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NOTE

Modern Vacancies, Ancient Remedy: How the De Facto Officer Doctrine Applies to Vacancies Act Violations (And How It Should)

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Abstract. In broad terms, the Vacancies Act authorizes the temporary service of non-Senate-confirmed leaders (commonly called "actings"), while the de facto officer doctrine allows courts to validate the past acts of improperly serving officials. This Note examines whether, when, and how the de facto officer doctrine has applied and should apply to the past acts of improper actings.

Both the Vacancies Act and the de facto officer doctrine are understudied. That fact is somewhat unsurprising: Both doctrines are considered niche areas of the law. Within academia, the Vacancies Act is considered the province of administrative law experts, and even within the federal government, most agency personnel receive only ad hoc training and guidance on it. For its part, the de facto officer doctrine is an ancient tool of equity that many consider to be of decreasing import. But that lack of scholarly treatment *is* surprising given the ubiquity and importance of acting officials (and the many roles agencies play in our lives). Between 1981 and 2020, there were 147 acting cabinet secretaries and just 171 confirmed ones, and empirical studies have shown that Senate-confirmed positions are vacant between 15% and 25% of the time. Likewise, the de facto officer doctrine has surged to national prominence more than once—most recently in the 2020 Supreme Court case *Aurelius*. And, notably, courts have already been confronted by many of the questions this Note seeks to address.

This Note does not analyze the Vacancies Act or the de facto officer doctrine at length. Instead, it explores the themes, potential, and pitfalls of using the de facto officer doctrine to validate the actions of officials who have not only skirted Senate confirmation, but also

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violated the constraints of the Vacancies Act. This Note thus seeks to chart the topography of the intersection of those two bodies of law and to provide a roadmap to future courts confronted with Vacancies Act violations.

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Introduction*

The administrative state "wields vast power and touches almost every aspect of daily life."[1] Agencies regulate the financial markets,[2] deliver the mail, enforce antidiscrimination in the workplace,[3] and run the nation's rail network.[4] They control which curse words can air on television,[5] the percentage of peanuts in products labeled "peanut butter,"[6] and most things in between. Much of that power rests in the hands of agency heads and officials.

The Framers, recognizing the dangers inherent in executive power, checked it with the Appointments Clause, which requires Senate confirmation of certain government officers.[7] But practical constraints—be they in-office sickness and death or ails of a more political ilk—forced even the Second Congress to authorize the temporary service of non-Senate-confirmed leaders.[8]

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* This Note is current as of January 2022. Subsequent changes in the legal landscape are not addressed.

1. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010).
2. *E.g.*, *What We Do*, SEC, https://perma.cc/8TDR-2W9H (last updated Nov. 22, 2021); *The Commission*, COMMODITY FUTURES TRADING COMM'N, https://perma.cc/2ZX5-X4XZ (archived Jan 6, 2022).
3. *E.g.*, *Overview*, EEOC, https://perma.cc/EBQ5-7VNF (archived Jan 6, 2022).
4. "Amtrak is a federally chartered corporation, with the federal government as majority stockholder. The Amtrak Board of Directors is appointed by the President of the United States and confirmed by the U.S. Senate. Amtrak is operated as a for-profit company, rather than a public authority." AMTRAK, FY 2020 COMPANY PROFILE: FOR THE PERIOD OCTOBER 1, 2019-SEPTEMBER 30, 2020, at 3 (2020), https://perma.cc/N92M-ESUX. The Supreme Court has twice held that Amtrak is a government entity. *See* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 394 (1995) ("[Amtrak] is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution."); Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 46 (2015) (holding that Amtrak is a governmental entity "for purposes of determining the validity of the metrics and standards").
5. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 510, 529-30 (2009) (holding that it was not arbitrary and capricious for the Federal Communications Commission to impose liability on Fox for fleeting expletives uttered during the 2002 and 2003 Billboard Music Awards).
6. *See generally* The Uncertain Hour, *The Peanut Butter Wars*, MARKETPLACE (Nov. 10, 2017), https://perma.cc/2EB2-F48W (chronicling "peanut butter grandma" Ruth Desmond's advocacy and role in the Food and Drug Administration hearings concerning additives in peanut butter).
7. U.S. CONST. art. II, § 2, cl. 2 ("[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 . . . .").
8. Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533, 581 (2020); Doolin Sec. Sav. Bank, F.S.B. v. Off. of Thrift Supervision, 139 F.3d 203, 209-10 (D.C. Cir. 1998) (citing, inter alia, Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281), *superseded by statute*, Federal Vacancies Reform

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Today we call those temporarily serving, non-Senate-confirmed leaders "actings." Their service is authorized and governed primarily by the Federal Vacancies Reform Act of 1998 (Vacancies Act).[9] The scope of that Act is difficult to overstate.

Between 1981 and 2020, there were 147 acting cabinet secretaries and just 171 confirmed ones.[10] And empirical studies have shown that Senate-confirmed positions are vacant between 15% and 25% of the time.[11] Despite the prevalence of acting officials and the power that they wield, the Vacancies Act has received little attention. Within academia, the Act is considered the niche province of administrative law buffs, and even within the federal government, most agency personnel receive only "ad hoc" training and guidance on it.[12] The Act only recently garnered more attention, as challenges to President Trump's actings punctuated his time in office.[13]

With lawsuits challenging Trump-era actings still pending and Biden-era ones brewing,[14] what should become of the *actions* of improper *actings*? Of the delisting of the grizzly bear as an endangered species by Jim Kurth "[e]xercising the [a]uthority of the Director"?[15] Of the suspension of rules regulating natural gas on federal lands by Katharine MacGregor "[e]xercising the [a]uthority of the Assistant Secretary"?[16] Actings are everywhere, and actions carried out under the color of their titles have both engendered significant reliance interests and caused enduring harm. In the face of a Vacancies Act violation, should those actions be allowed to stand or be voided—and, crucially, who should get to decide?

Act of 1998 (Vacancies Act), Pub. L. No. 105-277, § 151, 112 Stat. 2681-611, 2681-611 to -616 (codified at 5 U.S.C. §§ 3345-3349d).

9. 5 U.S.C. §§ 3345-3349d.

10. Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 642 (2020).

11. *Id.* at 639 (discussing her empirical study of vacant positions between 1977 and 2005).

12. ANNE JOSEPH O'CONNELL, ADMIN. CONF. OF THE U.S., ACTING AGENCY OFFICIALS AND DELEGATIONS OF AUTHORITY 41 (2019), https://perma.cc/Z87V-TKRP.

13. *E.g.*, Anne Joseph O'Connell, *Who's on First at the Department of Homeland Security?*, LAWFARE (Sept. 14, 2020, 2:32 PM), https://perma.cc/9M48-RY6P (detailing a "wide range" of lawsuits challenging the acting leadership of President Trump's Department of Homeland Security).

14. Anne Joseph O'Connell, *Waiting for Confirmed Leaders: President Biden's Actings*, BROOKINGS (Feb. 4, 2021), https://perma.cc/7C9F-5FQG; *see also infra* Part IV.A.

15. Mendelson, *supra* note 8, at 562 n.153 (quoting Endangered and Threatened Wildlife and Plants; Review of 2017 Final Rule, Greater Yellowstone Ecosystem Grizzly Bears, 83 Fed. Reg. 18,737, 18,743 (Apr. 30, 2018) (to be codified at 50 C.F.R. pt. 17)).

16. *Id.* at 563 n.153 (quoting Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58,050, 58,072 (Dec. 8, 2017) (to be codified at 43 C.F.R. pts. 3160, 3170)). Note that Kurth and MacGregor were not traditional actings; instead, they were exercising the delegated authority of a vacant position. *See id.* at 561-63; *see also infra* Part III.C.1.

The constitutionality (contested), desirability (debatable), and ubiquity (undeniable) of actings have been examined by the legal historians and scholars, judges and Justices who have written about the Act. This Note, by contrast, analyzes how courts have dealt with the *aftermath* of a Vacancies Act violation. More specifically, it asks whether and when "[a]n ancient tool of equity"[17]—the de facto officer doctrine—might apply to the actions of officials serving in violation of the Vacancies Act. The doctrine provides that a court may "confer[] validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient."[18] In other words, it allows a court to validate the actions of an improperly serving official.

Readers familiar with the Vacancies Act will recall that it considerably narrows the remedies at a court's disposal. The text of the Act, codified at 5 U.S.C. § 3348, automatically voids all actions taken by improperly serving actings.[19] Indeed, that enforcement provision is what gave the 1998 Act—as compared to its predecessors—its bite.[20] In this Note, I suggest that § 3348 is much more porous than generally believed and then probe the implications of that permeability. This Note's chief contribution is thus tracing the topography of this area of law and analyzing the lack of clarity that has developed on the margins of § 3348. I analyze what federal courts have said and done when interpreting § 3348 and evaluating the propriety of the de facto officer doctrine in Vacancies Act–violation cases. I conclude that the de facto officer doctrine can be a valuable tool necessary to protect the public interest and, by offering normative criteria and guiding principles, suggest how future courts should apply the doctrine to Vacancies Act violations.

This Note proceeds in four parts. Part I provides constitutional and statutory background on the Appointments Clause and acting service. It explains that although Vacancies Acts violations are technically statutory, they are also inescapably constitutional in nature. Before reaching the heart of my analysis—the de facto officer doctrine's applicability to Vacancies Act violations—Part II examines a crucial threshold question: whether the de facto

17. Aurelius Inv., LLC v. Puerto Rico, 915 F.3d 838, 862 (1st Cir. 2019), *rev'd sub nom.* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020).

18. Ryder v. United States, 515 U.S. 177, 180 (1995) (citing Norton v. Shelby County, 118 U.S. 425, 440 (1886)).

19. 5 U.S.C. § 3348(d)(1) ("An action taken by any person who is not acting [in compliance with the Vacancies Act] . . . shall have no force or effect.").

20. *See* SW Gen., Inc. v. NLRB, 796 F.3d 67, 70 (D.C. Cir. 2015) ("The statute was framed as a reclamation of the Congress's Appointments Clause power."), *aff'd*, 137 S. Ct. 929 (2017). *See generally* Stephen Migala, The Vacancies Act and Its Anti-ratification Provision (Nov. 11, 2019) (unpublished manuscript), https://perma.cc/X3WZ-AUZA (describing the origins of the 1998 Act's antiratification provision and the then-Senate's desire to write a vacancies statute that could not be subverted by the executive).

officer doctrine is available for constitutional violations at all. It focuses on a 2020 Supreme Court case that presented that very question: *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*.[21] Part III identifies three loopholes to the Vacancies Act's otherwise muscular enforcement provision: (1) offices exempt from § 3348, the "But I'm Exempt" loophole; (2) offices governed by agency-specific succession statutes, the "But Another Statute Governs" loophole; and (3) actions arguably not covered by the Act, the "But Those Actions Were Delegable" loophole. It also analyzes how courts, agencies, and Congress have addressed the de facto officer doctrine in each loophole. Part IV assesses the likelihood that government lawyers will rely on the doctrine in the coming months and years and seeks to predict the success of such a legal strategy. Lastly, Part V steps back, evaluating the normative value of the de facto officer doctrine in light of efficiency, functionality, democratic-legitimacy, and equity concerns.

A brief aside: The sources of legal authority on this topic span all three branches. They include Office of Legal Counsel (OLC) guidance and opinions,[22] Government Accountability Office (GAO) rulings,[23] and judicial opinions from both Article III and Article I courts. A recent exchange illustrates that overlap. In August 2020, the GAO, often called the "congressional watchdog,"[24] issued an opinion finding that several high-level officials within the Department of Homeland Security were all serving in violation of the Vacancies Act.[25] The agency contested the GAO's findings. The fact that the Department of Homeland Security responded was itself not surprising, but the tenor of its response was.[26] Chad Mizelle, a junior official performing the duties of the General Counsel, demanded that the GAO "rescind" its decision,

21. 140 S. Ct. 1649 (2020).

22. The OLC drafts "legal opinions" and provides legal advice to the President and executive branch agencies. *Office of Legal Counsel*, U.S. DEP'T JUST., https://perma.cc/8QL8-RPCD (archived Jan. 12, 2022).

23. The GAO issues independent "legal decisions and opinions" at the request of Congress or as provided for by statute. *Legal Decisions*, U.S. GOV'T ACCOUNTABILITY OFF., https://perma.cc/JM29-YRB2 (archived Jan. 12, 2022); *see, e.g.*, *Federal Vacancies Reform Act*, U.S. GOV'T ACCOUNTABILITY OFF., https://perma.cc/YBD8-68L4 (archived Jan. 22, 2022).

24. *About*, U.S. GOV'T ACCOUNTABILITY OFF., https://perma.cc/RR44-LJ3D (archived Jan. 12, 2022).

25. U.S. GOV'T ACCOUNTABILITY OFF., B-331650, DEPARTMENT OF HOMELAND SECURITY—LEGALITY OF SERVICE OF ACTING SECRETARY OF HOMELAND SECURITY AND SERVICE OF SENIOR OFFICIAL PERFORMING THE DUTIES OF DEPUTY SECRETARY OF HOMELAND SECURITY (2020), https://perma.cc/G8U4-LC6R; *see also* O'Connell, *supra* note 13 (detailing the GAO's Department of Homeland Security decision and chronicling its aftermath).

26. *See* O'Connell, *supra* note 13 (calling the tone of the response "stunning").

writing that its conclusions were "baseless and baffling."[27] He further intimated that the agency's decision was inaccurate, partisan, and timed to discredit President Trump.[28] Although the Mizelle example is arguably the most astonishing, it is by no means anomalous. And so, by exploring the de facto officer doctrine's interaction with the Vacancies Act, this Note tells, almost accidentally, a second story: one about interbranch relations, conflict, and strategy.

I. Threshold Matters: The Appointments Clause and Acting Service

The Appointments Clause is "among the [most] significant structural safeguards of the constitutional scheme."[29] It serves as a check on the President appointing favorites and ensures that the nation's top leaders are "free from ethical conflicts and qualified to run the government."[30] The Clause is widely understood to create two categories of officers—principal and inferior—although it explicitly names only the latter category.[31] A principal officer must be appointed by the President with the "advice and consent" of the Senate (PAS),[32] while an inferior officer may be appointed directly by the President,

27. Letter from Chad Mizelle, Senior Off. Performing the Duties of the Gen. Couns., U.S. Dep't of Homeland Sec., to Thomas H. Armstrong, Gen. Couns., U.S. Gov't Accountability Off. 1, 8 (Aug. 17, 2020), https://perma.cc/5KCH-PH5J.

28. The conclusion reads:

> The Report takes the reader on a march through a marsh. At each refusal to rely on key evidence, the morass thickens and the water deepens, as crucial questions lurking just underneath the surface begin to emerge: Is the ignored evidence and failure to afford [the Department of Homeland Security] deference more than just a good faith disagreement? Does the timing of this Report suggest that something else is motivating this opinion? Does the GAO's unfortunate recent history of issuing partisan and inaccurate reports perhaps explain what is going on? As the reader reaches the Report's conclusion, he is left with the sinking and inescapable feeling that something is afoot in the swamp.

Id. at 7. The letter also, inexplicably, contains a photo pulled from Twitter of Secretary Kirstjen Nielsen apparently swearing in Commissioner Kevin McAleenan. *Id.* at 4.

29. Aurelius Inv., LLC v. Puerto Rico, 915 F.3d 838, 852 (1st Cir. 2019) (quoting Edmond v. United States, 520 U.S. 651, 659 (1997)), *rev'd sub nom.* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020).

30. Mendelson, *supra* note 8, at 593.

31. *Id.* at 541; *see* U.S. CONST. art. II, § 2.

32. "PAS" stands for "Presidential Appointee with Senate confirmation." U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-249, FEDERAL ETHICS PROGRAMS: GOVERNMENT-WIDE POLITICAL APPOINTEE DATA AND SOME ETHICS OVERSIGHT PROCEDURES AT INTERIOR AND SBA COULD BE IMPROVED, at iii (2019), https://perma.cc/98VY-DMG7. The acronym is also used more broadly to refer to offices requiring Presidential appointment and Senate confirmation. *See, e.g.*, NLRB v. SW Gen., Inc., 137 S. Ct. 929, 934 (2017).

by a court, or by a department head (that is to say, without needing to be confirmed by the Senate).[33]

Senate confirmation can be onerous.[34] According to the most recent Congressional Research Service report on the topic, on average nearly six months elapse between nomination and confirmation of full-time agency leaders.[35] The Vacancies Act is thus a practical answer to the sometimes impractical requirement of Senate confirmation. In recent years, it has served as a response to abuses of the Senate's power (meritless, partisan blocking of appointments)[36] and created abuses of its own (appointments of unqualified individuals who would be unlikely to survive nonpartisan screening).[37]

Where do actings fit into the principal–inferior dichotomy? All actings are considered inferior officers due to the temporary nature of their service; as such, they may be properly appointed by the President alone without Senate confirmation.[38] But constitutional questions persist—particularly concerning actings in principal offices.[39] Because the constitutionality of acting principal

33. *See* U.S. CONST. art. II, § 2, cl. 2.

34. *See* Mendelson, *supra* note 8, at 584 ("Adopting the narrowest view of the Appointments Clause—requiring any person exercising principal office powers to be 'nominate[d]' by the President and Senate-confirmed—would compel each President to begin her administration with headless Cabinet agencies unless previously confirmed Secretaries agreed to stay on." (alteration in original) (footnote omitted) (quoting U.S. CONST. art. II, § 2, cl. 2)).

35. JARED C. NAGEL & MICHAEL GREENE, CONG. RSCH. SERV., R45028, PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS IN INDEPENDENT AND OTHER AGENCIES DURING THE 114TH CONGRESS 2 (2017), https://perma.cc/P77G-EEN3.

36. *See, e.g.*, Charlie Savage, *Before Scalia's Death, a Clash Between G.O.P. and Obama Over Appellate Judges*, N.Y. TIMES (Feb. 15, 2016), https://perma.cc/Q2ZA-B4FX (noting that "[s]ince Republicans took control of the Senate in January 2015, the process that would enable Mr. Obama to fill vacancies on the 12 regional federal courts of appeal has essentially been halted").

37. Consider William Perry Pendley, who served as the Deputy Director of Policy Programs at the Bureau of Land Management (and exercised the authority of the Bureau's Director, a PAS position, via delegation) under President Trump. Joel Rose, *How Trump Has Filled High-Level Jobs Without Senate Confirmation Votes*, NPR (Mar. 9, 2020, 5:04 AM ET), https://perma.cc/76Z4-HLJN ("Before coming to BLM, Pendley spent his career in the private sector trying to roll back environmental rules as the head of the Mountain States Legal Foundation. And he's questioned whether the federal government should own public lands at all.").

38. United States v. Eaton, 169 U.S. 331, 343 (1898); *see also* VALERIE C. BRANNON, CONG. RSCH. SERV., R44997, THE VACANCIES ACT: A LEGAL OVERVIEW 29-35 (rev. 2021), https://perma.cc/M7RY-NXA2 (detailing various theories of the Vacancies Act's constitutionality).

39. *E.g.*, NLRB v. SW Gen., Inc., 137 S. Ct 929, 946 (Thomas, J., concurring) ("Appointing principal officers under the [Vacancies Act], however, raises grave constitutional concerns because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate."); O'Connell, *supra* note 14 ("[W]hile the Vacancies Act permits the president to choose non-confirmed senior

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officers, uncertain as it is, relies on the *temporary* nature of acting service, at some point, a flagrant violation of the Vacancies Act necessarily bleeds into a violation of the Appointments Clause. Justice Clarence Thomas, for example, has written that three-and-a-half years of acting service simply can no longer be considered "temporary."[40] By that logic, President Trump's unprecedented use of actings, with respect to both number and tenure, was especially troubling.[41]

As described above, an officer may be improperly serving under the Constitution (in violation of the Appointments Clause), under a statute (in violation of the Vacancies Act), or under both (where a Vacancies Act violation bleeds into an Appointments Clause one). But what of remedies? In the case of constitutional violations, courts are relatively free to fashion remedies of their design. Typically, courts cure defects by, say, finding that a purportedly principal officer is actually inferior or by severing a constitutionally significant statutory mechanism.[42] But in the case of a Vacancies Act violation, 5 U.S.C. § 3348 voids all actions taken by improperly serving acting officials, curtailing a court's discretion in the process.[43] As summarized by Anne Joseph O'Connell, the result is that "officials serving in violation of the [Vacancies] Act can be treated more harshly than those operating unconstitutionally."[44]

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agency officials as acting Cabinet secretaries . . . the Supreme Court has not clearly ruled that such officials are permitted under the Constitution's Appointments Clause, which requires principal officers to be Senate-confirmed or recess appointed."); Mendelson, *supra* note 8, at 601-02 (arguing that the acting service of principal officers is justified by the Take Care and Vesting Clauses but that acting service of more than thirty to forty days violates the Appointments Clause); Neal K. Katyal & George T. Conway III, Opinion, *Trump's Appointment of the Acting Attorney General is Unconstitutional*, N.Y. TIMES (Nov. 8, 2018), https://perma.cc/FB7V-WN2B. The Court last addressed that question in 1898. *Eaton*, 169 U.S. 331. For the purposes of this Note, I will assume that the Vacancies Act is constitutional.

40. *SW Gen.*, 137 S. Ct. at 946 n.1 (Thomas, J., concurring) (quoting *Eaton*, 169 U.S. at 343); *see also* O'Connell, *supra* note 13 ("McAleenan's service did not last much longer than what the Vacancies Act permits, so it likely did not violate the Appointments Clause, assuming Senate-confirmed officials taking on the duties of a principal officer for a limited period is constitutional. But what about acting service 500 days after the principal office became vacant?").

41. O'Connell, *supra* note 10, at 646 ("[T]otal tenures of acting officials in the Trump Administration are much longer than in previous ones . . . ."); Mendelson, *supra* note 8, at 540 (explaining that "[w]hile the numbers cannot be precisely compared," the Trump Administration appears to have exceeded previously recorded use of acting officials).

42. *See, e.g.*, Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2192 (2020) (severing unconstitutional removal protections); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 508 (2010) (same); Morrison v. Olson, 487 U.S. 654, 671-73 (1988) (holding that the appointment of a special counsel did not violate the Appointments Clause, in part because the independent counsel was an inferior officer).

43. 5 U.S.C. § 3348(d)(a).

44. O'Connell, *supra* note 10, at 631.

II. Setting the Stage: The De Facto Officer Doctrine, the Vacancies Act, and the Constitution

Because the line between Vacancies Act and Appointments Clause violations is less of a line and more of a continuum, drawing a sharp distinction between the two is as artificial as it is unnecessary: The foundation of any Vacancies Act violation *is* the Appointments Clause. Thus, this Note must answer the necessarily antecedent question whether the de facto officer doctrine is available for constitutional violations at all. I begin by providing brief background on the de facto officer doctrine itself.

A. What is the De Facto Officer Doctrine?

The de facto officer doctrine allows courts to validate the past actions of an improperly serving official. Courts have applied the doctrine for nearly six centuries,[45] and its perennial appeal is no surprise: The doctrine is a commonsense solution borne out of a desire, and need, to protect the interests of the public and ensure the stability of government functions over time.[46] Absent some sort of de facto validity, courts would be flooded by multiple, repetitious lawsuits "challenging every action taken by every official whose claim to office could be open to question."[47] By preventing that occurrence, the doctrine protects "the government's ability to take effective and final action."[48]

This Subpart discusses the de facto officer doctrine's contours and characteristics, drawing upon its origins and evolution where instructive. The jurisprudence surrounding the de facto officer doctrine resists easy classification. As one commentator aptly put it, "the origins of the de facto [officer] doctrine and its various branchings comprise either a gloriously rich vein of judicial policymaking or a hopelessly convoluted collection of policy rationales masquerading as legal doctrine."[49]

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45. *See* Aurelius Inv., LLC v. Puerto Rico, 915 F.3d 838, 852 (1st Cir. 2019) (citing Note, *The* De Facto *Officer Doctrine*, 63 COLUM. L. REV. 909, 909 n.1 (1963) ("The first reported case to discuss the concept of *de facto* authority was The Abbe of Fountaine, 9 Hen. VI, at 32(3) (1431).")), *rev'd sub nom.* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020).

46. *See* Ryder v. United States, 515 U.S. 177, 180 (1995).

47. *Id.* ("The de facto doctrine springs from the fear of the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government despite technical defects in title to office." (quoting 63A AM. JUR. 2D *Public Officers & Employees* § 578 (1984))).

48. *Aurelius*, 915 F.3d at 862 (quoting Andrade v. Lauer (*Andrade I*), 729 F.2d 1475, 1499 (D.C. Cir. 1984)).

49. Spencer Scheidt, Note, *"A Cloud of Constitutional Illegitimacy": Prospectivity and the De Facto Doctrine in the Gerrymandering Context*, 69 DUKE L.J. 959, 966 (2020).

That said, "the verbal formulation of the doctrine was elaborated rather early" and has "remained virtually constant" over time.[50] In the United States, an 1846 Connecticut court explained that

> [a]n officer *de facto*, is one who exercises the duties of an office, under colour of an appointment or election to that office. He differs, on the one hand, from a mere usurper of an office, who undertakes to act as an officer without any colour of right; and, on the other, from an officer *de jure*, who is, in all respects, legally appointed and qualified to exercise the office. These distinctions are very obvious, and have always been recognized.[51]

As for its elements, "[t]here is no definitive test for application of the *de facto* officer doctrine, as it is a common-law doctrine responsive to the equities."[52] Nevertheless, distinctive elements emerge from the case law.

To begin, the doctrine is understood to apply only where an officer is widely believed to be properly serving.[53] That reputational prong can be divided into three sub-elements: (1) performance of the functions and duties of the office; (2) possession of the office; and (3) appearance of right to the office.[54] In other words,

> [a] *de facto* officer is "one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper."[55]

Once it is *known* that an officer is improperly serving, the doctrine is no longer available.[56] Put succinctly: "The authority of a *de jure* officer is founded in

50. Note, *supra* note 45, at 909.

51. Town of Plymouth v. Painter, 17 Conn. 585, 588 (1846); *see also id.* at 589-93 (collecting common law cases, nineteenth-century English cases, and nineteenth-century American cases defining the doctrine in similar terms); Note, *supra* note 45, at 909 & n.2 (discussing *Plymouth* and other cases).

52. Brief for Cross-Respondents COFINA Senior Bondholders' Coalition at 15, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (Nos. 18-1334 et al.), 2019 WL 4568210. "The COFINA Senior Bondholders' Coalition is a collection of entities that held billions of dollars in bonds issued by the Puerto Rico Sales Tax Financing Corporation (known by its Spanish acronym, 'COFINA'), an instrumentality of the Commonwealth of Puerto Rico." *Id.* at 1.

53. 63C AM. JUR. 2D *Public Officers & Employees* § 23 (West 2021) (noting that an officer should have the "reputation of being the officer he or she assumes to be").

54. *Id.*

55. Aurelius Inv., LLC v. Puerto Rico, 915 F.3d 838, 862 (1st Cir. 2019) (quoting Waite v. Santa Cruz, 184 U.S. 302, 323 (1902)), *rev'd sub nom. Aurelius*, 140 S. Ct. 1649.

56. For example, in applying the doctrine, the First Circuit noted that "the Board Members' titles to office were never in question until [its] resolution of this appeal." *Id.* at 862; *see also* Scheidt, *supra* note 49, at 970-71; Note, *supra* note 45, at 913.

right, that of a *de facto* officer in reputation."[57] Similarly, a distinct but related element of good faith suffuses the de facto officer doctrine jurisprudence.[58]

In 1886, the Supreme Court enunciated another principle limiting the reach of the doctrine: "There must be a legal office in existence, which is being improperly held, to give to the acts of [an improperly serving officer] the validity of an officer *de facto*."[59] That requirement makes sense when one considers that the de facto officer doctrine is concerned with "continued administration of [an] office" and the "perpetuity of the system"—reasoning that "loses force when [the doctrine is] appl[ied] to a de facto office."[60] The de jure office requirement has not, however, been uniformly followed by state courts.[61]

Finally, in its traditional form, the de facto officer doctrine barred collateral challenges to an officer's authority.[62] But the collateral-attack distinction has faded over time, and collateral attacks on authority are now commonplace.[63] Indeed, the D.C. Circuit has done away with that bar entirely where the requirements of timeliness and notice are satisfied.[64]

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57. Note, *supra* note 45, at 912.

58. "Further, such conduct was sufficient to invest the judge below with that element of good faith required for invocation of the de facto judge doctrine." Leary v. United States, 268 F.2d 623, 628 (9th Cir. 1959); Note, *supra* note 45, at 912 ("[T]he officer must have acted in good faith if the court is to apply the *de facto* doctrine.").

59. Norton v. Shelby County, 118 U.S. 425, 444 (1886); *see also* Note, *supra* note 45, at 915 (noting that although the *Norton* Court had "assumed that the *de jure* office limitation had been, historically, an element of the *de facto* doctrine, . . . few courts had specifically discussed the requirement prior to that time," but that the requirement was "met with rather wide acceptance thereafter").

60. Note, *supra* note 45, at 915 (quoting *In re* Norton, 68 P. 639, 640 (Kan. 1902)).

61. *Id.* at 915-16.

62. Scheidt, *supra* note 49, at 969-70.

63. *E.g.*, SW Gen., Inc. v. NLRB, 796 F.3d 67, 71-74 (D.C. Cir. 2015) (accepting an employer's challenge to an NLRB complaint on the grounds that the agency's Acting General Counsel was serving in violation of the Vacancies Act), *aff'd*, 137 S. Ct. 929 (2017); Hooks *ex rel.* NLRB v. Kitsap Tenant Support Servs., Inc., 816 F.3d 550, 553 (9th Cir. 2016) (same).

64. *See, e.g.*, Andrade v. Lauer (*Andrade I*), 729 F.2d 1475, 1498-99 (D.C. Cir. 1984) (holding that the de facto officer doctrine does not necessarily bar collateral attacks); *SW Gen.*, 796 F.3d at 81-82 ("[W]e have held that collateral attacks on an official's authority are permissible when two requirements are satisfied: 'First, the plaintiff must bring his action at or around the time that the challenged government action is taken. Second, the plaintiff must show that the agency or department involved has had reasonable notice under all the circumstances of the claimed defect in the official's title to office.'" (quoting *Andrade I*, 729 F.2d at 1499)). In *Andrade v. Regnery*, 824 F.2d 1253, 1256 (D.C. Cir. 1987), the filing of the lawsuit was itself considered adequate notice. *SW Gen.*, 796 F.3d at 82.

Over centuries of development, various courts have carved various exceptions to the de facto officer doctrine's sweep.[65] But perhaps the most consequential limit of all—whether the doctrine is available in constitutional challenges—remains unresolved.[66] The story and case of *Aurelius* offer some clarity.

B. Is the Doctrine Available for Constitutional Violations? *Aurelius* and Friends

The factual backdrop to *Aurelius* was cinematic in scale. Over $100 billion in debt; a congressional Hail Mary and promise—the Puerto Rico Oversight, Management and Economic Stability Act (PROMESA)—to save Puerto Rico from what would have been an unprecedented default; a powerful and litigious New York hedge fund, Aurelius Capital, dissatisfied with its end of that bargain; and a United States territory, its 3.2 million inhabitants, caught in the balance.[67]

In response to the 2016 fiscal crisis in Puerto Rico, PROMESA established a seven-member Financial Oversight and Management Board responsible for "independent supervision and control" of Puerto Rico's bankruptcy and restructuring.[68] Under the terms of PROMESA, all seven Board members were to be appointed by the President—one in his sole discretion and six from "specific lists of candidates provided by congressional leaders."[69] None required Senate confirmation.[70]

At the time of the Board's establishment, Aurelius Capital had held Puerto Rican bonds for a year. Fearing that the Board-run restructuring would keep it from recouping its bonds' full value,[71] Aurelius sued, challenging the

65. *See* Scheidt, *supra* note 49, at 976-85 (detailing structural and doctrinal limits).

66. Scheidt writes that "the *Ryder* decision solidified a rough constitutional-rights exception to the de facto officer doctrine." *Id.* at 979. This Note, by contrast, argues that *Ryder* is considerably more nuanced and that any "exception" it created is substantially narrower than Scheidt suggests. *See infra* Part II.B. Notably, Scheidt's piece was published in January 2020, before the Supreme Court handed down its decision in *Aurelius*, and he does not discuss the First Circuit's decision or its reliance on the de facto officer doctrine at length.

67. *See* Jesse Barron, *The Curious Case of Aurelius Capital v. Puerto Rico*, N.Y. TIMES MAG. (Nov. 26, 2019), https://perma.cc/PW7M-CCSP.

68. Aurelius Inv., LLC v. Puerto Rico, 915 F.3d 838, 844 (1st Cir. 2019), *rev'd sub nom.* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020).

69. *In re* Fin. Oversight & Mgmt. Bd. for P.R., 318 F. Supp. 3d 537, 542 (D.P.R. 2018), *aff'd in part, rev'd in part sub nom. Aurelius*, 915 F.3d 838, *rev'd sub nom. Aurelius*, 140 S. Ct. 1649.

70. *Id.* at 543. If, however, the President chose to bypass Congress's lists, any individual he appointed would be subject to Senate confirmation. *Id.*

71. After the case was argued, the *New York Times Magazine* highlighted the following exchange between Justice Alito and counsel for Aurelius, Ted Olson:

footnote continued on next page

constitutional validity of the Board under the Appointments Clause.[72] The District Court for the District of Puerto Rico ruled against Aurelius, finding that the Board's members were not "Officers of the United States" and therefore not subject to the Appointments Clause.[73] Aurelius appealed, and the First Circuit reversed: The Board's members were principal officers who should have been appointed "by the President, by and with the advice and consent of the Senate."[74] But the First Circuit's remedy was cold comfort for Aurelius.

Deeming it "especially appropriate," the First Circuit invoked the de facto officer doctrine.[75] The court pointed to the Board members' good faith, the potentially "thousands" of innocent third parties' reliance interests, and the case's potentially destructive effect on Puerto Rico's historic debt restructuring "already turned upside down once before by the ravage of the hurricanes that affected Puerto Rico in September 2017."[76] The court's holding and reasoning embodied the equitable ethos that is the foundation of the de facto officer doctrine.[77]

In addition to equitable considerations, the First Circuit also followed—in its eyes "exact[ly]"—Supreme Court precedent: *Buckley v. Valeo*.[78] Notably, the Supreme Court in *Buckley* did not actually mention the de facto officer doctrine by name.[79] Instead, *Buckley* referenced only the "de facto validity" of past actions.[80] In a later case, *Ryder v. United States*, the Supreme Court wrote that "[t]o the extent [*Buckley*] may be thought to have *implicitly* applied a form of the *de facto* officer doctrine, we are not inclined to extend [the case] beyond

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> "Are you and Aurelius here just as amici to defend the Constitution?" Alito asked. "There is no money issue involved here?"
>
> "Of course, there—of course, there—"
>
> "This is a real case," Alito said. "I'd just like to know what's really going on here."
>
> "Well," Olson said, "there's over $100 billion dollars' of indebtedness being adjudicated."
>
> "Right, and your client wants more of it," Alito replied.

Barron, *supra* note 67. The *New York Times Magazine* also noted that Aurelius's chairman, Mark Brodsky, "once spent about seven years suing Argentina for bond payments" and eventually secured a generous settlement. *Id.*

72. *In re Fin. Oversight. & Mgmt. Bd.*, 318 F. Supp. 3d at 544-45.

73. *Id.* at 556-57.

74. *Aurelius*, 915 F.3d at 859-61.

75. *Id.* at 862.

76. *Id.*

77. *See supra* Part II.A.

78. *Aurelius*, 915 F.3d at 862 (citing Buckley v. Valeo, 424 U.S. 1, 140-42 (1976) (per curiam), *superseded in other part by statute*, Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code)).

79. *See* 424 U.S. at 142.

80. *Id.*

[its] facts."[81] Perhaps unsurprisingly, then, the Supreme Court punted on the de facto question in *Aurelius*.[82] Instead, it held, much like the district court had, that the Board's members were "local officers," not officers of the United States subject to the Appointments Clause.[83]

Nevertheless, the doctrine was thoroughly briefed by both sides: Aurelius argued that the de facto officer doctrine does not apply to Appointments Clause violations, while the federal government "insist[ed] to the contrary."[84] By the time the case reached the Supreme Court, the question of the de facto officer doctrine's applicability to constitutional violations had been reduced to two inquiries: first, how broad the Court's decisions in *Buckley* and *Ryder* were, and second, which decision controlled the case at hand.[85] Aurelius argued that *Ryder* explicitly precluded the doctrine's application to Appointments Clause violations.[86] To square that assertion with *Buckley* (which arguably *did* apply the de facto officer doctrine to an Appointments Clause violation), the Aurelius lawyers contended that *Buckley*'s holding was limited to its facts.[87] Predictably, they argued that their case was more like *Ryder* and less like *Buckley*.[88]

The United States and the Board rigorously contested Aurelius's attempt to cabin *Buckley*. The federal government argued that *Ryder* only forbade the application of the de facto officer doctrine in cases concerning

81. 515 U.S. 177, 184 (first emphasis added).

82. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020) ("[S]ince we hold the appointment method valid, . . . we [need not] consider the application of the *de facto* officer doctrine.").

83. *Id.* at 1661-63.

84. *Id.* at 1665; *see, e.g.*, Reply and Response Brief for the United States at i, *Aurelius*, 140 S. Ct. 1649 (Nos. 18-1334 et al.), 2019 WL 4568198; Brief for Aurelius and Assured at i, *Aurelius*, 140 S. Ct. 1649 (Nos. 18-1334 et al.), 2019 WL 4034610.

85. The First Circuit had not engaged with either inquiry at length; with little fanfare, it relied on *Buckley* as a controlling example of the de facto officer doctrine's applicability to constitutional challenges. *See* Aurelius Inv., LLC v. Puerto Rico, 915 F.3d 838, 862-63 (1st Cir. 2019), *rev'd sub nom. Aurelius*, 140 S. Ct. 1649. The court did, however, note that the doctrine's "so-called" traditional elements were satisfied. *Id.* at 862 (explaining that the board members were "acting with the color of authority" and "in good faith" and that their actions had engendered significant reliance interests).

86. *See* Brief for Aurelius and Assured, *supra* note 84, at 48-49.

87. *See id.* at 12.

88. *See id.* at 56-57. Aurelius also argued that the de facto officer doctrine is limited to cases concerning "merely technical" defects of statutory authority. *Id.* at 51 (quoting Nguyen v. United States, 539 U.S. 69, 77 (2003)). COFINA's brief pointed out that the case on which Aurelius relied for that proposition "stated only that the cases '[t]ypically' involved a technical violation, not that they must or always did so." Brief for Cross-Respondents COFINA Senior Bondholders' Coalition, *supra* note 52, at 25 (alteration in original) (quoting *Nguyen*, 539 U.S. at 77).

unconstitutionally serving judges and adjudicators.[89] And cross-respondent COFINA's brief marshalled persuasive reasons to draw such a line.[90] Distinguishing the actions of legislative and executive officers from that of judicial officers, COFINA contended that the public's interest in validating the past acts of an officer is at its "apex" when it comes to legislative and executive officers.[91] It argued that the actions of such officers "often have wide-ranging implications," whereas a judge's actions are "limited to the particular case or the handful of cases he or she has adjudicated."[92] COFINA also reasoned that individuals have a right to a fair trial (which may be "implicated" by an improperly appointed judge), but there simply is "no right to any particular executive or legislative action, or any special right to proper appointments."[93] For those reasons, COFINA argued that it was logical and proper to apply the de facto officer doctrine to the past acts of unconstitutionally serving legislative and executive, but not judicial, officers—and, crucially, that such line drawing reconciled *Buckley* and *Ryder*'s seemingly contradictory holdings.

Based on the language of *Ryder* alone, the United States and COFINA had the better reading of the case as limited to unconstitutionally serving adjudicators, not officers of all kinds.[94] Indeed, when counsel for Aurelius, Ted Olson, was pressed on the *Ryder*-versus-*Buckley* point during oral argument,

89. Reply and Response Brief for the United States, *supra* note 84, at 38-39 ("*Ryder* stands for the more modest proposition that a court ordinarily should not apply the *de facto* doctrine to an unconstitutional appointment of a judge or other adjudicator.").

90. Brief for Cross-Respondents COFINA Senior Bondholders' Coalition, *supra* note 52, at 16-17. COFINA principally argued that the Board was constitutional, but in the event that the Court found it was not, supported the application of the de facto officer doctrine. *See* Letter from Kathleen M. Sullivan, Partner, Quinn Emanuel Urquhart & Sullivan, to Scott S. Harris, Clerk of Ct., Sup. Ct. of the U.S. 2 (July 17, 2019), https://perma.cc/A5ES-A5NE.

91. Brief for Cross-Respondents COFINA Senior Bondholders' Coalition, *supra* note 52, at 16.

92. *Id.* Years before *Aurelius*, Deepak Gupta articulated a similar way of distinguishing *Buckley* and *Ryder*. Instead of distinguishing the legislative and executive from the adjudicative, Gupta distinguished "laws and regulations of general applicability" from action against a "particular person." Deepak Gupta, Recent Developments: Reactions to *Noel Canning v. NLRB, The Consumer Protection Bureau and the Constitution*, 65 ADMIN. L. REV. 945, 969 (2013). Gupta argues that the de facto officer doctrine should be favored in the former situation (laws of general applicability) because in the latter (action against a particular person) individual stakes are too high. *Id.* at 969-70.

93. Brief for Cross-Respondents COFINA Senior Bondholders' Coalition, *supra* note 52, at 17.

94. *See, e.g.*, *id.* at 24 ("*Ryder*'s holding is expressly limited to the adjudicatory context: 'We think that one who makes a timely challenge to the constitutional validity of the appointment of an officer *who adjudicates his case* is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred.'" (quoting Ryder v. United States, 515 U.S. 177, 182-83 (1995))).

Justice Ruth Bader Ginsburg noted that "the *Ryder* case, on which you placed such reliance, it—it was qualified."[95] Qualified indeed: Distinguishing adjudicators from other types of officers honors both the structural importance of the Appointments Clause and the equitable and prudential concerns of the de facto officer doctrine. But ultimately, the question remains an open one.[96]

95. Transcript of Oral Argument at 79, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (Nos. 18-1334 et al.).

96. The remedies that the Supreme Court has fashioned in other constitutional cases are telling. I will briefly discuss four major cases—*Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), *Lucia v. SEC*, 138 S. Ct. 2044 (2018), *NLRB v. Noel Canning*, 573 U.S. 513 (2014), and *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021).

In *Seila Law*, the Supreme Court held that the CFPB's leadership structure violated separation of powers. 140 S. Ct. at 2197. As for a remedy, petitioner Seila Law sought to void the action that the CFPB had taken against it, while the agency contended that its demand, "though initially issued by a Director unconstitutionally insulated from removal, [could] still be enforced . . . because it ha[d] since been ratified by an Acting Director" who was constitutionally serving. *Id.* at 2208. The Supreme Court ultimately remanded the case "for the Court of Appeals to consider whether the civil investigative demand was validly ratified." *Id.* at 2211. Thus, the Court declined to void (or validate) the unconstitutionally serving director's action but left the door to ratification open. The de facto officer doctrine did not come up during oral argument. *See* Transcript of Oral Argument, *Seila L.*, 140 S. Ct. 2183 (No. 19-7). On remand, the Ninth Circuit held that the civil investigative demand filed against Seila Law had in fact been validly ratified, noting that it "need not decide whether [the ratification] occurred through the actions of" the Acting Director because the CFPB's current director had "expressly ratified the agency's earlier decisions." CFPB v. Seila L. LLC, 997 F.3d 837, 846 (9th Cir. 2021); *see also infra* notes 110-15 (discussing ratification).

Lucia is a bit of a different story. Applying *Ryder*, the Court in *Lucia* reasoned that the "'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official." *Lucia*, 138 S. Ct. at 2055 (quoting *Ryder*, 515 U.S. at 183, 188). The Court further specified that this new hearing could not be before the original judge, even if he or she received a constitutional appointment in the intervening time period. *Id.* Although *Lucia* can easily be classified according to the line drawn in the *Aurelius* briefing—it dealt with adjudication; thus the de facto officer doctrine was not appropriate—the doctrine did not come up during oral argument. *See* Transcript of Oral Argument, *Lucia*, 138 S. Ct. 2044 (No. 17-130). During the *Aurelius* oral argument, however, Ted Olson argued that the opposing party's proposed distinction between judicial officers and legislative and executive officers could not stand because the administrative law judges at issue in *Lucia* were not solely adjudicators: They were also "conducting Article I activities, enforcing the laws of the United States." *See* Transcript of Oral Argument at 77-79, *Aurelius*, 140 S. Ct. 1649 (Nos. 18-1334 et al.).

That distinction might also explain why the Court did not apply the de facto officer doctrine in *Noel Canning*, which dealt with NLRB judges. The case was otherwise a good fit for the doctrine, as Justice Scalia himself remarked during the oral argument. *See* Transcript of Oral Argument at 5, *Noel Canning*, 573 U.S. 513 (No. 12-1281); *see also infra* notes 251-52 and accompanying text.

In *Arthrex*, a deeply fractured decision from October Term 2020, the Supreme Court weighed similar considerations and ultimately applied an unexpected remedy. *See*

footnote continued on next page

In sum, a court can typically invoke the de facto officer doctrine whenever an improperly serving official has cleared the doctrine's independent, equitable hurdles of reputation, good faith, and third-party reliance. If a court is evaluating a statutory challenge, the doctrine is unquestionably available; if it is deciding a constitutional one, the doctrine's availability is less clear, perhaps turning on the legislative–executive versus adjudicative divide surfaced by the *Aurelius* litigants. But when it comes to acting officials and the de facto officer doctrine, the Vacancies Act raises a third hurdle to clear.

C. What is the Vacancies Act?

This Subpart focuses on the Vacancies Act—its core premise and requirements, as well as its enforcement provision, 5 U.S.C. § 3348. The Vacancies Act is, generally speaking, the exclusive means of authorizing temporary acting service in executive agencies.[97] It is, first and foremost, a practical statute—it allows the President to maintain a functioning

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Christopher J. Walker, *What* Arthrex *Means for the Future of Administrative Adjudication: Reaffirming the Centrality of Agency-Head Review*, YALE J. ON REGUL.: NOTICE & COMMENT (June 21, 2021), https://perma.cc/32KS-GPSH. In the case, the Court considered whether the authority of the Patent Trial and Appeal Board (PTAB) "to issue decisions on behalf of the Executive Branch [was] consistent with" the Appointments Clause. *Arthrex*, 141 S. Ct. at 1976, 1979. The Court held that that authority was not consistent with the Appointments Clause because administrative patent judges (APJs) issue final decisions that are not subject to review by their agency's head. *Id.* at 1985. To cure that constitutional defect, the Court held that the statutory provision barring agency-head review was unenforceable (in effect, bestowing upon the agency head the power to review APJ decisions). *Id.* at 1986-88. In his dissent, Justice Thomas criticized the Court's remedy: "If the Court truly believed administrative patent judges are principal officers, then the Court would need to vacate the Board's decision. As this Court has twice explained, 'the "appropriate" remedy for an adjudication tainted with an appointments violation is a new "hearing before a properly appointed" official.'" *Id.* at 2006 (Thomas, J., dissenting) (quoting *Lucia*, 138 S. Ct. at 2055). In his partial concurrence, Justice Gorsuch took similar umbrage, arguing that the Court should have identified the constitutional violation, explained its reasoning, and set aside the PTAB's decision. *Id.* at 1990 (Gorsuch, J., concurring in part and dissenting in part). The majority's response was that "because the source of the constitutional violation [was] the *restraint* on the review authority of the Director, rather than the *appointment* of APJs . . . Arthrex is not entitled to a hearing before a new panel of APJs." *Id.* at 1988 (majority opinion) (emphasis added). The de facto officer doctrine did not come up during oral argument. *See* Transcript of Oral Argument, *Arthrex*, 141 S. Ct. 2183 (Nos. 19-1434, 19-1452 & 19-1458). And because APJs are adjudicators, it is unlikely that the doctrine, at least under one reading of *Ryder*, would have permitted such a bid.

As those decisions illustrate, remedies in this space are more complex hodgepodge than cohesive doctrine.

97. 5 U.S.C. § 3347(a); *see* BRANNON, *supra* note 38, at 2.

government in the face of unforeseeable circumstances (or just a recalcitrant Congress) and is integral to smooth presidential transitions.[98]

The Act is triggered when an officer serving in a PAS position "dies, resigns, or is otherwise unable to perform the functions and duties of the office."[99] Once triggered, the Act limits temporary service by dictating both who may serve as an acting and for how long, and it renders void any actions taken by noncompliant actings.[100]

With respect to who may serve as an acting, under the Act's default rule, the first assistant to a newly vacant position becomes the acting officer.[101] The President may displace that default rule by selecting either (1) "another Senate-confirmed official—within the agency or outside it"; *or* (2) a non-Senate-confirmed officer or employee "[who] has worked in the agency for at least ninety days during the year-long period before the vacancy occurred and is paid at the GS-15 level or higher."[102] As for term limits, "[a]n acting officer may serve for 210 days; [but] this basic term is subject to certain extensions, including while a nomination is pending in the Senate."[103] To summarize, an acting may be serving improperly if she is not among the individuals approved for acting service or if she has exceeded the Vacancies Act's time limits.

The Vacancies Act is primarily enforced through private litigation, wherein third parties with standing, most often regulated entities, seek nullification of noncompliant agency actions.[104] That is possible—and strategic—because "[t]he Vacancies Act renders noncompliant actions 'void *ab initio*,' meaning they were 'null from the beginning,'" and affords courts no opportunity to inquire whether the error was harmless or otherwise curable.[105] Section 3348 further "affirms this consequence by explicitly specifying that an agency may not ratify any acts taken in violation of the statute."[106]

Section 3348's void ab initio and antiratification provisions are manifestations of the 105th Congress's desire to strengthen the Vacancies Act.

98. *See* O'Connell, *supra* note 14; Mendelson, *supra* note 8, at 584.

99. 5 U.S.C. §§ 3345(a), 3348(b).

100. *See id.* § 3348.

101. BRANNON, *supra* note 38, at 10.

102. O'Connell, *supra* note 10, at 629 (citing 5 U.S.C. § 3345(a)(2)-(3)).

103. Nina A. Mendelson, L.M.-M. v. Cuccinelli *and the Illegality of Delegating Around Vacant Senate-Confirmed Offices*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 5, 2020), https://perma.cc/D35B-RZYT.

104. BRANNON, *supra* note 38, at 16.

105. *See id.* (first quoting NLRB v. SW Gen., Inc., 137 S. Ct. 929, 938 n.2 (2017); and then quoting *Void ab initio*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

106. *Id.* at 17.

That Congress was responding to a then-recent D.C. Circuit decision allowing agencies to ratify the past acts of improper acting officials; the legislature was concerned that such a policy would "render enforcement of the [Vacancies Act] a nullity in many instances."[107] In the wake of the D.C. Circuit's decision, the 1998 Act evinced Congress's desire to assert its authority and ensure that the President was not skirting the constitutional mandate of Senate confirmation for the nation's highest appointed offices.[108]

On its face, § 3348 should wholly preclude a court from applying the de facto officer doctrine to the past acts of an improperly serving acting; the reality is more complicated.

III. Uncharted Territory: The De Facto Officer Doctrine and the Vacancies Act

To validate the past acts of an improper acting, a court must first reckon with the equitable elements of the de facto officer doctrine, the potential bar on applying the doctrine to constitutional violations (after all, the Appointments Clause is the foundation of the Vacancies Act), and the Vacancies Act's enforcement provision, which makes clear that actions taken by an improperly serving acting are void ab initio—from the beginning—and cannot later be ratified.[109]

Derived from the law of agency,[110] ratification can "remedy a defect arising from the decision of 'an improperly appointed official'" when a properly appointed one "has the power to conduct an independent evaluation

107. *Id.* at 17 n.155 (alteration in original) (citing S. REP. NO. 105-250, at 20 (1998)). Legislative history collected by Brannon further underscores that Congress was "specifically concerned with overruling the decision of the D.C. Circuit in *Doolin*." *Id.* at 17 n.155. In *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, a bank challenged an Office of Thrift Supervision order by arguing that the Office's Acting Director was serving improperly. 139 F.3d 203, 204 (D.C. Cir. 1998), *superseded by statute*, Federal Vacancies Reform Act of 1998 (Vacancies Act), Pub. L. No. 105-277, § 151, 112 Stat. 2681-611, 2681-611 to -616 (codified at 5 U.S.C. §§ 3345-3349d). The D.C. Circuit held that the order was subsequently ratified by a properly appointed director and therefore had the force of law, regardless of the propriety of that acting service. *Id.* at 212-14. Stephen Migala likewise argues that *Doolin*, decided in 1998, is the reason that the 1998 Vacancies Act includes an antiratification provision—Congress was incensed by the notion that agencies could use ratification to evade judicial review of Vacancies Act violations. Migala, *supra* note 20, at 5-9.

108. *See* MORTEN ROSENBERG, CONG. RSCH. SERV., 98-892A, THE NEW VACANCIES ACT: CONGRESS ACTS TO PROTECT THE SENATE'S CONFIRMATION PREROGATIVE 1 (1998).

109. 5 U.S.C. § 3348(d).

110. *Doolin*, 139 F.3d at 212 ("Ratification occurs when a principal sanctions the prior actions of its purported agent.").

of the merits and does so."[111] Ratification is notable for its ability to preclude judicial review, but the circuits are split as to why. In the Second and Third Circuits, ratification moots a controversy.[112] The D.C. Circuit, on the other hand, has repeatedly held that ratification, "rather than mooting a claim, *resolves the claim on the merits* by 'remedy[ing] [the] defect' (if any) from the initial appointment."[113] Of course, many administrative law cases are heard by the D.C. Circuit, but from Arizona to North Carolina, the district courts that have addressed the question have tended to favor the Second and Third Circuits' approach, as have agencies.[114] Critically, under the Second and Third Circuits' mootness approach, a ratified action must then contend with the exceptions to the mootness doctrine.[115] The fledgling circuit split on this issue

111. Wilkes-Barre Hosp. Co. v. NLRB, 857 F.3d 364, 371 (D.C. Cir. 2017) (quoting Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 796 F.3d 111, 117 (D.C. Cir. 2015)).

112. Byrne v. Berryhill, No. 19-cv-00066, 2020 WL 373076, at *2 n.6 (D. Conn. Jan. 23, 2020) (noting that "several decisions in the Second Circuit have found the Appointments Clause issue to be mooted" by ratification (citing Faussett v. Saul, No. 18-cv-00738, 2020 WL 57537, at *5 n.5 (D. Conn Jan. 6, 2020))). As for the Third Circuit, see, for example: *1621 Route 22 West Operating Co. v. NLRB*, 725 F. App'x 129, 137 (3d Cir. 2018); *Copes v. Berryhill*, No. 16-cv-05735, 2019 WL 1455443, at *5 (E.D. Pa. Apr. 1, 2019) ("[O]n remand the issue will be moot, as '[o]n July 16, 2018, the Acting Commissioner ratified the appointment of ALJs . . . and approved their appointments as her own in order to address any Appointments Clause questions involving [Social Security Administration] claims.'" (second alteration in original) (quoting SOC. SEC. ADMIN., EM-18003 REV 2, IMPORTANT INFORMATION REGARDING POSSIBLE CHALLENGES TO THE APPOINTMENT OF ADMINISTRATIVE LAW JUDGES IN SSA'S ADMINISTRATIVE PROCESS—UPDATE (2018), https://perma.cc/EUQ2-64AR)); and *Koprowski v. Wistar Institute of Anatomy & Biology*, No. 92-cv-01132, 1993 WL 106466, at *2 (E.D. Pa. Apr. 6, 1993) ("I am persuaded by defendants' argument that the subsequent ratification of an arguably earlier improper removal moots Count III of plaintiff's Amended Complaint.").

113. *E.g.*, Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 920 F.3d 1, 13 (D.C. Cir. 2019) (per curiam) (alteration in original) (emphasis added) (quoting *Wilkes-Barre Hosp. Co.*, 857 F.3d at 371), *cert. denied*, 140 S. Ct. 789 (2020).

114. *E.g.*, Koster v. Whitaker, 427 F. Supp. 3d 1140, 1148 (D. Ariz. 2019) (denying as moot plaintiffs' motion for summary judgment because subsequent ratification rendered the rule in question valid); Covington v. Saul, No. 18-cv-00693, 2019 WL 3716546, at *10 (M.D.N.C. Aug. 7, 2019) (finding that a remand coupled with ratification by a properly serving official rendered the plaintiff's claim moot); Va Vue Vang v. Saul, No. 18-cv-00255, 2019 WL 4220934, at *12 (M.D.N.C. Sept. 5, 2019) (same); United States v. Khadr, 717 F. Supp. 2d 1212, 1214 (C.M.C.R. 2007) ("Chief Judge Bell's ratification of the assignment of the military judges to the instant panel and assignment of this case to the same moots the latter portion of appellant's motion."). Note, however, that none of those decisions make explicit reference to the contrary holdings of the D.C. Circuit. *See supra* note 113 and accompanying text.

115. *Koster*, 427 F. Supp. 3d at 1148 (rejecting the "capable of repetition yet evading review" exception to the mootness doctrine); Jooce v. FDA, Nos. 18-cv-00203, 18-cv-01615 & 19-cv-00372, 2020 WL 680143, at *7 (D.D.C. Feb. 11, 2020) (rejecting the "voluntary-

footnote continued on next page

has received little, if any, attention—most likely because whether moot or resolved on the merits, a ratified action nonetheless avoids judicial scrutiny.

Returning to the Vacancies Act, despite the language of 5 U.S.C. § 3348 that purports to invalidate all actions taken by an improperly serving official, there are three loopholes where the de facto officer doctrine could still apply: (1) offices exempt, in whole or in part, from the Vacancies Act; (2) offices governed by agency-specific succession statutes; *and* (3) actions arguably not covered by the Vacancies Act or § 3348. This Part discusses those three loopholes. It is both doctrinal and descriptive—grounded in existing case law and precedent—and normative and prescriptive—suggesting how courts might navigate future cases that raise those and similar issues.[116]

A. Loophole One: "But I'm Exempt"

1. Offices exempt from the Vacancies Act

There are notable exceptions to the Vacancies Act's reach. First, the Act expressly excludes several specific groups, namely officers of the GAO, multi-member independent commissions and government corporations, the Federal Energy Regulatory Commission, and the Surface Transportation Board, as well as Article I judges.[117] The consequences of such exclusion are weighty: "[I]f an office designated vacant under this provision is that of the agency head, it appears likely that no one can temporarily perform the functions and duties of that office under the Vacancies Act."[118] As there likely could be no such thing as an acting official in one of those exempted roles, much less an improperly serving one, this Note will focus on the offices that are covered by the Vacancies Act but excluded from § 3348.

2. Offices exempt from § 3348

As previously explained, 5 U.S.C. § 3348 provides that an action taken by an improper acting official "in the performance of any function or duty of a vacant office" is void and cannot be subsequently ratified.[119] Together, the void ab initio and antiratification provisions of § 3348 give the Vacancies Act its

cessation" exception to the mootness doctrine), *aff'd*, 981 F.3d 26 (D.C. Cir. 2020), *cert. denied*, 141 S. Ct. 2854 (2021).

116. As O'Connell notes: "As of December 31, 2019, there had been only twelve unique judicial decisions that cite the Vacancies Act's 'no force or effect' provision." O'Connell, *supra* note 10, at 632 (quoting 5 U.S.C. § 3348).

117. 5 U.S.C. §§ 3345(a), 3349c.

118. BRANNON, *supra* note 38, at 3 n.22.

119. 5 U.S.C. § 3348(d).

teeth. Section 3348's carveouts are quite specific. It does not apply to the General Counsels of the NLRB and the FLRA; any inspector general or chief financial officer "appointed by the President, by and with the advice and consent of the Senate"; and "[any] office of an Executive agency . . . if a statutory provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office."[120]

The *actions* of those excluded officers are almost certainly protected from the Vacancies Act's bite—that is, they are insulated from § 3348's void ab initio and antiratification provisions.[121] Could a court choose then to apply the de facto officer doctrine to give force to those acts?

3. The de facto officer doctrine in Loophole One

Loophole One has rarely been litigated, but the GAO archive on Vacancies Act violations is instructive.[122] Just two years after the enactment of the Vacancies Act, the GAO published a violation letter stating that "the Act does not invalidate the actions of acting Inspectors General and Chief Financial Officers whose service exceeds the permissible 210-day limit."[123] A 2006 letter echoed that sentiment: "[T]he nullification provisions of the Vacancies Reform Act do not apply to Inspectors General . . . ."[124] The judicial branch has yet to definitively resolve the question, but the relevant precedent similarly suggests that actions flowing from § 3348–exempt offices are not void ab initio.

In *SW General, Inc. v. NLRB*, the D.C. Circuit held that then–former Acting General Counsel of the NLRB Lafe Solomon had served in violation of the Vacancies Act.[125] The court stated that Solomon's actions were merely "*voidable*, not void," because the General Counsel of the NLRB is exempt from § 3348.[126] Although the NLRB had briefed the de facto officer doctrine, the

120. BRANNON, *supra* note 38, at 4 (quoting 5 U.S.C. § 3348(e)). Brannon explains that Congress meant to keep those unique positions independent of the commission or agency in which they serve. *Id.*

121. *See infra* Part III.A.3.

122. The GAO publishes Vacancies Act violations: The Vacancies Act tasks the Comptroller General with reporting new vacancies and officers who have exceeded the Act's time limits to the President, the Office of Personnel Management, and various agencies and congressional committees. 5 U.S.C. § 3349.

123. Letter from Robert P. Murphy, Gen. Couns., U.S. Gen. Accounting Off., to Sen. Fred Thompson, Chairman, Comm. on Governmental Affs. 2 (Sept. 15, 2000), https://perma.cc/EZ2C-EVWX.

124. Letter from Gary L. Kepplinger, Gen. Couns., U.S. Gov't Accountability Off., to President George W. Bush 2 (July 24, 2006), https://perma.cc/ZAY5-ZMDR.

125. 796 F.3d 67, 78 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017).

126. *Id.* at 78-79. Ratification was off the table because "no properly appointed General Counsel [had] ratified" the action in question. *Id.* at 79.

court declined to apply it, ultimately voiding Solomon's challenged action.[127] When the Supreme Court later affirmed the D.C. Circuit's decision, it did so without reconsidering the remedy the lower court had applied and without mentioning the de facto officer doctrine.[128] In a later Ninth Circuit case, *Hooks ex rel. NLRB v. Kitsap Tenant Support Services, Inc.*, Judge Michelle Friedland extended the D.C. Circuit's understanding of those § 3348–exempt offices.[129] The *Hooks* court held that a NLRB petition (coincidentally also issued by Acting General Counsel Solomon) was void*able*, not void, and then went on to actually void it.[130]

But that understanding is far from settled law. In *SW General*, the void-versus-voidable question was not actually litigated: Both the D.C. Circuit and the Supreme Court assumed that the actions in question were voidable because the parties had not contested the point.[131] Likewise, in *Hooks*, the NLRB had "waived any arguments based on the [Vacancies Act's] exemption clause" and did not "otherwise contest the remedy sought."[132] Notwithstanding the outcome in both *SW General* and *Hooks* (voided actions), a court likely *could* and *would* apply the de facto officer doctrine to a case with the right facts. Indeed, it is telling that the D.C. Circuit considered the de facto officer doctrine at all, even though it did not ultimately apply it.[133]

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127. *Id.* at 81-83.

128. The NLRB did not seek certiorari on that issue. *See* Petition for a Writ of Certiorari at i, *SW Gen.*, 137 S. Ct. 929 (No. 15-1251), 2016 WL 1377754.

129. 816 F.3d 550, 564-65 (9th Cir. 2016).

130. *Id.* A voidable action is one that a court may choose to void (i.e., it *can be voided*). Conversely, a void action is one that cannot be saved by a court (because it is void ab initio).

> A "voidable" action . . . "is not incurable." For instance, before a court strikes down a voidable agency decision, it will often inquire into whether the legal defect created actual prejudice. If an error is harmless, the court may uphold the agency action. In contrast, acts that are "void" may not be ratified or rendered harmless . . . .

BRANNON, *supra* note 38, at 16-17 (footnotes omitted) (quoting Easley v. Pettibone Mich. Corp., 990 F.2d 905, 909 (6th Cir. 1993)).

131. BRANNON, *supra* note 38, at 18-19; *see also* Brief for Professor John Harrison as Amicus Curiae in Support of Respondents at 21, Collins v. Yellen, 141 S. Ct. 1761 (2021) (No. 19-422), 2020 WL 6545951 ("The issues presented by a case are largely structured by the parties. The Court is free to assume for purposes of deciding a case that a point of law on which the parties agree is correct."). In *SW General*, the D.C. Circuit expressed no view on whether § 3348 might "wholly insulate the Acting General Counsel's actions"—meaning that Solomon's actions might *not even be voidable*. 796 F.3d at 79; *see also* BRANNON, *supra* note 38, at 19.

132. 816 F.3d at 564.

133. Judge Friedland expressly noted that "defenses based on harmless error or the de facto officer doctrine might potentially be raised" in future cases concerning § 3348–exempt offices. *Id.*

Only one Article III court, the Court of Appeals for the Second Circuit, has had occasion to answer the question whether actions carried out by acting officials in offices covered by the Vacancies Act but excluded from § 3348 are voidable or void. It held that such actions are voidable, not void ab initio, and thus may be ratified by a properly serving official.[134] That holding leaves open the parallel possibility that such actions may also be validated by operation of the de facto officer doctrine.

Where appropriate, courts should accordingly apply the de facto officer doctrine in this loophole. First, Congress exempted offices from § 3348 to preserve their independence,[135] and the de facto officer doctrine will not jeopardize that goal. Second, the current status quo—voidable, but not void—affords courts flexibility to evaluate the nature of the actions in question and any harm done. The de facto officer doctrine is similarly grounded in flexibility. Third, the line drawn by COFINA in its *Aurelius* briefing between judicial officers and legislative and executive officers points towards the application of the doctrine in this loophole because all of the § 3348–exempt offices are legislative or executive in nature. Thus, where consistent with its origins in equity, courts should freely apply the de facto officer doctrine to Loophole One.

As a practical postscript, what then became of Solomon's actions? While *SW General* and *Hooks* voided the specific actions at issue in each case,[136] Solomon's successor, Richard Griffin, swiftly ratified many others.[137] According to a memorandum written by Griffin, ratification was the agency's

134. *See* NLRB v. Newark Elec. Corp., 14 F.4th 152, 161-63 (2d Cir. 2021). The court explained that "agency actions can be ratified, so long as the actions of the agency official that are being ratified are not automatically void under the [Vacancies Act]" and decided, based on the text of the statute, that the actions of the NLRB General Counsel are not automatically void. *Id.* at 162-63. "If an action is merely voidable, and not void, that action can be ratified by a properly serving official." *Id.* at 163.

135. *See* BRANNON, *supra* note 38, at 19.

136. *But see* Kitsap Tenant Support Servs., Inc., 366 N.L.R.B. No. 98, at 1 n.1 (May 31, 2018) (finding that the complaint against Kitsap, which was initiated when Acting General Counsel Solomon was improperly serving, was valid because General Counsel Griffin later independently ratified it). Although Kitsap was the party that raised Solomon's defective service in *Hooks*, the Ninth Circuit addressed only the preliminary-injunction question in that case. 816 F.3d at 555 n.4 ("Because the only decision we are reviewing is the district court's decision to dismiss the 10(j) petition, and because we affirm its dismissal on the ground that the petition itself lacked valid authorization, we need not reach [Kitsap's] argument about the validity of the underlying administrative complaint.").

137. The Supreme Court decided *SW General* on March 21, 2017. *See* 137 S. Ct. 929 (2017). Griffin issued Notices of Ratification by that August. *Newark Elec. Corp.*, 14 F.4th at 161. Note that while the de facto officer doctrine is a sweeping remedy (i.e., it validates *all* past acts), voiding is piecemeal in nature (i.e., a court voids a specific, challenged action), and ratification comes in both flavors.

plan in the wake of *SW General* and *Hooks*.[138] As the agency had anticipated, employers sought to use the holdings of both cases in subsequent NLRB proceedings to challenge complaints initiated during the period of Solomon's improper service.[139] Over thirty NLRB cases found such an argument to be moot.[140]

The language across those cases, almost always appearing in a footnote, is highly similar: "[W]e find that subsequent events have rendered moot the Respondent's argument . . . . Specifically, . . . General Counsel Richard F. Griffin, Jr., issued a Notice of Ratification in this case . . . ."[141] Griffin's "Notices of Ratification" are likewise virtually identical. Nearly all state:

> Congress provided the option of ratification by expressly exempting "the General Counsel of the National Labor Relations Board" from the [Vacancies Act] provisions that would otherwise preclude . . . ratification . . . . For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.[142]

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138. Memorandum from Richard F. Griffin, Jr., Gen. Couns., NLRB, to All Div. Heads, Reg'l Dirs., Officers-In-Charge, and Resident Officers, NLRB 15 (Mar. 28, 2016), https://perma.cc/8DAP-4RYM. The memorandum stated that:

> Following the denial of its petition for rehearing en banc, the government has determined to seek Supreme Court review in *SW General*. In the Courts of Appeals, the Board continues to defend the Acting General Counsel's appointment in circuits other than the D.C. Circuit, with cases fully briefed in the Second, Third and Sixth circuits. Where the challenge was raised belatedly (often for the first time in court), the Board is arguing that the challenge was waived, as well as defending the appointment under the Federal Vacancies Reform Act (FVRA). Further, the General Counsel, upon receipt of a recommendation by a Regional Director, has undertaken review of case actions and determinations in cases currently pending before the Board where this issue has been raised, and has ratified the underlying actions and determinations to date.

Id.

139. *E.g.*, 1621 Route 22 W. Operating Co., 364 N.L.R.B. 481, 481 n.4 (2016); Butler Med. Transp., LLC, 365 N.L.R.B. No. 112, at 1 n.2 (July 27, 2017).

140. *E.g.*, *1621 Route 22 W. Operating Co.*, 364 N.L.R.B. at 481 n.4. *But see supra* notes 112-16 and accompanying text (discussing the circuit conflict on the question whether ratification moots a controversy or resolves it on the merits). To arrive at the number of NLRB cases, I searched both Westlaw and LexisNexis for NLRB decisions citing *SW General* and/or *Hooks*. In all of those cases, the NLRB emphasized that none of the parties had objected to Solomon's service prior to *SW General*, echoing the strategy articulated in General Counsel Griffin's memo. Memorandum from Richard F. Griffin, Jr., *supra* note 138, at 15; *cf.* Robert Iafolla, *Top NLRB Lawyer's Firing Muddies Future Labor Enforcement*, BLOOMBERG L.: DAILY LAB. REP. (updated Jan. 21, 2021, 3:50 PM), https://perma.cc/4C5V-JMFR (noting that *SW General*'s holding "only applied to unfair labor practice cases in which parties [had] previously raised an objection to the acting general counsel's authority to authorize complaints").

141. *1621 Route 22 W. Operating Co.*, 364 N.L.R.B. at 481 n.4.

142. H&M Int'l Transp., Inc., 363 N.L.R.B. 1861, 1862 (2016) (quoting one of Griffin's notices); *see also, e.g.*, Burndy, LLC, 364 N.L.R.B. 946, 946 nn.1-2 (2016); Total Sec. Mgmt. Ill. 1, LLC, 364 N.L.R.B. 1532, 1533 n.5 (2016).

These so-called Notices of Ratification are not collected or centralized in any one place, and the only way to track them down is through their citation by the NLRB in its own decisions.[143]

Although no court has had occasion to directly answer the question whether actions carried out by acting officials in offices covered by the Vacancies Act but excluded from § 3348 can be validated by the de facto officer doctrine, Griffin's Notices—and the NLRB's acceptance of them—align with the voidable-but-not-void holdings of the D.C. and Ninth Circuits. For the time being, Griffin's statutory interpretation stands.

B. Loophole Two: "But Another Statute Governs"

1. Offices governed by agency-specific succession provisions

The preceding Subpart argued that the de facto officer doctrine likely can and should be used to validate actions of officers exempt from the Vacancies Act in whole or in part. This Subpart focuses on a second loophole, one formed by the interaction between the Vacancies Act and agency-specific succession statutes.

In *SW General*, discussed above in the context of Loophole One, President Obama chose to invoke the Vacancies Act instead of the succession provision in the National Labor Relations Act (NLRA) because the latter only authorizes 40 days of acting service, while the former affords more than five times that.[144] The D.C. Circuit, and later the Supreme Court, accordingly examined whether Solomon had served in violation of the Vacancies Act, not the NLRA. If they had done the opposite, the discussion would have been brief: Solomon was unquestionably serving in violation of the NLRA.

With two exceptions, the Vacancies Act is the "exclusive means for temporarily authorizing" acting service.[145] The first exception is when the

143. Only three "Notices of Ratification" have been published in the Federal Register since 1936. *See* Notice of Ratification of Decision to Take 90.94 Acres of Land, More or Less, into Trust for the Lower Brule Sioux Tribe of Indians of South Dakota, 66 Fed. Reg. 7925 (Jan. 26, 2001) (Department of the Interior); Notice of Ratification, 78 Fed. Reg. 53,734 (Aug. 30, 2013) (CFPB); Ratification of Claims Approval, 46 Fed. Reg. 42,949 (Aug. 25, 1981) (Small Business Administration). But General Counsel Griffin issued well over three Notices of Ratification *just* in relation to *SW General* and *Hooks*—a fact that suggests the Federal Register is nowhere near a complete record. To find past Notices of Ratification, I searched Westlaw's Federal Register catalog, which contains full-text coverage from March 1936, for "Notice of Ratification." I also cross-referenced the results of that search on Westlaw with the Notices of Ratification available on the federal government's Federal Register site.

144. *See* SW Gen., Inc. v. NLRB, 796 F.3d 67, 71 n.2 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017).

145. 5 U.S.C. § 3347(a).

President makes a recess appointment.[146] The second is when a different statutory provision "expressly" authorizes acting service.[147] There are over 100 such statutory provisions (agency-specific succession statutory provisions) across the executive branch.[148] And many of them differ from the Vacancies Act in important ways. In general, they tend to "designate only one official to serve as acting officer and often do not specify a time limit on that official's service."[149]

The terrain of overlap between the Vacancies Act and agency-specific statutes can be treacherous. At times, the Vacancies Act is rendered merely nonexclusive: "It is possible that both the agency-specific statute and the Vacancies Act may be available to temporarily fill a vacancy."[150] But at other times, the Vacancies Act is rendered inapplicable.[151] As Valerie Brannon explains, that terrain is shaped by two potentially conflicting interpretive rules. First, "courts will, if possible, 'read the statutes to give effect to each.'"[152] Relying on that interpretive rule, courts have tended to "resolve[] any potential conflict by holding that whichever statute is *invoked* is the controlling one."[153] But such cases typically run afoul of the second interpretive rule that Brannon cites: The specific governs the general.[154] Canons of interpretation aside, "the President appears capable of legally turning to the Vacancies Act unless Congress has *explicitly referenced* the Act and declared it does not apply."[155]

146. *Id.* § 3347(a)(2).

147. *Id.* § 3347(a)(1).

148. O'CONNELL, *supra* note 12, app. A at 74-100.

149. BRANNON, *supra* note 38, at 21 (footnote omitted).

150. *Id.* at 20-21.

151. *See id.* at 24-25. *But cf.* Stephen Migala, *The Vacancies Act and an Acting Attorney General*, 36 GA. ST. U. L. REV. 699, 701 (2020) (arguing that the Vacancies Act can never be used to fill vacant offices that are subject to agency-specific succession statutes).

152. BRANNON, *supra* note 38, at 22 (quoting Watt v. Alaska, 451 U.S. 259, 267 (1981)).

153. *Id.* (emphasis added).

154. *Id.*; *see* English v. Trump, 279 F. Supp. 3d 307, 314, 325 (D.D.C. 2018) (holding that the President was free to invoke the Vacancies Act despite the fact that the CFPB's succession statute was enacted later and was arguably more specific).

155. *See* O'Connell, *supra* note 10, at 671 (emphasis added). For example, the Department of Homeland Security's succession statute expressly displaces the Vacancies Act. *See* BRANNON, *supra* note 38, at 24 ("[T]he statutory provisions governing acting service in the office of the Secretary of Homeland Security apply 'notwithstanding' the Vacancies Act, indicating an intent to render the Vacancies Act inapplicable to this position." (footnote omitted) (quoting 6 U.S.C. § 113(g)(1))). *But see* O'Connell, *supra* note 13 (explaining that the Trump Administration argued in court that the Vacancies Act was not displaced by the Homeland Security Act).

The Vacancies Act's relationship with agency-specific succession statutes is largely an open question[156]—but one that, unlike the legal questions of the first and third loopholes, has benefitted from significant judicial attention and percolation.[157] That said, the present welter of jurisprudence, characterized by conflicting canons of statutory interpretation and case-by-case analysis, is helpful but hardly dispositive.[158]

2. The de facto officer doctrine in Loophole Two

5 U.S.C. § 3348 is likely not triggered when a vacancy is filled under the terms of an agency's succession statute (as opposed to the Vacancies Act). As such, the de facto officer doctrine would likely be available for a court to apply. Although that question is somewhat straightforward, the larger question of *when* an agency-specific statute displaces the Vacancies Act is not.[159] The President is almost always free to invoke the Vacancies Act and may in fact prefer it to agency-specific succession statutes because of the Act's comparatively generous time limits and flexibility. But the Vacancies Act is accompanied by § 3348's void ab initio and antiratification provisions. Agency-specific succession statutes, on the other hand, tend to lack enforcement provisions[160] and are, at least in some respects, less stringent than the Vacancies Act.[161] That leniency, coupled with the attendant lack of clarity in an already complex field, often serves to harm the public and encourage gamesmanship. Brannon suggests that Congress itself should resolve those tensions either by amending the Vacancies Act to clarify when it is displaced or

156. *See* O'Connell, *supra* note 10, at 671 ("While it may not be desirable as a matter of policy, the President appears capable of legally turning to the Vacancies Act unless Congress has explicitly referenced the Act and declared it does not apply. . . . The Supreme Court has not waded into these interpretation disputes, leaving uncertainty.").

157. *E.g.*, Hooks *ex rel.* NLRB v. Kitsap Tenant Support Servs., Inc., 816 F.3d 550, 556 (9th Cir. 2016) ("[N]either the [Vacancies Act] nor the NLRA is the *exclusive* means of appointing an Acting General Counsel of the NLRB. Thus, the President is permitted to elect between these two statutory alternatives to designate an Acting General Counsel.").

158. Mendelson, *supra* note 8, at 553 ("[The] statutory instructions are often conflicting, unclear, or unbounded, leaving greater scope for argument and underscoring the importance of clearer constitutional guidance both to Congress and the courts.").

159. *See, e.g.*, *English*, 279 F. Supp. 3d at 319-20.

160. For example, the Homeland Security Act lacks a corollary to § 3348. O'Connell, *supra* note 13.

161. *See* BRANNON, *supra* note 38, at 21 ("[A]gency-specific statutes tend to designate only one official to serve as acting officer and often do not specify a time limit on that official's service." (footnote omitted)). *But see* SW Gen., Inc. v. NLRB, 796 F.3d 67, 71 n.2 (D.C. Cir. 2015) (discussing the NLRA's 40-day time limit on acting service), *aff'd*, 137 S. Ct. 929 (2017).

by speaking clearly in agency-specific statutes (as in the Homeland Security Act).[162]

How then should courts proceed? Unlike the first loophole, this loophole is characterized by patchwork legislation and common law. But the status quo—allowing the President to choose whether to invoke the Vacancies Act or an agency-specific succession statute—clearly maximizes presidential flexibility. Applying the de facto officer doctrine arguably furthers that goal: It maximizes flexibility by softening the blow of a Vacancies Act misstep, and thanks to the doctrine's equitable elements does so without sacrificing accountability. Indeed, those elements serve as a check on bald evasion of the constitutional requirement of Senate confirmation for PAS positions. Ultimately, the de facto officer doctrine's application in Loophole Two is likely to require case-by-case analysis but, where an agency-specific statute does not mandate voiding, the de facto officer doctrine will likely and should remain available.

C. Loophole Three: "But Those Actions Were Delegable"

So far, we have seen that the de facto officer doctrine likely can and should apply to (1) offices exempt from 5 U.S.C. § 3348 (Loophole One); and (2) offices governed by agency-specific succession statutes, depending on their precise enforcement provisions (Loophole Two). Loophole Three is distinct from its precursors in several ways. To begin, it deals with the nature of *actions*, rather than the nature of *offices*. It also implicates broader questions about the Vacancies Act and its efficacy—more specifically, questions about delegated authority.

1. Understanding delegation

Delegation is likely the largest loophole of all. In the face of a vacant office, there are generally two options: (1) a person fitting one of the Vacancies Act's three permissible categories can assume the "acting" title and mantle; *or* (2) the office can remain vacant, and the actions which correspond to it be carried out via delegation. Although not a loophole per se, that second option—the delegation of functions—is a massive workaround, a way of subverting the Vacancies Act in its entirety. O'Connell points out that "[w]hile little attention is paid to legal questions surrounding acting officials, there is *even less* attention paid to delegations in the face of vacancies, even though they are largely interchangeable mechanisms."[163] Delegation turns on the concept, derived from the text of § 3348, of deleg*able* functions.

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162. BRANNON, *supra* note 38, at 24-25.

163. O'Connell, *supra* note 10, at 689 (emphasis added).

On their face, § 3348's void ab initio and antiratification provisions only apply to the *functions* or *duties* of a vacant office.[164] A function or duty of a vacant office is one that must be performed "by the applicable officer (*and only that officer*)."[165] The parenthetical phrase "and only that officer" is generally interpreted to mean that *if* a function can be delegated, it is *not* a function that must be performed by "*only* that officer" and, accordingly, is not subject to § 3348's void ab initio and antiratification provisions.[166] Thus, the statutory text is read to implicitly create a category of *delegable* (nonexclusive) functions and a category of *non*delegable (exclusive) ones.

Courts have generally held that the Vacancies Act does not prohibit delegation, thereby allowing "temporary officials or subordinate officials [to] perform the duties of a vacant office without violating the Vacancies Act, as long as they do so subject to a lawful delegation."[167] A lawful delegation must be made by a properly serving officer and must predate the vacancy.[168] But because federal housekeeping and other statutes confer extremely broad delegation powers on virtually all agency officials, under the current interpretation of the Vacancies Act, almost every function is delegable.[169] In a frequently-asked-questions memo published immediately after the 1998 Vacancies Act became law, the OLC under the direction of Randolph Moss noted that "[m]ost, and in many cases all, the responsibilities performed by a PAS officer will not be exclusive, and the Act permits non-exclusive responsibilities to be delegated."[170] Today, agencies routinely decide whether a function is delegable or exclusive on the fly.[171] Although nondelegable

164. 5 U.S.C. § 3348(a), (d).

165. *Id.* § 3348(a)(2) (emphasis added).

166. *See* BRANNON, *supra* note 38, at 7-8.

167. *Id.* at 7.

168. *Id.* at 6-7, 7 n.64; Guidance on Application of Fed. Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 70-71 (1999).

169. O'Connell, *supra* note 10, at 634 (citing Guidance on Application of Fed. Vacancies Reform Act, 23 Op. O.L.C. at 72).

170. Guidance on Application of Fed. Vacancies Reform Act, 23 Op. O.L.C. at 72; *see also District Judge Randolph D. Moss*, U.S. DIST. CT.: D.C., https://perma.cc/C2W5-P9R3 (archived Jan. 20, 2022) (indicating that Judge Moss served as Acting Assistant Attorney General in the Department of Justice, Office of Legal Counsel from 1998 to 2000).

171. O'CONNELL, *supra* note 12, at 62 ("So as not to violate the Vacancies Act, many agencies officially assign 'delegable functions' or 'nonexclusive functions' of the 'vacant office' when the Act's time limits run out, without defining what those functions are. These agencies then address any questions about particular functions as they arise. Many agencies reported seeking OLC advice on whether particular duties are non-exclusive and therefore can be carried out by lower-level officials."). O'Connell's interviews reveal that independent regulatory commissions and boards do, however, keep meticulous lists "of what functions can be carried out, and by whom, without a quorum." *Id.*

functions exist,[172] they are rare and headed toward extinction if courts continue to "presume that delegation is permissible 'absent affirmative evidence of a contrary congressional intent.'"[173] And "despite the common-sense understanding" of the word, such delegation "leaves no one in place to supervise or revoke [it]."[174] O'Connell tells the story of Nancy Berryhill, who—after being notified by the GAO that she was serving at the Social Security Administration in violation of the Vacancies Act—simply continued to "perform the same role as before [through delegation], but without the acting title."[175]

The scholarly reaction to delegation has been mixed, with some suggesting that sweeping delegation is a necessity of government and others that it contrary to the spirit of the Vacancies Act and perhaps even unconstitutional.[176] Nina Mendelson, for example, writes that the "the wholesale delegation of a Senate-confirmed office's responsibilities violates the text of [the Vacancies Act]."[177] In her view, delegation empowers administrations to "creat[e] a cadre of shadow acting officials."[178] Stephen Migala similarly argues that the common conception of delegation as proper under the Vacancies Act is incorrect based on the Act's text, purpose, and legislative history.[179]

Scholarship aside, delegation is pervasive, and the prevailing view is that it is also permissible.[180] But that view is prevailing only with respect to assessing *violations* of the Vacancies Act—not remedies.

2. Actions arguably not covered by the Vacancies Act

The Subpart above detailed how delegation presents a potent workaround to the Vacancies Act. In cases of such delegation, courts tend to uphold the

172. O'Connell, *supra* note 10, at 633; O'CONNELL, *supra* note 12, at 62 ("Some interviewees reported that nothing is exclusive to any position in their agencies, allowing delegation of all duties. Others noted that a handful of specific tasks could not be delegated downward.").

173. BRANNON, *supra* note 38, at 26 (quoting U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004)).

174. Mendelson, *supra* note 8, at 559.

175. O'Connell, *supra* note 10, at 634.

176. *See, e.g., id.* at 682-89 (discussing the constitutional implications of such broad delegation and suggesting that it can sometimes serve as an "end run" around the Vacancies Act (capitalization altered)).

177. Mendelson, *supra* note 8, at 561.

178. *Id.*

179. Migala, *supra* note 20, at 18-30.

180. O'Connell, *supra* note 10, at 722, 728.

actions in question.[181] But such a workaround requires, well, delegation. In the absence of actual delegation, President Trump's Department of Justice argued that an improper acting official's actions were not covered by § 3348 because they were deleg*able*—even though they had not actually been deleg*ated*. How § 3348 applies to delegable functions that have not been delegated has rarely been litigated—likely due to the ease of actually delegating delegable functions—and the two on-point cases point in seemingly opposite directions.

Most recently, Moss, now a D.C. District Court Judge, rejected the deleg*able*-even-if-never-deleg*ated* argument in *L.M.-M. v. Cuccinelli* and cast doubt on the larger delegation scheme in the process.[182] In *L.M.-M.*, the government argued that § 3348 applies only to nondelegable, exclusive duties. As such, it did not matter if Kenneth Cuccinelli, then serving as Acting Director of the United States Citizenship and Immigration Services (USCIS), was serving in violation of the Vacancies Act: He had only performed deleg*able* duties (although never delegated to him) that could thus be ratified by a properly serving official (although no one had even tried to).[183] In its briefing, the Department of Justice supported that argument with a citation to *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*.[184]

More precisely, the government cited a pair of citing parentheticals. In *Guedes*, the D.C. Circuit attached the following explanatory parenthetical to § 3348: "(only prohibiting the ratification of nondelegable duties)."[185] The court then cited 28 U.S.C. § 510 as "(authorizing delegation of 'any function of the Attorney General')."[186] That citation couplet is a routine application of the delegation formula discussed in the previous Subpart: The "only that officer" language of § 3348 *plus* a statute authorizing broad delegation *equals* a nonexclusive, delegable function beyond the reach of the Vacancies Act's void ab initio and antiratification provisions.

But Judge Moss did not find anything routine about it. He rejected the Department's cobbled-together definition of delegable duties as antithetical to

181. *E.g.*, Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 419-21 (D. Conn. 2008), *aff'd*, 587 F.3d 132 (2d Cir. 2009). So if challenged, the grizzly bear and natural gas actions referenced in the Introduction would almost certainly be upheld as valid under the Vacancies Act.

182. 442 F. Supp. 3d 1, 34 (D.D.C. 2020), *appeal dismissed per stipulation*, No. 20-5141, 2020 WL 5358686 (D.C. Cir. Aug. 25, 2020).

183. *Id.* at 31.

184. 920 F.3d 1 (D.C. Cir. 2019) (per curiam), *cert. denied*, 140 S. Ct. 789 (2020); *see* Supplemental Memorandum of Points & Authorities in Opposition to the Motion for a Preliminary Injunction & in Support of Partial Motion for Summary Judgment at 12, *L.M.-M.*, 442 F. Supp. 3d 1 (No. 19-cv-02676), 2019 WL 11031718, ECF No. 25.

185. 920 F.3d at 12.

186. *Id.*

the Vacancies Act's text and purpose.[187] In his words, such a reading "would cover all (or almost all) departments subject to the [Act]" and render § 3348 entirely superfluous.[188] Judge Moss ultimately concluded that Cuccinelli was serving as the Acting Director of USCIS in violation of the Vacancies Act.[189] As a result, his challenged actions had to be set aside as "compelled by" § 3348.[190] Although Judge Moss's decision squarely implicated the entire delegation scheme, he noted that *L.M.-M.*'s holding was "a narrow one," limited to cases where "the department head did not reassign [the] function using his vesting-and-delegation authority or any other authority at least 180 days before the vacancy occurred."[191] It remains to be seen whether *L.M.-M.*'s apparent dicta disclaiming sweeping delegation under the Vacancies Act will be followed by other courts.

The reason for Judge Moss's seemingly anomalous break from the existing jurisprudence is clear: It is one thing to subvert the Vacancies Act through delegation and quite another to claim the title of "acting" and argue that any related actions should stand because they *could have been* delegated. It is also worth noting that creating the First Assistant position after the vacancy arose may just have been too far beyond the pale for Judge Moss.[192] In the case, Acting Secretary of the Department of Homeland Security Kevin McAleenan had appointed Cuccinelli to "serve as the Principal Deputy Director [of USCIS]" and, on that same day, "also revised USCIS's order of succession, designating the newly created position of Principal Deputy Director as 'the First Assistant and most senior successor to the Director of USCIS.'"[193] In effect, Cuccinelli's position was both created and designated as next-in-line after the vacancy in question occurred. All that said, if the USCIS Director's nonexclusive functions had been properly delegated to Cuccinelli, *L.M.-M.* almost certainly would have come out the other way. In fact, there may not have even been a case at all.

Although not mentioned in *L.M.-M.*, the GAO's library of violation letters lends some credence to the Department of Justice's failed argument. In a 2001

187. *L.M.-M.*, 442 F. Supp. 3d at 33-34.

188. *See id.* at 31.

189. *Id.* at 9.

190. *Id.* at 9, 35-36.

191. *Id.* at 34 ("The Court's holding, moreover, is a narrow one: the Court merely concludes that where, as here, a statute assigns a function to a single PAS office, and where, as here, the department head did not reassign that function using his vesting-and-delegation authority or any other authority at least 180 days before the vacancy occurred, that function is a 'function or duty' of the vacant PAS office within the meaning of § 3348, and it must be performed either by a properly serving acting official or by the department head.").

192. *See id.* at 27-29.

193. *Id.* at 7 (quoting the record).

letter, then–General Counsel Anthony Gamboa wrote: "[A]ctions taken by acting officials . . . *which are not delegable* . . . have no force or effect."[194] The clear implication of Gamboa's letter is that deleg*able* functions *would* have force and effect, in spite of § 3348 and even if not actually delegated. Inexplicably, the language of delegable and nondelegable duties does not appear in any GAO letter issued between 2002 and 2008.[195] In that six-year window, rather than the language of nondelegable duties, the GAO uniformly opted for the phrase "exclusive function or duty, as defined by 5 U.S.C. § 3348."[196] In recent years, "non-delegable" has returned to the GAO's lexicon.[197] But as compelling as the Trump Department of Justice may have found the GAO letters, they have no legal force.[198]

194. Letter from Anthony H. Gamboa, Gen. Couns., U.S. Gen. Accounting Off., to President George W. Bush 4 (May 18, 2001) (emphasis added), https://perma.cc/335H-R89Y.

195. These letters are available at *Federal Vacancies Reform Act: Violation Letters and Decisions*, U.S. GOV'T ACCOUNTABILITY OFF., https://perma.cc/7TTU-5TFN (archived Jan. 20, 2022) (to locate, select "View the live page"). I read all of the publicly available letters and tracked which contain the relevant delegable–nondelegable language.

196. *See, e.g.*, Letter from Anthony H. Gamboa, Gen. Couns., U.S. Gov't Accountability Off., to Sen. Susan M. Collins, Chairman, Comm. on Governmental Affs. 2 (Aug. 19, 2004), https://perma.cc/PAU8-BUWK; Letter from Anthony H. Gamboa, Gen. Couns., U.S. Gov't Accountability Off., to Sen. Susan M. Collins, Chairman, Comm. on Homeland Sec. & Governmental Affs. 2 (July 20, 2005), https://perma.cc/9YKR-9RQR.

197. *See, e.g.*, Letter from Gary L. Kepplinger, Gen. Couns., U.S. Gov't Accountability Off., to Sen. Richard J. Durbin, Sen. Russell D. Feingold & Sen. Edward M. Kennedy 5 (June 13, 2008), https://perma.cc/7UF6-HNP8 ("[S]ince the position of Assistant Attorney General for OLC has no non-delegable duties or functions, we do not find Mr. Bradbury's service as Principal Deputy Assistant Attorney General for OLC to be a violation of the Vacancies Act."); Letter from Lynn H. Gibson, Gen. Couns., U.S. Gov't Accountability Off., to President Barack Obama 2 n.3 (May 17, 2012), https://perma.cc/RKE6-L4Y6 ("Generally, when a position is vacant and the applicable periods for temporary service have expired, no one but the head of an agency may perform any of the non-delegable functions or duties of the vacant position."); Letter from Susan A. Poling, Gen. Couns., U.S. Gov't Accountability Off., to President Barack Obama 1 (June 18, 2014), https://perma.cc/49KM-C4Y9 ("After expiration of an acting officer's allowed period of service, the position is to remain vacant; any non-delegable function or duty of that position can only be performed by the head of the agency."); Letter from Susan A. Poling, Gen. Couns., U.S. Gov't Accountability Off., to President Barack Obama 2 (Nov. 25, 2015), https://perma.cc/RZ3M-SLZL ("In response to our inquiry, [the Department of Health and Human Services] reported that no functions and duties within the meaning of section 3348(a)(2) of the [Vacancies] Act were undertaken by Dr. DeSalvo after February 27, 2015, and before her nomination. Accordingly, we have no basis upon which to conclude that any actions performed by Dr. DeSalvo must be nullified or viewed as having no force or effect." (footnote omitted)).

198. Michelle Hackman, *Homeland Security Officials Chad Wolf, Ken Cuccinelli Invalidly Appointed, Congressional Watchdog Concludes*, WALL ST. J. (updated Aug. 14, 2020, 2:17 PM ET), https://perma.cc/W4F6-W4GT ("The GAO, Congress's watchdog, has no authority over the executive branch, and its report amounts only to a recommendation on the law.").

3. The de facto officer doctrine in Loophole Three

The previous Subpart chronicled the ways in which agencies use delegation to evade the Vacancies Act and its enforcement provision, § 3348. This Subpart discusses how the de facto officer doctrine might apply in the face of delegation.

In *L.M.-M.*, the government argued that § 3348's void ab initio and antiratification provisions did not apply to delegable functions.[199] Judge Moss was unconvinced, particularly because the supposedly delegable functions in question had never been delegated.[200] The Department of Justice did not make a de facto officer doctrine bid; instead, it argued for ratification.[201] But "no one ha[d] even attempted to ratify the directives" in question.[202] The government's "preview[ed]" ratification argument was thus unpersuasive.[203] But as mentioned above, Judge Moss is somewhat of an outlier in that respect; most courts have found broad delegation based on a constructed definition of nonexclusive, delegable functions permissible under the Vacancies Act.[204]

Guedes is more telling. There, "by the time the dispute reached the D.C. Circuit, the challenged rule had been validly ratified by a properly appointed official."[205] Although § 3348 prohibits such ratification, the parties in *Guedes* did not contest the point.[206] The decision nevertheless suggests that deleg*able* functions are exempt from § 3348's void ab initio and antiratification provisions. Brannon interprets the *Guedes* holding similarly, writing that the federal appeals court observed "[t]he fact that the duty was delegable was determinative, regardless of whether the duty had in fact *been* delegated to another official."[207] Thus, as the doctrine currently stands, it is clear that delegable duties, when delegated, are exempt from § 3348, are voidable (not void), and are subject to ratification.[208] The question of delegable duties that are delegable in theory, but have not actually been delegated, is thornier.

199. L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 30-31 (D.D.C. 2020), *appeal dismissed per stipulation*, No. 20-5141, 2020 WL 5358686 (D.C. Cir. Aug. 25, 2020).

200. *Id.* at 31-32.

201. *Id.* at 30-31.

202. *Id.* at 30.

203. *Id.* at 30, 32. ("[T]he mere fact that a department head is also vested with all functions specifically vested in other department officers and employees cannot, standing alone, defeat the enforcement mechanisms found in the [Vacancies Act].").

204. BRANNON, *supra* note 38, at 7-9.

205. *L.M.-M.*, 442 F. Supp. 3d at 33.

206. *Id.*

207. BRANNON, *supra* note 38, at 8.

208. *See* Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 920 F.3d 1, 10-12 (D.C. Cir. 2019) (per curiam), *cert. denied*, 140 S. Ct. 789 (2020).

Brannon suggests that the "prevailing view" is that actual delegation is not necessary: "[T]he Vacancies Act . . . govern[s] only a narrow set of nondelegable duties."[209] The present state of the doctrine thus suggests that delegable duties, at the very least when delegated and perhaps universally, are immune from § 3348 and, accordingly, that the de facto officer doctrine would be at a court's disposal.[210]

In *L.M.-M.*, the sheer absurdity and audacity of Cuccinelli's appointment made it unlikely that a court would apply the de facto officer doctrine even if it found that it could.[211] But even with a less outlandish set of facts, a court might still frown upon a failure to delegate—what amounts to a failure to do the bare minimum. For those reasons, even if the de facto officer doctrine *could* be applied, which it appears is the case, it is unlikely that it would be.[212]

As such, courts confronted with the question whether the de facto officer doctrine is available to validate delegable functions carried out by improperly serving actings should continue to look for evidence of actual delegation.[213] At times, that may seem formalistic, but given the ad hoc, unpublished, and inaccessible nature of many agency happenings,[214] the judicial branch provides crucial oversight. In the presence of actual delegation, courts should apply the de facto officer doctrine whenever the public interest is served. The doctrine's reputational prong is key to that determination and serves a protective function. For example, many of President Trump's actings could not have cleared the doctrine's reputation or good-faith bars.[215] The de facto officer

209. BRANNON, *supra* note 38, at 9.

210. *But see* Behring Reg'l Ctr. LLC v. Wolf, 544 F. Supp. 3d 937, 948-49 (N.D. Cal. 2021), *appeal dismissed sub nom.* Behring Reg'l Ctr. LLC v. Mayorkas, No. 21-16421, 2022 U.S. App. LEXIS 542 (9th Cir. Jan. 7, 2022) (rejecting the de facto officer doctrine with little discussion because § 3348 "renders actions taken by persons serving in violation of the Act void *ab initio*" and the court had earlier rejected the government's delegation theory as contrary to the text and purpose of the Vacancies Act). In some places, *Behring* arguably sweeps more broadly than *L.M.-M.*: The court suggested that no delegation is proper under the Vacancies Act.

211. Cuccinelli's position was both created *and* designated as next in line after the vacancy in question occurred. *See supra* text accompanying note 192.

212. *See also infra* Part IV.B (analyzing the apparent presidential preference for ratification over the de facto officer doctrine).

213. Indeed, that is just what occurred in *Northwest Immigrant Rights Project v. United States Citizenship & Immigration Services*, 496 F. Supp. 3d 31 (D.D.C. 2020). There, Judge Moss began by observing that, in *L.M.-M.*, the court had found that delegable duties that had not *actually been delegated* were subject to the strictures of § 3348. *Id.* at 59. He then noted that the instant case was different "because the Secretary [*had*] delegated the authority to issue Department rules." *Id.* (emphasis added). For that reason, the actions were not void ab initio under § 3348. *Id.* at 60.

214. *See* O'CONNELL, *supra* note 12, at 38-51, 60-68.

215. *See supra* Part II.A.

doctrine is preferable to ratification for that reason; ratification consolidates power in the hands of the already implicated executive branch, whereas the de facto officer doctrine shifts it to the impartial judicial one. Thus, courts should closely review ratification and, where possible, apply the de facto officer doctrine over existing ratifications of questionable character.

As a parallel to the Lafe Solomon postscript: Mendelson notes that even "*after* Judge Moss's ruling," Cuccinelli claimed to be both "the 'senior official performing the duties of the Department of Homeland Security Deputy Secretary,' as well as the 'senior official performing the duties of the USCIS director.'"[216] She adds that her research did not uncover any "agency documents that directly support[ed] such a delegation."[217] Both postscripts speak to the practical difficulties courts encounter in policing active service and the corresponding need for legislative reform.

IV. Reading the Tea Leaves: The Future of the De Facto Officer Doctrine

The Trump era has ended. But, from Lafe Solomon under President Obama to Ken Cuccinelli under President Trump, Vacancies Act violations are unabashedly bipartisan. The present, widely accepted interpretation of delegation under the Vacancies Act concentrates power in the executive: If § 3348 applies to only the rare nondelegable function, the President is free to disregard the Vacancies Act's limitations and bypass Senate confirmation. For that reason, it is unlikely that the current interpretation of the Vacancies Act will change in the Biden Administration.[218] It would be odd for any President to read a statute so as to divest the executive branch of power. This is perhaps a rare example of James Madison's prediction—that branch allegiance would forever reign supreme—come true.[219]

This Part analyzes the likelihood that the de facto officer doctrine will be raised by government lawyers in the coming months and years and discusses the likelihood of success in such cases. The previous Part was descriptive and prescriptive; this one is predictive.

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216. Mendelson, *supra* note 103 (quoting the USCIS and Department of Homeland Security websites).

217. *Id.*

218. *Cf. Wilding Out*, STRICT SCRUTINY, at 33:10 (Feb. 22, 2021), https://perma.cc/24QL-66NA (noting the remarkable continuity of litigation positions in immigration cases that straddle presidencies, regardless of a change in party).

219. *See* THE FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961).

A. What to Expect During the Biden Presidency

Most legal challenges to President Trump's acting officials and their actions are likely to become moot because they will no longer present a live case or controversy. In the rare case where a controversy remains live, and in future challenges, the Biden Administration will be free to invoke the de facto officer doctrine. Litigation on that front—the first Vacancies Act controversy of the new administration—began the very month that President Biden took office. This Subpart discusses that controversy while the next analyzes the apparent presidential preference for ratification over the de facto officer doctrine.[220]

On January 20, 2021, President Biden fired NLRB General Counsel Peter Robb after Robb refused to resign.[221] Five days later, President Biden installed Peter Sung Ohr as Acting General Counsel.[222] Challenges to Robb's firing and Ohr's acting service immediately followed,[223] with commentators speculating that the issue had potential to make its way to the Supreme Court.[224] The central legal issue was whether President Biden had the authority to fire Robb without cause before the end of his four-year statutory term; absent such removal authority, Ohr's acting appointment would likely be unlawful.[225]

The NLRB itself declined to weigh in on the matter. When a cable television worker argued that Ohr didn't have the authority to discontinue prosecution of his complaint because Robb had been illegally removed, the Board explained that "reviewing the actions of the President is ultimately a

220. *See, e.g.*, Memorandum from Richard F. Griffin, Jr., *supra* note 138, at 15 (discussing the plan to ratify Lafe Solomon's improper actions in the aftermath of *SW General* during the Obama Administration); L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 30-31, 35 (D.D.C. 2020) (previewing a ratification argument, but not discussing the de facto officer doctrine at length because it was "not raised as a defense"), *appeal dismissed per stipulation*, No. 20-5141, 2020 WL 5358686 (D.C. Cir. Aug. 25, 2020).

221. Iafolla, *supra* note 140.

222. O'Connell, *supra* note 14.

223. *Id.*; Fred Wang, *Why the Legal Challenge to Robb's Removal Is a Losing Argument*, ONLABOR (Feb. 25, 2021), https://perma.cc/AF9E-SQRL.

224. *See, e.g.*, Alan I. Model, Michael J. Lotito, Maury Baskin & Kevin E. Burke, *Peter Sung Ohr Has Cemented the Biden NLRB's Direction Despite Challenges to His Interim Appointment and Prosecutorial Authority*, LITTLER (Mar. 17, 2021), https://perma.cc/PUL7-LK3E. Robb's removal raises additional Appointments Clause and separation-of-powers issues. *See* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2192 (2020) (holding the CFPB's structure unconstitutional because its single Director was removable only for cause).

225. *See* Ian Kullgren, *Abruzzo Confirmed as NLRB Top Lawyer by Harris Tiebreak*, BLOOMBERG L.: DAILY LAB. REP. (updated July 21, 2021, 10:01 AM), https://perma.cc/3ZB7-K23D.

task for the federal courts."[226] So far, one district court has held that the President may remove the NLRB General Counsel at will.[227]

In July 2021, Vice President Kamala Harris cast a tie-breaking vote to confirm Jennifer Abruzzo, President Biden's pick, to permanently fill the NLRB vacancy.[228] But Abruzzo's confirmation does not resolve the question whether Robb's removal was lawful,[229] and employers mired in Ohr-initiated complaints are likely to continue raising challenges. Of course, now that Abruzzo is confirmed, she is free to ratify those actions post hoc (just as then–General Counsel Richard Griffin did in the wake of *SW General*).[230] Absent such ratification, the situation would be ripe for the de facto officer doctrine because the General Counsel of the NLRB is exempt from § 3348 and because of the sheer volume of actions that the General Counsel touches.[231] But given the choice, presidential administrations have historically preferred ratification to the de facto officer doctrine.[232]

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226. Nat'l Ass'n of Broad. Emps. & Technicians Local 51, 370 N.L.R.B. No. 114, at 2 (Apr. 30, 2021).

227. Goonan *ex rel.* NLRB v. Amerinox Processing, Inc., No. 21-cv-11773, 2021 WL 2948052, at *5 (D.N.J. July 14, 2021). District courts play a limited role in the review of NLRB decisions and the regulatory scheme as a whole. *Id.* at *4 n.7.

228. Kullgren, *supra* note 225.

229. *See id.*

230. Wang, *supra* note 223; *see supra* notes 137-42 and accompanying text.

231. *See, e.g.*, Iafolla, *supra* note 140 (noting that *NLRB v. Noel Canning* "invalidated more than 700 reported and unreported [NLRB] decisions" and that the Court's subsequent decision in *New Process Steel, L.P. v. NLRB* "similarly voided hundreds of board rulings"). *But see id.* (remarking that the effect of *SW General* was cabined because it applied to only "unfair labor practice cases in which parties [had] previously raised an objection to the acting general counsel's authority"). Applying the de facto officer doctrine here would also not run afoul of the distinction derived from *Buckley* and *Ryder* between legislative and executive officers on the one hand, and adjudicative ones on the other, as the primary function of the NLRB General Counsel is prosecutorial. *General Counsel*, NLRB, https://perma.cc/33SK-W7CH (archived Jan. 22, 2022) (stating that the General Counsel is "responsible for the investigation and prosecution of unfair labor practice cases"); *see also* SW Gen., Inc. v. NLRB, 796 F.3d 67, 82-83 (D.C. Cir. 2015) (considering but ultimately rejecting the de facto officer doctrine), *aff'd*, 137 S. Ct. 929 (2017).

232. For example, one might think that given the Trump Administration's reliance on actings, its lawyers would have invoked the de facto officer doctrine at every turn. But they did not. *See, e.g.*, L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 35 (D.D.C. 2020) (noting that the de facto officer doctrine "was not raised as a defense"), *appeal dismissed per stipulation*, No. 20-5141, 2020 WL 5358686 (D.C. Cir. Aug. 25, 2020); *see also* O'Connell, *supra* note 13 (explaining that the government did "not contest that if the Court credits Plaintiffs' argument [about the succession orders], the rules were promulgated without authority and must be set aside" (quoting Casa de Md., Inc. v. Wolf, 486 F. Supp. 3d 928, 957 (D. Md. 2020))).

B. The Presidential Preference for Ratification

I suggest three reasons for the apparent presidential preference for ratification. First, good faith is a central part of the de facto officer doctrine's equitable equation. If the GAO has written a violation letter[233] and that letter has received press coverage, the government will have a difficult time arguing that the acting service in question was grounded in good faith. But a GAO violation letter is not dispositive: The government may contest a GAO finding, and that choice should not in and of itself defeat the reputation and good-faith prongs of the de facto officer doctrine. But even if that interbranch wrinkle might make determining good faith challenging, courts are familiar with the concept and adept at identifying it.[234] That said, ratification remains attractive in part because it sidesteps the good-faith requirement altogether.

Second, the de facto officer doctrine is properly applied only where the actions in question have engendered innocent third parties' reliance interests. It would have been difficult for the admittedly deregulatory Trump Administration[235] to argue that its actions merited equitable protection.[236] Indeed, during oral argument in the Deferred Action for Childhood Arrivals (DACA) rescission case, Chief Justice John Roberts brought up the de facto officer doctrine, reminding the government's counsel that "when the government acts illegally in a way that affects other people," it is "not always the case . . . that we go back and untangle all of the consequences of that."[237] But Solicitor General Noel Francisco, perhaps sensing the doctrine's inherent inapplicability to the facts of his case, did not pursue the point.[238]

The two reasons discussed explain why the de facto officer doctrine may not have been a particularly strong argument for the Trump Administration to make. The third reason behind the presidential preference for ratification

233. *See, e.g.*, *L.M.-M.*, 442 F. Supp. 3d at 35; *supra* notes 194-96.

234. "Good faith" is a pervasive concept in American jurisprudence. *See, e.g.*, *Good Faith*, BLACK'S LAW DICTIONARY (11th ed. 2019); Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 812-13 (1982) (describing how courts organically fashioned a "general requirement of good faith" in the contract-dispute context before such a requirement was codified in the Second Restatement of Contracts).

235. *See, e.g.*, Exec. Order No. 13,771, 3 C.F.R. 284 (2018) (requiring that agencies repeal two existing regulations for each new one promulgated).

236. *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1916 (2020) (holding that the Department of Homeland Security's decision to wind down its Deferred Action for Childhood Arrivals program was arbitrary and capricious under the Administrative Procedure Act).

237. *See* Transcript of Oral Argument at 38, *Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (Nos. 18-587, 18-588 & 18-589); O'Connell, *supra* note 13 (noting the exchange between the Chief Justice and the Solicitor General).

238. *See* Transcript of Oral Argument, *supra* note 237, at 38.

has to do with strategy. Relying on a court's discretion to administer an equitable remedy introduces uncertainty, which ratification minimizes. Put otherwise, why would the executive entreat a court to apply the de facto officer doctrine, when it could just as easily opt to have a subsequent, properly serving official ratify the actions in question?[239] Ratification is even more attractive than the possibility of de facto officer relief because of its promise to end—by mooting or on the merits—a live controversy.[240]

C. The Future of Ratification

Ratification (which is explicitly named in the Vacancies Act) and the de facto officer doctrine (which perfuses it) are like funhouse mirror images of each other. Where the de facto officer doctrine is preoccupied with reliance, ratification, as a general matter, "cannot operate retrospectively" to defeat the rights of third parties created in the period before ratification.[241] In other words: "The intervening rights of third persons cannot be defeated by ratification."[242] Migala argues that the third-party-rights exception has gone largely unnoticed in cases that address ratification.[243] He also questions whether ratification can be applied to the public-agency context at all.[244] Ratification, at least in the federal-agency context, has received almost no scholarly attention and, at present, Migala's arguments stand alone. Nonetheless, those apparent gaps in the jurisprudence, if filled, might destroy the attractiveness of ratification, forcing future administrations to rely on the de facto officer doctrine.

Thus, two key variables—currently in flux—control the likelihood of the de facto officer doctrine's future use. The first is whether ratification remains a viable alternative. At present, the mechanism of ratification is understudied, and its contours as explained in court opinions tend to be equally vague. If ratification contracts, we will likely see a resurgence of the de facto officer doctrine. The second variable is whether the current interpretation of the Vacancies Act, which allows for sweeping delegation, will hold. Judge Moss's opinion in *L.M.-M.* notwithstanding, that change is likely to be congressional; although, the current Supreme Court may be especially amenable to Judge Moss's more textual arguments. Such about-faces are not unheard of, as the

239. Of course, the executive could ratify the actions in question only if the office in question were exempt from § 3348's void ab initio and antiratification provisions.

240. *See supra* notes 110-15 and accompanying text.

241. Migala, *supra* note 20, at 31 (quoting FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 540 (Chicago, Callaghan & Co. 1890)).

242. *Id.* at 33 (quoting FEC v. NRA Pol. Victory Fund, 513 U.S. 88, 98 (1994)).

243. *Id.* at 40.

244. *Id.* at 35-40.

Supreme Court itself has noted: "Age is no antidote to clear inconsistency with a statute."[245] Indeed, in *SW General*, the Court's holding—that the Vacancies Act applies with equal force to first assistants (who become actings by default) and to individuals selected by the President for acting service—contradicted both widespread practice *and* OLC and GAO guidance.[246]

If delegation ceases to be the capacious workaround it is today, we are likely to see more outright Vacancies Act violations and accordingly more appeals to the de facto officer doctrine. Ratification and delegation are linked: If ratification is held to be improper in the public-agency context, as Migala argues, we may see aggressive delegation in response. Likewise, if delegation is restricted, ratification may take center stage (particularly in light of ratification's ability to evade judicial review[247]). In sum, the likelihood that the de facto officer doctrine comes up during the Biden Administration and beyond depends in large part on the status of ratification and delegation. Although this analysis focuses on the Supreme Court, Congress is also a key player, particularly on the delegation front.

V. Taking a Step Back: Normative Values and Policy Concerns

Acting service raises thorny statutory, constitutional, and separation-of-powers issues, but it is arguably a necessary evil, at least "if government is to go on."[248] This final Part considers the policy concerns inherent to applying the de facto officer doctrine to Vacancies Act violations.

A. Efficiency and Functionality

As previously discussed, the Vacancies Act is a fundamentally practical statute.[249] The de facto officer doctrine is equally pragmatic: It protects reliance interests and ensures stability across outcomes. Thus, applying the doctrine to Vacancies Act violations honors the pragmatic purpose and prudential concerns of the Act.

But applying the de facto officer doctrine to Vacancies Act violations does not necessarily require doing so across the board. For instance, when it comes

245. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (quoting Metro. Stevedore Co. v. Rambo, 515 U.S. 291, 300 (1995)) (holding that 28 U.S.C. § 1407 does not allow a district court to transfer a case to itself after concluding pre-trial multidistrict litigation proceedings despite both the prevalence of that practice and widespread acceptance among federal courts).

246. *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 943-44 (2017).

247. *See supra* notes 110-15 and accompanying text.

248. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915).

249. *See* O'Connell, *supra* note 14; Mendelson, *supra* note 8, at 584.

to Vacancies Act violations that are constitutional in nature (because they implicate the Appointments Clause), the adjudicative versus legislative–executive divide identified in the *Aurelius* briefing is a useful tool that is equally grounded in pragmatism. In its brief, COFINA argued that Supreme Court precedent foreclosed the de facto officer doctrine's applicability to cases involving unconstitutionally serving judges, but not constitutional cases writ large; it explained that when compared to a legislator, an adjudicator's actions are inherently more limited and narrower in scope.[250] *NLRB v. Noel Canning*, which dealt with recess appointments of NLRB judges, is perhaps the exception that proves the rule.[251] During oral argument, when Justice Sonia Sotomayor asked counsel what the Court should *do* with the decisions of the many potentially improperly appointed NLRB judges, Justice Antonin Scalia interrupted counsel's response: "Well, surely, you would—you would argue the de facto officer doctrine. . . . And we've applied that in innumerable cases. You don't really think we're going to go back and rip out every decision made."[252] Ultimately, however, the *Noel Canning* Court did just that, invalidating "more than 700 reported and unreported decisions issued by the board."[253] In the end, the Court's decision not to apply the de facto officer doctrine is in keeping with COFINA's proposed distinction between judicial officers and legislative and executive officers.[254]

Applying the de facto officer doctrine to the actions of improperly serving legislative and executive officers promotes efficiency without impinging upon individual rights.[255] That point is best illustrated by returning to the example of Lafe Solomon. As Acting General Counsel, Solomon was "responsible for the investigation and prosecution of unfair labor practice cases."[256] Prosecution is undeniably an executive function, meaning that under COFINA's framework, the de facto officer doctrine was available. The D.C. Circuit considered but declined to apply the doctrine, taking pains to note that it "[did] not expect" its holding to "undermine a host of NLRB decisions."[257] Judge Karen LeCraft

250. Brief for Cross-Respondents COFINA Senior Bondholders' Coalition, *supra* note 52, at 16. The NLRB's adjudicative reach, however, is a strong counterpoint. *See, e.g.*, NLRB v. Noel Canning, 573 U.S. 513, 520 (2014).

251. 573 U.S. at 520.

252. Transcript of Oral Argument at 4-5, *Noel Canning*, 573 U.S. 513 (No. 12-1281).

253. Iafolla, *supra* note 140.

254. *See supra* notes 89-95 and accompanying text.

255. *See* Brief for Cross-Respondents COFINA Senior Bondholders' Coalition, *supra* note 52, at 17 (discussing the individual right to a fair trial).

256. *General Counsel*, *supra* note 231.

257. SW Gen., Inc. v. NLRB, 796 F.3d 67, 82-83 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017). The court presciently reasoned that most employer-respondents would be barred from

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Henderson summarized the court's sentiment: "[T]his case is not Son of *Noel Canning*."[258] In short, COFINA's proposal distinguishing judicial officers from legislative and executive officers honors both the efficiency and fairness concerns at the core of the de facto officer doctrine.

B. Democratic Legitimacy

The separation of powers—and Senate confirmation of unelected government officials in particular—is a fundamental component of our constitutional structure. The Vacancies Act rests precariously upon that system of checks and balances.[259] It allows the President to avoid Senate confirmation, and, as Mendelson points out, Presidents sometimes prefer to "leav[e] positions outright" vacant and to "rely on unconfirmed individuals to help politicize agencies."[260] She adds that relying on actings might "give a President freer rein to distribute 'spoils' to loyalists, including campaign workers, to use more agency posts for patronage, and perhaps even to choose individuals whose record and commitments raise integrity-related concerns or conflicts of interest."[261] Widespread delegation adds opacity to that precarity. "Understandably," O'Connell notes, "the media and even members of Congress often fail to distinguish acting officials from officials performing delegated functions."[262] Legitimacy is hardly served when agency succession is indecipherable to Washington insiders and outsiders alike.

Applying the de facto officer doctrine to the past acts of improper acting officials raises questions regarding democratic legitimacy. Acting officials, proper or otherwise, have effectively evaded democratic processes—including the assurance that they are "free from ethical conflicts and qualified to run the government"[263]—so blessing their actions feels neither particularly legitimate nor democratic. But writing off the doctrine entirely would come at much too high a cost—recall, for example, the facts of *Aurelius*.[264] Instead, the answer is reform.

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raising a copycat Vacancies Act claim post–*SW General* by their failure to have done so initially. *Id.* at 83.

258. *Id.* at 82.

259. *See supra* note 39 and accompanying text.

260. Mendelson, *supra* note 8, at 541.

261. *Id.*

262. O'Connell, *supra* note 10, at 635.

263. Mendelson, *supra* note 8, at 593. Mendelson suggests that unconfirmed individuals can, and should, be vetted in other ways. *Id.* at 593-94.

264. *See supra* notes 65-74 and accompanying text. A court might not always be able to save the underlying scheme by working around the purported violation as the Supreme Court did in *Aurelius* when it held that the officials in questions were not officers of the

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Scholars, practitioners, jurists, and legislators have suggested a variety of Vacancies Act reforms, including shortening the Act's time limits;[265] constraining who may be named an acting;[266] "limiting acting service in the highest positions";[267] and curtailing delegation.[268] None of those reforms directly affect the de facto officer doctrine; instead, they change the backdrop against which it operates. As the backdrop moves toward legitimacy and accountability, so too will use of the doctrine.

C. Equity

Discussing the equitable ramifications of applying the de facto officer doctrine requires teasing apart the doctrine's desirability in a vacuum from the political valences of a particular case. Put otherwise, there is likely little overlap between readers who would support the doctrine's application in an *Aurelius*-like scenario—where the public's interest stood to be vindicated over a corporation's[269]—and readers who would support its application in the DACA rescission context.[270] But the de facto officer doctrine is insulated from the political tides because of its strong emphasis on reliance interests and the weight it gives to good faith and reputation.[271] More importantly, it never operates in a void. Whatever actions a court validates through the doctrine must still contend with broader constitutional and legal constraints. Indeed, in most of the cases this Note discussed, Vacancies Act claims were raised alongside Administrative Procedure Act ones.[272] The de facto officer doctrine is not a "get out of jail free" card; rather, it serves an important function and where it allows otherwise invalid actions to stand, it does so for good reason.

United States. *See* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1663-65 (2020).

265. O'Connell, *supra* note 14; Press Release, House Comm. on Oversight & Reform, Rep. Porter and House Committee Chairs Reintroduce Bill to Close Loopholes in Federal Vacancies Law (May 3, 2021), https://perma.cc/W47M-D37C (discussing the Accountability for Acting Officials Act).

266. Steve Vladeck, *Trump Is Abusing His Authority to Name "Acting Secretaries." Here's How Congress Can Stop Him.*, SLATE (Apr. 9, 2019, 12:34 PM), https://perma.cc/PJ7J-YZ6B.

267. O'Connell, *supra* note 14.

268. *Id.*

269. *But see* Barron, *supra* note 67 (explaining that "tens of thousands of retired Puerto Ricans" wound up on Aurelius's side because of their belief that PROMESA impinged upon Puerto Rican sovereignty and would reduce their "already-meager" pension checks by as "much as 8.5 percent").

270. Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1901 (2020); *see also supra* notes 236-38.

271. *See supra* Part II.A.

272. *See, e.g.*, L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 34-36 (D.D.C. 2020), *appeal dismissed per stipulation*, No. 20-5141, 2020 WL 5358686 (D.C. Cir. Aug. 25, 2020).

Turning to equity more directly: The Vacancies Act depends on private litigants for its enforcement.[273] The willingness of private litigants to bring suit, in turn, depends on the remedies available.[274] Although it is possible that a robust de facto officer doctrine could serve as a deterrent to potential plaintiffs, the same could be said of harmless error and similar doctrines in a variety of contexts. Litigation is inherently an uncertain endeavor, and there is little reason to believe that the de facto officer doctrine would have an outsized deterrent effect.[275] And while the doctrine is powerful, it is also discretionary, equitable, and reliance based; as such, there is little chance that it will be applied to especially flagrant violations or unsavory fact patterns.[276]

Conclusion

President Bill Clinton did not append a statement to the Vacancies Act when he signed it into law,[277] but the White House had previously contended that the enforcement provisions of the 1998 Act would "seriously disrupt the functioning of the Government."[278] That fear has yet to come to pass—far from it.

I began this Note by observing that the Vacancies Act has both responded to political abuses of power and created abuses of its own. The de facto officer doctrine protects citizens from getting caught in that political crossfire. As use of the Vacancies Act continues to increase, it is reasonable to believe that violations of it will too. This Note examined how the de facto officer doctrine

273. The GAO is required to report violations of the Vacancies Act's time limits, but not "to search for non-compliance." O'CONNELL, *supra* note 12, at 56. At the time of writing, the GAO has issued only thirty-two violation letters since 2000 (although some letters cover multiple violations). *Federal Vacancies Reform Act: Violation Letters and Decisions*, *supra* note 195. As Brannon notes: "The most direct means to enforce the Vacancies Act is through private suits in which courts may nullify noncompliant agency actions." BRANNON, *supra* note 38, at 16.

274. *See* Ryder v. United States, 515 U.S. 177, 182-83 (1995).

275. *But see id.* (declining to apply the de facto officer doctrine and noting that "[a]ny other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments").

276. *See, e.g.*, *supra* notes 236-39 and accompanying text.

277. I manually searched the catalog of all October 1998 signing statements published in the Weekly Compilation of Presidential Documents on govinfo.gov. The Weekly Compilation was discontinued in January 2009. *See* U.S. GPO, *Compilation of Presidential Documents, 1993 to Present*, GOVINFO, https://perma.cc/XF7L-WNWV (archived Feb. 17, 2022).

278. Letter from Erskine B. Bowles, Chief of Staff, White House, to Sen. Trent Lott, Majority Leader 1 (July 28, 1998), *in* Stephen Migala, *The Vacancies Act and an Acting Attorney General*, 36 GA. ST. U. L. REV. 699 app. at A-88 (2020), https://perma.cc/6UNJ-5V7T.

might apply to those violations and discussed how it should. The relevant cases suggest that the doctrine is available in three loopholes to the Vacancies Act's enforcement provision. But the greatest loophole of all—delegation—enables a savvy executive to avoid acting service, its constraints and consequences, altogether.[279] Delegated actions largely fall outside of the ambit of the de facto officer doctrine, although one might imagine the doctrine applying to confer validity in the case of an unlawful or otherwise improper delegation.

The Note's postscripts—Solomon's actions universally enjoying ratification at the hands of his successor, Cuccinelli and Berryhill continuing to serve as "actings" via delegation—reveal that a court's ruling may not be the practical boon parties and outsiders expect it to be, and that perhaps the real remedy for that remedies problem lies with Congress.

So what role, if any, will this ancient doctrine play in the second quarter of the twenty-first century? Judge Moss correctly noted that the doctrine "has seen a substantial contraction over time."[280] According to Google's Ngram Viewer, use of the phrase "de facto officer doctrine" peaked in 1996 and has been on a decline since 2005.[281] But according to LexisNexis, the phrase has steadily increased in federal court usage from 1965 to 2021.[282] On the one hand, those findings point in seemingly opposite directions; on the other, Google measures search-term use in printed sources, primarily books,[283] while Lexis charts use in judicial opinions, suggesting that as public interest has waned, legal interest has perhaps waxed. The doctrine surprised the legal community when it surged to national prominence in the wake of *Aurelius*. We should not underestimate it a second time.

279. *See supra* Part III.C.1.

280. L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 35 (D.D.C. 2020), *appeal dismissed per stipulation*, No. 20-5141, 2020 WL 5358686 (D.C. Cir. Aug. 25, 2020).

281. *Ngram Viewer*, GOOGLE BOOKS, https://perma.cc/PR2F-VPWU (archived Jan. 22, 2022) (showing the results of a search for "de facto officer doctrine" in the "English (2019)" database). Google's Ngram Viewer is a search feature that graphically represents the annual frequency of words or phrases in sources printed between 1500 and 2019. *See What Does the Ngram Viewer Do?*, GOOGLE BOOKS, https://perma.cc/VMB2-SHA3 (archived Jan. 22, 2022).

282. For this finding, I used LexisNexis's Timeline feature after searching for federal cases that contain the term "de facto officer doctrine."

283. *What Does the Ngram Viewer Do?*, *supra* note 281.