, resigned 1/31/1795 – Oliver Wolcott, Jr. nominated 2/2/1795; confirmed 2/3/1795; commissioned and entered upon duties 2/2/1795 (1 day gap).

2. Secretary of War Henry Knox, resigned 12/28/1794 and served until 12/31/1794 – Timothy Pickering nominated, confirmed, commissioned, and entered upon duties 1/2/1795 (1 day gap).

3. Attorney General Edmund Randolph, commissioned Secretary of State 1/2/1794 – William Bradford nominated 1/24/1794; confirmed and commissioned 1/27/1794; entered upon duties 1/29/1794 (27 day gap).

4. Attorney General William Bradford, died 8/23/1795 – Charles Lee nominated 12/9/1795; confirmed, commissioned, and entered upon duties 12/10/1795 (3 month, 17 day gap).

5. Postmaster General Timothy Pickering, commissioned Secretary of War 1/2/1795 – Joseph Habersham nominated 2/24/1795; confirmed and commissioned 2/25/1795 (54 day gap).

6. Secretary of the Navy, newly created post 4/30/1798, declined by George Cabot on 5/11/1798, who was nominated 5/1/1798, and confirmed and commissioned 5/3/1798 to new post, declined – office vacant until Benjamin Stoddert nominated 5/18/1798; confirmed and commissioned 5/21/1798; and entered upon duties 6/18/1798 (49 day gap).

7. Secretary of the Treasury Samuel Dexter, resigned 4/20/1801, and served until 5/6/1801 – Albert Gallatin recess appointed and commissioned 5/14/1801 (8 day gap).

8. Attorney General Levi Lincoln, resigned 12/28/1804 and served until 12/31/1804 – Robert Smith (Secretary of the Navy) nominated and confirmed 3/2/1805, commissioned 3/3/1805, but never took office – post remained vacant until next administration – next President left the post vacant until John Breckenridge was recess appointed and commissioned, and entered upon duties 8/7/1805 (7 month, 7 day gap).

9. Postmaster General Joseph Habersham, resigned 11/2/1801 – Gideon Granger recess appointment, commissioned, and entered upon duties 11/28/1801 (26 day gap).

10. Attorney General John Breckenridge, died 12/14/1806 – Caesar A. Rodney nominated 1/15/1807; confirmed and commissioned 1/20/1807 (37 days later).

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* This appendix is compiled from information found in Robert Brent Mosher, *Executive Register of the United States: 1789-1902* (1903).

11. Secretary of State James Madison, inaugurated President 3/4/1809 – Robert Smith nominated, confirmed, commissioned, and entered upon duties 3/6/1809 (1 day gap).

12. Attorney General Caesar A. Rodney, resigned 12/5/1811 – William Pinkney nominated 12/10/1811; confirmed and commissioned 12/11/1811; and entered upon duties 1/6/1812 (32 day gap).

Gaps where Senate-confirmed officer was appointed to serve (8)

1. Secretary of State Edmund Randolph, resigned 8/20/1795 – Timothy Pickering (Secretary of War) served *ad interim* until he was nominated 12/9/1795 and confirmed and commissioned 12/10/1795.

2. Secretary of War Timothy Pickering, commissioned Secretary of State 12/10/1795 – Pickering (now Secretary of State) served *ad interim* until James McHenry was nominated, confirmed, and entered upon duties 2/6/1796.

3. Secretary of State Timothy Pickering, fired 5/12/1800 – Charles Lee (Attorney General) served *ad interim* until John Marshall was nominated 5/12/1800; confirmed and commissioned 5/13/1800; and entered upon duties 6/6/1800.

4. Secretary of State John Marshall, commissioned Chief Justice 1/31/1801, served until 2/4/1801 – John Marshall (now Chief Justice) began *ad interim* service 2/4/1801 (3 day gap) and served until the end of the administration.

5. Secretary of War James McHenry, was asked by President Adams to resign, and he did 5/31/1800 – Benjamin Stoddert (Secretary of the Navy) served *ad interim* until Samuel Dexter was nominated 5/12/1800; confirmed and commissioned 5/13/1800; and entered upon duties 6/12/1800.

6. Secretary of War Samuel Dexter, commissioned Secretary of the Treasury 1/1/1801 – Samuel Dexter (now Secretary of Treasury) served *ad interim* until the end of the administration.

7. *Ad interim* Secretary of State John Marshall (Chief Justice), replaced by Levi Lincoln (Attorney General) on 3/4/1801 as *ad interim* Secretary of State, at the start of the Jefferson Administration, until James Madison was nominated and commissioned 3/5/1801, and entered upon duties 5/2/1801.

8. Secretary of the Navy Benjamin Stoddert, resigned 2/18/1801 and served until 3/31/1801 – Henry Dearborn (Secretary of War) served *ad interim* until Robert Smith was recess appointed and commissioned 7/15/1801, and entered upon duties 7/27/1801.

Non-Senate-confirmed officer serving during exigency (1)

1. Secretary of War Henry Dearborn, resigned 2/16/1809 – John Smith (Chief Clerk) served *ad interim* for the final two weeks of the Jefferson administration, and continued until William Eustis was nominated 3/6/1809; confirmed and commissioned 3/7/1809 (3 days after the start of the Madison administration); and entered upon duties 4/8/1809.

EXHIBIT B

Founders Online

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To Thomas Jefferson from Henry Dearborn, 16 February 1809

Sir, Washington Februy. 16th. 1809

I accept with gratefull feelings the recent mark of your friendship, and having taken the requisite steps for authorising my entering on the duties of my new office, I hereby resign the office of Secretary of the Department of War.—be pleased Sir to accept my most sincere thanks for the many obligations you have confered on me.

and believe to be with the highest respect & esteem your sincere friend.

H. Dearborn

Founders Online

From Thomas Jefferson to War Department, 17 February 1809

Whereas, by the resignation of Henry Dearborne, late Secretary at War, that office is become vacant. I therefore do hereby authorize John Smith, chief clerk of the office of the Department of War, to perform the duties of the said office, until a successor be appointed. Given under my hand at Washington this 17th. day of February 1809.

TH: JEFFERSON

DNA: RG 107—LRUS—Letters Received by the Secretary of War, Unregistered Series.

EARLY ACCESS LINK https://founders.archives.gov/documents/Jefferson/99-01-02-9824
What's this?

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SOURCE PROJECT	Jefferson Papers
TITLE	From Thomas Jefferson to War Department, 17 February 1809
AUTHOR	Jefferson, Thomas
RECIPIENT	War Department
DATE	17 February 1809
CITE AS	"From Thomas Jefferson to War Department, 17 February 1809," *Founders Online*, National Archives, last modified June 13, 2018, http://founders.archives.gov/documents/Jefferson/99-01-02-9824. [This is an **Early Access document** from The Papers of Thomas Jefferson. It is not an authoritative final version.]

Founders Online

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To Thomas Jefferson from John Smith, 17 February 1809

Sir, Feb: 17th. 1809

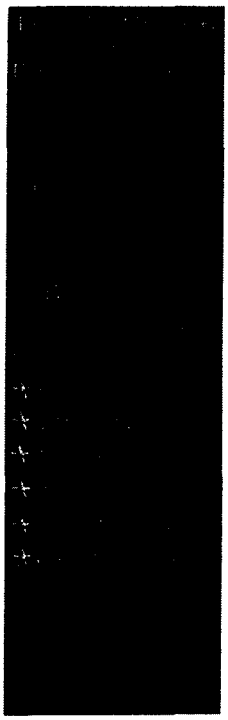
I have had the honor of receiving your commission to perform the duties of Secretary at War until a successor be appointed to General Dearborn late Secretary.—Permit me to express to you my gratitude for this evidence of your confidence, and to assure you that, while I regret that some one more competent had not received the commission, as far as I am capable its duties shall be faithfully executed

I have the honor to be, Sir, with perfect respect & esteem Your Ob. Sevt.

Jno. Smith

DNA: RG 59—LAR—Letters of Application and Recommendation.

SOURCE PROJECT	Jefferson Papers
TITLE	To Thomas Jefferson from John Smith, 17 February 1809
AUTHOR	Smith, John
RECIPIENT	Jefferson, Thomas
DATE	17 February 1809
CITE AS	"To Thomas Jefferson from John Smith, 17 February 1809," *Founders Online*, National Archives, last modified June 13, 2018, http://founders.archives.gov/documents/Jefferson/99-01-02-9825. [This is an Early Access document from The Papers of Thomas Jefferson. It is not an authoritative final version.]



DEARBORN, Henry, (1751 - 1829)

DEARBORN, Henry, (father of Henry Alexander Scammell Dearborn), a Representative from Massachusetts; born in North Hampton, N.H., February 23, 1751; attended the public schools; studied medicine; commenced practice in Nottingham Square in 1772; during the Revolutionary War was a captain in Stark's Regiment and participated in the Battle of Bunker Hill; accompanied Arnold's expedition to Canada and took part in the storming of Quebec; was taken prisoner, but was released on parole in May 1776; joined Washington's staff in 1781 as deputy quartermaster general with rank of colonel, and served at the siege of Yorktown; moved to Monmouth, Mass. (now Maine), in June 1784; elected brigadier general of militia in 1787 and made major general in 1789; appointed United States marshal for the district of Maine in 1789; elected as an Anti-Administration candidate from a Maine district of Massachusetts to the Third Congress and reelected as a Republican to the Fourth Congress (March 4, 1793-March 3, 1797); appointed Secretary of War by President Jefferson and served from March 4, 1801, to March 7, 1809; appointed collector of the port of Boston by President Madison in 1809, which position he held until January 27, 1812, when he was appointed senior major general in the United States Army; was in command at the capture of York (now Toronto) April 27, 1813, and Fort George May 27, 1813; recalled from the frontier July 6, 1813, and placed in command of the city of New York; appointed Minister Plenipotentiary to Portugal by President Monroe and served from May 7, 1822, to June 30, 1824, when, by his own request, he was recalled; returned to Roxbury, Mass., where he died June 6, 1829; interment in Forest Hills Cemetery, Boston, Mass.

Bibliography

Erney, Richard Alton. *The Public Life of Henry Dearborn. 1957. Reprint, New York: Arno Press, 1979.*

This document is based on the 1992 version of the *Secretaries of War and Secretaries of the Army* book.

Mr. West and Mr. Caldera were added the last time we updated this electronic document. Future updates will be accomplished as resources permit.

SECRETARIES OF WAR

—AND—

SECRETARIES OF THE ARMY

Portraits & Biographical Sketches

by

William Gardner Bell

CENTER OF MILITARY HISTORY
UNITED STATES ARMY
WASHINGTON, D.C., 1992

Library of Congress Cataloging in Publication Data

Bell, William Gardner.

Secretaries of war and secretaries of the army.

Bibliography: p.
Includes index.

1. United States. Dept. of the Army◆Officials and employees◆Biography. 2. United States. War Dept.◆Officials and employees◆Biography. 3. Cabinet officers◆United States◆Biography. I. Title.
E176.B42 353.62◆092◆2 [B] 80-20122

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Secretaries of the Army

Appendix

Since 1992

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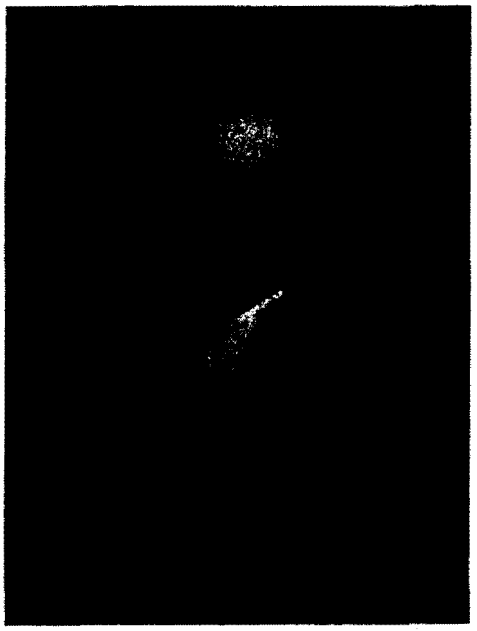
Henry Dearborn

HENRY DEARBORN was born in Hampton, New Hampshire, on 23 February 1751; studied medicine under Dr. Hall Jackson at Portsmouth; married Mary Bartlett, his first wife, in 1771; entered practice as a physician in 1772; was elected captain of a militia company; participated in the Battle of Bunker Hill, served under Benedict Arnold in the Quebec expedition and was captured, 1775; was paroled in 1776 and exchanged in 1777; was appointed major of the 3d New Hampshire Regiment; participated in operations at Ticonderoga and Freeman◆s Farm with the 1st New Hampshire Regiment; spent the winter of 1777◆1778 at Valley Forge; took part in the Battle of Monmouth, 1778; engaged in the 1779 operations against the Six Nations; married his second wife, Dorcas Marble, in 1780; joined Washington◆s staff as deputy quartermaster general; commanded the 1st New Hampshire at Yorktown in 1781; returned to private life in Maine, 1783; was appointed brigadier and major general of militia; was appointed U.S. Marshal for the District of Maine, 1790; served in the U.S. House of Representatives, 1793◆1797; served as Secretary of War, 5 March 1801◆7 March 1809; helped plan the removal of the Indians beyond the Mississippi; was appointed Collector of the Port of Boston, 1809; was appointed senior major general in the U.S. Army, 1812; was ineffective in command of the northeastern theater in the War of 1812; captured York (Toronto) and Fort George (Quebec) in 1813; was transferred to command in New York City in 1813; married his third wife, Sarah Bowdoin; was nominated and withdrawn for the post of Secretary of War; served as minister to Portugal, 1822◆1824; died in Roxbury, Massachusetts, on 6 June 1829.

The Artist

Walter M. Brackett (1823◆1919), the Boston artist, became actively engaged in Secretary of War Belknap◆s plans for an Army portrait gallery, and painted four of the secretary◆s earliest predecessors◆Pickering, Dexter, Dearborn, and Eustis◆in 1873. Only Daniel Huntington, Robert W. Weir, and Henry Ulke exceeded his output. Fittingly, his subjects were all residents of Massachusetts. His Pickering portrait is in the West Point collection.

[28]



HENRY DEARBORN
Jefferson Administration
By Walter M. Brackett
Oil on canvas, 29◆" x 24◆", 1873

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page created 1 March 2001

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Founders Online

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FROM JAMES MADISON TO WILLIAM EUSTIS, 7 MARCH 1809

To William Eustis

SIR, WASHINGTON March 7th. 1809

The enclosed commission will inform you that I have taken the liberty to nominate you to fill the Office of Secretary of War, vacated by the resignation of General Dearborn, and that the Senate have compleated the appointment. I transmit the Commission with a hope that I shall have the pleasure of learning that your Country will have the benefit of your services in that important station. I need not add, what your partriotism [*sic*] will suggest, that it is desirable, its duties should be entered upon with as little delay as may be consistent with the arrangements preparatory to your removal to the seat of Government. With very high respect I am Sir, your Obt Servt.

J. M

FC (DLC). In a clerk's hand.

SOURCE PROJECT	Madison Papers
TITLE	From James Madison to William Eustis, 7 March 1809
AUTHOR	Madison, James
RECIPIENT	Eustis, William
DATE	7 March 1809
CITE AS	"From James Madison to William Eustis, 7 March 1809," *Founders Online*, National Archives, last modified June 13, 2018, http://founders.archives.gov/documents/Madison/03-01-02-0028. [Original source: *The Papers of James Madison*, Presidential Series, vol. 1, *1 March–30 September 1809*, ed. Robert A. Rutland, Thomas A. Mason, Robert J. Brugger, Susannah H. Jones, Jeanne K. Sisson, and Fredrika J. Teute. Charlottesville: University Press of Virginia, 1984, p. 26.]

Founders Online

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To James Madison from William Eustis, 18 March 1809

From William Eustis

Sir, Boston March (18th 1809.)

Being absent from town I did not (rec)eive untill the evening of the 15th. your Letter of the 7th instant accompanied with a Commission of Secretary to the war department.[1] Impressed with a just sense of the honor conferred on me by this distinguished mark of your confidence, and by the very obliging manner in which it was communicated, I have delayed an answer no longer than was necessary to contemplate the importance and high responsibility of the station, the inadequacy of my own powers and the implied change in my occupation and habits of life. An apprehension that my health could not be preserved thro' a summer-residence at Washington presented itself as a principal objection. Trusting to the probability that the exigencies of the public service may render such a residence not indispensable I will come to the duties of the office with such means and talents as I possess and with the hope that in the course of their application there may arise no just cause for censure from the public and no regret on your part that the appointment has been thus bestowed.

In a very few days it is my intention to leave this place—to enquire into the state of the public works at N. York agreeably to an injunction conveyed to me by the Secretary of State and to proceed immediately to Washington. I am with every sentiment of true respect, your most obedient and most humble servant

William Eustis.

RC (DLC). Docketed by JM, "recd. Mar 24."

1. Eustis was confirmed as secretary of war on 7 Mar. 1809 (*Senate Exec. Proceedings*, 2:118, 120).

SOURCE PROJECT	Madison Papers
TITLE	To James Madison from William Eustis, 18 March 1809
AUTHOR	Eustis, William
RECIPIENT	Madison, James
DATE	18 March 1809
CITE AS	"To James Madison from William Eustis, 18 March 1809," *Founders Online*, National Archives, last modified June 13, 2018, http://founders.archives.gov/documents/Madison/03-01-02-0070. [Original source: *The Papers of James Madison*, Presidential Series, vol. 1, *1 March–30 September 1809*, ed. Robert A. Rutland, Thomas A. Mason, Robert J. Brugger, Susannah H. Jones, Jeanne K. Sisson, and Fredrika J. Teute. Charlottesville: University Press of Virginia, 1984, p. 66.]

EXHIBIT C

HISTORICAL APPOINTMENTS[1]

Recess Appointments (5)

1. 10/22/1816 to 12/10/1817: George Graham, Chief Clerk, temporarily appointed Secretary of War. (BD)[2]
2. 09/01/1823 to 09/16/1823: John Rodgers, Commodore (Navy) and President of the Board of Navy Commissioners, temporarily appointed Secretary of the Navy. (BD)
3. 05/12/1831 to 05/23/1831: John Boyle, Chief Clerk, temporarily appointed Secretary of the Navy. (BD)
4. 06/20/1831 to 07/21/1831: Phillip G. Randolph, Chief Clerk, temporarily appointed Secretary of War. (BD)
5. 06/21/1831 to 08/07/1831: Asbury Dickins, Chief Clerk, temporarily appointed Secretary of Treasury. (AD)

Acting Appointment While Secretary Is Indisposed (145)

1. 02/17/1809 to 04/08/1809: John Smith, Chief Clerk, temporarily acting as Secretary of War. (BD) New administration 3/04/1809; successor nominated 3/06/1809 (2 days later); confirmed 3/07/1809 (1 day after nomination); entered upon duties 4/08/1809.
2. 03/08/1809 to 05/15/1809: Charles W. Goldsborough, Chief Clerk, temporarily appointed Secretary of the Navy. (BD)
3. 11/23/1819: Christopher Vanderventer, Chief Clerk, temporarily acting as Secretary of War. (AJ)
4. 04/24/1829 to 05/26/1829: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of Treasury. (AD)
5. 07/07/1829: William B. Lewis temporarily acting as Secretary of War. (AJ)
6. 07/08/1829: Richard H. Bradford temporarily acting as Secretary of the Navy. (AJ)
7. 08/19/1829: William B. Lewis temporarily acting as Secretary of War. (AJ)

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[1] This appendix is compiled from information found in the following sources, cited by the Government, with abbreviations used herein noted in parentheticals: *Trial of Andrew Johnson, President of the United States, Before the Senate of the United States, on Impeachment by the House of Representatives for High Crimes and Misdemeanors* (Gov't Printing Office 1868) (AJ); *Biographical Directory of the American Congress: 1774-1971* (Gov't Printing Office 1971) (BD); *In re Asbury Dickins*, 34th Cong., 1st Sess., Rep. C.C. 9 (Ct. Cl. 1856) (AD); *In re Cornelius Boyle*, 34th Cong., 3d Sess., Rep. C.C. 44 (Ct. Cl. 1857) (CB).

[2] Full date ranges are provided when contained in the source material. Otherwise, only start dates of the temporary appointment are shown.

8. 11/07/1829: Phillip G. Randolph, Chief Clerk, temporarily acting as Secretary of War. (AJ)

9. 06/12/1830: Phillip G. Randolph, Chief Clerk, temporarily acting as Secretary of War. (AJ)

10. 03/08/1831: Phillip G. Randolph, Chief Clerk, temporarily acting as Secretary of War. (AJ)

11. 03/21/1831 to 04/14/1831: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)

12. 06/16/1831 to 06/23/1831: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)

13. 08/10/1831: Daniel Brent, Chief Clerk, temporarily acting as Secretary of State. (AJ)

14. 08/10/1831 to 09/20/1831: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)

15. 10/18/1831 to 10/26/1831: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of Treasury. (AD)

16. 03/15/1832 to 03/30/1832: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of Treasury. (AD)

17. 06/08/1832: John Robb, Chief Clerk, temporarily acting as Secretary of War. (AJ)

18. 07/16/1832: John Robb, Chief Clerk, temporarily acting as Secretary of War. (AJ)

19. 07/18/1832: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

20. 07/21/1832: Daniel Brent, Chief Clerk, temporarily acting as Secretary of State. (AJ)

21. 07/23/1832: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)

22. 10/01/1832 to 10/10/1832: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of Treasury. (AD)

23. 11/08/1832 to 11/17/1832: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of Treasury. (AD)

24. 11/12/1832: John Robb, Chief Clerk, temporarily acting as Secretary of War. (AJ)

25. 03/28/1833: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)

26. 05/06/1833 to 05/09/1833: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of Treasury. (AD)

27. 05/06/1833: John Robb, Chief Clerk, temporarily acting as Secretary of War. (AJ)

28. 05/29/1833 to 05/31/1833: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of Treasury. (AD)

29. 06/13/1833: Daniel Brent, Chief Clerk, temporarily acting as Secretary of State. (AJ)

30. 06/05/1833: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)

31. 06/05/1833: Daniel Brent, Chief Clerk, temporarily acting as Secretary of State. (AJ)

32. 06/06/1833: John Robb, Chief Clerk, temporarily acting as Secretary of War. (AJ)

33. 06/13/1833: Daniel Brent, Chief Clerk, temporarily acting as Secretary of State. (AJ)

34. 07/18/1833: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

35. 07/21/1833: Daniel Brent, Chief Clerk, temporarily acting as Secretary of State. (AJ)

36. 08/10/1833 to 08/24/1833: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)

37. 09/28/1833: John Robb, Chief Clerk, temporarily acting as Secretary of War. (AJ)

38. 11/11/1833 to 11/15/1833: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)

39. 05/08/1834: Mahlon Dickerson temporarily acting as Secretary of War. (AJ)

40. 07/05/1834: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)

41. 07/08/1834: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AJ)

42. 10/11/1834 to 10/31/1834: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)

43. 05/02/1835 to 06/13/1835: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)

44. 05/07/1835 to 06/17/1835: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)

45. 05/18/1835: Carey A. Harris, Chief Clerk, temporarily acting as Secretary of War. (AJ)

46. 07/01/1835: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

47. 07/06/1835 to 07/13/1835: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)

48. 08/31/1835 to 09/08/1835: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)

49. 09/28/1835 to 10/19/1835: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)

50. 10/20/1835: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

51. 10/23/1835: Carey A. Harris, Chief Clerk, temporarily acting as Secretary of War. (AJ)

52. 04/29/1836: Carey A. Harris, Chief Clerk, temporarily acting as Secretary of War. (AJ)

53. 05/19/1836 to 05/23/1836: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)

54. 05/27/1836: Carey A. Harris, Chief Clerk, temporarily acting as Secretary of War. (AJ)

55. 07/07/1836 to 08/29/1836: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)

56. 07/09/1836: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)

57. 09/27/1836 to 11/09/1836: Asbury Dickins, Chief Clerk, temporarily acting as Secretary of State. (AD)

58. 06/28/1837: Aaron O. Dayton, Chief Clerk, temporarily acting as Secretary of State. (AJ)

59. 07/13/1837 to 07/31/1837: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)

60. 10/20/1837: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

61. 10/27/1837: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (AJ)

62. 07/01/1838: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

63. 07/21/1838: Aaron Vail, Chief Clerk, temporarily acting as Secretary of State. (AJ)

64. 07/21/1838: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (AJ)

65. 10/06/1838 to 11/05/1838: John Boyle, Chief Clerk, temporarily acting as Secretary of the Navy. (CB)

66. 04/24/1839: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

67. 06/08/1839: Aaron Vail, Chief Clerk, temporarily acting as Secretary of State. (AJ)

68. 06/15/1839: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

69. 08/28/1840: J.L. Martin, Chief Clerk, temporarily acting as Secretary of State. (AJ)

70. 10/16/1840: J.L. Martin, Chief Clerk, temporarily acting as Secretary of State. (AJ)

71. 03/19/1841: John D. Simms, Chief Clerk, temporarily acting as Secretary of the Navy. (AJ)

72. 04/27/1841: Daniel Fletcher Webster, Chief Clerk, temporarily acting as Secretary of State. (AJ)

73. 08/20/1841: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

74. 09/13/1841 to 09/13/1841: McClintock Young, Chief Clerk, temporarily appointed Secretary of Treasury. (BD)

75. 09/14/1841 to 10/13/1841: Selah R. Hobbie, First Assistant Postmaster General, temporarily appointed Postmaster General. (BD)

76. 10/20/1841: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

77. 10/30/1841: McClintock Young, Chief Clerk, temporarily appointed Secretary of Treasury. (AJ)

78. 05/14/1842: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

79. 06/07/1842: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

80. 06/30/1842: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

81. 07/20/1842: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

82. 12/14/1842: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

83. 11/01/1842: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

84. 05/31/1843: Samuel Hume Porter temporarily acting as Secretary of War. (AJ)

85. 06/08/1843: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

86. 06/08/1843: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

87. 06/21/1843 to 06/24/1843: William S. Derrick, Chief Clerk, temporarily appointed Secretary of State. (BD)

88. 08/17/1843: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

89. 08/28/1843: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

90. 09/28/1844: Richard K. Cralle, Chief Clerk, temporarily acting as Secretary of State. (AJ)

91. 03/31/1846: Nicholas P. Trist, Chief Clerk, temporarily acting as Secretary of State. (AJ)

92. 09/02/1846: Nicholas P. Trist, Chief Clerk, temporarily acting as Secretary of State. (AJ)

93. 10/07/1846: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

94. 03/04/1847: Nicholas P. Trist, Chief Clerk, temporarily acting as Secretary of State. (AJ)

95. 03/31/1847: Nicholas P. Trist, Chief Clerk, temporarily acting as Secretary of State. (AJ)

96. 07/21/1847: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

97. 08/04/1847: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

98. 10/15/1847: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

99. 12/09/1847: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

100. 04/10/1848: John Appleton, Chief Clerk, temporarily acting as Secretary of State. (AJ)

101. 05/26/1848: Archibald Campbell, Chief Clerk, temporarily acting as Secretary of War. (AJ)

102. 08/17/1848: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

103. 10/01/1849: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

104. 10/08/1849: John D. McPherson, Chief Clerk, temporarily acting as Secretary of War. (AJ)

105. 06/20/1850: John McGinnis, Chief Clerk, temporarily acting as Secretary of Treasury. (AJ)

106. 10/04/1850: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

107. 10/07/1850: Allen A. Hall temporarily acting as Secretary of Treasury. (AJ)

108. 12/06/1850: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

109. 12/23/1850: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

110. 03/01/1851: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

111. 03/31/1851: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

112. 05/10/1851: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

113. 06/16/1851: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

114. 06/20/1851: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

115. 07/14/1851: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

116. 08/04/1851: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

117. 09/13/1851: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

118. 11/26/1851: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

119. 02/20/1852: William S. Derrick, Chief Clerk, temporarily acting as Secretary of State. (AJ)

120. 02/21/1852: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

121. 03/01/1852: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

122. 03/19/1852: William Hunter, Chief Clerk, temporarily acting as Secretary of State. (AJ)

123. 04/26/1852: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

124. 05/01/1852: William Hunter, Chief Clerk, temporarily acting as Secretary of State. (AJ)

125. 05/24/1852: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

126. 06/10/1852: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

127. 07/06/1852: William Hunter, Chief Clerk, temporarily acting as Secretary of State. (AJ)

128. 08/27/1852: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

129. 10/04/1852: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

130. 10/28/1852: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

131. 12/31/1852: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

132. 01/15/1853: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

133. 03/03/1853: William L. Hodge, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

134. 07/11/1853: Peter G. Washington, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

135. 09/23/1853: Peter G. Washington, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

136. 04/12/1854: Peter G. Washington, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

137. 08/21/1854: William Hunter, Chief Clerk, temporarily acting as Secretary of State. (AJ)

138. 08/29/1854: Archibald Campbell, Chief Clerk, temporarily acting as Secretary of War. (AJ)

139. 10/05/1854: Peter G. Washington, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

140. 10/30/1854: Archibald Campbell, Chief Clerk, temporarily acting as Secretary of War. (AJ)

141. 05/03/1855: Peter G. Washington, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

142. 08/06/1855: Peter G. Washington, Assistant Secretary, temporarily acting as Secretary of Treasury. (AJ)

143. 10/09/1855: Archibald Campbell, Chief Clerk, temporarily acting as Secretary of War. (AJ)

144. 01/19/1857: Archibald Campbell, Chief Clerk, temporarily acting as Secretary of War. (AJ)

145. 07/05/1859: William R. Drinkard, Chief Clerk, temporarily acting as Secretary of War. (AJ)

Exigencies (23)

1. 01/07/1813 to 01/18/1813: Charles W. Goldsborough, Chief Clerk, temporarily acting as Secretary of the Navy. Exigency: Paul Hamilton resigned as Secretary of Navy during the War of 1812. (BD) Successor nominated 1/08/1813 (next day); confirmed 1/12/1813 (4 days after nomination); entered upon duties 1/19/1813.

2. 12/02/1814 to 01/16/1815: Benjamin Homans, Chief Clerk, temporarily acting as Secretary of the Navy. Exigency: William Jones resigned as Secretary of Navy during the War of 1812. (BD) Successor nominated 12/15/1814 (13 days later); confirmed 12/19/1814 (4 days after nomination); entered upon duties 1/16/1815.

3. 03/04/1817 to 03/10/1817: John Graham, Chief Clerk, temporarily acting as Secretary of State. (BD) Exigency: change in administration. Successor nominated and confirmed 3/05/1817 (next day); entered upon duties 9/22/1817. Attorney General appointed *ad interim* on 3/10/1817.

4. 03/04/1825 to 03/07/1825: Daniel Brent, Chief Clerk, temporarily acting as Secretary of State. (BD) Exigency: change in administration. Successor nominated 3/05/1825 (next day); confirmed and entered upon duties 3/07/1825 (2 days after nomination).

5. 03/04/1829 to 03/09/1829: Charles Hay, Chief Clerk, temporarily acting as Secretary of the Navy. (BD) Exigency: change in administration. Successor nominated, confirmed, and entered upon duties 3/09/1829 (5 days later).

6. 03/04/1829 to 03/28/1829: James A. Hamilton temporarily acting as Secretary of State. (BD) Exigency: change in administration. Successor nominated and confirmed 3/06/1829 (2 days later); entered upon duties 3/28/1829.

7. 06/25/1834 to 07/01/1834: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. Exigency: Senate rejected cabinet nominee for the first time in U.S. history. (BD) Successor nominated and confirmed 6/27/1834 (2 days later); entered upon duties 7/01/1834.

8. 03/04/1841 to 03/05/1841: J.L. Martin, Chief Clerk, temporarily acting as Secretary of State. (BD) Exigency: change in administration. Successor nominated, confirmed, and entered upon duties 3/05/1841 (next day).

9. 03/04/1841 to 03/05/1841: John D. Simms, Chief Clerk, temporarily acting as Secretary of the Navy. (BD) Exigency: change in administration. Successor nominated, confirmed, and entered upon duties 3/05/1841 (next day).

10. 03/04/1841 to 03/05/1841: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (BD) Exigency: change in administration. Successor nominated, confirmed, and entered upon duties 3/05/1841 (next day).

11. 03/04/1841 to 03/08/1841: Selah R. Hobbie, First Assistant Postmaster General, temporarily acting as Postmaster General. (BD) Exigency: change in administration. Successor nominated 3/05/1841 (next day); confirmed 3/06/1841 (1 day after nomination); entered upon duties 3/08/1841.

12. 09/11/1841 to 10/11/1841: John D. Simms, Chief Clerk, temporarily acting as Secretary of the Navy. Exigency: George E. Badger resigned as Secretary of the Navy with

several other members of the cabinet in protest when President Tyler vetoed Whig initiatives. (BD) Successor nominated 9/11/1841 (same day); confirmed 9/13/1841 (2 days after nomination); entered upon duties 10/11/1841.

13. 09/12/1841 to 10/12/1841: Albert M. Lee, Chief Clerk, temporarily acting as Secretary of War. Exigency: John Bell resigned as Secretary of War with several other members of the cabinet in protest when President Tyler vetoed Whig initiatives. (BD) Successor recess appointed 10/12/1841 (30 days later).

14. 03/01/1843 to 03/08/1843: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. Exigency: Walter Forward resigned as Secretary of Treasury in protest. (BD) Failed nomination 3/02/1843 (next day); rejected 3/03/1843 (1 day after nomination); successor nominated and confirmed 3/03/1843 (same day as previous nomination rejected); entered upon duties 3/08/1843.

15. 05/02/1844 to 07/04/1844: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. Exigency: The previous Secretary of Treasury John Spencer died in office. (BD) Failed nomination 6/14/1844 (43 days later); rejected 6/15/1844 (1 day after nomination); successor nominated and confirmed 6/15/1844 (same day as previous nomination rejected); entered upon duties 7/04/1844.

16. 03/06/1849 to 03/08/1849: McClintock Young, Chief Clerk, temporarily acting as Secretary of Treasury. (BD) Exigency: change in administration. Successor nominated 3/06/1849; confirmed 3/07/1849 (next day); commissioned and entered upon duties 3/08/1849 (1 day after nomination).

17. 03/06/1849 to 03/08/1849: Selah R. Hobbie, First Assistant Postmaster General, temporarily acting as Postmaster General. (BD) Exigency: change in administration. Successor nominated 3/06/1849 (same day); confirmed 3/07/1849 (1 day after nomination); commissioned and entered upon duties 3/08/1849.

18. 07/23/1850 to 08/15/1850: Daniel C. Goddard, Chief Clerk, temporarily acting as Secretary of Interior. (BD) Exigency: change in administration. Successor nominated, confirmed, and entered upon duties 8/15/1850 (23 days later).

19. 07/23/1850 to 07/24/1850: Samuel J. Anderson, Chief Clerk, temporarily acting as Secretary of War. (BD) Exigency: change in administration. Winfield Scott, Major General (Army), was appointed *ad interim* 7/24/1850 (1 day later).

20. 08/27/1850 to 09/16/1850: Daniel C. Goddard, Chief Clerk, temporarily acting as Secretary of Interior. Exigency: Thomas M. T. McKennan resigned as Secretary of Interior after 11 days, citing his nervous temperament. (BD) Successor nominated 9/11/1850 (15 days later); confirmed 9/12/1850 (1 day after nomination); entered upon duties 9/16/1850.

21. 03/04/1853 to 03/07/1853: William Hunter, Chief Clerk, temporarily acting as Secretary of State. (BD) Exigency: change in administration. Successor nominated, confirmed, and entered upon duties 3/07/1853 (3 days later).

22. 03/09/1859 to 03/14/1859: Horatio King, First Assistant Postmaster General, temporarily acting as Postmaster General. Exigency: The previous Postmaster General Aaron Brown

died in office. (BD) Successor nominated and confirmed 3/09/1859 (same day); commissioned and entered upon duties 3/14/1859 (5 days later).

23. 12/15/1860 to 12/17/1860: William Hunter, Chief Clerk, temporarily acting as Secretary of State. Exigency: Lewis Cass resigned as Secretary of State in protest. (BD) Successor nominated 12/16/1860 (next day); confirmed 12/17/1860 (1 day after nomination); entered upon duties same day.

EXHIBIT D

U.S. Department of Justice
Office of Legal Counsel

Office of the Assistant Attorney General *Washington, D.C. 20530*

November 14, 2018

MEMORANDUM FOR EMMET T. FLOOD
COUNSEL TO THE PRESIDENT

Re: Designating an Acting Attorney General

After Attorney General Jefferson B. Sessions III resigned on November 7, 2018, the President designated Matthew G. Whitaker, Chief of Staff and Senior Counselor to the Attorney General, to act temporarily as the Attorney General under the Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349d. This Office had previously advised that the President could designate a senior Department of Justice official, such as Mr. Whitaker, as Acting Attorney General, and this memorandum explains the basis for that conclusion.

Mr. Whitaker's designation as Acting Attorney General accords with the plain terms of the Vacancies Reform Act, because he had been serving in the Department of Justice at a sufficiently senior pay level for over a year. *See id.* § 3345(a)(3). The Department's organic statute provides that the Deputy Attorney General (or others) may be Acting Attorney General in the case of a vacancy. *See* 28 U.S.C. § 508. But that statute does not displace the President's authority to use the Vacancies Reform Act as an alternative. As we have previously recognized, the President may use the Vacancies Reform Act to depart from the succession order specified under section 508. *See Authority of the President to Name an Acting Attorney General*, 31 Op. O.L.C. 208 (2007) ("*2007 Acting Attorney General*").

We also advised that Mr. Whitaker's designation would be consistent with the Appointments Clause of the U.S. Constitution, which requires the President to obtain "the Advice and Consent of the Senate" before appointing a principal officer of the United States. U.S. Const. art. II, § 2, cl. 2. Although an Attorney General is a principal officer requiring Senate confirmation, someone who temporarily performs his duties is not. As all three branches of government have long recognized, the President may designate an acting official to perform the duties of a vacant principal office, including a Cabinet office, even when the acting official has not been confirmed by the Senate.

Congress did not first authorize the President to direct non-Senate-confirmed officials to act as principal officers in 1998; it did so in multiple statutes starting in 1792. In that year, Congress authorized the President to ensure the government's uninterrupted work by designating persons to perform temporarily the work of vacant offices. The President's authority applied to principal offices and did not require the President to select Senate-confirmed officers. In our brief survey of the history, we have identified over 160 times before 1860 in which non-Senate-confirmed persons performed, on a temporary basis, the duties of such high offices as Secretary of State, Secretary of the Treasury, Secretary of War, Secretary of the Navy, Secretary of the Interior, and Postmaster General. While designations to the office of Attorney General were less

frequent, we have identified at least one period in 1866 when a non-Senate-confirmed Assistant Attorney General served as Acting Attorney General. Mr. Whitaker's designation is no more constitutionally problematic than countless similar presidential orders dating back over 200 years.

Were the long agreement of Congress and the President insufficient, judicial precedent confirms the meaning of the Appointments Clause in these circumstances. When Presidents appointed acting Secretaries in the nineteenth century, those officers (or their estates) sometimes sought payment for their additional duties, and courts recognized the lawfulness of such appointments. The Supreme Court confirmed the legal understanding of the Appointments Clause that had prevailed for over a century in *United States v. Eaton*, 169 U.S. 331 (1898), holding that an inferior officer may perform the duties of a principal officer "for a limited time[] and under special and temporary conditions" without "transform[ing]" his office into one for which Senate confirmation is required. *Id.* at 343. The Supreme Court has never departed from *Eaton*'s holding and has repeatedly relied upon that decision in its recent Appointments Clause cases.

In the Vacancies Reform Act, Congress renewed the President's authority to designate non-Senate-confirmed senior officials to perform the functions and duties of principal offices. In 2003, we reviewed the President's authority in connection with the Director of the Officer of Management and Budget ("OMB"), who is a principal officer, and concluded that the President could designate a non-Senate-confirmed official to serve temporarily as Acting Director. *See Designation of Acting Director of the Office of Management and Budget*, 27 Op. O.L.C. 121 (2003) ("*Acting Director of OMB*"). Presidents George W. Bush and Barack Obama placed non-Senate-confirmed officials in several lines of agency succession and actually designated unconfirmed officials as acting agency heads. President Trump, too, has previously exercised that authority in other departments; Mr. Whitaker is not the first unconfirmed official to act as the head of an agency in this administration.

It is no doubt true that Presidents often choose acting principal officers from among Senate-confirmed officers. But the Constitution does not mandate that choice. Consistent with our prior opinion and with centuries of historical practice and precedents, we advised that the President's designation of Mr. Whitaker as Acting Attorney General on a temporary basis did not transform his position into a principal office requiring Senate confirmation.

I. The Vacancies Reform Act

Mr. Whitaker's designation as Acting Attorney General comports with the terms of the Vacancies Reform Act. That Act provides three mechanisms by which an acting officer may take on the functions and duties of an office, when an executive officer who is required to be appointed by the President with the advice and consent of the Senate "dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a). First, absent any other designation, the "first assistant" to the vacant office shall perform its functions and duties. *Id.* § 3345(a)(1). Second, the President may depart from that default course by directing another presidential appointee, who is already Senate confirmed, to perform the functions and duties of the vacant office. *Id.* § 3345(a)(2). Or, third, the President may designate an officer or employee within the same agency to perform the functions and duties of

the vacant office, provided that he or she has been in the agency for at least 90 days in the 365 days preceding the vacancy, in a position for which the rate of pay is equal to or greater than the minimum rate for GS-15 of the General Schedule. *Id.* § 3345(a)(3). Except in the case of a vacancy caused by sickness, the statute imposes time limits on the period during which someone may act. *Id.* § 3346. And the acting officer may not be nominated by the President to fill the vacant office and continue acting in it, unless he was already the first assistant to the office for at least 90 days in the 365 days preceding the vacancy or is a Senate-confirmed first assistant. *Id.* § 3345(b)(1)–(2); *see also Nat'l Labor Relations Bd. v. SW General, Inc.*, 137 S. Ct. 929, 941 (2017).

A.

The Vacancies Reform Act unquestionably authorizes the President to direct Mr. Whitaker to act as Attorney General after the resignation of Attorney General Sessions on November 7, 2018.[1] Mr. Whitaker did not fall within the first two categories of persons made eligible by section 3345(a). He was not the first assistant to the Attorney General, because 28 U.S.C. § 508(a) identifies the Deputy Attorney General as the "first assistant to the Attorney General" "for the purpose of section 3345." Nor did Mr. Whitaker already hold a Senate-confirmed office. Although Mr. Whitaker was previously appointed, with the advice and consent of the Senate, as the United States Attorney for the Southern District of Iowa, he resigned from that position on November 25, 2009. At the time of the resignation of Attorney General Sessions, Mr. Whitaker was serving in a position to which he was appointed by the Attorney General.

In that position, Mr. Whitaker fell squarely within the third category of officials, identified in section 3345(a)(3). As Chief of Staff and Senior Counselor, he had served in the Department of Justice for more than 90 days in the year before the resignation, at a GS-15 level or higher. And Mr. Whitaker has not been nominated to be Attorney General, an action that would render him ineligible to serve as Acting Attorney General under section 3345(b)(1). Accordingly, under the plain terms of the Vacancies Reform Act, the President could designate

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[1] Attorney General Sessions submitted his resignation "[a]t [the President's] request," Letter for President Donald J. Trump, from Jefferson B. Sessions III, Attorney General, but that does not alter the fact that the Attorney General "resign[ed]" within the meaning of section 3345(a). Even if Attorney General Sessions had declined to resign and was removed by the President, he still would have been rendered "otherwise unable to perform the functions and duties of the office" for purposes of section 3345(a). As this Office recently explained, "an officer is 'unable to perform the functions and duties of the office' during both short periods of unavailability, such as a period of sickness, and potentially longer ones, such as one resulting from the officer's removal (which would arguably not be covered by the reference to 'resign[ation].')." *Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. __, at *4 (2017); *see also Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 61 (1999) ("In floor debate, Senators said, by way of example, that an officer would be 'otherwise unable to perform the functions and duties of the office' if he or she were fired, imprisoned, or sick."). Indeed, any other interpretation would leave a troubling gap in the ability to name acting officers. For most Senate-confirmed offices, the Vacancies Reform Act is "the exclusive means" for naming an acting officer. 5 U.S.C. § 3347(a). If the statute did not apply in cases of removal, then it would mean that no acting officer—not even the first assistant—could take the place of a removed officer, even where the President had been urgently required to remove the officer, for instance, by concerns over national security, corruption, or other workplace misconduct.

Mr. Whitaker to serve temporarily as Acting Attorney General subject to the time limitations of section 3346.

B.

The Vacancies Reform Act remains available to the President even though 28 U.S.C. § 508 separately authorizes the Deputy Attorney General and certain other officials to act as Attorney General in the case of a vacancy.[2] We previously considered whether this statute limits the President's authority under the Vacancies Reform Act to designate someone else to be Acting Attorney General. *2007 Acting Attorney General*, 31 Op. O.L.C. 208. We have also addressed similar questions with respect to other agencies' succession statutes. *See Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. __ (2017) ("*Acting Director of CFPB*"); *Acting Director of OMB*, 27 Op. O.L.C. at 121 n.1. In those instances, we concluded that the Vacancies Reform Act is not the "exclusive means" for the temporary designation of an acting official, but that it remains available as an option to the President. We reach the same conclusion here: Section 508 does not limit the President's authority to invoke the Vacancies Reform Act to designate an Acting Attorney General.

We previously concluded that section 508 does not prevent the President from relying upon the Vacancies Reform Act to determine who will be the Acting Attorney General. Although the Vacancies Reform Act, which "ordinarily is the exclusive means for naming an acting officer," *2007 Acting Attorney General*, 31 Op. O.L.C. at 209 (citing 5 U.S.C. § 3347), makes an exception for, and leaves in effect, statutes such as section 508, "[t]he Vacancies Reform Act nowhere says that, if another statute remains in effect, the Vacancies Reform Act may not be used." *Id.* In fact, the structure of the Vacancies Reform Act makes clear that office-specific provisions are treated as exceptions from its generally exclusive applicability, not as provisions that supersede the Vacancies Reform Act altogether.[3] Furthermore, as we noted, "the Senate Committee Report accompanying the Act expressly disavows" the view that, where another statute is available, the Vacancies Reform Act may not be used. *Id.* (citing S. Rep. No. 105-250, at 17 (1998)). That report stated that, "with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies [Reform] Act would continue to provide an alternative procedure for temporarily occupying the office." *Id.* We therefore concluded that the President could direct the Assistant Attorney General for the Civil Division to act as Attorney General under the Vacancies Reform Act, even though the incumbent Solicitor General would otherwise have served under the chain of succession specified in section 508 (as supplemented by an Attorney General order).

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[2] Under 28 U.S.C. § 508(a), in the case of a vacancy in the office of Attorney General, "the Deputy Attorney General may exercise all the duties of that office, and for the purpose of [the Vacancies Reform Act] the Deputy Attorney General is the first assistant to the Attorney General." If the offices of Attorney General and Deputy Attorney General are both vacant, "the Associate Attorney General shall act as Attorney General," and "[t]he Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General." *Id.* § 508(b).

[3] One section (entitled "Exclusion of certain offices") is used to exclude certain offices altogether. 5 U.S.C. § 3349c. Office-specific statutes, however, are mentioned in a different section (entitled "Exclusivity") that generally makes the Vacancies Reform Act "the exclusive means" for naming an acting officer but also specifies exceptions to that exclusivity. *Id.* § 3347(a)(1).

At the time of our *2007 Acting Attorney General* opinion, the first two offices specified in section 508(a) and (b)—Deputy Attorney General and Associate Attorney General—were both vacant. *See* 31 Op. O.L.C. at 208. That is not currently the case; there is an incumbent Deputy Attorney General. But the availability of the Deputy Attorney General does not affect the President's authority to invoke section 3345(a)(3). Nothing in section 508 suggests that the Vacancies Reform Act does not apply when the Deputy Attorney General can serve. To the contrary, the statute expressly states that the Deputy Attorney General is the "first assistant to the Attorney General" "for the purpose of section 3345 of title 5" (i.e., the provision of the Vacancies Reform Act providing for the designation of an acting officer). 28 U.S.C. § 508(a). It further provides that the Deputy Attorney General "may" serve as Acting Attorney General, not that he "must," underscoring that the Vacancies Reform Act remains an alternative means of appointment.[4] These statutory cross-references confirm that section 508 works in conjunction with, and does not displace, the Vacancies Reform Act.

Although the Deputy Attorney General is the default choice for Acting Attorney General under section 3345(a)(1), the President retains the authority to invoke the other categories of eligible officials, "notwithstanding [the first-assistant provision in] paragraph (1)." 5 U.S.C. § 3345(a)(2), (3). Moreover, there is reason to believe that Congress, in enacting the Vacancies Reform Act, deliberately chose to make the second and third categories of officials in section 3345(a) applicable to the office of Attorney General. Under the previous Vacancies Act, the first assistant to an office was also the default choice for filling a vacant Senate-confirmed position, and the President was generally able to depart from that by selecting another Senate-confirmed officer. *See* 5 U.S.C. § 3347 (1994). That additional presidential authority, however, was expressly made inapplicable "to a vacancy in the office of Attorney General." *Id.*; *see also* Rev. Stat. § 179 (2d ed. 1878). Yet, when Congress enacted the Vacancies Reform Act in 1998, it did away with the exclusion for the office of Attorney General. *See* 5 U.S.C. § 3349c (excluding certain other officers).[5]

Our conclusion that the Vacancies Reform Act remains available, notwithstanding section 508, is consistent with our prior opinions. In *Acting Director of OMB*, we recognized that an OMB-specific statute, 31 U.S.C. § 502(f), did not displace the President's authority under the Vacancies Reform Act. *See* 27 Op. O.L.C. at 121 n.1 ("The Vacancies Reform Act does not provide, however, that where there is another statute providing for a presidential designation, the Vacancies Reform Act becomes unavailable."). More recently, we confirmed that the President could designate an Acting Director of the Bureau of Consumer Financial Protection ("CFPB"),

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[4] We do not mean to suggest that a different result would follow if section 508 said "shall" instead of "may," since as discussed at length in *Acting Director of CFPB*, such mandatory phrasing in a separate statute does not itself oust the Vacancies Reform Act. *See* 41 Op. O.L.C. __, *7–9 & n.3. The point is that, in contrast with the potential ambiguity arising from the appearance of "shall" in the CFPB-specific statute, section 508 expressly acknowledges that the Deputy Attorney General is the first assistant but will not necessarily serve in the case of a vacancy in the office of Attorney General.

[5] When it reported the Vacancies Reform Act, the Senate Committee on Governmental Affairs contemplated that the Attorney General would continue to be excluded by language in a proposed section 3345(c) that would continue to make section 508 "applicable" to the office. *See* S. Rep. No. 105-250, at 13, 25; 144 Cong. Rec. 12,433 (June 16, 1998). But that provision "was not enacted as part of the final bill, and no provision of the Vacancies Reform Act bars the President from designating an Acting Attorney General under that statute." *2007 Acting Attorney General*, 31 Op. O.L.C. at 209 n.1.

notwithstanding 12 U.S.C. § 5491(b)(5), which provides that the Deputy Director of the CFPB "shall" serve as Acting Director when the Director is unavailable. *See Acting Director of CFPB*, 41 Op. O.L.C. __. We reasoned that the CFPB-specific statute should "interact with the Vacancies Reform Act in the same way as other, similar statutes providing an office-specific mechanism for an individual to act in a vacant position." *Id.* at *7–9 & n.3. We noted that the Vacancies Reform Act itself provides that a first assistant to a vacant office "shall perform the functions and duties" of that office unless the President designates someone else to do so, 5 U.S.C. § 3345(a), and that mandatory language in either the CFPB-specific statute or the Vacancies Reform Act does not foreclose the availability of the other statute. *Acting Director of CFPB*, 41 Op. O.L.C. __, at *7–8.

Courts have similarly concluded that the Vacancies Reform Act remains available as an alternative to office-specific statutes. *See Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 555–56 (9th Cir. 2016) (General Counsel of the National Labor Relations Board, which has its own office-specific statute prescribing a method of filling a vacancy); *English v. Trump*, 279 F. Supp. 3d 307, 323–24 (D.D.C. 2018) (holding that the mandatory language in the CFPB-specific statute is implicitly qualified by the Vacancies Reform Act's language providing that the President also "may direct" qualifying individuals to serve in an acting capacity), *appeal dismissed upon appellant's motion*, No. 18-5007, 2018 WL 3526296 (D.C. Cir. July 13, 2018).

For these reasons, we believe that the President could invoke the Vacancies Reform Act in order to designate Mr. Whitaker as Acting Attorney General ahead of the alternative line of succession provided under section 508.

II. The Appointments Clause

While the Vacancies Reform Act expressly authorizes the President to select an unconfirmed official as Acting Attorney General, Congress may not authorize an appointment mechanism that would conflict with the Constitution. *See Freytag v. Commissioner*, 501 U.S. 868, 883 (1991). The Appointments Clause requires the President to "appoint" principal officers, such as the Attorney General, "by and with the Advice and Consent of the Senate." U.S. Const., art. II, § 2, cl. 2. But for "inferior Officers," Congress may vest the appointment power "in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.*

The President's designation of Mr. Whitaker as Acting Attorney General is consistent with the Appointments Clause so long as Acting Attorney General is not a principal office that requires Senate confirmation. If so, it does not matter whether an acting official temporarily filling a vacant principal office is an inferior officer or not an "officer" at all within the meaning of the Constitution, because Mr. Whitaker was appointed in a manner that satisfies the requirements for an inferior officer: He was appointed by Attorney General Sessions, who was the Head of the Department, and the President designated him to perform additional duties. *See Acting Director of OMB*, 27 Op. O.L.C. at 124–25. If the designation constituted an appointment to a principal office, however, then section 3345(a)(3) would be unconstitutional as applied, because Mr. Whitaker does not currently occupy a position requiring Senate confirmation.

For the reasons stated below, based on long-standing historical practice and precedents, we do not believe that the Appointments Clause may be construed to require the Senate's advice and consent before Mr. Whitaker may be Acting Attorney General.

A.

The Attorney General is plainly a principal officer, who must be appointed with the advice and consent of the Senate. *See Edmond v. United States*, 520 U.S. 651, 662–63 (1997); *Morrison v. Olson*, 487 U.S. 654, 670–72 (1988). The Attorney General has broad and continuing authority over the federal government's law-enforcement, litigation, and other legal functions. *See, e.g.*, 28 U.S.C. §§ 516, 533. The Supreme Court has not "set forth an exclusive criterion for distinguishing between" inferior officers and principal officers. *Edmond*, 520 U.S. at 661. "Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President." *Id.* at 662. There is no officer below the President who supervises the Attorney General.

Although the Attorney General is a principal officer, it does not follow that an Acting Attorney General should be understood to be one. An office under the Appointments Clause requires both a "continuing and permanent" position and the exercise of "significant authority pursuant to the laws of the United States." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (internal quotation marks omitted); *see also Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 74 (2007). While a person acting as the Attorney General surely exercises sufficient authority to be an "Officer of the United States," it is less clear whether Acting Attorney General is a principal office.

Because that question involves the division of powers between the Executive and the Legislative Branches, "historical practice" is entitled to "significant weight." *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014); *see also, e.g.*, *The Pocket Veto Case*, 279 U.S. 655, 689 (1929). That practice strongly supports the constitutionality of authorizing someone who has not been Senate-confirmed to serve as an acting principal officer. Since 1792, Congress has repeatedly legislated on the assumption that temporary service as a principal officer does not require Senate confirmation. As for the Executive Branch's practice, our non-exhaustive survey has identified over 160 occasions between 1809 and 1860 on which non-Senate-confirmed persons served temporarily as an acting or ad interim principal officer in the Cabinet.

Furthermore, judicial precedents culminating in *United States v. Eaton*, 169 U.S. 331 (1898), endorsed that historical practice and confirm that the temporary nature of acting service weighs against principal-officer status. The Supreme Court in *Eaton* held that an inferior officer may perform the duties of a principal officer "for a limited time[] and under special and temporary conditions" without "transform[ing]" his office into one for which Senate confirmation is required. *Id.* at 343. That holding was not limited to the circumstances of that case, but instead reflected a broad consensus about the status of an acting principal officer that the Supreme Court has continued to rely on in later Appointments Clause decisions.

1.

Since the Washington Administration, Congress has "authoriz[ed] the President to direct certain officials to temporarily carry out the duties of a vacant PAS office [i.e., one requiring Presidential Appointment and Senate confirmation] in an acting capacity, without Senate confirmation." *SW General*, 137 S. Ct. at 934; *see also Noel Canning*, 134 S. Ct. at 2609 (Scalia, J., dissenting in relevant part) (observing that the President does not need to use recess appointments to fill vacant offices because "Congress can authorize 'acting' officers to perform the duties associated with a temporarily vacant office—and has done that, in one form or another, since 1792"). Those statutes, and evidence of practice under them during the early nineteenth century, did not limit the pool of officials eligible to serve as an acting principal officer to those who already have Senate-confirmed offices. This history provides compelling support for the conclusion that the position of an *acting* principal officer is not itself a principal office.

In 1792, Congress first "authorized the appointment of 'any person or persons' to fill specific vacancies in the Departments of State, Treasury, and War." *SW General*, 137 S. Ct. at 935 (quoting Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281). Although the statute expressly mentioned vacancies in the position of Secretary in each of those Departments, the President was authorized to choose persons who held no federal office at all—much less one requiring Senate confirmation. Although the 1792 statute "allowed acting officers to serve until the permanent officeholder could resume his duties or a successor was appointed," Congress "imposed a six-month limit on acting service" in 1795. *Id.* at 935 (citing Act of Feb. 13, 1795, ch. 21, 1 Stat. 415). In 1863, in response to a plea from President Lincoln, *see* Message to Congress (Jan. 2, 1863), Cong. Globe, 37th Cong., 3d Sess. 185 (1863), Congress extended the provision to permit the President to handle a vacancy in the office of "the head of any Executive Department of the Government, or of any officer of either of the said Departments whose appointment is not in the head thereof." Act of Feb. 20, 1863, ch. 45, § 1, 12 Stat. 656, 656. The 1863 statute allowed the duties of a vacant office to be performed for up to six months by "the head of any other Executive Department" or by any other officer in those departments "whose appointment is vested in the President." *Id.*

In 1868, Congress replaced all previous statutes on the subject of vacancies with the Vacancies Act of 1868. *See* Act of July 23, 1868, ch. 227, 15 Stat. 168. That act provided 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 . . . perform the duties of such head until a successor be appointed or the absence or sickness shall cease." *Id.*, § 1, 15 Stat. at 168. In lieu of elevating the "first or sole assistant," the President could also choose to authorize any other officer appointed with the Senate's advice and consent to perform the duties of the vacant office until a successor was appointed or the prior occupant of the position was able to return to his post. *Id.* § 3, 15 Stat. at 168. In cases of death or resignation, an acting official could serve for no longer than ten days. *Id.* The 1868 act thus eliminated the President's prior discretion to fill a vacant office temporarily with someone who did not hold a Senate-confirmed position. Yet, it preserved the possibility that a non-Senate-confirmed first assistant would serve as an acting head of an executive department.

Over the next 120 years, Congress repeatedly amended the Vacancies Act of 1868, but it never eliminated the possibility that a non-Senate-confirmed first assistant could serve as an acting head of an executive department. In 1891, it extended the time limit for acting service in cases of death or resignation from ten to thirty days. Act of Feb. 6, 1891, ch. 113, 26 Stat. 733. In 1966, it made minor changes during the course of re-codifying and enacting title 5 of the United States Code. *See* S. Rep. No. 89-1380, at 20, 70–71 (1966); 5 U.S.C. §§ 3345–3349 (1970). Congress amended the act once more in 1988, extending the time limit on acting service from 30 to 120 days and making the statute applicable to offices that are not in "Departments" and thus are less likely to have Senate-confirmed first assistants. Pub. L. No. 100-398, § 7(b), 102 Stat. 985, 988 (1988).

Accordingly, for more than two centuries before the Vacancies Reform Act, Congress demonstrated its belief that the Appointments Clause did not require Senate confirmation for temporary service in a principal office, by repeatedly enacting statutes that affirmatively authorized acting service—even in principal offices at the heads of executive departments—by persons who did not already hold an appointment made with the Senate's advice and consent.

2.

Not only did Congress authorize the Presidents to select officials to serve temporarily as acting principal officers, but Presidents repeatedly exercised that power to fill temporarily the vacancies in their administrations that arose from resignations, terminations, illnesses, or absences from the seat of government. In providing this advice, we have not canvassed the entire historical record. But we have done enough to confirm that Presidents often exercised their powers under the 1792 and 1795 statutes to choose persons who did not hold any Senate-confirmed position to act temporarily as principal officers in various departments. In the Washington, Adams, and Jefferson Administrations, other Cabinet officers (or Chief Justice John Marshall) were used as temporary or "ad interim" officials when offices were vacant between the departure of one official and the appointment of his successor. *See, e.g.*, *Biographical Directory of the American Congress, 1774–1971*, at 13–14 (1971); *see id.* at 12 (explaining that the list of Cabinet officers excludes "[s]ubordinates acting temporarily as heads of departments" and therefore lists only those who served ad interim after an incumbent's departure).

President Jefferson made the first designation we have identified of a non-Senate-confirmed officer to serve temporarily in his Cabinet. On February 17, 1809, approximately two weeks before the end of the Jefferson Administration, John Smith, the chief clerk of the Department of War, was designated to serve as Acting Secretary of War. *See id.* at 14; Letter from Thomas Jefferson to the War Department (Feb. 17, 1809), *Founders Online*, National Archives, https://founders.archives.gov/documents/Jefferson/99-01-02-9824 ("Whereas, by the resignation of Henry Dearborne, late Secretary at War, that office is become vacant. I therefore do hereby authorize John Smith, chief clerk of the office of the Department of War, to perform the duties of the said office, until a successor be appointed."). As chief clerk, Smith was not a principal officer. He was instead "an inferior officer . . . appointed by the [Department's] principal officer." Act of Aug. 5, 1789, ch. 6, § 2, 1 Stat. 49, 50. The next Secretary of War did not enter upon duty until April 8, 1809, five weeks after the beginning of the Madison Administration. *See Biographical Directory* at 14.

Between 1809 and 1860, President Jefferson's successors designated a non-Senate-confirmed officer to serve as an acting principal officer in a Cabinet position on at least 160 other occasions. We have identified 109 additional instances during that period where chief clerks, who were not Senate confirmed, temporarily served as ad interim Secretary of State (on 51 occasions), Secretary of the Treasury (on 36 occasions), or Secretary of War (on 22 occasions). *See id.* at 15–19; 1 *Trial of Andrew Johnson, President of the United States, Before the Senate of the United States, on Impeachment by the House of Representatives for High Crimes and Misdemeanors*, 575–81, 585–88, 590–91 (Washington, GPO 1868); *In re Asbury Dickins*, 34th Cong., 1st Sess., Rep. C.C. 9, at 4–5 (Ct. Cl. 1856) (listing 18 times between 1829 and 1836 that chief clerk Asbury Dickins was "appointed to perform the duties of Secretary of the Treasury" or Secretary of State "during the absence from the seat of government or sickness" of those Secretaries, for a total of 359 days).[6] Between 1853 and 1860 there were also at least 21 occasions on which non-Senate-confirmed Assistant Secretaries were authorized to act as Secretary of the Treasury.[7]

We have also identified instances involving designations of persons who apparently had no prior position in the federal government, including Alexander Hamilton's son, James A. Hamilton, whom President Jackson directed on his first day in office to "take charge of the Department of State until Governor [Martin] Van Buren should arrive in the city" three weeks later. 1 *Trial of Andrew Johnson* at 575; *see Biographical Directory* at 16. President Jackson also twice named William B. Lewis, who held no other government position, as acting Secretary of War. *See* 1 *Trial of Andrew Johnson* at 575. Moving beyond the offices expressly covered by the 1792 and 1795 statutes, there were at least 23 additional instances before 1861 in which Presidents authorized a non-Senate-confirmed chief clerk to perform temporarily the duties of the Secretary of the Navy (on 21 occasions), or the Secretary of the Interior (on 2 occasions).[8]

At the time, it was well understood that when an Acting or ad interim Secretary already held an office such as chief clerk, he was not simply performing additional duties, but he was deemed the Acting Secretary. We know this, because the chief clerks sometimes sought

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[6] *See also* Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29 (providing that the chief clerk in what became the Department of State was "an inferior officer, to be appointed by the [Department's] principal officer"); Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65, 65 (providing for an "Assistant to the Secretary of the Treasury," later known as the chief clerk, who "shall be appointed by the said Secretary"). The sources cited in the text above indicate that (1) the following chief clerks served as ad interim Secretary of State: Aaron Ogden Dayton, Aaron Vail (twice), Asbury Dickins (ten times), Daniel Carroll Brent (five times), Daniel Fletcher Webster, Jacob L. Martin (three times), John Appleton, John Graham, Nicholas Philip Trist (four times), Richard K. Cralle, William S. Derrick (fifteen times), William Hunter (seven times); (2) the following chief clerks served as ad interim Secretary of the Treasury: Asbury Dickins (eight times), John McGinnis, and McClintock Young (twenty-seven times); and (3) the following chief clerks (or acting chief clerks) served as ad interim Secretary of War: Albert Miller Lee, Archibald Campbell (five times), Christopher Vandeventer, George Graham, John D. McPherson, John Robb (six times), Philip G. Randolph (five times), Samuel J. Anderson, and William K. Drinkard.

[7] *See* 1 *Trial of Andrew Johnson* at 580–81, 590–91 (entries for William L. Hodge and Peter Washington); Act of Mar. 3, 1849, ch. 108, § 13, 9 Stat. 395, 396–97 (providing for appointment by the Secretary of an "Assistant Secretary of the Treasury").

[8] *See Biographical Directory* at 14–17 (chief clerks of the Navy in 1809, 1814–15, 1829, 1831, and 1841); *id.* at 18 (chief clerk of the Department of the Interior, Daniel C. Goddard, in 1850 (twice)); *In re Cornelius Boyle*, 34th Cong., 3d Sess., Rep. C.C. 44, at 3, 12–13 (Ct. Cl. 1857) (identifying 13 times between 1831 and 1838 that chief clerk John Boyle was appointed as Acting Secretary of the Navy, for a total of 466 days).

payment for the performance of those additional duties. Attorney General Legaré concluded that Chief Clerk McClintock Young had a claim for compensation as "Secretary of the Treasury *ad interim*." *Pay of Secretary of the Treasury ad Interim*, 4 Op. Att'y Gen. 122, 122–23 (1842). And the Court of Claims later concluded that Congress should appropriate funds to compensate such officers for that service. *See, e.g.*, *In re Cornelius Boyle*, 34th Cong., 3d Sess., Rep. C.C. 44, at 9, 1857 WL 4155, at *4 (Ct. Cl. 1857) ("The office of Secretary *ad interim* being a distinct and independent office in itself, when it is conferred on the chief clerk, it is so conferred not because it pertains to him *ex officio*, but because the President, in the exercise of his discretion, sees fit to appoint him[.]"); *Dickins*, 34 Cong. Rep. C.C. 9, at 16, 1856 WL 4042, at *3.

Congress not only acquiesced in such appointments, but also required a non-Senate-confirmed officer to serve as a principal officer in some instances. In 1810, Congress provided that in the case of a vacancy in the office of the Postmaster General, "all his duties shall be performed by his senior assistant." Act of Apr. 30, 1810, ch. 37, § 1, 2 Stat. 592, 593. The senior assistant was one of two assistants appointed by the Postmaster General. *Id.* When Congress reorganized the Post Office in 1836, it again required that the powers and duties of the Postmaster General would, in the case of "death, resignation, or absence" "devolve, for the time being on the First Assistant Postmaster General," who was still an appointee of the Postmaster General. Act of July 2, 1836, ch. 270, § 40, 5 Stat. 80, 89. On four occasions before 1860, a First Assistant Postmaster General served as Postmaster General ad interim. *See Biographical Directory* at 17–19 (in 1841 (twice), 1849, and 1859).

On the eve of the Civil War in January 1861, President Buchanan summarized the Chief Executive's view of his authority to designate interim officers in a message submitted to Congress to explain who had been performing the duties of the Secretary of War:

> The practice of making . . . appointments [under the 1795 statute], whether in a vacation or during the session of Congress, has been constantly followed during every administration from the earliest period of the government, and *its perfect lawfulness has never, to my knowledge, been questioned or denied.* Without going back further than the year 1829, and without taking into the calculation any but the chief officers of the several departments, it will be found that provisional appointments to fill vacancies were made to the number of one hundred and seventy-nine . . . . Some of them were made while the Senate was in session, some which were made in vacation were continued in force long after the Senate assembled. *Sometimes, the temporary officer was the commissioned head of another department, sometimes a subordinate in the same department.*

Message from the President of the United States, 36th Cong., 2d Sess., Exec. Doc. No. 2, at 1–2 (1861) (emphases added).

3.

When it comes to vacancy statutes, the office of Attorney General presents an unusual case, albeit not one suggesting any different constitutional treatment. The office was established in the Judiciary Act of 1789, *see* Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 93, and the Attorney General was a member of the President's Cabinet, *see Office and Duties of Attorney*

General, 6 Op. Att'y Gen. 326, 330 (1854). But the Attorney General did not supervise an "executive department," and the Department of Justice was not established until 1870. *See* Act of June 22, 1870, ch. 150, § 1, 16 Stat. 162, 162. Thus, the terms of the 1792, 1795, and 1863 statutes, and of the Vacancies Act of 1868, did not expressly apply to vacancies in the office of the Attorney General.

Even so, the President made "temporary appointment[s]" to the office of Attorney General on a number of occasions. In 1854, Attorney General Cushing noted that "proof exists in the files of the department that temporary appointment has been made by the President in that office." *Office and Duties of Attorney General*, 6 Op. Att'y Gen. at 352. Because the 1792 and 1795 statutes did not provide the President with express authority for those temporary appointments, Cushing believed it "questionable" whether the President had the power, but he also suggested that "[p]erhaps the truer view of the question is to consider the two statutes as declaratory only, and to assume that the power to make such temporary appointment is a constitutional one." *Id.* Cushing nonetheless recommended the enactment of "a general provision . . . to remove all doubt on the subject" for the Attorney General and "other non-enumerated departments." *Id.*

Congress did not immediately remedy the problem that Cushing identified, but Presidents designated Acting Attorneys General, both before and after the Cushing opinion. In some instances, the President chose an officer who already held another Senate-confirmed office. *See Acting Attorneys General*, 8 Op. O.L.C. 39, 40–41 (1984) (identifying instances in 1848 and 1868 involving the Secretary of the Navy or the Secretary of the Interior).[9] In other instances, however, non-Senate-confirmed individuals served. After the resignation of Attorney General James Speed, for instance, Assistant Attorney General J. Hubley Ashton was the ad interim Attorney General from July 17 to July 23, 1866. *See id.* at 41; *Biographical Directory* at 20. At the time, the Assistant Attorney General was appointed by the Attorney General alone. *See* Act of March 3, 1859, ch. 80, 11 Stat. 410, 420 ("[T]he Attorney-General ... is hereby[] authorized to appoint one assistant in the said office, learned in the law, at an annual salary of three thousand dollars[.]").[10]

On other occasions between 1859 and 1868, Ashton and other Assistant Attorneys General who had not been Senate confirmed also signed several formal legal opinions as "Acting Attorney General," presumably when their incumbent Attorney General was absent or otherwise

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[9] This list is almost certainly under-inclusive because the published sources we have located identify only those who were Acting Attorney General during a period between the resignation of one Attorney General and the appointment of his successor. They do not identify individuals who may have performed the functions and duties of Attorney General when an incumbent Attorney General was temporarily unavailable on account of an absence or sickness that would now trigger either 28 U.S.C. § 508(a) or 5 U.S.C. § 3345(a).

[10] In 1868, Congress created two new Assistant Attorneys General positions to be "appointed by the President, by and with the advice and consent of the Senate," and specified that those positions were "in lieu of," among others, "the assistant attorney-general now provided for by law," which was "abolished" effective on July 1, 1868. Act of June 25, 1868, ch. 71, § 5, 15 Stat. 75, 75. A few weeks later, Ashton was confirmed by the Senate as an Assistant Attorney General. *See* 18 Sen. Exec. J. 369 (July 25, 1868). He was therefore holding a Senate-confirmed office when he served another stint as Acting Attorney General for several days at the beginning of the Grant Administration in March 1869, *see Biographical Directory* at 21, and when he signed five opinions as "Acting Attorney General" in September and October 1868.

unavailable. *See Case of Colonel Gates*, 11 Op. Att'y Gen. 70, 70 (1864) (noting that the question from the President "reached this office in [the Attorney General's] absence").[11] In 1873, when Congress reconciled the Vacancies Act of 1868 with the Department of Justice's organic statute, it expressly excepted the office of Attorney General from the general provision granting the President power to choose who would temporarily fill a vacant Senate-confirmed office. *See* Rev. Stat. § 179 (1st ed. 1875). There is accordingly no Attorney General-specific practice with respect to the pre-1998 statutes.

B.

Well before the Supreme Court's foundational decision in *Eaton* in 1898, courts approved of the proposition that acting officers are entitled to payment for services during their temporary appointments as principal officers. *See, e.g.*, *United States v. White*, 28 F. Cas. 586, 587 (C.C.D. Md. 1851) (Taney, Circuit J.) ("[I]t often happens that, in unexpected contingencies, and for temporary purposes, the appointment of a person already in office, to execute the duties of another office, is more convenient and useful to the public, than to bring in a new officer to execute the duty."); *Dickins*, 34 Cong. Rep. C.C. 9, at 17, 1856 WL 4042, at *3 (finding a chief clerk was entitled to additional compensation "for his services[] as acting Secretary of the Treasury and as acting Secretary of State"). Most significantly, in *Boyle*, the Court of Claims concluded that the chief clerk of the Navy (who was not Senate confirmed) had properly served as Acting Secretary of the Navy on an intermittent basis over seven years for a total of 466 days. 34 Cong. Rep. C.C. 44, at 8, 1857 WL 4155, at *1–2 (1857). The court expressly addressed the Appointments Clause question and distinguished, for constitutional purposes, between the office of Secretary of the Navy and the office of Acting Secretary of the Navy. *Id.* at 8, 1857 WL 4155 at *3 ("It seems to us . . . plain that the office of Secretary *ad interim* is a distinct and independent office in itself. It is not the office of Secretary[.]"). Furthermore, the court emphasized, the defining feature of the office of Secretary ad interim was its "temporary" character, and it must therefore be considered an inferior office:

> Congress has exercised the power of vesting the appointment of a Secretary *ad interim* in the President alone, and we think, in perfect consistency with the Constitution of the United States. We do not think that there can be any doubt that he is an *inferior* officer, in the sense of the Constitution, whose appointment may be vested by Congress in the President alone.

Id.

When the Supreme Court addressed this Appointments Clause issue in 1898, it reached a similar conclusion. In *United States v. Eaton*, the Court considered whether Congress could authorize the President alone to appoint a subordinate officer "charged with the duty of temporarily performing the functions" of a principal officer. 169 U.S. at 343. The statute

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[11] There were two additional opinions signed by Ashton as "Acting Attorney General" in 1864 and 1865 (11 Op. Att'y Gen. 482; 11 Op. Att'y Gen. 127); as well as four signed as "Acting Attorney General" by Assistant Attorney General John Binckley in 1867 (12 Op. Att'y Gen. 231; 12 Op. Att'y Gen. 229; 12 Op. Att'y Gen 222; 12 Op. Att'y Gen. 227); two signed as "Acting Attorney General" by Assistant Attorney General Titian J. Coffey in 1862 and 1863 (10 Op. Att'y Gen. 492; 10 Op. Att'y Gen. 377); and one signed as "Acting Attorney General" by Assistant Attorney General Alfred B. McCalmont in 1859 (9 Op. Att'y Gen. 389).

authorized the President "to provide for the appointment of vice-consuls . . . in such a manner and under such regulations as he shall deem proper." *Id.* at 336 (quoting Rev. Stat. § 1695 (2d ed. 1878)). The President's regulation provided that "[i]n case a vacancy occurs in the offices both of the consul and the vice-consul, which requires the appointment of a person to perform temporarily the duties of the consulate, the diplomatic representative has authority to make such appointment, with the consent of the foreign government . . . immediate notice being given to the Department of State." *Id.* at 338 (quoting regulation). Pursuant to that authority, Sempronius Boyd, who was the diplomatic representative and consul-general to Siam, appointed Lewis Eaton (then a missionary who was not employed by the government) as a vice-consul-general and directed him to take charge of the consulate after Boyd's departure. *Id.* at 331–32. With the "knowledge" and "approval" of the Department of State, Eaton remained in charge of the consulate, at times calling himself "acting consul-general of the United States at Bangkok," from July 12, 1892, until a successor vice-consul-general arrived on May 18, 1893. *Id.* at 332–33. In a dispute between Boyd's widow and Eaton over salary payments, the Court upheld Eaton's appointment, and the underlying statutory scheme, against an Appointments Clause challenge. *Id.* at 334–35, 352.

The Constitution expressly includes "Consuls" in the category of officers whose appointment requires the Senate's advice and consent. U.S. Const. art. II, § 2, cl. 2. The *Eaton* Court, however, concluded that a "vice-consul" is an inferior officer whose appointment Congress may "vest in the President" alone. 169 U.S. at 343. The Court held that Eaton's exercise of the authority of a Senate-confirmed office did not transform him into an officer requiring Senate confirmation:

> Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered.

Id. The Court concluded that more than forty years of practice "sustain the theory that a vice-consul is a mere subordinate official," which defeated the contention that Eaton's appointment required Senate confirmation. *Id.* at 344. In so doing, the Court cited Attorney General Cushing's 1855 opinion about appointments of consular officials, which had articulated the parameters for that practice. *See id.*[12] Significantly, the Court also made clear that its holding was not limited to vice-consuls or to the exigencies of Eaton's particular appointment. Rather, the Court emphasized that the temporary performance of a principal office is not the same as holding that office itself. The Court feared that a contrary holding would bear upon "any and every delegation of power to an inferior to perform *under any circumstances or exigency*." *Id.* at

[12] In the 1855 opinion, Attorney General Cushing explained that a vice-consul is "the person employed to fill the [consul's] place temporarily in his absence." *Appointment of Consuls*, 7 Op. Att'y Gen. 242, 262 (1855). He noted that consuls had to be Senate-confirmed, but vice-consuls were regarded as the "subordinates of consuls" and therefore did not require "nomination to the Senate." *Id.* at 247.

343 (emphasis added). In view of the long history of such appointments, *Eaton* simply confirmed the general rule. It did not work any innovation in that practice.

The Court has not retreated from *Eaton*, or narrowed its holding, but instead has repeatedly cited the decision for the proposition that an inferior officer may temporarily perform the duties of a principal officer without Senate confirmation. In *Edmond*, the Court observed that "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." 520 U.S. at 663. But the Court also observed that there is no "exclusive criterion for distinguishing between principal and inferior officers" and restated *Eaton*'s holding that "a vice consul charged temporarily with the duties of the consul" is an "inferior" officer. *Id.* at 661. In *Morrison*, the Court emphasized that a subordinate who performed a principal officer's duties "for a limited time and under special and temporary conditions" is not "thereby transformed into the superior and permanent official," and explained that a vice-consul appointed during the consul's "temporary absence" remained a "subordinate officer notwithstanding the Appointment Clause's specific reference to 'Consuls' as principal officers." 487 U.S. at 672–73 (quoting *Eaton*, 169 U.S. at 343)). Justice Scalia's dissenting opinion in *Morrison* similarly described *Eaton* as holding that "the appointment by an Executive Branch official other than the President of a 'vice-consul,' charged with the duty of temporarily preforming the function of the consul, did not violate the Appointments Clause." *Id.* at 721 (Scalia, J., dissenting). Likewise, in his dissenting opinion in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 537 F.3d 667 (D.C. Cir. 2008), *aff'd in part and rev'd in part*, 561 U.S. 447 (2010), then-Judge Kavanaugh cited *Eaton* to establish that "[t]he temporary nature of the office is the . . . reason that *acting* heads of departments are permitted to exercise authority without Senate confirmation." *Id.* at 708 n.17 (Kavanaugh, J. dissenting). Notably, Judge Kavanaugh also cited our 2003 opinion, which concluded that an OMB official who was not Senate confirmed could serve as Acting Director of OMB. *See id.* (citing *Acting Director of OMB*, 27 Op. O.L.C. at 123).

In *SW General*, the Court acknowledged the long history of Acts of Congress permitting the President to authorize officials to temporarily perform the functions of vacant offices requiring Senate approval. 137 S. Ct. at 935. Although the Court's opinion did not address the Appointments Clause, Justice Thomas's concurring opinion suggested that a presidential directive to serve as an officer under the Vacancies Reform Act should be viewed as an appointment, and that such a direction would "raise[] grave constitutional concerns because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate." *Id.* But Justice Thomas also distinguished *Eaton* on the ground that the acting designation at issue in *SW General* was not "special and temporary" because it had remained in place "for more than three years in offices limited by statute to a 4-year term." *Id.* at 946 n.1. Justice Thomas's opinion may therefore be understood to be consistent not only with *Eaton*, but also with the precedents of this Office, which have found it "implicit" that "the tenure of an Acting Director should not continue beyond a reasonable time." *Status of the Acting Director, Office of Management and Budget*, 1 Op. O.L.C. 287, 289–90 (1977). Even under Justice Thomas's opinion, Mr. Whitaker's designation as Acting Attorney General, which was made one week ago, and which would lapse in the absence of a presidential nomination, should qualify as "special and temporary" under *Eaton*.

C.

Executive practice and more recent legislation reinforces that an inferior officer may temporarily act in the place of a principal officer. In 1980, for instance, this Office raised no constitutional concerns in concluding (in the context of a non-executive office) that the Comptroller General was statutorily authorized to "designate an employee" of the General Accounting Office to be Acting Comptroller General during the absence or incapacity of both the Senate-confirmed Comptroller General and the Senate-confirmed Deputy Comptroller General. *Authority of the Comptroller General to Appoint an Acting Comptroller General*, 4B Op. O.L.C. 690, 690–91 (1980).

Most significantly, in 2003, this Office relied on *Eaton* in concluding that, although "the position of Director [of OMB] is a principal office, . . . an Acting Director [of OMB] is only an inferior officer." *Acting Director of OMB*, 27 Op. O.L.C. at 123. We did not think that that conclusion had been called into question by *Edmond*'s statement that an inferior officer is one who reports to a superior officer below the President, because in that case "[t]he Court held only that '[g]enerally speaking' an inferior officer is subordinate to an officer other than the President," and because *Edmond* did not deal with temporary officers. 27 Op. O.L.C. at 124 (citations omitted). Assuming that for constitutional purposes the official designated as acting head of an agency would need to be an inferior officer (and that the OMB official in question was not already such an officer), we further concluded that the President's designation of an acting officer under the Act should be regarded as an appointment by the President alone—a constitutionally permissible mode for appointing an inferior officer. *Id.* at 125. Since then, Presidents George W. Bush and Obama each used their authority under the Vacancies Reform Act to place non-Senate-confirmed Chiefs of Staff in the lines of succession to be the acting head of several federal agencies.[13] In three instances, President Obama placed a Chief of Staff above at least one Senate-confirmed officer within the same department.[14] And, in practice, during the Bush, Obama, and Trump Administrations, multiple unconfirmed officers were designated to serve as acting agency heads, either under the Vacancies Reform Act or another office-specific

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[13] See Memorandum, Designation of Officers of the Social Security Administration, 71 Fed. Reg. 20333 (Apr. 17, 2006); Memorandum, Designation of Officers of the Council on Environmental Quality, 73 Fed. Reg. 54487 (Sept. 18, 2008) (later superseded by 2017 memorandum cited below); Memorandum, Designation of Officers of the Overseas Private Investment Corporation to Act as President of the Overseas Private Investment Corporation, 76 Fed. Reg. 33613 (June 6, 2011); Memorandum, Designation of Officers of the Millennium Challenge Corporation to Act as Chief Executive Officer of the Millennium Challenge Corporation, 77 Fed. Reg. 31161 (May 21, 2012); Memorandum, Designation of Officers of the General Services Administration to Act as Administrator of General Services, 78 Fed. Reg. 59161 (Sept. 20, 2013); Memorandum, Designation of Officers of the Office of Personnel Management to Act as Director of the Office of Personnel Management, 81 Fed. Reg. 54715 (Aug. 12, 2016); Memorandum, Providing an Order of Succession Within the National Endowment of the Humanities, 81 Fed. Reg. 54717 (Aug. 12, 2016); Memorandum, Providing an Order of Succession Within the National Endowment of the Arts, 81 Fed. Reg. 96335 (Dec. 23, 2016); Memorandum, Designation of Officers or Employees of the Office of Science and Technology Policy to Act as Director, 82 Fed. Reg. 7625 (Jan. 13, 2017); Memorandum, Providing an Order of Succession Within the Council on Environmental Quality, 82 Fed. Reg. 7627 (Jan. 13, 2017).

[14] See Executive Order 13612, Providing an Order of Succession Within the Department of Agriculture, 77 Fed. Reg. 31153 (May 21, 2012); Executive Order 13735, Providing an Order Within the Department of the Treasury, 81 Fed. Reg. 54709 (Aug. 12, 2016); Executive Order 13736, Providing an Order of Succession Within the Department of Veterans Affairs, 81 Fed. Reg. 54711 (Aug. 12, 2016).

statute.[15] Those determinations reflect the judgments of these administrations that the President may lawfully designate an unconfirmed official, including a Chief of Staff, to serve as an acting principal officer.

Congress too has determined in the Vacancies Reform Act and many other currently operative statutes that non-Senate-confirmed officials may temporarily perform the functions of principal officers. By its terms, the Vacancies Reform Act applies to nearly all executive offices for which appointment "is required to be made by the President, by and with the advice and consent of the Senate." 5 U.S.C. § 3345(a); *see id.* § 3349c(1)–(3) (excluding only certain members of multi-member boards, commissions, or similar entities). And it specifically provides for different treatment in some respects depending on whether the vacant office is that of an agency head. *Id.* § 3348(b)(2). Moreover, the statute contemplates that non-Senate-confirmed officials will be able to serve as acting officers in certain applications of section 3345(a)(1) as well as in all applications of section 3345(a)(3), which refers to an "officer or employee." The latter provision had no counterpart in the Vacancies Act of 1868, but it was not completely novel, because clerks, who were not Senate-confirmed, were routinely authorized to serve as acting officers under the 1792 and 1795 statutes.[16]

Congress has also enacted various statutes that enable deputies not confirmed by the Senate to act when the office of the Senate-confirmed agency head is vacant. *See* 12 U.S.C. § 4512(f) (providing for an Acting Director of the Federal Housing Finance Agency); *id.* § 5491(b)(5) (providing for an Acting Director of the Bureau of Consumer Financial Protection); 21 U.S.C. § 1703(a)(3) (providing for an Acting Director of the Office of National Drug Control Policy); 40 U.S.C. § 302(b) (providing for an Acting Administrator of the General Services Administration); 44 U.S.C. § 2103(c) (providing for an Acting Archivist). All of those provisions contemplate the temporary service of non-Senate-confirmed officials as acting

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[15] For example, during this administration, Grace Bochenek, a non-Senate-confirmed laboratory director, served as Acting Secretary of Energy from January 20, 2017, until March 2, 2017; Tim Horne, a non-Senate-confirmed Regional Commissioner, served as Acting Administrator of the General Services Administration from January 20, 2017, until December 12, 2017 (pursuant to a designation under a GSA-specific statute); Phil Rosenfelt, a non-Senate-confirmed Deputy General Counsel, served as Acting Secretary of Education from January 20, 2017, until February 7, 2017 (pursuant to a designation under a statute specific to that department); Don Wright, a non-Senate-confirmed Deputy Assistant Secretary, served as Acting Secretary of Health and Human Services from September 30, 2017, until October 10, 2017; Peter O'Rourke, a non-Senate-confirmed Chief of Staff, served as Acting Secretary of Veterans Affairs from May 29, 2018, until July 30, 2018; and Shelia Crowley, a non-Senate-confirmed Chief of Operations, served, upon President's Obama's designation, as Acting Director of the Peace Corps from January 20, 2017, until November 16, 2017. During the Obama administration, Darryl Hairston, a career employee, served as Acting Administrator of the Small Business Administration from January 22, 2009, until April 6, 2009, and Edward Hugler, a non-Senate-confirmed Deputy Assistant Secretary, served as Acting Secretary of Labor from February 2, 2009, until February 24, 2009. During the Bush Administration, Augustine Smythe, a non-Senate-confirmed Executive Associate Director served as Acting Director of OMB from June 10, 2003, until late June 2003, consistent with our opinion.

[16] Echoing the movement in the early nineteenth century to chief clerks rather than Senate-confirmed officials from other departments, section 3345(a)(3) was reportedly the product of a desire to give the President "more flexibility" to use "qualified individuals who have worked within the agency in which the vacancy occurs for a minimum number of days and who are of a minimum grade level." S. Rep. No. 105-250, at 31 (additional views of Sen. Glenn et al.); *id.* at 35 (minority views of Sens. Durbin and Akaka).

principal officers, and these statutes would appear to be unconstitutional if only a Senate-confirmed officer could temporarily serve as an acting principal officer.

Similarly, other current statutes provide that, although the deputy is appointed by the President with the Senate's advice and consent, the President or the department head may designate another official to act as the agency head, even though that official is not Senate-confirmed. *See* 20 U.S.C. § 3412(a)(1) (providing that "[t]he Secretary [of Education] shall designate the order in which other officials of the Department shall act for and perform the functions of the Secretary . . . in the event of vacancies in both" the Secretary and Deputy Secretary positions); 31 U.S.C. § 502(f) (providing that the President may designate "an officer of the Office [of Management and Budget] to act as Director"); 38 U.S.C. § 304 (providing that the Deputy Secretary of Veterans Affairs serves as Acting Secretary "[u]nless the President designates another officer of the Government"); 42 U.S.C. § 7132(a) (providing that "[t]he Secretary [of Energy] shall designate the order in which the Under Secretary and other officials shall act for and perform the functions of the Secretary . . . in the event of vacancies in both" the Secretary and Deputy Secretary positions); 49 U.S.C. § 102(e) (providing that the Secretary of Transportation shall establish an order of succession that includes Assistant Secretaries who are not Senate-confirmed for instances in which the offices of the Secretary, Deputy Secretary, and Under Secretary of Transportation for Policy are vacant); 40 U.S.C. § 302(b) (providing that the Deputy Administrator serves as Acting Administrator of General Services when that office "is vacant," "unless the President designates another officer of the Federal Government"); *cf.* 44 U.S.C. § 304 (limiting the individuals whom the President may choose to serve as Acting Director of the Government Printing Office to those who occupy offices requiring presidential appointment with the Senate's advice and consent).

Indeed, if it were unconstitutional for an official without Senate confirmation to serve temporarily as an acting agency head, then the recent controversy over the Acting Director of the CFPB should have been resolved on that ground alone—even though it was never raised by any party, the district court, or the judges at the appellate argument. On November 24, 2017, the Director of the CFPB appointed a new Deputy Director, expecting that she would become the Acting Director upon his resignation later that day. *Acting Director of CFPB*, 41 Op. O.L.C. __, at *2 n.1. The Director of the CFPB relied on 12 U.S.C. § 5491(b)(5), which expressly contemplates that a non-Senate-confirmed official (the Deputy Director) will act as a principal officer (the Director). The President, however, exercised his authority under 5 U.S.C. § 3345(a)(2) to designate the Director of OMB as Acting Director of the CFPB. *See English*, 279 F. Supp. 3d at 330. When the Deputy Director challenged the President's action, we are not aware that anyone ever contended that the Deputy Director was constitutionally ineligible to serve as Acting Director because she had not been confirmed by the Senate. If the newly installed Deputy Director of the CFPB could lawfully have become the Acting Director, then the Chief of Staff to the Attorney General may serve as Acting Attorney General in the case of a vacancy.

D.

The constitutionality of Mr. Whitaker's designation as Acting Attorney General is supported by Supreme Court precedent, by acts of Congress passed in three different centuries, and by countless examples of executive practice. To say that the Appointments Clause now

prohibits the President from designating Mr. Whitaker as Acting Attorney General would mean that the Vacancies Reform Act and a dozen statutes were unconstitutional, as were countless prior instances of temporary service going back to at least the Jefferson Administration.

There is no question that Senate confirmation is an important constitutional check on the President's appointments of senior officers. The Senate's role "serves both to curb Executive abuses of the appointment power, and to promote a judicious choice of [persons] for filling the offices of the union." *Edmond*, 520 U.S. at 659 (internal quotation marks omitted). At the same time, the "constitutional process of Presidential appointment and Senate confirmation . . . can take time: The President may not promptly settle on a nominee to fill an office; the Senate may be unable, or unwilling, to speedily confirm the nominee once submitted." *SW General*, 137 S. Ct. at 935. Despite their frequent disagreements over nominees, for over 200 years, Congress and the President have agreed upon the value and permissibility of using temporary appointments, pursuant to limits set by Congress, in order to overcome the delays of the confirmation process.

If the President could not rely on temporary designations for principal offices, then the efficient functioning of the Executive Branch would be severely compromised. Because most Senate-confirmed officials resign at the end of an administration, a new President must rely on acting officials to serve until nominees have been confirmed. If Senate confirmation were required before anyone could serve, then the Senate could frustrate the appropriate functioning of the Executive Branch by blocking the confirmation of principal officers for some time. *See* 144 Cong. Rec. 27496 (Oct. 21, 1998) (statement of Sen. Thompson) (noting that section 3345(a)(3) had been added because "[c]oncerns had been raised that, particularly early in a presidential administration, there will sometimes be vacancies in first assistant positions, and that there will not be a large number of Senate-confirmed officers in the government," as well as "concerns . . . about designating too many Senate-confirmed persons from other offices to serve as acting officers in additional positions"). A political dispute with the Senate could frustrate the President's ability to execute the laws by delaying the appointment of his principal officers.

The problems with a contrary rule are not limited to the beginning of an administration. Many agencies would run into problems on an ongoing basis, because they have few officers subject to Senate confirmation. Thus, when a vacancy in the top spot arises, such an agency would either lack a head or be forced to rely upon reinforcements from Senate-confirmed appointees outside the agency. Those outside officers may be inefficient choices when a non-Senate-confirmed officer within the agency is more qualified to act as a temporary caretaker. At best, designating a Senate-confirmed officer to perform temporary services would solve a problem at one agency only by cannibalizing the senior personnel of another.

It is true that these concerns do not apply to the current circumstances of the Department of Justice, which is staffed by a number of Senate-confirmed officers. Following Attorney General Sessions's resignation, the President could have relied upon the Deputy Attorney General, the Solicitor General, or an Assistant Attorney General to serve as Acting Attorney General. But the availability of potential alternatives does not disable Congress from providing the President with discretion to designate other persons under section 3345(a)(3) of the Vacancies Reform Act. Nothing in the text of the Constitution or historical practice suggests that

the President may turn to an official who has not been confirmed by the Senate if, but only if, there is no appropriate Senate-confirmed official available.

III.

The President's designation to serve as Acting Attorney General of a senior Department of Justice official who does not currently hold a Senate-confirmed office is expressly authorized by 5 U.S.C. § 3345(a)(3). Mr. Whitaker has been designated based upon a statute that permits him to serve as Acting Attorney General for a limited period, pending the Senate's consideration of a nominee for Attorney General. Consistent with our 2003 opinion, with *Eaton*, and with two centuries of practice, we advised that his designation would be lawful.

STEVEN A. ENGEL
Assistant Attorney General