

## The Whitaker Appointment

***By Anne L. Schneider, November, 2018.***

The day after the midterm election President DJT asked for and received the resignation of Jeff Session as Attorney General of the United States. DJT then appointed Matt Whitaker, Session's Chief of Staff, as Acting Attorney General and said a name for a permanent appointment would be submitted later to the U.S. Senate. In this position Whitaker (whose position as Chief of Staff does not require Senate approval) would oversee the Mueller investigation that currently is supervised by Rod Rosenstein, Deputy Attorney General. Sessions recused himself from overseeing the Mueller investigation because he was involved in DJT's campaign and therefore has a conflict of interest.

Arguments immediately began over whether this appointment

- is a violation of the Constitution, (Article II);
- violates U.S. Statutes, 28 U.S. Code 508,
- violates U.S. Statutes, 5 U.S. Code 3345,
- precludes Whitaker from supervising the Mueller investigation because of the terms of the special counsel regulations 28 CFR Part 600.

The following sections take up these issues focusing especially on certain passages in 3345 that defenders are citing as evidence the appointment is lawful but this, in my opinion, is a misinterpretation. These sections should be interpreted to mean that the appointment is unlawful, yet persons claiming the appointment is unlawful also are not paying much attention to 3345, the Federal Vacancy Reform act, except to say that 508 has precedent. Puzzling!

## Is the appointment a violation of the Constitution?

Article II, Section reads:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; **and he 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 the Courts of Law, or in the Heads of Departments.

This appears to make it clear that the person appointed as an "officer" of the United states must have 2/3 Senate approval but if this is an "inferior" office the Congress may by law grant the President power to make the appointment without Senate approval. The Department of Justice rationale includes, among other things, an

argument that the acting AG is an “inferior” office. See this their reasoning here: [http://apps.washingtonpost.com/g/documents/world/read-the-justice-department-memo-defending-whitakers-appointment/3307/..+\\*](http://apps.washingtonpost.com/g/documents/world/read-the-justice-department-memo-defending-whitakers-appointment/3307/..+*)

## Is the appointment a violation of federal statutes?

The constitutional provision grants Congress the authority to define “inferior” offices or to further define the succession rules. There are two relevant statutes: 28 U.S. Code 508 <https://www.law.cornell.edu/uscode/text/28/508> and The Federal Vacancies Reform Act **5 U.S. Code § 3345** - [https://www.law.cornell.edu/uscode/text/28/508?qt-us\\_code\\_temp\\_noupdates=0#qt-us\\_code\\_temp\\_noupdates](https://www.law.cornell.edu/uscode/text/28/508?qt-us_code_temp_noupdates=0#qt-us_code_temp_noupdates)

### Statute # 1: 28 U.S. Code 508.

This statute is short, specific to the Department of Justice, and very clear that there is an order of succession in which a person who is to be appointed in case of a vacancy must hold a position within DOJ that has had Senatorial approval. Here’s what the statute says:

- (a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.
- (b) When by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Associate Attorney General shall act as Attorney General. The Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.

And, federal law provides that all of these possible positions mentioned in this statute require 2/3 approval by the Senate. Positions requiring 2/3 agreement by the Senate are published in the *United States Government Policy and Supporting Positions* (Plum Book). There are an estimated that 1200-1400 positions require Senate confirmation. The ones in DOJ are listed here:

[https://en.wikipedia.org/wiki/List\\_of\\_positions\\_filled\\_by\\_presidential\\_appointment\\_with\\_Senate\\_confirmation#Department\\_of\\_Justice\\_2](https://en.wikipedia.org/wiki/List_of_positions_filled_by_presidential_appointment_with_Senate_confirmation#Department_of_Justice_2)

In accord with this statute, the Acting Attorney General is not an inferior office at all and Whitaker's appointment appears to be a violation of the law. Any actions he takes can be challenged on those grounds. However, there is another statute.

### **Statute #2. The Federal Vacancies Reform Act**

The second relevant statute 5 U.S. Code § 3345 - Acting officer (see full text at end of article) -- says that a vacancy in an office that is required to be filled by the President with the advice and consent of the senate dies, resigns, or is otherwise unable to perform the functions and duties, then the first assistant shall perform those functions in an acting capacity (Section (a)). As noted above, the first assistant in the department of Justice is the Deputy Attorney General (Rod Rosenstein) and has been approved for that position by the Senate. Some are arguing that since Sessions was asked to resign, this statute does not even apply at all. Others point that that regardless of how or why he left, he is "unable to perform the functions and duties..." Therefore, this statute probably is relevant.

Much of the disagreement revolves around the last sections of the statute. It goes on to say that the President can appoint an employee of the agency whose pay is at the GS level 15 or higher. This provision has been used by some commentators to argue that Whitaker's appointment is not illegal because he is an employee whose pay is higher than that.

But the statute does not end there, these remaining sections contain a confusing double negative.

Here's the exact wording – the double negative makes this hard to understand at first. Pay attention to the emphasis that has been added.

(1) Notwithstanding subsection (a)(1), a person **may not serve as an acting officer** for an office under this section, if—

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, **such person—**

(i) **did not serve in the position of first assistant to the office of such officer; or**

(ii) **served in the position of first assistant to the office of such officer for less than 90 days; and**

(B) the President **submits a nomination of such person to the Senate for appointment to such office.**

It is possible, however, to disentangle a double negative. Here's how:

- "... a person may NOT serve as an acting officer..." – that would be Whitaker — "if such person DID NOT SERVE in the position of first assistant..." Whitaker had NOT served as first assistant. Thus, he cannot be appointed according to this provision.
- "Or... [such person also cannot be appointed if...] "served in the position of first assistant to the office of such officer (that would be AG Sessions) for less than 90 days and ... the President submits a nomination of such person to the Senate for appointment to such office." He has not met that standard, either, therefore he cannot be appointed under this "employee" provision.

To summarize: The statute sets out two conditions for an employee to be appointed as acting AG, even if they do not currently hold position of assistant AG or deputy to the assistant AG. The first condition is that they had **previously** held the position of first assistant to the AG for 90 days or longer. Whitaker has not held that position at all. The second condition is that if they had held the position of assistant AG for less than 90 days AND the President had submitted their name to the Senate for confirmation, then they could be appointed acting AG. Whitaker does not meet that condition either.

Thus, the double negative is confusing, but once unpacked, it says that someone who **has held that position in the past** could be appointed (if served more than 90 days, or if less than 90 days AND the President has submitted their name to Senate for confirmation). But Whitaker has never held the position of assistant or deputy AG.

It is curious, however, that most of the legal experts are NOT focusing on this argument about the interpretation of conditions under which "any" employee can be appointed; but are arguing that the Federal Vacancy Act itself is superceded by the 508 Statute that applies specifically to the DOJ. It is not clear why legal scholars are not making the case about the wording and disentangling the confusing double negative.

## **What Is the Justice Department Reasoning that the Appointment is Legal?**

The Justice Department has issued a response to a case filed by the State of Maryland asking for a ruling to confirm Rod Rosenstein as the "real" Acting Attorney General. Here's a link explaining their reasoning:

[http://apps.washingtonpost.com/g/documents/world/read-the-justice-department-memo-defending-whitakers-appointment/3307/.,+\\*](http://apps.washingtonpost.com/g/documents/world/read-the-justice-department-memo-defending-whitakers-appointment/3307/.,+*)

They cite the two statutes mentioned above, but claim that Whitaker can be appointed because he is in the third category mentioned in Section (a) of 3345. Here's the three categories:

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

The first category is the assistant AG who would be eligible for appointment. The second category would be a person who serves in an office that requires Presidential appointment by and with advice and consent of the Senate. This provision implies that it would not even have to be in the same agency, but advice and consent of the senate is required. The third would be an employee of DOJ, if.... Here's that section along with the "if":

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

Then, their reasoning regarding the "if" seems to be that any employee of DOJ can be appointed if they have worked there for at least 90 days and are paid more than the GS 15 level, OR have worked there less than 90 days but the President has submitted their name to the Senate for confirmation. However, that is still Section (a) of the act. Section (b) cited above goes on to say "notwithstanding subsection (a)(1), a person may NOT serve as an acting officer... if such person (i) did NOT serve in the position of first assistant and so on as already explained. Their reasoning is based on Section (a) and

disregards section (b). Their reasoning treats the third category as a legal category, provided one of the next two conditions is met. However, this reasoning ignores the more reasonable interpretation of section (b) that says an employee can be appointed if they “**served in the position of first assistant to the office** for less than 90 days or less than 90 days AND the President has submitted their name. In other words, the “employee” category is limited not only to pay grade above GS15 but also limited by the requirement that they have to previously have served as first assistant. The DOJ reasoning ignores this requirement entirely in understanding of the conditions under which any employee can be appointed.

At the risk of unnecessary repetition, consider again the actual language of section (b), parsed to expose the double negative:

- “... a person may NOT serve as an acting officer...if such person did not serve in the position of first assistant...” Whitaker had NOT served as first assistant. Thus, he cannot be appointed according to this provision.
- “Or... [the employee cannot be appointed if he/she] ... “served in the position of first assistant to the office of such officer [that would be AG Sessions] for less than 90 days and ... the President submits a nomination of such person to the Senate for appointment to such office.” He has not met that standard, either, therefore he cannot be appointed under this “employee” provision.

In addition to this argument, their brief then makes the argument that the Federal Vacancy Act (this is 3345 act that allows the President to appoint any employee according to their reasoning) takes precedent over the 508 statute that specifically lays out the rules of succession for the Department of Justice. They also argue that similar appointments have been done many times and therefore the Whitaker appointment must not violate either the constitution or the statutes. They say that Trump has now done it six times, while President Barack Obama did it twice and that President George W. Bush did it once.

So far, most of the legal analysis seems to focus on which statute should prevail, and on the constitutional question, rather than on the confusion contained in the Federal Vacancy Act, except to say that the act is confusing, or is a mess. On the other hand, section (b) clearly requires that an acting officer must have served previously as the assistant for 90 days or more (requiring Senate approval) or have served for less than 90 days and had his/her name submitted for permanent approval. Whitaker has done neither of those.

**Can Whitaker Supervise the Mueller Investigation?**

Neal Kaytal helped draft the special counsel regulations, and he writes in the Washington Post,<sup>1</sup> that Whitaker cannot supervise the Mueller investigation and cites some other relevant provisions. These are 28 CFR Part 600.

- The regulations require a person who supervises an investigation must be a lawyer with integrity and impartiality. Whitaker is on record as opposing the Russian investigation and therefore cannot supervise it, under the special counsel regulations.
- The special counsel is not subject to day-to-day supervision by ANY official in the Department of Justice, including the AG or Acting AG.
- An Acting AG could step in to stop an investigation or prosecutorial step if it is inappropriate or unprecedented in terms of established department procedures and if this is done, the AG must notify the House and Senate Judiciary committees and the ranking minority as well as the majority.
- The regulations specify that only the AG can fire a special prosecutor and only for cause. The President cannot do it

## What Can Be Done?

So far, several actions have taken place.

- Attorneys General in 18 states have sent a letter saying that Whitaker must recuse himself from overseeing the Mueller investigation.
- Senator Shuman, minority leader of the U.S. Senate, has asked for a written response as to why Whitaker was appointed.
- The state of Maryland has filed an injunction in a Maryland court regarding whether Whitaker holds the position legally and can, therefore, be involved in a case that the state has pending with the Attorney General. The DOJ memo discussed above was in response to that case.
- Senator Flake (Arizona Republican) has a bill protecting the Mueller investigation that was passed out of the Justice committee but that Senate President McConnell will not call up for a vote. This is a leverage point for action during the “lame duck” session of Congress.

Most of the action will play out in the Courts; but ordinary citizens need to strenuously object to the President of the United States getting away with an unlawful appointment.

Comments, questions, suggestions? Send to [legislativeadvocacy@vuu.org](mailto:legislativeadvocacy@vuu.org).

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<sup>1</sup> [https://www.washingtonpost.com/outlook/2018/11/12/rules-are-clear-whitaker-cant-supervise-muellers-investigation/?utm\\_term=.ab9c98bb906f](https://www.washingtonpost.com/outlook/2018/11/12/rules-are-clear-whitaker-cant-supervise-muellers-investigation/?utm_term=.ab9c98bb906f)

## Here's the full text of Act 5 U.S. Code § 3345 -

(a) If an officer of an [Executive agency](#) (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be [made](#) by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or [employee](#) of such [Executive agency](#) to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or [employee](#) served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the [position](#) described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a [position](#) at GS-15 of the General Schedule.

(b)

(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if—

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—

(i) did not serve in the [position](#) of first assistant to the office of such officer; or

(ii) served in the [position](#) of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if—

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)

(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.