

THE
NATIONAL LAW REVIEW

If Shulkin Didn't Resign, Who Runs the VA Until a New Secretary Is Confirmed? A Vacancies Act Puzzle

Tuesday, April 3, 2018

[Recent news reports](#) have raised a substantial question about who has authority to run the Department of Veterans Affairs (“VA”) in the wake of Dr. David Shulkin’s departure from the agency. According to the White House, Dr. Shulkin resigned. Meanwhile, Dr. Shulkin himself has publicly insisted that he did not resign and was instead fired.

This inconsistency sets up a potential dispute over whether, under the [Federal Vacancies Reform Act of 1998](#) (“Vacancies Act”), President Trump had the authority to appoint Robert Wilkie, the Undersecretary of Defense for Personnel & Readiness, to serve as Acting Secretary of the VA.

As a result, contractors doing business with the VA have found themselves confronted with a series of knotty questions about the impact this uncertainty may have on the VA’s procurement priorities and actions.

The Federal Vacancies Reform Act

Enacted in 1998, the Vacancies Act sets out “the **exclusive** means for temporarily authorizing” an agency head to replace a Senate-confirmed officer of an Executive agency who leaves his or her post. 5 U.S.C. § 3347(a) (emphasis added). As a general matter, if such an officer “dies, resigns, or is otherwise unable to perform the functions and duties of the office[,]” “the first assistant to the office of such officer” shall serve as the acting leader of the agency. 5 U.S.C. § 3345(a)(1). However, the President generally may in these circumstances appoint another federal officer or employee to run the agency until the Senate confirms a new officer. See 5 U.S.C. § 3345(a). Interim appointees may only serve for a limited period of time and, if the interim appointee was a federal employee or inferior officer, then the interim appointee must be from the same Executive agency as the one in which the vacancy occurs and meet certain other requirements. See 5 U.S.C. § 3345(a)(3)(A); 5 U.S.C. § 3346.

Notably, the express language of the Vacancies Act—focusing specifically on death, resignation, or incapacitation—does not permit the President to appoint an acting replacement to a vacancy created by a Presidential firing. In this way, the rule is often understood to protect the Senate’s prerogative to confirm constitutional officers by constraining the President’s ability to simply fire agency heads and appoint acting replacements without Senate approval. (Though [informal DOJ guidance](#), citing Senate floor debates, leaves open the possibility that the Vacancies Act’s “unable to perform” clause includes an official being fired.)

But even if the President generally is not authorized to appoint a replacement for a fired official, the Vacancies Act does recognize an exception to that rule: if another “statutory provision expressly” permits the President to select a temporary appointee, then the President can use that statute as a means of appointing an interim replacement. 5 U.S.C. § 3347(a)(1).

The Vacancies Act and the VA

Given the Vacancies Act’s provisions, it could matter whether Dr. Shulkin resigned or was fired. If he resigned,

COVINGTON

Article By [Jennifer L. Plitsch](#)
[Susan B. Cassidy](#)[Mike Wagner](#)
[Evan Sherwood](#)[Covington & Burling LLP](#)
[Inside Government Contracts](#)
[Government Contracts, Maritime &](#)
[Military Law](#)
[Labor & Employment](#)
[All Federal](#)

then the President would likely have authority to appoint Undersecretary Wilkie as an interim successor under Section 3345. However, if Dr. Shulkin was fired, then the validity of Undersecretary Wilkie's appointment may be in doubt unless there is another statute providing for an appointment consistent with Section 3347.

To our knowledge, the White House has yet to assert that there is such a statute, and has instead stated that Dr. Shulkin resigned. However, there is a statutory authority that may support the President's ability to select an interim successor such as Undersecretary Wilkie: 38 U.S.C. § 304. That statute creates the office of the Deputy Secretary of Veterans Affairs, and it further states that "[u]nless *the President designates another officer of the Government*, the Deputy Secretary shall be Acting Secretary of Veterans Affairs during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary." (Emphasis added). Moreover, in recent litigation concerning the replacement of the former director of the Consumer Financial Protection Bureau, a federal court noted that Section 304 is the type of statute that might displace the Vacancies Act. *English v. Trump*, 279 F. Supp. 3d 307, 322 (D.D.C. 2018).

But this does not necessarily resolve the issue. Section 3347 requires another statute to "expressly" permit a presidential appointment, and a Court may find that Section 304 is not express because it does not state that the President shall have authority to appoint an interim successor. Rather, Section 304 is written in the negative, providing for the Deputy Secretary to run the agency "unless" the President has otherwise lawfully appointed someone to that post. Given that language, one might argue that Section 304 does not provide authority under Section 3347 for the President to appoint a temporary successor.

Implications for Contractors

For contractors, the upshot of the debate regarding President Trump's appointment of Acting Secretary Wilkie is this: if the appointment is invalid under the Vacancies Act, then Wilkie's performance of certain functions or duties of the office may be void. However, even this point has an additional nuance. Legislative history and certain court precedent suggests that an invalid appointment of an official would void only that official's performance of *nondelegable* functions or duties. Stated differently, the Vacancies Act appears not to affect the validity of an official's performance of *delegable* duties. Under this view, many run-of-the-mill VA procurement functions presumably would be valid, even if Acting Secretary Wilkie's appointment is deemed unlawful.

Nonetheless, contractors doing business with the VA would be wise to continue monitoring this issue closely, especially in light of the continuing debate about the essential nature and purpose of the VA. The push in some circles to privatize the VA would have profound effects on the contracting community, and if such an overhaul were to occur during Acting Secretary Wilkie's tenure, it likely would be challenged on the ground that Wilkie's appointment is unlawful, rendering the policy change void. Moreover, even if Acting Secretary Wilkie's appointment ultimately is deemed lawful, the uncertainty it has created—and the looming prospect of litigation—could very well have second- and third-order effects that generally bog down the agency's actions.

© 2019 Covington & Burling LLP

Source URL: <https://www.natlawreview.com/article/if-shulkin-didn-t-resign-who-runs-va-until-new-secretary-confirmed-vacancies-act>