



Trump's Stand-In Bureaucrats May Have Overstayed Limits

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December 12, 2017

President Donald Trump's slow pace of hiring for key government jobs has left stand-ins occupying positions for so long that it may violate time limits on acting appointments, potentially resulting in decisions being overturned in court.

Enforcement actions as well as policy decisions on a variety of topics, such as easing restrictions on methane emissions from oil wells or permitting schools to offer 1 percent milk, could be challenged on the grounds that they were enacted by officials who had been in acting roles too long or were improperly delegated authority.

"We are considering all legal options to prevent illegal policy changes being forced upon the American people by Donald Trump's political appointees," said Harrell Kirstein, a spokesman for American Bridge 21st Century, a Democratic political action committee.

Trump is nearing the one-year mark of his term but has yet to name permanent appointees for about 250 of the roughly 620 key government positions that require Senate confirmation, according to the nonpartisan, nonprofit Partnership for Public Service. That's left acting officials in as many as a dozen positions for which no one has been nominated, including an assistant secretary of state and the head of the Drug Enforcement Administration, being occupied by acting officials, according to agency websites or representatives.

1998 Act

Under the 1998 Federal Vacancies Reform Act, a position vacated by a presidential transition generally cannot be filled by acting officials for more than 300 days unless a permanent nominee

has been named and is awaiting Senate confirmation. That deadline for most positions passed in mid-November.

The law, which sets a shorter 210-day deadline outside of transitions, is designed to prevent presidents from evading Senate review of appointees.

According to an [October report](#) from the [Congressional Research Service](#), the Vacancies Act does not provide a mechanism for ousting officials who have stayed past the deadline but offers grounds for actions they take to be voided in court.

“For almost all positions, if you’re serving in violation of the Vacancies Act, anything that you do is void as a matter of law,” said Anne Joseph O’Connell, a law professor at the [University of California, Berkeley](#).

Trump has been slower than any recent predecessor to staff up his administration, making the 300-day deadline a much bigger problem, said the Partnership for Public Service’s president, Max Stier.

Critical Positions

The White House didn’t respond to emailed questions on the topic. But several agency representatives responded by urging the Senate to confirm permanent nominees or defending the executive branch’s pace in naming them.

"Our primary goal is to find the right permanent official for these critical leadership roles rather than simply fill for expedience," Department of Veterans Affairs press secretary Curt Cashour said in an email.

In many cases the administration has downgraded the title of an acting official, while delegating the authority to carry out the job’s duties to them. After an inquiry by Bloomberg, the Secretary of Veterans Affairs retroactively delegated authority to the official who had been serving as acting undersecretary for benefits to perform duties of that role without the acting title, Cashour said.

A delegation of authority, however, has to be consistent with the Constitution, Vacancies Act limitations on which duties can be passed to others and with the laws governing each agency. "This administration seems to be trying to push the boundaries on allocating power to people who haven’t been confirmed by the Senate," said Nina Mendelson, who teaches administrative law at the [University of Michigan](#).

At the [Justice Department](#), acting officials were listed as recently as last week as acting heads of the Community Relations Service, the Drug Enforcement Administration, and the Bureau of Alcohol, Tobacco, and Firearms.

This week, following inquiries from Bloomberg, the Community Relations Service website was updated and no longer lists its head, Deputy Director Gerri Ratliff, as an acting director. A spokesperson for ATF, Regina Milledge-Brown, said Thomas Brandon was now leading the agency as "deputy director, head of agency."

A Justice Department official, who spoke on the condition of anonymity, said that the attorney general has authority to designate an acting DEA administrator under the department's reorganization plan, which doesn't include a 300-day limit.

When asked last week about four officials who had been listed as acting in an agency memo, the Environmental Protection Agency said in an email that "acting career staff will continue to serve in their respective roles" while waiting for the confirmation of permanent nominees.

After a follow-up question about the Vacancies Act, the agency said in an email that officials whose time as acting appointees had run out would go back to their standard positions and perform whatever duties of the vacant spot they were legally allowed to perform.

The Department of Interior, after being asked about officials listed as acting on its website, said that one was in fact not an acting official and the other was in a position not covered by the Vacancies Act. It then amended its statement to say that actually neither was an acting official. Both officials are still listed as acting on the department's website.

"Every president going back at least to Clinton -- and really further than that -- has basically tried to push the legal boundaries as much as they can," said Thomas Berry, an attorney who authored a paper for the Cato Institute criticizing delegation of authority to a former acting official during the administration of President Barack Obama.

Supreme Court

In March, the U.S. Supreme Court upheld a decision vacating an order issued against an ambulance company by the National Labor Relations Board, ruling that the Obama-appointed acting general counsel behind it had been improperly serving in violation of a Vacancies Act restriction on someone being both the acting official and nominee for the same position.

Michael Reynolds for most of 2017 was acting director of the National Park Service, but the website now identifies him as its deputy director for operations, "exercising the authority of Director for the National Park Service." But that web page is still illustrated with a photo of him captioned "National Park Service Acting Director."

At least four State Department officials, including the one responsible for South and Central Asia, were described in late October or early November announcements or briefing transcripts as acting assistant secretaries. In December, State Department websites called each a "principal deputy assistant secretary" instead.

Methane Rule

Last week, the Bureau of Land Management published a final rule delaying many requirements in the Obama administration's controversial rule restricting methane emissions from oil drilling on public lands. The one-year delay was signed by Katharine MacGregor, who had previously been identified as an acting assistant secretary but in the Federal Register was called a deputy assistant secretary "exercising the authority of the assistant secretary."

MacGregor is still identified as an acting assistant secretary in a photo gallery on the Interior Department's website, which includes a photo she provided from a fishing trip in Yellowstone National Park.

"Delaying the methane rule was done in full compliance," Heather Swift, an Interior Department spokeswoman, said in an email.

"Some of these actions are almost certainly not legally authorized, and some are in more of a gray zone," said Mendelson. She cited the methane decision as one in the gray zone.

On Nov. 22, a week after the 300-day deadline elapsed without a permanent nominee being announced for the job of undersecretary of Agriculture for food, nutrition, and consumer services, Brandon Lipps, who had been appointed an acting deputy undersecretary, issued an interim final rule extending schools' ability to offer products including flavored 1 percent milk. The department's regulations specify that authority over the school lunch program belongs to the undersecretary.

If families or organizations chose to bring a lawsuit challenging Lipps' authority to issue the rule, it would serve to draw deserved attention to the issue of school lunch rules, said Kevin Concannon, who vacated the undersecretary position as Obama was departing.

"This shouldn't just go under cover and unnoticed," he said.