AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers/Appointment and Removal Power

**Doolin Security Savings Bank, FSB v. Office of Thrift Supervision, 139 F.3d 203 (DC Cir. 1998)**

*The Vacancies Act provides rules for temporarily filling executive offices while the Senate is in session. Early in the Clinton administration, Jonathan L. Fiechter was serving as the acting director of the Office of Thrift Supervision (OTS) in the Treasury Department. Fiechter had previously served as the deputy director of the OTS, but was never Senate-confirmed for the position of director. He was named acting director by the departing OTS director, Timothy Ryan, who resigned shortly after George H.W. Bush lost his bid for reelection.*

*In 1993, Fiechter signed off on enforcement action against Doolin Security Savings Bank. In 1996, Fiechter was still acting director when an administrative law judge reached a finding that Doolin had engaged in unsound banking practices. Fiechter resigned to accept a position at the World Bank before acting on that finding. His successor, Nicolas P. Retsinas, issued a cease and desist order against Doolin in 1997. Retsinas, who had been serving as assistant secretary of Housing and Urban Development, had been named the acting director of OTS by President Bill Clinton under the terms of the Vacancies Act. Less than a month later, the Senate confirmed Ellen Seidman as director of OTS.*

*Doolin Security Savings Bank filed a motion to have the order dismissed on the grounds that the enforcement action had been initiated by an acting director who had not been properly appointed under the terms of the Vacancies Act. The D.C. Circuit Court denied that motion, concluding that Retsinas had been properly appointed under the Vacancies Act and that his order effectively ratified all the previous legal action by the OTS against Doolin. The Vacancies Act limited how long an officer appointed under its terms could continue to fill the role, but it did not attempt to limit how long the president took to submit a nomination for Senate confirmation for positions within the executive branch or how long a president might take to formally name an acting officer.*

Judge [RANDOLPH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I215b0bc634f411e9bc5c825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I215b0bc634f411e9bc5c825c4b9add2e).

Article II of the Constitution allows the President to appoint Officers of the United States by and with the consent of the Senate. The President may also make temporary appointments of Officers without Senate confirmation for "Vacancies that may happen during the Recess of the Senate." What if an appointee resigns or dies while the Senate is in session? Must the office remain unoccupied unless the President nominates, and the Senate confirms, someone else? For more than two centuries, legislation has given an answer. In its modern version, the Vacancies Act authorizes the Executive to fill positions temporarily when a vacancy occurs as a result of an officer's resignation, death, illness or absence. A dispute about the meaning of the Vacancies Act is at the center of this case.

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Because the OTS Director exercises "significant authority pursuant to the laws of the United States," the occupant of the position undoubtedly qualifies as an "Officer" under the Constitution, and is thereby subject to the Appointments Clause, Article II, § 2, cl. 2, of the Constitution. *Buckley v. Valeo* (1976). Congress did not vest the Director's appointment in the President or the Treasury Secretary. Instead the governing statute provides that the Director must "be appointed by the President, by and with the advice and consent of the Senate." "The Director shall be appointed for a term of 5 years," but an incumbent may hold over "after the expiration of the term for which appointed until a successor Director has been appointed."

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Despite the Appointments Clause, the statute governing OTS, and the significant regulatory responsibility lodged in OTS, the agency has a history of being run by individuals who were neither nominated by the President nor confirmed by the Senate for the position of OTS Director.

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The conditions for invoking § 3345 and § 3346 [of the Vacancies Act] are the death, resignation, illness or absence of the official. When any one of these events occurs, the "first assistant"--if there is one--automatically fills the vacant position, unless the President, acting pursuant to § 3347, "direct[s]" someone else to perform the duties of the office. Under § 3347, the someone else must be an Executive officer holding another appointed position for which he was confirmed by the Senate. Retsinas qualified. He had been confirmed by the Senate as Assistant Secretary of Housing and Urban Development and was serving in that capacity when President Clinton directed him to take over at OTS.

This brings us to § 3348. Of the four causes of a vacancy mentioned in the Act, two--illness and absence--are ordinarily transitory. Apparently for this reason, the Act contains no time limits regarding vacancies resulting from illness or absence. Vacancies resulting from death or resignation are another matter. Here there are time limits. Section 3348(a) provides that a vacancy caused by either of these events may be filled pursuant to § 3347 "for not more than 120 days." An exception to the 120-day limitation is provided if a nomination to fill the vacancy has been submitted to the Senate during this period, in which case an individual occupying the office may remain "until the Senate confirms the nomination," or until 120 days after the Senate rejects the nomination or the nomination is withdrawn.

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If one focused only on the introductory clause in § 3348(a)--"A vacancy caused by death or resignation"--it might be supposed that the departure of anyone occupying the office, even an unappointed acting official, could trigger the Vacancies Act. Viewed in context, however, it becomes clear that the statute contemplates only the death, resignation, illness or absence of someone appointed to the position by the President. . . .

. . . . [T]he person whose "vacancy" brings the Vacancies Act into operation must have ascended to the post through a Presidential appointment. There may be instances when a person, not constitutionally appointed, temporarily performs the duties of the "head of an Executive agency" (§ 3345) or of an "officer" in an Executive bureau (§ 3346). The Vacancies Act itself gives rise to this prospect. But the person's performance of those duties does not make him "head of an Executive agency" or an "officer" in a department's bureau for the purposes of the Act. Otherwise, § 3348's time limitation could be easily avoided by a series of temporary replacements followed by resignations, with each resignation triggering a new 120-day period.

In short, § 3345 and § 3346--and thus § 3347--apply only to those vacancies caused by the departure of an officer of the Executive Branch who had been appointed by the President. Ryan was such an "officer." Fiechter was not. It follows that even if Fiechter had lawfully been serving as Acting Director, his resignation did not create a "vacancy" enabling the President to invoke the Vacancies Act and name Retsinas to the empty post. Only Ryan's departure triggered the President's authority under § 3347 to direct someone to perform the duties of the vacant position.

We now come to the heart of the controversy. Does the § 3348 clock begin ticking the moment there is a "vacancy" caused by the death or resignation of a constitutionally appointed officer? The Bank believes so. If the Bank is right, the deadline for filling the Director's position passed years before the President named Retsinas. On the other hand, OTS and the Department of Justice as amicus curiae believe the time limit in § 3348 does not begin running until someone actually takes office pursuant to the Vacancies Act, either through a "detail" under § 3345 or § 3346 or through a Presidential directive pursuant to § 3347. On this view, Retsinas was lawfully serving as Director on March 29, 1997, when he issued the cease and desist order against the Bank.

The language of the Vacancies Act strongly supports OTS's position. Nothing in the Act expressly deals with the amount of time that may transpire before the President exercises his § 3347 authority to designate a temporary replacement. . . . The time limit is placed not on Presidential action, but on the tenure of the President's designee.

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The origins of the modern Vacancies Act go back to the beginning of the nation. President Washington's first cabinet appointments--Hamilton for the Treasury Department, Knox for the War Department and Jefferson for State--were accomplished in a flash. Nominations were sent up one day in 1789; Senate confirmation followed on the same day, or the next. By the election year 1792, Congress must have realized that transitions might not always go so smoothly; that, in any event, some provision should be made for temporary absences and illnesses of Presidential appointees; and that, as Justice Holmes later put it, "the machinery of government would not work if it were not allowed a little play in its joints." The Second Congress passed An Act making alterations in the Treasury and War Departments, section 8 of which provided that "in case of the death, absence ... or sickness" of the Secretaries of State, Treasury or the War Department, or of any officer in those departments, "it shall be lawful for the President ... to authorize any person or persons at his discretion to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease." Three years later, in 1795, during the second Washington administration, Congress enacted an amendment limiting the length of service of those occupying offices under section 8: "no one vacancy shall be supplied, in manner aforesaid, for a longer term than six months."

Thus, from the beginning Congress limited how long the President's designee could serve, not how swiftly the President had to use this legislative authority to fill the vacancy. . . .

. . . . The Vacancies Act was never meant to give the President an "incentive" to fill vacant positions with appointees confirmed by the Senate. The function of the Act is to allow some breathing room in the constitutional system for appointing officers to vacant positions, to validate the actions of those temporarily occupying the positions. If no one is detailed or directed pursuant to § 3345, or § 3346, or § 3347, or if someone is named but the 120-day period in § 3348(a) expires, the position will either remain vacant or wind up being occupied by someone not constitutionally entitled to exercise the powers of the office. In either situation, there will still be incentives for the President to send up a nominee to fill the vacancy. The incentives derive from the Appointments Clause of the Constitution and the political and legal consequences of staffing high positions with non-appointed "acting" officials. *Ryder v. United States* (1995).

We therefore conclude that the President legally named Retsinas to serve as OTS Director pursuant to § 3347 and that Retsinas lawfully occupied that position on March 29, 1997, when he issued the cease and desist order against the Bank.

In addition to attacking Retsinas's status, the Bank, joined by an amicus curiae, argues that his predecessor, Fiechter, illegally exercised authority as Acting Director of OTS. Fiechter became Acting Director when outgoing Director Ryan delegated to him "all the powers of the Director." Although the OTS statute permits the Director to delegate "any power," the Bank denies that it allows a Director to delegate "all powers" and then immediately resign, never to take back the reins or monitor the delegation. . . .

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. . . . To require another Director sign a new notice containing charges already found to be supported, not merely by probable cause, but by substantial evidence would do nothing but give the Bank the benefit of delay (assuming that we would refuse to stay our judgment pending reinstitution of agency proceedings against the Bank). Because we hold that Retsinas effectively ratified the Notice of Charges signed by Fiechter at a time when he could have initiated the charges himself, we do not decide whether Fiechter lawfully occupied the position of Director.