

## Legal Sidebar

# Help Wanted: Supreme Court Holds Vacancies Act Prohibits Nominees from Serving as Acting Officers

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As reported by a number of news organizations, many executive branch positions that the President may staff only with the advice and consent of the Senate [remain unfilled](#). An incredibly complex statute, the [Federal Vacancies Reform Act of 1998](#) (Vacancies Act), governs when “acting” officers may temporarily perform the duties of those advice-and-consent positions when the office is vacant. A number of notable positions in the current administration are filled by acting officers, including, for example, the [Inspector General of the Department of Defense](#), the [Commissioner of the Bureau of Labor Statistics](#), and the [Solicitor General](#). A recent Supreme Court case interpreting the Vacancies Act, [NLRB v. SW General, Inc.](#), may limit the ability of some of those acting officers to continue serving in their current acting capacity if the President nominates those acting officers to more permanently serve in that office.

Foundationally, the [Appointments Clause of the Constitution](#) authorizes the President to “nominate, and by and with the advice and consent of the Senate,” to appoint principal “officers of the United States.” Thus, these constitutional “officers” may only be appointed to their position with Senate approval. Historically, the President and Congress have sometimes found it difficult to agree on appropriate candidates, and advice-and-consent positions may sit vacant for extended periods of time. In 1868, Congress enacted [the first version of a law](#) that specified who would act as the temporary head of an executive department if the current head resigned, died, or was otherwise absent. While the law has been amended several times over the years, Congress significantly [revamped it in 1998](#), enacting the current version of the Vacancies Act. The modern Vacancies Act [exclusively governs](#) the temporary filling of most advice-and-consent positions. Consequently, unless a separate, more specific statutory provision provides otherwise, an individual may only serve as an acting officer if the terms of the Vacancies Act are followed.

Under the Vacancies Act, [5 U.S.C. § 3345](#), subsection (a)(1), if an advice-and-consent position becomes vacant, the default rule is that the “first assistant” to that office “shall” become the acting officer, performing the duties of the office for no longer than [210 days](#). (This 210-day time period runs from the beginning of the vacancy and is tolled if the President submits a nomination to Congress.) However, the President may also direct two other classes of people to serve as an acting officer of an agency instead of the “first assistant”: either, under subsection (a)(2), a person currently serving in a different advice-and-consent position; or, under subsection (a)(3), a senior officer or employee of that agency who served in the agency for at least 90 days during the year preceding the vacancy.

Earlier this year, the Supreme Court interpreted a provision of the Vacancies Act that places certain limitations on the ability of these people to serve as an acting officer. [Subsection \(b\)\(1\)](#) provides that, “notwithstanding subsection (a)(1),” (that is, the default rule), “a person may not serve as an acting officer” if, (A) in the prior year, that person did not serve as a first assistant to that office for at least 90 days, *and* (B) the President formally nominates that person to that office. (And although it was not at issue in the Court’s opinion, there is also an exception to this exception: [subsection \(b\)\(2\)](#) states that subsection (b)(1) does not apply “to any person” who is serving in a first-assistant position that is itself an advice-and-consent office, if “the Senate has approved the appointment of such person to such office.”)

In [NLRB v. SW General, Inc.](#), SW General challenged an adverse decision of the National Labor Relations Board (NLRB). The company argued that the underlying complaint was invalid because it had been issued under the authority of an acting officer, Lafe Solomon, who was serving in violation of the Vacancies Act. Solomon was directed by the

President to serve as the NLRB's acting general counsel after the prior general counsel resigned in June 2010. Solomon was eligible to serve as the acting officer under subsection (a)(3) of the Vacancies Act, as a senior employee at the NLRB. In January 2011, the President, however, nominated Solomon to serve as permanent general counsel, after which Solomon authorized the complaint against SW General.

SW General argued that once the President nominated Solomon to the office of general counsel of the NLRB, subsection (b)(1) of the Vacancies Act barred him from serving as acting officer, because he had not previously served as the first assistant to that office. In response, the NLRB claimed that subsection (b)(1) applied only to *first assistants* serving under subsection (a)(1). Solomon had been appointed as a *senior officer* under subsection (a)(3), not as a first assistant.

The Supreme Court, in [an opinion written by Chief Justice Roberts](#), agreed with SW General. In so ruling, the Court emphasized the broad nature of the language in subsection (b)(1), which states that “*a person* may not serve as an acting officer,” without expressly limiting the class of “person” to which the subsection applies. Accordingly, “a person” in (b)(1) necessarily included senior officers, such as Solomon. Chief Justice Roberts acknowledged that subsection (b)(1) singles out subsection (a)(1) by stating that a person may not serve as an acting officer “notwithstanding subsection (a)(1).” But he concluded that the “notwithstanding” clause merely indicated that Congress intended this restriction on serving as an acting officer to apply even over the mandatory language of subsection (a)(1). According to the majority opinion, Congress foresaw the possibility that those two provisions would conflict and communicated that the restriction in subsection (b)(1) should prevail “notwithstanding” the mandatory nature of the default rule. Thus, the fact that subsection (b)(1) mentions only subsection (a)(1) does not mean that it does not *also* apply to subsections a(2) and a(3).

Justice Sotomayor [dissented](#) in an opinion joined by Justice Ginsburg. The dissent maintained that the prohibition on acting service in subsection (b)(1) applied only to first assistants serving as acting officers under subsection (a)(1). [The dissent highlighted](#) the “decade-plus practice,” apparently assented to by the Senate and the President, of acting officers continuing to serve in an acting capacity after they had been formally nominated to that office. The majority opinion, however, argued that the evidence of this practice mustered by the dissent was insignificant, especially in light of the clear statutory text.

Under the prevailing interpretation of the Vacancies Act, then, subsection (b) prohibits *any* person from serving as an acting officer once the President nominates them to that office, unless that person is currently in a “first assistant” position, and either has served in that position for at least 90 days, or was appointed to that position through the advice-and-consent process. As the dissent noted, this interpretation of the statute may represent a significant departure from prior practice. In some ways, though, the case simplified the rule, by clarifying that the prohibition in subsection (b)(1) applies to all classes of people who might serve as acting officers.

Nonetheless, the Vacancies Act remains quite complicated. In particular, the Court did not delve into the consequences of violating the Vacancies Act. Generally, the actions of any person purportedly serving as acting officer in violation of subsection (b)(1) will “[have no force or effect](#).” However, the statute also provides, [in subsection \(e\) of 5 U.S.C. § 3348](#), that certain offices are exempt from the provision that nullifies the actions of an officer who violates the act. Accordingly, even if acting officers in those excepted positions violate the Vacancies Act, it is not necessarily the case that their actions will have no force and effect. The [Court did not decide](#) what the consequences are if such officers violate the Vacancies Act, leaving that potentially complex question open.

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