

## ARTICLE II, THE VACANCIES ACT AND THE APPOINTMENT OF "ACTING" EXECUTIVE BRANCH OFFICIALS

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In late 1997, when the Senate Judiciary Committee refused to refer Bill Lann Lee, President Clinton's nominee to head the Justice Department's Office of Civil Rights, for a Senate vote because of concerns about Mr. Lee's position on race-based preferences and affirmative action,<sup>1</sup> President Clinton briefly considered waiting until the Senate had gone into recess for Christmas to appoint Mr. Lee to his position.<sup>2</sup> Under Article II of the Constitution, Mr. Lee's recess appointment would have been good for a year.<sup>3</sup> When Senate leaders threatened retaliation<sup>4</sup> if the President followed through with this constitutionally authorized end run around the confirmation process,<sup>5</sup> the President appointed Mr. Lee "Acting" Assistant Attorney General for Civil Rights, which, it was reported, meant that Mr. Lee might actually be able to serve *longer* than if the President had appointed Lee while the Senate was in

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1. See *Democrat Wants New Hearing for Embattled Nominee*, AP, Nov. 8, 1997, available in 1997 WL 4891645; Naftali Bendavid, *Democrats Delay Panel's Vote on Civil Rights Nominee*, CHI. TRIB., Nov. 7, 1997, § 1, at 3; Eva M. Rodriguez & Edward Felthensal, *Vote on Nominee for Civil-Rights Post Delayed as Clinton's Choice is in Peril*, WALL ST. J., Nov. 7, 1997, at A20. On Mr. Lee generally, and his nomination, see Roberto Suro, *Civil Rights Nominee Has Made Allies of Adversaries; Solution-Oriented Lee Faces Scrutiny in Senate*, WASH. POST, Aug. 20, 1997, at A23.

2. Republican Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, characterized a recess appointment as a "finger in the eye" of the Senate and suggested that Lee's temporary appointment as Acting Assistant Attorney General would be less offensive and less likely to invite retaliation. Jackie Calmes, *Hatch Suggests Means of Filling Civil-Rights Job*, WALL ST. J., Dec. 15, 1997, at A6; Helen Dewar, *Appointment of Lee on Acting Basis Would Upset GOP Less, Hatch Suggests*, WASH. POST, Dec. 15, 1997, at A12; Edwin Meese & Todd Gaziano, *Recessing Mr. Lee?*, WASH. TIMES, Dec. 15, 1997, at A19; Jonathan Peterson, *Putting Lee in Rights Post Seen as Risky Clinton Move*, L.A. TIMES, Dec. 15, 1997, at A1.

3. See U.S. CONST. art. II, § 2, cl. 3.

4. See Peterson, *supra* note 2 ("Senate Republicans have warned that if Clinton makes a recess appointment, they are prepared to retaliate on other White House nominees, program funding and Democratic legislation.").

5. Others were urging him to exercise his Article II power to fill federal judicial vacancies as soon as Congress went into recess. See, e.g., Neal Kumar Katyal, *Clinton Has the Power To Fill the Vacant Seats*, L.A. TIMES, Oct. 1, 1997, at B7.

recess.<sup>6</sup>

Soon after the appointment, however, Senator Orrin Hatch, Chairman of the Judiciary Committee, wrote a letter to Attorney General Janet Reno in which he cited a federal statute, the Vacancies Act,<sup>7</sup> which imposes a time limit on the service of acting executive branch officials.<sup>8</sup> The letter and the statute attracted the attention of the press, though many dismissed the statute, which was variously described as “burdensome,” “obscure,” “little known” and even “routinely ignore[d].”<sup>9</sup> The White House responded by citing *another* statute allegedly vesting the Attorney General with broad powers to fill any and all vacancies at the Department of Justice that, it claimed, superseded the Vacancies Act and its statutory time limit.<sup>10</sup>

This Article looks at both the Vacancies Act, as well as the provisions with which the Administration countered, in the context of both the Lee nomination and one other case (largely ignored by the press) involving Duke law professor Walter E. Dellinger’s service as acting Solicitor General from July 1996 until August 1997. Contrary to Administration claims, I conclude that the Vacancies Act *does* apply to Justice Department officials, and that the statute cited by the Administration allegedly superseding the Vacancies

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6. See Stewart M. Powell, *Lee Wins Civil Rights Job Despite GOP Block: President Dodges Senate Opposition and Names L.A. Lawyer to Post on an Acting Basis*, S.F. EXAMINER, Dec. 15, 1997, at A1 (reporting that, “as an acting attorney general, Lee could manage the day-to-day operations of the 250 lawyers in the Justice Department’s civil rights division potentially for as long as three years, with successive temporary appointments as an acting official”); see also Julia Malone, *Lee Tapped as Acting Rights Chief Clinton Bypasses Congress but Takes Tack Considered Less Offensive by GOP*, AUSTIN AM.-STATESMAN, Dec. 16, 1997, at A2.

7. See 5 U.S.C. §§ 3345-3349 (1994).

8. See Letter from Sen. Orrin G. Hatch to Attorney General Janet Reno (Dec. 19, 1997), available in 1997 WL 12105430 (requesting to know “how long [Attorney General Reno] intend[s] to have Mr. Lee serve in an acting capacity” and requesting a written opinion as to the applicability of the Vacancies Act to Lee’s appointment or reasons why the Act is not applicable); *Hatch Finds Provision to Challenge Lee’s Appointment*, CHI. TRIB., Dec. 21, 1997, § 1, at 9; Helen Dewar, *Senators Question How Long Lee Can Stay in Rights Post*, WASH. POST, Dec. 20, 1997, at A8; Nancy E. Roman, *Hatch Hobbles Tenure of Lee with Time Limit*, WASH. TIMES, Dec. 20, 1997, at A1; David Stout, *Senator Asks How Long Rights Choice Will Remain*, N.Y. TIMES, Dec. 20, 1997, at A9 (noting that Senator Hatch argued that Lee’s tenure should be limited to four months); see also Letter from Sen. Strom Thurmond to Attorney General Janet Reno (Jan. 23, 1998), available in 1998 WL 7380358 (also questioning the legitimacy of Lee’s appointment).

9. See, e.g., Sean Scully, *Bid to Reform Vacancies Act up in Air*, WASH. TIMES, Sept. 29, 1998, at A6 (“Democratic opponents of the bill don’t deny that presidents routinely ignore the Vacancies Act . . .”); *Vacant Government*, WALL ST. J., Mar. 30, 1998, at A18 (“Clinton aids privately dismiss the . . . Vacancies Act as burdensome and obscure . . .”); *The Vacancy Act Fight*, WASH. POST, Dec. 29, 1997, at A16 (“obscure statute”); *The Clinton-Lee Loophole*, TIMES-PICAYUNE (New Orleans), Dec. 20, 1997, at B6 (“little-known”). But see Matthew M. Hoffman, *The Art of “Acting,”* WASH. POST, Jan. 1, 1998, at A25 (arguing that the Vacancies Act is neither “obscure” nor particularly cumbersome).

10. See *infra* notes 34-48 and accompanying text.

Act, if not read in harmony with that Act, unconstitutionally allows the President and the Attorney General to circumvent the Senate's constitutional advice and consent role set forth in Article II.

### I. THE CONSTITUTION AND PRESIDENTIAL APPOINTMENTS

The power of the President to appoint executive branch officials and the conditions for the exercise of that power are contained in Article II, Section 2 of the Constitution (the "Appointments Clause").<sup>11</sup> Under the plain language of Article II, there are three ways the President may make appointments. The first is the usual process of nomination by the President and confirmation by the Senate for "Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States . . ."<sup>12</sup> Second, Congress may, by law, authorize the President or others to appoint "inferior Officers."<sup>13</sup> Finally, the President may fill "all Vacancies" occurring while the Senate is in recess, and such commissions are good until the end of the Senate's next session.<sup>14</sup>

By involving the Senate in the appointment of executive and judicial officers, the Framers intended to provide a check on the power of the Executive.<sup>15</sup> The fear at the time was that the President would use the power of appointment, if vested exclusively in that Office, like the King of England used his powers of patronage.<sup>16</sup> Though some felt the President alone should

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11. Article II provides:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

U.S. CONST. art. II, § 2, cls. 2-3.

12. U.S. CONST. art II, § 2, cl. 2. For an argument that there ought to be a little more "advice" in the Senate's "advice and consent" role and suggestions on how that might be accomplished, see Glenn Harlan Reynolds, *Taking Advice Seriously: An Immodest Proposal for Reforming the Confirmation Process*, 65 S. CAL. L. REV. 1577 (1992). See also John C. Yoo, *Criticizing Judges*, 1 GREEN BAG 2d 277, 282-86 (1998).

13. U.S. CONST. art. II, § 2, cl. 2.

14. U.S. CONST. art. II, § 2, cl. 3.

15. See THE FEDERALIST NO. 69, at 421 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (contrasting the King of England's patronage power with the circumscribed appointment power of the President).

16. See THE DECLARATION OF INDEPENDENCE paras. 12-13 (U.S. 1776) ("He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries. He has erected a multitude of New Offices and sent hither swarms of Officers to harass our

have the power to make all appointments,<sup>17</sup> most agreed the Senate's role was necessary to avoid Executive abuses.<sup>18</sup>

As a result of the Framers' design, courts have consistently rejected the proposition that the President may evade the Appointments Clause by claiming an inherent power to fill vacancies under the so-called Take Care Clause,<sup>19</sup> which obligates the President to see that the laws are faithfully executed.<sup>20</sup> If the Constitution denies any inherent power to the President to fill vacancies outside the processes set forth in Article II, it would seem absurd to argue that such power is possessed by one of the President's subordinates.<sup>21</sup> Yet this is the position that the Administration has taken in the cases of Bill Lann Lee and Professor Dellinger. Before probing the weaknesses of the Administration's argument in Part III, this Article first discusses the operation of the Vacancies Act.

People, and eat out their Substance.”).

17. For example, Samuel Spencer argued in the North Carolina ratifying convention that because of the Senate's ability to veto the President's nominees, the lines of separation between the executive and legislative branches would become blurred:

[I]t is easy to perceive, that the President, in order to do any business, or to answer any purpose in his department of his office, and to keep himself out of perpetual hot water, will be under a necessity to form a connection with that powerful body, and be contented to put himself at the head of the leading members who compose it.

2 THE DEBATE ON THE CONSTITUTION 879 (Bernard Bailyn ed., The Library of America 1993); see also Bruce Fein, *Appointments Are the President's Game Politics: The Confirmation Process Should be Limited to Scrutiny of Cronyism, Competence & Corruption*, L.A. TIMES, Nov. 7, 1997, at B9 (arguing that “the confirmation process should be confined to scrutiny for cronyism, competence and corruption”).

18. See, e.g., THE FEDERALIST NO. 76, *supra* note 15, at 457 (Alexander Hamilton) (arguing that the role of the Senate “would have a powerful, though, in general, a silent operation. It would be an excellent check on the spirit of favoritism in the President . . .”).

19. See U.S. CONST. art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.”).

20. See *George v. Ishimaru*, 849 F. Supp. 68, 71-72 (D.D.C. 1994); *Olympic Fed. Sav. & Loan v. Office of Thrift Supervision*, 732 F. Supp. 1183, 1199-1200 (D.D.C. 1990); *Williams v. Phillips*, 360 F. Supp. 1363, 1369 (D.D.C. 1973).

21. Cf. *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the Court rejected the argument that Congress could, under the Necessary and Proper Clause, see U.S. CONST. art. I, § 8, cl. 18, appoint members of the Federal Election Commission:

Congress could not, merely because it concluded that such a measure was “necessary and proper” to the discharge of its substantive legislative authority, pass a bill of attainder or *ex post facto* law contrary to the prohibitions contained in [the Constitution]. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.

*Buckley*, 424 U.S. at 135.

## II. THE VACANCIES ACT

The Vacancies Act (the "Act"), first passed in 1868,<sup>22</sup> is an attempt to reconcile the requirements of Article II with the need to keep the executive branch functioning in the face of vacancies occasioned by death, resignation, or by delays in the confirmation process. The Act (reprinted in Appendix A) is now found in 5 U.S.C. §§ 3345-3349, and "delegate[s] to the President limited authority to temporarily fill certain vacancies"<sup>23</sup> in Executive agencies or military departments.<sup>24</sup>

Section 3346<sup>25</sup> provides for the filling of vacancies occurring when "an officer of a bureau of an Executive department or military department, whose appointment is not vested in the head of the department, dies, resigns, or is sick or absent . . ."<sup>26</sup> When such a vacancy is created and the absent officer's appointment is not vested in the head of that department, "his first assistant, *unless otherwise directed by the President under section 3347 of this title* shall perform the duties of the office until a successor is appointed or the absence or sickness stops."<sup>27</sup>

Under section 3347, "the President may direct the head of another Executive department or military department or another officer of an Executive department or military department, whose appointment is vested in the President by and with the advice and consent of the Senate, to perform the duties of the office until a successor is appointed or the absence or sickness stops."<sup>28</sup>

Any such appointment, however, is circumscribed by section 3348, which limits the amount of time that a temporary appointee may serve without Senate action. Section 3348(a) reads: "A vacancy caused by death or resignation may be filled temporarily under section 3345, 3346, or 3347 of this title *for not more than 120 days* . . ."<sup>29</sup>

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22. See Act of July 23, 1868, ch. 227, 15 Stat. 168 (1868) (authorizing the temporary filling of vacancies in the Executive Department).

23. *Olympic Fed. Sav. & Loan v. Office of Thrift Supervision*, 732 F. Supp. 1183, 1194 (D.D.C. 1990).

24. See 5 U.S.C. §§ 3345-3346 (1994).

25. Section 3345 of the Act provides for the filling of a vacancy that occurs when "the *head of an executive agency* (other than the General Accounting Office) or military department dies, resigns, or is sick or absent . . .," 5 U.S.C. § 3345 (emphasis added), but otherwise functions like section 3346.

26. 5 U.S.C. § 3346.

27. 5 U.S.C. § 3346 (emphasis added).

28. 5 U.S.C. § 3347.

29. 5 U.S.C. § 3348(a) (emphasis added). Originally, the time limit for the temporary appointments was 10 days. See Act of July 23, 1868, ch. 227, § 3, 15 Stat. 168 (1868). The Act was amended in 1891 to increase the time limit to 30 days. See Act of Feb. 6, 1891, ch. 113, 26 Stat. 733 (1891). The time limit was increased again in 1988 to the present limit of 120 days. See Presidential

There are exceptions to the 120-day rule. First, “if a first or second nomination to fill such vacancy has been submitted to the Senate, the position may be filled temporarily under section 3345, 3346, or 3347 of this title—

(A) until the Senate confirms the nomination; or

(B) until 120 days after the date on which either the Senate rejects the nomination or the nomination is withdrawn . . . .”<sup>30</sup>

The second exception states that “if the vacancy occurs during an adjournment of the Congress sine die, the position may be filled temporarily until 120 days after the Congress next convenes . . . .”<sup>31</sup> Section 3348 also contains an unequivocal statement that temporary appointees under the Act “whose nomination to fill such vacancy has been submitted to the Senate may not serve after the end of the 120-day period [set forth in section 3348 (a)(1)(B) or (a)(2)] if the nomination of such person is rejected by the Senate or is withdrawn.”<sup>32</sup>

Finally, section 3349 states flatly that a “temporary appointment, designation, or assignment of one officer to perform the duties of another under section 3345 or 3346 of this title *may not be made otherwise than as provided by those sections*, except to fill a vacancy occurring during a recess of the Senate.”<sup>33</sup> Thus, if a vacancy occurs under the Act, either (i) the first assistant will temporarily fill the post, (ii) a replacement will be appointed by the head of the agency (if the head has the power to do so) or (iii) the President shall name a replacement under the procedures set forth in section 3347. Section 3349 makes it clear that these methods of appointment, all of which are subject to the 120-day rule of section 3348, are the exclusive methods of filling vacancies.

### III. THE VACANCIES ACT AND JUSTICE DEPARTMENT VACANCIES

There is one very relevant exception to section 3347, which reads: “This section does not apply to a vacancy in the office of Attorney General.”<sup>34</sup> Under the Administration’s liberal interpretation of this section, “the office of

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Transition Effectiveness Act, Pub. L. No. 100-398, § 7, 102 Stat. 985, 988 (1988).

30. 5 U.S.C. § 3348(a)(1) (1994).

31. 5 U.S.C. § 3348(a)(2).

32. 5 U.S.C. § 3348(b). This makes sense. If the temporary appointee is the first nominee referred to in subsection (a), and that nominee is either rejected or is withdrawn, that person should not get to serve for an additional 120 days while a second nominee is vetted by the Senate.

33. 5 U.S.C. § 3349.

34. 5 U.S.C. § 3347 (1998).

Attorney General” includes the entire Justice Department.<sup>35</sup> Meanwhile, 28 U.S.C. § 509 (reprinted in Appendix B) states, in pertinent part, “All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General . . . .”<sup>36</sup> Section 510 (also reprinted in Appendix B) states that the Attorney General may delegate that authority as “he considers appropriate.”<sup>37</sup>

In both testimony to Congress<sup>38</sup> and in a written response to Senator Hatch’s letter,<sup>39</sup> the Administration maintained that sections 509-510 (sometimes referred to as the Justice Department’s “Organic Act”) superseded the Vacancies Act, and that the Organic Act subjects acting appointees to “no precise limit on the time during which an official may carry out the duties of a vacant Senate-confirmed office . . . .”<sup>40</sup>

Though the Administration denies that this means “that such an office may remain unfilled indefinitely,” neither the Administration nor the Justice Department has suggested when a permissible “temporary” appointment becomes an admittedly impermissible “indefinite” one.<sup>41</sup>

The origin of the exception to section 3347, however, makes it clear that the exemption applies solely to “a vacancy in the office of Attorney General”<sup>42</sup> and no other. The reason is simple: Congress specified by statute who succeeds to the Attorney General’s post should a vacancy occur.<sup>43</sup> When the Department of Justice was created in 1870,<sup>44</sup> the enabling legislation provided:

[T]here shall be in said Department an officer learned in the law, to

35. See *infra* notes 38-40 and accompanying text.

36. 28 U.S.C. § 509 (1994).

37. See 28 U.S.C. § 510 (1994). Specifically, “[t]he Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.” *Id.*

38. See *Oversight of the Implementation of the Vacancies Act, Hearings Before the Senate Committee on Governmental Affairs*, Mar. 18, 1998 (Statement of Joseph N. Onek, Principal Deputy Associate Attorney General, Department of Justice and Daniel Koffsky, Special Counsel, Office of Legal Counsel), available in 1998 WL 8993549 [hereinafter Onek Statement].

39. See Letter from Andrew Fois, Assistant Attorney General, Office of Legal Counsel, Department of Justice to Senator Orrin G. Hatch (Jan. 14, 1998), quoted in Steven J. Duffield & James C. Ho, *The Illegal Appointment of Bill Lann Lee*, 2 TEX. REV. L. & POL. 335, 353 & nn.108-09 (1998).

40. Onek Statement, *supra* note 38.

41. *Id.*

42. 5 U.S.C. § 3347.

43. See 28 U.S.C. § 508 (1994).

44. See Act of June 22, 1870, ch. 150, 16 Stat. 162 (codified as amended at 28 U.S.C. §§ 501-599 (1994)) (establishing the Department of Justice).

assist the Attorney-General in the performance of his duties, to be called the solicitor-general, and who, in case of a vacancy in the office of Attorney-General . . . shall have power to exercise all the duties of that office.<sup>45</sup>

The Attorney General exemption was carved out when the Vacancies Act was codified in the *Revised Statutes of the United States*.<sup>46</sup> The exception remains today, although the line of succession is somewhat different.<sup>47</sup> It does *not* appear that the intent was to exempt other Justice Department officials from the operation of the Vacancies Act. Significantly, there is no similar exemption for the Attorney General, or any other temporary appointee in the section of the Act containing the 120-day time limit.

According to testimony given before the Senate in early 1998, the Administration maintains that the Vacancies Act does not apply to those vacancies occurring in the Justice Department.<sup>48</sup> The argument hinges in part on the exemption of the office of the Attorney General from section 3347 of the Vacancies Act, which the Administration argues exempts it (and by extension all other Justice Department officials) from *all* sections of the Act, including the 120-day limit. The Administration further argues that the Attorney General, by virtue of the Organic Act, has broad powers to fill departmental vacancies independent of both the constitutional appointments process and the time limit of the Vacancies Act. Assuming *arguendo* that the Administration is correct in its reading, such a statute would raise serious constitutional questions under the Appointments Clause.

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45. Section 2, 16 Stat. at 162.

46. The exemption provided:

In any of the cases mentioned in the two preceding sections, *except the death, resignation, absence or sickness of the Attorney-General*, the President may, in his discretion, authorize and direct the head of any other Department or any other officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease.

Act of December 1, 1873, § 179, 18 Stat. 28 (1873) (emphasis added) (revising and consolidating the statutes of the United States in force on December 1, 1873). Compare Act of July 23, 1868, ch. 227, § 3, 15 Stat. 168 (1868) (authorizing the temporary supplying of vacancies in the Executive Department).

47. See 28 U.S.C. § 508 (stating that the Deputy Attorney General shall succeed the Attorney General, then the Associate Attorney General; further, “[t]he Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General”).

48. See Onek Statement, *supra* note 38.

#### IV. ASSESSING THE ADMINISTRATION'S CASE

There are several problems with the Administration's position, which I will address in turn. First, I argue that Justice Department officials are not, as suggested by the Administration, exempt from the provisions of the Vacancies Act. Second, assuming *arguendo* that Congress intended to include the entire Justice Department in the exemption crafted for "the office of Attorney General," that would clearly be unconstitutional because it would enable the President and the Attorney General to fill every office below that of Attorney General without Senate confirmation. Finally, in Part V, I argue that even if the Administration agrees that it is bound by the Vacancies Act, Mr. Lee would still be ineligible to serve as a temporary appointee because he was not, prior to his present appointment, occupying a position requiring Presidential appointment and Senate confirmation as required by the Act.

##### *A. Is the Department of Justice Exempt from the Vacancies Act?*

It is fairly clear that the "office of Attorney General" exemption in 5 U.S.C. § 3347 does not apply to a vacancy in the Solicitor General's office, the office of Assistant Attorney General or any other office in the Justice Department.<sup>49</sup> The exemption explicitly mentions only the Attorney

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49. See *supra* text accompanying notes 34-48. William & Mary School of Law Professor (formerly Dean of Case Western University School of Law) Michael J. Gerhardt disagreed with this assessment of the applicability of the Vacancies Act to the Department of Justice in testimony given before the Senate Committee on Governmental Affairs after this Article had been written. See *Oversight of the Implementation of the Vacancies Act, Hearings Before the Senate Committee on Governmental Affairs*, Mar. 18, 1998 (Statement of Michael J. Gerhardt, Professor of Law, William & Mary School of Law), available in 1998 WL 8993509 [hereinafter Gerhardt Statement].

In his statement, Professor Gerhardt opined that the Act "does not clearly apply to the Justice Department," primarily because the Act speaks of its application to heads of executive *agencies* and heads of bureaus of executive agencies, which, according to Professor Gerhardt, are "terms of art, none of which refer to subcabinet-level offices or divisions within an executive branch department, such as the Office of Legal Counsel or the Civil Rights Division in the Justice Department." Gerhardt Statement, *supra*. Instead, the more specific sections 509-10 (which Professor Gerhardt terms the Department's "Organic Act") apply, and take the Justice Department out of the Vacancies Act. See *id.* Professor Gerhardt claims that the "plain language" of sections 509-10, the "longstanding practice of the Justice Department" and congressional acquiescence combine to support his view. *Id.*

With all due respect to Professor Gerhardt, his reading of the Vacancies Act is strained and unconvincing. First, his distinction between the Justice Department and the language used in the Vacancies Act is too literal. There is nothing that suggests that the words used were not intended to cover personnel like Assistant Attorneys General, nor is there significant evidence suggesting that sections 509-10 were meant to do anything more than establish a clear line of succession with regard to the Attorney General's position; specifically, there is no evidence of congressional intent to supersede the Vacancies Act.

Even if such evidence existed, Professor Gerhardt downplays the constitutional ramifications of a statute empowering the President or the Attorney General to fill positions within the Justice

General.<sup>50</sup> As stated above, that exception was placed in the Vacancies Act because Congress had already prescribed the line of succession for that office.<sup>51</sup> Further, even if the exemption in section 3347 was intended to include vacancies in the Solicitor General's Office, which the Attorney General filled under 28 U.S.C. §§ 509-510, there is no language exempting the Attorney General's vacancy appointments from the time limit set forth in the Vacancies Act.<sup>52</sup>

Department for an indeterminate amount of time without Senate advice and consent. He addresses this tension between the Justice Department's interpretation of sections 509-10 and the Article II appointments process with reference to an inherent presidential power to make temporary appointments under the Take Care Clause. *See* Gerhardt Statement, *supra*. Professor Gerhardt even claims that "the only published [judicial] opinion with any reference [to such an interim power] endorsed [it] to some extent . . . in dicta." *See id.* (citing *Williams v. Phillips*, 482 F.2d 669, 670 (D.C. Cir. 1973) (per curiam)).

First, the district court originally hearing the *Williams* case firmly rejected that alleged power of the President. *See infra* note 92. More importantly, however, Professor Gerhardt's citation to the D.C. Circuit's opinion in *Williams* to support the President's alleged inherent authority to make temporary appointments is extremely misleading. The D.C. Circuit denied the Acting Director of the Office of Economic Opportunity, whose status was being challenged, a stay of the district court's decision that he was serving illegally pending appeal on the grounds that he was unlikely to prevail on the merits. *See Williams*, 482 F.2d at 670. The court began its opinion with the unequivocal declaration that "Art. II, § 2 of the Constitution unequivocally requires an officer of the United States to be confirmed by the Senate unless different provision is made by congressional statute." *Id.* While the court acknowledged that an inherent power of the President "*for a reasonable time*" to make temporary appointments

could be argued . . . in the absence of limiting legislation, . . . that would not establish that the President was entitled, for a period of four and a half months from the date the President obtained the resignation of the incumbent director, to continue the designation of Phillips as acting director without any nomination submitted for Senate consideration. The Government concedes that the president cannot designate an acting officer indefinitely without any presentation to the Senate for confirmation. *An indication of the reasonable time required by the president to select persons for nomination appears in the 30-day period provided in the Vacancies Act for temporary appointments of Executive Department officers pending nomination to the Senate.*

*Id.* at 670-71 (emphasis added) (footnote and citation omitted). Professor Gerhardt also overlooks other cases in which the inherent appointment theory has been rejected. *See supra* note 20 and *infra* note 102 and accompanying text. Such an inherent power, at least absent some extraordinary circumstances not present here, seems incompatible with the plain text of the Appointments Clause.

Yet the Justice Department does not escape criticism. Professor Gerhardt stated that "the critical problem is with the failure of the present Justice Department to abide by its own construction of [sections 509-10] as permitting the Attorney General to make . . . temporary appointments without Senate approval *as long as the appointments are not made to circumvent the advise [sic] and consent of the Senate.*" Gerhardt Statement, *supra* (emphasis added). Professor Gerhardt cites, as examples, the fact that for two years the Administration failed to submit a nominee for the head of the Criminal Division to the Senate and that during Professor Dellinger's tenure as Solicitor General, his name was never formally submitted either. *See id.* "If these were not attempts to circumvent the advise [sic] and consent power of the Senate," he concludes, "they at least made its exercise more difficult." *Id.* Professor Gerhardt concluded his testimony with suggestions that Congress remedy the problem legislatively. *See id.* Apparently it heeded his thoughtful proposals. *See infra* notes 108-19 and accompanying text.

50. *See* 5 U.S.C. § 3347 (1994).

51. *See supra* note 43 and accompanying text.

52. *See* 5 U.S.C. § 3348.

When asked to interpret these provisions in the early 1970s, a federal district court in *United States v. Lucido*<sup>53</sup> read the two statutes together and concluded that Congress had not intended for the Attorney General to be able to fill vacancies with persons who could serve without regard to the 120-day time limit of the Vacancies Act, despite the application of 28 U.S.C. §§ 509-510.<sup>54</sup> The *Lucido* court rejected the Nixon Administration's version of the same argument presently being made by the Clinton Administration: that because the office of the Attorney General was exempt from section 3347, the Vacancies Act, including the time limit, did not apply.<sup>55</sup> The court acknowledged that the office of Attorney General was exempt from section 3347 and vacancies in that office *were* covered by the provisions of 28 U.S.C. § 508, but also noted that the office of Attorney General was not specifically exempted from the strictures of section 3348.<sup>56</sup> The court reasoned that if that had been Congress's intent, Congress would have included a specific exemption in section 3348 to make it parallel section 3347.<sup>57</sup> "But," the court wrote:

they did not do so and they did provide for the filling of vacancies in § 508. It is perfectly plausible that the Congress was concerned about the possibility of a lengthy vacancy in the office of Attorney General. Many duties vital to the everyday functioning of the Justice Department are exercised by the Attorney General, which duties may not be delegated to another official on the resignation of the Attorney General and obviously not delegable upon his death. *But at the same time the Congress remained concerned about its constitutional responsibility to advise and consent. Thus, they retained some of the impetus for the President's sending a name to the Senate in a timely fashion rather than allowing a "temporary" Attorney General to*

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53. 373 F. Supp. 442 (E.D. Mich. 1974).

54. *Lucido* arose from the vacancies in the office of Attorney General that occurred at the height of the Watergate investigation. After the presence of a taping machine inside the Oval Office became public, a court issued a subpoena for certain tapes at the request of Special Prosecutor Archibald Cox. When Cox refused the Nixon Administration's offer of summaries of the relevant tapes, President Nixon ordered Attorney General Elliot Richardson to fire Cox. Richardson refused and resigned. Deputy Attorney General William Ruckelshaus also refused and resigned. After becoming Acting Attorney General by operation of 28 U.S.C. § 508(b), Solicitor General Robert Bork fired Cox. For a summary of what became known as the "Saturday Night Massacre," see ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 1-27 (1987); KEN GORMLEY, *ARCHIBALD COX: CONSCIENCE OF A NATION* 338-77 (1997); PETER W. MORGAN & GLENN H. REYNOLDS, *THE APPEARANCE OF IMPROPRIETY: HOW THE ETHICS WARS HAVE UNDERMINED AMERICAN GOVERNMENT, BUSINESS, AND SOCIETY* 65-66 (1997).

55. See *Lucido*, 373 F. Supp. 1142, 1147-51 (E.D. Mich. 1974).

56. *Lucido*, 373 F. Supp. at 1147-51.

57. *Id.* at 1150-51.

*serve indefinitely.* In this regard it is important to note that the purpose of [section 3348] was carried out in the instant case as Mr. Kleindienst's name was sent to the Senate for confirmation even before he assumed the duties of Attorney General. *Had the President been dilatory in sending a name to Congress, perhaps a different situation would be present.*<sup>58</sup>

Of course, the *Lucido* court could have gotten it wrong; there is at least one case holding that a Solicitor General who became Acting Attorney General had no limit on his tenure.<sup>59</sup> The support for the court's conclusion in that case, however, was slight, to say the least.<sup>60</sup> More importantly for our

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58. *Id.* at 1151 (emphasis added).

59. *See* United States v. Guzek, 527 F.2d 552 (8th Cir. 1975). In *Guzek*, the Eighth Circuit rejected the defendant's argument that because Robert Bork had exceeded the then 30-day statutory limit prescribed by the Vacancies Act, the wiretaps he approved after that time were without proper authorization. *See Guzek*, 527 U.S. at 559. Without analysis, the court held that Bork, as Acting Attorney General, "was not subject to the 30-day [now 120-day] limitation of 5 U.S.C. § 3348." *Id.* The court explained that:

Section 508(b) [under which Bork became Acting Attorney General] contains no language limiting the term of Solicitor General as Acting Attorney General. Thus, we hold that when Bork became Acting Attorney General he succeeded to all the powers of the office of the Attorney General without circumscription by the 30-day limitation of 5 U.S.C. § 3348.

*Id.* at 560 (footnote omitted).

60. In an accompanying footnote, the *Guzek* court cites to the Government's brief, in which the Government supported its argument by reference to historical practice. The Government explained:

The filling of the position of the Attorney General by an Acting Attorney General for a period in excess of 30 days is far from being without precedent. There have been at least six [sic] instances since 1880 (three of them since 1964) during which the office of Attorney General has been temporarily filled for a period in excess of 30 days.

*Id.* at 560 n.10.

There are a number of problems with the Government's argument. First, the number six is a mistake that the court duly noted—the Government's brief only included four such examples. Further, the Government's reliance, then and now, on historic instances of the Act's violation is hardly compelling authority that the time limit of the Vacancies Act does not apply to temporary appointments in the Justice Department. In fact, the subsequent amendment of the Act extending the time limit from 30 to 120 days, *see supra* note 29, can be read both as an acknowledgement that 30 days was too short given the contemporary confirmation process and a reaffirmation of the Act's goal, viz., to prevent the indefinite service of acting appointees. According to Mr. Morton Rosenberg, Specialist in American Public Law for the Congressional Research Service:

By giving more leeway to the President to find a nominee and tying the time limitation on "actings" to the prompt forwarding of nominations, the [Senate Committee on Governmental Affairs] believed it made more effective and clear the section 3349 declaration that the Act's provisions are the sole means for filling vacancies in covered agencies.

*Oversight of the Implementation of the Vacancies Act, Hearings Before the Senate Committee on Governmental Affairs*, Mar. 18, 1998 (Statement of Morton Rosenberg, Specialist in American Public Law, Congressional Research Service), available in 1998 WL 8993467 [hereinafter Rosenberg Statement] (citing S. REP. NO. 100-317, at 14 (1988)). Finally, both the Government and the court in *Guzek* failed to address the question raised here: whether an arrangement by which officers temporarily serving in positions for which Senate confirmation is required can permanently avoid such

purposes, neither court indicated that the exemption contained in section 3347 of the Act applied to anyone other than the Attorney General.

*B. Could Congress Authorize the Attorney General to Fill Justice Department Vacancies Requiring Senate Confirmation?*

The *Lucido* court was trying to avoid larger constitutional questions that emerge from an interpretation of the Vacancies Act that bootstraps the Attorney General's power to delegate in 28 U.S.C. §§ 509-510 into an extra-constitutional appointment power. Article II is clear that unless Congress otherwise indicates (or the Senate is in recess), Senate approval is required for the appointment of executive officers.<sup>61</sup> Though Congress could, if it desired, designate either the Assistant Attorney General or the Solicitor General as "inferior Officers,"<sup>62</sup> it has not done so. The statutes creating those offices, moreover, specify that those positions are to be occupied by persons nominated by the President and appointed with the advice and consent of the Senate.<sup>63</sup> Yet, according to the Administration, sections 509 and 510 enable the Attorney General to "temporarily" fill vacancies with persons who could conceivably serve indefinitely without ever having to undergo Senate confirmation. Taking the Administration's position seriously would mean that no confirmation hearings for any Department of Justice official below the Attorney General would be necessary; and that the Senate has no role to play.<sup>64</sup> Such a position is, of course, absurd. Yet the Administration has pressed this claim on behalf of both Bill Lee and Professor Dellinger.

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confirmation by being designated "temporary."

61. U.S. CONST. art. II, § 2, cl. 2.

62. See U.S. CONST. art. II, § 2, cl. 2.

63. See 28 U.S.C. § 505 (1994) ("The President shall appoint in the Department of Justice, by and with the advice and consent of the Senate, a Solicitor General, learned in the law, to assist the Attorney General in the performance of his duties."); 28 U.S.C. § 506 (same for Assistant Attorney General).

The language of these statutes also eliminates the only other possible argument the Administration might plausibly make: that, by virtue of authority under 28 U.S.C. § 510 to delegate functions of the Department to others from time to time, the Attorney General, as head of the Justice Department, has the authority to make Mr. Lee's appointment under section 3346 of the Vacancies Act. Recall that the President acts under section 3347 only if the vacant office's appointment is not vested in the head of that department. See 5 U.S.C. § 3347 (1994). Since the statutes mandate Senate confirmation, it would be implausible to argue that the appointments were simultaneously vested in the Attorney General. Moreover, appointments made under section 3346 are still subject to the 120-day time limit of section 3348, which is exactly what the Administration seeks to avoid.

64. If Lani Guinier had only known!

## V. THE CASES OF DELLINGER AND LEE

A. *Walter Dellinger*

Professor Dellinger was serving as the Assistant Attorney General in charge of the Office of Legal Counsel<sup>65</sup> when then Solicitor General Drew Days resigned his post in the summer of 1996 to return to his teaching position at Yale Law School.<sup>66</sup> In the interim, Professor Dellinger was named by Attorney General Reno<sup>67</sup> as "Acting Solicitor General."<sup>68</sup> Dellinger served in that capacity until his resignation, which became effective as of mid-August 1997.<sup>69</sup> Primarily because of the impending presidential election, which deterred the Judiciary Committee from acting upon nominations, there were no plans to submit Professor Dellinger's name to the Senate at the time he assumed his duties.<sup>70</sup> After the election, the Supreme Court's term was in full swing; submitting Dellinger's name at that time would have distracted him from his appearances before the Court in a number of high-profile cases in which the Administration had a stake.<sup>71</sup> In addition, Dellinger made it known, before he accepted the acting appointment, that he was anxious to return to North Carolina for personal reasons.<sup>72</sup> Therefore, the Administration and the Justice Department informed the Senate Judiciary Committee that they did not intend to submit Dellinger's name for confirmation, but that Dellinger would likely serve only through the end of the 1996-97 Supreme Court Term.<sup>73</sup> Apparently, there were no objections to

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65. A position for which Professor Dellinger was confirmed by the Senate, though not without some conservative "protest votes" reportedly cast in retaliation for Professor Dellinger's role in the 1987 refusal of the Senate to confirm Judge Robert Bork for a seat on the Supreme Court. *See Dellinger's Supreme Challenge*, LEGAL TIMES, Sept. 23, 1996, at 10 ("Dellinger . . . earned the lasting enmity of conservatives a decade ago when, as a Duke University law professor, he played a key role in derailing the Supreme Court nomination of Robert Bork.").

66. *See* Henry J. Reske, *Acting Solicitor General Named*, A.B.A. J., May 1996, at 40.

67. Professor Dellinger confirmed that it was Attorney General Reno, not the President, that designated Dellinger as Acting Solicitor General. *See* Telephone Interview with Walter E. Dellinger, III, Acting Solicitor General of the United States (July 31, 1997).

68. *See* Reske, *supra* note 66.

69. *See, e.g., U.S. Solicitor General to Return Home to Duke Law; Dellinger to Reclaim Teaching Position*, HERALD-SUN (Durham, N.C.), July 17, 1997, at C1.

70. *See* Telephone Interview with Walter E. Dellinger, III, *supra* note 67.

71. *Id.*

72. His wife, who had accompanied him to Washington, returned to her teaching position at the University of North Carolina while Dellinger commuted on the weekends. *Id. See also* Jeffrey Toobin, *Clinton's Left-Hand Man*, THE NEW YORKER, July 21, 1997, at 28, 32. It should be noted that Dellinger traveled home at his own expense. *See* Telephone Interview with Walter E. Dellinger, III, *supra* note 67.

73. *See* Telephone Interview with Walter E. Dellinger, III, *supra* note 67.

this arrangement.<sup>74</sup> Though it drew scant notice at the time,<sup>75</sup> Professor Dellinger's tenure clearly exceeded the statutory time limit imposed by the Vacancies Act.<sup>76</sup>

### *B. Bill Lann Lee's Appointment*

The controversy surrounding Bill Lann Lee's nomination recalls the politically charged days of the early Clinton Administration in which partisan opposition caused the Administration to withdraw the nominations of Zoe Baird and Kimba Wood, the President's first two choices for Attorney General, as well as Professor Lani Guinier, who was nominated for the civil rights post Lee now holds.<sup>77</sup> In contrast to the appointment of Professor Dellinger, editors and opinion columnists,<sup>78</sup> and more importantly, lawmakers, raised the issue of the Vacancies Act. Senator Hatch, while silent on Dellinger, sent a letter in early 1998 to Attorney General Reno asking whether Lee, a former litigator with the NAACP Legal Defense Fund, would be serving after the 120-day limit prescribed in the Act.<sup>79</sup> As noted, the Administration responded by citing the Justice Department's Organic Act, asserting that it superseded the Vacancies Act, and that Mr. Lee could serve without Senate confirmation for an indeterminate amount of time.

Even if the Administration were suddenly to drop its contention that the Vacancies Act does not apply, differences between Mr. Lee's appointment

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74. According to Professor Dellinger, before his appointment as Acting Solicitor General, Jamie Gorelick, then Deputy Attorney General, approached members of the Senate Judiciary Committee with the Administration's plan and heard no objections. *Id.*

75. *But see Vacant Justice*, WALL ST. J., August 11, 1997, at A14 (asking whether the Administration has violated the Vacancies Act). *See also* Brannon P. Denning, Letter to the Editor: Circumspect Actions Need Senate Check, WALL ST. J., August 18, 1997, at A15.

76. Professor Dellinger began his service while the Senate was in recess, but his commission was not a recess appointment. *See Telephone Interview with Walter E. Dellinger, III, supra* note 67. In any event, Congress began a new session in January 1997, so he could not have served beyond that date even if he had been an official recess appointee. *See U.S. CONST.* art II, § 2, cl. 3 (recess appointments good until end of next session of Congress).

77. *See supra* notes 1-9 and sources cited therein. For a detailed account of the machinations that accompanied Mr. Lee's appointment as acting Assistant Attorney General, see Duffield & Ho, *supra* note 39, at 348-50; Rosenberg Statement, *supra* note 60. The Duffield and Ho Article was published as this Article was being readied for publication.

78. *See, e.g., The Clinton-Lee Loophole*, TIMES-PICAYUNE (New Orleans), Dec. 20, 1997, at B6; *Acting Exercise*, WALL ST. J., Dec. 16, 1997, at A18; *The Vacancy Act Fight*, WASH. POST, Dec. 29, 1997, at A16; *The Permanent Acting Assistant Secretary*, WASH. TIMES, Dec. 30, 1997, at A14; *Clinton's End Run Around the Senate*, OMAHA WORLD-HERALD, Dec. 17, 1997, at 28; Hoffman, *supra* note 9; Stephen B. Presser, *Clinton Puts His Thumb in the Eye of the Constitution*, CHI. TRIB., Dec. 16, 1997, at 25; George F. Will, *Time to Evict Bill Lann Lee*, WASH. POST, Mar. 26, 1998, at A23.

79. *See supra* note 8.

and the appointment of Professor Dellinger place in doubt Mr. Lee's very eligibility for a temporary appointment under the Act.

Under the Act, only one who is "the head of another Executive department or military department or another officer of an Executive department or military department, whose appointment is vested in the President, by and with the advice and consent of the Senate" is eligible to fill a temporary vacancy.<sup>80</sup> Mr. Lee came to the job from the NAACP Legal Defense Fund, and prior to his appointment, Mr. Lee had no position in the Clinton Administration, much less one that required Senate confirmation. In contrast, Professor Dellinger had undergone Senate confirmation when he was nominated as head of the Office of Legal Counsel; this prior confirmation was apparently one of the factors making his service as Solicitor General more tolerable to the Senate.<sup>81</sup>

Curiously, though the Justice Department denies the Vacancies Act even applies to its temporary appointees, the mechanics of Mr. Lee's appointment were calculated to *appear* compliant with the Act.<sup>82</sup> The Act provides for automatic succession of "first assistant[s]."<sup>83</sup> After Deval Patrick, the former Assistant Attorney General for Civil Rights, resigned in January of 1997, the Attorney General delegated the responsibilities of that office to Isabelle Katz Pinzler, then Deputy Assistant Attorney General, a position not subject to Senate confirmation. After Ms. Pinzler served six months in that position, Mr. Lee's name was submitted to the Senate, which returned his name to the President in November. Though Lee was named Acting Assistant Attorney General by the President on December 15, 1997, concurrent with Ms. Pinzler's resignation, the Attorney General had earlier named Mr. Lee to the position that Ms. Pinzler formerly held—Principal Deputy Assistant Attorney General.

As other commentators have pointed out, this does not legitimize Mr. Lee's service because Ms. Pinzler's service itself exceeded the 120-day time limit, and thus by the summer of 1997 she was no longer validly serving as acting head of the Civil Rights Division; therefore, Mr. Lee could not have

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80. 5 U.S.C. § 3347 (1994).

81. Of course, one might question whether the Vacancies Act can authorize the "transferability" of Senate confirmation. Under the Vacancies Act, theoretically, the Secretary of Education could serve for 120 days as the Director of the CIA or as the Secretary of Defense, if the President wished. However, one might argue that there is a distinct lack of equivalence between the Director of the Nation's intelligence community and the latter two positions, though all three require Senate confirmation.

82. A fuller description of the chain of events here can be found in Rosenberg Statement, *supra* note 60. See also Duffield & Ho, *supra* note 39, at 349-50.

83. See 5 U.S.C. § 3345 (1994).

succeeded to the office as first assistant, because there was no one lawfully in that position whom he could have succeeded.<sup>84</sup> More importantly, the attempts to make Mr. Lee's appointment a first assistant succession under sections 3345-46 is inconsistent with the President's announcement that *he* was appointing Mr. Lee as Acting Assistant Attorney General, which would seem to fall under section 3347. The difference is that under section 3347, the President is only entitled to make a temporary appointment of someone who has previously been confirmed by the Senate, which Mr. Lee was not.

## VI. REMEDIES

It is possible that the Senate will, one way or the other, act on Mr. Lee's nomination and, like Professor Dellinger's service as acting Solicitor General, the present controversy will become moot. However, given the increasing frustration expressed over the pace and tenor of executive and judicial appointments,<sup>85</sup> and the fact that the Lee clamor followed closely on the heels of questions about Professor Dellinger's tour of duty, consideration of solutions for a situation that seems, "capable of repetition, yet evading review"<sup>86</sup> seems overdue. In this section, I suggest three easy solutions that could prevent future crises.

### A. Clarify Statutory Ambiguities

At the very least, the statutes cry out for amendment. Congress should make it clear that although the Attorney General is exempt from the Act because the line of succession is set by another statute, an Acting Attorney General and all other acting Justice Department officials are subject to the time limits set forth in 5 U.S.C. § 3348. This clarification would effect the attempt made in *Lucido*<sup>87</sup> to read the Vacancies Act and the Attorney General succession statute in harmony with the Appointments Clause. The present interpretation suggested by the Administration allowing the Attorney General to make appointments without Senate confirmation and without a time limit is incompatible with the Vacancies Act and with the Constitution itself. In addition, so that there is no doubt about the Act's enforceability, Congress should include a provision for challenging appointees whose time in office has exceeded the 120-day limit.

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84. See Duffield & Ho, *supra* note 39, at 349-50.

85. See, e.g., *Rehnquist Hits Senate Over Judicial Delays*, CHI. TRIB., Jan. 1, 1998, § 1, at 3.

86. See, e.g., *Southern Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911), *quoted in Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

87. See *supra* notes 53-58 and accompanying text.

### B. Greater Senate Vigilance

Senators have inexplicably stated publicly that they would have considered a recess appointment of Mr. Lee more of an affront to senatorial privilege than the Administration's extraconstitutional acting appointment.<sup>88</sup> At least the former is constitutionally authorized,<sup>89</sup> though its exercise is admittedly a bit at odds with the spirit in which the procedure was conceived originally.<sup>90</sup> Of course, it could be that Senators were simply hoping that the President would make an acting appointment, and they could lower the boom with the Vacancies Act argument. A recess appointment, on the other hand, would have meant that they would have been stuck with Mr. Lee for at least one year and could have done nothing about it.

Curiously, many commentators and Senators have also groused about the lack of an explicit enforcement provision in the Vacancies Act—the implication being that if Mr. Lee were temporarily appointed, there would be no way to force the Administration to observe the 120-day limit. This reasoning makes no sense. Why could not litigious Senators simply challenge the status of an acting appointee in court and claim that they were being deprived of their right to offer advice and consent? In *Williams v. Phillips*,<sup>91</sup> a group of Senators did just that,<sup>92</sup> and a district court held that the

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88. See *supra* note 2.

89. See U.S. CONST. art. II, § 2, cl. 3 (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”).

90. See Meese & Gaziano, *supra* note 2 (noting that the recess appointment was placed in the Constitution when the Senate was not in session year-round); Presser, *supra* note 78 (same).

91. 360 F. Supp. 1363 (D.D.C. 1973).

92. The facts in *Williams*, while not directly on point, are interesting and somewhat relevant. The plaintiffs in the case were a group of senators seeking to remove the defendant from his position as the acting head of the Office of Economic Opportunity (“OEO”). See *id.* at 1364. Evidently, as in the case of the Solicitor General, there was no statute particular to the OEO specifying how a vacancy would be handled. In the absence of such legislation, the senators claimed, the President must follow the procedures set forth in the Vacancies Act and the Appointments Clause. Since the President did not, they argued, *Williams* had been unlawfully appointed to his post. See *id.* at 1367.

The court noted that, because the OEO was not an “Executive agency” as defined in the Vacancies Act, see 5 U.S.C. § 101, it did not apply to vacancies that arose in the OEO. See *id.* at 1367. However, the Court rejected firmly the defendant’s argument that the President has the constitutional authority to appoint officers of the United States without Senate confirmation. See *id.* at 1367-68.

The court wrote:

The constitutional provision governing the appointment of federal officers, is clear in its mandate. Unless Congress has vested the power of appointment of an office in the President, the Courts, or a Department head, he may be appointed only with the advice and consent of the Senate, unless that body is in recess.

*Id.* at 1367-68. Unimpressed with the defendant’s citation to Attorney General’s opinions indicating that such a power existed, see 25 Op. Att’y Gen. 258 (1904) (while Senate is in recess, President may temporarily fill a vacancy during such recess); 6 Op. Att’y Gen. 357 (1854) (President may issue

deprivation of the opportunity to give their advice and consent to the President regarding certain nominees constituted the sort of particularized injury necessary to maintain standing.<sup>93</sup> The court stated:

In this case, a declaration that the defendant is unlawfully serving in office would bear upon the plaintiffs' duties to consider appropriations for OEO, or other legislative matters affecting OEO or the position of OEO Director. *Moreover, the service by the defendant as Acting Director of OEO, rather than Director, does not remove the direct injury to the plaintiffs' alleged right to pass on the individual nominated to be Director. The injury is aggravated, if anything, because the Acting Director is performing the duties of the Director without the advice and consent which the plaintiffs' would have been able to assert over an individual whose name had been submitted to the Senate for confirmation.*<sup>94</sup>

Suing the Administration over a questionable appointment may be just the impetus needed to encourage the Administration to submit the acting official or an alternative nominee for confirmation.

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regulations regarding the appointment of naval personnel in "distant service"), the court stated that "it is clear from the defendant's own citation of authority that that power, if it exists at all, exists only in emergency situations." *Williams*, 360 F. Supp. at 1369.

Moreover, the court noted that the presence of a statute granting the President the power to make temporary appointments (the Vacancies Act) in some cases, but not in others, undermined the defendant's argument: "[A] Presidential power to appoint officers temporarily in the face of statutes requiring their appointment to be confirmed by the Senate . . . would avoid the nomination and confirmation process of officers in its entirety. Constitutional provisions cannot be given such an interpretation." *Id.* (emphasis added). The judge went on to hold that "in the absence of . . . legislation vesting a temporary power of appointment in the President, the constitutional process of nomination and appointment must be followed." *Id.* at 1371. The D.C. Circuit Court of Appeals, in a per curiam opinion, refused to stay the district court's decision, holding that the official's claim had little chance of succeeding on its merits. *See supra* note 49.

Once again, a court asserted the importance of observing the Appointments Clause and rejected executive branch attempts to circumvent it with temporary or acting appointments. The result in *Williams* also undermines the Administration's argument that the Attorney General is empowered to make such appointments. *See supra* notes 49-52 and accompanying text. In essence, President Nixon claimed in *Williams* the same sort of power the Clinton Administration is claiming for the Attorney General: the unrestricted power to fill vacancies in offices requiring Senate confirmation temporarily, without the involvement of the Senate.

93. *See Williams*, 360 F. Supp. at 1366.

94. *Id.* (emphasis added). Of course, the scope of individual members' standing to challenge legislation or executive actions is open to debate. *See, e.g.*, *Raines v. Byrd*, 117 S. Ct. 2312 (1997) (holding members of Congress lacked, on the facts, standing to challenge the line-item veto); *Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997) (injury to individual members of Congress challenging House rule requiring affirmative vote of three-fifths of the membership of the House to raise federal income tax deemed "too speculative" to sustain standing). *See generally* R. Lawrence Dessem, *Congressional Standing to Sue: Whose Vote is This, Anyway?*, 62 NOTRE DAME L. REV. 1 (1986).

Oaths to uphold the Constitution aside, the Senate ought to be extremely protective of its constitutional prerogatives. Senators can bet that no one else will be; and once surrendered such prerogatives are often difficult to reclaim. Just as the Senate would not sit back and allow an "Acting" Associate Justice to be named to the Supreme Court, their response should be the same when the Solicitor General<sup>95</sup> or an Assistant Attorney General is involved. "The Appointments Clause," one judge has written, "subjects the selection process to public scrutiny, thereby affecting who takes office, how they perceive their function, and how they exercise their powers."<sup>96</sup> That safeguard, and our system of checks and balances in general, is not effective when one branch fails to act, thus circumventing the Constitution's requirements, as the Senate did when it acquiesced in Professor Dellinger's appointment. Nor are those constitutional provisions theirs to waive. While it has not adopted the same "no harm-no foul" attitude toward Mr. Lee, the Senate contributed to the current situation involving Bill Lee, first by not allowing a floor vote to be taken on Mr. Lee, then by suggesting his acting appointment would be less offensive than a recess appointment.

### C. *Suasion*

Perhaps future Presidents will, as a matter of course or in response to heretofore absent public pressure, follow both the text and the spirit of the Constitution and promptly submit acting appointees to the Senate for confirmation.<sup>97</sup> Though Professor Dellinger, at least, had been confirmed once by the Senate, the absurdity of maintaining that one Senate confirmation is good for the duration of one's government service should at once become evident. Imagine then President Reagan defending a decision not to submit "Acting" Associate Supreme Court Justice Robert Bork to the Senate for confirmation in part on the grounds that he had previously been confirmed for his seat on the court of appeals.

Circumvention of the Senate's Advice and Consent role is not only unconstitutional, it is dangerous, especially when the appointments involve

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95. Despite its low profile, the Office of Solicitor General is hardly an unimportant office in the formation of American constitutional law. The Solicitor General is thought to have significant influence with the Supreme Court in setting the Court's agenda. *See generally* LINCOLN CAPLAN, *THE TENTH JUSTICE* 19-32 (1987); REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 3, 26-28, 151-52, 174-75 (1992).

96. *Olympic Fed. Sav. & Loan v. Office of Thrift Supervision*, 732 F. Supp. 1183, 1189 (D.D.C. 1990).

97. The court in *Lucido* praised the Nixon Administration for doing just that. *See supra* notes 53-58 and accompanying text. Any administration not exceeding the Nixon Administration's constitutional scruples should probably take a hard look at itself. The voters, too, should take note.

federal law enforcement officials. The increase in the number of federal criminal statutes<sup>98</sup>—a phenomenon of relatively recent vintage<sup>99</sup>—places enormous power in the hands of the Department of Justice and myriad other federal agencies.<sup>100</sup> While good sense is often exercised by those charged with enforcing the nation's laws, there is always a danger that the executive branch will be tempted to misuse its power.<sup>101</sup> Part of the Senate's responsibility is to evaluate these individuals for qualities like prudence, honesty and sensitivity to the rule of law—virtues necessary to prevent federal prosecutions from becoming persecutions.

## VII. CONCLUSION

Twice in the last two years, the Clinton Administration has sought to avoid the inconvenience of the appointment process set forth in the Constitution. Through a questionable reading of the Attorney General's authority, it claims a broad exemption from the Vacancies Act.<sup>102</sup> In the case

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98. See, e.g., MORGAN & REYNOLDS, *supra* note 54, at 159-84.

99. *Id.* at 160-61.

100. *But see Safeguarding the Use of RICO*, CHI. TRIB., Nov. 4, 1989, § 1, at 12 (noting the Department of Justice's promulgation of standards regarding the use of federal racketeering statutes to prevent abuse).

101. See David Burnham, *The F.B.I.*, THE NATION, Aug. 11, 1997, at 11, 23 (noting that "[w]ith a truly coordinated team of federal investigators and prosecutors, an ambitious and unprincipled [Attorney General] . . . could threaten the very essence of democratic government by throwing the full weight of the Justice Department against an administration's political enemies").

102. While the Senate bears some responsibility for forcing the President's hand in the case of Bill Lann Lee, the Administration has shown a disturbing propensity to avoid conflict by circumventing constitutional and statutory procedures with controversial nominees. For example, in addition to Professor Dellinger's personal reasons for wishing to limit his time in Washington, see *supra* note 72, there is also the fact that his nomination as head of the Office of Legal Counsel was opposed by both North Carolina Senators, Jesse Helms and Lauch Faircloth. Because Senators may place a "hold" on a nominee from their home state whom the Senator finds personally offensive, Dellinger's confirmation as Solicitor General might not have been a sure thing. The Administration avoided any possible confirmation battles with its ingenious solution.

There is another example, while not involving an Article II officer, that fits the Administration pattern. The facts recited in *George v. Ishimaru*, 849 F. Supp. 68 (D.D.C. 1994), have a familiar ring to them. The defendant, Ishimaru, was designated by President Clinton as Acting Staff Director of the Commission on Civil Rights. The Commission, created by statute, see 42 U.S.C. §§ 1975-1975d (1994), is composed of eight members. The President is entitled to appoint four members; the President *pro tem* of the Senate, two members; and the Speaker of the House, two members. See 42 U.S.C. § 1975(b); *Ishimaru*, 849 F. Supp. at 70. The President can designate a Chairperson and a Vice Chairperson from among the eight Commission members, but those choices must be approved by a majority of the Commission's members. See 42 U.S.C. § 1975(d); *Ishimaru*, 849 F. Supp. at 70. Further, there is a provision for a Staff Director, who is also appointed by the President, again with the concurrence of a majority of Commission members. See 42 U.S.C. § 1975b(a); see *Ishimaru*, 849 F. Supp. at 70.

When President Clinton took office, the Staff Director's office was vacant. See *id.* The other members of the Commission recommended the current Acting Staff Director (Mr. Bobby Doctor) to

of Walter Dellinger, who served for over a year as Acting Solicitor General without his name even being submitted to the Senate for confirmation, any questions became moot with his resignation from the Justice Department and his return to academia. With Bill Lann Lee, however, the issues are very much alive, and in desperate need of resolution. Not only are Justice Department officials, other than the Attorney General, not exempt from the plain language of the Act, but the President can only fill temporary vacancies under the Act with persons who have already been confirmed by the Senate for a particular job. Mr. Lee held no such position in the Clinton Administration.

Moreover, despite attempts to create *ex nihilo* the Attorney General's authority to fill vacancies through a synergistic interpretation of the Act and the Attorney General's power under 28 U.S.C. §§ 509 and 510, the statutes creating both the position of Solicitor General and Assistant Attorney General are clear: the President nominates, and with the advice and consent

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serve as the permanent Staff Director. *See id.* Clinton instead appointed the defendant, and the Chair of the Committee then notified the President that he would not concur in the President's selection. *See id.* The Chair was replaced, and the new Chairperson removed Mr. Doctor as Acting Staff Director. *See id.* Doctor returned to the Commission's office in Atlanta, where he continued working for the Commission. *See id.* The plaintiff, a member of the Commission and Professor of Politics at Princeton, requested an opinion on the legality of Doctor's termination from the Commission's legal counsel. *See id.* at 70. In response to George's request, the Acting General Counsel of the Commission determined that the Chairperson had no authority to terminate Doctor; that same day, the Acting General Counsel was terminated as well. *See id.* at 70. In December 1993, Clinton again appointed the defendant as Acting Staff Director. A majority of the Commission then voted to reinstate Doctor as Acting Staff Director. *See id.* at 70.

The Office of Legal Counsel issued an opinion in January 1994 stating that the Commission could not override the President's appointment. *See id.* at 71. The next day, the Commission voted not to confirm the defendant on a vote of four against, one abstention, and three refusals to vote. *See id.* Nevertheless, the defendant continued to serve as Acting Staff Director, and at the time the suit was commenced, President Clinton had neither sought to submit the name of another Staff Director for the Commission's approval, nor again sought the concurrence of a majority of the Commission for the defendant. *Id.*

In the district court's conclusions of law, the judge repeated the parties' stipulation that the defendant was not a constitutional officer and that neither the Vacancies Act nor the Appointments Clause applied. *See id.* at 71. Nevertheless, the court rejected out of hand the President's claim of "inherent authority" to fill offices under the Take Care Clause of the Constitution. *See id.* at 71-72; *see also* U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."). "No court has ever recognized that the President has such inherent authority," the judge wrote. *Id.* at 71-72. The judge even chided the Administration for making such an argument: "The important work of the Commission on Civil Rights should not be impeded by continuing to argue about 'inherent' Presidential power which no court in the nation's history has ever recognized." *Id.* at 73.

The court concluded that the President had to comply with the statute, and enjoined the defendant from representing himself as the Acting Staff Director. The judge, while "not unsympathetic to the government's argument that it needs to continue to function," stressed that "the government must function in a lawful manner." *Id.* at 73.

of the Senate, appoints—just like the Constitution says.

The Administration, regrettably, leaves the impression in its handling of both the Dellinger and the Lee appointments that it simply cannot be bothered with observation of what it deems to be constitutional minutiae.<sup>103</sup> On occasion, its impatience with constitutional forms and formalities is expressed candidly. When asked about Mr. Lee's nomination, and the implications of his being an acting, as opposed to a recess, appointee, White House adviser Rahm Emanuel responded, "The process is not what's important. The goal line is what's important."<sup>104</sup> On the contrary, our Constitution is in large part about process, and it is important that the procedures set forth therein are scrupulously observed. It should have given pause to the Administration that the position it is taking—that the Vacancies Act does not apply to the Justice Department—was first argued by the Nixon Administration as the Watergate scandal decimated its Justice Department.<sup>105</sup>

In the end, a combination of Senate vigilance, public pressure and congressional resolution of statutory ambiguities is needed to prevent these problems from arising again. Moreover, the branches should work together to fill vacancies, each exercising its constitutional responsibilities in good faith, without unnecessary provocation of, or embarrassment to, the other. Both the President and the Senate should remember that they exercise their respective constitutional prerogatives not for their own benefit, but for the benefit of "We the People." As one judge put it:

[T]he Constitution was not written to protect the interests of the Senate, the Congress, the President, or any other branch or division of government. The Constitution and its system of checks and balances was written to protect the people. The restrictions it placed upon the branches' exercise of power were not designed to ensure the branches' interest in equal power, but to ensure that citizens would not find themselves governed by a single branch . . . .<sup>106</sup>

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103. The *Ishimaru* case fits this pattern as well, though the concerns did not rise to a constitutional level. See *supra* note 102.

104. See Dewar, *supra* note 2 (quoting White House adviser Rahm Emanuel). Emanuel's remarks seem to confirm Michael Paulsen's Iron Law of Constitutional Law:

Where the Constitution is inconvenient, ingenuity will be exercised and intellectual integrity sacrificed to find a way around it; and the vigor of such efforts and self-deceptions will be directly proportional to the perceived stakes of adherence to the inconvenient constitutional provision and inversely proportional to the perceived intrinsic merit of that constitutional provision.

Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907, 915 (1994).

105. See, e.g., *The Vacancy Act Fight*, *supra* note 9; *The Permanent Acting Assistant Secretary*, *supra* note 78.

106. *Olympic Fed. Sav. & Loan v. Office of Thrift Supervision*, 732 F. Supp. 1183, 1189 (D.D.C.

The federal appointments process is slow and cumbersome, some would say grossly inefficient, even when working as it should.<sup>107</sup> It is certainly often inconvenient to a President desiring to see nominees confirmed. But those are not good reasons to ignore either the commands of Congress or of the Constitution itself. The Constitution, after all, was not framed for the convenience of members of the political class; following the formalities of the Constitution is often inconvenient for such persons, as it should be.

### VIII. EPILOGUE

As this Article was being readied for publication this summer, members of the Senate, led by Senators Fred D. Thompson (R-TN), the majority leader Trent Lott (R-MS), Strom Thurmond (R-SC) and Robert Byrd (D-WV), apparently heeding advice from academics to provide a legislative solution to the Vacancies Act conundrum,<sup>108</sup> introduced legislation that would rewrite the Vacancies Act.<sup>109</sup> The proposed Federal Vacancies Reform Act of 1998 (the "FVRA") rewrites section 3345 and requires the President (and only the President) to make temporary appointments to vacant positions, as an alternative to automatic succession by the first assistant.<sup>110</sup> In addition, new section 3345 limits the first assistant succession by disqualifying persons (i) who are first assistants as of the date of the vacancy; (ii) who served in the position of first assistant for less than 180 days during the previous year; and (iii) who are nominated by the President for that position.<sup>111</sup>

The FVRA rewrites section 3346 to extend the period of time for which a temporary appointment may serve from 120 to 150 days.<sup>112</sup> Section 3347 clarifies the applicability of the FVRA; it applies sections 3345 and 3346 to "any office of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) for which appointment is required to be made by the President, by and with the advice and consent of the Senate," unless: (i) an act of Congress "expressly

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1990).

107. See, e.g., *A Tyrannous Minority*, THE ECONOMIST, Jan. 10, 1998, at 24 (remarking that the "nominations logjam" reflected "the tendency of America's admirable checks and balances to descend into ridiculous self parody").

108. See *supra* note 49 (describing testimony of Professor Michael Gerhardt).

109. See Federal Vacancies Reform Act of 1998, S. 2176, 105th Cong.; S. REP. NO. 105-250 (1998). Previously, Senator Robert Byrd introduced legislation that would withhold pay from temporary appointees who overstayed the 120-day limit. See Federal Vacancies Compliance Act of 1998, S. 1761, 105th Cong. The provisions of Sen. Byrd's bill were not included in the June legislation.

110. See S. REP. NO. 105-250, at 2-3, (1998).

111. See *id.* at 3. These provisions would constitute the new section 3345.

112. See *id.*

supersedes” the FVRA; (ii) the President or the head of a department is “expressly authorized” by Congress to designate an acting appointee; or (iii) the President makes a recess appointment.<sup>113</sup> Section 3347 also preempts arguments that the Justice Department was making with regard to sections 509 and 510 by specifying that a statutory delegation of “general authority to the head of an Executive agency . . . to delegate duties to, or to reassign duties among, officers or employees of such Executive agency” is *not* an express authorization to make temporary appointments contemplated by that section.<sup>114</sup>

The FVRA also includes provisions calculated to increase pressure on the President to make timely appointments. If the President does not submit a name to the Senate within 150 days of the vacancy, section 3348 provides that the office must remain vacant until a name is submitted and except in the case of a vacancy involving the head of an Executive agency, *only* the head of the agency “may perform any function or duty of such office, until a nomination is made . . . .”<sup>115</sup> The same section also gives no force or effect to actions taken by persons in violation of the FVRA. Remaining sections require reports of vacancies, persons acting as temporary appointees, and the names of persons who have been submitted to the Senate for confirmation to be made to Comptroller General, and make provisions for the transition of personnel following Presidential inaugurations.<sup>116</sup>

The Senate took up the FVRA in September 1998, but Republicans were unable to muster the necessary votes to stop debate and force a vote.<sup>117</sup> The failure to cut off debate was attributed both to the desire of Democrats to see wide-ranging reforms in the way the Senate acts on presidential nominees<sup>118</sup> and to add unrelated amendments on managed-care reform to the FVRA.<sup>119</sup>

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113. *Id.* at 5.

114. *Id.* at 6.

115. *Id.* at 7.

116. *See id.* at 10-13 (new sections 3349, 3349a-3349c).

117. *See* Stephen Green, *Senate Fails to Force Out Appointee*, SAN DIEGO UNION-TRIB., Sept. 29, 1998, at A5; Scully, *supra* note 9.

118. *See* Scully, *supra* note 9.

119. *See* Green, *supra* note 117. *But see The Vacancies Reform Act*, WASH. POST, Nov. 3, 1998, at A16 (reporting that the FVRA was going to pass as a rider to the omnibus budget bill).

## APPENDIX A

“THE VACANCIES ACT,” 5 U.S.C. §§ 3345-3349 (1994).

### **§ 3345. Details; to office of head of Executive agency or military department**

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

### **§ 3346. Details; to subordinate offices**

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

### **§ 3347. Details; Presidential authority**

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

### **§ 3348. Details; limited in time**

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

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

(A) until the Senate confirms the nomination; or

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

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

(b) Any person filling a vacancy temporarily under section 3345, 3346, or 3347 of this title whose nomination to fill such vacancy has been submitted to the Senate may not serve after the end of the 120-day period referred to in

paragraph (1)(B) or (2) of subsection (a) of this section, if the nomination of such person is rejected by the Senate or is withdrawn.

**§ 3349. Details; to fill vacancies; restrictions**

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

**APPENDIX B**

28 U.S.C. §§ 509-510 (1994).

**§ 509. Functions of the Attorney General**

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except for the functions—

(1) vested by subchapter II of chapter 5 of title 5 in administrative law judges employed by the Department of Justice;

(2) of the Federal Prison Industries, Inc.; and

(3) of the Board of Directors and officers of the Federal Prison Industries, Inc..[sic]

**§ 510. Delegation of authority**

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

